REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ASIANBANK CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 5412

Promulgated:

FEB 03 1999

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DECISION

This case involves a claim for refund of the total amount of ₱2,022,485.78, allegedly representing overpaid gross receipts tax for the taxable quarters ending June 30, 1994 to June 30, 1996, the breakdown of which are as follows:

	A M O U N T		
QTR. ENDED	REMITTED	SHOULD BE	OVERPAID
June 30, 1994	₱ 5,400,503.38	₱ 5,180,762.05	₱ 219,741.32
Sept. 30, 1994	5,104,497.54	4,795,812.89	308,684.65
Dec. 31, 1994	7,680,470.93	7,434,597.15	245,873.78
Mar. 31, 1995	5,556,991.95	5,413,985.07	143,006.88
June 30, 1995	8,568,154.06	8,351,467.65	216,686.41
Sept. 30, 1995	8,306,402.43	8,077,226.02	229,176.41
Dec. 31, 1995	9,343,571.65	9,064,217.72	297,353.93
Mar. 31, 1996	11,364,164.01	11,002,201.61	361,962.40
T o t a l	₱61,324,755.95	₱59,320,270.16	₱2,022,485.78

Petitioner is a domestic banking corporation duly organized and existing under the laws of the Philippines. Its principal office is located at 3/F AsianBank Center, Sen. Gil Puyat Avenue, Makati City.

For the period involved herein, petitioner seasonably filed its Quarterly Percentage Tax Returns paying a total gross receipts tax of ₱61,324,755.95. Petitioner alleges that the tax base of the said sum included the 20% final withholding tax paid on interest income it earned from investments, interbank call lendings, and deposits.

On January 30, 1996, this Court rendered a decision in C.T.A. Case No. 4720 entitled **Asian Bank Corporation vs. Commissioner of Internal Revenue** wherein it was held that the 20% final withholding tax on bank's interest income should not form part of its taxable gross receipts for purposes of computing gross receipts tax.

On July 19, 1996, on the strength of the aforementioned decision, petitioner filed with the Bureau of Internal Revenue a letter-request for the refund of the sum of ₱1,566,681.40, representing overpaid gross receipts tax for the period April 1, 1994 to June 30, 1996.

On July 20, 1996, a day after the claim for refund was filed with the Bureau of Internal Revenue, petitioner filed the instant petition for review in order to toll the running of the two-year prescriptive period to judicially claim for the refund of overpaid internal revenue tax pursuant to Section 230 of the Tax Code, as amended.

On October 9, 1996, petitioner filed with respondent's bureau a clarificatory letter increasing its claim for refund to ₱2,022,485.78.

On October 16, 1996, petitioner amended its petition for review filed in this Court, incorporating the additional allegations.

In her Answer, respondent raised the following special and affirmative defenses:

> 7. Petitioner's claim for refund had already been barred by prescription;
>
> 8. The doctrine of "Stare Decisis Et Non Quieta Movere" being relied upon by petitioner only applies to the final decision of the Supreme Court;
>
> 9. Petitioner's claim for refund/tax credit is still undergoing administrative routinary investigation/examination by respondent's Bureau;
>
> 10. Petitioner miserably failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected;
>
> 11. The total amount of ₱2,022,485.78 claimed by petitioner as overpaid Gross Receipts Taxes was not properly documented;
>
> 12. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable;
>
> 13. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to sustain the burden is fatal to the action for tax credit/refund;
>
> 14. It is incumbent upon the petitioner to show that it has complied with the provisions of Section 204 in relation to Section 230 of the Tax Code, as amended;

> 15. Well-settled is the rule that claims for tax refund/credit are construed in *strictissimi juris* against the taxpayer as it partakes the nature of exemption from tax and it is incumbent upon the petitioner to show that it is entitled thereto under the law.

In order to support its claim for refund, petitioner presented various documents which consist, among others, of:

1. Quarterly Percentage Tax Returns for the quarters ending June 30, 1994 to June 30, 1996 (Exhs. A to H-3, inclusive);

2. The AsianBank Manager's Checks pertaining to the above returns (Exhs. I to P);

3. The breakdown and computations of overpaid GRT for the period involved (Exhs. Q to X-3, inclusive);

4. Petitioner's written claims for refund (Exhs. Y and Z); and

5. Various certifications and confirmations of the withholding agents regarding the 20% final taxes withheld.

The Court is now confronted with the following issues:

a. Whether or not petitioner is entitled to the claim for refund; and

b. Whether or not petitioner has proven its claim with sufficient evidence.

Anent the first issue, this Court stands firm on its ruling that the 20% final withholding tax on bank's interest income should not form part of taxable gross receipts for purposes of computing the gross receipts tax. As ably held by this Court in the **Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, dated January 30, 1996**:

> "We agree with the petitioner that the 20% final withholding tax on it's interest income should not form part of its taxable gross receipts.
>
> Revenue Regulations No. 12-80 dated Nov. 7, 1980 on Taxation of Certain Income Derived from Banking Activities provides that the rates of tax to be imposed on the gross receipts of such financial institution; shall be based on all items of income actually received, thus:
>
> > **SEC. 4.** xxx xxx xxx
> >
> > (e) *Gross receipts tax on banks, non-bank financial intermediaries, financing companies, and other non-bank financial intermediaries not performing quasi-banking activities.* — The rates of taxes to be imposed on the gross receipts of such financial institutions shall be based on all items of income actually received. Mere accrual shall not be considered, but once payment is received on such accrual or in cases of prepayment, then the amount actually received shall be included in the tax base of such financial institutions, as provided hereunder. (Underscoring supplied)
>
> From the foregoing, it is but logical to infer that the final tax, not having been received by the petitioner but instead went to the coffers of the government, should no longer form part of its gross receipts for the purpose of computing the GRT. This conclusion is in accord with the interpretation of the Supreme Court in the case entitled **Collector of**

Internal Revenue vs. Manila Jockey Club, 108 Phil. 821, as quoted by this Court in disposing of a similar issue in the case entitled **Compania Maritima vs. Acting Commissioner of Internal Revenue,** CTA Case No. 1426 dated November 14, 1966, thus:

> In the second place, the highest tribunal of the land interpreted the term "gross receipts: to mean all receipts of a taxpayer excluding those which have been especially earmarked by law or regulation for the government or some person other than the taxpayer. Thus, it was held:
>
> > "xx xx. The Government could not have meant to tax as gross receipt of the Manila Jockey Club the ½% which it directs same Club to turn over to the Board of Races. The latter being a Government institution, there would be double taxation, which should be avoided unless the statute admits of no other interpretation. In the same manner, the Government could not have intended to consider as gross receipt the portion of the funds which it directed the Club to give, or know the Club would give, to winning horses and Jockeys - admitted 5%. It is true that the law says that out of the total wager funds 12½% shall be set aside as the 'commission' of the track owners but the law itself takes official notice, and virtually approves or directs payment of the portion that goes to owners of horses as prizes and bonuses of jockeys, which portion is admittedly 5% out of the 12½% commission. As it did not at that time contemplate the application of 'gross receipts' revenue principle, the law in making a distribution of the total wager funds, took no

> trouble of separating one item from the other; and for convenience, grouped three items under one common denomination.
>
> "Needless to say, gross receipts of the proprietor of the amusement place should not include any money which although delivered to the amusement place has been especially earmarked by law or regulation for some person other than the proprietor." (**The Commissioner of Internal Revenue vs. Manila Jockey Club, Inc., G.R. Nos. L-13890 & L-13887, June 30, 1960**)

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

Having resolved the legal issue involved, We now delve on the factual aspect of this case.

Based on the evidence presented, this Court is convinced that petitioner has sufficiently established its entitlement to refund. The claim for refund was seasonably filed within two years from the date of payment of the tax pursuant to Section 230 of the Tax Code in relation to Section 125(a)(1) of the same code.

However, We are limiting the refund to the amount which have been verified from the evidence presented. It is noted that the independent CPA retained by petitioner has rendered a disclaimer on petitioner's interest income account and quarterly gross receipts tax due to non-audit (Exhs. NN, and AAA to AAA-4, inclusive).

Therefore, only the 20% final taxes on interest income duly supported by documents were included from the gross receipts tax base, detailed as follows:

<u>Floating Rate Treasury Notes and</u>
<u>Fixed Rate Treasury Notes (Exhs. ZZ, and Z-1 to Z-6)</u>

2-YEAR FRTNs

Series	Date	Interest	20% Final Tax
S-3rd 01/19/95-01/19/97	07/19/95	₱ 762,562.50	₱ 152,512.50
S-3rd 01/19/95-01/19/97	01/19/96	762,562.50	152,512.50
S-13th 12/14/95-12/14/97	06/14/96	1,948,687.50	389,737.50
T O T A L		₱ 3,473,812.50	₱ 694,762.50

3-YEAR FRTNs

Series	Date	Interest	20% Final Tax
S-A2	04/07/94	₱ 466,664.74	₱ 93,332.95
10/07/93-10/07/96	07/07/94	343,501.91	68,700.38
	10/07/94	343,464.96	68,692.99
S-04	04/24/94	15,894.00	3,178.80
10/24/91-10/24/96	07/25/94	15,676.87	3,135.37
	10/24/94	13,985.23	2,797.05

S-01	04/25/94	1,196,420.85	239,284.17
07/25/91-07/25/94	07/25/94	784,235.55	156,847.11
S-12	04/28/94	3,305,554.65	661,110.93
01/28/93-01/28/96	07/28/94	3,260,397.73	652,079.55
	10/28/94	2,908,577.52	581,715.50
S-11	05/19/94	739,333.96	147,866.79
11/19/92-11/19/95	08/19/94	747,440.37	149,488.08
	11/21/94	603,658.21	120,731.65
S-A1	05/28/94	1,810,566.16	362,113.23
08/26/93-08/26/96	08/28/94	1,829,353.76	365,870.75
	11/28/94	1,259,459.76	251,891.95
S-05	05/28/94	1,163,439.19	232,687.84
11/28/91-11/28/94	08/28/94	1,175,242.01	235,048.40
	11/28/94	761,466.75	152,293.35
S-15	05/27/94	770,778.24	154,155.65
05/27/93-05/27/96	08/29/94	779,059.11	155,811.82
	11/28/94	504,472.04	100,894.41
S-13	05/25/94	357,678.84	71,535.77
02/25/93-02/25/96	08/25/94	361,521.56	72,304.31
	11/25/94	250,708.84	50,141.77
S-09	06/17/94	76,755.47	15,351.09
09/17/92-09/17/95	09/19/94	75,778.76	15,155.75
	12/19/94	46,993.88	9,398.78
S-14	06/20/94	467,766.33	93,553.27
03/18/93-03/18/96	09/19/94	458,833.41	91,766.68
	12/19/94	286,392.02	57,278.40
S-07	06/19/94	1,125,211.08	225,042.22
06/18/92-06/18/95	09/19/94	1,103,723.04	220,744.61
	12/19/94	688,915.64	137,783.13
S-03	06/27/94	138,773.95	27,754.79
09/26/91-09/26/94	09/26/94	137,315.99	27,463.20
S-A6	04/20/94	2,575,174.30	515,034.86
01/20/94-01/20/97	07/20/94	2,543,601.79	508,720.36
	10/20/94	2,479,466.27	495,893.25
S-A8	06/27/94	7,857,311.11	1,571,462.22
03/24/94-03/24/97	09/26/94	7,718,851.11	1,543,770.22
	12/26/94	4,706,469.44	941,293.89
S-A2	01/07/95	212,093.44	42,418.69
10/07/93-10/07/96	04/07/95	237,999.47	47,599.89

	07/07/95	321,889.32	64,377.86
	10/09/95	309,637.85	61,927.57
S-A6	01/20/95	1,543,487.83	308,697.57
01/20/94-01/20/97	04/20/95	1,741,737.00	348,347.40
	07/20/95	2,560,193.22	512,038.64
	10/20/95	2,064,551.81	412,910.36
S-12	01/30/95	2,016,585.68	403,317.13
01/28/93-01/28/96	04/28/95	2,336,807.10	467,361.42
	07/28/95	1,982,598.00	396,519.60
	10/30/95	1,419,316.97	283,863.39
S-11	02/20/95	510,118.92	102,023.78
11/19/92-11/19/95	05/19/95	567,828.09	113,565.62
S-15	02/27/95	543,546.28	108,709.26
05/27/93-05/27/96	05/29/95	591,978.13	118,395.63
	08/28/95	746,640.07	149,328.01
	11/27/95	482,702.33	96,540.47
S-13	02/27/95	246,787.96	49,357.59
02/25/93-02/25/96	05/25/95	274,706.83	54,941.37
	09/25/95	347,533.35	69,506.67
	11/27/95	227,753.28	45,550.66
S-A1	02/27/95	1,267,293.56	253,458.71
08/26/93-08/26/96	05/28/95	1,383,852.99	276,770.60
	08/28/95	1,757,414.36	351,482.87
	11/27/95	1,122,087.20	224,417.44
S-09	03/17/95	55,210.94	11,042.19
09/17/95-09/17/95	06/17/95	65,531.85	13,106.37
	09/19/95	70,547.68	14,109.54
S-A1	03/20/95	336,468.75	67,293.75
03/18/93-03/18/96	06/19/95	931,115.47	86,223.09
	09/18/95	429,934.52	85,986.90
	12/18/95	309,886.55	61,977.31
S-A7	03/20-97	809,375.00	161,875.00
08/26/93-08/26/96	06/19/95	1,037,047.48	207,409.50
S-A8	03/24/95	5,482,000.00	1,096,400.00
03/24/94-03/24/97	06/26/95	7,279,704.44	1,455,940.89
	09/25/95	4,178,532.54	835,706.51
	12/26/95	2,985,502.85	597,100.57
S-A2	01/07/96	237,012.93	47,402.59
10/07/93-10/07/96	04/07/96	289,490.70	57,898.14
S-A6	01/22/96	1,779,094.98	355,819.00
01/20/94-01/20/97	04/22/96	2,156,885.03	431,377.01

S-12 01/20/94-01/20/97	01/29/96	1,374,860.84	274,972.17
S-13 02/25/93-02/25/96	02/26/96	281,245.71	56,249.14
S-A1	02/26/96	1,416,506.52	283,301.30
01/20/94-01/20/97	05/27/96	1,551,595.50	310,319.10
S-15	02/27/96	606,069.06	121,213.81
05/27/93-05/27/96	05/27/96	663,847.53	132,769.51
S-14 03/18/93-03/18/96	03/18/96	369,612.97	73,922.59
S-A8	03/25/96	3,705,789.78	741,157.96
03/24/94-03/24/97	06/24/96	4,027,153.76	805,430.75
S-A9 04/21/94-04/21/97	04/22/96	106,371.42	21,274.28
T O T A L		₱127,609,422.24	₱25,421,884.46

5-YEAR FRTNs

Series	Date	Interest	20% Final Tax
S-5th 10/26/95-10/26/2000	06/26/95	₱5,623,437.50	₱1,124,687.50
S-6th 11/23/95-11/16/2000	05/23/96	2,676,850.00	535,370.00
T O T A L		₱8,300,287.50	₱1,660,057.50

Treasury Bills (Exh. Z-7 and Z-8)

Series	Date	Interest	20% Final Tax
5A-L-35	06/19/96	₱ 638,895.39	₱ 127,779.08
5A-M-35	06/19/96	1,249,711.36	249,942.27
5A-M-36	06/25/96	2,512,419.34	502,483.87
T O T A L		₱ 4,401,026.09	₱ 880,205.22

Interbank Call Lendings

Bank Name	Exh.	Interest	20% Final Tax
UCPB	AA	₱ 3,063,853.88	₱ 612,770.78
China Bank	BB	116,666.67	23,333.33
Citytrust Banking	CC	3,321,996.53	664,399.31
Equitable Banking	DD	6,108,477.50	1,221,695.50
Hongkong Shanghai	EE	408,333.33	81,666.67
Metropolitan Bank	FF	6,296,716.14	1,259,343.24
Allied Banking	GG	651,180.56	130,236.11
PCIB	HH	2,987,500.01	597,499.99
RCBC	II	989,583.33	197,916.67
Security Bank	JJ	3,370,833.33	674,166.67
FEBTC	KK	87,500.00	17,500.00
PS Bank	LL	12,847,222.22	2,569,444.44
UCPB	MM	8,523,888.87	1,704,777.77
T O T A L		₱48,773,752.37	₱ 9,754,750.48

Furthermore, the interest income earned by the petitioner earlier or beyond the period involved herein were also excluded.

A recomputation of petitioner's overpaid gross receipts tax shows a lesser sum of ₱1,345,743.01, to wit:

Kind of Investment	20% Final Tax Paid	Rate of GRT	Amount Refundable
Floating Rate Treasury Notes and Fixed Rate Treasury Notes			
* 2-year FRTNs	₱ 694,762.50	5%	₱ 34,738.12
* 3-year FRTNs	25,421,884.46	3%	762,656.53
* 5-year FRTNs	1,660,057.52	1%	16,600.58
Treasury Bills	880,205.22	5%	44,010.26
Interbank Call Lendings	9,754,750.48	5%	487,737.52
Total	₱38,411,660.18		₱1,345,743.01

WHEREFORE, in view of the foregoing, the instant petition for review is partially **GRANTED**. Respondent is hereby **ORDERED** to **REFUND** in favor of petitioner the reduced amount of ₱1,345,743.01 as overpaid gross receipts tax for the quarters ending June 30, 1994 up to June 30, 1996.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

(Dissenting)
AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Judge

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
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ASIANBANK CORPORATION,
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DISSENTING OPINION

The majority view decided to grant the refund claimed by herein petitioner on the basis of the latter's theory that the 20% final withholding tax on the bank's interest income should not form part of taxable gross receipts for the purpose of computing the gross receipts tax.

I humbly disagree with the majority opinion and I hereby reiterate my dissent expressed in the case entitled **China Banking Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5405, dated September 30, 1998** where I stated, thus:

> There is no provision in the Tax Code or any special laws which excludes the 20% final income tax withholding under Section 50(a), as no longer forming part of the gross receipts for purpose of the 5% gross receipts tax. On

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

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

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

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

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

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

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

(a) Cash receipts and disbursement method or cash basis. - Income earned by the taxpayer is not included in gross income until received and expenses are not deducted until paid within the taxable year; and

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

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

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

The High Court's decision in the case of Commissioner of Internal Revenue vs. The Manila Jockey Club, Inc. 108 Phils. 821, June 30, 1960, which was reaffirmed by the said Court in the case of **Visayan-Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 357, February 27, 1965** cannot be considered as precedent cases, hence, inapplicable to the two cases decided by this Honorable Court in the cases of Compania Maritima vs. Acting Commissioner of Internal Revenue, CTA Case No. 1426 dated November 14, 1966 and Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720 dated January 30, 1996, for the following reasons:

1) In the Manila Jockey Club, Inc. case, the Club was authorized to operate horse races in which betting was made through the sale of tickets to the public. The total amount of bets called "wager fund" were distributed pursuant to Executive Order No. 320 and Republic Act No. 309, as follows:

87½% as dividends to holders of winning tickets

12½% as "commissions" of the Manila Jockey Club, of which ½% was assigned to the Board on Races and 5% was distributed as prizes for owners of winning horses and authorized bonus for jockeys.

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

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

Accordingly, gross receipts of the proprietor of the amusement place should not include any money which, although delivered to the amusement place was "especially earmarked" by law or legal rule or regulations for some persons other than the proprietor. Undeniably, they are money received by the racing club but they are moneys earmarked by law or regulations for winning horse owners and jockeys and never for a minute become the property of the race track. The same is true in the case of the ½% which the law directs the club to deliver to the Board on Races. The High Court therefore agrees with the stand of the Court of Tax Appeals that such funds representing 5½% of the 12½% "commissions" of the race track do not form part of the gross receipts, hence not subject to the amusement tax of 20%.

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

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

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

> "The 5% gross receipts tax under Section 120 of the Tax Code is collectible on all finance companies doing business in the Philippines from interests, discounts, and all other items treated as gross income under the Tax Code. Accordingly,

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

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

In view of the foregoing, I vote to deny the entire claim for refund for lack of legal bases.

AMANCIO Q. SAGA
Associate Judge