REPUBLIC OF THE PHILIPPINES
Court Of Tax Appeals
QUEZON CITY

SECOND DIVISION

CORPORATE INVESTMENTS PHILIPPINES, INC., ***Petitioner,***	**C.T.A. CASE NO. 6549**
	Members:
-versus-	CASTAÑEDA, JR., Chairperson UY, and PALANCA-ENRIQUEZ, JJ.
COMMISSIONER OF INTERNAL REVENUE, ***Respondent.***	**Promulgated:** MAR 1 2 2007

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DECISION

PALANCA-ENRIQUEZ, J.:

May petitioner Corporate Investments Philippines, Inc. be held liable for deficiency income, expanded withholding, gross receipts, final withholding and documentary stamp taxes for the taxable year ending December 31, 1998 in the aggregate amount of P197,456,881.96?

THE CASE

This is the issue raised in this Petition For Review filed on October 23, 2002 by Corporate Investments Philippines, Inc. (hereafter "petitioner") praying for the cancellation of the assessments issued by the Commissioner of Internal Revenue (hereafter "respondent") against petitioner involving deficiency income, expanded withholding, gross receipts, final withholding and documentary stamp taxes for the taxable year ending December 31, 1998.

THE FACTS

In their Joint Stipulation of Facts and Issues, the parties stipulated 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 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:

TRANSACTION	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

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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.'

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

In his answer, respondent alleged by way of special and affirmative defenses that the assessment was issued within the prescriptive period in view of the agreement in writing made by petitioner and respondent in accordance with *Sections 203 and 222 of the Tax Code;* petitioner's failure to show proof that the transaction involving the sale of Heritage Memorial Park, Batiawan and other properties in the amount of P33,381,928.00 were valid transactions subject to capital gains tax and that they were indeed subjected to the said tax, is a violation under *Section 2.57(A) of Revenue Regulations No. 2-98,* and as such, the gain was considered ordinary gain, pursuant to *Section 27 of the Tax Code*; based on the final decision on designated assessment, no proof of the transaction claimed and the corresponding capital gains tax was submitted by petitioner; the discrepancy between GRT per audit and schedule of GRT submitted by petitioner was based mainly on the "Sundries Out Interest (Interest on Loan-CRB) account; such account was added to the computation of the gross receipts subject to GRT on the premise that petitioner's Consummated Negotiated Sales (CNS) transactions indicated or constituted deposit substitutes as defined in *Section 22(Y) of the Tax Code, as amended*; in connection with the final withholding tax liability of the petitioner, the interests paid to the investors of the petitioner were assessed and subjected to the final withholding tax, pursuant to *Section 22(X) and (Y) of the Tax Code, as amended, and Section 2.57.1 (A)(1) of Revenue Regulations No. 2-98*; the deficiency DST were assessed based on *Sections 175 and 180 of the Tax Code, as amended*; the documentary stamp taxes were assessed against the total loans granted, as shown in the Cash Disbursement Book and total deposit substitutes received shown in the cash receipts book; and the assessments for income, expanded withholding, gross receipts, final withholding and documentary stamp tax were issued within the prescriptive period.

Petitioner presented its Chief Accountant, Edison Daplas, as witness, and submitted documentary evidence, which were admitted by the Court.

On the other hand, respondent presented Marivic P. Bautista, Revenue Officer II, and his Group Supervisor, Erlinda Olgado, as witnesses, and likewise submitted documentary evidence, which were admitted by the Court.

Both parties were then ordered to file their simultaneous memoranda within thirty (30) days from notice. Thereafter, the petition shall be deemed submitted for decision.

On June 22, 2006 and July 10, 2006, petitioner and respondent filed their respective memoranda. On August 4, 2006, petitioner filed its Reply Memorandum. In a Resolution dated October 13, 2006, the petition was deemed submitted for decision.

ISSUES

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

I

WHETHER OR NOT THE ASSESSMENTS WERE ISSUED WITHIN THE PRESCRIPTIVE PERIOD AS PROVIDED

FOR IN SECTION 203 OF THE TAX CODE, AS AMENDED.

II

WHETHER OR NOT THE WAIVER OF THE DEFENSE OF PRESCRIPTION EXECUTED BY THE PETITIONER IS VALID.

III

WHETHER THE GAIN REALIZED FROM THE SALE OF (A) MEMORIAL LOTS IN HERITAGE MEMORIAL PARK; (B) BATIAWAN PROPERTY IN BATAAN; AND (C) BAGUIO PROPERTY IS AN ORDINARY GAIN OR CAPITAL GAIN.

IV

WHETHER OR NOT PETITIONER IS LIABLE FOR DEFICIENCY INCOME TAX IN THE AMOUNT OF P19,167,649.14.

V

WHETHER OR NOT THE AMOUNT OF P781,974.00 REPRESENTING REPAIR AND MAINTENANCE OF COMPANY CARS IS SUBJECT TO THE 1% CREDITABLE WITHHOLDING TAX ON CERTAIN CONTRACTORS.

VI

WHETHER OR NOT THE COMMISSION EXPENSE PERTAINING TO COMMISSION PAID TO BROKERS FOR THE SALE OF SHARES OF STOCK BY THE INVESTMENT MANAGEMENT GROUP OF THE

PETITIONER IS STILL SUBJECT TO CREDITABLE WITHHOLDING TAX (CWT).

VII

WHETHER OR NOT THE AMOUNT OF P589,002.00 REPRESENTING SUPPLIES IS SUBJECT TO 1% CREDITABLE WITHHOLDING TAX (CWT).

VIII

WHETHER OR NOT THE CREDITABLE WITHHOLDING TAX (CWT) ON RENT IS PROPER.

IX

WHETHER OR NOT PETITIONER IS LIABLE FOR DEFICIENCY GROSS RECEIPTS TAX (GRT) IN THE AMOUNT OF P38,290,602.27, INCLUSIVE OF INTEREST COMPUTED UP TO APRIL 30, 2002.

X

WHETHER OR NOT THE PETITIONER IS LIABLE FOR DEFICIENCY FINAL WITHHOLDING TAX (FWT) ON SUNDRIES IN INTEREST ACCOUNT IN THE AMOUNT OF P118,105,143.58, INCLUSIVE OF INTEREST COMPUTED UP TO APRIL 30, 2002.

XI

WHETHER OR NOT THE SUNDRIES IN AND SUNDRIES OUT IS SUBJECT TO DOCUMENTARY STAMP TAX (DST).

XII

WHETHER OR NOT PETITIONER IS LIABLE FOR DEFICIENCY DOCUMENTARY STAMP TAX (DST) ON ADDITIONAL SHARES SUBSCRIBED IN THE AMOUNT OF P1,000,000.00, EXCLUSIVE OF INTEREST.

XIII

WHETHER OR NOT PETITIONER IS ENTITLED TO CLAIM AS DEDUCTION FOR INCOME TAX PURPOSES THE DOCUMENTARY STAMP TAX (DST) PAID, PARTICULARLY ON THE CONFIRMATION OF PURCHASE (COP), WHICH THE PETITIONER ALLEGED THAT IT SHOULD NOT BE HELD LIABLE TO DST SINCE IT IS NOT A PARTY TO THE TRANSACTION.

Principal Issue

The foregoing issues raised by both parties boil down to the principal issue of whether or not petitioner is liable to pay the following deficiency tax assessments in the aggregate sum of P197,456,881.96 covering the taxable year 1998, 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-98-00008	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
		P197,456,881.96

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693

THE COURT'S RULING

The Petition is partly meritorious.

First and Second Issues –
Prescription/Validity of Waiver

Being interrelated, the first and second issues shall be discussed jointly.

Petitioner contends that the assessment against it for expanded withholding, final withholding, gross receipts and documentary stamp taxes had already prescribed when it received the Formal Letter of Demand on April 10, 2002.

On the other hand, respondent argues that his right to assess has not yet prescribed when he issued the Formal Letter of Demand because the waiver executed by petitioner on April 21, 2001 extended the assessment period up to June 30, 2002.

Petitioner's contention is partly meritorious.

Section 203 of the National Internal Revenue Code of 1997 (hereafter "NIRC of 1997), *as amended*, provides:

> "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

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proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided,* That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

Corollary thereto, *Section 2.58 (A) (2) of RR. No. 2-98,* implementing *Section 57 (A) of the NIRC of 1997, as amended*, provides:

> *"Sec. 2.58 RETURNS AND PAYMENT OF TAXES WITHHELD AT SOURCE.*
>
> (A) *Monthly return and payment of taxes withheld at source –*
>
> xxx xxx
>
> *(2) WHEN TO FILE –*
>
> (a) xxx
> (b) For large taxpayers, the filing of the return and payment of tax shall be made within twenty five (25) days after the end of each month.
>
> xxx xxx."

Pursuant to the aforecited *Section 203 of the NIRC of 1997, as amended*, the three-year (3) period to assess commences from the date of actual filing of the return or from the last day prescribed by law for the filing of such return, whichever comes later. Hence, if the return was filed

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695

earlier than the last day allowed by law, the period to assess shall still be counted from the last day prescribed for filing of the return. However, if the return was filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed.

With regard to the assessment for deficiency income tax, petitioner filed its Annual Income Tax Return on April 15, 1999 for taxable year 1998 (*Exhibit "H"*). Pursuant to the above provision, the BIR had until April 15, 2002 to assess petitioner for deficiency income tax. When, therefore, respondent issued the assessment for income taxes on April 08, 2002 to petitioner, the same was well within the three-year prescriptive period.

As regards the assessment for expanded withholding tax (hereafter "EWT"), the return is required to be filed within twenty-five (25) days after the end of each month. Therefore, respondent had until the following dates within which to assess petitioner for the subject deficiency covering EWT for the months of January to December of the taxable year ending December 31, 1998, to wit:

Period	BIR Records	Date Filed	Last Day to File	Last Day to Assess
1998	**Page Nos.**			
January	23	2/10/1998	2/25/1998	2/26/2001

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February	22	3/10/1998	3/25/1998	3/26/2001
March	21	4/13/1998	4/27/1998	4/26/2001
April	20	5/12/1998	5/25/1998	5/24/2001
May	19	6/10/1998	6/25/1998	6/25/2001
June	18	7/10/1998	7/27/1998	7/26/2001
July	17	8/10/1998	8/25/1998	8/24/2001
August	15	9/10/1998	9/25/1998	9/24/2001
September	12	10/12/1998	10/26/1998	10/25/2001
October	9	11/10/1998	11/25/1998	11/26/2001
November	7	12/10/1998	12/25/1998	12/24/2001
December	5	1/7/1999	1/25/1999	1/24/2002

Clearly, the formal letter of demand and assessment notice for deficiency EWT, having been issued only on April 8, 2002, the same had already prescribed.

As regards the assessment for gross receipts tax (hereafter "GRT"), the same had likewise prescribed. *Section 128(A)(1)* provides for a period of twenty five (25) days after the end of each taxable quarter for filing a return of percentage taxes. Thus:

> "SEC. 128. Returns and Payment of Percentage Taxes. –
>
> (A) Returns of Gross Sales, Receipts or Earnings and Payment of Tax. –
>
> (1) Persons Liable to Pay Percentage Taxes.- Every person subject to the percentage taxes imposed under this Title shall file a quarterly return of the amount of his gross sales, receipts or earnings and pay the tax due thereon within twenty-five (25) days after the end of each taxable quarter. Provided, That in the case of a person whose VAT registration is cancelled and who becomes liable to the tax imposed in

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> Section 116 of this Code, the tax shall accrue from the date of cancellation and shall be paid in accordance with the provisions of this Section."

Pursuant the above provision, the determination of the prescriptive period to assess on this type of tax is counted from the last day to file a return, which is twenty five (25) days following the close of each taxable quarter. The table below shows the dates when petitioner filed its Quarterly Percentage Tax Returns for the four quarters of the taxable year 1998, as well as the corresponding dates within which respondent is allowed to assess petitioner:

Period 1998	BIR Records Page Nos.	Date Filed	Last Day to File Sec. 128 (A)(1), NIRC	Last Day to Assess
1st Quarter	217	4/20/1998	4/27/1998	4/26/2001
2nd Quarter	215	7/20/1998	7/27/1998	7/26/2001
3rd Quarter	210	10/20/1998	10/26/1998	10/25/2001
4th Quarter	208	1/25/1999	1/25/1999	1/24/2002

It is clear, therefore, that the period to assess the GRT had likewise prescribed.

With respect to the final withholding tax (hereafter "FWT") and documentary stamp tax (hereafter "DST"), *Section 222 (a) of the NIRC of 1997, as amended*, provides:

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

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> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file 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.
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> x x x" (Emphasis supplied)

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. 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.

Respondent's argument that the period to assess had been extended by virtue of the waiver cannot be sustained. In *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue (447 SCRA 227),* the Supreme Court emphasized that a waiver of the statute of limitations under the NIRC, to a certain extent, is a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations and must, therefore, be carefully and strictly construed.

In the more recent case of *Bank of the Philippine Islands vs. Commissioner of Internal Revenue (473 SCRA 227-228),* the Supreme Court laid down the requisites for a valid waiver, as follows:

> "A valid waiver of the statute of limitations under paragraphs (b) and (d) of Section 223 of the Tax Code of 1977, as amended, must be: (1) in writing; (2) agreed to by both the Commissioner and the taxpayer; (3) before the expiration of the ordinary prescriptive periods for assessment and collection; and (4) for a definite period beyond the ordinary prescriptive periods for assessment and collection. The period agreed upon can still be extended by subsequent written agreement, provided that it is executed prior to the expiration of the first period agreed upon. The BIR had issued Revenue Memorandum Order (RMO) No. 20-90 on 04 April 1990 to lay down an even more detailed procedure for the proper execution of such a waiver. RMO No. 20-90 mandates that the procedure for execution of the waiver shall be strictly followed, and any revenue official who fails to comply therewith resulting in the prescription of the right to assess and collect shall be administratively dealt with."

A careful perusal of the waiver (*Exhibit "27"*) shows that it was signed only by Virginia L. Trinidad, Assistant Commissioner for the Large Taxpayers Service, not the Commissioner, as mandated by the NIRC and Revenue Memorandum Order No. 20-90 (RMO No. 20-90). This case involves taxes amounting to more than one million pesos (P1,000,000.00).

700

For this, RMO No. 20-90 requires the Commissioner to sign for the BIR (*Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, supra*). The waiver being defective is, therefore, not valid and binding.

Another defect noted in this case is that the waiver does not indicate the date of acceptance by the BIR. *Paragraph 2 of RMO No. 20-90* mandates that:

> "2. The waiver shall be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials.
>
> Soon after the waiver is signed by the taxpayer, the Commissioner of Internal Revenue or the revenue official authorized by him, as hereinafter provided, shall sign the waiver indicating that the Bureau has accepted and agreed to the waiver. The date of such acceptance by the Bureau should be indicated. Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case of a subsequent agreement is executed." (Emphasis supplied)

In conjunction thereto, *Revenue Memorandum Circular No. 06-05, dated February 2, 2005*, in pertinent part provides:

> "1. A waiver of the statute of limitations under the Tax Code must **conform strictly with the provisions of Revenue memorandum Order No. 20-90 in order to be valid and binding.**

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> 1.1. The waiver must specify a definite agreed date between the BIR and the taxpayer within which the former may assess and collect revenue taxes.
>
> 1.2. The waiver must be **accepted by the Commissioner of Internal Revenue or his duly authorized representative, and the date of acceptance must be indicated.**
>
> xxx xxx." (Emphasis supplied)

The law is very clear that the date of acceptance by the Bureau should be indicated; otherwise the waiver is defective and cannot be given effect. It cannot be determined whether the waiver was accepted before the expiration of the 3-year assessment period.

<u>Validity of Assessments</u>

Having resolved that only the assessments for deficiency income, final withholding and documentary stamp taxes were issued within the period allowed by law, We now proceed to the determination of the validity and correctness of said tax assessments.

1. **<u>Income Tax</u>**

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**

As regards the Heritage Memorial Park lots, respondent treated the same 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.

As regards the Batiawan and Baguio properties, respondent treated the same as ordinary assets for failure of petitioner to present proof of payment of the Capital Gains Tax (CGT) in the administrative level. Respondent further contends that since 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 (*TSN,*

703

June 22, 2004, pp. 6-8), petitioner is deemed engaged in real estate business. As such, the properties sold by petitioner are ordinary assets subject to ordinary income tax.

Contrariwise, petitioner contends that it is not engaged in real estate business. It 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.

We agree with the respondent.

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

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704

> 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*).

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:

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706

"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.

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

707

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 (*Calosanz 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*).

Thus, the deficiency income tax due is hereby recomputed as follows:

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

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Add: Interest from 16-April-99 to 30-Apr-02	3,164,049.71
Total Deficiency Income Tax Due	**P 8,370,894.37**

2. Expanded Withholding Tax

Considering that the right of the respondent BIR Commissioner to collect from petitioner the deficiency expanded withholding tax in Assessment No. EWT-98-000016 had already prescribed, then there is no more need for this Court to make a determination on the validity and correctness of said Assessment for the latter would only be unenforceable.

3. Gross Receipts Tax

Considering that respondent's GRT assessment had already prescribed as earlier discussed, We likewise find no need to make a determination on the validity and correctness of the said Assessment No. GRT-98-000008.

4. Final Withholding Tax

Respondent assessed petitioner of deficiency final withholding tax in the amount of P118,105,143.58, computed as follows:

Final Withholding Tax

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

709

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**

Respondent assessed petitioner of deficiency FWT because petitioner undertook quasi-banking activities, as evidenced by its Confirmation of Purchase instruments, and also because the Consummated Negotiated Sales (CNS) transactions of petitioner indicate "deposit substitutes." Respondent relied on his interview with petitioner's authorized personnel who said that petitioner has an average of around 2,000 funders to the CNS per year. Funders to the CNS arose through the Fund Management Group Department of petitioner wherein individuals or juridical persons were invited to invest through the issuance of the Confirmation of Purchase instruments.

Petitioner questions the assessment contending that respondent was not able to explain why the CNS involved "deposit substitutes".

Petitioner further points out that a perusal of the Confirmation of Purchase shows the following:

(1) Petitioner was acting only as paying agent, as indicated by the phrase "As Paying Agent";

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710

(2) The agency is confirmed by the fact that the document states that the purchase is merely "coursed through us" (referring to petitioner) and that the purchase was "for your account" (referring to the account of the funder); and

(3) There is no indication that the transaction is "with recourse" to petitioner.

Based on the above, petitioner claims that it had no borrowing transactions with the funders since it is not a seller of the debt instrument purchased. Thus, petitioner concludes that its transactions do not involve deposit substitutes and quasi-banking activities because it does not borrow funds from the public to re-lend the same.

Petitioner's contentions cannot be sustained.

Section 57 (A) of the NIRC of 1997, as amended, provides:

"**SEC. 57.** *Withholding of Tax at Source.* –

(A) *Withholding of Final Tax on Certain Incomes.* – Subject to rules and regulations the Secretary of Finance may promulgate, upon the recommendation of the Commissioner, requiring the filing of income tax return by certain income payees, the tax imposed or prescribed by Sections **24(B)(1)**, 24(B)(2), 24(C), 24(D)(1); 25(A)(2), 25(A)(3), 25(B), 25(C), 25(D), 25(E); **27(D)(1)**, 27(D)(2), 27(D)(3), 27(D)(5); 28(A)(4), 28(A)(5), 28(A)(7)(a), 28(A)(7)(b), 28(A)(7)(c), 28(B)(1), 28(B)(2), 28(B)(3), 28(B)(4), 28(B)(5)(a), 28(B)(5)(b), 28(B)(5)(c); 33; and 282 of this Code on specified items of income shall be withheld by payor-corporation and/or person and paid in the same manner and subject to the same conditions as provided in Section 58 of this Code."

Two of the final taxes required to be withheld under the above provision are those imposed in *Sections 24(B)(1) and 27 (D)(1)*, which provide:

"**SEC. 24.** *Income Tax Rates.* –

x x x

(B) *Rates of Tax on Certain Passive Income.* —

(1) *Interests, Royalties, Prizes, and Other Winnings.* — A final tax at the rate of twenty percent (20%) is hereby imposed upon the amount of interest from any currency bank deposit and yield or any other monetary benefit from deposit substitutes and from trust funds and similar arrangements; x x x" [Emphasis supplied]

"**SEC. 27.** *Rates of Income Tax on Domestic Corporations.* –

x x x
(D) *Rates of Tax on Certain Passive Incomes.* —

(1) *Interest from Deposits and Yield or any other Monetary Benefit from Deposit Substitutes and from Trust Funds and Similar Arrangements, and Royalties.* — A final tax at the rate of twenty percent (20%) is hereby imposed upon the amount of interest on currency bank deposit and yield or any other monetary benefit from deposit substitutes and from trust funds and similar arrangements received by

domestic corporations, and royalties, derived from sources within the Philippines: x x x" [Underscoring supplied]

Corollary thereto, to implement *Sections 57(A), 24(B)(1), and 27(D)(1), Revenue Regulations No. 2-98* was promulgated. *Section 2.57.1(A)(1) and (G)(1)* thereof in pertinent part provides:

> "**SEC. 2.57.1.** *Income Payments Subject to Withholding Tax.* – The following forms of income shall be subject to final withholding tax at the rates herein specified;
>
> (A) *Income payments to a citizen or to a resident alien individual;*
>
> (1) Interest from any peso bank deposit, and yield or any other monetary benefit form deposit substitutes and from trust funds and similar arrangements; x x x – Twenty percent (20%).
>
> x x x
>
> (G) *Income Payment to a Domestic Corporation.* – The following items of income shall be subject to a final withholding tax in the hands of a domestic corporation, based on the gross amount thereof and at the rate of tax prescribed therefor:
>
> (1) Interest from any currency bank deposit and yield or any other monetary benefit from deposit substitutes and from trust fund and similar arrangements derived from sources within the Philippines – Twenty Percent (20%)."

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713

Pursuant to the foregoing provision, a payor-corporation should withhold a final tax of twenty percent (20%) imposed upon the amount of interest or any other monetary benefit from deposit substitutes.

In resolving the issue of whether income from petitioner's CNS is subject to final withholding tax, We need to first determine whether or not the Confirmation of Purchase is in the nature of a deposit substitute. *Section 22 (Y) of the NIRC of 1997, as amended,* defines deposit substitutes as follows:

> "(Y) The term **'deposit substitutes'** shall mean an alternative form of obtaining funds from the public (the term 'public' means borrowing from twenty (20) or more individual or corporate lenders at any one time), other than deposits, through the issuance, endorsement, or acceptance of debt instruments for the borrower's own account, for the purpose of relending or purchasing of receivables and other obligations, or financing their own needs or the needs of their agent or dealer. These instruments may include, but need not be limited to bankers' acceptances, promissory notes, repurchase agreements, including reverse repurchase agreements entered into by and between the Bangko Sentral ng Pilipinas (BSP) and any authorized agent bank, certificates of assignment or participation and similar instruments with recourse: *Provided, however,* That debt instruments issued for inter-bank call loans with maturity of not more than five (5) days to cover deficiency in reserves against deposit liabilities, including those between or among banks and quasi-banks, shall not be considered as deposit substitute debt instruments."

714

On the other hand, *Section 22 (X)* defines "quasi-banking activities" as follows:

> "(X) The term **'quasi-banking activities'** means borrowing funds from twenty (20) or more personal or corporate lenders at any one time, through the issuance, endorsement, or acceptance of debt instruments of any kind other than deposits for the borrower's own account, or through the issuance of certificates of assignment or similar instruments, with recourse, or of repurchase agreements for purposes of relending or purchasing receivables and other similar obligations: *Provided, however,* That commercial, industrial and other non-financial companies, which borrow funds through any of these means for the limited purpose of financing their own needs or the needs of their agents or dealers, shall not be considered as performing quasi-banking functions."

A thorough evaluation of the transactions at bar reveals that petitioner indeed obtained funds from the public in order to re-lend the same to its borrowers notwithstanding petitioner's representation in the Confirmation of Purchase that it is a "paying agent" of its borrowers (i.e., Philippine Analytical Laboratory, Inc.) and that there is no indication that the transaction is "with recourse" to it. In reality, petitioner is the borrower of the funds because it becomes liable to the funders, insofar as the funders are concerned, whether or not petitioner's borrowers fail to pay upon maturity. Meanwhile, petitioner uses those funds to re-lend to its

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715

borrowers. As evidenced by the debt instruments executed by petitioner's borrowers, the payee (in the case of promissory notes) or lender (in the case of loan agreements) is the petitioner – the party who re-lent the funds to the borrowers. Considering the fact that petitioner has an average of 2,000 funders in a year, the number is more than enough to consider petitioner as engaging in quasi-banking activities and that its transactions involved deposit substitutes.

For all the foregoing, We hold that the income from petitioner's deposit substitutes, as evidenced by the Confirmations of Purchase, is subject to the 20% final tax.

5. Documentary Stamp Tax

Respondent assessed petitioner for deficiency documentary stamp tax in the amount of P21,786,798.98, computed as follows:

Documentary Stamp Tax

	Consummated Negotiated Sale-Sundries Out (CDB)	Consummated Negotiated Sale-Sundries In (CRB)	Additional Common Shares Subscribed And Fully Paid	Total Amount
Total Amount Subject to DST	P4,890,383,622.03	P5,085,843,579.95	P 100,000,000.00	
Multiplied by DST Rate	0.30/200	0.30/200	2/200	
DST Due	P 7,335,575.43	P 7,628,765.37	P 1,000,000.00	
Less: DST Paid per Return	2,843,011.50	0.00	0.00	
Basic Deficiency DST Due and Collectible	P 4,492,563.93	P 7,628,765.37	P 1,000,000.00	P13,121,329.30

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716

Add: Penalties	
Interest from 01-11-99 to 04-30-02	8,665,469.67
Total Deficiency DST Due and Collectible	P21,786,798.97

Respondent assessed petitioner for deficiency DST on the alleged total loans granted, as shown in the Cash Disbursement Book (CDB) and on the alleged total deposit substitutes received, as shown in the Cash Receipts Book (CRB) based on *Section 180* of the *NIRC of 1997*, as amended. Also, respondent assessed petitioner additional DST for failure to show proof that it paid the same on the additional shares subscribed and fully paid based on *Section 175* of the same Code.

Petitioner argues that the Sundries In and Confirmations of Purchase are not deposit substitutes or debt instruments under the law which subjects the same to DST under Section 180 because there is no borrowing transaction between the funders and the petitioner.

We rule for the respondent.

In this regard, *Section 180 of the NIRC of 1997, as amended,* provides:

> "**SEC. 180.** *Stamp Tax on All Bonds, Loan Agreements, Promissory Notes, Bills of Exchange, Drafts, Instruments and Securities Issued by the Government or Any of its Instrumentalities, Deposit Substitute Debt Instruments,*

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> *Certificates of Deposits Bearing Interest and Others Not Payable on Sight or Demand.* — On all bonds, loan agreements, including those signed abroad, wherein the object of the contract is located or used in the Philippines, bills of exchange (between points within the Philippines), drafts, instruments and securities issued by the Government or any of its instrumentalities, deposit substitute debt instruments, certificates of deposits drawing interest, orders for the payment of any sum of money otherwise than at sight or on demand, on all promissory notes, whether negotiable or non-negotiable, except bank notes issued for circulation, and on each renewal of any such note, there shall be collected a documentary stamp tax of Thirty centavos (P0.30) on each Two hundred pesos (P200), or fractional part thereof, of the face value of any such agreement, bill of exchange, draft, certificate of deposit, or note: *Provided,* That only one documentary stamp tax shall be imposed on either loan agreement, or promissory notes issued to secure such loan, whichever will yield a higher tax: x x x" [Emphasis supplied]

Since loan agreements, such as those shown in petitioner's CDB, are one of the instruments enumerated in the above provision, the CNS-Sundries Out representing its total loans granted are subject to DST.

As earlier discussed, petitioner's transactions involve deposit substitutes since it was proven that petitioner borrowed from the public to re-lend the same. Considering that deposit substitutes, such as those shown in petitioner's CRB, are also one of the instruments subject to DST, pursuant to *Section 180*, petitioner is, therefore, liable for deficiency DST on its CNS-Sundries In.

With respect to deficiency DST on the additional shares subscribed and fully paid, petitioner is liable to pay the same under *Section 175* of the *NIRC of 1997, as amended*, for failure to prove that it paid the same. *Section 175* provides:

> "**SEC. 175.** *Stamp Tax on Original Issue of Shares of Stock.* — On every original issue, whether on organization, reorganization or for any lawful purpose, of shares of stock by any association, company or corporation, there shall be collected a documentary stamp tax of Two pesos (P2.00) on each Two hundred pesos (P200), or fractional part thereof, of the par value, of such shares of stock: *Provided,* That in the case of the original issue of shares of stock without par value the amount of the documentary stamp tax herein prescribed shall be based upon the actual consideration for the issuance of such shares of stock: *Provided, further,* That in the case of stock dividends, on the actual value represented by each share."

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**

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79

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.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

720

A T T E S T A T I O N

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

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

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

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice