REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

GRAND PLAZA HOTEL CORPORATION, Petitioner, - versus - COMMISSIONER OF INTERNAL REVENUE, Respondent.	C.T.A. EB No. 545 (C.T.A. CASE NO. 7516) Members: ACOSTA, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.* Promulgated: APR 22 2010 2:00 p.m.

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DECISION

FABON-VICTORINO, J.:

From the Decision of June 4, 2009 and subsequent Resolution of September 9, 2009 of the Former First Division of this Court in C.T.A. Case No. 7516, which denied for lack of merit the Petition for Review and Motion for Reconsideration, respectively, petitioner interposes this appeal, pursuant to paragraph 2, Section 18 of Republic Act 1125, as amended, as well as Rule 8, Section 3(b) of the Revised Rules of the Court of Tax Appeals.

Culled from the record that on April 13, 2005, petitioner Grand Plaza Hotel Corporation received from respondent Commissioner of Internal Revenue a Formal Letter of Demand dated April 12, 2005, finding it liable for deficiency income tax for the taxable year 2001 in the amount of P765,103.84, inclusive of penalties, surcharge, interest and compromise penalty, computed as follows:

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Taxable income per return			187,210,934.00
Multiply by tax rate			32%
Tax due per return			59,917,098.95
less: tax paid for 1Q, 2Q, 3Q		46,244,036.75	
Tax paid per Form 1702		9,314,483.43	
Allowed CWT/Form 2307			
Claimed per return	4,358,578.75		
Less: disallowances on CWT	403,129.97	3,955,448.78	50,513,968.98
Deficiency income tax			403,129.97
add penalties			
surcharge			100,782.49
interest (up to 4-30-05)			245,191.38
compromise penalty			16,000.00
Total deficiency income tax			**765,103.84**

The deficiency assessment was an offshoot of the disallowance of certain creditable withholding tax (CWT) certificates claimed by petitioner as deduction or tax credit against its income tax liabilities for the taxable year 2001 as indicated in the attached Details of Discrepancy and Audit Result/Assessment Notice No. INC-01-000142.

On May 4, 2005, petitioner protested respondent's Formal Letter of Demand claiming that the deficiency income tax assessment was without factual or legal basis.

On July 27, 2006, petitioner received respondent's Final Decision On Disputed Assessment dated July 21, 2006, stating that its protest was given due course consequently, petitioner's liability was reduced from Php 765,103.85 to 749,269.51, inclusive of interest, which petitioner must pay as deficiency income tax. Attached to the Decision was the Computation of Deficiency Income Tax, detailed as follows:

A. Deficiency Income Tax

Taxable income per return		187,240,934.00
Multiply by tax rate		32%
Net income per return		59,917,098.95
Less: Tax paid for 1Q, 2Q, 3Q	46,244,036.77	
Tax paid per Form 1702	9,314,483.43	
Allowed CWT/Form 2307 Claimed per return	4,358,578.75	
Less: disallowances on CWT	(403,129.97)	
Deficiency Income Tax		59,513,968.98
Add: Interest up to 07-31-06		403,129.97
add penalties		346,139.54
Total Amount Due		**P 749,269.51**

Applied Creditable VAT w/h	10,926.45
Applied CWT year 1998, 1999 and 2000	392,173.52
Variance in amount of Form 2307 Versus schedule	30.00
Total Disallowance on CWT	**P 403,129.97**

On August 28, 2006, petitioner assailed respondent's ruling through a Petition for Review raffled to the Former First Division of this Court. Petitioner prayed that the assessment for deficiency income tax be declared null and void for lack of factual and/or legal bases and that an order be issued withdrawing/cancelling the subject assessment.

On November 9, 2006, respondent filed his Answer justifying his position in this wise:

> 3. Petitioner claimed a total creditable withholding tax (CWT), per Form 2307, of P4,358,578.75 for the year 2001. This amount is inclusive of the following:
>
> a. certificate for the year 2001 amounting to P3,955,448.78
> b. certificates for the year 1998 amounting to P35.00
> c. certificates for the year 1999 amounting to P3,086.77
> d. certificates for the year 2000 amounting to P389,051.75
> e. certificates on creditable VAT withholding amounting to P10,926.45;
> f. a variance in the amount in the certificates issued by Bankard, Inc. for the 4th quarter amounting to P30.00.
>
> 4. Disallowances were made on items (b) (c) and (f) in the preceding paragraph pursuant to Sections 5 and 58(B) & (D) of the National Internal Revenue Code of 1997 (1997 Tax Code), and Sections 2.58.1 and 2.58.3 of the Revenue Regulations 2-98 which provides that "the amount of creditable tax withheld shall be allowed as a tax credit against the income tax liability of the payee in the quarter of the taxable year in which income was earned or received."

5. Item (e) in paragraph 3 was disallowed pursuant to Section 114(C) of the 1997 Tax Code and Section 4.114 of Revenue Regulations 2-98 which provides for "withholding of creditable value-added tax." The certificates should have been applied as tax credits to the petitioner's VAT liability and not to its income tax liability.

6. Of the total creditable withholding tax certificates for the year 2001 amounting to P4,358,578.75, the amount of P3,955,448.78 was allowed [Item (a) of paragraph 3] while the amount of P403,129.97 [items (b) to (f)] was disallowed.

7. the penalties (surcharge, interest and compromise penalty) have been imposed to the provisions of Section 248 and 249 of the 1997 Tax Code and Revenue Memorandum Order 1-90.

Hence, the disallowances on creditable withholding tax certificates resulted to a deficiency income tax in the amount of P765,103.84.

Trial ensued. Thereafter, the parties simultaneously filed their respective memoranda in compliance with the Court's directive.

On June 4, 2009, the Former First Division sustained respondent's ruling. The decretal portion of now assailed Decision reads as follows:

"**WHEREFORE**, the Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the assessment issued by respondent against petitioner on April 12, 2005 for deficiency income tax is hereby **UPHELD**. Petitioner is **ORDERED** to **PAY** the amount of P749,103.84, representing petitioner's deficiency income tax plus interest and surcharges, computed as follows:

Taxable income per return			187,210,934.00
Multiply by tax rate			32%
Tax due per return			59,917,098.95
less: tax paid for 1Q, 2Q, 3Q		46,244,036.75	
Tax paid per Form 1702		9,314,483.43	
Allowed CWT/Form 2307			
Claimed per return	4,358,578.75		
Less: disallowances on CWT	403,129.97	3,955,448.78	50,513,968.98
Deficiency income tax			403,129.97
add penalties			
surcharge			100,782.49
interest (up to 4-30-05)			245,191.38
Total deficiency income tax			**749,103.84**

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> In addition, petitioner is hereby **ORDERED** to **PAY** twenty percent (20%) delinquency interest on the total amount of P749,103.84 from July 27, 2006 until full payment thereof, pursuant to Section 249(c)(3) of the 1997 Tax Code, as amended.
>
> **SO ORDERED**."

On June 11, 2009, petitioner received a copy of the foregoing Decision and seasonably filed a Motion for Reconsideration on June 26, 2009.

On September 9, 2009, the Former First Division issued the impugned Resolution denying petitioner's Motion for Reconsideration for lack of merit, a copy of which was received by petitioner on September 17, 2009.

Hence, this appeal before the *Court En Banc,* raising the following arguments:

> I. Petitioner had submitted the Affidavit-Direct Testimony of its Accounting Manager Mr. Edgar Soriente to prove that the creditable withholding tax certificates in question were received by Petitioner only in 2001 thereby making it impossible for Petitioner to have utilized said certificates in prior years.
>
> II. Petitioner is entitled to carry-over the excess creditable tax withheld for the years 1998, 1999 and 2000 and apply the same to petitioner's income tax liabilities for the taxable year 2001 pursuant to Section 76 of the National Internal Revenue Code of 1997.

Petitioner claims that the Former First Division erred in ruling that it failed to prove receipt of the CWT certificates only in 2001 and the same have not been used in the years prior to 2001. According to petitioner, the testimony of its Accounting Manager, Mr. Edgar Soriente, was sufficient to establish such receipt of CWT certificates for 1998, 1999 and 2000 only in 2001, precisely its inability to utilize them during their respective taxable years. That declaration of the

witness in his Judicial-Affidavit[1] should be given credence and full credit especially considering that respondent did not conduct any cross-examination despite the opportunity granted. Besides, there was no finding of double deduction on the part of petitioner or *indicium* that the said CWT certificates had been utilized prior to 2001.

Petitioner insists that it is entitled to carry-over the excess creditable tax withheld for the years 1998, 1999, and 2000 and apply the same to its income tax liabilities for the taxable year 2001. The disallowance of the questioned CWT certificates based on Sections 57, 58(B), and 58(D) of the National Internal Revenue Tax Code (NIRC) is allegedly misplaced. None of the provisions cited is relevant to the issue of its entitlement to carry-over and apply its excess creditable tax withheld to pay its income tax liabilities for the taxable year 2001. Dissecting the provision, petitioner posits that Section 57 delves on the requirement of withholding tax at source. Section 58(B), on the other hand, pertains to the obligation of the withholding agent or the payor to deduct and withhold taxes as well as to prepare a written statement of the income or other payments made and the taxes deducted and withheld during the applicable quarter or year. And Section 58(D) deals with the obligation of the recipient to include in his return the income upon which creditable tax had been withheld and in the event that the said creditable withholding tax is greater than the income tax due, the difference shall be refunded subject to the provisions of Section 204 of the Tax Code.

Moreover, respondent's ruling on the utilization of the subject excess creditable tax withheld for the years 1998 to 2000 only in the quarter of the taxable year in which the income was earned or received runs counter to the clear mandate of Section 76 of the NIRC. Such limitation is not in the provision.

In his Comment filed on December 4, 2009, in compliance with the En Banc Resolution of November 24, 2009, respondent argues that

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[1] Exhibit "I," page 4

the issues raised in the petition have already been conclusively passed upon and considered in the assailed Decision of September 9, 2009. From the Court's disquisition, it is clear that petitioner cannot carry over the excess creditable withholding tax on the questionable CWT certificates for taxable years 1998, 1999 and 2000 and claim the same as deduction or tax credit against its income tax for the taxable year 2001. Petitioner failed to prove that the income upon which the taxes were withheld have been declared in its income tax return for them to be carried-over to the next years.

Petitioner cannot also validly complain that respondent's assessment is void for lack of basis pursuant to Section 228 of the NIRC of 1997 as it was informed of the facts and the law upon which the disallowance of the CWT certificates was based, hence the assessement. In this regard, respondent claims in his favor the presumption of regularity in the performance of his official functions and the correctness of the tax assessment, both of which petitioner failed to overturn.

The petition has no leg to stand on to merit reversal or modification of the assailed Decision of June 4, 2009.

There is no question that petitioner may carry-over excess or unutilized creditable withholding tax (CWT) for the years 1998, 1999 and 2000 and apply the same to its income tax liabilities for the taxable year 2001 or until fully utilized. This is clearly allowed under Section 76 of the NIRC, thus:

> "SEC. 76. ***Final Adjustment Return.*** - Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable income of that year, the corporation shall either:
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> (A) Pay the balance of tax still due; or
> (B) Carry-over the excess credit; or

> (C) Be credited or refunded with the excess amount paid, as the case may be.
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> In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor." (underscoring ours)

To illustrate the import of the foregoing provision, the Supreme Court has ruled, thus:

> 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.[2] (underscoring ours)

However, petitioner is required to support and prove the validity of its claim and entitlement to carry-over the alleged excess

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[2] *CIR vs. Bank of the Philippine Islands, G.R. No. 178490, July 07, 2009*

CWT and apply it against its income tax liabilities for the succeeding years. The provision that petitioner itself invokes requires it to introduce clear and convincing evidence that the income reflected on the questionable CWT certificates for the years 1998, 1999 and 2000 have been declared in its income tax return of the previous years. Evidence of equal weight and probative value must also be adduced to establish that petitioner did not carry-over the alleged excess CWT to the succeding years and applied or credited it to its tax liabilities. But petitioner failed to discharge this burden to establish the factual basis of its claim. In fine, petitioner was unable to meet the basic requirements under Section 2.58.3 of Revenue Regulations No. 2-98 for it to exercise the option to carry over the alleged excess CWT for the taxable years 1998, 1999 and 2000 and claim the same as a deduction or tax credit against its income tax liabilities for the taxable year 2001. Section 2.58.3 provides as follows:

> Section 2.58.3. Claim for Tax Credit or Refund. –
>
> (A) xxx;
>
> (B) Claims for tax credit or refund of any creditable income tax which was deducted and withheld on income payments shall be given due course **only when it is shown that the income payment has been declared as part of the gross income and the fact of withholding is established by a copy of the withholding tax statement duly issued by the payor to the payee showing the amount paid and the amount of tax withheld therefrom.** Proof of remittance is the responsibility of the withholding agent. (Emphasis Ours)

As aptly found by the Former First Division, "petitioner failed to show that the income on the questionable creditable withholding tax certificates for the years 1998, 1999 and 2000 were already declared in the income tax return of the previous years, for them to be carried over to the next years."

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Intriguingly, petitioner did not even attempt to present its income tax returns for the previous years to fortify its rejection of respondent's assessment for deficiency income tax for taxable year 2001 in the amount of Php 749,103.84, rendering the disallowance of the CWT on the questionable CWT certificates in order. The failure of petitioner to present these documents gives rise to the presumption that their presentation is prejudicial to its cause. [3]

Contrary to petitioner's claim, the Affidavit-Direct Testimony of its Accounting Manager Edgar Soriente executed on October 3, 2007, without more, is simply not sufficient to substantiate the allegation that the questioned CWT certificates were received by petitioner only in 2001, thus, the impossibility for it to have used them in prior years. Standing alone, the said testimony is unverifiable and self-serving if not dubious, considering its origin. Petitioner's bare allegations, unsubstantiated by evidence, are not equivalent to proof.

Significantly, the said Affidavit-Direct Testimony of Mr. Edgar Soriente did not categorically state that petitioner received from the withholding agent the questionable CWT certificates only in 2001. It merely indicates that the CWT certificates for the year 1998, 1999 and 2000 were not on hand that petitioner was unable to claim them as a deduction against its tax liabilities for the taxable periods covered.

Finally, settled is the rule that assessments are entitled to the presumption of correctness and validity; and should, therefore be considered conclusive in the absence of fraud or illegality or a showing that the determination of the same is not correct or does not proceed from a wrong principle of law. [4] Therefore, it is incumbent upon petitioner to prove that the impugned assessment is not correct and not made in good faith, which obligation petitioner failed to satisfy. [5]

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[3] De Guzman v. NLRC, 540 SCRA 21
[4] CIR v. CTA, G.R. no. 48027, March 11,1991, 195 SCRA, citing the case of Coca-Cola Corporation v. the Commissioner of Internal Revenue, G.R. No. L-23604, March 15, 1974, 56 SCRA 5, all cited in Eduardo Lim, Jr. v. the Commissioner of Internal Revenue, CTA EB No. 455, February 2, 2010
[5] Sy Po v. CTA, No. L-81446, August 18, 1988, 164 SCRA 524

The burden of the taxpayer contesting the validity or correctness of an assessment is to prove not only that the Commissioner of Internal Revenue is wrong, but that the taxpayer is right. [6]

WHEREFORE, the Petition for Review filed by petitioner Grand Plaza Hotel Corporation is hereby DENIED. The assailed Decision dated June 4, 2009 and the Resolution dated September 09, 2009 issued by the Former First Division of this Court in C.T.A. Case No. 7516 are hereby AFFIRMED, *en toto*.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ON LEAVE
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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[6] Tan Guan v. CTA, No. L23676, April 27, 1967, 19 SCRA 903

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C E R T I F I C A T I O N

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice