REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

BANK OF AMERICA N.A. – MANILA BRANCH,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. Case No. 6144

Members:

CASTAÑEDA, JR., *Chairman,*
UY, and
PALANCA-ENRIQUEZ, *JJ.*:

Promulgated:

MAR 14 2005

x- -x

D E C I S I O N

CASTAÑEDA, Jr., J:

This is a judicial appeal from the inaction of respondent on the administrative protest filed by the petitioner against the various deficiency tax assessments issued by respondent for the calendar years 1995, 1996 and 1997 in the total amount of P753,838,679.76 pursuant to Section 228 of the National Internal Revenue Code of 1997.

Petitioner is the Manila Branch of Bank of America N.A. (formerly Bank of America NT & SA), duly organized and registered under the laws of the United States and authorized by the Securities and Exchange Commission to engage in business in the Philippines, with office address at 27/F Philamlife Tower, 8767 Paseo de Roxas, Salcedo Village, Makati City.

Records reveal that the tax audit was conducted pursuant to Letter of Authority (LA) No. 1997000018500 dated July 27, 1998 and received by petitioner on July 31, 1998 together with respondent's letter-request for production of petitioner's records and documents dated July 30, 1998 (*BIR Records, page 3369*).

On April 20, 1999, an informal conference was held attended by petitioner's representatives and the revenue examiners concerned.

Petitioner wrote a letter dated May 6, 1999 (*BIR Records, p.3371*) signed by its Vice-President – Country Operations Officer, Mr. Pablo K. Asuncion, Jr. requesting for an extension of time to submit response to respondent's audit report. Respondent replied through a letter dated May 10, 1999 (*BIR Records, p. 3519*) extending the period for the submission of petitioner's response to audit report until May 21, 1999 only.

A pre-assessment notice was issued by respondent on May 21, 1999 (*BIR Records, p. 3519*) with an attached summary of the results of investigation of petitioner's books of accounts and other accounting records covering the years 1995, 1996 and 1997.

On July 12, 1999, the assigned revenue examiners submitted a Memorandum to the respondent Commissioner of Internal Revenue advising the latter of the results of the investigation of the 1995, 1996 and 1997 internal revenue tax liabilities of the petitioner with the recommendation that Final Notices of Assessments be issued to facilitate collection of the taxes.

On September 30, 1999, Petitioner received from Respondent a Final Notice (*Exhibit E*) dated August 6, 1999, with various assessment notices (Assessment Notices Nos. 95-0025-99 to 97-0044-99) and Details of Assessment (*Exhibit Z*) covering the alleged deficiency income tax, withholding tax on compensation, expanded withholding tax, final tax, onshore tax, gross receipts tax, branch profit remittance tax and documentary stamps tax and their increments for the calendar years 1995, 1996 and 1997 in the total amount of P753,838,679.76. The following are the specific deficiency tax liabilities assessed against the petitioner:

	1995	1996	1997
A. INCOME TAX			
Basic - Sec. 27/34/50	P28,872,711.72	P174,732,883.19	P133,096,744.68
Interest - Sec. 249	20,432,351.90	88,706,642.81	40,949,875.44
Compromise - RMO 1-90	25,000.00	25,000.00	25,000.00
Amount due and Collectible	**P49,330,063.62**	**P263,464,526.00**	**P174,071,620.12**
B. W/TAX – COMPENSATION			
Basic - Sec. 72 (a)	P404,741.06	P2,044,439.93	P1,272,990.87
Interest - Sec. 249	304,438.13	1,128,898.84	448,321.62
Compromise - RMO 1-90	25,000.00	25,000.00	25,000.00
Amount due and Collectible	**P734,179.19**	**P3,198,338.77**	**P1,746,312.49**
C. EXPANDED WITHHOLDING TAX			
Basic - Sec. 50 (b)	P770,571.25	P127,596.87	P365,161.46
Surcharge - Sec. 248	0.00	0.00	10,591.49
Interest - Sec. 249	579,608.28	70,456.44	132,332.67
Compromise - RMO 1-90	25,000.00	12,000.00	16,000.00
Amount due and Collectible	**P1,375,179.53**	**P210,053.31**	**P524,085.62**
D. FINAL TAX			
Basic - Sec. 24 (B) (1)	P10,594,170.90	P75,971,470.86	P49,528,353.68
Interest - Sec. 249	7,968,723.47	41,949,926.78	17,442,895.60
Compromise - RMO 1-90	50,000.00	25,000.00	50,000.00
Amount due and Collectible	**P18,612,894.37**	**P117,946,397.64**	**P67,021,249.28**

E. ONSHORE TAX

Basic - Sec. 24 (e) (3)	P5,114,391.97	P2,520,899.60	P4,145,827.20
Interest - Sec. 249	3,846,943.35	1,391,990.34	1,460,077.42
Compromise - RMO 1-90	25,000.00	25,000.00	25,000.00
Amount due and Collectible	**P8,986,335.32**	**P3,937,889.94**	**P5,630,904.62**

F. PROFIT REMITTANCE TAX

Basic - Sec. 25 (a) (5)	P5,935,212.45	0.00	0.00
Interest - Sec. 249	4,464,348.10		
Compromise - RMO 1-90	25,000.00		
Amount due and Collectible	**P10,424,560.55**	**0.00**	**0.00**

G. GROSS RECEIPTS TAX

Basic - Sec. 119		P8,034,501.26	
Interest - Sec. 249		4,596,939.90	
Compromise - RMO 1-90		25,000.00	
Amount due and Collectible	**0.00**	**P12,656,441.16**	**0.00**

H. DOCUMENTARY STAMP TAX

Basic - Sec. 179/180/182		P2,231,878.08	P8,842,240.26
Surcharge - Sec. 248		557,969.52	2,210,560.07
Compromise - RMO 1-90	P25,000.00	50,000.00	50,000.00
Amount due and Collectible	**P25,000.00**	**P2,839,847.60**	**P11,102,800.33**

On October 29, 1999, petitioner filed its protest-letter with the respondent requesting for the withdrawal and/or cancellation of the Assessment Notices.

The relevant documents in support of its protest were submitted by the petitioner to the respondent on December 16 and 28, 1999. Pursuant to Section 228 of the National Internal Revenue Code (NIRC) of 1997, respondent had a period of 180 days from December 28, 1999 or until June 25, 2000 within which to decide the administrative protest.

Respondent, however, has not rendered a decision on petitioner's protest. Since the 180-day period lapsed on June 25, 2000 without any action by respondent on petitioner's protest, petitioner filed this Petition for Review on July 21, 2000 assailing the Assessment Notices together with the Details of Assessments as void for not complying with the provisions of Section 228 of the NIRC of 1997 as well as Section 3 (3.1.4) of Revenue Regulations No. 12-99 which requires that the taxpayer shall be informed of the law and the facts upon which the assessments were made.

The jointly stipulated issues for resolution are the following:

1. Whether or not the Final Notice of Assessment/Demand Letter dated August 6, 1999, with various Assessment Notices (Assessment Notice Nos. 95-00025-99 to 97-0044-99) and Details of Assessment issued by respondent assessing petitioner for alleged deficiency income tax, withholding tax on compensation, expanded withholding tax, final tax, onshore tax, gross receipts tax, profit remittance tax and documentary stamp tax, and their increments for taxable years 1995, 1996 and 1997 in the total amount of P753,838,678.59 is void for failure to comply with Section 228 of the Tax Code and Revenue Regulations 12-99.

2. Assuming that the Final Notice of Assessment/Demand Letter dated August 6, 1999, with various Assessment Notices (Assessment Notice Nos. 95-00025-99 to 97-0044-99) and Details of Assessment issued by respondent assessing petitioner for alleged deficiency income tax, withholding tax on compensation, expanded withholding tax, final tax, onshore tax, gross receipts tax, profit remittance tax and documentary stamp tax, and their increments for taxable years 1995, 1996 and 1997 in the total amount of P753,838,678.59, are not void, whether or not the same should be withdrawn and cancelled for lack of factual and/or legal basis. (*Joint Stipulation of Facts and Issues, CTA Records, p. 126*)

On the issue of the validity of the Assessment Notices pursuant to Section 228 of the NIRC of 1997 and Revenue Regulations 12-99, the petitioner advances the following arguments in support of its allegation that the assessments are void for non-compliance with Section 228 of the Tax Code of 1997 and as implemented by RR No. 12-99:

"Section 228 of the Tax Code of 1997 provides that the taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void. To implement the above

VL8

provision, the Department of Finance issued Revenue Regulations (RR) 12-99 on September 6, 1999. Sections 3.1.2 and 3.1.4 of RR 12-99 provide:

> 3.1.2 Preliminary Assessment Notice (PAN). – If after review and evaluation of the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based (**see illustration in Annex A hereof**). If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.
>
> 3.1.4 Formal Letter of Demand and Assessment Notice. – The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void (**see illustration in Annex B hereof**). The same shall be sent to the taxpayer only by registered mail or by personal delivery. If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and (d) date of receipt thereof.

In providing illustrative examples, RR 12-99 provided means that can facilitate or render least cumbersome the implementation of Section 228 of the Tax Code of 1997. In ascertaining whether an assessment complies with Section 228 of the Tax Code of 1997, Sections 3.1.2 and 3.1.4 and Annexes "A", "A-1" and "B" of RR 12-99 should be taken as a whole. The intention of the Secretary of Finance must be ascertained from the whole text of RR 12-99 and every part thereof should be taken into view (Commissioner of Internal Revenue v. TMX Sales, Inc., G.R. No. 83736, January 15, 1992; People v. Rivera, 59 Phil 236 [1933]).

xxx xxx xxx

Measured by the foregoing standards, Respondent's Final Notice is void for failure to conform with the requisites of Section 228 of the Tax Code of 1997 and RR 12-99. As is evident from the records, the Final Notice issued by Respondent to Petitioner for alleged deficiency income tax, EWT on compensation, EWT, final tax, onshore tax, GRT, BPRT and DST do not contain a memorandum explaining the details of the assessments. As testified by Ms. Cynthia V. Maravilla, while there are references to the provisions of

JT9

> the Tax Code, as amended, the Details of Assessment and the Assessment Notices do not explain how the provision applies to Petitioner. [Page 10, Transcript of Stenographic Notes ("TSN"), November 29, 2000) There is no indication as to how the tax base used were arrived at and why the same were being subjected to tax. The two-paged Details of Assessment does not even mention any DST due. (Exhibit [2] "Z"; Page 11, TSN, November 29, 2000) The amount of taxes discussed in the Final Notice (Exhibit "E") do not correspond with those in the Details of Assessment (Exhibit "Z").
>
> Moreover, some of the references in the Tax Code do not apply to Petitioner. The Final Notice (Exhibit "E") makes reference to Section 24 E(3) of the Tax Code on rates of tax on domestic corporations although the same does not apply to Petitioner, which is a foreign corporation existing under and by virtue of the laws of the United States. (Page 13 TSN, November 29, 2000)
>
> The Final Notice issued by Respondent for the alleged deficiency taxes, therefore, miserably fails to comply with the requirement that it should state the law and the facts on which the assessment is based. Thus, the assessments are void pursuant to Section 228 of the Tax Code, as amended.
>
> The provisions of Section 228 and RR 12-99 are mandatory. (Azucena T. Reyes v. Commissioner of Internal Revenue, CA G.R. SP No. 71392, August 8, 2003)." *(Memorandum for the Petitioner, CTA Records, pp. 460 – 467)*

On the second issue, petitioner alleges that the assessment is without factual basis as the Petitioner complied with existing laws in the determination and payment of its taxes. In its Memorandum, petitioner made an item by item discussion of its arguments against the assessments made against it by the respondent. For purposes of brevity, the Court deemed it necessary to take up petitioner's arguments on each item of assessment simultaneously with the resolution thereof.

On the issue of whether or not the Final Notice of Assessment/Demand Letter dated August 6, 1999, with various Assessment Notices and Details of Assessment are void for failure to comply with Section 228 of the Tax Code and Revenue Regulations 12-99, the Court finds petitioner's arguments untenable.

The purpose of the requirement that the taxpayer shall be informed of the law and facts on which the assessment is made, found in Section 228 of the NIRC of 1997, "is to give the taxpayer the opportunity to refute the findings of the examiner and give a more accurate and detailed explanation regarding the proposed assessment(s)" ***(Belle Corporation vs. Commissioner of Internal Revenue, CTA CASE NO. 5930, April 4, 2002).***

On May 27, 2003, respondent's witness, Felina Guimbao, the revenue examiner who conducted the examination of petitioner's 1995, 1996 and 1997 tax liabilities, testified that the petitioner was duly informed of the results of her investigation and examination of petitioner's records thru an informal conference held on April 20, 1999. That sometime after the informal conference, a Preliminary Assessment Notice (PAN) was issued and finally, a Final Notice of Demand was issued calling for the payment of deficiency taxes (*TSN, May 27, 2003, p. 9*). The aforementioned testimony of respondent's witness was not disputed. In fact, petitioner's counsel did not even cross-examine respondent's witness (*Minutes of the Hearing, July 3, 2003*).

There is no denying that an informal conference was held on April 20, 1999 between the authorized representatives of the petitioner and respondent. The purpose of the informal conference is to afford the petitioner an opportunity to give its side, to interpose objections and/or present documentary evidence to disprove the proposed assessment. It is likewise undisputed that Petitioner wrote a letter addressed to the then Commissioner of Internal Revenue, Mr. Beethoven L. Rualo, dated May 6, 1999 (*BIR Records, p. 3371*) signed by its Vice President – Country Operations Officer, Mr. Pablo K. Asuncion, Jr. requesting for an extension of time to submit its response to respondent's audit report.

Thereafter, a pre-assessment notice was issued by respondent on May 21, 1999 together with an attached summary of the results of investigation of petitioner's books of accounts and other accounting records covering the years 1995, 1996 and 1997. This pre-assessment notice was received by petitioner's representative on May 27, 1999. Said pre-assessment notice provides:

> "If you are not agreeable to the findings, you or your authorized representative may see the Assistant Commissioner – Enforcement Service to clarify issues arising from the investigation and/or review of your tax case. However, if we do not hear from you within fifteen (15) days from receipt hereof, we will presume that you are agreeable to the proposed assessment in which case, the corresponding letter of demand will be sent to you upon approval of the report of investigation."

Finally, on September 30, 1999, petitioner received a Final Notice dated August 6, 1999 requesting payment in accordance with the attached assessment notices within thirty (30) days from receipt thereof. The Details of Assessment accompanying the Assessment Notices cited the particular laws upon which the assessments were based.

Considering the foregoing circumstances, the Court finds that the petitioner was afforded the opportunity to refute the findings of the respondent. The petitioner was given the opportunity to present its side during the informal conference as well as after the issuance of the preliminary assessment notice (PAN) and the Final Assessment Notices (FANs). It is clear that the assessment of the deficiency tax liabilities of the petitioner was arrived at after undergoing the entire process of reviewing the financial records of the petitioner, communicating the findings of the

577

revenue examiners to the petitioner, formally serving the PAN to the petitioner and lastly, issuing the FANs for the deficiency tax liabilities of the petitioner. At any stage of the assessment process, the petitioner could have acquired complete knowledge of the facts from the respondent or his authorized representatives if it really wanted to have such knowledge.

As stated above, the underlying reason for the requirement of stating the law and the facts on which the assessment is made is to enable the taxpayer to refute the findings of the respondent. In the case before Us, a perusal of petitioner's protest-letter dated October 29, 1999 (*Exhibit AA*) readily reveals that petitioner had specific knowledge not only of the accounts involved but the amounts as well. Its protest-letter, consisting of sixteen (16) pages, is replete with arguments against each specific item covered by respondent's assessment notices. The only logical conclusion is that petitioner had actual knowledge of the matters included in the assessments even if it claims that the Details of Assessment did not state the facts upon which the assessment is based.

In the afore-cited case of ***Belle Corporation vs. CIR, supra***, this Court ruled:

> Likewise, in its protest letter dated March 1, 1999, petitioner was able to explain in detail and submit documents to support its claim that the assessments were erroneous. Verily, at the time the assessments were issued, petitioner knew very well the law and the facts on which they were based. The purpose of the law having been served, Section 228 of the Tax Code may be deemed to have been complied with.
>
> Since we rule that by petitioner's actual knowledge of the bases of the assessments, the requirement under Section 228 of the Tax Code that 'the taxpayer be informed of the law and the facts on which the assessment is made' is deemed to have been complied, it follows then that the assessments dated November 27, 1997 are not null and void, even if the same failed to state the law and the facts on which they were based.

573

This Court has consistently and unanimously ruled that substantial compliance with the requirements of Section 228 of the Tax Code makes the Final Assessment Notices valid and binding against the taxpayer (***AVON PRODUCTS, INC., vs. COMMISSIONER OF INTERNAL REVENUE, CTA CASE NO. 5908, January 20, 2005, 2nd Division; SONY PHILIPPINES, INC. vs. COMMISSIONER OF INTERNAL Revenue, CTA CASE NO. 6185, October 26, 2004, 1st Division; ING BANK N.V. MANILA BRANCH vs. COMMISSIONER OF INTERNAL REVENUE, CTA CASE NO. 6187, August 9, 2004; FMF DEVELOPMENT CORPORATION vs. COMMISSIONER OF INTERNAL REVENUE, CTA CASE NO. 6153, March 20, 2003; UNIQUE DYEWORKS, INC. vs. COMMISSIONER OF INTERNAL REVENUE, CTA CASE NO. 5931, June 26, 2002; PNZ MARKETING, INCORPORATED vs. COMMISSIONER OF INTERNAL REVENUE, CTA CASE NO. 5726, December 14, 2001)***

In the case before Us, the Court finds that the disputed Final Assessment Notices are valid and binding, there being substantial compliance with Section 228 of the NIRC of 1997.

We will now proceed to the second issue pertaining to the factual and/or legal basis of the specific items included in the FANs.

I. EXPANDED WITHHOLDING TAX (EWT)

A. 1995 ASSESSMENT

Account Name	Amount
Rental	P 74,358.52
Advertising and Promotion	21,729.94
Janitorial & Security Services	7,323.09
Building Repairs and Maintenance	667,159.70

Total Basic Tax Due	P 770,571.25.00
Add: Interest	579,608.28
Compromise Penalty	25,000.00
Total Tax Deficiency	**P 1,375,179.53**

1. Rental

The respondent assessed the petitioner for deficiency 5% EWT on rental payments on the basis of the following (*BIR Records, p. 3400*):

Account Name	GL Account Code	Amount
Rental Parking	425254	P 1,056,198.05
Premises Other	425372	113,188.48
Housing Expat		1,787,207.78
Total Per GL		P 2,956,594.31
Total Per Alphalist		1,469,424.00
Rental still subject to EWT		P 1,487,170.31
5% EWT due thereon		**P 74,358.52**

a. Rental - Parking

Respondent assessed 5% EWT on rental on parking fees paid by petitioner to Ayala Land, Inc. for rental of parking slots at the Valero Carpark Building in the amount of P1,056,198.05. Petitioner is contending that these pertain to reimbursement of parking fees paid to employees and that the same are therefore not subject to EWT, pursuant to BIR Ruling No. 1-90, dated January 4, 1990, which provides that mere reimbursements of actual expenses without any mark-up or profit element are not subject to EWT.

In a number of rulings, the BIR has held that reimbursements of actual expenses are not subject to withholding tax (see BIR Ruling Nos. 28-80, undated, 156-84 dated September 12, 1984, and 129-92, dated April 20, 1992). Accordingly, in order for the expenses to be not subject to withholding tax, it must first be established that they are reimbursements of actual expenses. This is what the petitioner failed to do. It fell short of establishing that the income payments (rentals) are actually reimbursements of parking expenses of its employees. It merely presented as evidence entries in GL Account Code (GL Code) 425254 – Rent – other than travel in the General Expense Detail Report (Exhibit DDD). The description of the entries states "Valero Parking." The evidence presented does not at all prove that the amounts in the entries are actually reimbursements to employees for their parking fees. Petitioner could have presented sample reimbursement forms/vouchers with attached parking tickets/statement and trace them to a specific general ledger entry to prove that the figures recorded in GL Code 425254 are actually reimbursements of parking fees.

Moreover, the independent CPA's verification confirmed that there are particular parking slots in the Valero Carpark Building exclusively designated for petitioner's use, and that the parking fees should have been subjected to 5% EWT.

b. Premises Others

Respondent assessed deficiency 5% EWT on rental on storage fees (paid by petitioner to Datalift Movers, Inc. and Lane Moving and Storage) in the amount of P113,188.48. These items formed part of GL Code 425372 (Premises Others).

Petitioner contends that storage fees are not in the nature of rental fees or lease payments, and thus the storage fees are not subject to 5% EWT on rental.

In VAT Ruling No. 255-89 dated October 13, 1989, cited by petitioner, the BIR ruled that payments received for rentals of warehouses are not subject to VAT because a contract for storage of goods is different from a contract of lease. A leased storage/warehouse facility is not a lease of real property as contemplated in Article 1643 in relation to Article 1648 of the Civil Code. Unlike a contract of storage of goods, a lease involves the execution of an instrument by which the exclusive possession of property is given for a limited period. The customer in a contract of storage does not require exclusive possession of a fixed storage area because other goods belonging to other customers are also stored there. Lastly, the consideration paid for the use of the leased property partakes the nature of a storage charge (which is a consideration for rendering of storage services) rather than rent (which is a consideration for the lease of real property).

A reading of the contract between petitioner and Lane Moving and Storage (Exhibit FFF) shows that the petitioner is actually paying for the storage of files for safekeeping and preservation, such that the nature of the fees is service fees and not rental fees. Files are stored in magnetic tapes and diskettes placed inside cartons and safety deposit boxes, which are all stored inside a highly-secured vault. The petitioner is also paying for each magnetic tape and diskette used to store its files.

Thus, since the income payments are not in the nature of rental fees, the same is not subject to 5% EWT on rental. However, there is a question of whether the storage fees are actually warehousing fees subject to 1% EWT, pursuant to Section 1(e)(2)(d) of Revenue Regulations (RR) No. 6-85 dated May 2, 1985.

In VAT Ruling No. 052-91, the BIR ruled that the contract of San Miguel Corp. with Philippine Cryo Foods Corp. (owner of cold storage facilities) is not a lease of real property but, rather, a warehousing contract. Citing *U.C.C., 7-102. State ex rel. and for Use and Benefit of Cawrse v. American Surety Co. of New York*, 148 Or. 1, 35 P.2d 487, 491, it defined a warehouseman as one engaged in business of receiving and storing goods of others for compensation or profit; person who receives goods and merchandise to be stored in his warehouse for hire; one who, as a business and for hire, keeps and stores goods of others. Citing *Black's Law Dictionary*, the business is public or private as it may be conducted for storage of goods of general public or for those of certain persons. . . ."

Moreover, under US jurisprudence, which has persuasive effect in the Philippines, the operation of safe deposit vaults is not a true "warehousing," though law of warehousemen is applied thereto for convenience (*Words and Phrases Vol. 44, p. 641, citing Bank of California v. City of Portland, 69 P.2d 273, 278, 157 Or. 203, 115 A. L.R. 676*).

Using the foregoing guidelines, the payment of the petitioner to Datalift Movers, Inc. and Lane Moving and Storage for storage of files for safekeeping and preservation, placed in safe deposit vaults, can be construed as warehousing fees. These storage fees, considered as payments to warehousing contractors, are subject to 1% EWT. Since the petitioner did not subject these storage fees to EWT, whether at the rate of 5% or 1%, the petitioner has deficiency 1% EWT in the amount of P1,131.88 plus interest.

c. Housing Expat

Included in the "housing expat" expense which respondent considered as subject to 5% EWT on rentals are payments for the expatriate's electricity, water, and gardening expenses in the amount of P297,783.78, which the petitioner believed is not subject to EWT since these are merely reimbursements to its expatriate employees for the latter's actual expenses.

The recorded expenses are actual payments for electricity, water, and gardening services the details of which can be found in Exhibit DDD under GL Code 363520. There are specific amounts for gardeners' allowance, electricity, water, and house rental. And since income payments to gardeners, electricity, and water are not subject to EWT, the petitioner is correct in its practice of not subjecting them to EWT, whether they are reimbursements or not.

Considering the above, the petitioner is still subject to deficiency 5% EWT on rentals amounting to P53,809.90, plus interest, computed below:

Total per GL	P 2,956,594.31
Less: Rental not subject to EWT	
Premises Other	113,188.48
Housing Expat	297,783.78
Rental subject to withholding tax	P 2,545,622.05
Less: Total per Alphalist	1,469,424.00
Rental Still Subject to EWT	P 1,076,198.05
5% EWT due thereon	**P 53,809.90**

2. Advertising and Promotion

The respondent assessed the petitioner for deficiency 1% EWT on payments for advertising and promotion on the basis of the following (BIR Records, p. 3400):

Account Name	GL Account Code	Amount
Advertising	374212	P 55,410.00
Newspaper & Publication	409815	741,096.45
Public Relation Others	365760	1,105,452.66
Business Development Others	635802	403,819.92
Total Per GL		P 2,305,779.03
Less: Amount per 1701B		132,785.00
Advertising & Promo still subject to EWT		P 2,172,994.03

1% EWT due thereon **P 21,729.94**

a. Advertising

Respondent considered advertising expense amounting to P55,410.00, recorded in GL Code 374212, as subject to 1% EWT.

Petitioner, on the other hand, avers that the expense in GL Code 374212 is not subject to EWT because this represents payments to Philippine Today, Inc. for the printing of published statement of conditions. Since these are direct payments to media, they are not subject to EWT pursuant to Section 1(e)(2)(h) of RR No. 6-85, which states that:

> (e) Amounts paid to certain contractors. On gross payments to the following contractors, whether individual or corporate – one per centum (1%): xxx
>
> 2. Other contractors – xxx
>
> (h) Advertising agencies, **exclusive of the amount paid or payable to media**;" (Emphasis supplied)

We agree with petitioner.

Direct payments to media are not subject to EWT. Petitioner has sufficiently established that the expense in GL Code 374212 represents direct payments to media by presenting as evidence the general ledger entries with description "st of condition" (Exhibit DDD) and Annual Information Return of Income Payments Not Subject to EWT (Exhibit EEE).

Thus, income payments for advertising in the amount of P55,410.00 should not have been included by respondent in the list of income payments subject to 1% EWT.

b. Newspaper and Publication

Respondent considered payments for newspaper and publication in the amount of P741,096.45, recorded in GL Code 409815, as subject to 1% EWT.

On the other hand, petitioner avers that payments for newspaper and publication are not subject to EWT pursuant to Section 1(e)(2)(f) of RR No. 6-85, which states that:

> (e) Amounts paid to certain contractors. On gross payments to the following contractors, whether individual or corporate – one per centum (1%): xxx
>
> 2. Other contractors – xxx
>
> (f) Printers, bookbinders, lithographers and publishers **except those principally engaged in the publication or printing of any newspaper, magazine, review or bulletin which appears at regular intervals, with fixed prices for subscription and sale**;" (Emphasis supplied)

A verification of petitioner's records shows that expenses under GL Code 409815 pertain to payment to newspapers, magazine, and circular subscriptions (e.g. Asian Wall Street Journal, Philippine Daily Inquirer, Bulletin Today, PC Computer Magazines, and CB Circulars) (Exhibit DDD). These are publications which appear at regular intervals with fixed prices of subscription and sale. Moreover, they are generally known as not principally devoted to the publication of advertisements. Based on the above rules and regulation, payments by petitioner for these publications are not subject to EWT.

However, the exempt payments for newspaper and publication should be limited to P382,098.23 because this is the only amount reported by petitioner as exempt from EWT as shown in Exhibit EEE, which was also verified by the commissioned independent CPA (Exhibit AAA-8).

Thus, income payments for newspaper and publication in the amount of P382,098.23 should not have been included by respondent in the list of income payments subject to 1% EWT.

c. Public Relations and Business Development

Respondent considered payments for public relations (GL Code 365760) and business development (GL Code 635802) in the amounts of P1,105,452.66 and P403,819.92, respectively, as subject to 1% EWT.

V80

Petitioner avers that its payments for public relations and business development are not subject to EWT. The payments included membership dues, seminar fees, sponsorship cost which are not among the items subject to EWT in RR No. 6-85. They also include purchases of banners, greeting cards, Christmas giveaways, t-shirts, and flower arrangements, which are also not subject to EWT since these are casual purchases from non-regular suppliers amounting to less than P100,000.00.

Petitioner has been included in the list of Top 5,000 corporations since 1994. As such, it is required to subject to 1 % EWT all income payments to its local suppliers of goods, pursuant to Revenue Memorandum Circular (RMC) No. 28-94. The same RMC defined "local supplier of goods" as a supplier whom any of the top 5,000 corporations regular makes its purchases of goods. As a general rule, this term does not include a casual purchase of goods, i.e. not from regular suppliers and oftentimes involving single purchases, unless the amount of the purchase, at any one time, involves P100,000.00 or more, in which case, such purchase of goods shall be subject to EWT.

Verification showed that most of the expenses for public relations and business development are really membership dues, sponsorships, and seminar fees (Exhibit DDD). They are not included among the income payments subject to EWT per RR No. 6-85, thus they should not be subject to EWT. From the P1,237,752.04 public relation expense verified by the independent CPA as exempt (Exhibit AAA-9 & AAA-10) based on petitioner's Information Return for Income Payments Not Subject to Withholding Tax (Exhibit EEE), only P749,678.56 should be allowed as actually exempt. From the P131,661.98 business development expense verified by the independent CPA as exempt (Exhibit AAA-10) from EWT, only P96,976.98 should be allowed as actually exempt. The same is shown below:

Particular	Nature of Income Payment	Amount
Public Relations		
American Chamber of Commerce	Advertisement/Membership	P 72,410.00
Bank Admin. Inst.	Seminar Fee/Membership	70,934.56
Bank Security Mgt. Assoc.	Membership Dues	4,000.00
Bankers Club	Membership Dues	3,000.00
Bankers Council for Personnel Mgt.	Membership Dues	2,100.00

581

Center for Research & Communications	Membership Dues/Seminar Fees	26,600.00
Credit Card Assoc. of the Phils.	Assessment	14,840.00
Dell's Canteen Services	Meals Seminar	11,304.00
EIU Phils.	Membership Dues/Phil.Wkly Up	142,500.00
Employees Confederation of the Phils.	Membership Dues	2,700.00
FINEX	Membership Dues	20,400.00
Foreign Exchange Assoc. of the Phils.	Membership Dues	72,150.00
Illam	Sponsorship	28,000.00
Jr. Achievement of the Phils.	Membership Dues/Sponshp/Adv	10,000.00
Likharawan	Referral Awards Program	3,800.00
Makati Business Club	Membership Dues	12,000.00
Money Market Assoc. of the Phils.	Membership Dues/ Seminar Fee	56,750.00
Paranaque Chamber of COmmerce	Ad Souvenir Program	3,000.00
Personnel Mgt Assoc. of the Phils.	Membership Dues/Seminar Fee	3,500.00
Southridge Build-a-chapel	Donation	5,000.00
ANZ Chamber of Commerce	Membership Dues	6,000.00
Assoc. of Credit Exec. in Tourism	Membership Dues	1,500.00
SIS Tech. Phils. Inc.	Seminar Fee	12,745.00
Autism Society	Ad-souvenir program	1,500.00
Clearing Officers Club	Membership Dues / Seminar Fee	3,500.00
Makati Police Assoc.	10 tickets Makati Police	3,000.00
Manila Golf & Country Club	Membership Dues	25,000.00
Asia Summit Corp.	Convention Fee	29,925.00
Business Focus Manila	Seminar Fee	22,500.00
Equitable Computer Services Inc.	Seminar Fee	57,420.00
Integrated Computer System	Seminar Fee	21,600.00
Total		**P 749,678.56**

Business Development		
Philippine Basketball Assoc.	Ad-souvenir program	P 9,000.00
Manila Golf & Country Club	Membership Dues	87,976.98
Total		**P 96,976.98**

Purchases of goods (e.g. t-shirts, Christmas giveaways, flower arrangements, greeting cards, ballpens, etc) considered as exempt by petitioner are not included in the above allowed exempted items. Petitioner has failed to show that the same were not purchased from its local suppliers of goods. It did not present sufficient documents to prove that they are actually casual purchases of goods from non-regular suppliers. More importantly, the petitioner failed to present as evidence a list of its regular suppliers, required to be submitted every semester to the Revenue District Office (RDO) having jurisdiction over petitioner's principal place of business, pursuant to RMC No. 28-94, the same RMC cited by petitioner in its memorandum.

Petitioner also claims that P24,063.17 of the amount in public relations expense represents common area charges billed by B.A. Lepanto Condominium Corporation (BALCC) to the bank. These charges consist of advertising and promotion, janitorial and security services, and repairs and maintenance. Verification showed that the P24,063.17 represents advertising and promotion expenses reimbursed by petitioner to BALCC. These were traced to Exhibit DDD and 1995 Summary of Expenses of BALCC and Expenses of Equity Sharing (Exhibit GGG). Since the P24,063.17 expenses are mere reimbursements, they are not subject to EWT, as previously discussed. Moreover, petitioner has shown that BALCC subjects its income payment to EWT by submitting as evidence BALCC's 1995 Annual Information Return on Creditable Taxes Withheld (Exhibit HHH).

Considering the above, the petitioner is still subject to deficiency 1% EWT on advertising and promotion in the amount of P8,647.67, plus interest, computed below:

Total Per GL		P 2,305,779.03
Less: Income payments not subject to EWT		
Advertising	P 55,410.00	
Newspaper & Publication	382,098.23	
Public Relation Others	749,678.56	
Business Development Others	96,976.98	
BALCC's reimbursement	24,063.17	1,308,226.94
Adjusted Advertising & Promo subject to EWT		P 997,552.09
Less: Amount per 1701B		132,785.00
Advertising & Promo still subject to EWT		P 864,767.09
1% EWT due thereon		**P 8,647.67**

3. Janitorial and Security Services

The respondent assessed the petitioner for deficiency 1% EWT on payments for janitorial and security services on the basis of the following (BIR Records, p. 3400):

Account Name	GL Account Code	Amount
Janitorial	418923	P 1,067,968.24
Guard	418942	1,333,349.38
Others	419050	290,351.20
Other Armored transport services	412346	1,980,000.00
Total Per GL		P 4,671,668.82
Total Amount per Alpha List		3,939,359.92
Janitorial & Sec. Still subject to EWT		P 732,308.90
1% EWT due thereon		**P 7,323.09**

Petitioner contends that it withheld on a total of P4,210,796.51 janitorial and

√83

security-related payments, which are reflected in its 1995 Annual Return of Creditable Income Tax Withheld (Exhibit CCC). The items in the said document formed part of the corresponding GL Codes used in respondent's assessment, based on Exhibit DDD, which includes janitorial services, guard services, other armored transportation and other services like mailing, handyman, and movers. On the other hand, respondent did not indicate in his assessment how P3,939,359.92, allegedly from the petitioner's alpha list, was computed.

Verification of the evidence presented (Exhibit CCC) showed that petitioner withheld P42,097.56 EWT on a total of P4,209,796.51 janitorial and security-related payments, broken down as follows:

Particulars		**Amount of Income**	**Tax Withheld**
Janitorial: Consolidated Bldg. Maintenance		P 856,381.36	P 8,563.81
Guard: Prince Security	P255,240.00		
Tamaraw Security Service	862,421.25	1,117,661.25	11,176.61
Others: Ace Marketing	P 40,950.00		
Oscar Araneta	185,250.00		
Datalift Movers	29,553.90	255,713.90	2,557.14
Other Armored Transport:			
Tamaraw Reinf Armored Car Svcs		1,980,000.00	19,800.00
TOTAL		**P 4,209,796.51**	**P 42,097.56**

Thus, the amount in "Total Amount per Alpha List" in respondent's computation should have been P4,209,796.51.

There is therefore remaining P461,872.31 (P4,671,668.82 – P4,209,796.51) "Janitorial and Sec. Still subject to EWT" to be accounted for. The petitioner avers that P448,603.60 of the amount of P461,872.31 represents reimbursements to BALCC for janitorial and security services and, thus, not subject to EWT. Verification showed that only P438,469.91 (janitorial-P221,166.65; security-P217,303.26) of the amount of P448,603.60 had been charged to expense by petitioner (Exhibit DDD). Petitioner presented the 1995 Summary of Expenses of BALCC and Expenses of Equity Sharing (Exhibit GGG), to prove that the amount of

P438,469.91 are actually mere reimbursements, and BALCC's 1995 Annual Information Return on Creditable Taxes Withheld (Exhibit HHH), to prove that BALCC withheld on its income payments to third party suppliers. Thus, P438,469.91 should not form part of the income payments for janitorial and security services still subject to EWT.

The petitioner also claims that P41,297.00 of the amount in GL Code 419050 – Building Contract Services-Others, used by the respondent as basis for his assessment, is not subject to EWT. The expense of P41,297.00 relates to contract services for landscaping and lobby plant maintenance, window washing, laundry and cleaning, towels and electric signs. According to petitioner, these items are not among those enumerated in RR No. 6-85 as subject to EWT.

As traced from petitioner's General Expense Detail Report for 1995 (Exhibit DDD), the breakdown of the amount P41,297.00 is as follows:

Nature of Income Payment	Amount
Laundry	P 8,770.00
Cachola services	2,125.50
Houseline installation	9,000.00
Hard disk installation	2,200.00
Relocation of telerate equipment	19,201.50
Total	**P 41,297.00**

Laundry and cachola services are not among those enumerated in RR No. 6-85 as subject to EWT. However houseline installation, hard disk installation, and relocation of telerate equipment may fall under the following income payments in Section 1(e)(2) of RR No. 6-85:

> "(e) Amounts paid to certain contractors. On gross payments to the following contractors, whether individual or corporate – one per centum (1%): xxx
>
> 2. Other contractors – xxx
>
> (c) Persons engaged in the installation of water system, and gas or electric light, heat, or power; xxx
>
> (e) Transportation contractors for the carriage of goods and merchandise of whatever kind by land, air or water; xxx
>
> (l) Persons engaged in the installation of elevators, central air-conditioning units, computer machines and other equipment and

machineries and the maintenance of services thereon; xxx."

Thus, of the P41,297.00 being claimed by the petitioner, only P10,895.50 (laundry-P8,770.00 and cachola services-P2,125.50) can actually be considered not subject to EWT.

Considering the above, the petitioner is still subject to deficiency 1% EWT on janitorial and security service payments in the amount of P125.07, plus interest, computed below:

Total Per GL		P 4,671,668.82
Less: Income payments not subject to EWT		
BALCC's reimbursement	P 438,469.91	
Laundry and cachola services	10,895.50	449,365.41
Adjusted Jan'l & Sec. subject to EWT		P 4,222,303.41
Total amount per alpha list		4,209,796.51
Janitorial & Sec. still subject to EWT		P 12,506.90
1% EWT due thereon		**P 125.07**

4. Other services

The respondent assessed the petitioner for deficiency 1% EWT on payments for various services on the basis of the following (BIR Records, pp. 3400-3401):

Account Name	GL Account Code	Amount
Building Repairs and Maintenance	423118	P 2,689,761.41
Repairs and Maintenance EDP Eqt.	429592	958,779.63
-Other Eqpt./Furniture	429691	980,874.37
Contract Services-Data Processing	418928	20,251,195.85
Interchange Fees Paid		
Master Card	329828	14,223,669.00
VISA	329861	33,851,678.33
Equipt. Rent		
Photocopy	427456	301,342.21
Others	427499	3,204,728.28
Stationery & Supplies	401390	1,938,768.74
Exp. Software Packages Purchased	471072	66,324.00
Exp. Hardware Equipment Purchased	471138	98,600.00
Exp. Other Equipt. & Furniture	471171	864,198.60
Increase in Computer & Peripheral Eqpt.		7,039,244.00
Increase in Furniture & Fixture		11,828,280.00

Total Per GL		P 98,297,444.42
Less: Amount per 1701B	P 2,859,933.57	
Amount per Alpha List	28,721,540.82	31,581,474.39
Amount Still subject to 1% EWT		P 66,715,970.03
1% EWT due thereon		**P 667,159.70**

a. Amount per 1701B

According to the petitioner, the amount per 1701B should have been P5,340,647.26, instead of only P2,859,993.57. Said amount represents income payments for casual purchases of goods (e.g., stationery, supplies, software packages, hardware equipment, other equipment, and furniture) from non-regular suppliers in amounts less than P100,000.00. Since petitioner is included in the list of Top 5,000 corporations, it is required to subject to 1% EWT all income payments to its local supplier of goods except for casual purchases of goods, i.e. not from regular suppliers and oftentimes involving single purchases, unless the amount of the purchase, at any one time, involves P100,000.00 or more.

However, as discussed earlier, petitioner failed to present sufficient evidence to prove that all of the alleged purchases amounting to P5,340,647.26 were casual purchases of goods. From the documents submitted, the Court finds that the total amount of P2,166,616.75 should have been subjected to EWT. The breakdown is as follows (Exhibits EEE & AAA-20 to AAA-24):

Particulars	Nature of Income Payment	Amount
Hongkong Hardware Supplier	Door Bumper	P 816.00
Ferco Hardware & Construction Supply	Hardware Supplies	6,855.90
Southern Electric Products Inc.	Electrical Supplies	16,690.00
Brick Myrill, Inc.	Computer Supplies	7,400.00
Microcircuits Corporation	Modem	37,700.00
E & L Gentec Ent. Co.	Aircon parts	14,500.00
Lux Manufacturing, Inc.	Water purifier Parts	2,217.00
Greenpole Industrial & Trading Corp.	Watercooler Parts	3,000.00
Honda Cars Makati	Floor mats	1,100.00
TCG Cycle Center	Motorcycle parts	1,083.00
Adman Resources	Umbrella	211,070.00
Are Trade Enterprises	Ballpens	36,000.00
Asia Network Technology Corp.	Sports Bags	109,500.00
Budabosa Treebank	Christmas giveaways	30,000.00
Contemporary Club Concepts, Inc.	Christmas giveaways	54,550.00
Gencap, Inc.	Caps	16,000.00
Gift Concepts	Ballpens & Perpetual Calendars	48,000.00

587

Particulars	Nature of Income Payment	Amount
Pan West Sports, Inc.	Golf balls & bags	24,220.00
PW Manufacturing & Trading Corp.	Golf bags	5,100.00
Star Paper Corporation	Christmas giveaways	17,374.50
Files Systems Mfg & Supply Co.	Office supplies	25,245.00
Laxon Enterprises, Inc.	Supplies	5,122.50
Macrovent Enterprises	Computer supplies	1,100.00
Nova Business Systems Inc.	Office supplies	3,903.00
Office Line Systems Sale & Services	Office supplies	300.00
Prompt Sales	Diskettes	14,620.00
Microbase Incorporated	Software	75,900.00
Phil-Data Business Systems Inc.	Software	13,516.00
Micorbase Incorporated	Computer Parts	98,820.00
Erthco Environmental Service Inc. Phils.	Asbestos	77,605.00
Che Corporation	Checkwriter	14,150.00
Geralds Marketing	Magnetic tape	12,800.00
Locator Int'l Telecom & Traders Corp.	Telephone Parts	29,040.00
Pookoo Phils., Inc.	Digital rate board	31,800.00
Topros, Inc.	Paper shredder	65,150.00
Total Commercial & Industrial Corp.	Feed rollers	12,500.00
AA Aluminum Supply	Ladders	7,400.00
Adcoms Int'l Inc.	Kyeboard tray	4,550.00
Business Machines Corp.	Microfilm supplies	11,835.00
Kirsten Int'l	Officers chairs	57,472.00
Link Asia Marketing (Phils) Inc.	La Guard time clock	17,850.00
Teltronics Corp.	Cabling voice recorder	2,160.00
SM Equicom Computer Services Inc.	Computer supplies	174,080.00
Unison Computer Systems, Inc.	Computer	428,400.00
Magnabyte Corporation	Computer supplies	152,280.00
Microbase Incorporated	Software & Printer for Clearing	15,000.00
Ambassador Home & Electronics Centre	Appliances	61,650.00
Automatic Center	Appliances	40,718.00
Dixon Metal Enterprises	Mobile cabinet	10,577.00
First Lepanto Ceramics, Inc.	Floor tiles	3,398.00
Persian Carpet Palace	Persian carpet	7,500.00
Star Appliance Center, Inc.	Appliance	36,429.25
CWC International Corp.	Fabric of Sofa	10,569.60
Total		**P 2,166,616.75**

The rest of the amount, P3,174,030.51, are not subject to EWT, as the description of the income payments are not among those included under the items subject to EWT pursuant to RR No. 6-85. The breakdown is as follows (Exhibits EEE, AAA-21, & AAA-22):

Particulars	Nature of Income Payments	Amount
Philippine Global Communications Inc.	Telex/fax charges	P 426,587.80

V88

Eastern Telecommunications Phils.	Telex/fax usage	346,532.50
Globe Telecom	Telex/fax usage	20,097.10
Phil. Long Distance Telephone Co.	Telephone services	193.30
Cesar Tinampay	Car rental	1,150.00
Golf Auto Rental Corporation	Car rental	93,217.25
Cosmo Car Rental, Inc.	Car rental	3,563.00
Credit Card Association of the Phils.	Assessment	17,800.00
DHL Worldwilde Express	Taxes & Duties	140,565.74
First Datacorp	Pacific Connect	16,000.00
Infocraft	Pacific Connect	200.00
Shangri-la Hotel, Manila	Banquets	26,412.11
Sycip Salazar Hernandez Gatmaitan	Legal services	40,600.00
Cebu Plaza Hotel	Lodging	10,010.71
Century Park Sheraton Manila	Lodging	28,995.73
Gilarmi Apartments	Lodging	13,698.00
Mandarin Oriental Manila	Banquets	222,514.90
Punta Baluarte	Lodging	113,817.81
The Heritage Hotel Manila	Lodging	44,037.56
The Peninsula Manila	Banquets	59,234.04
Micro Data Systems Management Inc.	Projector Rental	6,500.00
U-BIX Corporation	Rent Sorter	250.00
Telerate Financial Info Network LTD	Landline Rental	1,542,052.96
Total		**P 3,174,030.51**

Thus, the amount in respondent's assessment as "Amount per 1701B" should be P3,174,030.51 instead of P2,859,933.57.

b. BA Lepanto Condominium Corp. (BALCC) Reimbursements – Repairs and Maintenance

Petitioner contends that the P1,838,433.00 of the amount in GL Code 423118 – Building Repairs and Maintenance represents reimbursements to BALCC for common area charges billed by the latter. The said amount is specifically for repairs and maintenance. This amount was traced to Exhibit DDD and Exhibit GGG. Since the amount P1,838,433.00 represents reimbursements only, the same is not subject to EWT. Moreover, petitioner has shown that BALCC subjects its income payment to EWT by submitting as evidence BALCC's 1995 Annual Information Return on Creditable Taxes Withheld (Exhibit HHH).

c. Contract Services

Petitioner contends that the amount of P10,008,460.21 in GL Code 418928 – Contract Services – Data Processing represents reimbursements for expenses advanced by BA Savings Bank (BASB), an affiliate of the petitioner. Since these are mere reimbursement of actual expenses, these are not subject to EWT.

Petitioner has existing agreements with VISA International and Mastercard authorizing the former to administer agreements with merchants who wish to honor VISA and Mastercard credit cards (Exhibits KKKKK & OOOOO). Petitioner entered into an agreement with BASB, whereby the former delegated the task of processing merchant sales vouchers and other related activities to BASB. Under the agreement, petitioner shall reimburse BASB for the actual cost of all out-of-pocket costs and expenses reasonably incurred by the latter in the performance of services as specified under the agreement (Exhibit XXX).

Petitioner also contends that the amount of P1,668,640.32 in GL Code 418928 represents reimbursements to BA-San Francisco (BASF) for the former's share in fees paid to Reuters for communication services.

The amounts P10,008,459.21 and P1,668,640.32 paid to BASB and BASF, respectively, were traced to Exhibit DDD. Nonetheless, petitioner was not able to prove that both amounts actually represent reimbursements. With regard to payment to BASB, it was even indicated in the description of some of the entries (Exhibits DDD-87, DDD-138, DDD-241, DDD-296, DDD-350, DDD-453, DDD-501, DDD-551, & DDD-652) that the expense pertains to BASB "service fees," which means that these are actually payments for the services rendered by BASB to the petitioner, and not mere reimbursements of out-of-pocket expenses. More importantly, no conclusive evidence was presented to support the allegation that amounts indicated in the GL were actually reimbursements. Petitioner could have presented inter-company advices, reimbursement forms and vouchers, and actual receipts and invoices to prove its contention.

For failure of the petitioner to support its allegation that the amounts P10,008,460.21 and P1,668,640.32 are not subject to EWT, they should be remain included in respondent's assessment as income payments subject to 1% EWT.

d. Interchange fees

In his assessment, respondent considered the interchange fees paid by

590

petitioner in the total amount of P48,075,347.33 (Mastercard-P14,223,669.00, VISA-P33,851,678.33) as subject to 1% EWT.

Petitioner contends that these fees, which are paid to VISA and Mastercard as consideration for the latter's clearing and settlement services, are not subject to EWT. Petitioner has no legal obligation to withhold 1% EWT from such fees. Moreover, it contends that it is the credit card companies that are the parties constituted as withholding agents, in respect of gross amounts paid to any business entity representing the sales of goods/services made by the latter to card holders, pursuant to Section 1(m) of RR No. 6-85, as amended by RR Nos. 6-94, 12-94, and 16-94.

Records show that these payments are interchange discount processing fee paid to VISA and Mastercard on outgoing drafts by Bankard Processing Centers. Outgoing drafts are those purchased from and processed for merchant customers, regardless of which bank issued the credit card (Exhibits BBB-221 to BBB-222). Agreements with VISA and Mastercard showed that interchange fees are part of the clearing and settlement process, services provided by the card companies (Exhibit MMMMM). Since interchange payments are not among those included in RR No. 6-85, as amended, as subject to 1% EWT, the interchange fees paid by the petitioner to VISA and Mastercard should not be subject to 1% EWT. Thus, interchange fees should not form part of the assessment of the respondent as income payments of the petitioner subject to 1% EWT.

Based on the above discussion, petitioner is still liable for deficiency 1% EWT for other services in the amount of P164,880.93, plus interest, computed as follows:

Total Per GL		P 98,297,444.42
Less: Income payments not subject to EWT		
BALCC reimbursements	P 1,838,433.00	
Intechange fees	48,075,347.33	49,913,780.33
Adjusted other services subject to EWT		P 48,383,664.09
Less: Amount per 1701B	P 3,174,030.51	
Amount per Alpha List	28,721,540.82	31,895,571.33
Amount still subject to 1% EWT		P 16,488,092.76
1% EWT due thereon		**P 164,880.93**

In summary, petitioner is liable for deficiency EWT for the year 1995 in the

(J91)

amount of P400,540.38, computed as follows:

Account Name	Amount
Rental (5% EWT)	P 53,809.90
Warehousing (1% EWT)	1,131.88
Advertising and Promotion (1% EWT)	8,647.67
Janitorial and Security (1% EWT)	125.07
Other services (1% EWT)	164,880.93
Total Basic Tax Due	P 228,595.45
Add: Interest (0.75218)	171,944.93
Total EWT Deficiency for 1995	**P 400,540.38**

Respondent's imposition of compromise penalty cannot be sustained. A compromise penalty cannot be imposed since no compromise agreement was reached between the parties. "The imposition of the same without the conformity of the taxpayer is illegal and unauthorized" (*Commissioner of Internal Revenue v. Lianga Bay Logging Co., Inc., G.R. No. 35266, January 21,1991*; *Atlas Consolidated Mining and Development Corporation (doing business under the name Atlas-Itochu Consortium) v. Commissioner of Internal Revenue, CTA Case No. 5671, August 29, 2002*. This holds true for all assessments of the respondent in this case.

B. 1996 ASSESSMENT

Account Name	Amount
Various Services/Repairs and Maintenance	P 25,727.99
Rental	11,868.88
Award of Mr. Manuel Gonzales	90,000.00
Total Basic Tax Due	P 127,596.87
Add: Interest	70,456.44
Compromise Penalty	12,000.00
Total Tax Deficiency	**P 210,053.31**

1. Various Services/Repairs and Maintenance

The respondent assessed the petitioner for deficiency 1% EWT on income payments for various services on the basis of the following (BIR Records, p. 3423):

GL Account Code	Account Name	Amount
423118	Exp.- Bldg. Repairs & Maintenance	P 1,541,408.24

√92

418923	Contractual - Janitorial	1,275,072.45
418942	Contractual - Guard	1,606,078.28
419050	Contractual - Others	303,591.60
429592	Repairs & Maintenance	774,411.58
429615	Repairs & Maintenance – Software	30,677.49
429691	Repairs & Maintenance – Other Equpt.	789,324.87
412346	Armored Vehicle	2,021,250.00
418928	Contract Services – Data Processing	13,568,981.51
401390	Stationery & Office Supplies	2,132,111.93
365746-802	Business Development/Public Relation	3,068,175.83
	Total per GL Account Report	P 27,111,083.78
	Less: Account Subjected to EWT	23,997,674.79
	Difference	P 3,113,408.99
	Less: Account Exempt from EWT per 1701B	540,610.26
	Expense Account not subjected to EWT	P 2,572,798.73
	Rate of Tax	1%
	Basic Tax Due	**P 25,727.99**

a. Account Exempt from EWT per 1701B

The petitioner avers that it included P3,785,701.87 income payments in its Annual Information Return for Income Payments Not Subject to Withholding Tax (Exhibit TTT) which were not considered by the respondent as exempt and, thus, were not included in the amount P540,610.26 – "Account Exempt from EWT per 1701B."

Exhibit TTT shows that there are income payments amounting to P2,870,620.37, a lesser amount than the amount of P3,785,701.87 claimed by the petitioner as income payments which are not subject to EWT. The former amount consists of P735,586.62 income payments which are allegedly casual purchases of goods (e.g., stationery, supplies, giveaways, flower arrangements, etc.) from non-regular suppliers in amounts less that P100,000.00. As discussed in the 1995 Assessment, petitioner is included in the list of Top 5,000 corporations. As such, it is required to subject all income payments to its local suppliers of goods to a 1 % EWT, excluding "casual purchases of goods".

However, petitioner failed to present documentary evidence to prove that the alleged purchases are indeed casual purchases of goods. The petitioner failed to provide as evidence a list of its regular suppliers, required to be submitted every

793

semester to the Revenue District Office (RDO) having jurisdiction over the petitioner's principal place of business.

Thus, the total amount of P735,586.62 is subject to EWT. The breakdown is as follows (Exhibits TTT & RRR-7 to RRR-9):

Particulars	Nature of Income Payment	Amount
E & L Gentec	Electrical Supplies	P 2,500.00
Hongkong Hardware	Electrical Supplies	2,000.00
New South Manila	Electrical Supplies	1,020.00
Motorist's House	Gasoline Expense	146,064.97
Auts International, Inc.	Stationery & Supplies	85.00
Dan Daryll Philippines Enterprise	Stationery & Supplies	14,895.00
HJO Business Machines Corp.	Stationery & Supplies	20,800.00
Macrovent Enterprise	Stationery & Supplies	1,985.00
Telerate Financial Information Network	Stationery & Supplies	1,158.00
Gencaps	Caps	5,000.00
Gifts Concepts	Giveaways	20,000.00
Grand Success Ventures	Christmas Giveaways	241,000.00
Greatwall Garment	Shirts	12,420.00
LJ Serendip Mktg.	Christmas Giveaways	112,500.00
Lydia's Lechon	Entertainment Expense	4,000.00
A.B. Bernal Engravers	Trophies – Golf Tournament	4,807.00
Mila's Lechon	Entertainment Expense	2,500.00
Pan West Sports Inc.	Golf Balls	18,500.00
Paper Prints Inc.	Christmas Giveaways	54,950.00
Cecille's Flower Shop	Flower Arrangement	5,689.65
C'est CA Giftworks	Flower Arrangement	7,615.00
Daniel's Flowers & Gifts	Flower Arrangement	4,200.00
Nature's Touch	Flower Arrangement	3,700.00
Shower of Gold	Flower Arrangement	4,280.00
Sweet Blooms Flower Shop	Flower Arrangement	3,700.00
Star Appliance Center Inc.	Prizes – BA golf tour	38,382.00
The Leather Collections	Giveaways	1,835.00
Total		**P 735,586.62**

The rest of the amount, P2,135,033.75, is not subject to EWT, as the description of income payments indicated is not those included under the items subject to EWT pursuant to RR No. 6-85. The breakdown is as follows (Exhibits TTT & RRR-7 to RRR-9):

Particulars	Nature of Income Payment	Amount
Eastern Telecom	Telex/fax	P 113,522.71
Globe Telecom	Telex/fax	60,238.63
Phil. Global Communications Inc.	Telex/fax	311,656.73
DHL Worldwilde	Telex/fax	52,517.23
American Chamber of Commerce	Cocktails	25,000.00

94

Particulars	Nature of Income Payment	Amount
Bankard Inc.	Fiesta Night	20,000.00
ILLAM	Baseball sponsorship	30,000.00
18th Asia Pacific Forex Assembly	Sponsorship	150,000.00
ACETI	Membership Dues/Raffle Ticket	4,500.00
American Chamber of Commerce	Membership Meeting	26,415.00
ANZ Chamber of Commerce	Membership Fee	6,000.00
Bank Administration Institute	Membership	59,525.35
Bankers Association of the Phils.	Gov. Singson Golf	24,908.28
Clearing Officers Club	Christmas Party/Membership	3,400.00
FVJ Studio	CBA Picture	1,350.00
Forex Association of the Phils.	Meetings	15,532.67
Forex Philippines	Dues	10,000.00
Gilarmi Hotel	Lodging Expense	9,233.00
Holiday Inn	Seminar	11,977.25
Hotel Intercon	CBA Meeting	12,871.86
Makati Business Club	Membership Fee	15,700.00
Makati Police Association	Tickets	3,900.00
Makati Sports Club	Membership Fee	43,032.02
Mandarin Oriental	CBA Meeting/Privilege Card	22,711.45
New World Int'l	CBA Meeting/Hotel Billing	39,543.86
Employer's Confederation	Membership Fee	3,500.00
Palate & Spirits	Entertainment Expense/Cocktails Fee	22,320.00
Manila Golf & Country Club	Membership	284,241.99
Manila Polo Club	Membership Fee	28,429.25
Money Market Assoc. of the Phils.	Convention Fees/Membership Fees & Mtg./Summer Outing	117,585.00
Member's Lounge	Mart Friday Club	31,666.67
Orient Overseas Servuces	Airline/Fees	92,809.80
Crystal Travel & Tours	Airline/Tickets	480,945.00
Total		**P 2,135,033.75**

According to petitioner, the remaining amount of P915,081.50 (P3,785,701.87 less P2,870,620.37) represents reimbursements to its officers for their meals and entertainment expense incurred for business development. However, petitioner did not present any evidence to actually support the allegation. No reimbursement vouchers, third party invoices and official receipts, and other documents relative to its claim were presented in evidence by the petitioner. For failure to support its allegation, the amount P915,081.50 is subject to EWT. Respondent's action of not including the same in his adjustment is therefore correct.

Based on the foregoing, the amount in respondent's adjustment under "Account Exempt from EWT per 1701B" should have been P2,675,644.01 (P2,135,033.75 plus P540,610.26) instead of only P540,610.26.

b. BALCC Reimbursements

Petitioner avers that P1,834,779.51 of the amount assessed by respondent as subject to 1% EWT pertains to reimbursements paid by petitioner to BALCC for common area charges billed by the latter to the former. This amount consists of charges for janitorial (GL Code 418923) and security (GL Code 418942) services, building repairs and maintenance (GL Code 423118), stationery & supplies (GL Code 401390), other equipment repairs & maintenance (GL Code 429691), contract services – data processing (GL Code 418928), and contractual – others (GL Code 419050). .

Out of the total amount of P1,834,779.51 claimed by the petitioner, the amount of P1,797,679.77 was verified to have been actually recorded in petitioner's 1996 General Ledger Statements (Exhibit UUU). The Summary of Expenses of BALCC and Expense of Equity Sharing (Exhibit VVV) proves that the payments are indeed mere reimbursements. As such, they are not subject to EWT for the same reasons as in the 1995 Assessment. Moreover, petitioner has shown that BALCC subjects its income payment to EWT by submitting as evidence BALCC's Annual Information Return on Creditable Taxes Withheld (Exhibit WWW).

Thus, the amount P1.797,679.77 should not have formed part of respondent's assessment as income payments subject to EWT.

c. Contract Services – Data Processing

Petitioner avers that P6,664,825.38 of the amount in GL Code – 418928 – Contract Services – Data Processing pertains to reimbursements paid by the petitioner to BASB for expenses advanced by the latter in processing petitioner's merchant sales vouchers.

However, aside from the General Ledger Statements (Exhibit UUU), petitioner did not present any conclusive evidence that would sustain the claim that amounts indicated in the GL are mere reimbursements only. Petitioner could have presented inter-company advices, reimbursement forms and vouchers, and actual receipts and invoices to prove its contention.

For failure of petitioner to prove its claim, the amount should remain in respondent's assessment as income payment subject to 1% EWT.

Based on the above discussion, the petitioner is no longer liable for deficiency 1% EWT for various services, as shown below:

Total per GL Account Report	P 27,111,083.78
Less: Account Subjected to EWT	23,997,674.79
Difference	P 3,113,408.99
Less: *Account Exempt from EWT per 1701B*	2,675,644.01
Expense Account not subjected to EWT	P 437,764.98
Less: BALCC Reimbursements	1,797,679.77
Adjusted expense not subjected to EWT	(P 1,359,914.79)

2. Rental

Respondent assessed the petitioner for deficiency 5% EWT on rentals on the basis of the following (BIR Records, p. 3423):

GL Account Code	Account Name	Amount
427456	Rental - Equipment	P 300,226.56
425254	Rental - Parking	1,297,962.17
425372	Rental - Premises	255,555.26
	Total Rental Expense	P 1,853,743.99
	Less: Account Subjected to EWT	1,616,366.40
	Expense Account not subjected to EWT	P 237,377.40
	Rate of Tax	5%
	Basic Tax Due	**P 11,868.88**

a. Rental – Equipment

Petitioner avers that the total amount of P300,226.56 pertains to rental of photocopying machine lodged under GL Code 427456 – Equipment Rent – Photocopy and was already subjected to 1% EWT as reflected in the petitioner's Annual Information Return for Income Payments Subject to Withholding Tax (Exhibit SSS). Exhibit SSS and Exhibit UUU when examined confirmed petitioner's allegation.

The 5% EWT on rentals applies to income payments for rentals of real property, as stated in Section 1 (c) of RR No. 6-85, as amended by RR No. 8-90. A photocopying machine is not considered a real property, under the definition of real property/immovable property in Section 415 of the Civil Code. Rental of photocopying machines may not be considered as rental of real property, and therefore, it is not subject to 5% EWT on rentals.

b. Rental – Premises

Petitioner explained that P203,280.50 of the amount in GL Code 425372 – Rental – Premises pertains to storage charges/fees paid to Datalift Movers, Inc., Lane Moving and Storage and Luzon Moving & Storage. Verification of Exhibit SSS affirmed petitioner's contention. Petitioner avers that storage fees are not in the nature of rental fees or lease payments, and thus not subject to 5% EWT on rental.

As discussed in the 1995 Assessment, storage fees are different from rental fees and are not subject to 5% EWT. However, the payment of the petitioner to the storage companies for storage of files for safekeeping and preservation, placed in safe deposit vaults, can be construed as warehousing fees. These storage fees, considered as payments to warehousing contractors, are subject to 1% EWT. Since the petitioner did not subject these storage fees to EWT, whether at the rate of 5% or 1%, the petitioner has deficiency 1% EWT in the amount of P2,032.81, plus interest and penalty.

c. BALCC Reimbursement

According to the petitioner, the amount of P12,511.70, under GL Code 425372 (Rental - Premises), pertains to reimbursement by the petitioner to BALCC as part of the common area charges billed by the latter to the former and reflected as such in Exhibit UUU. Moreover, BALCC withholds the taxes on these expenses when it disburses payments to its supplier, as shown in Exhibit WWW. As the amount of P12,511.70 is a mere reimbursement, it is not subject to 5% EWT and should not have formed part of respondent's assessment.

Based on the above discussion, the petitioner is no longer subject to deficiency 5% EWT on rentals, as shown below.

198

Total Rental Expense		P 1,853,743.99
Less: Account Subjected to EWT		1,616,366.40
Expense Account not subjected to EWT		P 237,377.40
Less: Rental - photocopy	P 300,226.56	
Storage fees	203,280.50	
BALCC Reimbursement	12,511.70	516,018.76
Adjusted expense not subjected to EWT		**(P 278,641.36)**

However, it is subject to deficiency 1% EWT on warehousing fees in the amount of P2,032.81, plus interest and penalty.

3. Award of Mr. Manuel Gonzales

Respondent assessed the petitioner for deficiency 20% final tax in the amount of P90,000.00 on the P450,000.00 award given to Mr. Manuel Gonzales.

Records showed that the P450,000.00 award was given as moral damages and attorney's fees to Mr. Manuel Gonzales for the extrajudicial settlement of the case *Manuel Gonzales vs. Bank of America NT & SA*, Civil Case 13112, RTC Makati, Metro Manila, Branch 59 (Exhibit YYY). This was not subjected by the petitioner to EWT as reflected in Exhibit TTT.

Exemplary and moral damages awarded to a party litigant are not considered as taxable income. Likewise, the attorney's fees awarded as reimbursement of costs of litigation are also not subject to income tax. Thus, award of exemplary and moral damages and attorney's fees are also not subject to withholding tax.

Based on the foregoing, the respondent has no basis in assessing petitioner for deficiency 20% final tax on the award of damages to Mr. Manuel Gonzales.

In summary, the petitioner is only liable for deficiency 1% EWT on warehousing fees in the amount of P3,155.29, computed as follows:

Storage fees (warehousing fees)	P 203,280.50
Basic Tax Due @ 1%	P 2,032.81
Add: Interest (0.55218)	1,122.48
Total EWT Deficiency for 1996	**P 3,155.29**

199

C. 1997 ASSESSMENT

Respondent assessed the petitioner for deficiency EWT on the basis of the following (BIR Records, p. 3513):

Unremitted EWT		P 42,365.94
Professional fees	P3,227,955.20	322,795.52
Basic tax due		P 365,161.46
Surcharge on unremitted – 25%		10,591.49
Subtotal		P 375,752.95
Interest		132,332.67
Compromise penalty		16,000.00
Amount due and collectible		**P 524,085.62**

1. Unremitted EWT

Respondent assessed petitioner for unremitted EWT in the amount of P42,365.94, representing the difference between the total EWT per alphalist, in the amount of P422,223.67, and total remittances of EWT per monthly EWT returns (BIR Form 1743-W), in the amount of P379,857.73.

Petitioner contends that there is no unremitted EWT for the reason that the total EWT per alphalist is equal to the total remittances reflected in the Annual Information Return for Income Payments Subject to EWT (Exhibit SSSS). While it is true that the amount in both documents is P422,223.67, nonetheless, the annual information return does not prove that there was actual remittance made. On the contrary, a verification of the monthly EWT returns (CTA Records, p. 3085) confirmed that the petitioner only remitted P379,857.73 for the year 1997. The petitioner is therefore liable for unremitted EWT of P42,365.94 plus surcharge and interest.

2. Professional fees

The respondent's came up with his assessment for professional fees on the basis of the following computation:

GL Account Code	Account Name	Amount
407571	Special Professional Services	P 1,480,455.65
407576	Audit/Other Independent Accountant	979,413.00

600

716849	Legal-Non-recoverable	40,163.34
416882	Legal-Outside Counsel	1,934,556.62
469994	Management Fees Paid	284,550.00
407618	Other Operational Services	212,969.52
	Total Professional Fees Expense	P 4,932,108.13
	Per Alphalist (includes brokers fee)	1,704,152.93
	Difference	P 3,227,955.20
	Rate of tax	10%
	Tax Still Due	**P 322,795.52**

Petitioner contends that respondent failed to consider as adjustments the professional fees the former paid to general professional partnerships (GPPs). The details of this amount, as provided in the 1997 Annual Information Return for Income Payments Not Subjected to EWT (Exhibit TTTT) are as follows:

GPP	**Amount**
SGV & Co.	P 982,413.00
Punongbayan & Araullo	12,000.00
Ponce Enrile	547,234.00
Sycip Salazar	620,676.76
Agcaoili & Associates	189,456.00
Siguion-Reyna	141.09
Total	**P 2,351,920.85**

Section 20(b) of the NIRC defines GPPs as partnerships formed by persons for the sole purpose of exercising their common profession, no part of the income of which is derived from engaging in any trade or business.

The above income payees are known to be GPPs.

Section 23(a) of the NIRC provides that person exercising a common profession in general partnership shall be liable for income tax only in their individual capacity. Thus, income payments made to the above GPPs are not subject to EWT and the petitioner's practice of not subjecting them to EWT has legal basis. Therefore, the amount of P2,351,920.85 representing income payments to GPPs should have been considered by the respondent as adjustment to total professional fees expense before subjecting the same to EWT.

Another adjustment the petitioner is averring is the P284,550.00 reimbursements it paid to BA Lepanto Condominium Corp. (BALCC) for management fees. It asserts that since BALCC is the one which withholds the taxes

601

upon payment to the third parties, petitioner is no longer bound to withhold EWT on the amount reimbursed to BALCC.

We agree with the petitioner. As discussed in the 1995 and 1996 assessments, since BALCC has control of payment to third party suppliers, and the petitioner merely reimburses BALCC, then it is the latter which is responsible for withholding the income tax at source. Furthermore, the petitioner has adequately shown that BALCC withholds EWT on income payments by presenting as evidence BALCC's Annual Information Return on Creditable Taxes Withheld (Exhibit VVVV).

Of the claimed amount of P284,550.00, however, only P259,300.00 shall be allowed as adjustment since this is the amount reflected in petitioner's general ledger (Exhibit UUUU-23).

After considering the exempt payments, the petitioner still has deficiency EWT in the amount of P155,001.57, computed as follows:

Total Professional fees expense		P 4,932,108.13
Less: Payment to GPPs	P2,351,920.85	
Reimbursements to BALCC	259,300.00	2,611,220.85
Professional fees subject to EWT		P 2,320,887.28
Less: Per Alphalist (includes brokers fee)		1,704,152.93
Difference		P 616,734.35
Rate of tax		10%
Tax still due		P 61,673.44
Unremitted EWT		42,365.94
Surcharge on unremitted EWT		10,591.49
Subtotal		P 114,630.87
Interest (0.35218)		40,370.70
Total EWT Deficiency for 1997		**P 155,001.57**

II. WITHHOLDING TAX ON COMPENSATION

A. 1995 Assessment

The respondent assessed the petitioner for deficiency withholding tax on compensation on the basis of the following (BIR Records, p. 3401):

682

Compensation and fringe benefits per audited F/S (SGV-Adjusting Journal Entry)	P 88,547,836.00
Less: Tax exempt	10,990,060.68
Compensation and fringe benefits subject to W/tax	P 77,557,775.32
Less: Subjected to w/holding tax per alphalist of employees	76,071,590.93
Compensation and fringe benefits still not subjected to w/tax	P 1,486,184.39
Tax paid and remitted January – December 1997	P 20,717,009.87
Tax due thereon (P20,717,009.87/P76,071,590.93xP1,486,184.39)	P 404,741.06
Interest	304,438.13
Compromise Penalty	25,000.00
Amount due and collectible	**P 734,179.19**

Upon verification by the independent CPA, the Tax Exempt portion amounting to P10,990,060.68 may represent the following:

Benefits	Amount
De Minimis Benefits (Dental, Optical, Clothing, Meal)	P 791,434.40
Retirement Expense	7,036,593.13
Life Insurance	222,635.40
Health Care	2,939,397.75
Total	**P 10,990,060.68**

It is petitioner's contention that the total tax-exempt compensation should have been P20,092,763.26, computed as follows:

Benefits	Amount
Tax-exempt compensation used by respondent	P 10,990,060.68
Severance pay	5,759,640.00
Exempt bonuses (P30,000 and below)	3,343,062.58
Total	**P 20,092,763.26**

The severance pay pertains to the benefits received by Arlene D. Lotilla for her involuntary separation as employee of the petitioner on the ground of redundancy. This is evidenced by a Release, Waiver, and Quitclaim, dated February 23, 1995, executed by Ms. Lotilla (Exhibit KKK-2) and journal entries reflecting the separation pay given (Exhibit KKK-1).

The exempt bonuses pertain to bonuses, not exceeding P30,000.00, received

603

by petitioner's employees. The amount claimed as exemption is supported by a schedule of employees with their corresponding exempt bonuses (Exhibit LLL). All of the employees in the schedule are included in the alphalist of employees (Exhibit MMM) submitted to the Bureau of Internal Revenue (BIR).

Section 28(b) of the NIRC, as amended by Republic Act (RA) No. 7833 dated December 8, 1994, provides:

> (b) *Exclusion from gross income.* – The following items shall not be included in gross income and shall be exempt from taxation under this Title: xxx
>
> (7) *Retirement benefits, pensions, gratuities, etc.* – (A) Retirement benefits received by officials and employees of private firms, whether individuals or corporate, in accordance with a reasonable private benefit plan maintained by the employer: Provided, That the retiring official or employee has been in the service of the same employer for at least 10 years and is not less than 50 year of age at the time of his retirement: *Provided*, further, That the benefits granted under this subparagraph shall be availed of by an official or employee only once. For purposes of this subsection, the term "reasonable private benefit plan" means a pension, gratuity, stock bonus or profit-sharing plan maintained by an employer for the benefit of some or all of his officials of employees, where contributions are made by such employer for officials or employees, or both, for the purpose of distributing to such officials and employees the earnings and principal of the fund thus accumulated, and wherein it is provided in said plan that at no time shall any part of the corpus or income of the fund be used for, or be diverted to, any purpose other than for the exclusive benefit of the said officials and employees.
>
> (B) Any amount received by an official or employee or by his heirs from the employer as a consequence of separation of such official or employee from the service of the employer due to death, sickness or other physical disability or for any cause beyond the control of said official or employee.
>
> (C) The provisions of any existing law to the contrary notwithstanding, social security benefits, retirement gratuities, pensions and other similar benefits received by resident or non-resident citizens of the Philippines or aliens who come to reside permanently in the Philippines from foreign government agencies and other institutions, private or public. xxx

(64)

(8) *Miscellaneous items.* – xxx

(F) 13th month pay and other benefits.

(i) Benefits received by officials and employees of the national and local governments pursuant to Republic Act No. 6686;

(ii) Benefits received by employees pursuant to Presidential Decree No. 851, as amended by Memorandum Order No. 28, dated August 13, 1986;

(iii) Benefits received by officials and employees not covered by Presidential Decree No. 851, as amended; and

(iv) Other benefits such as productivity incentives and Christmas bonus in an amount not exceeding Twelve thousand pesos (P12,000) which shall be integrated in the 13th month pay solely for purposes of this Act.

Provided, however, That the exclusion shall only apply to the first Thirty thousand pesos (P30,000). (Underscoring supplied)

Based on the foregoing, the amounts received by an employee from his employer due to separation from employment for reasons beyond the control of the said employee and the 13th month pay and other benefits not exceeding P30,000 are excluded from the taxable compensation income.

The petitioner has duly proven, by the evidence presented, that it paid P5,759,640.00 to one of its employees due to severance of employment on the ground of redundancy, a reason beyond the control of the employee. The petitioner has also shown how it derived the exempt bonuses. In addition, the names of the employees given bonuses tied up with the alphalist of employees. Therefore, the severance pay and bonuses not exceeding P30,000.00 per employee should not form part of taxable compensation income.

The petitioner, therefore, is not liable for any deficiency withholding tax on compensation after considering severance pay and exempt bonuses, as shown below:

Compensation and fringe benefits per audited F/S (SGV-AJE)	P 88,547,836.00
Less: Tax exempt	20,092,763.26
Compensation and fringe benefits subject to W/tax	P 68,455,072.74

GR

Less: Subjected to w/holding tax per alphalist of employees	76,071,590.93
Compensation and fringe benefits still not subjected to w/tax	**P (7,616,518.19)**

B. 1996 Assessment

The respondent assessed the petitioner for deficiency withholding tax on compensation as shown in the final notice dated August 6, 1999, as follows (Annex A):

Basic – Sec 72 (a)	P 2,044,439.93
Interest – Sec. 249	1,128,898.84
Compromise – RMO 1-90	25,000.00
Amount due and collectible	**P 3,198,338.77**

Based on the computation of the basic tax due of P2,044,439.93 (Exhibit RRR-14, and BIR Records, p. 3424), the petitioner allegedly did not subject to withholding tax compensation and fringe benefits amounting to P7,434,949.78.

A review of the records of the case reveals that respondent assessed the petitioner based on the following (BIR Records, p. 3424):

Compensation and fringe benefits per ITR – regular	P 124,109,516.00
Compensation and fringe benefits per ITR – FCDU	1,297,962.00
Total compensation and fringe benefits	P 122,811,554.00
Less: Contribution to retirement fund	38,031,148.00
Compensation subject to w/tax	P 84,780,406.00
Less: Subjected to w/holding tax per alphalist of employees	81,310,917.20
Compensation and fringe benefits still not subjected to w/tax	**P 3,469,488.80**

As shown above, respondent considered as tax-exempt compensation contributions to retirement fund in the amount of P38,031,148.00, and deducted the same from the total compensation and fringe benefits subject to tax. Petitioner alleges that the following benefits should also be considered as tax-exempt:

Benefits	Amount
De Minimis Benefits (Dental, Optical, Clothing, Meal)	P 1,001,382.00
Life Insurance	179,978.00
Health Care	3,149,641.00
Exempt Bonuses (P30,000 and below)	2,990,171.04
Total	**P 7,321,172.04**

606

Under RR No. 6-82, dated October 1, 1982, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as compensation subject to withholding if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, goodwill, contentment, or efficiency of his employees. Such small privileges are termed as "de minimis benefits" in later regulations (RR No. 2-98 dated April 17, 1998 and RR No. 3-98, dated June 21, 1998).

In the case of the bonuses, these were duly supported by a schedule of employees with their bonuses not exceeding P30,000.00 (Exhibit CCCC). The names of employees in the schedule were tied up with the alphalist of employees (Exhibit DDDD). However, one Bernadette Tan was not listed in the alphalist. Thus, the bonus in the amount of P30,000.00 pertaining to her cannot be allowed as exemption. This reduces the total amount of bonuses exempt from tax to only P2,960,171.04.

The petitioner is, therefore, not liable for any deficiency withholding tax on compensation for the year 1996, as shown below:

Total compensation and fringe benefits	P 122,811,554.00
Less: Contribution to retirement fund	38,031,148.00
Other exemptions	7,291,172.04
Compensation and fringe benefits subject to W/tax	P 77,489,233.96
Less: Subjected to w/holding tax per alphalist of employees	81,310,917.20
Compensation and fringe benefits still not subjected to w/tax	**P (3,821,683.24)**

C. 1997 ASSESSMENT

The respondent assessed the petitioner for deficiency withholding tax on compensation for the year 1997 on the basis of the following (BIR Records, p. 3515):

Compensation and fringe benefits per ITR - regular			P 114,520,373.00
Less: Subjected to w/holding tax per alphalist of employees		P 87,730,859.32	
Compensation exempt from w/tax			
Clothing	P 930,791.71		

607

Retirement exp	5,798,486.01		
Life insurance	339,778.57		
Health care	3,075,693.93		
Severance	12,158,874.20	22,303,624.42	110,034,483.74
Compensation not subjected to w/tax			P 4,485,889.26
Tax paid and remitted January – December 1997		P 24,895,974.14	
Tax due thereon (24,895,974.14/87,730,859.32 x 4,485,889.26)			P 1,272,990.87
Interest			448,321.62
Compromise Penalty			25,000.00
Amount due and collectible			**P 1,746,311.62**[1]

Per respondent's examiners' computation, the tax-exempt compensation amounts to P22,303,624.42. Petitioner avers that this amount should be P22,337,288.07, as supported by the profit and loss statement (Exhibit WWWW), contending the amounts used by respondent have no basis.

A review of the records, however, shows that respondent's figures were derived from the account balances in petitioner's financial information system (BIR Records, pp. 3109-3134) and schedule of exempt compensation (BIR Records, pp. 3135-3137).

Thus, the respondent has basis for the amounts considered as tax-exempt compensation, having been derived from petitioner's own system.

Therefore, the respondent's assessment for deficiency withholding tax on compensation is sustained in the amount of P1,721,312.49 (as corrected), which is equal to the respondent's assessed amount less the compromise penalty, which cannot be imposed, as there is no compromise agreement that has been agreed upon by the parties.

III. FINAL TAX

The respondent assessed the petitioner for deficiency final tax on the basis of the following computations (BIR Records, pp. 3401, 3424, and 3515):

	1995	**1996**
Interest expense per F/S	P 201,037,908.00	P 449,287,673.00

[1] Should be P1,746,312.49.

668

Tax due thereon	P 40,207,581.60	P 89,857,534.60
Less: tax paid/remitted	29,613,410.70	13,886,063.74
Basic tax still due	P 10,594,170.90	P 75,971,470.86
Interest	7,968,723.47	41,949,926.78
Compromise penalty – non payment	25,000.00	25,000.00
- non submission of annual returns	25,000.00	-
Amount due and collectible	**P 18,612,894.37**	**P 117,946,397.64**

	1997
Interest expense per F/S	P 792,752,091.00
Less: Interest expense due to HO, Branches, Agencies, & Subsidiaries	355,350,741.00
Interest Expense subject to FT	P 437,401,350.00
Less: Interest subjected to Final Tax	189,759,581.60
Interest expense still subject to tax	P 247,641,768.40
Rate of Tax	20%
Basic tax due	P 49,528,353.68
Interest	17,442,895.60
Compromise penalty – non payment	25,000.00
- non submission of annual returns	25,000.00
Amount due and collectible	**P 67,021,249.28**

On the other hand, petitioner alleges that not all of the interest expense included by the respondent in his assessment should be subject to 20% final tax. The respondent considered the interest expense in the financial statements as the tax base for the 20% final tax. Interest expense on interbank borrowings of less than 5 days to cover deficiency reserves and interest expense on placements to home office and other branches, which allegedly are not subject to 20% final tax, were included in the computation for deficiency final tax. Below is the breakdown of the interest expense which, according to petitioner, and as supported by the independent CPA's findings, should not have been included, to wit:

Account No.	Account Name	Account Definition (Exhibit BBB)	Per petitioner and independent CPA)	1995 Amount	1996 Amount	1997 Amount
310333	Int Exp-D/T Fgn Br/US Bnk-Time-non Neg-Fgn	An expense account to record the interest expense on non negotiable time	Refers to interest expense on interbank borrowings of less than 5 days from the Philippine	P 224,918.40	-	P 2,606,799

609

Account No.	Account Name	Account Definition (Exhibit BBB)	Per petitioner and independent CPA)	1995 Amount	1996 Amount	1997 Amount
		deposits of branches of US banks whose addresses are outside the US or its territories.	branches of foreign banks to cover deficiency in reserves against deposit liabilities.			
310876	Int Exp-D/T non US Bnks-Time-non Neg-Fgn	An expense account to record the interest expense on non negotiable time deposits with a fixed maturity of non US banks whose addresses are outside the US or its territories.	Refers to interest expense on interbank borrowings of less than 5 days from domestic banks to cover deficiency in reserves against deposit liabilities.	P47,480,994.07	P 6,315,475.71	P 176,131,945
327923	Interest Expense – Due to Branches	An expense account used to record the interest expense on time deposits with a fixed maturity due to other overseas unit of the Bank.	Refers to interest expense paid by the Bank on placements from home office and other branches.	P11,159,386.77	P365,209,766.34	
TOTAL				**P58,865,299.24**	**P371,525,242.05**	**P 178,738,744**
Tax Due				**P11,773,059.85**	**P 74,305,048.41**	**P35,747,748.80**

610

A. Interest expense on interbank borrowings of less than 5 days

Petitioner alleges that part of its interest expense pertains to interest expense on interbank borrowings of less than 5 days issued to cover deficiency in reserves against deposits and that the same is not subject to final tax, pursuant to Section 3 of RR No. 17-84, as amended by RR No. 10-86, which provides:

> *Final withholding tax on interest on savings and time deposit.* – (a) *In general.* – Interest from Philippine currency, bank deposits and yield or any other monetary benefits from deposit substitutes and from trust fund and similar arrangements received by citizens, resident alien individuals, and resident foreign corporations shall be subject to a final withholding tax at the rate of 20%.
>
> (b) Exemptions from withholding tax. – The withholding of tax as required in the preceding paragraph shall not apply to –
>
> (i)<u>Yield on debt instruments with maturity of not more than five days, issued specifically on interbank call on loans to cover deficiency in reserves against deposit liabilities as evidenced by interbank loan advice or repayment transfer tickets</u>. (Underscoring supplied)

Based on the foregoing, interest from interbank borrowings of less than 5 days issued to cover deficiency in reserves against deposit liabilities, which are *evidenced by interbank loan advice or repayment transfer tickets*, are not subject to final tax.

Petitioner, however, failed to present sufficient documents to substantiate its claim that part of the interest expense reported in its financial statements are actually interest payments on interbank borrowings of less than 5 days to cover deficiency in reserves. As required by the above regulation, these shall be evidenced by interbank loan advice or repayment transfer tickets. Petitioner did not present such documents as evidence. Petitioner relied on the descriptions in the chart of accounts (Exhibit BBB) for GL Code 310333 and 310876 to support its allegation. The independent CPA's verification also relied only the nature of the accounts as indicated in the chart of accounts (Exhibit RRR-16). The evidence presented is insufficient considering that the descriptions in the chart of account are different from the nature of the accounts as alleged by the petitioner.

(ell)

B. Interest expense paid on placements from home office and other branches

Likewise, petitioner failed to substantiate its claim that part of the interest expense in the financial statement are actually interest on placements from home office and other branches. To support its allegation, it relied on the description of account no. 327923 - Interest Expense – Due to Branches in the chart of accounts (Exhibit BBB-207) and the profit and loss statement (Exhibits JJJ for 1995), which only showed that the amount recorded in account no. 327923 was included in its computation of profit and loss. Beyond these, nothing else was submitted to support its claim. The evidence presented by the petitioner failed to convince this Court that the interest expense was actually paid to the home office. The petitioner could have submitted interbank loan advice or statements, contracts or agreements, and other documents evidencing the interest payment to the home office and other branches. Moreover, the verification done by the independent CPA also relied on the nature of the accounts as indicated in the chart of accounts (Exhibit RRR-16).

Based on the foregoing, the respondent's assessments for deficiency final tax in the amounts of P18,562,894.37 for 1995, P117,921,397.64 for 1996, and P66,971,249.28 for 1997, as shown below, are sustained except for the imposition of the compromise penalty.

	1995	1996	1997
Basic tax still due	P 10,594,170.90	P 75,971,470.86	P 49,528,353.68
Interest	7,968,723.47	41,949,926.78	17,442,895.60
Total Final Tax Deficiency	**P 18,562,894.37**	**P 117,921,397.64**	**P 66,971,249.28**

IV. INCOME TAX

A. 1995 Assessment

The respondent assessed the petitioner for deficiency income tax on the basis of the following (BIR Records, p. 3402):

Net income per ITR		P 95,299,248.00
Add: Adjustments to income		
Prior years expense (Incentive)	P 6,486,398.00	
Salaries & Wages – no withholding taxes	1,486,184.39	

Rental – no EWT	1,487,170.31	
Advertising – no EWT	2,172,994.03	
Janitorial & Security Services	732,308.90	
Other services, Supplies & Equipt. – No EWT	66,715,970.03	79,081,025.66
Taxable income per audit		P174,380,273.66
Tax due thereon		P 61,033,095.78
Less: Tax credits/payments		32,160,384.06
Basic tax still due		P 28,872,711.72
Interest		20,432,351.90
Compromise penalty		25,000.00
Amount due and collectible		**P 49,330,063.62**

1. Prior year's expense (Incentive)

The respondent disallowed as deduction from gross income the prior year's provision for incentive pay in the amount of P6,486,398.00.

An examination of the records shows that the P6,486,398.00 provision for incentive pay was accrued in 1994 but was considered as a reconciling item – unallowable deduction in petitioner's computation of 1994 taxable income (Exhibit PPP-15). The provision was reversed as an expense in 1995 when the petitioner paid a total of P6,653,513 in incentives. Petitioner presented journal entries to reflect this transaction (Exhibit PPP-2). The petitioner had presented sufficient evidence to prove that the provision for incentive pay in 1994 was actually paid out in 1995, and thus deductible for income tax purposes in 1995.

2. Salaries and wages

Respondent disallowed as deduction salaries and wages in the amount of P1,486,184.39 for the alleged failure of the petitioner to subject the same to withholding tax on compensation.

However, as discussed earlier in the 1995 assessment for withholding tax on compensation, the petitioner has duly proven that it should not be subject to deficiency withholding tax on compensation. Section 29 (j) of the NIRC of 1993, as amended (now Section 34(K) of the NIRC of 1997), provides:

> (a) ***Additional requirement for deductibility of certain payments.*** - Any amount paid or payable which is otherwise deductible from, or taken into account in computing gross income or for which depreciation or amortization

(63)

> may be allowed under this section, shall be allowed as a deduction only if it is shown that the tax required to be deducted and withheld therefrom has been paid to the Bureau of Internal Revenue in accordance with this section, Sections 51, and 74 of this Code.

Since the petitioner has properly withheld taxes on the salaries and wages of its employees, the salaries and wages amounting to P1,486,184.39 should be allowed as deduction for income tax purposes.

3. Rental

Respondent disallowed as deduction rental fees in the amount of P1,487,170.31 for the alleged failure of the petitioner to subject the same to 5% EWT. As discussed in the 1995 assessment for EWT, out of the P1,487,170.31 income payments allegedly not subjected to 5% EWT, a total amount of P1,076,198.05 were not subjected to withholding tax. Therefore, for failure of the petitioner to subject P1,076,198.05 income payments to withholding tax, the same shall be disallowed as deduction from gross income, pursuant to Section 29(j) of the 1993 NIRC (now Section 34(K) of the 1997 NIRC). The adjustment made by the respondent should be limited to P1,076,198.05 rental fees to determine taxable income.

4. Advertising

Respondent disallowed as deduction from gross income the advertising fees in the amount of P2,172,994.03 for the alleged failure of the petitioner to subject the same to 1% EWT.

As determined in the 1995 assessment for EWT, out of the P2,172,994.03 income payments allegedly not subjected to 1% EWT, only the amount of P864,767.09 was not proven by the petitioner as having been subjected to 1% EWT. For failure of the petitioner to subject P864,767.09 advertising fees to withholding tax, the same shall be disallowed as deduction from gross income, pursuant to Section 29(j) of the 1993 NIRC (now Section 34(K) of the 1997 NIRC). The adjustment of respondent should be limited to P864,767.09 advertising fees to determine taxable income.

614

5. Janitorial and Security Services

Respondent disallowed as deduction janitorial and security fees in the amount of P732,308.90 for the alleged failure of the petitioner to subject the same to 1% EWT. As determined in the 1995 assessment for EWT, out of the total amount of P732,308.90 income payments allegedly not subjected to 1% EWT, only a portion thereof amounting to P12,526.90 was not proven by the petitioner as having been subjected to 1% EWT. For failure of the petitioner to subject P12,526.90 janitorial and security fees to withholding tax, the same shall be disallowed as deduction from gross income pursuant to Section 29(j) of the 1993 NIRC (now Section 34(K) of the 1997 NIRC). The adjustment of respondent should be limited to P12,526.90 janitorial and security fees to determine taxable income.

6. Other Services

Respondent disallowed as deduction expenses for various services, supplies, and equipment in the amount of P66,715,970.03 for the alleged failure of the petitioner to subject the same to 1% EWT. As previously determined in the 1995 assessment for EWT, out of the P66,715,970.03 income payments allegedly not subjected to 1% EWT, only the amount P16,488,092.76 was not proven by the petitioner as having been subjected to 1% EWT. For failure of the petitioner to subject P16,488,092.76 fees for various services, supplies, and equipment to withholding tax, the same shall be disallowed as deduction from gross income, pursuant to Section 29(j) of the 1993 NIRC (now Section 34(K) of the 1997 NIRC). The adjustment of respondent should be limited to P16,488,092.76 fees for various services, supplies, and equipment to determine taxable income.

After considering the foregoing, the petitioner is still subject to deficiency income tax in the amount of P13,061,809.73, computed as follows:

Net income per ITR		P 95,299,248.00
Add: Adjustments to income		
Rental and warehousing fees	P 1,076,198.05	
Advertising	864,767.09	
Janitorial & Security Services	12,526.90	
Other services, Supplies & Equipt.	16,488,092.76	18,441,584.80
Taxable income per audit		P 113,740,832.80

6K

Tax due thereon	P 39,809,291.48
Less: Tax credits/payments	32,160,384.06
Basic tax still due	P 7,648,907.42
Interest (0.70767)	5,412,902.31
Total Income Tax Deficiency for 1995	**P 13,061,809.73**

B. 1996 Assessment

The respondent assessed the petitioner for deficiency income tax as follows (BIR Records, p. 3425):

Net income per ITR			P(109,307,956.00)
Add: Adjustments to income			
Realized FX exchange gain		P 16,817,333.00	
Salaries & Wages – no withholding tax		7,434,949.80	
Repairs and maintenance – no EWT		2,572,798.73	
Rent expense – no EWT		237,377.59	
Gross income per F/S	P1,077,376,193.00		
Gross income per ITR	873,609,620.00	203,766,573.00	
Interest expense on bills payable/other borrowings		377,715,733.00	608,544,765.12
Net income per audit			P 499,236,809.12
Tax Due Thereon			P 174,732,883.19
Interest			88,706,642.81
Compromise penalty			25,000.00
Amount due and collectible			**P 263,464,526.00**

1. Realized Foreign Exchange Gain

Respondent added realized foreign exchange gain to net income per income tax return to get total income subject to tax. However, upon examination of petitioner's 1996 Annual Income Tax Return Reconciliation – RBU (Exhibit GG), realized foreign exchange gain was actually added back to petitioner's profit per books to arrive at its taxable income. Thus, said gain already formed part of petitioner's tax base for 1996. Respondent's addition of realized foreign exchange gain to taxable income cannot be sustained.

2. Salaries and Wages

Respondent disallowed as deduction salaries and wages in the amount of P7,434,949.80 for the alleged failure of the petitioner to subject the same to

66

withholding tax on compensation. However, as discussed earlier in the 1996 assessment for withholding tax on compensation, the petitioner has duly proven that it is not subject to any deficiency withholding tax on compensation since it has properly withheld taxes on the salaries and wages of its employees. Thus, the inclusion of salaries and wages amounting to P7,434,949.80 in the assessment for deficiency income tax is without merit.

3. Repairs and Maintenance

Respondent disallowed as deduction repairs and maintenance expense in the amount of P2,572,798.73 for the alleged failure of the petitioner to subject the same to 1% EWT. However, as determined in the 1996 assessment for EWT, the petitioner has duly proven that it should not be subject to deficiency EWT. Since the petitioner has properly withheld taxes on its income payments for repairs and maintenance, and is not subject to any deficiency EWT on such income payments, the repairs and maintenance expense in the amount of P2,572,798.73 should be allowed as deduction for income tax purposes.

4. Rent Expense

Respondent disallowed petitioner's rent expense in the amount of P237,377.59 as a deduction from gross income because of the alleged failure of the petitioner to subject the same to 5% EWT. The petitioner has duly proven that it is not subject to any deficiency 5% EWT however, as determined in the 1996 assessment for EWT, the petitioner failed to subject the storage fees in the amount of P203,280.50 to 1% EWT. For failure of the petitioner to subject P203,280.50 storage fees to withholding tax, the same shall be disallowed as a deduction from gross income. The adjustment of respondent should be limited to P203,280.50 for storage fees to determine taxable income.

5. Difference Between Gross Income per F/S and ITR

Respondent disallowed the following as reconciling items – nontaxable income in petitioner's 1996 income tax computation (Exhibit GG):

Trading profits	P 23,118,243.00

Revaluation of trading investments	88,053.00
PLDT dividends	7,650.00
Institutional interest income on due to branches	5,871,955.00
Interest on tax-exempt and tax paid government securities	174,680,672.00
Total	**P 203,766,573.00**

To support its contention that the above items are non-taxable, the petitioner presented as evidence its 1996 audited F/S (Exhibit HH), annual ITR (Exhibit FF), and the accompanying reconciliation of net income (Exhibit GG). However, petitioner did not provide any evidence to support the nature of the above income items. The petitioner could have presented dividend certificates, government advices and certificates, third parties memoranda, etc. For lack of evidence to substantiate petitioner's claim, the respondent's assessment is sustained.

Thus, the difference of P203,766,573.00 between the gross income per F/S and ITR should not be allowed as deduction for income tax purposes.

6. Interest expense on bills payable and other borrowings

Respondent disallowed as deduction the interest expense on bills payable and other borrowings in the amount of P377,715,733.00 for the alleged failure of the petitioner to subject the same to 20% final tax. As previously discussed in the 1996 assessment for final tax, the petitioner has a deficiency 20% final tax of P75,971,470.86. This is equivalent to P379,857,354.30 interest expense not subjected by the petitioner to 20% final tax. However, only P377,715,733.00 interest expense was assessed by the respondent. For failure of the petitioner to subject interest expense to final tax, the same shall be disallowed as deduction from gross income. The adjustment of respondent should be limited to P377,715,733.00 interest expense to determine taxable income.

After considering the foregoing, the petitioner is still subject to deficiency income tax in the amount of P249,266,353.77, as shown below:

Net income per ITR		P(109,307,956.00)
Add: Adjustments to income		
Rent expense (storage fees)	P 203,280.50	
Difference between gross income per F/S & ITR	203,766,573.00	

618

Interest expense on bills payable/ other borrowings	377,715,733.00	581,685,586.50
Net income per audit		P 472,377,630.50
Tax Due Thereon		P 165,332,170.68
Interest (0.50767)		83,934,183.09
Total Income Tax Deficiency for 1996		**P 249,266,353.77**

3. 1997 Assessment

The respondent assessed the petitioner for deficiency income tax on the basis of the following (BIR Records, p. 3516):

Net income per ITR		P 866,388,781.00
Add: Adjustments to income		
Realized FX gain	P 12,592,972.00	
Salaries & Wages – no w/tax	4,485,889.26	
Sundry losses	1,780,026.55	
Interest expense on due to HO, branches, agencies and subs.	355,350,741.00	
Management & other professional fees – no EWT	3,227,955.20	377,437,584.01
Taxable income per audit		P1,243,826,365.01
Tax due thereon		P 435,339,227.75
Less: Tax credits/payments		
Total claimed	P 303,236,073.48	
Disallowed – unsupported	993,590.41	302,242,483.07
Basic tax still due		P 133,096,744.68
Interest		40,949,875.44
Compromise penalty		25,000.00
Amount due and collectible		**P 174,071,620.12**

1. Realized Foreign Exchange Gain

Respondent added realized foreign exchange gain to net income per income tax return to get total income subject to tax. However, upon examination of petitioner's 1997 Annual Income Tax Return Reconciliation – RBU (Exhibit JJ), realized foreign exchange gain was actually added back to petitioner's profit per books to arrive at its taxable income. Thus, said gain already formed part of the tax base and to add it again to income per ITR would subject it to tax twice. Therefore, realized foreign exchange gain should not be one of the adjustments to income.

2. Salaries and Wages

Respondent disallowed as deduction salaries and wages in the amount of P4,485,889.26 for the alleged failure of the petitioner to subject the same to withholding tax on compensation. As discussed earlier in the 1997 assessment for withholding tax on compensation, the petitioner failed to subject to withholding tax, compensation expense in the amount of P4,485,889.26. For failure of the petitioner to subject P4,485,889.26 compensation to withholding tax, the same shall be disallowed as deduction from gross income pursuant to Section 29(j) of the 1993 NIRC (now Section 34(K) of the 1997 NIRC). Thus, respondent's action of adding back P4,485,889.26 compensation to income subject to tax is valid.

3. Sundry Losses

Respondent disallowed as deduction sundry losses amounting to P1,780,026.55, alleging that the same loss booked in 1997 was actually recovered in 1998. However, upon verification of the evidence presented, the sundry recovery in 1998 does not pertain to the sundry loss in 1997 but to a loss recognized in 1998.

In March 1998, a loss of P1,414,989.00 was booked under GL Code 493970 – Sundry Losses (Exhibits BBBBB-2&3). In May 1998, a total of P1,414,989.00 was booked under GL Code 210145 – Sundry Recoveries. A description "reversal to entry dated 3/19/98" accompanied the general ledger entry (Exhibit BBBBB-4). These sundry recoveries were reflected in the computation of profit and loss (Exhibit BBBBB-6).

Based on the above, the respondent has no basis in his disallowance of sundry losses amounting to P 1,780,026.55. Thus, the same shall not form part of taxable income.

4. Interest Expense due to Home Office (HO), Branches, Agencies, and Subsidiaries

Respondent disallowed as deduction interest expense due to HO, branches, agencies, and subsidiaries in the amount of P355,350,741.00 because these are payments to the same entity.

(20

Petitioner contends that interest expense due to HO, branches, agencies, and subsidiaries is allowable as deduction from gross income pursuant to Article 8, paragraph 4 of the RP-US Tax Treaty.

Article 8 (4) of the RP-US Tax Treaty provides:

> "(4) In the determination of the business profits of a permanent establishment, there shall be allowed as deductions ordinary and necessary expenses which are reasonably allocable to such profits, including executive and general administrative expenses whether incurred in the Contracting State in which the permanent establishment is situated elsewhere. However, no such deductions shall be allowed in respect of amounts paid or payable (other than reimbursement of actual expenses) by the permanent establishment to the head office of the resident of which it is a permanent establishment or any of its other offices by way of – xxx
>
> c) interest on moneys lent to the permanent establishment, <u>except in the case of a banking institution</u>." (Underscoring supplied)

From the foregoing, permanent establishments (e.g., branch) of banking institutions are allowed, as an exception to the general rule, to deduct interest payments made to HO and other offices.

Thus, the petitioner's interest expense due to HO, branches, agencies, and subsidiaries in the amount of P355,350,741.00 should have been allowed as deduction. Respondent's action of adding it back to derive taxable income is without basis.

5. Management & Other Professional Fees

Respondent disallowed as deduction management and professional fees in the amount of P3,227,955.20 for the alleged failure of the petitioner to subject the same to EWT. As discussed in the 1997 assessment for EWT, out of the P3,227,955.20 income payments allegedly not subjected to 10% EWT, P2,611,220.85 was aptly shown by the petitioner to be not subject to EWT. The assessment, however, for the remaining P616,734.35 still holds for failure of the petitioner to prove otherwise. However, the adjustment of respondent should be limited to P616,734.35 professional fees to determine taxable income.

621

After considering the foregoing, the petitioner is still subject to deficiency income tax in the amount of P3,634,679.93, computed as follows:

Net income per ITR		P 866,388,781.00
Add: Adjustments to income		
Salaries & Wages – no w/tax	P 4,485,889.26	
Management & other professional fees – no EWT	616,734.35	5,102,623.61
Taxable income per audit		P 871,491,404.61
Tax due thereon		P 305,021,991.61
Less: Tax credits/payments		
Total claimed	P 303,236,073.48	
Less: Disallowed – unsupported	993,590.41	302,242,483.07
Basic tax still due		P 2,779,508.54
Interest (0.30767)		855,171.39
Total Income Tax Deficiency for 1997		**P 3,634,679.93**

V. ONSHORE TAX

A. 1995 Assessment

The respondent assessed the petitioner for deficiency onshore tax based on the following (BIR Records, p. 3401)):

Onshore income	P 51,143,919.73
Rate of tax	10%
Tax due	P 5,114,391.97
Interest	3,846,943.35
Compromise penalty	25,000.00
Amount due and collectible	**P 8,986,335.32**

Petitioner submitted that its onshore income in the amount of P51,143,919.73, which was the tax base used by the respondent and reflected in its FCDU Profit and Loss Statement (Exhibit OO), consists of onshore income on loans extended to Philippine residents in the amount of P31,207,331.73 and interest income due from foreign branches and US banks in the amount of P19,936,588.00.

Petitioner alleged that it subjected to 10% onshore tax the amounts earned on the account "Interest Earned-Commercial/Industrial Loans – Non US," which relates to onshore income on loans extended to Philippine residents amounting to P31,207,331.73. Petitioner was able to substantiate its claim by submitting as

622

evidence withholding tax returns and certificates of withholding from borrowers [i.e., Philippine Long Distance Telephone Company (PLDT)and Caltex Philippines, Inc. (Caltex)], detailed as follows:

		Tax Withheld	Exhibit
Withheld & remitted by petitioner		P 4,241,411.11	QQ
Withheld & remitted by borrower:			
PLDT	P 381,635.73		RR,SS,TT
Caltex	1,006,457.10		UU,VV,WW
Total		1,388,092.83	
Total onshore tax withheld & remitted		**P 5,629,503.94**	

From the total interest earned of P31,207,331.73, of which only P3,120,733.17 should have been withheld and remitted as taxes, petitioner paid a total of P5,629,503.94 as onshore taxes. Petitioner represented that the reason for the over-remittance of P2,508,770.77 is that there was a total of US$101,279.37 (Exhibit XX) taxes withheld on interest income earned from loans granted by its Taipei Offshore Banking Branch. Although these income do not pertain to the petitioner, it withheld and remitted the 10% final tax from these income since the loans were granted to Philippine residents.

Regarding the remaining P19,936,588.00 assessed by the respondent for deficiency onshore tax, the petitioner alleged that this pertains to interest earned on demand deposits placed with foreign branches of U.S. banks, specifically Citibank N.A. Thus, this should not have been subjected to any tax pursuant to Section 24 (e) (3) of the 1993 NIRC, which provides:

> "(3) *Tax on income derived under the Expanded Foreign Currency Deposit System.* – Income derived by a depository bank under the expanded foreign currency deposit system from foreign currency transactions with non-residents, off-shore banking units in the Philippines, local commercial banks including branches of foreign banks that may be authorized by the Central Bank to transact business with foreign currency depository system units and other depository banks under the expanded foreign currency deposit shall be exempt from all taxes, except taxable income from such transactions as may be specified by the Secretary of Finance, upon recommendation of the Monetary Board to be subject to the usual income tax payable by banks: *Provided*, That interest income from foreign currency loans granted by such depository banks under said expanded system to residents (other than off-shore banking units in the Philippines or other depository banks under the expanded system) shall be subject to a 10% tax. xxx (Underscoring supplied)

623

However, a review of the documents presented as evidence showed that petitioner failed to substantiate its allegation. The description in the chart of accounts (Exhibit PP-2) is insufficient to prove that the P19,936,588 is actually interest earned on placements with Citibank N.A. The petitioner should have at least presented interbank advices and credit memoranda.

Thus, out of P51,143,919.73 onshore income that was assessed, only P19,936,588.00 should be subject to deficiency 10% onshore tax plus interest and penalties. Petitioner is therefore subject to deficiency onshore tax in the amount of P3,493,249.08, computed as follows:

Onshore income	P 19,936,588.00
Rate of tax	10%
Tax due	P 1,993,658.80
Interest (0.75218)	1,499,590.28
Total Onshore Tax Deficiency for 1995	**P 3,493,249.08**

B. 1996 Assessment

The respondent assessed the petitioner for deficiency onshore tax based on the following (BIR Records, p. 3424):

10% Onshore Tax			
Onshore income			P 22,786,132.00
Rate of tax			10%
Tax still due (No proof of payment)			P 2,278,613.20
35% Offshore Tax			
Other offshore income (tax at 35%)			P 593,749.00
Less: remittances/tax debit memo			
TDM - unsupported		P 52,615.00	
	1st quarter	P135,096.00	
	2nd quarter	169,125.60	
	3rd quarter	-	
	4th quarter	P 47,241.00	351,462.60
Basic tax due			P 242,286.40
Total tax still due			P 2,520,899.60
Interest			1,391,990.34
Compromise penalty			25,000.00
Amount due and collectible			**P 3,937,889.94**

624

1. 10% Onshore Tax

Per verification, the petitioner subjected to 10% onshore tax interest earned on FCDU loans extended to Philippine residents lodged under the account "Interest Earned-Commercial/Industrial Loans – Non US" in the amount of P22,786,132.00. The petitioner's withholding and remittance of the tax is supported by withholding tax returns and schedules of its borrower (i.e., PLDT), detailed as follows:

	Tax Withheld	Exhibit
Withheld & remitted by petitioner	P 3,775,761.29	JJJJ
Withheld & remitted by borrower: PLDT	469,704.78	KKKK
Total onshore tax withheld & remitted	**P 4,245,466.07**	

From the total interest earned of P22,786,132.00, of which only P2,278,613.20 should have been withheld and remitted as taxes, petitioner paid a total of P4,245,466.07 as onshore taxes. Petitioner represented that the reason for the over-remittance of P1,966,852.87 is that there was a total of US$83,911.69 (Exhibit LLLL) taxes withheld on interest income earned from loans granted by its Taipei Offshore Banking Branch. Although these income do not pertain to the petitioner, it withheld and remitted the 10% final tax from these income since the loans were granted to Philippine residents.

2. 35% Offshore Tax

The deficiency tax represents alleged unremitted offshore income tax in the amount of P242,286.40. Out of the alleged unsupported payment of offshore income tax, petitioner was able to prove payment of P189,672.00 for the third quarter of 1996 (Exhibit NNNN-1). However, petitioner failed to present documents to support the remaining amount of P52,614.40. Petitioner should have submitted creditable tax certificates (BIR Form No. 1743-750) to prove that its payor withheld and remitted the proper tax.

Thus, the petitioner is subject to deficiency 35% offshore tax of P81,667.02, computed as follows:

Offshore tax due	P 52,614.40
Interest (0.55218)	29,052.62
Total Offshore Tax Deficiency for 1996	**P 81,667.02**

625

C. 1997 Assessment

Gross onshore income			P 55,306,962.00
Rate of tax			10%
Tax still due			P 5,530,696.20
Less: tax remitted	1st Quarter	P 53,084.00	
	2nd Quarter	52,133.00	
	3rd Quarter	689,500.00	
	4th Quarter	590,152.00	1,384,869.00
Basic tax still due			P 4,145,827.20
Interest			1,460,077.42
Compromise penalty			25,000.00
Amount due and collectible			**P 5,630,904.62**

Petitioner alleged that its onshore income in the amount of P55,306,962.00, which was the tax base used by the respondent, consists of P13,748,544.80 interest earned from loans extended to the Central Bank of the Philippines (CBP), now Bangko Sentral ng Pilipinas or BSP, contained in the account "Interest Earned-Loans to Non-US Government/Office Institutions" reflected in petitioner's FCDU Profit and Loss Statement (Exhibit CCCCC).

These loans are said to be supported by a Restructuring Agreement (Exhibit NNNNN), which provides that, under Section 5.08 of Article V, "any and all payments by the Obligor…shall be made free and clear of and without deduction for any and all present or future taxes, levies, imposts, deductions, charges or withholdings, and all liabilities with respect thereto, (i) imposed by the Philippines or any political subdivision or taxing authority thereof or therein…" Thus, any interest paid by the CBP, now BSP, to the participating banks and other creditors is not subject to tax.

However, the petitioner failed to prove that it was actually one of the parties in the Agreement as a participating bank and the interest income was actually earned from payments by the CBP, now BSP, pursuant to the Agreement. The Agreement presented as evidence was bereft of necessary signatures and markings that would

624

indicate that there was a perfected contract between the other parties (i.e., CBP, RP, etc.) and the petitioner. Moreover, it could not be verily concluded that the amount shown in the profit and loss statement pertains to interest earned from loans to the CBP, now BSP, without other documents like communications from CBP, interbank advice, etc.

Regarding the remaining P41,558,417.38 interest income which pertains to interest earned from loans extended to Philippine residents, the Court is convinced that the same was subjected by the petitioner to 10% onshore tax. The petitioner's withholding and remittance of the tax is supported by withholding tax returns, schedules, and certificates of withholding from its borrower (i.e., PLDT, Caltex), detailed as follows:

		Tax Withheld	Exhibit
Withheld & remitted by petitioner		P 8,785,472.87	DDDDD
Withheld & remitted by borrower:			
PLDT	P 339,293.32		EEEEE
Caltex	117,309.15		FFFFF
Total		456,602.47	
Total onshore tax withheld & remitted		**P 9,242,075.34**	

From the total interest earned of P41,558,417.38, of which only P4,155,841.74 should have been withheld and remitted as taxes, petitioner paid a total of P9,242,075.34 as onshore taxes. Petitioner explained that the reason for the over-remittance of P5,086,233.60 is that there was a total of US$192,629.24 (Exhibit GGGGG) taxes withheld on interest income earned from loans granted by its Taipei Offshore Banking Branch. Although these income do not pertain to the petitioner, it withheld and remitted the 10% final tax from these income since the loans were granted to Philippine residents.

Based on the foregoing, the petitioner is still subject to deficiency 10% onshore tax of P1,859,050.70, computed as follows:

Gross onshore income	P 55,306,962.00
Rate of tax	10%
Tax still due	P 5,530,696.20
Less: tax remitted	4,155,841.74

627

Basic tax still due	P 1,374,854.46
Interest (0.35218)	484,196.24
Total Onshore Tax Deficiency for 1997	**P 1,859,050.70**

VI. 1995 BRANCH PROFIT REMITTANCE TAX (BPRT)

The respondent assessed the petitioner for deficiency BPRT based on the following (BIR Records, p. 3401):

Conversion into permanently capital	P 39,568,083.00
Tax Due Thereon (@ 15%)	P 5,935,212.45
Interest	4,464,348.10
Compromise penalty – non payment	25,000.00
Amount due and collectible	P 10,424,560.55

In 1995, the Bangko Sentral ng Pilipinas (BSP) approved petitioner's request to transfer its previous year's unremitted profits amounting to P39,568.082.59 to assigned capital in compliance with Section 5 Circular 51 of BSP, which implemented Republic Act (RA) No. 7721, otherwise known as "An Act Liberalizing the Entry and Scope of Operations of Foreign Banks in the Philippines." This is evidenced by correspondences between the BSP and the petitioner (Exhibit YY).

It is respondent's contention that the conversion of the unremitted profits to permanently assigned capital upon BSP approval was a form of constructive remittance on the part of the petitioner to its head office and as such, the same should be subject to15% BPRT pursuant to Section 25 (a) (5) of the NIRC. Respondent assessed 15% BPRT on the profit converted by petitioner into capital in the amount of P39,568,082.59 during 1995.

However, a perusal of the correspondences between the petitioner and the BSP, presented as evidence by petitioner, would indicate that there was conversion of the <u>unremitted</u> earnings to permanently assigned capital. This would mean that there was no remittance to the head office that happened, whether actual or constructive. The P39,568.082.59 earning of petitioner which was originally allotted to be remitted to its head office, was converted to permanently assigned capital, pursuant to Section 5 Circular 51 of the BSP. Clearly, the amount was never remitted but was retained in

628

this country,

Moreover, in the respondent's own ruling (Unnumbered ruling dated July 31, 1978, Exhibit ZZ) involving the same issue, it was ruled that if the branch profits are actually converted into capital and therefore, are retained in this country, they will not be subject to the remittance tax.

Based on the foregoing, the petitioner is not subject to deficiency BPRT.

VII. 1996 GROSS RECEIPTS TAX (GRT)

The respondent assessed the petitioner for deficiency GRT for 1996 on the basis of the following (BIR Records, p. 3420):

Gross income per F/S	P 1,077,376,193.00
Add: Other FCDU income subjected @ 35%	1,946,901.87
Less: PLDT dividends	(7,650.00)
Total	P 1,079,315,444.87
Add: Accrued interest receivable – beg.	21,549,503.00
Unearned discount – end.	302,112.00
Less: Accrued interest receivable – end.	(74,711,254.00)
Unearned discount – beg.	(2,123,280.00)
Gross receipts subject to tax	P 1,024,332,525.87
Less: Gross receipts subjected to tax	863,642,500.66
Still not subjected to tax	P 160,690,025.21
Tax Due	P 8,034,501.26
Interest	4,596,939.90
Compromise penalty	25,000.00
Amount due and collectible	**P 12,656,441.16**

It is petitioner's contention that respondent failed to consider certain items as adjustment for purposes of GRT. The following items should have been deducted from the gross receipts based on the nature of their account as indicated in petitioner's chart of accounts (Exhibit BBB):

Interest on tax-exempt government securities	P 6,144,277.11
Interest Earned-Overdraft-Due to Branches – Demand	3,210.33
Loan Principal Recovery Not Written Off	119,400.00
Trading-Profit/Loss – Market Appreciation/Depreciation	88,053.50
Total	**P 6,354,940.94**

629

The above amounts are included in petitioner's gross income which was the basis of respondent's assessment. According to petitioner, the above accounts are not subject to GRT since they are not included in the income items provided in Section 119 of the NIRC. However, aside from the description in the chart of accounts, petitioner did not provide documents to substantiate its claim that the foregoing amounts were actually of the nature they were purported to be. For example, no third party document was presented to prove that the amount P6,144,277.11 was actually interest on tax-exempt government securities. For lack of evidence to prove the claim of the petitioner, the total amount of P6,354,940.94 should be subject to GRT.

It is also petitioner's contention that the respondent failed to consider the gross receipts subjected to GRT from the petitioner's FCDU. Per verification, the amount of P863,642,500.66 deducted by respondent in his assessment as amount of gross receipts subjected to tax only pertains to petitioner's regular banking unit (RBU). Respondent failed to include the gross receipts subjected to GRT from petitioner's FCDU, in the amount of P1,946,901.97, as evidenced by 1996 Quarterly Percentage Tax Returns or BIR Form No. 2531 (Exhibit PPPP). Thus, the total amount of gross receipts subjected to GRT for 1996 amounted to P865,589,402.63.

Based on the foregoing, the petitioner is subject to deficiency GRT in the amount of P12,478,400.07 inclusive of interest, computed as follows:

Gross receipts subject to tax	P 1,024,332,525.87
Gross receipts subjected to tax	865,589,402.63
Still not subjected to tax	P 158,743,123.24
Rate of tax	5%
Basic tax due	P 7,937,156.16
Interest (0.57215)	4,541,243.90
Total Deficiency GRT Due for 1996	**P 12,478,400.06**

VIII. DOCUMENTARY STAMP TAX (DST)

A. 1995 Assessment

Respondent alleges that petitioner is liable to pay P25,000.00 compromise penalty for non-submission of annual information return for 1995 pursuant to Revenue Memorandum Order (RMO) No. 1-90. However, no compromise agreement between the parties was reached. Accordingly, the imposition of a compromise penalty has no basis. As discussed earlier, "the imposition of the same without the conformity of the taxpayer is illegal and unauthorized" (*Commissioner of Internal Revenue v. Lianga Bay Logging Co., Inc, supra.).* Thus, petitioner should not be subject to a compromise penalty of P25,000.00.

B. 1996 Assessment

Respondent assessed the petitioner for deficiency DST for 1996 on the basis of the following (BIR records, p. 3419):

Total transactions subject to DST		P15,119,496,295.34
DST Due	P	22,679,244.44
Less: DST Usages (per "BA DST payments)		20,447,366.36
DST Still Due	P	2,231,878.08
Add: 25% Surcharge		557,969.52
Compromise penalty: non-payment		25,000.00
non-submission of annual information return		25,000.00
Amount due and collectible	**P**	**2,839,847.60**

The independent CPA's verification report (Exhibit RRR-24) showed that the deficiency DST still due of P2,231,878.08 appears to represent the DST on trust receipt transactions of the petitioner amounting to P1,478,918,722.01. The respondent's examiners used the rate of P.30 on each P200 or fractional part of the face value of the transaction as basis for computing the DST due. Thus, multiplying P1,478,918,722.01 by .30/200, approximates the P2,231,878.08 deficiency DST still due[2].

Petitioner submits that it already subjected its trust receipt transactions to DST using the rate of P20 for the first P5,000 and P10 for the succeeding P5,000 or a fractional part thereof. According to the petitioner, this is the applicable rate for mortgages, since trust receipts are in the nature of mortgages, pursuant to BIR Ruling

[2] The computation was based on the verification conducted by the commissioned independent CPA. There appears a trasfiguration of figures. The amount of P1,478,918,722.01 should have been P1,487,918,722.01 per respondent's computation (BIR Records, p. 3419)

631

No. 256-89 dated December 14, 1989 and *Philippine Bank of Communications v. Commissioner of Internal Revenue*, CTA Case No. 3719, December 28, 1988. The rate used by the respondent's examiners (i.e., P.30 on each P200 or fractional part of the face value of the transaction) is applicable only to loan agreements, promissory notes, bills of exchange, drafts, instruments and securities issued by the government or any of its instrumentalities, deposit substitutes, debt instruments, certificates of deposit bearing interest, and other instruments not payable on sight or demand.

We agree with the petitioner that the rate to be used is P20 for the first P5,000 and P10 for the succeeding P5,000 or a fractional part thereof. In *Philippine Bank of Communications v. Commissioner of Internal Revenue, supra*, it was held that:

> "Thus, in Philippine National Bank vs. Jose, 63 Phil. 821, the Supreme Court defined "trust receipt" as an agreement by virtue of which a banker advances money to a person for the importation of goods, the former taking full title to the goods at the very beginning and continuing to do so until he is paid, or if the goods have been sold, until the proceeds of the sale are turned over to him by the importer or successors in interest. The ownership of the merchandise continues to be vested in the owner thereof or in the person who has advanced payment, until he has been paid in full, or if the merchandise has already been sold, the proceeds of the sale be turned over to him by the importer or by his representative or successor in interest. (Philippine National Bank vs. Vda. e Hijos de Angel Jose, 63 Phil. 814-815.) A trust receipt is considered therefore as a security transaction intended to aid in financing importers and attract dealers who do not have sufficient funds or resources to finance the importation or purchase of merchandise, and who may not be able to acquire credit except through utilization as collateral, of the merchandise imported or purchased. (53 Am. Jur. 961, cited in Samo vs. People, 5 Phil. 354.)
>
> A "deed of trust" is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power of the trustee to sell the land and pay the debt in case of default, is a deed of trust in the nature of a mortgage. (El Hogar Filipino vs. Paredes, 45 Phil. 192.) Evidently, as in deed of trust, a trust receipt is executed to secure an indebtedness, accomplished and effected as a security for the payment of an account, with authority to sell the property or merchandise to pay the debt or obligation. It requires no argument to show therefore that trust receipts issued in connection with letters of credit, as in deeds of trust, are subject to the affixture of documentary and science stamps pursuant to Section 156 of Revenue Regulations No. 26, otherwise known as the Revised Documentary Stamp Tax Regulations, implementing the provisions of Section 232 of the applicable National Internal Revenue Code." (Underscoring supplied)

632

Section 195 of the NIRC, as amended by Republic Act (RA) No. 7660 dated December 23, 1993, provides:

> "Stamp tax on mortgages, pledges, and deeds of trust. — On every mortgage or pledge of lands, estate, or property, real or personal, heritable or movable, whatsoever, where the same shall be made as a security for the payment of any definite and certain sum of money lent at the time or previously due and owing or forborne to be paid being payable, and on any conveyance of land, estate, or property whatsoever, in trust or to be sold, or otherwise converted into money which shall be and intended only as security, either by express stipulation or otherwise, there shall be collected a documentary stamp tax at the following rates:
>
> (a) When the amount secured does not exceed Five thousand pesos, Twenty pesos (P20.00);
> (b) On each Five Thousand pesos, or fractional part thereof in excess of Five thousand pesos, an additional tax of Ten pesos (P10.00). xxx" (Underscoring supplied)

Based on the foregoing, the nature of trust receipts is that of a deed of trust. The trust receipt transactions are subject to DST at the rate of P20 for the first P5,000 and P10 for the succeeding P5,000 or a fractional part thereof.

However, a review of the documents submitted showed that the petitioner was unable to substantiate its claim that it had already paid DST for its trust receipt transactions. The trust receipt agreements presented (Exhibit QQQQ) only proved that the petitioner collected payment for DST from its debtors (e.g., PNOC, Del Monte, etc), but did not show that the same was remitted to the respondent. No proof of payment of DST to the respondent was given as evidence. Therefore, the petitioner is still liable for deficiency DST plus penalties on its trust receipt transactions.

Using the rate of P20 for the first P5,000 and P10 for the succeeding P5,000 or a fractional part thereof and multiplying it to the total trust receipt transactions amounting to P1,487,918,722.01 would yield P2,975,847.40 as the total DST still due.

In sum, the petitioner is liable for deficiency DST of P3,719,809.25 inclusive of surcharge, exclusive of compromise penalty, which was improperly imposed, as shown below:.

633

DST Still Due	P	2,975,847.40
Add: 25% Surcharge		743,961.85
Amount due and collectible	**P**	**3,719,809.25**

3. 1997 Assessment

Respondent assessed the petitioner for deficiency DST for 1997 on the basis of the following (BIR records, p. 3511):

DST due on Interbank Borrowings (maturities greater than 5 days)	P 2,025,000.00
DST due on Trust Receipts	6,817,240.26
Basic Tax Due	P 8,842,240.26
Add: 25% Surcharge	2,210,560.07
Compromise penalty: non-payment	25,000.00
non-submission of annual information return	25,000.00
Amount due and collectible	**P 11,102,800.33**

Based on the above, the respondent assessed the petitioner on the latter's alleged failure to subject interbank borrowings with maturities greater than 5 days and trust receipt transactions to DST.

In its administrative protest, petitioner averred that respondent should not have included interbank borrowings and trust receipt transactions in his assessment. According to petitioner, interbank borrowings are already part of its foreign exchange money market/TCD transactions, while trust receipts transactions are already part of its loan transactions, both of which were already subjected to DST.

However, the petitioner failed to substantiate the above allegations. Exhibit HHHHH, which contains print-outs from the Multi Interbank Processing System (MIPS) detailing the petitioner's interbank transactions, does not contain any proof that DST was paid for the borrowings. No satisfactory evidence was presented to support its claim that interbank borrowings were already subjected to DST.

With regard to the deficiency DST on trust receipts, the petitioner submitted that it had already paid DST at the rate of P20 for the first P5,000 and P10 for the succeeding P5,000 or a fractional part thereof on its trust receipt transactions. Moreover, the rate used by the respondent examiner (i.e., P.30 on each P200 or fractional part of the face value of the transaction), which was derived by the

634

independent CPA in its report (Exhibit RRRR-19) to compute for the deficiency DST is incorrect for this applies to government securities.

Although we agree with the contention of the petitioner that the proper rate is P20 for the first P5,000 and P10 for the succeeding P5,000 or a fractional part thereof, reason for which was discussed in the 1996 Assessment of DST, the petitioner, again, failed to substantiate its claim that DST for its trust receipt transaction had already been paid. No proof of payment was submitted. Although the copies of the trust receipt agreements and attachments thereto (Exhibit IIIII) showed that DST was collected from the petitioner's debtors, the same failed to show that the tax was actually remitted to the respondent. Therefore, petitioner is still liable for deficiency DST plus penalties for its trust receipt transactions.

Using the rate subscribed by the petitioner (i.e., P20 for the first P5,000 and P10 for the succeeding P5,000 or a fractional part thereof) against the total trust receipt transactions of P4,544,826,839.74 (BIR Records, p. 3511) would yield P9,089,643.70 deficiency DST for trust receipt transactions.

In sum, the petitioner is liable for deficiency DST of P13,893,329.63, inclusive of surcharge, exclusive of compromise penalty, which was improperly imposed, computed as follows:

DST due on Interbank Borrowings (maturities greater than 5 days)	P 2,025,000.00
DST due on Trust Receipts	9,089,663.70
Basic Tax Due	P 11,114,663.70
Add: 25% Surcharge	2,778,665.93
Amount due and collectible	**P 13,893,329.63**

WHEREFORE, in view of all the foregoing, the deficiency tax assessments issued against the petitioner for calendar years 1995, 1996 and 1997 are hereby UPHELD in the following amounts:

Tax	1995	1996	1997	Total
Expanded Withholding Tax	P 400,540.38	P 3,155.29	P 155,001.57	P 558,697.24
Withholding Tax on Compensation	-	-	1,721,312.49	1,721,312.49
Final Tax	18,562,894.37	117,921,397.64	66,971,249.28	203,455,541.29

635

Income Tax	13,061,809.73	249,266,353.77	3,634,679.93	265,962,843.43
Onshore Tax	3,493,249.08	81,667.02	1,859,050.70	5,433,966.80
Gross Receipts Tax	-	12,478,400.06	-	12,478,400.06
Documentary Stamp Tax	-	3,719,809.25	13,893,329.63	17,613,138.88
TOTAL AMOUNT DUE & COLLECTIBLE	**P 35,518,493.56**	**P 383,470,783.03**	**P 88,234,623.60**	**P 507,223,900.19**

Accordingly, petitioner is **ORDERED** to **PAY** the respondent the aggregate amount of P507,223,900.19, plus 20% delinquency interest per annum from November 2, 1999 until the amount is fully paid pursuant to Section 249 (C) (3) of the 1997 NIRC .

SO ORDERED.

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

We Concur:

OLGA PALANCA-ENRIQUEZ
Associate Justice

ERLINDA P. UY
Associate Justice

CERTIFICATION

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

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Chairman

634