REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

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CORPORATE INVESTMENTS PHILIPPINES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE
Respondent.

C.T.A. EB No. 300
(CTA Case No. 6549)

Present:

Acosta, *P.J.*
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, *JJ.*

Promulgated:

SEP 1 2 2008 GrApolinario
3:05 p.m.

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D E C I S I O N

ACOSTA, *P.J.*:

This is a Petition For Review filed on August 14, 2007 by Corporate Investments Philippines, Inc. (petitioner) praying for the partial reconsideration of the Court of Tax Appeals Second Division's Decision dated March 12, 2007 and the reversal of the Resolution denying its Motion for Reconsideration dated July 3, 2007, through the cancellation of the assessments issued by the Commissioner of Internal Revenue (respondent) against petitioner, for deficiency income, final withholding and documentary stamp taxes in the total amount of P148,262,836.92.

The dispositive portion of the assailed Decision reads:

"**WHEREFORE**, premises considered, the instant Petition For Review is hereby **PARTIALLY GRANTED**. The following deficiency tax assessments in the total amount of P38,397,290.27 are ordered **CANCELLED and SET ASIDE**:

Tax Type	Assessment Number	Amount of Deficiency Tax
A. Expanded Withholding Tax	EWT-98-000016	P 106,688.00
B. Gross Receipts Tax	GRT-98-000008	38,290,602.27
TOTAL		**P 38,397,290.27**

However, petitioner is hereby **ORDERED** to **PAY** to respondent Commissioner of Internal Revenue the following deficiency tax assessments for taxable year 1998 in the total amount of P148, 262,836.92, broken down as follows:

Tax Type	Assessment Number	Amount of Deficiency Tax
A. Income Tax	INC-98-000016	P 8,370,894.37
B. Final Withholding Tax	FT-98-000010	118,105,143.58
C. Documentary Stamp Tax	DST-98-000018	21,786,798.97
TOTAL		**P 148,262,836.92**

In addition, petitioner is ordered to pay to respondent 20% delinquency interest on P148,262,836.92 per annum, computed from September 23, 2002 until fully paid, pursuant to *Section 249(C)(3) of the NIRC of 1997, as amended.*

SO ORDERED."

The facts as stipulated by the parties and adopted by the Second Division are as follows:

"1. Petitioner is a domestic corporation duly registered and licensed to operate as an investment house with the Securities and Exchange Commission (SEC), with principal address at the 22nd Floor of Taipan Building, Emerald Avenue, Ortigas Center, Pasig City, Metro Manila;

2. Respondent is the Commissioner of the Bureau of Internal Revenue (CIR) duly appointed to perform the duties of his

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office, including, among others, the power to decide, cancel, and abate tax liabilities pursuant to Section 244 (B) of the Tax Code, as amended by Republic Act ('RA') 8424, otherwise known as the 'Tax Reform Act' ('TRA') of 1997;

3. On April 10, 2002, Petitioner received a Formal Letter of Demand dated April 08, 2002, assessing it for deficiency of internal revenue taxes for taxable year 1998 in the amount of P197,456,881.96, inclusive of interest, broken down as follows:

Tax Type	Assessment Number	Amount of Deficiency Tax
A. Income Tax	INC-98-000016	P 19,167,649.14
B. Expanded Withholding Tax	EWT-98-000016	106,688.00
C. Gross Receipts Tax	GRT-98-000008	38,290,602.27
D. Final Withholding Tax	FT-98-000010	118,105,143.58
E. Documentary Stamp Tax	DST-98-000018	21,786,798.97
TOTAL		**P197,456,881.96**

4. On April 24, 2002, Petitioner, through its external auditor, filed with the Respondent its protest letter, pursuant to Section 228 of the Tax Code, requesting for reinvestigation/reconsideration of the alleged deficiency tax assessments for taxable year 1998;

5. On September 23, 2002, a letter from Respondent dated June 10, 2002 was received by Petitioner, denying the protest filed on April 24, 2002. The last paragraph of the Respondent's letter stated that:

'It is requested that your aforesaid deficiency revenue taxes liability be paid immediately upon receipt hereof, inclusive of penalties incident to delinquency. This is our final decision. If you disagree, you may appeal this final decision with the Court of Tax Appeals within thirty (30) days from date of receipt hereof, otherwise our said deficiency Documentary Stamp Tax assessment shall become final, executory and demandable.'

6. Section 288 of the Tax Code, as amended, provides that:

'If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision or from the lapse of the 180 day period; otherwise, the decision shall become final, executory and demandable.'

7. In view of all the foregoing, and pursuant to Section 7 of R.A. No. 1125, otherwise known as an 'Act Creating the Court of Tax Appeals', the Honorable Court has the exclusive appellate jurisdiction to review the instant Petition for Review;

8. Section 203 of the Tax Code, as amended, provides that 'xxx internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, xxx.';

9. The Respondent assessed the Petitioner for alleged deficiency income tax on the (1) sale of memorial lots in Heritage Memorial Park; (2) sale of Batiawan property in Bataan and (3) sale of Baguio property, as follows:

	AMOUNT
1. Sale of Heritage Memorial Park	P 9,554,322.00
2. Sale of Batiawan Property	19,752,273.00
3. Sale of Baguio Property	4,075,333.00
TOTAL	**P 33,381,928.00**

Respondent argued that the gain from the sale of the above-mentioned properties constitute ordinary income subject to the regular corporate income tax rate of 34%;

10. Section 39(1) of the Tax Code of 1997 states:

'Capital Assets. — The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Subsection (F) of Section 34; or real property used in trade or business of the taxpayer.'

11. Section 22(Y) of the Tax Code of 1997 provides:

'(Y) The term 'deposit substitutes' mean an alternative form of obtaining funds from the public (the term 'public' means borrowing from twenty (20) or more individuals or corporate lenders at any one time), other than deposits, xxx.'

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12. The Petitioner is listed as a large taxpayer pursuant to the existing revenue regulations."[1]

The Second Division found petitioner liable for the following deficiency tax assessments for taxable year 1998:

Tax Type	**Assessment Number**	**Amount of Deficiency Tax**
A. Income Tax	INC-98-000016	P 8,370,894.37
B. Final Withholding Tax	FT-98-000010	118,105,143.58
C. Documentary Stamp Tax	DST-98-000018	21,786,798.97
TOTAL		**P 148,262,836.92**

Not in agreement with the said findings, the instant petition was filed on August 14, 2007 by petitioner, within the extended period granted for its filing. Petitioner forwards the following grounds in support thereof:

I.

THE *SECOND DIVISION* OF THE COURT OF TAX APPEALS ERRED WHEN IT CONSIDERED THE PRESCRIPTION PERIOD FOR THE FINAL WITHHOLDING TAX AND DOCUMENTARY STAMP TAX TO BE TEN (10) YEARS AND NOT THREE (3) YEARS.

II.

THE *SECOND DIVISION* OF THE COURT ERRED IN HOLDING THAT THE CONFIRMATION OF PURCHASE IS A DEPOSIT SUBSTITUTE AND THAT PETITIONER WAS ENGAGED ON QUASI-BANKING ACTIVITY SINCE THERE IS NO EVIDENCE TO SUPPORT SUCH CONJUNCTURE.

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[1] *Joint Stipulation of Facts, March 12, 2007 Decision pages 2-5.*

III.

THE SECOND DIVISION OF THE COURT OF TAX APPEALS ERRED IN HOLDING THAT THE REAL PROPERTIES SOLD WERE ORDINARY ASSETS.

Respondent filed her Comment on October 2, 2007. She alleged that the Second Division ruled correctly on the taxability of petitioner and prayed that the Petition for Review be denied due course for being bereft of merit.

Thereafter, following the Court's October 18, 2007 Resolution, petitioner and respondent submitted their Memoranda on December 7, 2007 and December 10, 2007, respectively. Thus, on December 18, 2007, this case has been submitted for decision.

THE COURT'S RULING

The Court shall discuss the issues raised by petitioner in *seriatim;* and discuss the first and second issues jointly, they being interrelated.

FIRST AND SECOND ISSUES: PRESCRIPTION AND VALIDITY OF THE FINAL WITHHOLDING AND DOCUMENTARY STAMP TAX ASSESSMENTS.

This Court finds merit in petitioner's arguments.

Petitioner argues that the prescriptive period for the final withholding tax (FWT) and documentary stamp tax (DST) is three (3) years and not ten (10) years as ruled by the Second Division. Petitioner contends that the assessment against it for FWT and DST had already prescribed when it received the Formal Letter of Demand on April 10, 2002. Moreover, petitioner maintains that there is no evidence that would show that it did not file any return for these taxes. According to petitioner, this fact was not alleged, much less proven by respondent.

The Second Division ruled that *Section 222 (a)* of the National Internal Revenue Code (NIRC) finds application with respect to the FWT and DST, it provides:

> "**SEC. 222.** *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided,* That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.
>
> x x x" *(Emphasis supplied)*

The Second Division held that pursuant to the above provision, in case of a false or fraudulent return with intent to evade tax or of failure to file a return, the prescriptive period of assessment of the tax due shall be 10 years from the discovery by the BIR of the falsity, fraud or omission. It found that because the records of this case do not show the filing of the corresponding FWT and DST returns, respondent's right to assess petitioner for deficiency FWT and DST has not yet prescribed since the ten (10)-year prescriptive period applies.

Records, however, reveal otherwise.

In the Formal Letter of Demand accompanying the Assessment Notices received by petitioner on April 10, 2002, respondent computed the subject deficiency final withholding and documentary stamp tax assessments as follows[2]:

[2] *Exhibit "26", page 3, BIR Records, pages 565and 562.*

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FINAL WITHHOLDING TAX (ASSESSMENT NO. FT-98-000010)

Sundries IN Interest	P364,537,652.57
Multiply by Tax Rate	20%
Final Withholding Tax Due per Audit	P 72,907,530.51
Less: Paid per Returns	***1,423,611.42***
Basic Deficiency Final Withholding Tax Due	P 71,483,919.09
Add: Interest from 26-Jan-99 to 30-Apr-02	46,621,224.49
Total Deficiency Final Withholding Tax Due	**P118,105,143.58**

	CONSUMMATED NEGOTIATED SALE				
	Sundries Out (CDB)	Sundries In (CRB)	Bills Payable Money Market	Promissory Note	Total Amount
Total Amount Subject to DST	4,890,383,622.03	5,085,843,579.95	566,339,066.67	76,887,066.67	10,619,453,335.31
Multiplied by DST Rate	0.0015	0.0015	0.0015	0.00	0.0015
DST Due	7,335,575.43	7,628,765.37	849,508.60	115,330.60	15,929,180.00
Less: DST Paid per Returns	***2,843,011.50***	-	***849,508.60***	***115,330.60***	***3,807,850.70***
Basic Deficiency DST Due and Collectible	***4,492,563.93***	***7,628,765.37***	***0.00***	***0.00***	***12,121,329.30***

As can be seen from the computations above, respondent deducted the amounts P1,423,611.42 and P3,807,850.70, representing FWT and DST paid per returns, respectively, in arriving at P118,105,143.58, as deficiency FWT and P21,786,798.97 as deficiency DST.

Clearly, respondent herself recognized petitioner's filing of FWT and DST returns for taxable year 1998 and its corresponding payments made in the respective amounts of P1,423,611.42 and P3,807,850.70. Records show the details of these payments as:[3]

[3] *Exhibit "11", BIR Records, pages 486, 169 and 168.*

FINAL WITHHOLDING TAX:

PAGE NO., BIR REC.	Period	Month	Date Remitted	Amoount	Rate	FINAL TAX WITHHELD/ REMITTED
193	First Qtr	Jan.	2/10/1998	3,226,640.80	20%	645,328.16
194		Feb.	3/10/1998	1,424,469.70	20%	284,893.94
195		Mar.	4/13/1998	942,851.65	20%	188,570.33
196	Second Qtr	Apr.	5/12/1998	300,824.50	20%	60,164.90
197		May	6/10/1998	571,076.90	20%	114,215.38
198		June	7/10/1998	11,008.35	20%	2,201.67
199	Third Qtr	Aug.	9/10/1998	57,664.65	20%	11,532.93
200	Fourth Qtr	Oct.	11/10/1998	446,700.85	20%	89,340.17
201		Dec.	1/7/1999	136,819.70	20%	27,363.94
			Total:	**7,118,057.10**		**1,423,611.42**

DOCUMENTARY STAMP TAX:

PAGE NO., BIR REC	DATE OF PAYMENT	DOCUMENTARY STAMP TAX PAID: CONSUMMATED NEGTD SALE	BILLS PAYABLE (MONEY MARKET)	PROMISSORY NOTE	TOTAL
156	12/10/1998	32,405.00			32,405.00
155	12/10/1998	45,000.00			45,000.00
154	12/10/1998	15,592.20			15,592.20
153	12/15/1998			50,140.40	50,140.40
152	12/18/1998			18,000.00	18,000.00
151	12/9/1998	12,000.00			12,000.00
150	12/7/1998	60,166.90			60,166.90
149	12/7/1998	150.00			150.00
148	12/10/1998	24,750.00			24,750.00
147	12/8/1998			1,500.00	1,500.00
146	12/10/1998	45,778.20			45,778.20
144	11/10/1998			2,250.00	2,250.00
143	11/10/1998			5,812.60	5,812.60
142	11/10/1998			37,627.60	37,627.60
141	11/10/1998	63,167.00			63,167.00
139	11/21/1998	34,947.00			34,947.00
138	11/10/1998		223,345.60		223,345.60
135	9/4/1998		80,382.20		80,382.20
132	9/4/1998	138,196.80			138,196.80
129	8/6/1998	238,308.60			238,308.60

126	8/6/1998		37,800.00		37,800.00
123	6/29/1998		54,010.20		54,010.20
120	6/29/1998	165,500.40			165,500.40
118	6/11/1998	322,367.40			322,367.40
111	5/28/1998	165,928.40			165,928.40
098	5/25/1998		52,777.40		52,777.40
109	5/25/1998	17,025.00			17,025.00
107	5/7/1998	64,485.60			64,485.60
105	5/4/1998	202,865.20			202,865.20
103	5/4/1998	93,368.40			93,368.40
095	4/14/1998	24,239.00			24,239.00
093	4/3/1998	77,508.40			77,508.40
090	3/25/1998	11,840.20			11,840.20
087	3/20/1998	202,790.20			202,790.20
085	3/5/1998	76,575.40			76,575.40
082	2/24/1998	187,500.00			187,500.00
074	2/24/1998		120,940.20		120,940.20
080	2/17/1998	65,265.60			65,265.60
078	2/9/1998	137,963.40			137,963.40
072	2/3/1998		81,157.20		81,157.20
069	2/3/1998	30,273.20			30,273.20
067	1/26/1998	104,354.00			104,354.00
065	1/16/1998	182,700.00			182,700.00
062	1/16/1998		199,095.80		199,095.80
	DST Paid	**2,843,011.50**	**849,508.60**	**115,330.60**	**3,807,850.70**
	DST Rate	0.0015	0.0015	0.0015	0.0015
	DST Tax Base	**1,895,341,000.00**	**566,339,066.67**	**76,887,066.67**	**2,538,567,133.33**

Based on the foregoing, there is merit in petitioner's contention that the Court in Division erred in finding that no returns were filed insofar as petitioner's FWT and DST liabilities for taxable year 1998 are concerned. Thus, while Section 222 of the NIRC provides certain exceptions as to the period of limitation, *i.e.*, the presence of fraud or fraudulent return with intent to evade tax or *failure to file a return*, such is not attendant in this case to warrant application of the ten (10)-year prescriptive period. Accordingly, the prescriptive period for the subject deficiency FWT and DST assessments is three (3) years as provided under Section 203 of the NIRC. It states:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.*- Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: Provided, That in a case where a return is filed beyond the period prescribed by law, the three-year period shall be counted

> from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

Pursuant to the afore-cited Section 203 of the NIRC, the three-year period to assess commences from the date of actual filing of the return or from the last date prescribed by law for the filing of such return, whichever comes later.

In the case of final withholding taxes on interest paid on deposits and yield on deposit substitutes/trusts/etc., the return is required to be filed and the corresponding payment to be made within twenty five (25) days from the close of each calendar quarter pursuant to Section 2.58(A)(2)(c) of Revenue Regulations No. 2-98. Therefore, respondent had until the following dates within which to assess petitioner for the subject deficiency final withholding tax for taxable year 1998:

Period	Month	Final Tax Withheld & Remitted	Date of Filing of Return	Last Day to File Return	Last Day to Assess
First Qtr	Jan.	645,328.16	2/10/1998	4/27/1998	* 4/27/2001
	Feb.	284,893.94	3/10/1998	4/27/1998	* 4/27/2001
	Mar.	188,570.33	4/13/1998	4/27/1998	* 4/27/2001
Second Qtr	Apr.	60,164.90	5/12/1998	7/27/1998	* 7/27/2001
	May	114,215.38	6/10/1998	7/27/1998	* 7/27/2001
	June	2,201.67	7/10/1998	7/27/1998	* 7/27/2001
Third Qtr	Aug.	11,532.93	9/10/1998	10/26/1998	** 10/26/2001
Fourth Qtr	Oct.	89,340.17	11/10/1998	1/25/1999	1/25/2002
	Dec.	27,363.94	1/7/1999	1/25/1999	1/25/2002
	Total:	**1,423,611.42**			

* the 25th day following the close of the quarter fell on a Saturday
** the 25th day following the close of the quarter fell on a Sunday

Clearly, the Formal Letter of Demand and Assessment Notice received by petitioner on April 10, 2002 were issued beyond the three-year prescriptive period within which respondent could make an assessment for deficiency FWT for the taxable year 1998.

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The same holds true with respect to the 1998 deficiency documentary stamp tax assessment. Pursuant to Section 200(B) of the NIRC, the DST return shall be filed within ten (10) days after the close of the month when the taxable document was made, signed, issued, accepted or transferred, and the tax thereon shall be paid at the same time the aforesaid return is filed.

In the present case, the last return for petitioner's 1998 DST liabilities was filed on December 10, 1998. Hence, the three year period for the respondent to assess petitioner of deficiency DST for the year 1998 lapsed on December 10, 2001. Since the Formal Letter of Demand and Assessment Notice were received by petitioner only on April 10, 2002, the deficiency DST assessment in the amount of P21,786,798.97 has likewise been barred by the three-year prescriptive period provided by law.

Even the first portion of Section 222 of the NIRC, *i.e.*, false and fraudulent returns, which can serve as basis to extend the period to assess to ten years cannot be applied.

False and fraudulent returns with intent to evade tax, were not raised nor relied upon by respondent, neither was it discussed nor mentioned in any of the assessments issued nor alleged or proven during trial. Under Section 228 of the NIRC the taxpayer should be informed in writing of the law and the facts on which it is based. Further, fraud implies willful attempt to evade or defeat tax. Fraud is never presumed. It is a question of fact and the circumstances constituting fraud must be alleged and proved.[4]

Along this line, it cannot likewise be said that there is prima facie evidence of false or fraudulent return under Section 248 (B) of the NIRC. This provision reads:

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[4] Commissioner of Internal Revenue vs. Ayala Securities Corporation, G.R. No. L-29485, March 31, 1976.

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> SEC. 248. Civil Penalties.-
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> (A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due in the following cases:
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> xxx xxx xxx
>
> (B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: Provided, That a **substantial under declaration of taxable sales, receipts or income, or a substantial overstatement of deductions**, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute prima facie evidence of false or fraudulent return: Provided, further, That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned therein."

Section 248 (B) of the NIRC, mentions of items/accounts, which if found to be under declared or over stated, shall constitute a prima facie evidence of fraud or fraudulent return filed by a taxpayer. These accounts are: (a) taxable sales, receipts or income, in case of under declaration, and (b) deductions, in cases of over statement.

The FWT assessment in this case refers to the supposed withholding of tax over interest income earned by the funders of petitioner, and are paid by petitioner to the said funders. It is then classified as an interest expense, a situation which is the reverse of what is being referred to in Section 248. Same is true with the DST assessment. The DST was found due from documents/transactions covering petitioner's negotiated sales and additional common shares subscribed. They are in the nature of receivables and payables. Thus, there is no under declaration of sales, receipts and income or overstatement of deductions which, as stated above, can be

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deemed as basis for the *prima facie* evidence of alleged filing of a false or fraudulent return by the taxpayer.

In the landmark case of *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue*[5], the Supreme Court provided the following explanation for the prescriptive periods:

> "The NIRC, under Sections 203 and 222, provides for a ***statute of limitations on the assessment and collection of internal revenue taxes in order to safeguard the interest of the taxpayer against unreasonable investigation***. Unreasonable investigation contemplates cases where the period for assessment extends indefinitely because this deprives the taxpayer of the assurance that it will no longer be subjected to further investigation for taxes after the expiration of a reasonable period of time. As was held in Republic of the Phils. v. Ablaza:
>
> 'The law prescribing a limitation of actions for the collection of the income tax is beneficial both to the Government and to its citizens; to the Government because tax officers would be obliged to act promptly in the making of assessment, and to citizens because after the lapse of the period of prescription citizens would have a feeling of security against unscrupulous tax agents who will always find an excuse to inspect the books of taxpayers, not to determine the latter's real liability, but to take advantage of every opportunity to molest peaceful, law-abiding citizens. Without such a legal defense taxpayers would furthermore be under obligation to always keep their books and keep them open for inspection subject to harassment by unscrupulous tax agents. ***The law on prescription being a remedial measure should be interpreted in a way conducive to bringing about the beneficent purpose of affording protection to the taxpayer within the contemplation of the Commission which recommend the approval of the law.***" *(Citations omitted and Emphasis supplied)*

Having found that the assessments for FWT and DST against petitioner to have prescribed, the second issue on the validity of the assessments has been rendered moot, except as to the assessment of DST on the additional shares subscribed and fully paid.

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[5] *G.R. No. 162852, December 16, 2004.*

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An evaluation of the records reveals that no return for this transaction has been filed by petitioner. Hence, the extended ten (10) year prescriptive period under Section 222 of the NIRC applies.

THIRD ISSUE: THE VALIDITY OF THE DEFICIENCY INCOME TAX ASSESSMENT.

Respondent assessed petitioner of deficiency income tax in the amount of P19,167,649.14, computed as follows:

Income Tax

Taxable Income per Return		P 1,684,594.00
Add: Heritage Memorial Park	P 9,554,322.00	
Batiawan Property	19,752,273.00	
Baguio Property	4,075,333.00	
Unsupported - Income allegedly subjected to CGT		33,381,928.00
Taxable Income per Audit		P35,066,522.00
Multiply by Tax Rate		34%
Basic Deficiency Income Tax Due		P11,922,617.48
Add: Interest from 16-April-99 to 30-Apr-02		7,245,031.66
Total Deficiency Income Tax Due		**P19,167,649.14**

Respondent treated the Heritage Memorial Park lots, as ordinary assets on the ground that the Sales and Remittance Report prepared and submitted by its broker, the Asian Pacific Estates Development Corporation, for every lot sold show in detail the total contract price, the terms, amount paid, applied commission, creditable withholding tax, and net amount remitted. The Batiawan and Baguio properties were also treated as ordinary assets, for failure of petitioner to present proof of payment of the Capital Gains Tax (CGT) in the administrative level. Respondent contends that petitioner's witness, Edison Daplas, on direct examination categorically declared that it had more or less fifty (50) sales transactions covering the sales of the properties; thus, petitioner is deemed engaged in real estate business.[6] As such, the properties sold by petitioner are ordinary assets subject to ordinary income tax.

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[6] *Transcript of Stenographic Notes(TSN), June 22, 2004, pages. 6-8.*

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On the other hand, petitioner maintains that it is not engaged in real estate business; but is engaged in securities brokerage, dealership and underwriting, as well as investment management and trust activities. As such, petitioner acquired the properties as investments. Assuming *arguendo* that the properties are considered ordinary assets, any gain from the sale of the Batiawan property should not be included in the gross income since the parties rescinded the sale.

This Court quotes with approval the comprehensive disquisition of the Second Division on the issue:

> "The assets of a taxpayer are classified for income tax purposes into ordinary assets and capital assets.
>
> *Section 39 (A)(1) of the NIRC of 1997, as amended,* defines 'capital assets', as follows:
>
> > '**SEC. 39.** *Capital Gains and Losses.* –
> >
> > (A) Definitions. — As used in this Title —
> >
> > (1) Capital Assets. — The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Subsection (F) of Section 34; or real property used in trade or business of the taxpayer.'
>
> The statutory definition of capital assets is negative in nature (*Nolledo, Commentaries and Jurisprudence on the National Internal Revenue Code of the Philippines, 1973 ed., p. 314*). If the asset is not among the exceptions, it is a capital asset; conversely, assets falling within the exceptions are ordinary assets. And necessarily, any gain resulting from the sale or exchange of an asset is a capital gain or an ordinary gain depending on the kind of asset involved in the transaction (*Calasanz vs. Commissioner of Internal Revenue, 144 SCRA 669*).

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Upon a careful examination of the evidence on record, We are convinced that the properties in question are not stock in trade nor property of a kind which would properly be included in the inventory if on hand at the close of the taxable year. Neither are they depreciable properties used in trade or business.

Consequently, this leaves us to the determination of whether said properties were held by petitioner primarily for sale to customers in the ordinary course of their trade or business, or whether the same were used in petitioner's trade or business.

In the case of *Calasanz vs. Commissioner of Internal Revenue, supra*, the Supreme Court has had the occasion to say that there is no rigid rule or fixed formula by which it can be determined with finality whether property sold by a taxpayer was held primarily for sale to customers in the ordinary course of his trade or business or whether it was sold as a capital asset. Hence, each case must in the last analysis rests upon its own peculiar facts and circumstances.

After a careful review of the facts on record, We are convinced that the real properties sold by petitioner are ordinary assets. While petitioner is an investment company, as shown in its Amended Articles of Incorporation (*Exhibit 'B'*) and *Bangko Sentral ng Pilipinas* Certificate of Authority No. 011 (*Exhibit 'F'*), petitioner does not dispute that it had 52 sales transactions in a single year involving the real properties it had acquired. Thus, on cross examination, petitioner's witness, Edision Daplas, testified:

> 'ATTY. FRANCIA:
> Q: So, Mr. Witness, would you confirm that when you were presented before this Court last June 19, 2003, that was last year, and when you were asked how many sales transactions were made by the petitioner for the taxable year 1998 pertaining to the sale of Heritage Memorial Park, the sale of Badjawan [should be Batiawan] property, and the sale of Baguio property, you testified that there are about 50 sales transactions for the sale of Heritage Memorial Park, one for the sale of Badiawan property, and another one for the sale of Baguio property. Would you confirm?
>
> MR. DAPLAS:
> A: Yes.

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> ATTY. FRANCIA:
> Q: So, Mr. Witness, you have also previously testified that petitioner is not engaged in real estate business, would you confirm?
>
> MR. DAPLAS:
> A: Yes, ma'am.
>
> ATTY. FRANCIA:
> Q: But, will you agree with me Mr. Witness, that despite its being not engaged in real estate business, during the taxable year 1998, the petitioner had generated a total of about 52 sales transactions?
>
> MR. DAPLAS:
> A: Yes, ma'am.' (*TSN, June 22, 2004, pp. 6-8*)

> Furthermore, petitioner engaged the services of a broker to have those real properties sold. It has been held that a property initially classified as a capital asset may, therefore, be treated as an ordinary asset if a combination of the factors indubitably tends to show that the activity was in furtherance of or in the course of a taxpayer's trade or business (*Calasanz vs. Commissioner of Internal Revenue, supra*). Taking this circumstance into consideration, We hold that petitioner is considered as engaged in real estate business; hence, the real properties it sold are ordinary assets subject to ordinary income tax.
>
> With respect to the Batiawan property, however, the gain from the sale of such property shall not be subject to the ordinary income tax because the sale was rescinded, in accordance with the automatic rescission provision of the Deed of assignment (*Exhibit 'I-1'*). Rescission creates the obligation to return the things which were the object of the contract, together with their fruits, and the price with its interests (*Article 1385, New Civil Code*)."

Therefore, the re-computation by the Second Division of the deficiency income tax is hereby upheld, thus:

Taxable Income per Return		P 1,684,594.00
Add: Heritage Memorial Park	P9,554,322.00	
Baguio Property	4,075,333.00	
Unsupported - Income allegedly subjected to CGT		13,629,655.00

Taxable Income per Audit	P15,314,249.00
Multiply by Tax Rate	34%
Basic Deficiency Income Tax Due	P 5,206,844.66
Add: Interest from 16-April-99 to 30-Apr-02	3,164,049.71
Total Deficiency Income Tax Due	**P 8,370,894.37**

WHEREFORE, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, the deficiency tax assessments for Final Withholding Tax and Documentary Stamp Tax in the amounts of P118,105,143.58 and P20,786,798.97, respectively, are hereby **CANCELLED** for having been issued beyond the three (3)-year prescriptive period provided under Section 203 of the National Internal Revenue Code.

The deficiency income tax and Documentary Stamp Tax on additional shares subscribed and fully paid assessment for taxable year 1998 is however **UPHELD**. Petitioner is hereby **ORDERED TO PAY** respondent the amount of P8,370,894.37, representing its deficiency income tax and P1,000,000.00 representing deficiency Documentary Stamp Tax on additional shares subscribed and fully paid. Petitioner is likewise hereby **ORDERED TO PAY** respondent twenty percent (20%) delinquency interest per annum, computed from September 23, 2002 until these taxes are fully paid, pursuant to *Section 249(C)(3) of the NIRC of 1997, as amended.*

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

(With Concurring and Dissenting Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

With Separate Concurring & Dissenting Opinion

OLGA PALANCA-ENRIQUEZ
Associate Justice

C E R T I F I C A T I O N

Pursuant to Section 13, Article VIII 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 *En Banc*.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CORPORATE INVESTMENTS PHILIPPINES, INC.
Petitioner,

C.T.A. EB NO. 300
(C.T.A. CASE NO. 6549)

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 12 2008 [illegible]
3:05 p.m.

x - x

Concurring and Dissenting Opinion

CASTAÑEDA, Jr., *J.:*

I agree that the deficiency income tax assessment for taxable year 1998 in the amount of P8,370,894.37 be upheld. I likewise agree that petitioner be ordered to pay respondent twenty (20%) delinquency interest per annum, computed from September 23, 2002 until fully paid, pursuant to Section 249 (C) (3) of the NIRC of 1997.

However, with due respect to my esteemed colleagues, I beg to disagree with the majority opinion that respondent's right to assess petitioner's deficiency final withholding tax (FWT) and deficiency documentary stamp tax (DST) in the amount of P118,105,143.58 and

P21,786,798.97, respectively, for taxable year 1998 has prescribed, and computed by respondent, as follows:

FINAL WITHHOLDING TAX (ASSESSMENT NO. FT-98-000010)

Sundries IN Interest	P364,537,652.57
Multiply by Tax Rate	20%
Final Withholding Tax Due per Audit	P 72,907,530.51
Less: Paid per Returns	***1,423,611.42***
Basic Deficiency Final Withholding Tax Due	P 71,483,919.09
Add: Interest from 26-Jan-99 to 30-Apr-02	46,621,224.49
Total Deficiency Final Withholding Tax Due	**P118,105,143.58**

	CONSUMMATED NEGOTIATED SALE				
	Sundries Out (CDB)	Sundries In (CRB)	Bills Payable Money Market	Promissory Note	Total Amount
Total Amount Subject to DST	4,890,383,622.03	5,085,843,579.95	566,339,066.67	76,887,066.67	10,619,453,335.31
Multiplied by DST Rate	0.0015	0.0015	0.0015	0.00	0.0015
DST Due	7,335,575.43	7,628,765.37	849,508.60	115,330.60	15,929,180.00
Less: DST Paid per Returns	***2,843,011.50***	-	***849,508.60***	***115,330.60***	***3,807,850.70***
Basic Deficiency DST Due and Collectible	***4,492,563.93***	***7,628,765.37***	***0.00***	***0.00***	***12,121,329.30***

There is falsity and/or omission in this case so respondent's right to assess petitioner is within ten (10) years from the discovery of such falsity or omission.

The FWT and DST returns are false because of the following reasons:

1. Assessments are prima facie presumed correct and made in good faith. Petitioner failed to successfully rebut the same;

2. There is deviation from the truth which is too much substantial to be ignored which makes the FWT and DST returns false.

There is omission in this case because of the following reasons:

1. Petitioner failed to formally offer the FWT and DST returns filed; and
2. Petitioner made a judicial admission that it failed to file the FWT and DST returns.

Petitioner failed to rebut The presumption of the correctness of the assessments

Assessments are prima facie presumed correct and made in good faith. The revenue officers conducted the necessary audit and investigation of petitioner's books of accounts and other related records before arriving at the subject assessment.

The burden of proof to rebut the presumption of correctness in the assessment is on the taxpayer. Petitioner failed to successfully rebut the same. The majority decision does not even mention of any error of the respondent as to the details of the assessment *per se* on the deficiency FWT and DST.

I agree with respondent CIR that "Even assuming the petitioner filed its returns, said returns are considered false for not having included in the returns the subject deficiency taxes. The application of the ten (10) year period under Section 222 would therefore still apply."[1]

Deviation from the truth

Based on the deficiency assessments, petitioner's deficiency final withholding tax (FWT) is P118,105,143.58. This amount includes the basic deficiency FWT due of P 71,483,919.09 and the interest from January 26, 1999 to April 30, 2002 in the amount of P46,621,224.49. If we divide the basic deficiency FWT due of P71,483,919.09 by 20%, the result is P357,419,595.45, the amount value of transactions subject to FWT which was not declared by petitioner in its returns. The percentage of such underdeclared/unreported value of transactions (basis) subject to FWT to that reported in the returns (paid per returns is P1,423,611.42 divided by 20% is P 7,118,057.10) or P357,419,595.45/ P 7,118,057.10 equals 5022%.

[1] Respondent's Memorandum filed on December 10, 2007, *En Banc* docket, p. 751.

As to petitioner's deficiency DST in the amount of P12,121,329.30, if we divide it by .0015 , the result is P8,080,886,200.00, the unreported amount of transactions subject to DST. The percentage of such unreported/underdeclared basis of DST to the reported/paid basis of DST (paid per returns is P3,807,850.70 divided by .0015=P2,538,567133.33) or P8,080,886,200.00/ P2,538,567133.33 is 319%.

The above-computed figures are deviation from the truth which are much too substantial to be ignored.

Based on the Supreme Court case of *Aznar vs. Court of Appeals*[2], a false return implies deviation from the truth, whether intentional or not. This case even held that in case of false return, the prescription is ten (10) years counted from discovery of the falsity, fraud or omission. Pertinent portion of this case reads, as follows:

> by resorting to a proper interpretation of Section 332 **(now Section 222)** of the NIRC. We believe that the proper and reasonable interpretation of said provision should be that in the three different cases of (1) false return, (2) fraudulent return with intent to evade tax, (3) failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within ten years after the discovery of the (1) falsity, (2) fraud, (3) omission. Our stand that the law should be interpreted to mean a separation of the three different situations of false return, fraudulent return with intent to evade tax, and failure to file a return is strengthened immeasurably by the last portion of the provision which aggregates the situations into three different classes, namely "falsity", "fraud" and "omission". That there is a difference between **"false return"** and "fraudulent return" cannot be denied. While the first **merely implies deviation from the truth, whether intentional or not,** the second implies intentional or deceitful entry with intent to evade the taxes due. Our stand that the law should be interpreted to mean a separation of the three different situations of false return, fraudulent return with intent to evade tax, and failure to file a return is strengthened immeasurably by the last portion of the provision which

[2] No. L-20569, August 23, 1974, 58 SCRA 519.

> aggregates the situations into three different classes, namely "falsity", "fraud" and "omission". That there is a difference between **"false return"** and "fraudulent return" cannot be denied. While the first **merely implies deviation from the truth, whether intentional or not,** the second implies intentional or deceitful entry with intent to evade the taxes due.
>
> The ordinary period of prescription of 5 years within which to assess tax liabilities under Sec. 331**[now Section 203]** of the NIRC should be applicable to normal circumstances, but whenever the government is placed at a disadvantage so as to prevent its lawful agents from proper assessment of tax liabilities **due to false returns**, fraudulent return intended to evade payment of tax or failure to file returns, **the period of ten years provided for in Sec. 332 (a) [now Section 222a)] NIRC, from the time of the discovery of the falsity, fraud or omission even seems to be inadequate and should be the one enforced.**
>
> There being undoubtedly false tax returns in this case, We affirm the conclusion of the respondent Court of Tax Appeals that Sec. 332 (a) of the NIRC should apply and that the period of ten years within which to assess petitioner's tax liability bad net expired at the time said assessment was made. (*Emphasis Supplied*).

Thus, the difference between "false return" and "fraudulent return" is emphasized in this case. False return implies deviation from the truth, whether intentional or not; fraudulent return implies intentional or deceitful entry with intent to evade the taxes due.

The said case was also cited in the case of *Estate of Fidel F. Reyes and Estate of Teresita R. Reyes vs. Commissioner of Internal Revenue*[3]. Pertinent portion of Reyes case is quoted as follows:

> Petitioners submit that the tax returns are not false or fraudulent in accordance with Section 222 of the 1997 NIRC. There was no attempt on their part to conceal any vital information affecting their taxability. They merely committed a mistake as shown in the following circumstances: a) utilization of the market value as per tax declaration of the properties instead of the zonal values in determining the gross value of the estates; b) erroneous classification of some properties into conjugal and/or capital/paraphernal; (c) miscalculation of vanishing deductions in the estate tax return of Teresita R. Reyes; and (d) misdeclaration of the properties which should not have comprised the estate of Fidel Reyes.
>
> According to the petitioners, "intention to evade taxes" under Section 222(a) of the 1997 NIRC refers to both false and fraudulent return. Error or mistake

[3] C.T.A. Case No. 6747, January 16, 2006, CTA First Division, penned by Justice L. R. Bautista, concurred by Presiding Justice E. D. Acosta and Justice C.A. Casanova.

of law is not fraud. The final assessment notice (FAN) dated November 29, 2002 was made after four (4) years and 11 months from the date of the filing of the estate tax return of the estate of Fidel Reyes on December 29, 1997; while respondent issued the FAN against the estate of Teresita Reyes on November 29, 2002 or three (3) years nine (9) months and twenty eight (28) days from February 24, 1999 which was the filing of the estate tax return of the latter. Due to the absence of any falsity or fraudulent intent in the filing of the returns, respondent was supposed to assess petitioners of deficiency estate taxes within a period of three (3) years from the filing of the respective estate tax returns. Thus, respondent is already barred from assessing petitioners of deficiency/delinquency estate taxes.

The Supreme Court in the case of **Aznar vs. Court of Tax Appeals,** already resolved this issue when it made a distinction between "false" and "fraudulent" returns as provided for by the law. To quote:

> ***"[W]e believe that the proper and reasonable interpretation of said provision should be that in the three different cases of <u>(1) false return, (2) fraudulent return with intent to evade tax</u>, (3) failure to file a return, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time within ten years after the discovery of the (1) falsity, (fraud), (3) omission. Our stand that the law should be interpreted to mean a separation of the three different situations of <u>false return, fraudulent return with intent to evade tax</u>, and failure to file a return is strengthened immeasurably by the last portion of the provision which segregates the situations into three different classes, namely — "falsity", "fraud" and "omission".*** **<u>That there is a difference between "false return" and "fraudulent return" cannot be denied. While the first merely implies deviation from the truth, whether intentional or not, the second implies intentional or deceitful entry with intent to evade the taxes due.</u>**
>
> ***The ordinary period of prescription of five (5) years [now three (3) years] within which to assess tax liabilities under Section 331 of the NIRC [now Section 203] should be applicable to normal circumstances, but whenever the government is placed at a disadvantage so as to prevent its lawful agents from proper assessment of tax liabilities due to <u>false returns, fraudulent return intended to evade payment of tax</u> or failure to file return, <u>the period of ten years provided for in Section 332 (a) NIRC [now Section 222(a)], from the time of the discovery of the falsity, fraud or omission even seems to be inadequate and should be the one enforced."</u>***

Based on the above pronouncements, false returns do not necessary mean with intent to evade taxes, otherwise, there will be no distinction between false and fraudulent returns and the law would not have provided for the distinct situations. Simply put, whenever intent to evade taxes exists, fraud already exists. To apply petitioners' interpretation that both false and fraudulent returns require the "intent to evade taxes" element would mean that in false returns, fraud also necessarily exists because of the requirement of the intent to evade payment correct taxes accompanying the falsity. *(Emphasis Supplied)*

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> Xxx xxx xxx
>
> In the case at bar, **the bases for the falsity of the returns are the substantial underdeclaration of properties** in the amounts of P497,789.12 and P664,661.27 for the estates of Fidel F. Reyes and Teresita R. Reyes and overstatement of vanishing deductions in the amount of P10,680,355.43 for the estate of Teresita R. Reyes. In the case of Packaging Products Corporation, the absence of falsity of the return stemmed from different interpretation of the law with regard to the availment of tax credits on sales taxes. *(Emphasis Supplied).*
>
> Indeed, there is no indicia of fraud in the instant case. The estates of Fidel and Teresita Reyes, through Administrator Pacheco, availed of the VAP of the government and even included properties not forming part of the estates which negate any deceitful intention to defraud the government of revenues. However, the Court is convinced that petitioners filed false returns taking into account that:
>
> 1) Despite having reported conjugal and paraphernal properties, both real and personal, the estate of Fidel Reyes failed to declare basic deficiency estate tax worth P497,789.12;
>
> 2) Instead of the vanishing deductions claimed of P10,680,355.43, the estate of Teresita R. Reyes may only claim vanishing deductions of P663,027.01. The failure to correctly include deductions actually incurred by the taxpayer, in effect lowered deficiency estate tax of the estate of Teresita Reyes; and
>
> 3) The estate of Teresita R. Reyes did not report basic deficiency estate tax in the sum of P664,661.27.
>
> **To reiterate, in the filing of false returns, intention to evade taxes need not exist. A fraudulent return is always an attempt to evade a tax, but a merely false return may not be. The filing of a false return is sufficient to warrant assessment of ten (10) years from date of discovery of the falsity.** *(Emphasis Supplied).*

In the *en banc* level[4], this Court affirmed the above ruling and emphasized that "false returns do not necessarily mean with intent to evade taxes, otherwise, there will be no distinction between false and fraudulent returns and the law would not have provided for the distinct situations."

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[4] *"Estate of Fidel F. Reyes and Estate of Teresita R. Reyes, vs. Commissioner of Internal Revenue"*, C.T.A. EB 189, March 21, 2007, penned by Justice O. Palanca-Enriquez, concurred by PJ E. D. Acosta, Justice J. C. Castañeda, Justice L.R. Bautista, Justice E. P. Uy, and Justice C.A. Casanova.

Moreover, in the case of *Holiday Inns (Phils.) Inc. vs. Commissioner of Internal Revenue*[5], the Court of Appeals held the following:

> This Court agrees with the CTA that the **ten-year period of limitation should apply.** The falsity of the VAT return filed by HIPI is established by the fact that in its 1995 Annual Income Tax Return, HIPI's declared gross income from sale of services representing management fees was higher than the taxable sales reported in its VAT returns by P269,967.02. This was not denied by HIPI albeit it claimed good faith in not declaring the said amount. That notwithstanding, this Court is not inclined to sustain HIPI's defense of good faith, otherwise, any taxpayer filing a false return can easily escape liability. **While there may be truth to HIPI's claim that it had no malicious intent to evade payment of the tax, this does not preclude a finding of a false return. This is because while a fraudulent return implies a malicious and deliberate intent to evade the payment of the tax, a false return merely implies a deviation from the correct amount of the tax.** That the 50% surcharge was not imposed does not mean that the return filed by HIPI was correct. **In fact, the 30% threshold on substantial underdeclaration under Section 248(B) of the Tax Code is but a mere prima facie presumption of the filing of a false or fraudulent return. Thus, the fact that HIPI underdeclared 5% only of its total sales does not mean that it did not file a false return.** To sustain HIPI's interpretation would certainly be absurd.*(Emphasis Supplied)*

The above case reiterates that a false return merely implies a deviation from the correct of tax. This case even held that the 30% threshold under Section 248(B) of the Tax Code is but a mere presumption of the filing of a false or fraudulent return. Thus, if in fact there is deviation from the truth and the ratio is below the 30% threshold, the return is still false and the ten year period applies.

Section 248(B) of the Tax Code reads, as follows:

SEC. 248. Civil Penalties.-

> (B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is

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[5] C.A.-G.R. SP No. 78828, September 9, 2004.

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willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case, any payment has been made on the basis of such return before the discovery of the falsity or fraud: *Provided*, That a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute prima facie evidence of a false or fraudulent return: *Provided, further*, That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein.

From the wordings of the above-quoted provision, this section pertains to the imposition of civil penalties and is not the basis in classifying the return as a false or fraudulent return.

Following the doctrine in *Aznar*[6] case, it is evident that petitioner committed falsity in its return when it deviated from the truth. Petitioner failed to declare substantial amounts in the FWT and DST returns filed.

Section 222(a) of the National Internal Revenue Code (NIRC) reads, as follows:

"SECTION 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* —
"(a) In the case of a **false** or fraudulent return with intent to evade tax or of failure to file a return, **the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity**, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

Xxx xxx xxx"(*Emphasis Supplied*).

Clearly, Section 222(a) provides that in three different cases of (1) false return, (2) fraudulent return with intent to evade tax, and (3) failure to file a return, the tax may be assessed, or a proceeding in ge

[6] *Supra*, note 2.

court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the (1) falsity, (2) fraud, or (3) omission.

Thus, the deficiency FWT and DST taxes may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity.

Failure to formally Offer the returns

It is noteworthy to mention that the CTA is a Court of record and thus, the litigants must prove every aspect of its case. The FWT and DST returns filed could not be admissible in evidence because these were not formally offered.

Judicial admission Of its failure to file The returns

Petitioner even made a judicial admission of its failure to file the FWT and DST returns, as follows:

> With regard to the final withholding tax and documentary stamp tax, no returns were filed precisely because Petitioner has no obligation to file and pay these taxes since it was not involved in quasi-banking activity and it did not deal with deposit substitutes".[7]

This admission is binding and no proof is required considering that this was made in the course of the proceedings. *JC*

[7] Petitioner's Memorandum filed on December 7, 2007 (pp. 7-8), *En Banc* docket, pp. 716-717.

In conclusion, the extent of the falsity or omission, is so considerable that the ten year prescriptive period counted from time of discovery of the falsity or omission in the returns is clearly applicable. Respondent's right to assess petitioner's deficiency FWT and DST, therefore, has not prescribed.

In view of the foregoing, I vote to affirm *in toto* the appealed Decision and Resolution dated March 12, 2007 and July 3, 2007, respectively, of the Second Division of this Court.

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

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REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

CORPORATE INVESTMENTS PHILIPPINES, INC., ***Petitioner,***	**C.T.A. EB NO. 300** **(C.T.A. CASE NO. 6549)**
	Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
COMMISSIONER OF INTERNAL REVENUE, ***Respondent.***	**Promulgated:** SEP 1 2 2008

x -- x

SEPARATE CONCURRING AND DISSENTING OPINION

PALANCA-ENRIQUEZ, J.:

Concurring

I concur with the majority in ruling that petitioner is liable for deficiency income tax for taxable year 1998, in the amount of P8,370,894.37, inclusive of deficiency interest. I likewise agree in the majority's imposition of 20% delinquency interest per annum on said deficiency tax assessment.

Dissenting

However, with all due respect, I cannot agree with the majority in ruling that the deficiency assessments for Final Withholding Tax ("FWT") and Documentary Stamp Tax ("DST") for taxable year 1998, had already prescribed, the assessment having been issued beyond the three year prescriptive period.

I maintain my stand that for FWT and DST assessments, the applicable prescriptive periods are ten years, pursuant to *Section 222 of the NIRC of 1997, as amended.*

The Second Division found and ruled that records of this case do not show that FWT and DST returns were filed by the petitioner, hence respondent's right to assess petitioner for deficiency FWT and DST has not yet prescribed since the ten-year prescriptive period applies. I sustain this ruling of the Second Division.

Petitioner Made a Judicial Admission That It Did Not File FWT and DST Returns for Taxable Year 1998.

In petitioner's "Memorandum" filed on December 6, 2007 in the above-captioned case, petitioner stated, to wit:

> "With regard to the final withholding tax and documentary stamp tax, no returns were filed precisely because Petitioner has no obligation to file and pay these taxes since it was not involved in quasi-banking activity and it did not deal with deposit substitutes" *(pp. 7-8 thereof)*.

As can be gleaned from the above-quoted statement, petitioner admitted that it did not file FWT and DST returns. Said admission of petitioner, being made in its Memorandum filed before this Court *En Banc*, is a judicial admission, pursuant to *Section 4, Rule 129 of the Revised Rules of Court*, which states:

> "SEC. 4. Judicial admissions. – An admission, verbal or written, made by a party in the course of the proceedings in the same case, does not require proof. The admission may be contradicted only by showing that it was made through palpable mistake or that no such admission was made."

Pursuant to the foregoing provision, a judicial admission is an admission, verbal or written, made by a party in the course of the proceedings in the same case, which dispenses with the need for proof with respect to the matter or fact admitted. It may be contradicted only by a showing that it was made through palpable mistake or no such admission was made *(Camitan, el al. vs. Fidelity Investment Corporation, G.R. No. 163684, April 16, 2008)*.

Since petitioner itself admitted that it did not file FWT and DST returns for taxable year 1998, such admission is binding to petitioner, which dispenses with the need of any other proof.

It cannot be argued by petitioner that the admission in its Memorandum dated December 6, 2007 that it did not file FWT and DST returns was a mere mistake by its counsel. Well-entrenched is the rule that the client is bound by the mistakes arising from negligence of his own counsel. The only exception to this rule is when the negligence is so gross that the client is deprived of his day in court *(Silot, Jr. vs. De La Rosa, 543 SCRA 538)*.

It is my considered view, however, that the exception does not find any application in this case. As the records would plainly show, petitioner was not deprived of its day in court. Also, petitioner could have introduced evidence, testimonial or otherwise, in order to controvert or correct the admission made by its counsel. However, petitioner chose

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not to retract its admission. Thus, it cannot be said that the admission of petitioner's counsel was made through a palpable mistake.

Equally settled is the rule that every counsel has the implied authority to do all acts which are necessary or incidental to the prosecution and management of the suit in behalf of his client. Any act performed by counsel within the scope of his general and implied authority is, in the eyes of the law, regarded as the act of the client himself. Consequently, the mistake or negligence of the client's counsel, which may result in the rendition of an unfavorable judgment, generally binds the client. To rule otherwise would encourage every defeated party, in order to salvage his case, to claim neglect or mistake on the part of his counsel. Then, there would be no end to litigation, as every shortcoming of counsel could be the subject of challenge by his client through another counsel who, if he is also found wanting, would likewise be disowned by the same client through another counsel, and so on, *ad infinitum (Camitan, el al. vs. Fidelity Investment Corporation, <u>supra</u>)*.

Clearly, petitioner's admission in its Memorandum filed with this Court *En Banc* that it did not file FWT and DST returns is already

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sufficient basis for the Court *En Banc* to sustain the ruling of the Second Division that respondent's right to assess petitioner of deficiency FWT and DST has not yet prescribed due to petitioner's failure to file said returns.

Deficiency FWT Assessment

As regards the FWT assessment, in partially reversing the Decision of the Second Division, the majority merely relied on respondent's computation of petitioner's deficiency FWT, which shows an entry "Less: Paid per Returns 1,423,611.42" from the Final Withholding Tax Due per Audit of P72,907,530.51 *(Formal Letter of Demand)*, as well as the "Summary of Quarterly Final Withholding Tax Returns" prepared by the respondent *(Exhibit "11")*.

With all due respect to the majority, respondent's computation of FWT assessment and preparation of "Summary of Quarterly Final Withholding Tax Returns" cannot be made the basis to show that petitioner filed the FWT Returns on its Sundries In Interest because the final withholding tax in the amount of P1,142,611.42 paid by the petitioner pertains only to the summary of the final withholdings tax on

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interest income payments and not necessarily to the FWT Returns on its Sundries in Interest (*Exhibit "14", row 9, column 15*). Records show that the "Summary of Quarterly Final Withholding Tax Returns" in the total amount of P1,423,611.42 prepared by respondent pertains to the final withholding tax on interest payments from the following clients:

CLIENTS	AMOUNT	FINAL TAX
Central CATV, Inc.	P45,138.90	P9,027.78
CIPI Leasing & Finance Corp.	983,101.80	196,620.36
Gerardo Ozaeta	2,618,648.45	523,729.69
HG Feliciano Co., Inc.	265,352.85	53,070.57
Juanito Ordoveza	60,236.80	12,047.36
KSA Realty Corp.	1,731,335.95	346,267.19
La Tondena Distillers, Inc.	11,008.35	2,201.67
Phil Breweries Corp.	355,914.65	71,182.93
Tipo Valley Corp.	996,406.65	199,281.33
Yolanda Uy	50,912.70	10,182.54
TOTAL	P7,118,057.10	**P1,423,611.42**

A mere summary is not equivalent to FWT Returns. It is clear, therefore, that petitioner did not file the FWT Returns and also did not pay the corresponding tax liability thereon. As between the judicial admission of petitioner and the mere computation of respondent, which is contrary to said admission, the Court should give evidentiary weight and value to petitioner's judicial admission, pursuant to *Section 4, Rule 129 of the Revised Rules of Court*.

With all due respect, therefore, the majority erred in concluding that petitioner filed FWT Returns.

Deficiency DST Assessment

As regards the deficiency DST, in partially reversing the decision of the Second Division, the majority also merely relied on respondent's computation of deficiency DST, as follows:

	Consummated Negtd Sale		Bills Payable Money Market	Promissory Note	Additional Common Shares and Fully Paid	Total Amount
	Sundries Out (CDB)	Sundries In (CRB)				
Total Amount subject to DST	4,890,383,622.03	5,085,843,579.95	566,339,066.67	76,887,066.67	100,000,000.00	10,619,453,335.31
Multiplied by DST Rate	P.30/P200	P.30/P200	P.30/P200	P.30/P200	P2/P200	
DST Due	7,335,575.43	7,628,765.37	849,508.60	115,330.60	1,000,000.00	16,929,180.00
DST Paid per Returns	2,843,011.50	-	849,508.60	115,330.60	-	3,807,850.70
Basic Deficiency DST Due and Collected	4,492,563.93	7,628,765.37	-	-	1,000,000.00	13,121,329.30
Add: Penalties Interest from 01-11-99 to 12-31-01						7,797,904.15
Total Deficiency DST Due and Collectible						20,919,233.45

(Schedule 2, attached to the Formal Letter of Demand)

Again, with all due respect to the majority, respondent's computation of DST assessment cannot be made the basis to show that petitioner filed DST Returns in its Sundries Out, Sundries In, Bills

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Payable Money Market, Promissory Note and Additional Common Shares. A mere computation is not equivalent to DST returns. In fact, a carefully scrutiny of the above-quoted computation shows that no DST payments were made at all with respect to petitioner's Sundries in and additional common shares. There being no DST payments made, the inescapable conclusion therefore is no returns were filed. Finally, the above computation of the respondent is belied by petitioner's very own admission in its Memorandum dated December 6, 2007 that it did not file DST returns for taxable year 1998. Between such judicial admission of petitioner and respondent's computation, the Court should give credence to petitioner's own judicial admission.

DST Return Shall be Filed and the Corresponding DST Liability Shall be Paid Within 10 Days After the Close of the Month When the Taxable Document Was Made, Signed, Issued, Accepted or Transferred

In addition, *Section 200 (B) of the NIRC of 1997, as amended*, provides that the DST return shall be filed within ten days after the close of the month when the taxable document was made, signed, issued, accepted, or transferred, and the tax thereon shall be paid at the same time the aforesaid return is filed. As such, DST return shall be filed and the corresponding tax shall be paid for every document made, signed, issued, accepted or transferred. Hence, it is incumbent upon petitioner to convince this Court that it filed DST return for every document it made, signed, issued, accepted or transferred with regards to its consummated negotiated sales-Sundries IN interest in the total amount of P5,085,843,579.95 contained in its Summary of Cash Receipts Books *(Exhibit "15")*, as well as its additional subscribed and paid common shares in the amount of P1,000,000.00. However, in both its consummated negotiated sales and additional shares subscribed and paid, petitioner failed to prove that it filed the corresponding DST returns and paid the taxes thereof.

Pursuant to *Section 222 of the NIRC of 1997, as amended*, for petitioner's failure to file DST returns on the aforesaid transactions, the tax may be assessed at anytime within 10 years. Clearly, in the instant case, respondent's right to assess petitioner of DST liability has not yet prescribed.

Documents Not Formally Offered Cannot be Considered by the Court

Even for the sake of argument, I consider the majority view that BIR Records bear some FWT and DST returns of petitioner, still the Court cannot give evidentiary value to said returns in deciding the merits of this case. Well-settled is the rule that the Court shall consider evidence only those that were formally offered. Conversely, evidence not formally offered cannot be considered by the Court in deciding the case at hand.

Thus, in the recent case of *Dizon vs. Court of Appeals, G.R. No. 140944, April 30, 2008*, the Supreme Court ruled, as follows:

> "Under Section 8 of RA 1125, the CTA is categorically described as a court of record. As cases filed before it are litigated *de novo*, party-litigants shall prove every minute aspect of their cases. Indubitably, no evidentiary value can be given the pieces of evidence submitted by the BIR, as the rules on documentary evidence require that these documents must be formally offered before the CTA. Pertinent is Section 34, Rule 132 of the Revised Rules on Evidence which reads:

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> '**SEC. 34.** *Offer of Evidence.* — The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified.'
>
> xxx xxx."

A perusal of the "Formal Offer of Evidence" filed by petitioner in this case *(Exhibits "A" to "NNN")* shows that the FWT Returns filed by petitioner for taxable year 1998 with respect to its Sundries IN Interest on its cash disbursements books were not formally offered in evidence. A further perusal of the documentary evidence offered by petitioner *(Exhibits "A" to "NNN")* shows that petitioner's DST Returns, with regard to the total loans granted shown in its Cash Disbursement Book *(Exhibit "14")*, total deposit substitutes received shown in its Cash Receipts Books *(Exhibit "15")* and additional subscribed and paid common shares in the amount of P1,000,000.00, were not also formally offered in evidence. Considering that said returns were not formally offered, no evidentiary value can be given the said documents.

Thus, the Second Division aptly ruled, as follows:

> "In this case, the records do not show the returns corresponding to the FWT and DST. Thus, respondent's

right to assess petitioner for deficiency FWT and DST has not yet prescribed."

For all the foregoing, and with due respect to the majority, I maintain and reiterate my stand that respondent's right to assess petitioner of deficiency FWT and DST has not yet prescribed, due to petitioner's omission to file its FWT and DST returns for taxable year 1998.

WHEREFORE, premises considered, I vote to **AFFIRM** *in toto* the Decision of the Second Division in C.T.A. Case No. 6549 and to **DISMISS** the instant Petition for Review.

OLGA PALANCA-ENRIQUEZ
Associate Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

CORPORATE INVESTMENTS PHILIPPINES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 300
(C.T.A. CASE NO. 6549)

Present:

ACOSTA, Presiding Justice,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, JJ.

Promulgated:

SEP 12 2008 GNApolinario
3:05 p.m.

x -- x

SEPARATE CONCURRING AND DISSENTING OPINION

PALANCA-ENRIQUEZ, J.:

Concurring

I concur with the majority in ruling that petitioner is liable for deficiency income tax for taxable year 1998, in the amount of P8,370,894.37, inclusive of deficiency interest. I likewise agree in the majority's imposition of 20% delinquency interest per annum on said deficiency tax assessment.

Dissenting

However, with all due respect, I cannot agree with the majority in ruling that the deficiency assessments for Final Withholding Tax ("FWT") and Documentary Stamp Tax ("DST") for taxable year 1998, had already prescribed, the assessment having been issued beyond the three year prescriptive period.

I maintain my stand that for FWT and DST assessments, the applicable prescriptive periods are ten years, pursuant to *Section 222 of the NIRC of 1997, as amended.*

The Second Division found and ruled that records of this case do not show that FWT and DST returns were filed by the petitioner, hence respondent's right to assess petitioner for deficiency FWT and DST has not yet prescribed since the ten-year prescriptive period applies. I sustain this ruling of the Second Division.

Petitioner Made a Judicial Admission That It Did Not File FWT and DST Returns for Taxable Year 1998.

In petitioner's "Memorandum" filed on December 6, 2007 in the above-captioned case, petitioner stated, to wit:

> "With regard to the final withholding tax and documentary stamp tax, no returns were filed precisely because Petitioner has no obligation to file and pay these taxes since it was not involved in quasi-banking activity and it did not deal with deposit substitutes" *(pp. 7-8 thereof)*.

As can be gleaned from the above-quoted statement, petitioner admitted that it did not file FWT and DST returns. Said admission of petitioner, being made in its Memorandum filed before this Court *En Banc*, is a judicial admission, pursuant to *Section 4, Rule 129 of the Revised Rules of Court*, which states:

> "SEC. 4. Judicial admissions. – An admission, verbal or written, made by a party in the course of the proceedings in the same case, does not require proof. The admission may be contradicted only by showing that it was made through palpable mistake or that no such admission was made."

Pursuant to the foregoing provision, a judicial admission is an admission, verbal or written, made by a party in the course of the proceedings in the same case, which dispenses with the need for proof with respect to the matter or fact admitted. It may be contradicted only by a showing that it was made through palpable mistake or no such admission was made *(Camitan, el al. vs. Fidelity Investment Corporation, G.R. No. 163684, April 16, 2008)*.

Since petitioner itself admitted that it did not file FWT and DST returns for taxable year 1998, such admission is binding to petitioner, which dispenses with the need of any other proof.

It cannot be argued by petitioner that the admission in its Memorandum dated December 6, 2007 that it did not file FWT and DST returns was a mere mistake by its counsel. Well-entrenched is the rule that the client is bound by the mistakes arising from negligence of his own counsel. The only exception to this rule is when the negligence is so gross that the client is deprived of his day in court *(Silot, Jr. vs. De La Rosa, 543 SCRA 538)*.

It is my considered view, however, that the exception does not find any application in this case. As the records would plainly show, petitioner was not deprived of its day in court. Also, petitioner could have introduced evidence, testimonial or otherwise, in order to controvert or correct the admission made by its counsel. However, petitioner chose not to retract its admission. Thus, it cannot be said that the admission of petitioner's counsel was made through a palpable mistake.

Equally settled is the rule that every counsel has the implied authority to do all acts which are necessary or incidental to the prosecution and management of the suit in behalf of his client. Any act performed by counsel within the scope of his general and implied authority is, in the eyes of the law, regarded as the act of the client himself. Consequently, the mistake or negligence of the client's counsel, which may result in the rendition of an unfavorable judgment, generally binds the client. To rule otherwise would encourage every defeated party, in order to salvage his case, to claim neglect or mistake on the part of his counsel. Then, there would be no end to litigation, as every shortcoming of counsel could be the subject of challenge by his client through another counsel who, if he is also found wanting, would likewise be disowned by the same client through another counsel, and so on, *ad infinitum (Camitan, el al. vs. Fidelity Investment Corporation, supra).*

Clearly, petitioner's admission in its Memorandum filed with this Court *En Banc* that it did not file FWT and DST returns is already sufficient basis for the Court *En Banc* to sustain the ruling of the Second Division that respondent's right to assess petitioner of deficiency FWT and DST has not yet prescribed due to petitioner's failure to file said returns.

Deficiency FWT Assessment

As regards the FWT assessment, in partially reversing the Decision of the Second Division, the majority merely relied on respondent's computation of petitioner's deficiency FWT, which shows an entry "Less: Paid per Returns 1,423,611.42" from the Final Withholding Tax Due per Audit of P72,907,530.51 *(Formal Letter of Demand)*, as well as the "Summary of Quarterly Final Withholding Tax Returns" prepared by the respondent *(Exhibit "11")*.

With all due respect to the majority, respondent's computation of FWT assessment and preparation of "Summary of Quarterly Final Withholding Tax Returns" cannot be made the basis to show that petitioner filed the FWT Returns on its Sundries In Interest because the final withholding tax in the amount of P1,142,611.42 paid by the petitioner pertains only to the summary of the final withholdings tax on interest income payments and not necessarily to the FWT Returns on its Sundries in Interest (*Exhibit "14", row 9, column 15*). Records show that the "Summary of Quarterly Final Withholding Tax Returns" in the total amount of P1,423,611.42 prepared by respondent pertains to the final withholding tax on interest payments from the following clients:

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A mere summary is not equivalent to FWT Returns. It is clear, therefore, that petitioner did not file the FWT Returns and also did not pay the corresponding tax liability thereon. As between the judicial admission of petitioner and the mere computation of respondent, which is contrary to said admission, the Court should give evidentiary weight and value to petitioner's judicial admission, pursuant to *Section 4, Rule 129 of the Revised Rules of Court.*

With all due respect, therefore, the majority erred in concluding that petitioner filed FWT Returns.

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As regards the deficiency DST, in partially reversing the decision of the Second Division, the majority also merely relied on respondent's computation of deficiency DST, as follows:

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Total Deficiency DST Due and Collectible						20,919,233.45

(Schedule 2, attached to the Formal Letter of Demand)

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DST Return Shall be Filed and the Corresponding DST Liability Shall be Paid Within 10 Days After the Close of the Month When the Taxable Document Was Made, Signed, Issued, Accepted or Transferred

In addition, *Section 200 (B) of the NIRC of 1997, as amended*, provides that the DST return shall be filed within ten days after the close of the month when the taxable document was made, signed, issued, accepted, or transferred, and the tax thereon shall be paid at the same time the aforesaid return is filed. As such, DST return shall be filed and the corresponding tax shall be paid for every document made, signed, issued, accepted or transferred. Hence, it is incumbent upon petitioner to convince this Court that it filed DST return for every document it made, signed, issued, accepted or transferred with regards to its consummated negotiated sales-Sundries IN interest in the total amount of P5,085,843,579.95 contained in its Summary of Cash Receipts Books *(Exhibit "15"),* as well as its additional subscribed and paid common shares in the amount of P1,000,000.00. However, in both its consummated negotiated sales and additional shares subscribed and paid, petitioner failed to prove that it filed the corresponding DST returns and paid the taxes thereof.

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case, respondent's right to assess petitioner of DST liability has not yet prescribed.

Documents Not Formally Offered Cannot be Considered by the Court

Even for the sake of argument, I consider the majority view that BIR Records bear some FWT and DST returns of petitioner, still the Court cannot give evidentiary value to said returns in deciding the merits of this case. Well-settled is the rule that the Court shall consider evidence only those that were formally offered. Conversely, evidence not formally offered cannot be considered by the Court in deciding the case at hand.

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A perusal of the "Formal Offer of Evidence" filed by petitioner in this case *(Exhibits "A" to "NNN")* shows that the FWT Returns filed by petitioner for taxable year 1998 with respect to its Sundries IN Interest on its cash disbursements books were not formally offered in evidence. A further perusal of the documentary evidence offered by petitioner *(Exhibits "A" to "NNN")* shows that petitioner's DST Returns, with regard to the total loans granted shown in its Cash Disbursement Book *(Exhibit "14")*, total deposit substitutes received shown in its Cash Receipts Books *(Exhibit "15")* and additional subscribed and paid common shares in the amount of P1,000,000.00, were not also formally offered in evidence. Considering that said returns were not formally offered, no evidentiary value can be given the said documents.

Thus, the Second Division aptly ruled, as follows:

> "In this case, the records do not show the returns corresponding to the FWT and DST. Thus, respondent's

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right to assess petitioner for deficiency FWT and DST has not yet prescribed."

For all the foregoing, and with due respect to the majority, I maintain and reiterate my stand that respondent's right to assess petitioner of deficiency FWT and DST has not yet prescribed, due to petitioner's omission to file its FWT and DST returns for taxable year 1998.

WHEREFORE, premises considered, I vote to **AFFIRM** *in toto* the Decision of the Second Division in C.T.A. Case No. 6549 and to **DISMISS** the instant Petition for Review.

OLGA PALANCA-ENRIQUEZ
Associate Justice