REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB NO. 1786
(CTA Case No. 8934)

Present:

Del Rosario, *PJ*,
Castañeda, Jr.,
Uy,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban, and
Manahan, *JJ.*

- versus -

Promulgated:

MAERSK GLOBAL SERVICE CENTRES (PHILIPPINES) LTD.,
Respondent.

JUN 13 2019 2:32 p.m.

x---x

DECISION

CASTAÑEDA, JR., *J.*:

This Petition for Review filed by petitioner Commissioner of Internal Revenue, seeks to reverse and set aside the Decision[1] dated October 11, 2017 and the Resolution[2] dated January 26, 2018, respectively, of the CTA Third (3rd) Division.

For easy reference, the dispositive portion of the assailed Decision reads:

[1] Penned by Retired Associate Justice Lovell R. Bautista, with Associate Justice Ma. Belen M. Ringpis-Liban concurring and Associate Justice Esperanza R. Fabon-Victorino concurring and dissenting, CTA *En Banc* Docket, pp. 18-40.
[2] CTA *En Banc* Docket, pp. 42-45.

"**WHEREFORE**, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, the assessments covering income tax and final withholding tax for calendar year 2010 in the total amount of Php49,469,186.64, inclusive of interest and compromise penalty, are hereby **CANCELLED** and **SET ASIDE**.

SO ORDERED."[3]

On the other hand, the dispositive portion of the assailed Resolution reads:

"**WHEREFORE**, premises considered, respondent's Motion for Reconsideration (on the Decision of the Honorable Court dated 11 October 2017) is hereby **DENIED** for lack of merit. The Decision promulgated on October 11, 2017 is **AFFIRMED**.

SO ORDERED."[4]

THE FACTS

The following are the facts found by the Court in Division:

"On October 15, 2007, petitioner [now respondent] executed a Service Agreement with A.P. Moller — Maersk A/S ('APMM'), a foreign corporation duly organized and existing under the laws of Denmark. APMM owns container vessels and containers, and operates worldwide through its subsidiaries; and is required to handle various back office tasks on behalf of its clients. Under the Service Agreement, petitioner would render back office tasks, documentation, and other processes (e.g., export documentation, import documentation, agency operations, logistics export handling, finance and accounting, systems processes, value added services) to APMM and its clients.

In CY 2006, petitioner had unutilized and excess input value-added tax ('VAT') attributable to its zero-rated sale of services in the total amount of Php11,133,280.05. In this regard, petitioner filed a claim for issuance of a tax credit certificate ('TCC') of the said amount with the Department of Finance ('DOF'). However, the claim was denied in a letter issued by the DOF on October 10, 2009 on the

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[3] See Note 1, p. 36.
[4] See Note 2, p. 44.

sole ground that petitioner did not strictly comply with the invoicing requirements for zero-rated sales.

For CY 2010, respondent [now petitioner] issued Letter of Authority No. LOA-43A-2011-00000642 on October 11, 2010 authorizing Revenue Officer ('RO') Carmencita Villanueva and Group Supervisor Antonino Ilagan to conduct the investigation of the 2010 books of accounts and accounting records of petitioner.

Thereafter, respondent issued a Notice of Informal Conference and a Preliminary Assessment Notice ('PAN') with attached Details of Discrepancies.

On April 3, 2014, respondent issued two (2) Formal Letters of Demand with attached Details of Discrepancies and three (3) Assessment Notices (the 'FANs'), which were received by petitioner on even date. Under the FAN, petitioner was assessed deficiency income tax and FWT on branch profits and compromise penalty, as follows:

xxx xxx xxx

On April 27, 2014, petitioner filed a letter with respondent wherein it requested for a reinvestigation of the FAN.

In a letter dated June 10, 2014, which was received by petitioner on June 19, 2014, respondent granted petitioner's request for reinvestigation. RO Rosalina Reyes was authorized by respondent to handle the re-investigation.

In a letter dated July 21, 2014, petitioner submitted additional documents to respondent.

In a letter dated January 14, 2015, which was received by petitioner on January 29, 2015, respondent reiterated its assessment and recommended the issuance of a Final Decision on Disputed Assessment ('FDDA').

Meanwhile, alleging the one hundred and eighty (180)-day period under Section 228 of the 1997 National Internal Revenue Code, as amended ('1997 NIRC') had lapsed without respondent's action on petitioner's protest to the FAN, petitioner filed the present Petition for Review on November 24, 2014.

Respondent filed his Answer on January 23, 2015.

Petitioner filed its Pre-Trial Brief by registered mail on February 27, 2015, while Respondent's Pre-Trial Brief was filed on April 8, 2015. Thereafter, a pre-trial conference was held on April 14, 2015. Together, the parties filed their Joint Stipulation of Facts and Issues on April 24, 2015, which was adopted by the Court in the Pre-Trial Order issued on May 20, 2015.

Petitioner proceeded with the presentation of its evidence. To this end, petitioner presented Ms. Nicole Elene S. Butalid, its Site Finance and Office Management Lead. Thereafter, petitioner filed its Formal Offer of Evidence on July 28, 2015 wherein it offered Exhibits xxx. Petitioner's Formal Offer of Evidence was resolved by the Court in a Resolution dated August 3, 2015, which admitted all of petitioner's evidence.

Respondent then proceeded with the presentation of his evidence. In this regard, respondent presented the following witnesses: (1) Atty. Carmencita G. Villanueva, the RO who conducted the audit or investigation of petitioner's books of accounts and other accounting records for CY 2010; and (2) Ms. Rosalina T. Reyes, the RO who conducted the reinvestigation in relation to petitioner's protest to the FAN. Respondent's Formal Offer of Evidence was filed on October 20, 2015 wherein he offered Exhibits xxx. Petitioner filed its Comment (To Respondent's Formal Offer of Evidence) on November 5, 2015. Respondent's Formal Offer of Evidence was resolved by the Court in a Resolution dated November 24, 2015, which admitted all of respondent's evidence.

Petitioner presented rebuttal evidence through its witness, Ms. Analou Y. Meneses, petitioner's Finance Manager. Consequently, Petitioner's Formal Offer of Rebuttal Evidence was filed on February 16, 2016 wherein it offered Exhibits xxx. Respondent failed to file his comment thereon despite notice. Petitioner's Formal Offer of Rebuttal Evidence was resolved by the Court in Resolutions dated March 8, 2016 and July 20, 2016, which admitted all of petitioner's rebuttal evidence except Exhibits xxx. Petitioner then filed a Proffer of Evidence on August 8, 2016, which was duly noted by the Court in a Resolution dated August 31, 2016.

Thereafter, petitioner filed its Memorandum on September 8, 2016; however, respondent failed to file his memorandum despite notice. On October 14, 2016, the Court issued a Resolution submitting the case for decision; hence, this Decision."[5]

On October 11, 2017, the Court in Division issued the assailed Decision. On November 8, 2017, petitioner filed his Motion for Reconsideration (on the Decision of the Honorable Court dated 11 October 2017).[6] On December 8, 2017, respondent filed its Comment (To Motion for Reconsideration dated 7 November 2017).[7] On January 26, 2018, the Court in Division issued the assailed Resolution.

On March 1, 2018, the CIR filed his Petition for Review (on the Decision of the Honorable Court dated 11 October 2017). On April 12, 2018, respondent filed its Comment (To Petition for Review dated 28 February 2018). On April 23, 2018, the Court *En Banc* issued a resolution[8] requiring the parties to submit their memoranda. On May 31, 2018, respondent filed its Memorandum,[9] while petitioner failed to file the same.[10] Thus, on July 12, 2018,[11] the Court En Banc issued a resolution submitting the case for decision. Hence, this Decision.

THE ISSUES

Petitioner presented the following issues:

"I.

There was valid and legal basis for petitioner to disallow the respondent's bad debt expense as an item of deduction.

II.

The Honorable Court erred to hold that the assessment for final withholding tax on branch profit remittance was improper."[12]

THE RULING

The Court *En Banc* denies the instant Petition. *Js*

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[5] Court in Division Docket, Vol. 2, pp. 746-750.
[6] Court in Division Docket, Vol. 2, pp. 769-777.
[7] Court in Division Docket, Vol. 2, pp. 780-785.
[8] Court *En Banc* Docket, pp. 72-73.
[9] Court *En Banc* Docket, pp. 74-97.
[10] Records Verification, Court *En Banc* Docket, p. 102.
[11] Court *En Banc* Docket, pp. 104-105.
[12] Grounds, Petition for Review, Court *En Banc* Docket, p. 7.

Respondent's denied VAT refund claim is a valid loss which was properly deducted from its gross income for CY 2010

The Court in Division found that:

> "In CY 2006, herein respondent Maersk Global Service Centres (Philippines) Ltd ('Maersk' for brevity) had excess input VAT arising from various purchases of goods and services in the amount of ₱11,133,280.05.
>
> Thereafter, Maersk filed a claim for issuance of Tax Credit Certificate (TCC) or refund of creditable input tax attributable to zero-rated sales.
>
> However, the Department of Finance (DOF) denied the claim for tax refund or tax credit for failure to comply with the invoicing requirements.
>
> On March 11, 2010 Maersk received the DOF's ruling denying its claim for refund or tax credit.
>
> In view of the DOF's denial of its claim, Maersk wrote off the same in its books and claimed it as a deduction from gross income for CY 2010.
>
> The CIR then assessed Maersk for deficiency income tax and disallowed the deduction, explaining in the FAN:
>
> I. DEFICIENCY INCOME TAX
>
> > Non-deductible Bad Debts (₱11,133,280.00) – Verification disclosed that the bad debts amounting to ₱11,133,280.00 per financial statements was not properly supported with the necessary documents in order to be valid deduction from gross income, therefore, disallowed pursuant to Section 34."[13]

The Court in Division ruled that respondent's use of "bad debts" account does not necessarily equate to bad debts expense, as identified under the NIRC of 1997, as amended. It treated the denied claim as a deductible loss. *ge*

[13] Court in Division Docket, Vol. 2, pp. 756-757.

Hence, the Court in Division concluded that upon compliance with the requisites for deductibility of losses pursuant to Section 34(D)(1)(a) of the NIRC of 1997, as amended, respondent's denied VAT refund claim was a valid loss, which was properly deducted from its gross income for CY 2010.

In her Judicial Affidavit,[14] Ms. Nicole Elene S. Butalid, Site Finance and Office Management Lead of respondent, explained how the claimed input taxes were recorded in its books. Thus:

> "**Q33.** After the Company received the DOF letter of denial on March 11, 2010, what did it do next with regard to the denial?
>
> **A33.** We expensed the denied input VAT claims as Bad Debts.
>
> **Q34.** Why did the Company use the term "bad debts" for the denied VAT refund claim?
>
> **A34.** This is the term used in our Company Global Chart of Accounts which is what our Accounting System is based on.
>
> **Q35.** Please explain the accounting entries for the following: (a) when the input tax was incurred, (b) when the input was applied for refund with the DOF and (c) when the input tax was written off after the claim for refund was denied by the DOF.
>
> **A35. a.1** To take up the input VAT on purchases of goods;
>
> | | |
> |---|---|
> | Debit: | Purchases |
> | | Input VAT |
> | Credit: | Accounts payable/Cash |
>
> **a.2** To take up purchases of services without OR
>
> | | |
> |---|---|
> | Debit: | Services |
> | | Deferred Input VAT |
> | Credit: | Accounts payable/Cash |
>
> **a.3** To take up receipt of OR/Payment;
>
> | | |
> |---|---|
> | Debit: | Input VAT |
> | Credit: | Deferred input VAT |
>
> **a.4** Reclassification of Input VAT to VAT Settlement account

[14] Exhibit P-12, Docket, Vol. 1, pp. 58-71.

Debit:	VAT Settlement
Credit:	Input VAT

a.5 Closing of VAT settlement account at the end of the year;

Debit:	Other Receivables
Credit:	VAT Settlement

b. When the input VAT was applied for refund with the DOF

No entry

c. When the input VAT was written off after the claim for refund was denied by the DOF

Debit:	Other Provisions – Allowance
Credit:	Other Receivables
Debit:	Bad Debts
Credit:	Other Provisions – Allowance Permanent Difference"

An analysis of the above accounting entries shows that based on respondent's Global Chart of Accounts and accounting system, the VAT Settlement account where the Input VAT was lodged (Journal Entry No. a.4) was eventually closed to Other Receivables account at the end of the year (Journal Entry No. a.5).

From the foregoing, it is clear that respondent's bad debts account does not pertain to a claim arising from money lent or from goods sold or services rendered that became worthless or uncollectible. It is just the account name in its Global Chart of Accounts and accounting system which referred to the denied VAT refund claim.

As discussed in the Decision of the Court in Division, Maersk internal accounting procedure is beyond the purview of the Court. Further, the Court explained that as applied to deductions in general, **the proper characterization of the account as a valid deduction from gross income depends on the actual nature of the account.**[15]

[15] Court in Division Docket, Vol. 2, p. 758.

Thus, the Court in Division aptly held that the use of the account name "bad debts" does not necessarily equate to the bad debts expense, as identified in the NIRC of 1997, as amended.

Treatment of denied VAT refund claims

Section 110(B) of the NIRC of 1997, as amended, provides the treatment of excess input VAT, to wit:

1. The excess input VAT **can be carried over to the succeeding quarter or quarters**;

2. **Any input tax attributable to zero-rated sales by a VAT-registered person may at his option be refunded or credited against other internal revenue taxes**, subject to the provisions of Section 112. *(Emphasis supplied)*

The above provisions pertain to the treatment of excess input VAT in the ordinary course of business during the taxable period that the input taxes are incurred.

However, the issue involved here is the treatment of the **disallowed/denied** application for refund or issuance of tax credit certificate of input VAT attributable to zero-rated sales.

It is noteworthy that there is no explicit rule as to the treatment of **disallowed/denied** application for refund or issuance of tax credit certificate on input VAT attributable to zero-rated sales under the NIRC of 1997, as amended. However, Revenue Regulations (RR) No. 09-89 provided for Journal Entries *vis-à-vis* the recording of transactions if there are **disallowed/denied** input taxes upon verification of the claim, *to wit:*

"Example 4:

Under the same set of facts as in Examples 1, 2, 3, the net refundable or creditable input tax shall be computed as follows:

Input tax per VAT return		P32,500
Less: Input tax not attributable to export sales:		
Input tax attributable to taxable domestic sales	P16,250	
Input tax attributable to exempt sales	8,125	
Input tax on ending inventory	1,120	
Excess of output tax over input tax attributable to taxable domestic sales	3,750	29,245

Net amount refundable or creditable	P3,255

The following entries shall be made to reflect the foregoing transactions:

xxx xxx xxx

B. Upon filing of application for refund or tax credit:

Receivable (TCC/Refund)	P3,255	
Input tax		P3,255

To record the amount of input taxes claimed for refund or tax credit.

Input tax attributable to zero-rated sales		P8,125
Less:		
Excess of output tax over input tax attributable to taxable domestic sales	P3,750	
Input tax on ending inventory	1,120	4,870
Claim for refund/tax credit		P3,255

Case 1

Upon receipt of the tax credit or refund where there are no disallowances:

Cash or TCC	P3,255	
Receivables (TCC/Refund)		P3,255

To record the amount of refund or tax credit received.

Case 2

Upon receipt of tax credit or refund where there are disallowed input taxes of P2,500 upon verification of claim:

Purchases or Cost of Sales	**P2,500**	
Receivables (TCC/Refund)		**P2,500**

To close unallowable input tax upon verification of claim.

Cash or TCC	P755	
Receivables (TCC/Refund)		P755

To record the amount of refund or tax credit received." ***(Emphases supplied)***

Based on the foregoing, the disallowed/denied claim for input tax was recorded as Purchases or Cost of Sales, which is classified as an expense account and a deduction from the taxpayer's sales/revenue. *Jr*

It should be noted that respondent's treatment of recording the input taxes in the Other Receivables account is in order. When the DOF denied respondent's claim, it cannot record the disallowed/denied input taxes as part of the cost because the books of account for the year 2006 have been closed. Alternatively, the same was written of its books through the contra account Other Provision-Allowance, which is an account used to reduce the value of a related account (in this case, the Other Receivables account). This contra account was eventually closed to the Bad Debts Expense account, which formed part of respondent's deductions from its gross income.

Further, the Court in Division noted that under the Black's Law Dictionary, loss is defined as **"an undesirable outcome of a risk; the disappearance or diminution of value, usually in an unexpected or relatively unpredictable way."**

The denial of the claim for refund of excess input VAT led to the undesirable outcome of a risk and disappearance or diminution of value. Thus, it is considered as a loss.

The Court in Division likewise enumerated the requisites for deductibility of losses from gross income, as follows:

1. The loss is actually sustained by the taxpayer;
2. The loss is sustained during the taxable year;
3. The loss is not compensated by insurance or other forms of indemnity;
4. The loss is incurred in the taxpayer's trade, profession, or business; and
5. The loss is evidenced by a closed and completed transaction.

Upon verification by the Court in Division, respondent's denied VAT refund claim was a valid loss, to wit:

1. Respondent actually sustained a loss in the amount of ₱11,133,280.00 when the DOF denied its claim for refund, considering that such denial equated to respondent no longer having any reasonable expectation to classify the same as a receivable;

2. The loss was sustained in CY 2010, when respondent received the DOF's denial letter, and as evidenced by the date stamped on the envelope[16] of said letter (i.e., March 11, 2010); ✓

[16] Exhibit P-10, Docket, Vol. I, p. 472.

3. Respondent was not compensated for the loss;

4. Respondent incurred the loss in the conduct of its trade or business (*i.e.*, the denied input VAT arose from petitioner's zero-rated sales of services); and

5. The DOF categorically stated in its denial letter that respondent's claim for the issuance of TCC "cannot be given due course."

Thus, it is proper to treat the denied VAT refund claim as a deductible loss.

Finally, petitioner subscribes to the dissenting opinion of the Honorable Associate Justice Esperanza R. Fabon-Victorino, that the unutilized input taxes attributable to zero-rated sales can only be recovered through an application for refund or tax credit. There is no specific provision under the law which allows another modality to recover unapplied input taxes arising from zero-rated or effectively zero-rated sales.

While *We* recognize that the NIRC of 1997, as amended, specifically mentions refund or tax credit as modes to recover unutilized input taxes attributable to zero-rated sales, it does not categorically prohibit the use of any other mode for its recovery. In fact, a reading of Section 112 (A) of the NIRC of 1997, as amended, suggests that an alternative mode may be resorted to by a taxpayer for the recovery of excess input taxes other than by tax refund or tax credit. Thus:

> "SEC. 112. **Refunds or Tax Credits of Input Tax.** –
>
> (A) *Zero-rated or Effectively Zero-rated Sales.* – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated **may**, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: xxx" *(Emphasis supplied)*

The use of the permissive word "may" by the statute signifies that a taxpayer has the discretion[17] whether to apply for a tax refund or tax credit of the excess input VAT, to the extent that such input tax has not been applied against output tax. In other words, the above-quoted law allows a taxpayer to **fully recover** the excess input tax, to the extent that such input tax has not been applied against output tax, either by tax refund or tax credit. *JL*

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[17] *Purita Bersabal v. Honorable Judge Serafin Salvador, et al.*, G.R. No. L-35910, July 21, 1978.

However, while the law merely speaks of tax refund or tax credit, there is no law which prohibits a taxpayer from resorting to any other mode for the recovery of excess input tax, as in this case. Here, there is no transgression of any law or rule by respondent when it treated its denied VAT refund claim as an expense or a loss, because when it treated the same as such and deducted it from its gross income for CY 2010, respondent therefore opted not to fully recover its excess input tax to the extent that such input tax has not been applied against its output tax. Thus, respondent merely chose to claim it as a deductible expense or loss leading to a partial recovery of its excess input VAT, instead of fully recovering it by pursuing its refund claim.

Thus, if the taxpayer desires to fully recover its excess input VAT, *i.e.*, to the extent that such input tax has not been applied against output tax, the law provides only for two (2) modes: either by filing a claim for tax refund or tax credit. However, if the taxpayer decides not to fully recover the same, it may resort to other modes which are not categorically prohibited by any law or rule, and which are based on sound accounting principles and procedure.

Whether treated as part of Purchases or Cost of Sales, expense or loss, the deduction from gross income arising from the denied input VAT claim has the same effect on respondent's taxable income.

Considering the foregoing, the Court *En Banc* sees no reason to deviate from the conclusion reached by the Court in Division.

The assessment for Final Withholding Tax (FWT) on branch profit remittance was improper

Petitioner asserts that:

> "16. The Petitioner assessed the Respondent Branch Profit Remittance Tax on its entire earnings as of P166,043,000.00 for calendar year 2010 not only because the amount was entered under the Head Office Account but also because the said amount was in reality already directly paid and remitted to the Head Office. The Respondent is merely booking the transactions here in the Philippines and no amount is being remitted to the Respondent.
>
> xxx xxx xxx

18. It is thus moot and academic for the Respondent to apply or earmark its remittances to the Head Office in view of the current set up of the manner of payment by Respondent's customers."[18]

After careful review, the Court *En Banc* finds the above assertion untenable. In this regard, the Court in Division aptly held that:

"A review of petitioner's Head Office Account for CYs 2009 and 2010 reveals that it is comprised of two different items, i.e., Assigned Capital and Accumulated Earnings.

As regards the Assigned Capital account, the assigned capital of Php11,129,800.00 in CY 2010 remained the same in CY 2009. On the other hand, as regards the Accumulated Earnings account, all of petitioner's net income in CY 2010 (*i.e.*, Php40,013,880.00) was added to its Accumulated Earnings account, which resulted in the total balance of Php166,043,000.00 as of December 31, 2010.

Meanwhile, in the assessment, respondent assumed that petitioner's entire earnings as of CY 2010 was remitted (*i.e.*, not just the net income for CY 2010 in the amount of Php40,013,880.00, but also those of previous years), and thus imposed BPRT on the same resulting in the deficiency FWT assessment.

The Court holds that it was erroneous for respondent to conclude that the entire earnings of petitioner as of CY 2010 (*i.e.*, Php166,043,000.00) partakes the nature of an indirect remittance to the head office which should be subjected to BPRT. Under the branch accounting principles in the Philippines, the net income is a standard component or entry in the Head Office Account, which entry is added to the Accumulated Earnings of the previous year (*i.e.*, CY 2009) in order to arrive at the Accumulated Earnings as of the end of the current year (*i.e.*, CY 2010). The mere fact that Accumulated Earnings was booked under the Head Office Account does not automatically mean that said accumulated earnings were already applied or earmarked for remittance to the head office. Respondent's allegation of a constructive remittance of profits cannot be countenanced.

In addition, Section 28 (A) (5) of the 1997 NIRC requires that profits be applied or earmarked for remittance to the head

[18] Petition for Review, Court *En Banc* Docket, pp. 12-13.

office. In the present case, however, there is no evidence that petitioner actually did either — apply for remittance or earmark for remittance its net income as of CY 2010 to its head office.

Therefore, respondent's conclusion that the income, booked as Accumulated Earnings under the Head Office Account, should have been subject to FWT on BPRT, does not in any way justify the imposition of the BPRT absent any showing that actual remittance or earmarking for remittance was made by petitioner.

From the foregoing, it is evident that the assessments made against petitioner for CY 2010 were issued without basis in law and in fact. Necessarily, having ruled that the assessments for deficiency income tax and FWT are improper, the interest and compromise penalty imposed by respondent thereon likewise have no basis."[19]

Clearly, the BIR made an assessment based merely on a presumption *vis-à-vis* respondent's payment setup by its customers. Basic is the rule that "in order to stand judicial scrutiny, the assessment must be based on facts. The presumption of the correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption."[20] As such, the Court *En Banc* sees no reason to disturb the findings of the Court in Division.

Thus, petitioner failed to raise meritorious arguments to justify the reversal of the assailed Decision and Resolution. Hence, the denial of the instant Petition is in order.

Meanwhile, the required number of votes by the members of the Court *En Banc* was not sufficient to reverse the assailed Decision. Section 2 of Republic Act No. 1125, as amended, in relation to Section 3, Rule 2 of the 2005 Revised Rules of the CTA, as amended, pertinently provide:

"SEC. 2. *Sitting En Banc or Division; Quorum; Proceedings*. - xxx

xxx xxx xxx

The affirmative votes of five (5) members of the Court *en banc* shall be necessary to reverse a decision of a Division xxx"

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[19] Court in Division Docket, Vol. 2, pp. 762-763.
[20] *Commissioner of Internal Revenue v. Hantex Trading Co., Inc.*, G.R. No. 136975, March 31, 2005.

> "SEC. 3. *Court en banc; quorum and voting.* – xxx The presence at the deliberation and the affirmative vote of five (5) members of the Court *en banc* shall be necessary to reverse a decision of a Division but only a simple majority of the justices present to promulgate a resolution or decision in all other cases. Where the necessary majority vote cannot be had, the petition shall be dismissed; in appealed cases, the judgment or order appealed from shall stand affirmed; and on all incidental matters, the petition or motion shall be denied."

Considering that only four (4) members of this Court registered their dissent to the conclusion reached in this case, the same is insufficient to reverse the Division Decision.

WHEREFORE, the instant Petition is **DENIED**. Accordingly, the Decision dated October 11, 2017 and the Resolution dated January 26, 2018, respectively, are **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

(See Concurring and Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

(With due respect, please see attached CDO)
ERLINDA P. UY
Associate Justice

(I maintain my CDO in the assailed Decision of October 11, 2017)
ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
(With due respect, I join PJ's CDO)
CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
(With separate Concurring Opinion)
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- *versus* -

MAERSK GLOBAL SERVICE CENTRES (PHILIPPINES) LTD.,
Respondent.

CTA EB NO. 1786
(CTA Case No. 8934)

Present:

DEL ROSARIO, P.J.,
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS- LIBAN, and
MANAHAN, JJ.

Promulgated:
JUN 13 2019 2:32 pm.

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CONCURRING AND DISSENTING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* of my esteemed colleague, the Honorable Associate Justice Juanito C. Castañeda, Jr., in affirming the assailed Decision dated October 11, 2017 and Resolution dated January 26, 2018 of the Court in Division but only with respect to the cancellation of the deficiency final withholding tax relating to branch profit remittance tax for calendar year 2010.

With utmost respect, however, I am constrained to withhold my assent on the cancellation of the deficiency income tax assessment for calendar year 2010.

Records show that the deficiency income tax arose from petitioner's disallowance of respondent's bad debts amounting to ₱11,133,280.00. Petitioner found that the deduction was not properly substantiated by necessary documents so as to be considered an allowable deductible from gross income under Section 34 of the National Internal Revenue Code (NIRC) of 1997, as amended.[1]

The amount of ₱11,133,280.00 which was deducted by respondent from its gross income as bad debts actually pertain to the amount of the claim for issuance of a tax credit certificate (TCC) of excess input VAT that respondent filed with the Department of Finance (DOF). In a Letter dated October 10, 2009, which respondent received on March 11, 2010, the DOF denied respondent's claim for refund for respondent's failure to comply with the invoicing requirements in relation to its zero-rated sales *(i.e., the computer-generated sales invoices are not duly registered invoices and there was no official receipts issued).* As a consequence of the denial of its claim for issuance of a TCC, respondent wrote off the amount in its books and claimed it as a deduction from gross income for 2010.[2]

The Court in Division held that Maersk's use of the account name "bad debts" does not necessarily equate to the bad debt expense as identified in the NIRC, but the same refers to a **deductible loss**;[3] and that respondent properly considered the amount pertaining to the denied VAT refund claim as a loss, which could be deducted from its gross income for calendar year 2010, the year it received the DOF's letter of denial.[4]

I beg to differ. I agree with the Honorable Associate Justice Esperanza R. Fabon-Victorino's position in her Concurring and Dissenting Opinion on the assailed Decision that petitioner correctly disallowed the said amount as a deduction from respondent's gross income.

It is well-settled that deductions for income tax purposes partake of the nature of tax exemptions; hence, if tax exemptions are strictly construed, then deductions must also be strictly construed.[5]

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[1] Decision dated October 11, 2017, p. 13; CTA En Banc Docket, p. 30.
[2] Decision dated October 11, 2017, pp. 12, 14-15; CTA En Banc Docket, pp. 29, 31-32.
[3] Decision dated October 11, 2017, p. 14; CTA En Banc Docket, p. 31.
[4] Decision dated October 11, 2017, p. 15; CTA En Banc Docket, p. 32.
[5] Commissioner of Internal Revenue vs. General Foods (Phils.), Inc., G.R. No. 143672, April 24, 2003.

Section 34 of the NIRC of 1997, as amended, enumerates the allowable deductions from gross income, and one of those allowable deductions is the so-called "Losses", *viz.*:

> CHAPTER VII
> ALLOWABLE DEDUCTIONS
>
> SEC. 34. Deductions from Gross Income. - Except for taxpayers earning compensation income arising from personal services rendered under an employer-employee relationship where no deductions shall be allowed under this Section other than under subsection (M) hereof, in computing taxable income subject to income tax under Sections 24 (A); 25 (A); 26; 27 (A), (B) and (C); and 28 (A) (1), there shall be allowed the following deductions from gross income;
>
> (A) Expenses. - xxx
>
> (B) Interest. xxx
>
> (C) *Taxes.*
>
> (D) **Losses**. - (1) In General. - Losses actually sustained during the taxable year and not compensated for by insurance or other forms of indemnity shall be allowed as deductions: (a) If incurred in trade, profession or business; (b) Of property connected with the trade, business or profession, if the loss arises from fires, storms, shipwreck, or other casualties, or from robbery, theft or embezzlement.
>
> xxx xxx xxx
>
> (E) Bad Debts. xxx
>
> (F) Depreciation. xxx
>
> (G) Depletion of Oil and Gas Wells and Mines. xxx
>
> (H) Charitable and Other Contributions. xxx
>
> (I) Research and Development. xxx
>
> (J) Pension Trusts. xxx"

In order that **"Losses"** may be deductible from gross income, the law requires the following, namely: (i) the loss is **actually sustained** by a taxpayer during the taxable year; (ii) it is not compensated for by insurance or other forms of indemnity; (iii) (a) it is incurred in trade, profession or business, (b) of property connected with the trade, business or profession, if the loss arises from fires, storms, shipwreck, or other casualties or from robbery, theft or embezzlement.

The *ponencia* concludes that the requirement for the deductibility of a loss is present in this case considering that respondent actually sustained a loss in 2010 when it received the DOF's letter denying its claim for refund. Since respondent was not compensated for the loss which was incurred in the conduct of its trade or business, the *ponencia* found that such denial of respondent's claim led to the undesirable outcome of a risk and disappearance or diminution of value; hence, it should be considered as a loss.

I submit that **there was no actual loss** sustained by respondent when the DOF denied its claim for issuance of TCC. As aforementioned, the claim was denied for respondent's failure to comply with the invoicing requirements in relation to its zero-rated sales. Considering that the there was no finding that the input VAT subject of a claim for refund in the total amount of ₱11,133,280.00 is not properly substantiated in accordance with Section 113 of the NIRC of 1997, as amended, said input VAT has not actually disappeared or diminished in value. In truth, said input VAT in the amount of ₱11,133,280.00 remains to be respondent's assets, which it may utilize as credit against any of its future output VAT liability, by reinstating said input VAT in its VAT returns.

The teaching in *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*,[6] is applicable by analogy to this case:

> "The Court similarly disagrees in the declaration of the Court of Appeals that to deny the claim for refund of BPI, because of the irrevocability rule, would be tantamount to unjust enrichment on the part of the government. The Court addressed the very same argument in Philam, where it elucidated that **there would be no unjust enrichment in the event of denial of the claim for refund under such circumstances, because there would be no forfeiture of any amount in favor of the government. The amount being claimed as a refund would remain in the account of the taxpayer until utilized in succeeding taxable years**, as provided in Section 76 of the NIRC of 1997. It is worthy to note that unlike the option for refund of excess income tax, which prescribes after two years from the filing of the FAR, **there is no prescriptive period for the carrying over of the same**. Therefore, the excess income tax credit of BPI, which it acquired in 1998 and opted to carry over, may be repeatedly carried over to succeeding taxable years, i.e., to 1999, 2000, 2001, and so on and so forth, until actually applied or credited to a tax liability of BPI." *(Boldfacing supplied)*

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[6] G.R. No. 178490, July 7, 2009.

When the claimed excess input VAT is denied due to taxpayer-claimant's failure to comply with the invoicing requirements relating to its zero-rated sales, as in this case, the amount sought to be refunded will not be forfeited in favor of the government as the same remains in the account of the taxpayer-claimant that could be creditable against its output VAT.

Finally, in the event that said input VAT remains unutilized until its retirement or cessation from business, respondent may still recover the same by filing a claim for refund pursuant to Section 112(B) of the NIRC of 1997, as amended.

All told, I VOTE to: (i) **PARTIALLY GRANT** the Petition for Review; (ii) **AFFIRM** the October 11, 2017 Decision and January 26, 2018 Resolution of the Court in Division insofar as it cancelled the Final Withholding Tax on Branch Profit Remittance Tax; (iii) **AFFIRM** the deficiency income tax assessment issued against Maersk Global Service Centres (Philippines) Ltd. in the amount ₱1,113,334.60; and, (iv) **ORDER** Maersk Global Service Centres (Philippines) Ltd. to pay the Bureau of Internal Revenue its deficiency income tax in the amount ₱1,113,334.60, plus surcharge and interests computed in accordance with law.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

****

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- **versus** -

MAERSK GLOBAL SERVICE CENTRES (PHILIPPINES) LTD.,
Respondent.

CTA EB No. 1786
(CTA Case No. 8934)

Present

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

Promulgated:

JUN 13 2019 2:32 p.m.

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CONCURRING AND DISSENTING OPINION

UY, *J.*:

With all due respect to the learned ponente and my other colleagues, I concur with the Concurring and Dissenting Opinion of Presiding Justice Roman G. Del Rosario in affirming the assailed Decision dated October 11, 2017 and Resolution dated January 26, 2018 of the Court in Division, with respect only to the cancellation of the deficiency final withholding tax (FWT) relating to branch profit remittance tax for calendar year 2010; and in dissenting on the cancellation of the deficiency income tax assessment for the same year.

In addition to the arguments already raised by Presiding Justice Del Rosario regarding the reasons why the deficiency income tax assessment for calendar year 2010 should not be cancelled, may I respectfully point out that Revenue Regulations (RR) No. 9-89 may no longer be cited as legal basis, as was done in the instant case.

Section 23 of Republic Act No. 9337[1] reads:

> "SEC. 23. *Implementing Rules and Regulations.* – The Secretary of Finance shall, upon the recommendation of the Commissioner of Internal Revenue, promulgate not later than June 30, 2005, the necessary rules and regulations for the effective implementation of this Act. **Upon issuance of the said rules and regulations <u>all former rules and regulations pertaining to value-added tax</u> shall be deemed <u>revoked</u>.**" *(Emphasis and underscoring supplied)*

Pursuant to the foregoing provision, rules and regulations pertaining to value-added tax (VAT) issued before the effectivity of RA No. 9337, such as RR No. 9-89, shall be deemed revoked upon the issuance of the rules and regulations implementing the said law which should be done not later than June 30, 2005.

On June 22, 2005, the Secretary of Finance, upon the recommendation of petitioner, issued RR No. 14-2005, also known as the *"Consolidated Value-Added Tax Regulations of 2005"*, which became effective on July 1, 2005. Parenthetically, RR No. 14-2005 was later superseded by RR No. 16-2005 on September 1, 2005, which took effect on November 1, 2005. The latter RR, in turn, has undergone several amendments thereafter.

Correspondingly, all RR pertaining to VAT, including RR No. 9-89, were deemed revoked as of July 1, 2005. Thus, unless the provisions of the said RR pertaining to the treatment in case there was denial of an input VAT refund application, have been retained in the said RR No. 14-2005 and subsequent RR pertaining to VAT, such treatment under the said RR No. 9-89 is deemed revoked.

A cursory examination, however, of RR No. 14-2005 and subsequent RR pertaining to VAT would reveal that the provisions of RR No. 9-89, as to the treatment of the input VAT which was denied refund, have not been retained. Thus, such provisions are no longer binding, upon the effectivity of RR No. 14-2005, *i.e.,* on July 1, 2005.

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[1] AN ACT AMENDING SECTIONS 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES.

Considering that the taxable year under consideration is 2010, RR No. 9-89 may no longer be validly applied to the instant case.

Correspondingly, I vote: (1) to affirm the assailed Decision dated October 11, 2017 and Resolution dated January 26, 2018 of the Court in Division, with respect only to the cancellation of the deficiency FWT relating to branch profit remittance tax for calendar year 2010; and (2) to sustain the deficiency income tax assessment for the same year.

ERLINDA P. UY
Associate Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-*versus*-

MAERSK GLOBAL SERVICE CENTRES (PHILIPPINES) LTD.,
Respondent.

CTA EB No. 1786
(CTA Case No. 8934)

Members :

DEL ROSARIO, *P.J.*
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

Promulgated:

JUN 13 2019 2:32 p.m.

x- x

SEPARATE CONCURRING OPINION

MANAHAN, J.:

The *ponencia* affirmed the assailed Decision and Resolution promulgated on October 11, 2017 and January 26, 2018, respectively, and consequently denied the Petition for Review filed by the Commissioner of Internal Revenue (CIR) with the Court *En Banc*.

I concur with the conclusion that the denied VAT refund claim lodged by Maersk Global Service Centre (Philippines) Ltd. (Maersk) with the Department of Finance (DOF) can be validly considered as a loss which was properly deducted from its gross income for calendar year 2010 which was the year Maersk received the denial letter. Records of the case clearly show that the requisites for claiming the same as a loss exist to consider the same a valid deduction from gross income, to wit:

1. That the loss is actually sustained by the taxpayer;
2. That the loss is sustained during the taxable year;
3. That the loss is not compensated by insurance or other forms of indemnity;
4. That the loss is incurred in the taxpayer's trade, profession, or business; and
5. That the loss is evidenced by a closed and completed transaction.

In my view, Maersk has the option to consider the denial as a valid loss and this should have been recognized by the CIR in its findings re its income tax liabilities for taxable year 2010. Having said this, allow me to submit another alternative that Maersk may have availed of relative to the denied claim for refund and that is to treat the same as a deductible expense. The Bureau of Internal Revenue (BIR) in several rulings and in a Revenue Memorandum Circular (RMC) has acknowledged that a taxpayer whose claim for refund of input VAT relating to its zero-rated sales has been denied may claim the same as a deductible expense.

In BIR Ruling No. DA591-2004 issued on November 24, 2004, the BIR affirmed that a denied claim for refund of unutilized input VAT relating to its VAT zero-rated sales may be treated as a deductible expense for income tax purposes if the denial is based on failure to comply with certain sales invoicing requirements thus echoing the provisions of RMC No. 42-2003 issued on July 13, 2003 where the BIR confirmed that in cases where a taxpayer fails to submit sufficient invoicing documents to prove zero-rated sales, the amount of input VAT claimed may be charged to the appropriate expense account or asset account whichever is applicable. I quote portions of RMC No. 42-2003, thus:

> "A-13: xxx xxx xxx
>
> If the claim for refund/TCC is based on the existence of zero-rated sales by the taxpayer but it fails to comply with the invoicing requirements in the issuance of sales invoices (e.g. failure to indicate the TIN), its claim for tax credit/refund of VAT on it purchases shall be denied considering that the invoice it is issuing to its customers does not depict its *(sic)* being a VAT-registered taxpayer whose sales are classified as zero-rated sales. **Nonetheless, this treatment is without prejudice to the right of the taxpayer to charge the input taxes to the appropriate expense account or asset account subject to depreciation, whichever is applicable."** (emphasis supplied)

xxx xxx xxx

In other words, the BIR allows the unutilized input VAT to be treated as an expense which may be deductible from a taxpayer's gross income.

Notwithstanding the observation above, I agree with the results of the decision and the legal rationale and doctrines eloquently elaborated by the ponente.

CATHERINE T. MANAHAN
Associate Justice