REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CDL HOTELS (PHILS.) CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 339
(C.T.A. CASE No. 6585)

Present:

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

Promulgated:

AUG 1 0 2009

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DECISION

ACOSTA, *PJ:*

Before this Court of Tax Appeals *En Banc*[1] is a Petition for Review filed on December 26, 2007 assailing the Decision of the Court of Tax Appeals Second Division[2] dated July 12, 2007 and the subsequent Resolution dated November 15, 2007, affirming the assailed Decision. The dispositive portion of the assailed Decision reads:

[1] Court *En Banc.*
[2] Court Second Division.

"**WHEREFORE**, the instant Petition for Review is **DISMISSED**. The final assessment issued by respondent for petitioner's "Deficiency Income Tax", "Deficiency VAT" and "Deficiency Final Withholding Tax" as appearing in respondents "Final Decision on Disputed Assessment" received by petitioner on December 10, 2002, is hereby **AFFIRMED with some modifications.**

Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of P46,191,214.36, computed as follows:

Type of Tax	Basic Tax	25% Surcharge	Interest	Total
Income Tax	P11,712,193.01	P2,928,048.25	P6,701,086.72	P21,341,327.98
VAT	P 1,521,307.14		P 854,432.77	P 2,375,739.91
Final Withholding Tax	P12,039,721.30	P3,009,930.33	P7,424,494.84	P22,474,146.47
Amount Due				**P46,191,214.36**

Pursuant to Section 248 of the 1997 NIRC, as amended, a 25% surcharge is hereby imposed on the Deficiency Income tax and Final Withholding Tax.

In addition, petitioner is **ORDERED TO PAY** 20% delinquency interest on P46,191,214.36 computed from January 13, 2003 until full payment thereof pursuant to Section 249 (C) of the Tax Code.

SO ORDERED.

The Court Second Division found the pertinent facts to be as follows:

Petitioner CDL Hotels (Phils) Inc. is a corporation duly organized and existing under the laws of the Republic of the Philippines with principal office address at 10th Floor, The Heritage Hotel, EDSA Extension, Pasay City.[3] Its primary purpose is to own, lease, operate, manage or act as consultant to hotels, inns, resorts, condominiums, condotels, restaurants and clubs, other businesses as may be necessary or desirable in connection therewith and to maintain any and all services and facilities incident thereto.[4]

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue, authorized to perform the duties of his office, including, among others, the power to decide, cancel and abate tax liabilities pursuant to Section 204 (B) of the National Internal Revenue Code ("NIRC") of 1997. His office address is at the 4th Floor, BIR National Office Building Agham Road, Diliman, Quezon City, Philippines.[5]

On October 15, 1997, petitioner and Grand Plaza Hotel Corporation (GPHC) entered into a Management Contract[6] "for the management and operation of [The Heritage Hotel, Manila] by [petitioner] and for the provision by the [petitioner] of marketing sales and reservation support upon the terms and conditions" set forth in the said agreement.

On March 8, 1999, petitioner paid no income tax for the calendar 1998 but filed its Annual Income Tax Return[7] showing the following details:

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[3] Paragraph 1 of the parties' Joint Stipulation of Facts.
[4] Exhibit "Q".
[5] Joint Stipulation of Facts and Issues, paragraph 1.2. See also par. 2 of the Statement of the Case in respondent's Memorandum.
[6] Exhibit "S".
[7] Exhibit "W".

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Tax Due	P2,612,664.84
Tax credits/Withheld/Payments for the First Three Quarters	2,381,118.04
Tax Withheld Per BIR Form No. 2307 for the Fourth Quarter	559,075.31
Total Tax Credits/Payments	2,940,193.35
Payable	(327,528.51)
Amount Payable	(327,528.51)

The Income Statements found in petitioner's Account Information Form (BIR Form 1702AIF-1) gives the following details:[8]

Gross Revenues/Receipts/Fees		43,668,973.00
Cost of Sales/Services		43,668,973.00
Gross Profit From Operations		43,668,973.00
Deductible Items (Not Included in Cost of Sales/Services)		43,668,973.00
Share in Group Services Expenses		35,410,945.00
Professional Fees		388,012.00
Taxes and Licenses		125,513.00
Miscellaneous	60,194.00	
Total Deductions		35,984,664.00
Net Income		7,684,309.00

By virtue of the Letter of Authority No. LOA 1998 00009881 dated October 20, 1999, received by petitioner on November 3, 1999,[9] respondent conducted an examination of petitioner's books of account and other accounting records for its all internal revenue taxes for the calendar year 1998.

As a result of the investigation and pursuant to the Memorandum-Report dated October 1, 2001 of Revenue Officer II Domingo V. Pedrozo to the Regional Director of Revenue Region No. 8, Makati City,[10] Preliminary Notice of Assessment (PAN) and Details of Discrepancies were issued on January 10, 2002 and received by petitioner on January 14, 2002.[11]

On January 28, 2002, petitioner wrote Regional Director Antonio I. Ortega of the BIR Revenue Region No. 8, Makati and "reiterated [the] proposed assessments for deficiency income tax, VAT and final tax be reconsidered and accordingly withdrawn and cancelled."[12]

On January 29, 2002, respondent issued Final Letter of Demand, Final Assessment Notice and Details of Discrepancies, against the petitioner for the amount of P18,413,279.73 as deficiency income tax); P4,031,358.23 as deficiency VAT); and P19,464,216.14 as deficiency final withholding tax, computed as follows:[13]

Deficiency Income Tax	
Net Income per return	P7,684,309.00
Add: Share in group services expenses	35,410,945.00

[8] Exhibits "W-2" to "W-4".
[9] BIR Records, p. 20.
[10] Exhibit "1".
[11] BIR Records, pp. 115-116.
[12] *Ibid.*, pp. 128-130.
[13] Exhibits "A to D".

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Taxable income per investigation	P43,095,254.00
Tax due thereon (34%)	P14,652,386.36
Less: Tax paid	2,940,193.35
Deficiency tax due	P11,712,193.01
Add: Interest from 04-16-99 to 02-25-02	6,701,086.72
TOTAL	**P18,413,279.73**

Deficiency Value Added Tax	
Gross receipts subject to VAT	P27,429,860.00
VAT due	P2,493,623.64
Add: Interest from 01-26-99 to 02-25-02	1,537,734.59
TOTAL AMOUNT DUE	**P4,031,358.23**

Deficiency Final Withholding Tax	
Share in group services expense	P35,410,945.00
Withholding Tax due	P12,039,721.30
Add: Interest 01-26-99 to 02-25-02	7,424,494.84
TOTAL AMOUNT DUE	**P19,464,216.14**

In a letter dated February 18, 2002, received by respondent on the same date, petitioner protested the above assessment and requested for a re-investigation.[14] In response, the Revenue District Officer wrote to petitioner on February 20, 2002; and requested for the copies of the Management Agreement between petitioner and CDL Hotel-Singapore, Management Agreement between petitioner and Grand Plaza Hotel Corporation; statement of accounts/expense vouchers/invoices, auditor's working papers; books of accounts; and articles of incorporation.[15] Subsequently, for failure of petitioner to submit the documents as requested, Revenue Officer II Domingo V. Pedrozo recommended that the assessment notice to petitioner be made final and executory.[16]

After the reinvestigation, Revenue District Officer of the Revenue District No. 51, Pasay City informed petitioner in a letter dated August 19, 2002 that there has been found due deficiency income tax in the amount of P19,442,240.40, value-added tax in the amount of P2,268,745.47 and withholding tax in the amount of P19,464,216.14.[17]

Thus, on December 20, 2002, petitioner received respondent's "Final Decision on Disputed Assessment" and Amended Assessment Notices for deficiency VAT and compromise penalty, all dated December 10, 2002, affirming the FAN but with certain modifications on the amount of the deficiency VAT, to wit:[18]

Deficiency Value-Added Tax:	
Due from related company, Jan. 1, 1998	P14,434,938.00
Less: Output tax component on Receivables	1,312,267.09
Net	P13,122,670.91
Add: Net income for the year	43,668,973.00
Total	P56,791,643.91
Less: Due from related company, Dec. 31, 1998 (Net of Tax)	27,885,501.91
Gross receipts subject to VAT	P28,906,143.91
Tax rate	10%

[14] Exhibits "E" to "E-3".
[15] Exhibits "2", "3" and "4".
[16] BIR Records, p. 151.
[17] Exhibits "F" and "G"; "7" and "8".
[18] Exhibits "I", "J", "K", and "L".

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VAT due	P2,890,614.30
Add: Surcharge (25%)	722,653.57
Interest (1.26.99 to 2.28.00)	798,712.86
Total	P4,411,921.44
Less: VAT paid on February 28, 2000	2,890,614.30
Deficiency VAT	1,521,307.14
Add: Interest (3.1.00 to 12.20.02)	854,432.77
Amount still due	**P2,375,739.91**

Aggrieved, petitioner filed the instant petition for review on January 13, 2003.

For his part, respondent filed his Answer on March 25, 2003 interposing the following special and affirmative defenses:

"6. The assessments in question were made and issued in accordance with law, rules and regulations.

7. No deduction from gross income shall be allowed unless the taxpayer shall substantiate with sufficient evidence the amount of expense being deducted, and the direct connection or relation of the expense being deducted to the development, management, operation and/or conduct of the trade, business or profession of the taxpayer. (Gancayco vs. CIR, 1 SCRA 980)

8. The petitioner's share in group services expenses in the amount of P35,410,945.00 which is actually a payment to CDL Hotel International-Singapore, a non-resident foreign corporation, was not subjected to final withholding tax.

9. Contrary to petitioner's claim that the amount of P35,410,945.00 represents reimbursable expenses by CDL-Singapore for the sales promotion services rendered to petitioner as one of its international subsidiary, nonetheless, the same would not be considered as a deductible business expense of the petitioner.

Under the Management Agreement executed by and between the petitioner and Grand Plaza Hotel Corporation (GPHC), owner of Heritage Hotel (the 'Hotel'), it was stated that from the revenue of the Hotel, there shall be deducted the entire cost and expenses of maintaining, conducting and supervising the operation of the Hotel. Thus, any and all expenses incurred by the petitioner for the benefit of the Hotel shall be for the account of the Hotel and do not constitute as a deductible expenses in so far as the taxable income of the petitioner is concerned.

10. The aforesaid share in the group services expense as recorded in the books of the petitioner do not actually represent reimbursable expenses incurred by and payable to CDL-Singapore but rather more of profit allocation or payments made by the petitioner to the latter in consideration for its part in marketing, advertising, sales and reservation support services rendered for the promotion and development of Heritage Hotel.

11. Petitioner constructively received from Grand Plaza Hotel Corporation (GPHC) an amount equal to P27,429,860.00 in payment of management and incentive fees. Petitioner receives income only and exclusively from GPHC for its performance of various roles enumerated in the Management Agreement as Manager of said the Hotel.

Since the petitioner and CDL-Singapore as part of the CDL Hotel International Group, the former is being billed by the latter for its part in marketing, advertising, sales and reservation support services rendered for the promotion and development of Heritage Hotel. These inter-related company

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transaction were presented in the balance sheet under the 'Due to — Due from — related company account'. Petitioner bills GPHC and a debit to 'Due from related company' account to recognize its income therefrom. On the other hand, the liability to CDL-Singapore was taken up in the books of accounts by crediting the account 'Due to related company'.

Thus analysis of the above-mentioned accounts revealed that GPHC directly remitted to CDL-Singapore in December 1998 the amount of P27,093,023.67. This remittance was correspondingly taken up in the books of the petitioner as a reduction to both its receivables from GPHC and its liability to CDL-Singapore, thereby, constituting constructive receipts subject to value-added tax (VAT) pursuant to Section 108 of the 1997 Tax Code.

"12. All presumptions are in favor of the correctness of the tax assessment. (Interprovincial Autobus vs. Collector of Internal Revenue, 98 Phil. 290)"

On January 4, 2007, petitioner filed its Memorandum.

On January 11, 2007, the Court issued a resolution considering the case submitted for decision upon consideration of petitioner's Memorandum and without respondent's Memorandum.

On July 12, 2007, the Court Second Division rendered the assailed Decision, which dismissed the Petition for Review and ordered petitioner to pay the amount of P46,191,214.36 representing petitioner's deficiency income tax, value added tax and final withholding tax as appearing in respondent's Final Decision on Disputed Assessment received by petitioner on December 10, 2002.

Petitioner filed his Motion for Reconsideration of the said Decision on August 7, 2007. The Court Second Division, however, denied petitioner's Motion in a Resolution dated November 15, 2007.

Hence, petitioner filed the instant Petition for Review before the Court *En Banc* seeking the reconsideration of the Court Second Division's Decision and Resolution, and praying that a judgment be rendered granting the remedies prayed for by the petitioner in its Petition for Review and declaring the deficiency tax assessment subject of the case to be null and void.

On March 28, 2008, petitioner filed a Manifestation stating its availment of the Tax Amnesty under Republic Act (RA) No. 9480. On the other hand, respondent filed its Comment (Petitioner's Manifestation) on April 29, 2008. A subsequent Reply (To Respondent's Comment) was filed by petitioner on May 9, 2008.

The Court *En Banc* promulgated on June 6, 2008 a resolution noting petitioner's manifestation and further ordering petitioner to submit the originals or certified true copies of the tax amnesty documents within ten (10) days from receipt of the resolution.

The petitioner filed a Motion for Extension of Time to Submit Original or Certified True Copy of Tax Amnesty Documents on June 20, 2008 and a Motion for 2nd Extension of Time to Submit Original or Certified True Copy of Tax Amnesty Documents on July 7, 2008. Thereafter, petitioner filed its Compliance on July 21, 2008 attaching thereto the originals and certified true copies of the tax amnesty documents.

The Compliance of petitioner was noted by the Court *En Banc* in a resolution dated August 28, 2008. On the same resolution, the Court En Banc declared the Petition for Review, insofar as the deficiency income tax and deficiency value added tax of petitioner, to be closed and terminated subject to the provisions of RA No. 9480 and further ordered the petitioner to file an Amended Petition for Review within fifteen (15) days from receipt thereof and the respondent to file an Amended Answer to the Amended Petition for Review within fifteen (15) days from receipt thereof.

A Motion for Extension of Time to File Amended Petition for Review was filed by petitioner on September 15, 2008. On September 24, 2008, petitioner filed its Amended Petition for Review (On Appeal) seeking consideration of the assailed Decision and Resolution solely with regard to the assessment of deficiency final withholding tax.

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On September 29, 2008, respondent filed a Motion for Partial Consideration seeking to reconsider and set aside the Court *En Banc's* August 28, 2008 Resolution and asked the Court *En Banc* to deny petitioner's Manifestation filed on March 28, 2008.

The Court *En Banc* issued a resolution on October 15, 2008 and ordered the petitioner to comment within ten (10) days from receipt thereof.

On December 5, 2008, the Court *En Banc* issued a resolution denying respondent's Motion for Partial Reconsideration for lack of merit and further ordering respondent to file its comment to the Amended Petition for Review.

The Court *En Banc* promulgated a resolution on January 19, 2009 giving due course to the Amended Petition for Review and ordering the parties to file their respective memoranda.

On February 24, 2009, petitioner filed its Memorandum (On Appeal).

Without any memorandum submitted by respondent, the Court *En Banc* issued a resolution on March 12, 2009 submitting the case for decision.

Petitioner anchors the Amended Petition for Review on the following grounds:

I

> Contrary to the findings of this Honorable Court, Second Division, the Supreme Court has consistently ruled that a mere request for reconsideration or reinvestigation without an accompanying VALID waiver will not serve to interrupt the running of the period of prescription for the assessment and collection of national internal revenue taxes.

II

> The final assessment, having been based on the INVALID waiver, was issued beyond the prescriptive period provided for under the Tax Code and hence, the assessment is null and void.

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III

> The alleged falsity of the return has not been raised in the assessment, much less proven as fact by the respondent Commissioner of Internal Revenue during trial; hence, there is no legal basis to for this Honorable Court, Second Division, to declare that the applicable prescriptive period is ten (10) years from the discovery of the alleged false return.

IV.

> The assessment of deficiency withholding tax amounting on the reimbursement of head-office expenses amounting to P35,410,945.00 is without basis under existing BIR Rules and Regulations since under the same is not an income payment subject to withholding tax.

Petitioner posits that that the Court Second Division committed an error in stating that the petitioner's act in requesting for reinvestigation of the assessment effectively suspended the period of limitation for the assessment of deficiency taxes. Petitioner anchors it stance on the case of *Bank of the Philippine Island vs. Commissioner of Internal Revenue, GR No. 139736, October 17, 2005* where the Supreme Court ruled that a valid waiver is an essential requisite in order to toll the running of the period of prescription arising from a taxpayer's request for reinvestigation or reconsideration.

Moreover, petitioner asserts the importance of determining the validity or invalidity of the waiver by the Court *En Banc*. It argues that the waiver lacked the necessary signature of the respondent, or his duly authorized representative, as well as, the date of acceptance by respondent, thus making the waiver defective. Consequently, petitioner avers that the Final Assessment issued on December 10, 2002 is null and void.

Petitioner also argues that respondent is not justified in asserting the ten year period of limitation for assessment and collection of taxes since the latter never alleged the falsity of the return nor proven said falsity during trial.

Petitioner avers that even if the issue of prescription was not raised during the examination or in the Petition for Review, prescription can still be raised during the trial itself particularly where the respondent presents documents in support of its case showing that indeed the action has prescribed.

Lastly, petitioner alleges that its remittance of P35,410,945.00 does not represent income payments to CDL-Singapore but are expenses billed by CDL-Singapore against petitioner for its share in the promotion, marketing and advertising work incurred by CDL-Singapore, thus, are not subject to final withholding tax.

THE COURT *EN BANC'S* RULING

The Court *En Banc* finds the petition for review bereft of merit.

After a closer look and scrutiny of the arguments laid down by petitioner in the instant petition for review, the Court *En Banc* observes that the grounds relied upon and matters raised therein are mere restatements of petitioner's previous arguments before the Court Second Division, which have already been exhaustively considered, discussed and passed upon in the assailed Decision and Resolution. Hence, the Court *En Banc* adheres to the factual findings of the Court Second Division that petitioner is liable for the assessment of deficiency taxes for taxable year 1998.

On the first, second and third assignment of errors, the *Court En Banc* shall discuss them together as they interrelated and all pertain to the issue of prescription.

At the onset, Section 203 of the 1997 National Internal Revenue Code (NIRC), as amended, prescribes the period of limitation on assessment and

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collection by the Bureau of Internal Revenue (BIR) to be three (3) years counting from the time the return was filed or if the return was filed beyond the period prescribed by law, on the day the return was filed, viz:

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

The assessment involved in this case pertains to taxable year 1998. Petitioner alleged that it filed its income tax return on March 9, 1999. Applying Section 203 of the 1997 NIRC, the respondent, therefore, had until April 15, 2002 to assess petitioner, otherwise, any issuance of an assessment beyond April 15, 2002 is already deemed prescribed.

A close scrutiny of the records of the case shows that on January 29, 2002, respondent issued a Formal Assessment Notice (FAN)[19] which petitioner alleges to have received on February 4, 2002[20]. Having issued the FAN prior to April 15, 2002, respondent's issuance of the assessment on the deficiency income tax, therefore, has not yet prescribed.

Petitioner's allegation of prescription of the assessment by virtue of its receipt of the Final Decision on Disputed Assessment on December 20, 2002 has no basis in law. What the law contemplates as an assessment is the written notice to the effect that the amount therein stated is due from the taxpayer as a

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[19] Section 1.8, Joint Stipulation of Facts and Issues, p. 84, Rollo.
[20] Section 4, Petition for Review, p. 3, Rollo.

tax with demand for payment of the same within a stated period of time.[21] Evidently, the FAN is the one generally referred to in the 1997 NIRC to serve such purpose.

Moreover, petitioner's reliance on the case of *Bank of the Philippine Islands vs. Commissioner of Internal Revenue*[22] in order to argue that its request for reinvestigation, without an accompanying waiver, did not suspend the running of the prescriptive period to assess and collect is mistaken. Petitioner failed to consider that the issue in the *BPI Case* refers to the prescription on the collection of taxes. In fact, the *BPI Case* categorically stated that the issue of the timeliness of the assessment is no longer in controversy, and only the prescription on the period to collect the DST was put in issue, to wit:

> "**In the present Petition, there is no controversy on the timeliness of the issuance of the Assessment, only on the prescription of the period to collect the deficiency DST following its Assessment.** While Assessment No. FAS-5-85-89-002054 and its corresponding Assessment Notice were both dated 10 October 1989 and were received by petitioner BPI on 20 October 1989, there was no showing as to when the said Assessment and Assessment Notice were released, mailed or sent by the BIR. Still, it can be granted that the latest date the BIR could have released, mailed or sent the Assessment and Assessment Notice to petitioner BPI was on the same date they were received by the latter, on 20 October 1989. Counting the three-year prescriptive period, for a total of 1,095 days, from 20 October 1989, then the BIR only had until 19 October 1992 within which to collect the assessed deficiency DST."

It is clearly provided in Section 223 of the 1997 NIRC that the period to assess and collect shall be suspended for the period when the taxpayer requests for a reinvestigation which is granted by the Commissioner, viz:

> **Section 223.** *Suspension of Running of Statute of Limitations.* - **The running of the Statute of Limitations provided in Sections 203 and 222 on the making of assessment and the beginning of distraint or levy a proceeding in court for collection, in respect of any deficiency, shall be suspended** for the period during which the Commissioner is prohibited from making the assessment or

[21] *Commissioner of Internal Revenue vs. CTA*, 27 SCRA 1159.
[22] GR No. 139736, October 17, 2005.

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> beginning distraint or levy or a proceeding in court and for sixty (60) days thereafter; **when the taxpayer requests for a reinvestigation which is granted by the Commissioner**; when the taxpayer cannot be located in the address given by him in the return filed upon which a tax is being assessed or collected: Provided, that, if the taxpayer informs the Commissioner of any change in address, the running of the Statute of Limitations will not be suspended; when the warrant of distraint or levy is duly served upon the taxpayer, his authorized representative, or a member of his household with sufficient discretion, and no property could be located; and when the taxpayer is out of the Philippines. (Emphasis provided)

Since the assessment was clearly filed on time as discussed earlier, the filing of the request for investigation by petitioner, as provided in its protest letter dated February 18, 2002[23], was clearly directed towards suspending the period to collect and not the period to assess.

Going into the issue on the prescription of the assessment of the deficiency final withholding tax, which is the only existing tax assessed after petitioner availed of the Tax Amnesty Program under RA No. 9480, the Court *En Banc* concurs with the decision of the Court Second Division when it ruled that the "Monthly Remittance Returns of Income Taxes Withheld" for the year 1998 filed by petitioner are considered false returns since petitioner declared no income, when in truth there was income subject to tax. Given that petitioner's returns are false returns, the applicable prescriptive period for the assessment is ten (10) years from the discovery of falsity, as provided in Section 222 of the 1997 NIRC. Considering that the latest return filed by petitioner was January 11, 1999, and the FAN was issued on January 29, 2002, the issuance of the assessment over petitioner's final withholding tax for taxable year 1998 is within the ten (10) year period to assess, thus, the assessment is valid. Such was aptly discussed by the Court Second Division in the assailed Decision, to wit:

> "As regards the issue on the prescription of the assessment for deficiency final withholding tax, a review of the records would show that petitioner filed its

[23] Exhibit "E-2".

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various "Monthly Remittance Return of Income Taxes Withheld" for the year 1998 but without declaring any amount of income and other details thereto.

While the prescriptive period for assessment is three years as prescribed under section 203 of the 1997 NIRC, as amended; however, Section 222 of the 1997 NIRC provided for exceptions to the period of limitation of assessment and collection of taxes. We quote:

> "SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. —
>
> (a) In 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 (10) years after the discovery of the falsity, fraud or omission: . . .;
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> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by a subsequent written agreement made before the expiration of the period previously agreed upon.
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> xxx xxx xxx"

A reasonable understanding of the foregoing law is that false return is different from fraudulent return with intent to evade tax or from failure to file a return. The above provision should be interpreted to mean a separation of the three different situations of false return, fraudulent return with intent to evade tax, and failure to file a return. The difference between "false return" and "fraudulent return" cannot be denied. While the first merely implies deviation from the truth, whether intentional or not, the second implies intentional or deceitful entry with intent to evade the taxes due. The ordinary period of prescription of 3 years within which to assess tax liabilities under Sec. 203 of the 1997 NIRC, as amended, should be applicable to normal circumstances; but whenever the government is placed at a disadvantage so as to prevent its lawful agents from proper assessment of tax liabilities due to false returns, fraudulent returns intended to evade payment of tax or failure to file returns, the period of ten years as provided for in Section 222 of the 1997 NIRC, as amended, from the time of the discovery of the falsity, fraud or omission even seems to be inadequate and should be the one enforced.

In the case at bar, although petitioner filed its monthly return as mandated by law, it failed to declare thereto the income subject to the tax under the belief that the income supposedly subject to the withholding tax is not an income but a deductible expense. The returns filed by petitioner can be considered as false return because it deviated from the truth when no income was declared, when in truth there was an income subject to tax. Being considered as false return, it is immaterial if petitioner intentionally omitted to declare its income subject to final withholding tax or not.

Considering that petitioner's return is false, the applicable prescriptive period would be ten years from the discovery of falsity. In the case at bar, the latest return filed was on January 11, 1999, while the FAN was issued on January 29, 2002, such period being within the ten year period it follows that the assessment had not yet prescribed.

> Moreover, the Supreme Court had ruled that the filing of deficient returns which prevent the Commissioner of Internal Revenue from computing the proper taxes is tantamount to non-filing. The Commissioner had to determine and assess the taxes on data obtained, not from the return, but from other sources. Hence, the assessment for deficiency final withholding tax, therefore, has not prescribed."

Finding the assessment over petitioner's deficiency final withholding tax for taxable year 1998 to be proper, the Court En Banc shall now delve into the merits of the assessment.

The Court *En Banc* cannot rule solely on petitioner's liability over the final withholding tax for the year 1998 without first ascertaining whether petitioner is liable for the income tax, from which the final withholding tax relatively originates.

Petitioner's argument that its remittance of the amount of P35,410,945.00 to its parent company is not income payment but allowable expenses was clearly not proven by petitioner. The burden of proof that expenses incurred are ordinary and necessary rests on the taxpayer and not on the Government.[24] Noticeably, petitioner in this case failed to adduce enough proofs to support its allegation that the amount of P35,410,45.00 represents expenses that are deductible. Pertinent is the Court Second Division's findings in the assailed Decision, viz:

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> Despite the petitioner's documentary evidence, this Court finds no convincing evidence that establishes the fact that the amount of P35,410,945.00 represents a deductible expense, and not a profit or income remittance or allocation to CDL-Singapore.
>
> The Debit/Credit Memos, supposed to be proofs to establish that the amount is a reimbursable expense, are insufficient to grant petitioner's claim for they only show the amounts of HK$3,524,119.06 and HK$3,388,156.26 as reimbursement of head office expenses for the year 1998. However, they do not contain a breakdown or details of the head office expenses that will show the expenses include the amount of P35,410,945.00 and that such amount is to be treated as a deductible expense.
>
> There are no other pieces of evidence, like schedules detailing expenses incurred by CDL-Singapore; related receipts proving payments thereof by CDL-Singapore; CDL-Singapore's official receipts issued to petitioner; and petitioner's

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[24] *Atlas Consolidated Mining & Development Corporation vs. Commissioner of Internal Revenue*, GR Nos. L-26911 and L-26924, January 27, 1981.

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payment vouchers with sufficient description, that will establish the fact that the amount of P35,410,945.00 was incurred and that the same is a deductible expense under Our Tax Code.

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On the other hand, this Court agrees with respondent that the subject amount is more of a profit allocation as stated in the assailed Final Decision and supported by the evidence on records. We quote:

> "In Article V (52)(B3 to B6) of the Management Agreement executed by and between CDL-Phil. and Grand Plaza Hotel Corporation (GPHC), owner of Heritage Hotel, it was stated that from the revenue of the Hotel, there shall be deducted the entire cost and expenses of maintaining, conducting and supervising the operation of the Hotel. From the above mentioned Management Agreement, CDL-Phils. acts as a manager of Ground Plaza Hotel Corp., any and all expenses incurred by affiliates for the benefits of the hotel, if there is any, shall be for the account of the hotel and does not constitute as a deductible expense in so far as the taxable income of CDL-Phils. is concerned. Pursuant to Section 34(A)(1)(a) of the Tax Code of 1997, as amended, an expense to be deductible must be ordinary and necessary paid or incurred during the taxable year in carrying on or which are directly attributable to the development, management, operation, and/or conduct of trade, business, or exercise of profession. Expenses which are 'ordinary and necessary generally contemplates expenses which are directly connected with and proximately resulting from carrying on the business and must be shown to be appropriately helpful in the development of the taxpayer's business for the acquisition or pursuit of income or profit' (Gancayco vs. CIR, 1 SCRA 980)[.]
>
> "The share in group services expenses amounting to P35,410,945.00 was taken up and recorded in the books of CDL-Phils. as a deductible expense. Scrutiny of the records and additional documents submitted showed that this expense account seem to actually cover, although it is not, reimbursement of business expense for its sales promotion services rendered for the benefit and development of the Hotel being managed (Heritage Hotel) and not directly incurred in carrying on or which were attributable to the conduct of trade or business or to the operation of CDL Phils. in particular, hence, disallowed. Granting for the sake of argument, that this expense actually represent 'reimbursable expenses', still it should not be taken up as a deductible business expense of CDL Phils. but rather an expense directly chargeable to the operation of the Heritage Hotel."

Considering the foregoing, therefore, the income payments amounting to P35,410,45.00 should have been subject to final withholding tax as provided in Section 2.57 of Revenue Regulations No. 2-98 in relation to Section 28 of the NIRC, viz:

> "'**SEC. 28. Rates of Income Tax on Foreign Corporations. —**
>
> XXX XXX XXX
>
> (B) Tax on Nonresident Foreign Corporation. —
>
> (1) In General. — Except as otherwise provided in this Code, a foreign corporation not engaged in trade or business in the Philippines shall pay a tax equal to thirty-five percent (35%) of the gross income received during each taxable year from all sources within the Philippines, XXX
>
> **REVENUE REGULATIONS NO. 2-98**
>
> **SEC. 2.57 WITHHOLDING OF TAX AT SOURCE. —**
>
> XXX XXX XXX
>
> **(I) Income Derived From all Sources Within the Philippines by Non-Resident Foreign Corporation.** — The following shall be subject to final withholding tax based on the gross amount of income and at the rate of tax prescribed therefore:
>
> (1) In general — On gross income derived from all sources within the Philippines such as interests, dividends, rents, royalties, salaries premiums (except reinsurance premiums), annuities, emoluments, or other fixed or determinable annual, periodic or casual gains, profits and income from capital gains (except capital gains realized from sale, exchange, disposition of shares of stock in any domestic corporation which is subject to capital gains tax under Sec. 28(B)(5)(c) — at the following rates: XXX

Petitioner, however, argues that by virtue of the RP-Singapore Tax Treaty, the income payments are not subject to final withholding tax. Petitioner's argument lacks basis in fact and in law.

Section 4 of Revenue Regulations No. 7-82 which implements the RP-Singapore Tax Treaty requires the filing of an appropriate BIR Form for Income Tax Convention with the International Operations Division (now International Tax Affairs Division [ITAD]) of the Bureau of Internal Revenue for the availment of the treaty provisions, thus:

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> "SEC. 4. Availment of Treaty Benefits. — Any person availing of any benefits provided by the Convention shall file the appropriate BIR Form for Income Tax Convention, hereinbelow indicated with the International Operations Division, 27 Bureau of Internal Revenue, National Office Bldg., Quezon City. . . . . It shall be the duty of the Regional Director to forward the said form to the International Operations Division for proper action."

The requirement to file an application for tax treaty relief before the ITAD of the BIR for the valid availment of the provisions of any tax treaty has been confirmed in the case of *Mirant (Philippines) Operations Corporation [formerly: Southern Energy Asia-Pacific Operations [Phils], Inc] vs. CIR*[25], viz:

> **"However, it must be remembered that a foreign corporation wishing to avail of the benefits of the tax treaty should invoke the provisions of the tax treaty and prove that indeed the provisions of the tax treaty applies to it, before the benefits may be extended to such corporation.** In other words, a resident or non-resident foreign corporation shall be taxed according to the provisions of the National Internal Revenue Code, unless it is shown that the treaty provisions apply to the said corporation, and that, in cases the same are applicable, the option to avail of the tax benefits under the tax treaty has been successfully invoked.
>
> Under Revenue Memorandum Order 01-2000 of the Bureau of Internal Revenue, it is provided that the availment of a tax treaty provision must be preceded by an application for a tax treaty relief with its International Tax Affairs Division (ITAD). This is to prevent any erroneous interpretation and/or application of the treaty provisions with which the Philippines is a signatory to. The implementation of the said Revenue Memorandum Order is in harmony with the objectives of the contracting state to ensure that the granting of the benefits under the tax treaties are enjoyed by the persons or corporations duly entitled to the same." (Emphasis supplied.)

Applying the foregoing in the case at bar, petitioner did not present any evidence that it filed the necessary application for tax treaty relief with the ITAD of the BIR. Other than its mere allegation that its income payments are covered by the RP-Singapore Tax Treaty, it did not present an iota of proof that it can validly avail of the provisions of said treaty. Hence, the income payments are still subject to the final withholding tax.

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[25] CTA EB Case No. 40 (CTA Case No. 6382), June 7, 2005, which was affirmed in a Minute Resolution under GR No. 168531.

The Court *En Banc* reiterates that an assessment is *prima facie* assumed correct and made in good faith.[26] Failure to present proof of error in the assessment will justify judicial affirmance of said assessment.[27]

However, taking into consideration that petitioner has already availed of the provisions of RA No. 9480, as already ruled in the resolution of this Court dated August 28, 2008, the assessment on deficiency income and value added taxes in the amount of P21,341,327.98 and P2,375,739.91, respectively, for taxable year 1998 are hereby CANCELLED and SET ASIDE.

WHEREFORE, the instant Petition for Review is hereby **DENIED** for lack of merit. The assailed Decision dated July 12, 2007 and Resolution dated November 15, 2007 are hereby **AFFIRMED** insofar as the deficiency final withholding tax for taxable year 1998.

Accordingly, petitioner is ORDERED TO PAY respondent the amount of P22,474,146.47 representing petitioner's deficiency final withholding tax plus interest and surcharges, computed as follows:

Basic Tax	P 12,039,721.30
25% Surcharge	3,009,930.33
Interest 01-26-99 to 02-25-02	7,424,494.84
Total	**P 22,474,146.47**

In addition, petitioner is hereby **ORDERED** to **PAY** twenty percent (20%) delinquency interest on the total amount of P22,474,146.47 from January 13, 2003 until full payment thereof, pursuant to Section 249(c)(3) of the 1997 Tax Code, as amended.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

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[26] *CIR vs Hantex Trading Co., Inc.* GR No. 136975, March 31, 2005.
[27] *CIR vs. CA*, 242 SCRA 313-314.

WE CONCUR:

JUANITO C. CASTANEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

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 Justice