REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

<u>SECOND DIVISION</u>

BANGKO SENTRAL NG PILIPINAS, Petitioner,	**CTA CASE NO. 8810**
	Members:
-versus-	**Castañeda, Jr.,** *Chairperson,* **Casanova,** *and* **Manahan,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: SEP 05 2017 4:30 p.m.

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D E C I S I O N

CASTAÑEDA, JR., *J.*:

THE CASE

This resolves the Petition for Review filed by the *Bangko Sentral ng Pilipinas* on April 25, 2014, praying for the Court to annul, reverse, and set aside the Final Decision dated March 28, 2014, and to cancel the deficiency assessment of Final Withholding of Percentage Tax (FWPT) issued against it in the aggregate amount of ₱2,371,745,209.10 for taxable year 2009.

THE FACTS

Petitioner *Bangko Sentral ng Pilipinas* is an independent central monetary authority created by Republic Act (RA) No. 7653, otherwise known as "The New Central Bank Act". Its principal office address is at A. Mabini St. cor. P. Ocampo St., Malate, Manila, Philippines.[1]

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), who is charged with the power and duty, among others, to collect all taxes,[2] grant refunds, issue and abate tax assessments, and examine books of accounts and filed returns to determine the correctness of taxes paid under the Tax Code. He holds office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

Petitioner received an undated Preliminary Assessment Notice (PAN) on October 19, 2012, finding it liable for deficiency income tax, value-added tax (VAT), expanded withholding tax (EWT), final tax, final withholding of VAT (FWVAT), FWPT, withholding tax on compensation (WTC), and withholding of excise tax for taxable year 2009.[3]

Petitioner requested a reconsideration of the above assessment by filing a Reply to the PAN on November 5, 2012.[4]

On December 21, 2012, petitioner received a Formal Assessment Notice[5] (FAN) dated December 7, 2012. In the FAN, respondent still found due from petitioner the above-mentioned deficiency taxes for taxable year 2009.[6]

On January 18, 2013, petitioner filed its Protest dated January 8, 2013 to the FAN.[7]

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[1] Par. 1.1, Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, Vol. III, p. 1249.
[2] Par. 1.2, JSFI, Docket, Vol. III, pp. 1249-1250.
[3] Par. 1.3, Stipulation of Facts, JSFI, Docket, Vol. III, p. 1250; Exhibit "P-1", Docket, Vol. III, pp. 908-910.
[4] Par. 1.4, Stipulation of Facts, JSFI, Docket, Vol. III, p. 1250; Exhibit "P-2", Docket, Vol. III, pp. 922-951.
[5] Par. 1.5, Stipulation of Facts, JSFI, Docket, Vol. III, p. 1250.
[6] Exhibit "P-3", Docket, Vol. III, pp. 952-964.
[7] Par. 1.6, Stipulation of Facts, JSFI, Docket, Vol. III, p. 1250.

On November 4, 2013, petitioner received the Final Decision on Disputed Assessment (FDDA) dated October 31, 2013.[8] The said ruling acknowledged petitioner's settlement and the abatement of interest and penalties amounting to ₱3,337,741,641.43 on June 28, 2013 and ₱500,493,605.79 on July 19, 2013. However, respondent still found due from petitioner deficiency FWPT for taxable year 2009 in the amount of ₱2,371,745,209.10.[9]

On December 3, 2013, petitioner filed an appeal letter dated December 2, 2013 with respondent,[10] which was later on denied by respondent in a letter received on March 28, 2014.[11]

Thus, petitioner filed the instant Petition for Review on April 25, 2014.[12]

Respondent filed an Answer[13] by registered mail on July 24, 2014, interposing the following defenses:

> "4. Respondent hereby reiterates and re-pleads the preceding paragraphs of this answer as part of her Special and Affirmative Defenses.
>
> 5. For the proper information of the Honorable Court, petitioner was issued a Preliminary Assessment Notice covering the deficiency Income Tax, Value Added Tax, Expanded Withholding Tax, Final Tax, Final Withholding of VAT, Final Withholding of Percentage Tax, Withholding Tax on Compensation and Withholding of Excise Tax in the amounts of ₱42,190,320,602.09, ₱247,508,310.51, ₱4,158,952,107.25, ₱2,538,069,699.01, ₱62,682,850.74, ₱4,058,887,008.82, ₱658,299,883.68 and ₱1,032,400,114.38, respectively, inclusive of increments.
>
> 6. A request for compromise and abatement dated February 12, 2014 pertaining to ₱3,838,235,247.22 for tax assessments for taxable year 2009 was paid by petitioner after the issuance of the Final Decision on Disputed Assessment dated December 2, 2013. jc

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[8] Par. 1.7, Stipulation of Facts, JSFI, Docket, Vol. III, p. 1250.
[9] Exhibit "P-5", Docket, Vol. III, pp. 1036-1037.
[10] Par. 1.8, Stipulation of Facts, JSFI, Docket, Vol. III, p. 1250.
[11] Par. 1.9, Stipulation of Facts, JSFI, Docket, Vol. III, p. 1250.
[12] Docket, Vol. I, pp. 14-66.
[13] Docket, Vol. II, pp. 529-539.

7. Accordingly, the only portion of the assessment disputed by petitioner and subject of the instant petition pertains to the assessed deficiency final withholding of percentage tax ('FWPT') amounting to ₱2,371,745,209.10, inclusive of increments – all other items of the assessment are subject of the above-mentioned compromise offer on July 19, 2013.

8. Drawing out from the foregoing preliminaries, it is most respectfully submitted that petitioner is liable for the assessed deficiency FWPT. As would be discussed *in seriatim* hereunder, (1) the withholding of percentage tax is sanctioned by law, (2) interest income payments made by petitioner to banks and other financial intermediaries are subject to gross receipts tax, and consequently FWPT, (3) the withholding tax regulation does not distinguish between the ultimate beneficial owner of the fund on which interest was paid, (4) the FDDA is consistent with the results of reinvestigation per Final Assessment Notice, and (5) petitioner is estopped from belatedly raising alleged procedural defects during the administrative audit investigation of its deficiency taxes for taxable year 2009.

WITHHOLDING OF PERCENTAGE TAX IS SANCTIONED BY LAW.

9. During the audit investigation, it was found that petitioner had <u>interest income payments</u> to banks and other financial intermediaries which are subject to percentage tax. Accordingly, petitioner is required to withhold the same under RR No. 2-98 in relation to Section 128 (A)(3) of the National Internal Revenue Code of 1997 ('Tax Code'), as amended.

10. However, petitioner argues that it has no duty to withhold percentage tax and that respondent has exceeded her rule-making power by expanding the coverage of withholding tax.

11. This position deserves no merit.

12. It cannot be overemphasized that there is no conflict between the basic law under Title V – Other Percentage Tax of the National Internal Revenue Code of 1997, as amended ('Tax Code') and the implementing regulation embodied in Revenue Regulation 2-98, as amended.

13. The power to require the withholding of percentage tax is anchored on Section 128 (A)(3) of the Tax Code, which states that:

xxx xxx xxx

14. From the foregoing, it is distinctly clear that respondent is authorized to promulgate a scheme of tax pre-payment. In fact, there is no vagueness or trace of ambiguity from a reading of the above-mentioned provision as contended by petitioner because it has straight-forward granted respondent the authority to determine the manner and time of payment of percentage taxes.

15. It must be remembered that the withholding tax system *in general* is a scheme of tax prepayment. It is not a special class or kind of tax as argued by petitioner. Thus, Revenue Regulation No. 2-98 requiring the withholding of percentage taxes is consistent with the Tax Code which provides that:

xxx xxx xxx

16. Also, even if consideration be given to petitioner's argument on the principle of *Noscitur a Sociis*, a scheme of prepayment in the framework of the above-cited law literally refers to the authority of respondent to regulate a system or structure on the payment of percentage taxes. Petitioner erroneously isolated the word "prepayment" in Section 128 (A)(3)(b) in its own interpretation of the law. Thus, in arriving at its own construction of 'prepayment' in this confined context, it concluded that the afore-mentioned provision refers only to advance payments made by a statutory taxpayer prior to the occurrence of a taxable event. Accordingly, petitioner has been effectively misinformed and all arguments in line with this disposition must fail.

17. Hence, petitioner is duty-bound to withhold percentage taxes on interest payments to banks and other financial intermediaries under Section 5.116(5) of RR No. 2-98, as amended.

INTEREST INCOME PAYMENTS MADE BY PETITIONER TO BANKS AND OTHER FINANCIAL INTERMEDIARIES ARE SUBJECT TO GROSS RECEIPTS TAX, AND CONSEQUENTLY FWPT.

18. Petitioner, in the second body of its arguments, claimed that interest payments made by it to depositary banks in connection with the accounts covered by the FWPT assessment are not subject to Gross Receipts Tax ('GRT') and, consequently, the FWPT. *gu*

19. This argument must fail.

20. In the petition, it was argued that activities undertaken by petitioner under the Demand Deposit Reserves, Special Deposit Account, SDA – Trust, GS Sold under agreements to Repurchase, and the Reserve Deposit Liquidity Account should not be subject to GRT as these are merely made in compliance with statutory and regulatory obligations which form part of its governmental functions.

21. However, petitioner glossed over the fact that these activities are likewise attributable to the business of banking. Thus, they are subject to GRT from its income derived from its business or operations.

22. Failing to impress, petitioner argued that respondent failed to consider all proof of payment of the GRT per bank certification and concluded that the remaining balance of the FWPT assessment will pertain to SDA-Trust accounts which it alleged was not subject to GRT.

23. For proper reference, the FWPT per FDDA dated October 31, 2013 was computed as follows:

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24. The above-computed 'interest expense subjected to GRT' came from documents submitted by petitioner during the audit investigation. Settled is the rule in taxation that assessments are *prima facie* presumed correct and made in good faith. The taxpayer has the duty of proving otherwise.

REVENUE REGULATION NO. 2-98 DOES NOT DISTINGUISH BETWEEN THE ULTIMATE BENEFICIAL OWNER OF THE FUND ON WHICH INTEREST WAS PAID.

25. Petitioner contends that there is no basis for withholding the FWPT on interest payments to SDA-Trust Accounts as the beneficial owners thereof are not banks or financial intermediaries subject to the GRT.

26. Under RR No. 2-98, the government and its instrumentalities are mandated to withhold percentage tax on interests, commissions and discounts paid or <u>given</u> to banks and non-bank financial intermediaries. This without regard to the ultimate attribution of the interest paid or given.

27. Thus, petitioner is required to withhold the GRT on such interest payments to financial intermediaries considering that the latter's line of business is investment or placement of funds deposited, acquired or coursed through it from third parties. Accordingly, 'clients/investors' of financial intermediaries are engaged in trade or business subject to percentage tax and petitioner is required to withhold the same.

28. To recapitulate, interest income payments given by petitioner to banks and financial intermediaries are subject to final withholding tax. Therefore, the same shall be subject to a percentage tax. The liability for payment of the tax rests primarily on the payor as a withholding agent. Thus, in case of his failure to withhold the tax or in case of under withholding, the deficiency tax shall be collected from the payor/withholding agent. The payee (clients/investors) is not required to file an income tax return for the particular income.

29. Consequently, petitioner's ensuing argument that interest paid to financial intermediaries under trust arrangement is tax-exempt is erroneous.

THE FDDA ISSUED IS CONSISTENT WITH THE RESULTS OF REINVESTIGATION PER FINAL ASSESSMENT NOTICE.

30. Petitioner also argued that respondent's assessment in the FDDA and in the Final Decision is void insofar as it assesses petitioner for deficiency FWPT on interest payments to other financial intermediaries as the latter was not covered in the Preliminary Assessment Notice ('PAN') and in the Final Assessment Notice ('FAN'), thereby allegedly violating its right to due process.

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32. The documents submitted in support of the protest established that (1) not all of the interest paid out by petitioner pertain to banks; and (2) respondent allowed credit of GRT paid by banks per submitted certifications that GRT due on transactions with petitioner were already paid.

33. Thus, there is no new matter in the assessment that should comply with the due process requirement of law because the assessment was merely revised to accurately reflect the results of reinvestigation per FAN.

PETITIONER IS ESTOPPED FROM BELATEDLY RAISING ALLEGED PROCEDURAL DEFECTS DURING THE ADMINISTRATIVE AUDIT INVESTIGATION OF ITS DEFICIENCY TAXES FOR TAXABLE YEAR 2009.

34. To be sure, the issue on prescription was never raised by petitioner during the administrative audit investigation of its deficiency taxes for 2009.

35. It has been held by the Honorable Court in the case of Medicard Philippines Inc. ('MEDICARD') vs. Commissioner of Internal Revenue, that a taxpayer is estopped from belatedly raising issues that repudiate the CIR's jurisdiction in the administrative level <u>after extensive participation therein</u>. Particularly thumbed down by the Honorable Court was the failure to raise issues on the Letter of Authority in the administrative level stating as follows:

xxx xxx xxx

36. More importantly, the Supreme Court in the case entitled '*Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue*', it had the occasion to say:

xxx xxx xxx

37. It is most respectfully submitted that the RCBC case is on all fours with the instant case. As above-mentioned, there was already payment made by petitioner on certain portions of the PAN and the FAN after [the] amounts were reduced in the FDDA. A party shall not, after its opportunity to enjoy the benefits of an agreement, be allowed later to dispute the same, when the terms thereof ultimately would prove to operate against its hopeful expectations.

38. All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed. They will be presumed to have taken into consideration all the facts to which their attention was called (*CIR vs. Construction Resources of Asia, Inc. 145 SCRA 671).* It is incumbent upon the taxpayer to prove the contrary (*Mindanao Bus Company vs. CIR, 1 SCRA 538; CIR vs. Tuazon, Inc. 173 SCRA 397)* and failure to do so shall vest legality on respondent's actions and assessments.

39. Failure to present proof of error in the assessment will justify judicial affirmation of said assessment *(Delta Motors Co. vs. Commissioner, CTA Case No. 3782, 21 May 1986; Commissioner of*

Internal Revenue vs. Court of Appeals, et al., G.R. Nos. 104151 and 105563, 10 March 1995)."(Footnotes omitted)

In a Notice of Pre-Trial Conference dated August 5, 2014, Pre-Trial Conference was set on September 25, 2014.[14]

Petitioner filed its Reply[15] on August 11, 2014, which addressed the allegations in the Answer.

Petitioner's Pre-Trial Brief[16] and Amended Pre-Trial Brief[17] were filed on September 22, 2014 by registered mail and on October 3, 2014, respectively. On the other hand, respondent's Pre-Trial Brief[18] was filed through registered mail on October 3, 2014.

Upon respondent's motion, the Pre-Trial Conference was reset to October 9, 2014.[19]

The parties submitted their Joint Stipulation of Facts and Issues[20] on November 13, 2014. A Pre-Trial Order[21] was issued by the Court on November 26, 2014.

Thereafter, trial ensued, giving both parties the opportunity to present their respective testimonial and documentary evidence.

On December 3, 2014, petitioner presented its first witness, Assistant Governor Willie S. Alto, who testified on direct, cross and redirect and completed his testimony. The Judicial Affidavit of Assistant Governor Willie S. Alto, Exhibit "P-36", was also marked.[22]

On February 4, 2015, petitioner presented its second witness, Ms. Jeanette C. Siguenza, Manager of Financial Services Group of the Treasury Department,[23] who testified on direct, cross and redirect and

[14] Docket, Vol. II, p. 557.
[15] Docket, Vol. II, pp. 558-570.
[16] Docket, Vol. III, pp. 1116-1144.
[17] Docket, Vol. III, pp. 1190-1216.
[18] Docket, Vol. III, pp. 1229-1233.
[19] Minutes of Hearing dated September 25, 2014, Docket, Vol. III, p. 863.
[20] Docket, Vol. III, pp. 1249-1256.
[21] Docket, Vol. III, pp. 1261-1267.
[22] Minutes of Hearing dated December 3, 2014, Docket, Vol. III, p. 1268.
[23] Supplemental Judicial Affidavit of Jeanette C. Siguenza, Docket, Vol. IV, p. 1355.

completed her testimony. The affidavit of Ms. Jeanette C. Siguenza, Exhibit "P-37", was also marked.[24]

On March 2, 2015, petitioner presented its third witness, Ms. Mediatriz M. Boelsch, who completed her testimony.[25]

On July 27, 2015, petitioner presented Ms. Jeanette C. Siguenza, Mr. Mario F. Quinan and Mr. Cristino A. Eugenio as witnesses.[26]

On September 9, 2015, petitioner presented Mr. Cristino A. Eugenio, who testified on cross-examination and completed his testimony.[27]

After petitioner's presentation, marking, identification, and offer,[28] the Court admitted as part of petitioner's documentary evidence Exhibits "P-1" to "P-69".[29]

On February 3, 2016, respondent's lone witness, Mr. John Raymond R. Tan, Revenue Officer I, completed his testimony.[30]

On February 15, 2016, respondent filed a Formal Offer of Evidence.[31]

The Court admitted Exhibits "R-1" to "R-7-1" as part of respondent's evidence.[32]

Subsequently, petitioner filed its Memorandum[33] on April 27, 2016. Respondent, on the other hand, failed to submit a memorandum as per Records Verification dated June 16, 2016.[34] Accordingly, the case was declared submitted for decision on June 23, 2016.[35]

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[24] Minutes of Hearing dated February 4, 2015, Docket, Vol. III, p. 1307.
[25] Minutes of Hearing dated March 2, 2015, Docket, Vol. III, p. 1312.
[26] Minutes of Hearing dated July 27, 2015, Docket, Vol. IV, p. 1508.
[27] Minutes of Hearing dated September 9, 2015, Docket, Vol. IV, p. 1510.
[28] Formal Offer of Documentary Evidence, Docket, Vol. V, pp. 1519-1556.
[29] Resolutions dated November 6, 2015 and January 27, 2016, Docket, Vol. IV, pp. 1617-1618 and 1637-1638, respectively.
[30] Minutes of Hearing dated February 3, 2016, Docket, Vol. IV, p. 1650.
[31] Docket, Vol. IV, pp. 1653-1657.
[32] Resolutions dated March 22 and 28, 2016, Docket, Vol. V, pp. 1667-1668 and 1671, respectively.
[33] Docket, Vol. V, pp. 1672-1725.
[34] Docket, Vol. V, p. 1731.
[35] Docket, Vol. V, p. 1732.

On March 31, 2017, petitioner filed an Urgent Motion to Suspend Proceedings citing Article 2030 of the Civil Code in relation to the government's policy to settle disputes among agencies of the National Government by exerting efforts at compromise settlement.[36] Respondent was ordered[37] to comment on petitioner's motion but failed to comply.[38]

Accordingly, in a Resolution dated May 24, 2017, the Court set the motion for hearing on June 22, 2017. In an Order dated June 22, 2017, the Court denied petitioner's motion for lack of merit.[39]

There being no motion for reconsideration filed by petitioner on the Court's Order dated June 22, 2017, the Court considered the case submitted for decision.[40]

THE ISSUES

The parties submitted the following issues[41] for this Court's disposition:

1. Whether BSP is liable to pay the assessed amount of ₱2,371,745,209.10 representing alleged deficiency Final Withholding of Percentage Tax (FWPT), inclusive of interest, for taxable year 2009; and,

2. Whether or not respondent may collect the FWPT Assessment from BSP.

THE COURT'S RULING

Respondent issued an assessment against petitioner for alleged deficiency FWPT[42] in the amount of ₱2,586,406,700.80, detailed as follows:

[36] Docket, Vol. V, pp. 1734-1737.
[37] Resolution dated April 12, 2017, Docket, Vol. V, p. 1742.
[38] Records Verification dated May 8, 2017, Docket, Vol. V, p. 1743.
[39] Docket, Vol. V, p. 1747.
[40] Resolution dated August 3, 2017, Docket, Vol. V, p. 1749.
[41] Stipulation of Issues, JSFI, Docket, Vol. III, p. 1251.
[42] Formal Assessment Notice, Details of Discrepancies, Exhibit "P-3", Docket, Vol. III, p. 962.

Final withholding on interest payments to banks, ₱2,586,406,700.80 - Verification disclosed that you failed to withhold percentage tax on interest payments to banks as prescribed under Section 5.116(5) of RR No. 2-98, as amended.

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Schedule 21	
DEMAND DEPOSIT RESERVES	3,953,375,497.33
SPECIAL DEPOSIT ACCOUNT	4,221,792,672.58
SPECIAL DEPOSIT ACCOUNT-TRUST	23,537,710,062.99
GS SOLD UNDER AGREEMENTS TO REPURCHASE	9,348,306,812.17
RESERVE DEPOSIT LIQUIDITY ACCOUNT	10,666,948,971.02
Total interest expense (domestic) per FS/ITR	₱51,728,134,016.09
Final withholding of percentage tax rate	5%
Final withholding on interest payments to banks	**₱2,586,406,700.80**

However, the said amount was reduced to ₱2,371,745,209.10 in the FDDA.[43]

Before addressing the issue pertaining to petitioner's tax liability, the Court shall first determine whether the period to assess petitioner had already prescribed.

The period to assess petitioner of FWPT for January to October 2009 had already prescribed.

Section 203 of the National Internal Revenue Code (NIRC) of 1997, as amended, specifically provides that respondent has three (3) years to assess and collect an internal revenue tax, to wit:

> "**SEC. 203.** *Period of Limitation Upon Assessment and Collection.* – Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in

[43] Exhibit "P-5", Docket, Vol. III, p. 1036.

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

Pursuant to Section 203 of the NIRC of 1997, as amended, internal revenue taxes must be assessed within three years counted from the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later. This mandate governs the question of prescription of the government's right to assess internal revenue taxes primarily to safeguard the interests of taxpayers from unreasonable investigation. Accordingly, the government must assess internal revenue taxes on time so as not to extend indefinitely the period of assessment and deprive the taxpayer of the assurance that it will no longer be subjected to further investigation for taxes after the expiration of reasonable period of time.[44]

In order to determine the last day for respondent to assess petitioner of deficiency FWPT for taxable year 2009, this Court shall apply Section 5.116(B) of Revenue Regulations (RR) No. 2-98, as amended by RR No. 06-01 and RR No. 17-03, which requires the filing of Monthly Remittance Return of VAT and Other Percentage Taxes Withheld within ten (10) days after the end of each month the withholding was made or the withholding tax has accrued.

A perusal of the records shows that at the time respondent issued the FAN[45] on December 7, 2012, the right to assess petitioner of deficiency FWPT from January to October 2009 had already prescribed, illustrated as follows:

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[44] *Commissioner of Internal Revenue vs. FMF Development Corporation*, G.R. No. 167765, June 30, 2008.

[45] Exhibit "R-3", BIR Records, pp. 402-414; Par. 2.11, petitioner's Memorandum, Docket, Vol. V, p. 1680.

Month Covered (2009)	Date of Filing of BIR Form No. 1600[46]	Last Day to File BIR Form No. 1600 as required by law	Last Day to Assess	Date of Issuance of FAN
January	02/10/09	2/10/09	2/10/2012	
February	03/10/09	3/10/09	3/12/2012**	
March	04/08/09	4/10/09	4/10/2012	
April	05/11/09	5/11/09*	5/11/2012	
May	06/10/09	6/10/09	6/11/2012**	
June	07/09/09	7/10/09	7/10/2012	12/07/2012
July	08/10/09	8/10/09	8/10/2012	
August	09/10/09	9/10/09	9/10/2012	
September	10/09/09	10/12/09*	10/12/2012	
October	11/10/09	11/10/09	11/12/2012**	
November	12/10/09	12/10/09	12/10/2012	
December	01/11/10	1/10/10	1/11/2013	

* the last day prescribed for filing of the return fell either on a Saturday or a Sunday

** the last day of the three-year period fell either on a Saturday or a Sunday

Clearly, petitioner can only be assessed for deficiency FWPT on interest payments to banks for November and December of 2009.

However, as will be discussed at length, the Court finds that petitioner is not liable to withhold percentage tax on interest payments to banks.

The provision on withholding of FWPT (or GRT) provided under RR No. 2-98 is not applicable.

It must be observed that the percentage tax subject to withholding as referred to in the FAN and FDDA is gross receipts tax (GRT). In other words, respondent assessed petitioner of final withholding of GRT on its interest payments to banks.

Petitioner alleges that it has no duty to withhold GRT on banks. The general system and scheme of tax collection in the NIRC does not contemplate the withholding of GRT.

[46] Exhibits "P-8" to "P-19", Docket, Vol. IV, pp. 1558-1593.

According to petitioner, the obligation to withhold or collect tax from certain payments must be explicitly provided by law. It cannot be imposed by mere implication. The NIRC is always explicit when it provides for withholding obligations and GRT on banks is not one of those instances.

On the other hand, respondent alleges that petitioner failed to withhold FWPT on interest payments to banks and other financial intermediaries as prescribed under Section 5.116(5) of RR No. 2-98. Respondent claims that petitioner's duty to withhold the percentage taxes under Section 5.116(5) of RR No. 2-98 is based on Section 128(A)(3) of the NIRC of 1997, as amended, which provides:

> "SEC. 128. *Returns and Payment of Percentage Taxes.* –
>
> (A) *Returns of Gross Sales, Receipts or Earnings and Payment of Tax.* –
>
> xxx xxx xxx
>
> (3) *Exceptions.* – The Commissioner may, by rules and regulations, prescribe:
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> (a) The time for filing the return at intervals other than the time prescribed in the preceding paragraphs for a particular class or classes of taxpayers after considering such factors as volume of sales, financial condition, adequate measures of security, and such other relevant information required to be submitted under the pertinent provisions of this Code; and
>
> (b) The manner and time of payment of percentage taxes other than as hereinabove prescribed, including a scheme of tax prepayment."

Petitioner, however, claims that there is nothing in the provision of the NIRC which imposes the duty to withhold percentage taxes, including the FWPT on payments made to banks and other non-bank financial intermediaries being assessed by respondent. Jz

Petitioner further insists that a system of withholding under Section 128(A)(3) of the NIRC amounts to an invalid delegation of legislative power and that the obligation of the government to withhold GRT on its income payments is a violation of the equal protection clause, which renders Section 128(A)(3) void.

Also, petitioner argues that the provision under RR No. 2-98 requiring the final withholding of percentage tax was already repealed. Petitioner maintains that RR No. 9-04, which implements RA No. 9238, provides the time and venue for the filing and payment of GRT, without reference to any obligation to withhold.

Thus, petitioner concludes that RR No. 2-98, insofar as it imposes withholding percentage tax, has no legal basis and is obviously invalid.

A perusal of Section 128 of the NIRC of 1997, as amended, shows that respondent is authorized to prescribe the manner and time of payment of percentage taxes, such as GRT, including a "scheme of tax prepayment". There is nothing in the provision which would show that the "scheme of prepayment" excludes the withholding of GRT.

Nevertheless, without delving on the validity of the provision imposing final withholding of percentage tax under RR No. 2-98, the Court finds that the said provision is already inconsistent with the applicable law in this case, RA No. 9238, which re-imposed GRT on banks beginning January 1, 2004.

At the outset, it must be noted that financial institutions (banks and finance companies) have been subject to GRT under Title V of the Tax Code. However, RA No. 7716 imposed the VAT for the first time on financial institutions.[47]

The effectivity of the VAT law was deferred until December 31, 2002.[48] **The GRT imposed on banks and non-bank financial intermediaries under Section 5 of RA No. 8424 was replaced by the VAT on January 1, 2003** since no further deferment of the

[47] Value Added Tax, Atty. Victorino C. Mamalateo (2007), p. 445.

[48] Pursuant to RA No. 7716, the effectivity of the VAT Law was deferred until December 31, 1997, while RA Nos. 8241, 8424 and 9010 further deferred the effectivity of the VAT Law until December 31, 1998, December 1999 and December 31, 2002, respectively.

VAT law on banks and non-bank financial intermediaries was made after RA No. 9010.[49]

Later, **RA No. 9238 was enacted, re-imposing GRT on the services of banks, non-bank financial intermediaries, finance companies, and other financial intermediaries not performing quasi-banking functions beginning January 1, 2004, which were specifically exempted from VAT**. The pertinent portions of RA No. 9238 are hereunder quoted:

"REPUBLIC ACT NO. 9238

AN ACT AMENDING CERTAIN SECTIONS OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, BY EXCLUDING SEVERAL SERVICES FROM THE COVERAGE OF THE VALUE-ADDED TAX AND REIMPOSING THE GROSS RECEIPTS TAX ON BANKS AND NON-BANK FINANCIAL INTERMEDIARIES PERFORMING QUASI-BANKING FUNCTIONS AND OTHER NON-BANK FINANCIAL INTERMEDIARIES BEGINNING JANUARY 01, 2004.

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SECTION 3. Section 121 of the National Internal Revenue Code of 1997, as amended, is hereby restored with amendments to read as follows:

SEC. 121. *Tax on Banks and Non-Bank Financial Intermediaries Performing Quasi-Banking Functions.* - There shall be collected a tax on gross receipts derived from sources within the Philippines by all banks and non-bank financial intermediaries in accordance with the following schedule:

(a) On interest, commissions and discounts from lending activities as well as income from financial leasing, on the basis of remaining maturities of instruments from which such receipts are derived:

maturity period is five (5) years or less.................5%

maturity period is more than five (5) years...........1%

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[49] Value Added Tax, Atty. Victorino C. Mamalateo, p. 446. Changes in the provision on GRT and VAT on banks were also discussed in the case of *First Planters Pawnshop vs. Commissioner of Internal Revenue,* G.R. No. 174134, July 30, 2008.

(b) On dividends and equity shares in net income of subsidiaries..0%

(c) On royalties, rentals of property, real or personal, profits from exchange and all other items treated as gross income under Section 32 of this Code..5%

(d) On net trading gains within the taxable year on foreign currency, debt securities, derivatives and other similar financial instruments..5%

Provided, however, That in case the maturity period referred to in paragraph (a) is shortened thru pretermination, then the maturity period shall be reckoned to end as of the date of pretermination for purposes of classifying the transaction and the correct rate shall be applied accordingly.

Provided, finally, That the generally accepted accounting principles as may be prescribed by the Bangko Sentral ng Pilipinas for the bank or non-bank financial intermediary performing quasi-banking functions shall likewise be the basis for the calculation of gross receipts.

Nothing in this Code shall preclude the Commissioner from imposing the same tax herein provided on persons performing similar banking activities."

It is clear from the law above that beginning January 1, 2004, the gross receipts tax previously imposed was restored with certain amendments.

As a result, the Secretary of Finance promulgated RR No. 9-04 to implement the provisions of RA No. 9238.

Considering that the GRT imposed in this case is for taxable year 2009, the applicable law is RA No. 9238, as amended[50], and its implementing rules under RR No. 9-04.

In this regard, it must also be pointed out that RR No. 2-98 implements RA No. 8424, relative to the withholding of percentage tax

[50] RA No. 9337 increased the rates of GRT on royalties, rentals, profits and other items treated as gross income under Section 121(c) as well as on net trading gains, debt securities, derivatives and other similar instruments from 5% to 7%.

or GRT on banks, among others. However, as discussed, the provision on the imposition of GRT on banks, specifically Section 121 of RA No. 8424, underwent substantial amendments until its re-imposition under RA No. 9238. Accordingly, the withholding of GRT on banks pursuant to RR No. 2-98, under RA No. 8424, is inconsistent with RA No. 9238. The significant changes in the provisions imposing GRT on banks under RA No. 8424 and RA No. 9238 are highlighted in the table below:

RA NO. 8424	RA NO. 9238
SEC. 121. **Tax on Banks and Non-bank Financial Intermediaries.** – There shall be collected a tax on gross receipts derived from sources within the Philippines by all banks and non-bank financial intermediaries in accordance with the following schedule: (a) On interest, commissions and discounts from lending activities as well as income from financial leasing, on the basis of remaining maturities of instruments from which such receipts are derived: **Short-term maturity (not in excess of two (2) years) .... 5%** **Medium-term maturity (over two (2) years but not exceeding four (4) years) .... 3%** **Long-term maturity –** **(1) Over four (4) years but not exceeding seven (7) years .... 1%** **(2) Over seven (7) years .... 0%** (b) On dividends .... 0% (c) On royalties, rentals of property, real or personal, profits from exchange and all other items treated as gross	SEC. 121. **Tax on Banks and Non-Bank Financial Intermediaries Performing Quasi-Banking Functions.** – There shall be collected a tax on gross receipts derived from sources within the Philippines by all banks and non-banks financial intermediaries in accordance with the following schedule: (a) On interest, commissions and discounts from lending activities as well as income from financial leasing, on the basis of remaining maturities of instruments from which such receipts are derived: **Maturity period is five (5) years or less .... 5%** **Maturity period is more than five (5) years .... 1%** (b) On dividends and **equity shares in net income of subsidiaries .... 0%** (c) On royalties, rentals of property, real or personal, profits from exchange and all other items treated

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income under Section 32 of this Code 5%	as gross income under Section 32 of this Code 5%
	(d) On net trading gains within the taxable year on foreign currency, debt securities, derivatives and other similar financial instruments 5%
Provided, however, That in case the maturity period referred to in paragraph (a) is shortened thru pretermination, then the maturity period shall be reckoned to end as of the date of pretermination for purposes of classifying the transaction **as short, medium or long-term** and the correct rate of tax shall be applied accordingly.	*Provided, however*, That in case the maturity period referred to in paragraph (a) is shortened thru pretermination, then the maturity period shall be reckoned to end as of the date of pretermination for purposes of classifying the transaction and the correct rate shall be applied accordingly.
	***Provided, finally,* That the generally accepted accounting principles as may be prescribed by the Bangko Sentral ng Pilipinas for the bank or non-bank financial intermediary performing quasi-judicial banking functions shall likewise be the basis for the calculation of gross receipts.**
Nothing in this Code shall preclude the Commissioner from imposing the same tax herein provided on persons performing similar banking activities.	Nothing in this Code shall preclude the Commissioner from imposing the same tax herein provided on persons performing similar banking activities.

Aside from the difference in the GRT rate, it can be observed that the two laws provide different terms of maturity period to which the applicable rates of percentage taxes would be based. Also, RA No. 9238 imposes percentage tax on net trading gains, which is not included under RA No. 8424.

Notably, RR No. 9-04, which implements the provisions of RA No. 9238, provides as to how net trading gains together with other gross receipts are computed and reported:

"SECTION 3. *Imposition of Gross Receipts Tax (GRT) on Banks And Non-bank Financial Intermediaries Performing Quasi-* 92

Banking Functions. – There shall be collected on gross receipts from sources within the Philippines by all banks and non-bank financial intermediaries performing quasi-banking functions in accordance with the following schedule:

(a) On interest, commissions and discounts from lending activities as well as income from financial leasing, on the basis of remaining maturities of instruments from which such receipts are derived:

Maturity period of five (5) years or less — 5%
Maturity period is more than five (5) years — 1%

(b) On dividends and equity shares in the net income of subsidiaries — 0%

(c) On royalties, rentals of property, real or personal, profit from exchange and all other items treated as gross income under Section 32 of the Code — 5%

(d) On net trading gains within the taxable year on foreign currency, debt securities, derivatives and other similar financial instruments — 5%

In computing for the net trading gain within the taxable year on items of income provided in (d) above, the figure to be reported in the monthly percentage tax return (GRT) **shall be the cumulative total of the net trading gain/loss since the first month of the applicable taxable year less the figures already reflected in the previous months of the same taxable year**. Provided, that **net trading loss on items of income provided in (d) above may only be deducted from net trading gain on items of income provided in (d) above, but not from any other items of gross receipt to arrive at the total monthly gross receipts tax due**.

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Illustrations:

ABC Bank has the following income/loss for the month of March 2004:

Interest Income with Maturity of less than five years	P50,000.00
Rentals	50,000.00
Net trading Loss	(10,000.00)

For the month of March 2004, ABC Bank is liable for GRT amounting to P5,000.00 computed as follow:

Interest Income with Maturity of Less than Five years	P50,000.00	
Multiply by GRT Rate	5%	2,500.00
Rentals	P50,000.00	
Multiply by GRT Rate	5%	2,500.00
TOTAL		P5,000.00

For the month of April 2004, ABC Bank has the following income:

Interest Income with Maturity of less than five years	P100,000.00
Rentals	50,000.00
Net trading gain	20,000.00

For the month of April 2004, ABC Bank is liable for GRT amounting to P8,000.00 computed as follow:

Interest Income with Maturity of Less than Five years	P100,000.00	
Multiply by GRT Rate	5%	P5,000.00
Rentals	P50,000.00	
Multiply by GRT Rate	5%	2,500.00
Net Trading Gain for April 2004	P20,000.00	
Less: Net Trading Loss for March 2004	(10,000.00)	
Adjusted Net Trading Gain	P10,000.00	
Multiply by GRT Rate	5%	500.00
TOTAL		P8,000.00

Furthermore, if for the sake of this illustration, ABC Bank shall have by the end of December 2004, a cumulative net trading loss of P50,000.00, said trading loss can no longer be carried over to taxable year 2005 and deducted against any trading gain earned on any taxable year other than the year it was incurred.

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In the case of financial leasing, the taxable gross receipts shall consist of the interest income only whereas in the case of transactions under operating lease agreements, the gross receipts is the gross rental. Whether the lease transaction is 'finance lease' or 'operating lease' shall be determined by the contents of the document evidencing the lease agreement or, in short, the substance of the agreement rather than the form used to evidence such agreement between the lessor and the lessee.

Provided, however, that in case the maturity period referred to in paragraph (a) is shortened thru pretermination, then the maturity period shall be reckoned to end as of the date of pretermination for purposes of classifying the transaction and the application of the correct tax rate.

Provided, further, that the generally accepted accounting principles as may be prescribed by the Bangko Sentral ng Pilipinas for the bank or non-bank financial intermediary performing quasi-banking functions shall be the basis for the calculation of the taxable gross receipts.

Provided, finally, that the financial statements from which the basis for deriving the taxable gross receipts is determined must be prepared likewise in accordance with the generally accepted accounting principles as may be prescribed by the Bangko Sentral ng Pilipinas for the bank and non-bank financial intermediary performing quasi-banking functions.

Nothing in these Regulations shall preclude the Commissioner from imposing the same tax herein provided on persons performing similar banking activities." (*Emphasis supplied*)

Based on the foregoing, the amount to be reported in the monthly percentage tax return (GRT) considers the deduction of net trading loss on net trading gain to arrive at the total monthly gross receipts tax due. The above provisions also specified the composition of gross receipts in finance and operating lease. These are obviously not included and considered in the provision imposing final withholding of GRT on interest payments to banks under RR No. 2-98, which provides:

"SECTION 5.116. *Withholding of Percentage Tax.* –

Bureaus, offices and instrumentalities of the government, including government-owned or controlled corporations as well as their subsidiaries, provinces, cities and municipalities making any money payment to private individuals, corporations, partnerships and/or associations are required to deduct and withhold the taxes due from the payees on account of such money payments.

(A) *Internal revenue taxes required to be withheld.* – Percentage taxes on gross money payments, to the following shall be subjected to withholding at the rates herein prescribed: *ju* xxx xxx xxx

(5) *Banks and non-bank financial intermediaries* –

(a) On interest, commissions and discounts paid or given to banks and non-bank financial intermediaries arising out of lending activities as well as financial leasing, on the basis of the remaining maturities of the instrument –

Short-term maturity (not exceeding 2 years)	5%
Medium-term maturity (over 2 years but not exceeding 4 years)	3%
Long-term maturity	
(i) over 4 years but not exceeding 7 years	1%
(ii) over 7 years	0%

(b) On dividends 0%

(c) On royalties, rentals of property, real or personal, profits from exchange and all other gross income — Five percent (5%)"

Furthermore, as correctly pointed out by petitioner, the new rule implementing RA No. 9238 specified the time and venue for the filing and payment of GRT and this does not include the withholding of the said GRT at source. The pertinent portion of RR No. 09-04 reads:

"SECTION 6. *Time and Venue for the Filing and Payment of GRT.* – The GRT due computed and determined in accordance with these Regulations shall be paid monthly within 20 days following the end of the taxable month using BIR Form 2551M to the concerned AAB of the RDO/LTDO/LTAID I where the taxpayer is registered or required to be registered. *Provided*, that, if the taxpayer is an EFPS taxpayer, the rules and regulations governing the filing of returns and payment of taxes under EFPS shall be observed."

With the foregoing changes in the imposition of GRT on banks, the withholding of GRT provided under RR No. 2-98 already became inconsistent with the re-imposition of GRT provided under RA No. 9238, and with the revenue regulation implementing the same, which is RR No. 9-04.

Significantly, Section 6 of RA No. 9238 and Section 9 of RR No. 9-04 respectively provide:

> "SECTION 6. *Repealing Clause.* – The provisions of Section 17(b) and the third paragraph, first sentence of Republic Act No. 7716; Section 11(b) of Republic Act No. 8241; Section 5, Title XIV of Republic Act No. 8424; Section 1(b) of Republic Act No. 8761 and Section 1(b) of Republic Act No. 9010; and all others laws, decrees, orders, rules and regulations, and issuances or parts thereof inconsistent with this Act are hereby repealed or modified accordingly."

> "SECTION 9. *Repealing Clause.* – Revenue Regulations No. 18-99, Revenue Regulations No. 12-2003, and Revenue Regulations No. 20-2003 are hereby expressly repealed. Provisions of all other revenue issuances, or portions thereof which are inconsistent with the provisions of these Regulations are hereby likewise amended, modified or revoked accordingly."

Applying the foregoing to this case, the provision under RR No. 2-98 on the withholding of percentage GRT on banks shall be considered as revoked or repealed for being inconsistent with the provision re-imposing GRT on banks under RA No. 9238, as amended, and with RR No. 9-04. Hence, petitioner should not be held liable to pay final withholding of GRT on interest payments to banks.

Parenthetically, it is axiomatic that the constitutionality of a law, regulation, ordinance or act will not be resolved by courts if the controversy can be, as in this case, settled on other grounds.[51] As a consequence, the Court will no longer address the constitutionality and validity of Section 128(A)(3)(b) of the NIRC of 1997, as amended, and the provision imposing final withholding of percentage tax under RR No. 2-98.

Also, with the above findings, the resolution of the remaining issues raised by the parties is no longer necessary. *ju*

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[51] *The Office of the Solicitor General vs. Ayala Land Incorporated, et al.*, G.R. No. 177056, September 18, 2009.

WHEREFORE, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, the deficiency final withholding of percentage tax assessment issued against petitioner in the amount of ₱2,371,745,209.10 for taxable year 2009 is **CANCELLED** and **WITHDRAWN**.

SO ORDERED.

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

WE CONCUR:

CAESAR A. CASANOVA
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

ATTESTATION

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

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

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice