REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SPECIAL FIRST DIVISION

SAN ROQUE POWER CORPORATION, Petitioner,	**CTA CASE NO. 7787**
- versus -	Members:
	Uy, *Chairperson, and* **Fabon-Victorino,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** APR 30 2013 ; 2:30 p.m.

x---x

DECISION

UY, *J.*:

The instant Petition for Review was filed by petitioner San Roque Power Corporation, against respondent Commissioner of Internal Revenue, praying that, after due hearing, judgment be rendered setting aside the Formal Letter of Demand dated January 14, 2008 and Assessment Notice Nos. WE-04-06-005-017-501-000 for deficiency expanded withholding tax; WF-04-06-005-017-501-000 for deficiency final withholding tax; and FBT-04-06-005-017-501-000 for deficiency fringe benefits tax, all dated January 15, 2005, in the total amount of P118,619,729.22 issued by respondent for taxable year 2004.

THE FACTS

Petitioner is a domestic corporation engaged in the operation of a hydroelectric power generating plant located at Barangay San Roque, San Miguel, Pangasinan.[1] It is registered with the Board of

[1] Respondent's Memorandum, Docket, p. 2339.

Investments on a pioneer status as new operator of hydroelectric power generating plant under Certificate of Registration No. 97-356.[2]

On February 7, 2006, petitioner received Letter of Authority ("LOA") No. 00027833 dated February 22, 2006 issued by Revenue District Office (RDO) No. 06 of the Bureau of Internal Revenue (BIR), authorizing Revenue Officers Rodelio SJ Dacanay, Gregorio Z. Nipal, Almira Navarro, and Jinky Lim to examine its books of accounts and other accounting records relative to all internal revenue taxes for the period covering January 1, 2004 to December 31, 2004.[3]

Thereafter on April 4, 2007, petitioner received a Notice of Informal Conference dated April 3, 2007 issued by BIR RDO No. 06, finding petitioner to have deficiency withholding tax on compensation, expanded withholding tax (EWT), value-added tax, and final withholding tax (FWT), inclusive of applicable increments, for taxable year 2004 on the basis of the investigation of the aforesaid Revenue Officers,[4] as follows:

Withholding Tax on Compensation	P 4,287,333.80
Expanded Withholding Tax	3,625,338.56
Final Withholding Tax	98,234,867.07
Value-Added Tax	4,614,888.03
Total	**P 110,762,427.46**

Although petitioner by then is under the jurisdiction of the BIR Large Taxpayer Services, petitioner opted, without objection from the BIR Large Taxpayer Services, that the examination of its books of accounts and other accounting records for all internal taxes for taxable year 2004 be continued by BIR RDO No. 06 as the latter has all the records pertinent to such examination.[5]

In response to the issues raised by petitioner in its letter dated April 27, 2007, BIR RDO No. 06 conducted a re-investigation as contained in its letter dated August 6, 2007.[6]

On November 21, 2007, petitioner received a second Notice of Informal Conference dated November 15, 2007, wherein BIR RDO

[2] Exhibits "TTT-1" and "TTT-3".
[3] Docket, p. 1143.
[4] Docket, p. 1143.
[5] Docket, p. 1143.
[6] Docket, p. 1144.

No. 06 amended its assessment for alleged deficiency taxes for taxable year 2004, as follows:

Deficiency Expanded Withholding Tax	P	3,241,714.71
Deficiency Fringe Benefits Tax		6,109,673.68
Deficiency Final Withholding Tax		106,688,374.79
Total	**P**	**116,039,763.18**[7]

Thereafter, on December 27, 2007, petitioner received a letter of even date from BIR RDO No. 06 informing petitioner that it will pursue the assessments reflected in the Notice of Informal Conference.[8]

Subsequently on January 2, 2008, petitioner received a copy of the Preliminary Assessment Notice (PAN) dated December 28, 2007 issued by BIR Revenue Region No. 1, enumerating the following tax deficiencies (inclusive of interest and late payment charges):

Expanded Withholding Tax	P 3,530,629.68
Deficiency Final Withholding Tax	107,699,106.77
Deficiency Fringe Benefits Tax	6,167,554.80
Total	**P117,397,291.25**[9]

On January 24, 2008, petitioner received copies of the Formal Letter of Demand and Assessment Notices dated January 14 and 15, 2008, respectively, which were issued or mailed by the BIR on January 15, 2008, for deficiency taxes under Assessment Notice Nos. WE-04-06-005-017-501-000, WF-04-06-005-017-501-000, and FBT-04-06-005-017-501-000, as follows:

Expanded Withholding Tax	P 3,365,719.78
Final Withholding Tax	108,822,142.29
Fringe Benefits Tax	6,231,867.15
Total	**P118,619,729.22**[10]

In its letter dated February 21, 2008 to BIR Revenue Region No. 1, petitioner protested the assessment and collection of purported deficiency taxes under Assessment Notice Nos. WE-04-06-005-017-501-000, WF-04-06-005-017-501-000, and FBT-04-06-005-

[7] Docket, p. 1144.
[8] Docket, p. 1144.
[9] Docket, pp. 1144 to 1145
[10] Docket, p. 1145.

017-501-000 dated January 15, 2008 and Formal Letter of Demand dated January 14, 2008, for being barred by prescription and bereft of factual and legal bases.[11]

In a letter dated April 3, 2008 of BIR Revenue Region No. 1, petitioner was informed that the letter of demand and assessment notices still stand and its request for cancellation was denied with finality.[12]

Thus, on May 22, 2008, petitioner filed the instant Petition for Review to assail the aforesaid denial of its protest against respondent's Formal Letter of Demand dated January 14, 2008 and Assessment Notice Nos. WE-04-06-005-017-501-000, WF-04-06-005-017-501-000, and FBT-04-06-005-017-501-000, all dated January 15, 2005 issued by BIR Revenue Region No. 1, of Calasiao, Pangasinan.

In her Answer[13] filed on November 3, 2008, respondent interposes the following special and affirmative defenses:

> "6. Respondent adopts the abovementioned admissions and denials as part of his special and affirmative defenses.
>
> 7. The assessments for Withholding Tax on Compensation, Expanded Withholding Tax, Final Withholding Tax and Value-Added Tax respectively, were issued in accordance with law. In the Formal Letter of Demand, respondent clearly stated petitioner's tax liabilities, to wit:
>
>> 'Please be informed that after review of the investigation reports on your income, withholding and business tax liabilities the taxable year 2004 submitted by Revenue Officers Jinky Lim, Rodelio Dacanay and Gregorio Nipal under Letter of Authority No. 00027833 dated February 22, 2006, there have been found still due from you deficiency taxes as shown thereunder:

---

[11] Exhibit "J".
[12] Exhibit "K".
[13] Docket, pp. 1085 to 1090.

Assessment No.: WE-04-06-005-017-501-000
Deficiency Expanded Withholding Tax P3,565,719.78

Assessment No.: WF-04-06-005-017-501-000
Deficiency Final Withholding Tax P108,822,142.29

Assessment No.: FBT-04-06-005-017-501-000
Deficiency Fringe Benefits Tax P 6,231,142.29

TOTAL **P 118,619,729.22**

Please note that the interest will be adjusted if paid beyond February 12, 2008.

The twenty-five percent (255) surcharge and twenty percent (20%) interest per annum was based on the provisions of Section 248 (A) and Section 249 (B) of the 1997 NIRC, while the compromise penalty was in accord with RMO 1-90 and Section 250 of the 1997 NIRC.

The narrative details covering the aforementioned discrepancies and the detailed computation of the deficiency taxes are shown at the back hereof as Annex A.'

Based on the foregoing, the assessment issued against petitioner is valid being supported by factual and legal bases.

An assessment contains a computation of tax liabilities and a demand for payment of such liability within a prescribed period. It is worthy to note that assessment notices need not be a full narration of facts and laws on which the assessment is made. It is enough that the petitioner be **substantially informed** of the law and the facts on which the assessment for a tax liability is made. The Preliminary Assessment Notices received by petitioner indicated the amount of deficiency tax liability and a demand to pay within a prescribed period. The Supreme Court held that assessments simply required a computation of tax liabilities, the amount the taxpayer was to pay and a demand for payment within a prescribed period.

8. The right of respondent to assess petitioner for withholding taxes did not prescribe because the investigation upon petitioner's books and records has yet to conclude. That being the case, the right of respondent to assess petitioner is not barred by prescription and the filing of the Petition for Review is premature, pending the conclusion of the investigation.

In paragraph I(B) under the heading 'DISCUSSION', petitioner ratiocinated that it did not ask for a re-investigation and yet respondent's revenue officers conducted a re-investigation anyway. The truth is, the claimed 're-investigation' is a continuation of the investigation on petitioner's books and records. This fact is highlighted when petitioner said that, 'In sum, we respectfully object to the assessment for lack of factual and legal bases contrary to pertinent Bureau of Internal Revenue (BIR) rulings on the matter. We manifest that we reserve our right to submit additional documents should the need arises. Should you require the submission of additional documents, please let us know. By its own words, petitioner agreed that the investigation has not yet terminated, and that it shall comply with any request for the submission of documents should respondent's examiners deem it necessary. The use of the word 're-investigation' in this case did not denote the usage of a technical or legal term. It simply means to study again by close examination and systematic inquiry. At most, it is but a misnomer for continuing the investigation. The offer of petitioner to give additional documents so requested is but part of the investigation. The law allows the BIR access to all relevant or material records and data in the person of the taxpayer. It places no limit or condition on the type or form of the medium by which the record subject to the order of the BIR is kept. The purpose of the law is to enable the BIR to get at the taxpayer's records in whatever form they may be kept. Thus, contrary to petitioner's belief, assessment on its books and records is not barred by prescription. The hurried resort to judicial remedy has only led to premature filing of the instant Petition for Review.'

9. In the absence of evidence to the contrary, assessments are presumed correct. In the case of *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*, the Supreme Court held:

> 'Tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.'

The burden of proof *(sic)* is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong, but also that the taxpayer is right. The presumption in favor of the correctness of tax assessments stands where evidence to the contrary is wanting."

After pre-trial held on December 4, 2008, the parties filed their Joint Stipulation and Facts and Issues[14] on July 1, 2009. This was approved by the Court in the Resolution[15] dated July 6, 2009.

Before the scheduled date of petitioner's initial presentation of evidence, petitioner filed a Motion to Set Case for Preliminary Hearing to Resolve Issue of Prescription on July 16, 2009.[16] In line therewith, both parties manifested that they will not present evidence on the issue of prescription.[17] In compliance with the Resolution[18] dated August 24, 2009, respondent filed her Memorandum[19] on September 28, 2009 while petitioner filed its Memorandum [Re: Issue of Prescription][20] on October 1, 2009.

[14] Docket, pp. 1236 to 1239.
[15] Docket, p. 1244.
[16] Docket, pp. 1250 to 1254.
[17] Docket, pp. 1258 and 1266.
[18] Docket, p. 1271.
[19] Docket, pp. 1272 to 1283.
[20] Docket, pp. 1285 to 1308.

In the Resolution[21] dated November 13, 2009, the Former Second Division of this Court resolved the issue of prescription. Assessment Notice Nos. WE 04-06-005-017-501-000 and WF-04-06-005-017-501-000 for deficiency expanded withholding tax and deficiency final withholding tax covering the period of January to November 2004, and Assessment No. FBT 04-06-005-017-501-000 for deficiency fringe benefits tax for taxable year 2004 were CANCELLED AND SET ASIDE for having been issued beyond the prescriptive period. As to the remaining assessment for deficiency Expanded Withholding Tax and deficiency Final Withholding Tax for December 2004, the Court set the initial presentation of evidence for the petitioner on January 20, 2010.

A Motion for Reconsideration of the foregoing Resolution was filed by respondent on December 8, 2009[22], but the same was denied in the Resolution[23] dated April 14, 2010 for lack of merit.

Meanwhile, respondent assailed the Court's Resolutions dated November 13, 2009 and April 14, 2010 before the Court of Tax Appeals *En Banc* by way of a Petition for Review, docketed as CTA EB No. 626, pursuant to Rule 8 of the Revised Rules of the Court of Tax Appeals. The Court *En Banc*, in its Decision promulgated on August 31, 2011, denied respondent's Petition for Review and affirmed in *toto* the Court's Resolutions dated November 13, 2009 and April 14, 2010.[24] Respondent's Motion for Reconsideration on the Decision of the Court *En Banc* was likewise denied in the Resolution dated January 2, 2012.[25]

During the trial of this case with respect to the remaining assessment for deficiency Expanded Withholding Tax and deficiency Final Withholding Tax for December 2004, both parties presented and offered their respective evidence. Petitioner's formally offered pieces of documentary evidence, as contained in its Offer of Documentary Evidence[26], were admitted in the Resolutions dated August 11, 2011 and October 10, 2011.[27] Thereafter, respondent's formally offered evidence, as stated in her Formal Offer of Evidence[28] filed on February 29, 2012, were admitted in the Resolution[29] dated

[21] Docket, pp. 1406 to 1416.
[22] Docket, pp. 1417 to 1425.
[23] Docket, pp. 1457 to 1459.
[24] Docket, pp. 1774 to 1796.
[25] Docket, pp. 1943 to 1946.
[26] Docket, pp. 1657 to 1755.
[27] Docket, pp. 1651 to 1653 and 1851 to1853.
[28] Docket, pp. 2187 to 2195.
[29] Docket, pp. 2331 to 2332.

April 13, 2012. With the submission of respondent's Memorandum on May 23, 2012[30] and petitioner's Memorandum on August 10, 2012, the instant Petition for Review was submitted for decision in the Resolution dated August 23, 2012[31].

Hence, this Decision.

THE ISSUES

The parties submitted the following stipulated issues[32] for this Court's resolution, to wit:

> "1. Whether or not respondent's right to assess has prescribed.
>
> 2. Assuming *arguendo* that respondent's right to assess has not prescribed, whether or not the assessment notices have factual and legal bases.
>
> 3. Whether or not petitioner is liable for alleged deficiency in Expanded Withholding Tax (EWT), Final Tax (FT) and Fringe Benefit Tax (FBT) and increments for the taxable year 2004."

THE COURT'S RULING

The first issue on prescription had been extensively discussed in the Court's Resolution dated November 13, 2009, wherein it was held that the three (3)-year period of prescription under Section 203 of the National Internal Revenue Code (NIRC) of 1997, as amended, applies to this case. The Court also found that there was no allegation in respondent's Answer pertaining to petitioner's filing of fraudulent or false returns or non-filing of returns, which could have been considered as an exception to the period of limitation to assess and collect tax as provided in Section 222 of the NIRC; and that neither petitioner requested for any reinvestigation, nor executed any waiver of the statute of limitations, which could have suspended the running of the prescriptive period.

---

[30] Docket, pp. 2338 to 2348.
[31] Docket, p. 2450.
[32] Docket, p. 1238.

Thus, taking into consideration the filing dates of the EWT and FWT returns for the months of January to November 2004, and fringe benefits tax (FBT) for the whole year of 2004 *vis-à-vis* the date of issuance of the Formal Letter of Demand, the assessments, except the alleged deficiency EWT and FWT for the month of December 2004, are already barred by prescription. The dispositive portion of this Court's November 13, 2009 Resolution states:

> "**WHEREFORE**, as prayed for, petitioner's motion to cancel the subject assessments on the ground of prescription is hereby **GRANTED**. Accordingly, Assessment Notice No. WE 04-06-005-017-501-000 and Assessment No. WF-04-06-005-017-501-000 for deficiency Expanded Withholding Tax and deficiency Final Withholding Tax, respectively, covering the period of January to November 2004 are hereby **CANCELLED** and **SET ASIDE** for having been issued beyond the prescriptive period. Likewise, Assessment No. FBT 04-06-005-017-501-000 for deficiency Fringe Benefits Tax for taxable year 2004 is hereby **CANCELLED** and **SET ASIDE** for having been issued beyond prescriptive period.
>
> As to the remaining assessment for deficiency Expanded Withholding Tax and deficiency Final Withholding Tax for December 2004, let the initial presentation of evidence for the petitioner be set on January 20, 2010 at 9:00 a.m."

To reiterate, the deficiency EWT and FWT assessments covering the period of January to November 2004 and deficiency FBT for 2004 were issued beyond the 3-year prescriptive period. Therefore, respondent's right to assess the said taxes had prescribed. The portion of respondent's assessment which was assessed within the 3-year prescriptive period involves the alleged deficiency EWT and FWT covering the month of December 2004. Consequently, the resolution of the second and third jointly stipulated issues will cover only the said assessed deficiency EWT and FWT for December 2004.

I. <u>Expanded Withholding Tax</u>

The assessment of the BIR for deficiency EWT actually pertains to two components. First is for the amount of P1,407,735.85, inclusive of increments, allegedly representing unremitted taxes withheld for the months of February to September. Second is for the amount of P2,157,983.93 relative to the income payments subject to 10% and 15% EWT. The said assessed amounts are computed as follows:

	Basic	Interest	Late Payment	Total
EWT	P 769,212.61	P 558,023.24	P 80,500.00	**P1,407,735.85**
	1,336,212.96	821,770.97		**2,157,983.93**
	P2,105,425.57	**P1,379,794.21**	**P 80,500.00**	**P 3,565,719.78**

A. EWT – P1,407,735.85

Respondent computed the deficiency expanded withholding tax of P1,407,735.85[33], with a basic tax of P769,212.61 for the year 2004, as follows:

Month	Remittance Per BIR Form 1601-E[34]	Per Attachments[35]	Difference Unremitted	20% Interest	Late Payment	Total Amount Due
January	P 704,590.33	P 704,590.33	P -	P -	P -	P -
February	337,723.22	360,956.82	23,233.60	18,199.66	6,000.00	47,433.26
March	620,714.77	622,794.77	2,080.00	1,594.67	1,000.00	4,674.67
April	273,861.19	473,861.19	200,000.00	150,000.33	16,000.00	366,000.33
May	616,219.09	816,219.26	200,000.17	146,666.34	16,000.00	362,666.51
June	930,204.16	1,130,204.16	200,000.00	143,333.00	16,000.00	359,333.00
July	381,969.05	425,867.92	43,898.87	30,729.21	8,500.00	83,128.08
August	556,668.29	606,668.26	49,999.97	34,166.70	8,500.00	92,666.67
September	612,966.77	662,966.77	50,000.00	33,333.33	8,500.00	91,833.33
October	744,998.64	744,998.64	-	-	-	-
November	608,257.93	608,257.93	-	-	-	-
December	379,423.80	379,423.80	-	-	-	-
TOTALS	**P6,767,597.24**	**P7,536,809.85**	**P769,212.61**	**P558,023.24**	**P80,500.00**	**P1,407,735.85**

From the comparison of the amounts between BIR Forms 1601-E and per schedule of income payments to payees (referred to as "Attachments"), the deficiency EWT in the basic amount of P769,212.61 pertains to the discrepancies in the EWT due for the months of February to September 2004. Likewise, as can be gleaned from the above schedule, the amount of EWT due per BIR Form 1601-E for the month of December 2004 tallies with the amount

[33] Exhibit "4-B", BIR Records, p. 2628; Exhibit "E", Docket, p. 760.
[34] Exhibits "O" to "Z-1".
[35] Exhibits "OOO-2-a" to "OOO-2-l".

remitted per attachment. Inasmuch as the assessment for the first component in the total amount of P1,407,735.85 refers to the months of February to September, which are already barred by prescription, the same should be cancelled.

B. Subject to 10% and 15% EWT – P2,157,983.93

Respondent's examiner computed the deficiency EWT subject to 10% and 15% for taxable year 2004 in the amount of P2,157,983.93[36] as follows:

		EWT Rate	EWT Due
Legal Fees - Makati (Per Trial Balance)	P34,500,882.17		
Legal Fees - O & M (Per Trial Balance)	41,984.99		
Audit Expenses - Makati (Per Trial Balance)	2,499,612.02		
Total	P 37,042,479.18		
Less: Payment to SGV (Refer to attached schedule)	6,227,999.20		
Legal & Audit Fee Subject to EWT	P30,814,479.98	15%	**P4,622,172.00**
O & M Consultancy Fees Expense - Makati (Per Trial Balance)	P42,150,066.57		
Consultancy Fees – Makati	22,471,649.57		
Consultancy Fees – Land	9,628,189.51		
Consultancy Fees - O & M	2,074,645.01		
Consultancy Fees - Outside Special Services	269,800.00		
Total	P76,594,350.66		
Less Payments to:			
SHKPSL (subject to Final Tax) (Notes to FS 17)	P13,912,812.00		
KPIC (subject to Final Tax (Notes to FS 17)	35,313,747.00		
Total	P49,226,559.00		
Consultancy Fees subject to EWT	P27,367,791.66		
Mat., Services - Surveying Services - O&M RASA Surveying	P1,686,363.68		
Mat., Services - Dam Monitoring - O&M RASA Consultants	1,379,280.00		
Total	P3,065,643.68		

[36] Exhibit "4-C", BIR Records, p. 2626; Exhibit "E", Docket, p. 761; Exhibit "OOO-1-b".

ᵐᵈ

Total Consultancy Fees subject to EWT	P30,433,435.34		
Payees with more less than gross receipts of P720,000.00 per year:			
Various Consultants: per attachments to 1601-E			
January 543,040.30			
February 428,167.00			
March 544,778.50			
April 503,934.50			
May 522,823.10			
June 510,342.80			
July 499,635.00			
August 526,629.10			
September 533,915.00			
October 530,088.70			
November 547,839.10			
December 592,096.70	P6,283,289.80	10%	628,328.98
Payees with more than the gross receipts of P720,000.00 per year:	P24,150,145.54	15%	3,622,521.83
Total	P30,433,435.34		**P4,250,850.81**
Total Expanded Withholding Tax Due			**P8,873,022.81**
Less: 2004 Expanded Withholding Tax Remittance			7,536,809.85
Expanded Withholding Tax Still Due			P 1,336,212.96
20% Interest			821,770.97
Expanded Withholding Tax Still Due			**P2,157,983.93**

A scrutiny of the Detailed General Ledger (GL)[37], the Summary of Monthly Balances per GL[38], and the Independent Certified Public Accountant (CPA) Report[39] shows that of the alleged Professional, Consultancy, and Legal Fees of P116,434,236.04 for taxable year 2004 only the amount of P13,882,244.24 pertains to the month of December 2004, thus:

Expense Account	Exhibit	Total per GL	December
Legal Fees - Makati	QQQ-1-B.7.1	P 34,500,882.17	P 4,682,504.36
Legal Fees - O & M	QQQ-2-B.2.2	41,984.99	-
Audit Expenses - Makati	QQQ-3-B.4.2	2,499,612.02	574,611.92
O & M Consultancy Fees Expense - Makati	QQQ-4-B.4.1	42,150,066.57	4,741,795.00
Consultancy Fees – Makati	QQQ-6-B.6.1	22,471,649.57	2,724,874.45
Consultancy Fees – Land	QQQ-5-B.5.1	9,628,189.51	619,296.73
Consultancy Fees - O & M	QQQ-7-B.4.3	2,074,645.01	176,516.32
Mat., Services Surveying Services - O&M RASA Surveying	QQQ-8-B.4.2	1,686,363.68	254,545.46

[37] Exhibits "QQQ-1-B.1" to "QQQ-1-B.7", "QQQ-2-B.1" to"QQQ-2-B.2", "QQQ-3-B.1" to "QQQ-3-B.4", "QQQ-4-B.1" to "QQQ-4-B.4", "QQQ-5-B.1" to "QQQ-5-B.5", "QQQ-6-B.1" to "QQQ-6-B.6", "QQQ-7-B.1" to "QQQ-7-B.4", "QQQ-8-B.1" to "QQQ-8-B.4", "QQQ-9-B.1" to "QQQ-9-B.4" and "QQQ-10-A" to "QQQ-10-J".

[38] Exhibits "QQQ-1", "QQQ-2", "QQQ-3", "QQQ-4", "QQQ-5", "QQQ-6", "QQQ-7", "QQQ-8" and "QQQ-9".

[39] Exhibit "WWW", No. 4, pp. 10 to 11.

Mat., Services - Dam Monitoring - O&M RASA Consultants	QQQ-9-B.4.3 / QQQ-9-B.1.2	1,380,842.52	108,100.00
Subtotal		**P 116,434,236.04**	**P13,882,244.24**
Consultancy Fees - Outside Special Services		269,800.00	
Total		**P 116,704,036.04**	

The Consultancy Fees – Outside Special Services amounting to P269,800.00 per BIR Computation Sheet cannot be traced from petitioner's record, hence, cannot be verified as to the nature of such expense. A perusal of the Trial Balance[40] and Audited Financial Statements[41] confirms no similar expense account with the same amount. Consequently, the assessment for the same is improper and should be cancelled.

Of the total fees of P13,882,244.24, pertaining to the month of December 2004, the Independent CPA ascertained that the total Professional Fees only amount to P13,877,444.24[42] as hereunder summarized:

Findings	Amount	Exhibit "WWW"
Professional fees accrued and/or paid to GPP, hence, exempt from 10%/15% EWT	P 4,965,252.46	Annex "B-1"
Professional fees accrued and/or paid to non-residents, hence, exempt from 10%/15% EWT	11,628,588.07	Annex "B-2"
Professional fees accrued based on estimated amounts, hence, not subjected to EWT	1,000,000.00	Annex "B-3"
Reclassification of input VAT to expense accounts	609,694.14	Annex "B-4"
Others, unverified amount	7,533.00	Annex "B-5"
Professional fees subject to EWT	1,522,864.01	Annex "B-6"
Consultancy fees subjected to withholding tax on compensation	1,406,425.00	Annex "B-7"
Reversals of professional fees previously recorded in November 2004	(7,262,912.44)	Annex "B-8"
Total for the month of December 2004	**P 13,877,444.24**	Annex "B"

Evidently, there is a difference of P4,800.00[43] between the Detailed General Ledger versus the Independent CPA's summary. The Independent CPA noted that this pertains to the "Mat. Services–Dam Monitoring–Land"[44] account which formed part of the total amount of P108,100.00 for "Mat. Services–Dam Monitoring–O&M

[40] Exhibit "OOO-3".
[41] Exhibit "OOO-4".
[42] Exhibit "WWW", p. 25.
[43] ₱13,882,244.24 less ₱13,877,444.24.
[44] Exhibit "WWW", p. 11, and Exhibit "QQQ-9".

RASA Consultants" account for December 2004. Petitioner did not offer any evidence to support the said expense; thus, the assessment should remain.

1. Professional fees accrued and/or paid to GPP – P4,965,252.46[45]

Petitioner avers that Professional Fee in the amount of P4,965,252.46, as presented below, refers to payments and accruals to general professional partnerships (GPPs) which are exempt from creditable withholding tax, in accordance with the provision of Section 2.57.5 of Revenue Regulations No. 2-98, as amended by Revenue Regulations No. 14-2002:

Professional fees accrued &/or paid to GPP	Actually billed and/or paid	Accrued based on estimates	Total
Legal Fees - Makati	P 3,343,288.10	P750,000.00	**P4,262,311.10**
	-	169,023.00	
Audit Expenses - Makati	459,339.26	243,602.10	**702,941.36**
Total	**P 3,802,627.36**	**P1,162,625.10**	**P4,965,252.46**

Section 22(B) of the NIRC of 1997 defines general professional partnerships as partnerships formed by persons for the sole purpose of exercising their common profession, no part of the income of which is derived from engaging in any trade or business. Corollary thereto, Section 26 of the same NIRC provides that a general professional partnership shall not be subject to income tax. Its partners are the ones liable in their individual capacity for the payment of income tax.

The Supreme Court, in the case of ***Tan vs. Ramon R. del Rosario Jr., et al.***[46], had the occasion to rule that the income tax is imposed not on the professional partnership, which is tax exempt, but on the partners themselves in their individual capacity computed on their distributive shares of partnership profits. Considering that general professional partnerships are exempt from income tax, payments made to these partnerships are not subject to withholding tax pursuant to Section 2.57.5 of Revenue Regulations No. 2-98.[47]

[45] Exhibit "WWW", Annex "B-1".
[46] G.R. Nos. 109289 and 109446, October 3, 1994.
[47] Sec. 2.57.5. Exemption from withholding. – The withholding of creditable withholding tax prescribed in these Regulations shall not apply to income payments made to the following:

Thus, the Professional Fees in the amount of P3,802,627.36[48], which are duly substantiated by accounts payable vouchers[49], together with supporting statement of accounts[50] or official receipts[51] billed by various GPPs, shall not be subject to EWT.

Anent the Professional Fees accrued based on estimates in the amount of P1,162,625.10, the Independent CPA ascertained that it is petitioner's practice to accrue the estimated Professional Fee expense incurred for the month based on previous month's billings and/or based on contracts. As the accrual is based only on the estimated amount, petitioner did not subject the same to withholding tax.[52]

However, petitioner did not present additional documents other than its journal vouchers[53] and Summary of Accruals[54], which are self-serving, to support its allegation that the amount of P1,162,625.10 is due to GPPs. Therefore, it may be subjected to EWT.

Section 2.57.4 of Revenue Regulations No. 2-98, as amended by Revenue Regulations No. 12-01, provides when the obligation to withhold the tax arises, to wit:

> "SEC. 2.57.4. *Time of Withholding.* – **The obligation of the payor to deduct and withhold the tax under Section 2.57 of these Regulations arises at the time an income payment is paid or payable, or the income payment is accrued or recorded as an expense or asset,** whichever is applicable, in the payor's books, whichever comes first. The term 'payable' refers to the date the obligation becomes due, demandable or legally enforceable.
>
> Provided, however, that where income is not yet paid or payable but the same has been recorded as an expense or asset, whichever is applicable, in the payor's

(A) xxx
(B) Persons enjoying exemption from payment of income taxes pursuant to the provision of any law, general or special, such as but not limited to the following: xxx

48 Exhibits "QQQ-1-A.5" and "QQQ-3-A.3".
49 Exhibits "QQQ-1-C.6", "QQQ-1-C.7", "QQQ-1-C.8", "QQQ-3-C.1", and "QQQ-3-C.2".
50 Exhibits "QQQ-1-C.7.2", "QQQ-1-C.7.3", "QQQ-3-C.1.3", and "QQQ-3-C.2 to "QQQ-3-C.4".
51 Exhibits "QQQ-1-C.6.1", "QQQ-1-C.8.1", and "QQQ-3-C.1.4".
52 Exhibit "WWW", p. 12.
53 Exhibits "QQQ-1-C.5", "QQQ-4-C.2", and "QQQ"3-A.2".
54 Exhibits "QQQ-1-C.5.1" and "QQQ-4-C.2.2".

books, the obligation to withhold shall arise in the last month of the return period in which the same is claimed as an expense or amortized for tax purposes." *(Emphasis supplied)*

Based on the foregoing provision, the duty of petitioner to withhold arises when the Professional Fees are paid, becomes payable, or are accrued/recorded as expense in petitioner's books, **whichever comes first**. After which, the corresponding return and remittances must be made within 10 days after the end of each month, except for taxes withheld for the month of December of each year, which shall be filed on or before January 25 of the following year.[55]

Applying the above provisions in the present case, it is necessary to evaluate the case records as to the date when petitioner's obligation to withhold arose.

First, it must be determined when petitioner accrued or recorded the Professional Fees in its books and when was it claimed as expense for tax purposes.

Petitioner's Annual Income Tax Return (ITR) for year 2004 shows that it claimed the accruals in the amount of P1,162,625.10 as expense for the year 2004, though there was no income tax benefit derived thereon as petitioner is exempt from paying tax on its income from operation. However, the same cannot be given probative value as it was not formally offered as evidence in the present case. Consequently, what is left for determination is when did the income payments of petitioner become payable, *i.e.*, due, demandable or legally enforceable, or has actually been paid.

Records, however, reveal that no supporting documents were presented by petitioner to enable this Court to determine when the amount was due for payment or actually paid. Thus, the same is subject to 15% EWT.

---

[55] Section 2.58(A)(2) of Revenue Regulations 2-98, as amended by Revenue Regulations No. 12-01, Annex "B"(2).

In sum, the total amount of P1,162,625.10 shall be subjected to 15% EWT.

2. Professional Fees accrued and/or paid to non-residents – P11,628,588.07[56]

Petitioner claims that Professional Fees in the amount of P11,628,588.07 pertains to payments and accruals to non-residents, hence, exempt from EWT.

Based on the evidence presented, the Court finds the following:

Payee	Reference		Service Rendered for the month of:	Billing Date	Amount
A. Exempt – O & M Consultancy Fees Expense-Makati					
KPIC	QQQ-4-A.4	QQQ-4-C.4.2	November 2004 ($50,000 at 56.097)	6-Dec-04	P 2,804,850.00
KPIC	QQQ-4-A.2	QQQ-4-C.2.2d	December 2004 ($50,000 at 56.341)	none	2,817,050.00
Sub-total					**P5,621,900.00**
B. Billed Prior to December 2004					
Milbank	QQQ-1-A.6	QQQ-1-C-10	Sept to Oct 2004 ($1,455.46 at 56.349)- Legal Fees Makati	17-Nov-04	P 82,013.72
Milbank	QQQ-1-A.4	QQQ-4-C.2.2a	September 2004 ($2,000 at 56.341) – Legal Fees Makati	17-Nov-04	112,682.00
Amec	QQQ-6-A.3	QQQ-6-C.1.3a	November 2004 ($58.594 at 56.231)- Consultancy Fees-Makati	26-Nov-04	3,294,828.45
RW Beck	QQQ-6-A.3	QQQ-6-C.3.2a	October 2004 ($7,852.12 at 56.319)- Consultancy Fees-Makati	8-Nov-04	442,223.55
Sub-total					**P3,931,747.72**
C. Billed in December 2004					
Milbank	QQQ-1-A.6	QQQ-1-C-9	November 2004 ($2,922.75 at 56.312)- Legal Fees-Makati	13-Dec-04	164,585.90
RW Beck	QQQ-6-A.3	QQQ-6-C.2.3a	November 2004 ($4,909.53 at 56.312)- Consultancy Fees-Makati	13-Dec-04	276,465.45
Sub-total					**P 441,051.35**
D. No Proof of Billing/Payment					
Milbank	QQQ-1-A.4	QQQ-4-C.2.2a	December 2004 ($2,000 at 56.341)- Legal Fees-Makati		P 112,682.00

[56] Exhibit "WWW", Annex "B-2".

Winthrop	QQQ-1-A.4	QQQ-4-C.2.2b	November and December 2004 ($10,000 at 56.341)-Legal Fees-Makati		563,410.00
Amec	QQQ-6-A.2	QQQ-4-C.2.2	December 2004 ($10,000 at 56.341)-Consultancy Fees-Makati		563,410.00
RW Beck	QQQ-6-A.2	QQQ-4-C.2.2	December 2004 ($7,000 at 56.341)-Consultancy Fees-Makati		394,387.00
Sub-total					**P 1,633,889.00**
TOTAL					**P11,628,588.07**

Of the Professional Fees of P11,628,588.07, only the amount of P5,621,900.00 represents payments to non-residents, the services of which were performed outside the Philippines. Therefore, the said amount of P5,621,900.00 is exempt from EWT because only income payments to persons residing in the Philippines are subject to creditable withholding tax pursuant to Section 2.57.2 of Revenue Regulations No. 02-98.

The amount of P3,931,747.72 pertains to Professional Fees billed prior to December 2004. Considering that the obligation of petitioner to withhold the taxes arose during the periods prior to December 2004, and though billed in consonance with the provisions of Section 2.57.4 of Revenue Regulations No. 2-98 as amended by Revenue Regulations No. 12-01, the same are already barred by prescription. Thus, the said assessment should be cancelled.

On the other hand, the Professional Fees in the amount of P441,051.35 should be subjected to EWT as the same refer to billings made in December 2004 for which, at such time, petitioner is already obligated to withhold the corresponding taxes.

As regards the remaining amount of P1,633,889.00, it cannot be ascertained when the same was billed or actually paid; thus, the assessment shall be sustained.

3. Professional Fees accrued based on estimated amounts – P1,000,000.00[57]

Legal Fees - Makati	P 1,000,000.00

[57] Exhibit "WWW", Annex "B-3".

The Independent CPA explained that the Legal Fees-Makati in the amount of P1,000,000.00 were Legal Fees accrued due to M.Y. Chua Law Office[58], a professional practitioner. The Independent CPA noted that the said accrued Legal Fees, which were not subjected to EWT, were reversed in JV No. 007447 dated January 4, 2005[59]. Further, on January 27, 2005, petitioner received the actual billing from M.Y. Chua Law Office amounting to P1,028,100.00[60]; which was recorded as Legal Fees per APV No. 020647[61]. It appears that said amount of Legal Fees were subjected to 15% EWT and the taxes due were remitted to the BIR on February 9, 2005.[62] Considering the foregoing, the said assessed item must be cancelled.

4. Reclassification of input VAT to expense accounts – P609,694.14[63]

Reclassification of input VAT to expense accounts		**TOTAL**
Legal Fees - Makati	P 76,665.50 (40,285.86)	**P36,379.64**
O & M Consultancy Fees Expense - Makati	521,520.00	**521,520.00**
Consultancy Fees - O & M	51,794.50	**51,794.50**
Total	**P 609,694.14**	**P609,694.14**

The amount of P88,174.14[64] shows re-classification of input VAT to expense account with previous vouchers supporting the original entry made/transaction taken up in the GL supported by journal vouchers[65] with related billing statements, official receipts or sales invoices[66]. Original transactions and journal entry were taken up in the books prior to December 2004 and pertains to billing from GPP and non-resident; hence, not subject to EWT.

The reclassification of input VAT to O&M Consultancy Fees Expense-Makati amounting to P521,520.00[67] for Sithe Philippines

[58] Exhibit "QQQ-1-C.5-1".

[59] Exhibit "QQQ-1-C.5.2".
[60] Exhibit "QQQ-1-C.5.10".
[61] Exhibit "QQQ-1-C.5.6".
[62] Exhibits "QQQ-1-C.5.13" to "QQQ-1-C.5.14".
[63] Exhibit "WWW", Annex "B-4".
[64] ₱76,665.50 + (₱40,285.86) + ₱51,794.50.
[65] Exhibits "QQQ-1-C.11", "QQQ-1-C.12" and "QQQ-7-C.1".
[66] Exhibits "QQQ-1-C.11.3", "QQQ-1-C.11.4", "QQQ-1-C.12.8" and "QQQ-7-C.1.5a" to "QQQ-7-C.1.5g".
[67] Exhibits "QQQ-4-A.3" and "QQQ-4-C.3" to "QQQ-4-C.3.4".

Holdings, Inc. originally billed and paid in year 2003 should, likewise, not be subjected to EWT since petitioner's obligation to withhold tax therefrom arose in 2003.

5. Others, unverified amount – P7,533.00[68]

The unverified amount of P7,533.00 included in the "Legal Fees-Makati account" remained unaccounted; thus, the same should still be included in the computation of EWT.

6. Professional Fees subject to EWT – P1,522,864.01[69]

PROFESSIONAL FEES SUBJECTED TO EWT	Subjected to 2%	Subjected to 10%	Subjected to 15%	Total
Legal Fees - Makati	P -	P -	P 21,000.00	
	-	-	50,000.00	**P71,000.00**
Consultancy Fees – Land	-	454,296.73	-	
	-	12,500.00	-	
	-	350,000.00	-	**P969,296.73**
	-	-	152,500.00	
Consultancy Fees - O & M	124,721.82	-	-	**124,721.82**
Mat., Serv.-Surveying Serv.-O&M RASA Surveying	-	-	254,545.46	**254,545.46**
Mat., Serv.-Dam Monitoring-O&M RASA Consultants	-	103,300.00	-	**103,300.00**
Total	**P124,721.82**	**P920,096.73**	**P 478,045.46**	**P1,522,864.01**

The amount of P124,721.82 included under Consultancy Fees - O&M refers to purchase of internet services as evidenced by journal vouchers with related billing statements and official receipts which was properly subjected to 2% EWT.[70]

Professional Fee in the amount of P350,000.00 included under Consultancy Fees-Land pertains to payment to Smart Managers Consultancy, Inc.[71], which was subjected to 10% EWT instead of the applicable rate of 15% for December 2004. Petitioner claims that it has no tax deficiency after it made an additional payment in the

[68] Exhibit "WWW", Annex "B-5".
[69] Exhibit "WWW", Annex "B-6".
[70] Exhibits "QQQ-7-A", "QQQ-7-A.3", "QQQ-7-C.2", "QQQ-7-C.3". "QQQ-7-C.2.4" to "QQQ-7-C.2.5", "QQQ-7-C.3.6", "QQQ-7-C.3.7", "Z", and "OOO-2-l".
[71] Exhibit "QQQ-5-A.5".

amount of P17,500.00 on February 26, 2008, supported by BIR Form No. 0605 and BIR official receipt[72].

However, considering that the withholding tax of P17,500.00 was already due for payment on January 15, 2005 but was remitted only on February 26, 2008, the same shall be imputed with interest computed from January 15, 2005 until February 26, 2008, pursuant to Section 249(A) of the NIRC of 1997.

On the other hand, the remaining Professional Fees in the amount of P1,048,142.19[73], which are duly supported by vouchers, billing statements and official receipts[74], were properly subjected to EWT.

7. **Consultancy Fees subjected to withholding tax on compensation – P1,406,425.00**[75]

O&M Consultancy Fees Expense - Makati	P1,406,425.00

The Independent CPA explained that the amount of P1,406,425.00[76] consists of payments to seconded employees which were subjected to withholding tax on compensation; hence, not subject to EWT. Examination of cash vouchers with supporting documents[77] and Monthly Remittance Return of Income Taxes Withheld on Compensation[78] (BIR Form No. 1601-C) proves that these were properly subjected to withholding tax on compensation.

8. **Reversals of Professional Fees previously recorded in November 2004 – P7,262,912.44**[79]

Legal Fees - Makati	P (1,730,093.00)
Audit Expenses - Makati	(128,329.44)
O & M Consultancy Fees Expense - Makati	(2,808,050.00)
Consultancy Fees – Makati	(2,246,440.00)
Consultancy Fees – Land	(350,000.00)
Total	**P (7,262,912.44)**

[72] Exhibits "AA" and "AA-1".
[73] ₱1,522,864.01 less ₱124,721.82 less ₱350,000.00.
[74] Exhibits "QQQ-1-A.2", "QQQ-1-A.3", "QQQ-5-A.2", and "QQQ-8-A".
[75] Exhibit "WWW", Annex "B-7".
[76] Exhibits "QQQ-4-A" and "QQQ-4-A.5".
[77] Exhibits "QQQ-4-C.5" to "QQQ-4-C.6".
[78] Exhibits "UUU", "UUU-1", and "UUU-2".
[79] Exhibit "WWW", Annex "B-8".

The Independent CPA explained that at the beginning of the following month, the accrued expenses of immediately previous month are automatically reversed, *i.e.*, to credit same expense accounts recorded for the prior month-end accruals. At the end of the same month, petitioner would again accrue the estimated expense if actual billing is still pending. However, upon receipt of the actual billing, the amount of accruals will be reversed and the expense would be set-up based on the actual billing.[80]

Reversals of Professional Fees except reversal for Consultancy Fees-Land of P350,000.00 in the total amount of P6,912,912.44[81] previously recorded in November 2004 were properly supported by vouchers[82], showing reversals of previously recorded fee/expense accounts accrued in November 2004 with attached journal vouchers prepared in November 2004.

The amount of P350,000.00 is just a reclassification from one expense account (Consultancy Fees–Land) to another expense account (Information, Education, Comm Expense)[83], already previously subjected to EWT; hence, no additional EWT due.

In sum, petitioner should be held liable for deficiency EWT for December 2004, as computed below:

EXPANDED WITHHOLDING TAX		**AMOUNT**
Legal Fees - Makati		
Accrued to GPP	P 750,000.00	
Accrued to GPP	169,023.00	
Actually billed and/or paid to non-residents*	164,585.90	
Accrued to non-residents**	112,682.00	
Accrued to non-residents**	563,410.00	
Others, unverified amount	7,533.00	P 1,767,233.90
Consultancy Fees – Makati		
Actually billed and/or paid to non-residents*	276,465.45	
Accrued to non-residents**	563,410.00	
Accrued to non-residents**	394,387.00	1,234,262.45
Audit Expenses - Makati		
Accrued to GPP		243,602.10
Mat., Services - Dam Monitoring - O&M RASA Consultants		

[80] Exhibit "WWW", p. 12.
[81] ₱7,262,912.44 less ₱350,000.00.
[82] Exhibits "QQQ-1-A.1", "QQQ-3-A.1", "QQQ-4-A.1", and "QQQ-6-A.1".
[83] Exhibits "QQQ-5-A.1" and "QQQ-5-C.5".

Mat. Services-Dam Monitoring-Land -unverified		4,800.00
TOTAL		**P3,249,898.45**
EWT Rate		15%
Basic EWT Due		**P487,484.77**
Add: 25% Surcharge		121,871.19
Total Amount Due		**P 609,355.96**

Deficiency on Increments for Late Remittance of Withholding Taxes		
Smart Managers Consultancy, Inc. [₱350,000.00 x (15% - 10%)]		P17,500.00
Add: 25% Surcharges	4,375.00	
20% Interest (01-25-05 to 02-26-08)		
[P17,500.00 x 20% x 1128 days ÷ 365]	10,816.44	15,191.44
Total tax due		P 32,691.44
Less: Payments (02-26-08) [P350,00.00 x 5%]		17,500.00
Total Amount Due		**P15,191.44**

* Billed in December 2004 totaling to ₱441,051.35.
** No Proof of billing/payment totaling to ₱1,633,889.00

II. Final Withholding Tax

Petitioner was assessed for deficiency FWT for taxable year 2004 in the amount of P108,822,142.29[84], allegedly for petitioner's failure to provide the loan agreements so as to verify the veracity of the payments on loans, as well as the final withholding taxes paid, computed as follows:

Final Tax - On Foreign Banks and Non-Resident Foreign Corporation		
Accrued Interest Expense Payable - Beginning / FS		P 64,914,248.00
Add: Interest Expense / FS		588,904,471.24
Total		P 653,818,719.24
Less: Accrued Interest Expense Payable - Ending / FS		71,009,131.00
Interest Expense Paid		P 582,809,588.24
Final Tax on Interest Expense paid to Foreign Banks 10%		
(Section 28(A)(7)(b) of the N.I.R.C., as amended)		P 58,280,958.82
Final Tax on dividends declared 32%		
(Section 28(B)(5)(b) of the N.I.R.C., as amended)		P 164,053,308.15

[84] Exhibit "4-D", BIR Records, p. 2625.

Other Payments to Non-Resident Foreign Corporations		
Consultancy Fee Paid to:		
SHKPSL Notes to FS no. 17	P13,912,812.00	
KPIC Notes to FS no. 17	35,313,747.00	
HARZA Per trial balance	5,770,879.07	
Commitment fee paid to KPIC Notes to FS no. 17	8,580,216.00	
TOTAL	P63,577,654.07	
Final Tax on Other payments to non-resident foreign corporations (32%)		
{Section 28(B)(1) of the N.I.R.C., as amended}		P 20,344,849.30
Total Final Tax per Audit		P 242,679,116.28
Less: Final Tax remitted		175,296,984.83
Balance		P 67,382,131.45
20% Interest {Section 249(A) of the N.I.R.C., as amended}		41,440,010.84
Total Amount Due		**P108,822,142.29**

To summarize, the assessment is composed of the following:

Final Tax on:	
Interest Expense paid to Foreign Banks (10%)	P58,280,958.82
Dividends declared (32%)	164,053,308.15
Payments to non-resident foreign corporations (32%)	P20,344,849.30

Records indicate that the final tax on dividends declared amounting to P164,053,308.15 was remitted on September 8, 2004, as evidenced by BIR Form No. 1601-F for August 2004[85]. No dividend declaration or payment was recorded for December 2004; thus, there are only two components left for discussion, namely: the final tax on interest expense paid to foreign banks in the amount of P58,280,958.82 and the final tax on payments to non-resident foreign corporations in the amount of P20,344,849.30.

A. Final tax on interest expense paid to foreign banks – P58,280,958.82

[85] Exhibit "II".

Per Detailed General Ledger[86], total interest expense balance recorded for the month of December 2004 amounts to only P49,890,550.88, to wit:

Interest Expense	Exhibit	Balances for the year 2004	Exhibit	Balance for December 2004
Tranche A	RRR-2-b	₱ 291,223,976.14	RRR-2-a	₱ 24,907,333.82
Tranche B	RRR-2-d	186,913,781.78	RRR-2-c	15,495,359.19
Tranche C	RRR-2-f	110,766,713.30	RRR-2-e	9,487,857.87
Total Amount per GL	RRR-1	₱ 588,904,471.22		₱ 49,890,550.88

Computations of interest expense are broken down to Tranches A, B, and C Credit Agreements to determine the portions which are exempted from Philippine income taxation and which are subject to preferential tax rate of 10%.

Petitioner submits that the interest payments made to foreign banks noted by respondent were for the (a) loans from the Export-Import Bank of Japan (JEXIM)-Tranche A Senior Loans; (b) syndicated loans from the private sector guaranteed by JEXIM-Tranche B Senior Loans; and (c) syndicated loans from the private Sector-Tranche C Senior Loans. The loans financed or guaranteed by JEXIM were pursuant to JEXIM Credit Facility Agreement[87], JEXIM Participation Agreement[88], and Political Risk Guarantee Agreement[89]. While, the loans financed by the private sector were pursuant to the Tranche C Credit Agreement[90].

Of the total interest expense recorded for the month of December 2004 totaling to P49,890,550.88, P40,402,693.01 pertains to interest expense on Tranches A and B loans which was not subjected to FWT caused by petitioner's reliance on BIR Ruling DA-ITAD No. 113-03 dated August 1, 2003.[91] Only the amount of P9,487,857.87 interest expense on Tranche C loan agreement for the month of December 2004 was subjected to 10% final tax, which was duly remitted on January 12, 2005.[92]

[86] Exhibits "RRR-2.1" to "RRR-2.12".

[87] Exhibits "RRR-4-B" and "RRR-7".
[88] Exhibit "RRR-5".
[89] Exhibit "RRR-6".
[90] Exhibit "RRR-4-C.1" to "RRR-4-C.46".
[91] Exhibit "FFF".
[92] Exhibits "MM" and "RRR-14-L"

Considering that the facts set out in BIR Ruling No. DA-ITAD 113-03 and those facts uncovered in petitioner's documentary evidence[93] are the same, the opinion of respondent in said BIR Ruling deserves respect.

Thus, following by analogy the ruling in *Commissioner of Internal Revenue vs. San Roque Power Corporation*[94], petitioner can legally rely on BIR Ruling No. DA-ITAD 113-03 from the time of its issuance until after it will be reversed. As confirmed in BIR Ruling No. DA-ITAD 113-03, the interest income derived by petitioner's non-resident foreign lender-banks from loans financed or guaranteed by the Export-Import Bank of Japan (JEMIX), being a financial institution wholly owned by the Japanese government, is exempt from Philippine income tax.

B. Final Tax on payments made to non-resident foreign corporations – P20,344,849.30.

1. Consultancy Fees paid to SHKPSL, KPIC and HARZA – P54,997,438.07

The Independent CPA summarized the Consultancy Fees paid to SHKPSL (SHKPS or Sithe Hong Kong Power Services, Ltd.), KPIC (Kansai Power International Corporation), and HARZA (HECI or Harza Engineering Company International, L.P.) recorded in December 2004 as follows:

Consultancy Fee	Total Amount	Total Amount recorded prior to December 2004	Exhibit	Total Transactions recorded in December 2004
SHKPS traced to Note 17 of AFS	₱ 13,912,812.00	₱ 13,912,812.50	SSS-5-A	₱ (0.50)
KPIC traced to Note 17 of AFS	35,313,747.00	31,102,471.57	SSS-5-B	4,211,275.43
HECI traced to trial balance	5,770,879.07	5,296,683.37	SSS-5-C	474,195.70
Total	**₱ 54,997,438.07**	**₱ 50,311,967.44**		**₱ 4,685,470.63**

Based on records, there were no consultancy payments to SHKPS for the month of December 2004. The total payments to

[93] Exhibits "RRR-4-B", "RRR-7", "RRR-5", "RRR-6", "RRR-10" to "RRR-10-D", and "RRR-11" to "RRR-11-J".
[94] G.R. No. 187485, February 12, 2013, pp. 39 to 40.

SHKPS amounting to P13,912,812.50 pertain to Consultancy Fee for the period prior to December 2004, which shall be cancelled outright as the same are already barred by prescription.

As regards the Consultancy Fees in the amount of P4,685,470.63, the Independent CPA, based on his further examination of vouchers, invoices, billings and related documents for the month of December 2004, noted the following:[95]

	Findings	O&M Consultancy Fees-Makati	Materials, Services-Consultants (DA-O&M)	Total	Exhibit
a.	Consultancy fee for services rendered offsite from November 1-30, 2004 pursuant to the O&M Consulting Agreement with JV, invoice from KPIC, recorded only December 2004	₱ 2,804,850.00		₱2,804,850.00	QQQ-4-A.4
b.	Payments to Mr. Kiyoshi Washihira seconded to the Company-subjected to withholding tax on compensation	656,331.85		656,331.85	QQQ-4-A.5, QQQ-4-C.6
c.	Payments to Mr. Naoki Kobayashi seconded to the Company- subjected to withholding tax on compensation	750,093.15		750,093.15	QQQ-4-A.5, QQQ-4-C.5
d.	Payment for Professional fees rendered for the offsite activities relative to the review of reports as described in Project Activities for Period November 1-30, 2004 recorded only December 2004		192,490.70	192,490.70	SSS-5-C
e.	Professional fees accrued for December 2004 with JV and schedule of expense accrual for offsite services		281,705.00	281,705.00	SSS-5-C
	Total	**₱ 4,211,275.00**	**₱ 474,195.70**	**₱4,685,470.70**	

The Consultancy Fee for services rendered offsite in the amount of P2,804,850.00 pursuant to Operation and Maintenance

[95] Exhibit "WWW", pp. 23 to 24.

("O&M") Consulting Agreement with SHKPS[96], Amended and Restated Operation and Maintenance Consulting Agreement[97], and Amendment Agreement with KPIC[98] with related supporting documents[99] pertains to payments to non-residents for services rendered outside the Philippines; hence, exempt from income tax and FWT.

With regard to payments to seconded employees, Mr. Kiyoshi Washihira and Mr. Naoki Kobayashi, in the amount of P1,406,425.00[100], the same were properly subjected to withholding tax on compensation, as evidenced by Monthly Remittance Return of Income Taxes Withheld on Compensation[101] (BIR Form No. 1601-C). Accordingly, the said payments are not subject to FWT.

Anent the amount of P192,490.70, which refers to payment to HECI under Consulting and Professional Services Agreement[102], a scrutiny of the supporting sales invoice[103] shows that the services involved were rendered outside the Philippines. Hence, it should be considered income derived from sources outside the Philippines and not subject to Philippine income tax as well as to FWT.

The Professional Fees accrued for HECI's offsite services in the amount of P281,705.00 (letter "e") were supported by Consulting and Professional Services Agreement[104], vouchers, schedule of expense accrual, and invoices[105]; thus, not subject to FWT.

2. Commitment Fee paid to KPIC – P8,580,216.00

Based on the Schedule of Professional Fees-KPIC[106], accounts payable/journal vouchers, invoices and other relevant supporting documents[107], Commitment Fee paid to KPIC amounting to P8,580,216.00 involves transactions prior to December 2004. Therefore, the assessment pertaining thereto shall be cancelled due to prescription.

---

[96] Exhibit "SSS-1".
[97] Exhibit "SSS-2".
[98] Exhibit "MMM".
[99] Exhibits "QQQ-4-C.4" and "QQQ-4-C.4.2" to "QQQ-4-C.4.4".
[100] ₱656,331.85 add ₱750,093.15.
[101] Exhibits "UUU", "UUU-1", and "UUU-2".
[102] Exhibit "SSS-3".
[103] Exhibits "SSS-5-C-12.3a" to "SSS-5-C-12.3c".
[104] Exhibit "SSS-3".
[105] Exhibits "SSS-5-C" and "SSS-5-C-11" to "SSS-5-C-12".
[106] Exhibit "SSS-6".
[107] Exhibits "SSS-6-A-1" to "SSS-6-A-6".

To recapitulate, the assessment for the entire FWT shall be cancelled while the assessment for deficiency expanded withholding tax for December 2004 shall be reduced to P487,484.77.

Additionally, petitioner is liable to pay surcharge in the amount of P121,871.19 (P487,484.77 at 25%), pursuant to Section 248(3) of the NIRC of 1997; interest at the rate of 20% per annum on the basic deficiency EWT of P487,484.77, computed from January 15, 2005 until full payment thereof, pursuant to Section 249(A) of the NIRC of 1997; and delinquency interest at the rate of 20% per annum on the basic deficiency EWT of P487,484.77, computed from February 14, 2008 until full payment thereof, pursuant to Section 249(C)(3) of the NIRC of 1997.

As regards the late remittance of the balance of the EWT on the Professional Fees (Consultancy Fees-Land) in the amount of P17,500.00, petitioner is liable to pay respondent interest thereon at the rate of 20% per annum from the date prescribed for its payment (*i.e.*, on January 15, 2005)[108] until the full payment of the said balance on February 26, 2008, equivalent to the amount of P 10,902.50, pursuant to Section 249(A) of the NIRC of 1997.

WHEREFORE, in view of the foregoing considerations, the Petition for Review is **PARTIALLY GRANTED**. The deficiency final withholding tax for December 2004 is hereby **CANCELLED** and **SET ASIDE,** while the assessment for basic deficiency EWT for December 2004 is hereby **REDUCED** to P487,484.77.

Moreover, petitioner is hereby **ORDERED** to pay respondent the said basic deficiency EWT, and the following surcharge and interests, to wit:

1) surcharge in the amount of P121,871.19 (P487,484.77 at 25%), pursuant to Section 248(3) of the NIRC of 1997;

2) interest at the rate of 20% per annum on the basic deficiency EWT of P487,484.77, computed from January 15, 2005 until full payment thereof, pursuant to Section 249(A) of the NIRC of 1997; and

3) delinquency interest at the rate of 20% per annum on the basic deficiency EWT of P487,484.77, computed from

---

[108] Section 2.58(A)(2), Revenue Regulations No. 2-98, as amended.

February 14, 2008 until full payment thereof, pursuant to Section 249(C)(3) of the NIRC of 1997.

Lastly, as regards the late remittance of the balance of the EWT on the Professional Fees (Consultancy Fees-Land) in the amount of P17,500.00, petitioner is hereby **ORDERED** to pay respondent interest thereon at the rate of 20% per annum from the date prescribed for its payment (*i.e.*, on January 15, 2005)[109] until the full payment of the said balance on February 26, 2008, equivalent to the amount of P 10,902.50, pursuant to Section 249(A) of the NIRC of 1997.

SO ORDERED.

ERLINDA P. UY
Associate Justice

I CONCUR:

ESPERANZA R. FABON-VICTORINO
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ERLINDA P. UY
Associate Justice
Chairperson

[109] Section 2.58(A)(2), Revenue Regulations No. 2-98, as amended.

CERTIFICATION

Pursuant to Section 13 of 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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice