Republic of the Philippines
**COURT OF TAX APPEALS**
Quezon City

# SECOND DIVISION

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| **SAL OPPENHEIM JR. & CIE KOMMANDITGESELLSCHAFT AUF AKTIEN,** Petitioner, | **CTA CASE NO. 7923** For: Refund or Issuance of a Tax Credit Certificate |
| -versus- | Present: **CASTAÑEDA, JR.**, Chairperson **CASANOVA**, and **MINDARO-GRULLA**, JJ. |
| **COMMISSIONER OF INTERNAL REVENUE,** Respondent. | Promulgated: FEB 27 2012 2:30 p.m. |

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# DECISION

*MINDARO-GRULLA, J.:*

This is a Petition for Review filed on April 22, 2209 by Sal Oppenheim Jr. and Cie Kommanditgesellschaft Auf Aktien as petitioner, against the Commissioner of Internal Revenue (CIR) as respondent, for the Court in Division, pursuant to Section 7 (a) (2) of Republic Act (RA) No. 1125, An Act Creating the Court of Tax Appeals, as amended[1], as

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[1] Sec. 7. *Jurisdiction*. – The CTA shall exercise:
(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
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(2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of

well as Rule 4, Section 3 (a) (2), in relation to Rule 8, Section 4(a), of the Revised Rules of the Court of Tax Appeals (RRCTA)[2]. It involves a claim for refund or issuance of a tax credit certificate (TCC) in the amount of ₱4,177,900.00, allegedly representing overpaid final

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Internal Revenue, where the National Internal Revenue Code provides a specific period for action, in which case the inaction shall be deemed a denial;

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[2] Rule 4. Sec. 3. *Cases within the jurisdiction of the Court in Division.* – The Court in Division shall exercise:

(a) Exclusive original over or appellate jurisdiction to review by appeal the following:

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(2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code or other applicable law provides a specific period for action: *Provided,* that in case of disputed assessments, the inaction of the Commissioner of Internal Revenue within the one hundred eighty day-period under Section 228 of the National Internal Revenue Code shall be deemed a denial for purposes of allowing the taxpayer to appeal his case to the Court and does not necessarily constitute a formal decision of the Commissioner of Internal Revenue on the tax case; *Provided, further,* that should the taxpayer opt to await the final decision of the Commissioner of Internal Revenue on the disputed assessments beyond the one hundred eighty day-period abovementioned, the taxpayer may appeal such final decision to the Court under Section 3(a), Rule 8 of these Rules; and *Provided, still further,* that in the case of claims for refund of taxes erroneously or illegally collected, the taxpayer must file a petition for review with the Court prior to the expiration of the two-year period under Section 229 of the National Internal Revenue Code;

x x x x x x

Rule 8. Sec. 4. *Where to appeal; mode of appeal.* –

(a) An Appeal from a decision or ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claim for refund of internal revenue taxes erroneously or illegally collected; the decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade & Industry, the Secretary of Agriculture, and the Regional Trial Court in the exercise of their original jurisdiction, shall be taken to the Court by filing before it a petition for review as provided in Rule 42 of the Rules of Court. The Court in Division shall act on the appeal.

withholding taxes on the dividend income received by petitioner from its investments in Philippine Long Distance Telephone Company (PLDT) on April 20, 2007 and September 24, 2007.

Petitioner is a non-resident foreign corporation duly organized and existing under and by virtue of the laws of the Federal Republic of Germany, with principal place of business at PSB PBO Securities, Unter Sachsenhausen 4, 50667 Cologne, Germany, as evidenced by copies of petitioner's Certificates of Residence for 2007 and 2008 issued by the Tax Authority of the Federal Republic of Germany and excerpt from petitioner's Commercial Register Entry with the Local Court of Cologne, Germany.

Petitioner is not registered or engaged in trade or business in the Philippines, as evidenced by the Certification of Non-Registration of Corporation/Partnership issued by the Philippine Securities and Exchange Commission on August 28, 2008.

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) vested with authority, among others, to act upon and approve claims for refund or tax credit of overpaid or erroneously paid internal revenue taxes, including final tax withheld on dividend income received by non-residents. She holds office at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner owns shares in Philippine domestic corporations, including, among others, PLDT, whose shares of stock are listed and traded in the Philippine Stock Exchange (PSE). For this purpose, petitioner appointed Brown Brothers Harriman and Co. (BBH) as its global custodian bank, to facilitate the settlement of the purchase and sale of shares as well as to collect dividends distributed pursuant to the shares of stock.

BBH appointed Hongkong and Shanghai Banking Corporation (HSBC) as its sub-custodian in the Philippine market to perform said functions on its behalf and on behalf of its clients.

Petitioner received dividends from its shareholdings in PLDT (ISIN PH7182521093) on April 20, 2007 and on September 24, 2007, the details of which are as follows:

| Pay Date | Dividend per share | No. of shares | Gross dividends | 35% FWT | Net dividends received by petitioner |
|---|---|---|---|---|---|
| 04.20.07 | ₱ 50.00 | 163,850 | ₱ 8,192,500.00 | ₱2,867,375.00 | ₱ 5,325,125.00 |
| 09.24.07 | ₱100.00 | 126,970 | 12,697,000.00 | 4,443,950.00 | 8,253,050.0 |
| TOTAL | | | ₱20,889,500.00 | ₱7,311,325.00 | ₱13,578,175.00 |

Pursuant to Section 28(B)(1) of the National Internal Revenue Code (NIRC) of 1997, as amended, the dividends received by petitioner from its PLDT shares were subjected to final withholding tax (FWT) at the rate of thirty-five percent (35%) or the total amount of ₱7,311,325.00 as petitioner's FWT on its dividend income. The same was remitted to the BIR by PLDT's transfer agent.

On February 12, 2009, petitioner filed a tax treaty relief application with the BIR International Tax Affairs Division (ITAD), requesting administrative confirmation that the dividend payments made by PLDT to petitioner are subject to the preferential withholding tax rate of fifteen percent (15%) pursuant to the RP-Germany Tax Treaty, and not to the 35% income tax rate under Section 28(B) (1) of the Tax Code.

On February 18, 2009, petitioner filed with the BIR an administrative claim for refund or issuance of TCC in the amount of ₱4,177,900.00, representing the FWT erroneously withheld on the dividend income derived by petitioner on April 20, 2007 and on September 24, 2007 from its investments in shares of stock of PLDT.

Since respondent failed to act on petitioner's refund claim and in order to toll the running of the two-year period to claim a refund or tax credit, petitioner filed the instant Petition for Review on April 22, 2009.

Respondent, in her Answer filed on June 10, 2009, interposed the following Special and Affirmative Defenses:

"7. The claim for refund is still under examination by the respondent's Bureau;

8. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund or issuance of tax credit certificate;

9. The grant of claim for refund (is, sic) tantamount to an exemption from taxation which is construed strictly against the claimant and in favor of the taxing authority;

10. The taxes sought to be refunded were paid in accordance with law; the burden of proof to the contrary is upon the petitioner-claimant to show with clear and unambiguous provision of law supporting the same."

During trial, petitioner presented seven (7) witnesses, namely: Ms. Ma. Katherine Dela Torre, Mr. Antonio Madrid Jr., Mr. Reinard Alexander Cuvin and Ms. Dorothy Guillen of HSBC, Ms. Cornelia Dagdag of Philippine Dealing System Group of Companies, Mr. Francis Carlo Tempongco and Ms. Merceditas Siapuatco of PLDT.

On December 10, 2010, petitioner filed its Formal Offer of Evidence, offering Exhibits "A" to "QQ", inclusive of sub-markings. In a Resolution dated January 20, 2011, this Court admitted said documentary exhibits, and with their admission, petitioner is deemed to have formally rested its case.

The documentary evidence formally offered are as follows:

| Exhibits | Description |
|---|---|
| A | Petitioner's application for tax treaty relief dated February 9, 2009, stamped received by the International Tax Affairs Division (ITAD) of the Bureau of Internal Revenue (BIR) on February 12, 2009 |
| B | Petitioner's letter dated February 18, 2009 and Application for Tax Credit/Refund (BIR Form No. 1914), requesting the |

refund of the final withholding taxes (FWT) erroneously withheld on the dividends derived from its investments in PLDT shares

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| C | Certification of Non-Registration of Corporation/Partnership issued by the Philippine Securities & Exchange Commission for petitioner on August 28, 2008 |
| D | Certificates of Residence for 2007 issued by the Tax Authority of the Federal Republic of Germany |
| E | Certificates of Residence for 2008 issued by the Tax Authority of the Federal Republic of Germany |
| F | Custodian Agreement between petitioner and Brown Brothers Harriman & Co. (BBH) dated May 1, 2002. |
| G | Sub-Custodian Agreement between BBH and Hongkong and Shanghai Banking Corporation Limited (HSBC) dated April 19, 1991 |
| H | Certification by the Corporate Secretary of PLDT stating the number and value of PLDT's outstanding capital stock as of March 20, 2007 and August 24, 2007 |
| I | Certification by the Corporate Secretary of PLDT on the board resolution authorizing the declaration of cash dividends in favor of all existing shareholders of PLDT as of March 20, 2007, payable on April 20, 2007 |
| J | Certification by the Corporate Secretary of PLDT on the board resolution authorizing the declaration of cash dividends in favor of all existing shareholders of PLDT as of August 24, 2007, payable on September 24, 2007 |
| K | HSBC Certification dated September 16, 2008 on the amount of cash dividends paid by PLDT on April 20, 2007 and September 24, 2007, and the FWT withheld therefrom |
| L | Certificate of Final Income Tax Withheld (BIR Form 2306) issued by HSBC to PCD Nominee Corporation Germany for 2007, covering FWT in the amount of ₱2,918,825.00 |
| L-1 | HSBC's Monthly Remittance Return of Final Income Tax Withheld (BIR Form 1601-F) for April 2007, covering FWT in the total amount of ₱1,262,416,735.43 (EFPS Filing Reference No. 200700001613554, filed on May 11, 2007) |
| M | Certificate of Final Income Tax Withheld (BIR Form 2306) issued by PLDT to PCD Nominee Corporation Foreign Max for 2007, covering the FWT in the amount of ₱152,738,075.00 |
| M-1 | PLDT's Monthly Remittance Return of Final Income Tax Withheld (BIR Form 1601-F) for September 2007, covering FWT in the total amount of ₱2,656,843,465.84 (EFPS Filing Reference No. 200700001846260, filed on October 15, 2007 |
| N | Philippine Central Depository, Inc.'s (PCD) EQ Member Transaction Report for April 20, 2007, showing the cash dividend entitlements of HSBC 10 account from PLDT |

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| N-1 | Portion of the EQ Member Transaction Report for HSBC 10 account as of April 20, 2007, showing the entry pertaining to the cash dividend payment made by "TEL" (PLDT) on said date in favour of "GE17" (Transaction ID 44989011) |
| O | PCD's EQ Member Transaction Report for September 24, 2007, showing the cash dividend entitlements of HSBC 10 account from PLDT |
| O-1 | Portion of the EQ Member Transaction Report for HSBC 10 account as of September 24, 2007, showing the entry pertaining to the cash dividend payment made by "TEL" (PLDT) on said date in favor of "FMAX" (Transaction ID 51810280) |
| P | Printout of PCD System's EQ Confirmed Entitlements Report for HSBC 10 account as of April 20, 2007, showing the cash dividend entitlements of HSBC 10 account from "TEL" (PLDT) |
| P-1 | Portion of the EQ Confirmed Entitlements Report for HSBC 10 account, showing the entry pertaining to cash dividend entitlements of "GE17" from "TEL" (PLDT) on April 20, 2007 (Event ID: 87963186) |
| P-2 | Printout of PCD System's CA Broker Entitlements Report for the cash dividend entitlements of HSBC 10 account from PLDT, payable on April 20, 2007 |
| P-3 | Portion of the CA Broker Entitlements Report, showing the entry pertaining to the cash dividend entitlements of "GE17" from "TEL" (PLDT) on April 20, 2007 |
| Q | Printout of PCD System's EQ Confirmed Entitlements Report for HSBC 10 account as of September 24, 2007, showing the cash dividend entitlements of HSBC 10 account from "TEL" (PLDT) |
| Q-1 | Portion of the EQ Confirmed Entitlements Report for HSBC for 10 account showing the entry pertaining to the cash dividend entitlements of "FMAX" from "TEL" (PLDT) on September 24, 2007 (Event ID: 96380490) |
| Q-2 | Printout of PCD System's CA Broker Entitlements Report for the cash dividend entitlements of HSBC 10 account from PLDT, payable on September 24, 2007 |
| Q-3 | Portion of the CA Broker Entitlements Report, showing the entry pertaining to the cash dividend entitlements of "FMAX" from "TEL" (PLDT) on September 24, 2007 |
| R | HSBC Certification dated September 16, 2008 covering the Entitlement Reports for the cash dividend entitlements of BBH from PLDT payable on April 20, 2007 and September 24, 2007 |
| R-1 | HSBC Entitlement Report covering the cash dividend entitlement of BBH from PLDT (ISIN PH7182521093) on April 20, 2007 |
| R-2 | HSBC Entitlement Report covering the cash dividend entitlement of BBH from PLDT (ISIN PH7182521093) on September 24, 2007 |

R-3 MT 599 Swift Message of BBH dated May 2, 2007, addressed to HSBC, authorizing HSBC to debit the amount of P1,638,500.00 from its Cash Account

S Proof of Final Distribution issued by BBH for the net dividends received by petitioner on April 20, 2007 from its shareholdings in PLDT (ISIN PH7182521093), amounting to ₱5,325,125.00

T Proof of Final Distribution issued by BBH for the net dividends received by petitioner on September 24, 2007 from its shareholdings in PLDT (ISIN PH7182521093), amounting to ₱8,253.050.00

U Sworn Statement of Ms. Maria Katherine C. Dela Torre dated September 25, 2009

U-1 Signature of Ms. Maria Katherine C. Dela Torre appearing on page 11 of the Sworn Statement

U-2 Compliance dated September 25, 2009 covering the Sworn Statement

V Sworn Statement of Mr. Antonio B. Madrid, Jr. dated November 20, 2009

V-1 Signature of Mr. Antonio B. Madrid Jr. appearing on page 6 of the Sworn Statement

V-2 Compliance dated November 20, 2009 covering the Sworn Statement

W Printout of PCD System's Corporate Actions Member Entitlements Report (CAMER) for HSBC10 account for March 20, 2007

W-1 Portion of the CAMER, showing the entry pertaining to the cash dividend entitlement of the HSBC10 account from "TEL" (PLDT) on March 20, 2007

X Printout of PCD System's CAMER for HSBC10 account for August 24, 2007

X-1 Portion of the CAMER, showing the entry pertaining to the cash dividend entitlement of the HSBC 10 account from "TEL" ("PLDT") on August 24, 2007

Y Cash Enquiry HSBC 10 account dated April 20, 2007

Z Cash Enquiry HSBC 10 account dated September 24, 2007

AA Sworn Statement of Mr. Reinard Alexander A. Cuvin dated January 22, 2010

AA-1 Signature of Mr. Reinard Alexander A. Cuvin appearing on page 12 of the Sworn Statement

AA-2 Compliance dated January 22, 2010 covering the Sworn Statement

BB BIR-Revenue Accounting Division Certification dated November 18, 2008 on Information System Operation Service Data Center (ISOSDC) data file which reflects the collections from taxpayer PLDT representing payment of FWT made

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| | through the BIR's Electronic Filing and Payment System (EFPS) and remitted to the BIR per Bureau of Treasury Journal Entry Voucher |
| BB-1 | BIR Collections and Bank Reconciliation System Payment Information Print-out showing collection of FWT from PLDT reflected and posted in the BIR's System |
| BB-2 | BIR Collections and Bank Reconciliation System Payment Information Printout showing collection of FWT from PLDT in the amount of ₱64,971,130.84 on October 15, 2007 |
| CC | BIR- Revenue Accounting Division Certification dated November 18, 2009 on ISOSDC data file which reflects the collections from taxpayer HSBC representing payment of FWT made through the BIR's EFPS and remitted to the BIR per Bureau of Treasury Journal Entry Voucher |
| CC-1 | BIR Collections and Bank Reconciliation System Payment Information Print-out showing collection of FWT from HSBC reflected and posted in the BIR's System |
| DD | Sworn Statement of Ms. Cornelia C. Dagdag dated February 22, 2010 |
| DD-1 | Signature of Ms. Cornelia C. Dagdag appearing on page 5 of the Sworn Statement |
| DD-2 | Compliance dated February 24, 2010 covering the Sworn Statement |
| EE | Payment Confirmation generated through the BIR's EFPS acknowledging the BIR's receipt of the amount of ₱2,591,872,335.00 FWT paid through Union Bank on September 28, 2007 |
| EE-1 | Payment Form (BIR Form No. 0605) filed by PLDT through the BIR'S EFPS on September 28, 2007 showing advance payment of ₱2,591,872,335.00 FWT on Dividends |
| EE-2 | Manually prepared Payment Form (BIR Form No. 0605) of PLDT showing payment of ₱2,591,872,335.00 FWT on Dividends |
| EE-3 | Union Bank EFPS ePayment Advice acknowledging receipt of the amount of ₱2,591,872,335.00 and informing PLDT that its bank account with Union Bank was accordingly debited |
| EE-4 | Print-out of Bank Payment Status for the September 28, 2007 payment transaction |
| EE-5 | Printout of Union Bank's acknowledgement of receipt of instructions to authorize ePayment dated September 28, 2007 |
| FF | Payment Confirmation's generated through the BIR'S EFPS acknowledging the BIR's receipt of the amount of ₱64,971,130.84 FWT paid through Union Bank on October 15, 2007 |
| FF-1 | Union Bank EFPS ePayment Advice acknowledging receipt of the amount of ₱64,971,130.84 and informing PLDT that its bank account with Union Bank was accordingly debited |

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| FF-2 | Print-out of Bank Payment Status for the October 15, 2007 payment transaction |
| FF-3 | Printout of Union Bank's acknowledgement of receipt of instructions to authorize ePayment dated October 15, 2007 |
| GG | Manually prepared Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F) of PLDT showing that the amount of FWT still due from PLDT after it made the advance payment of ₱2,591,872,335.00 is ₱64,971,130.84 |
| HH | Portion of the October 15, 2007 Alphalist of PLDT's payment of FWT uploaded to the BIR's EFPS on October 15, 2007 |
| HH-1 | Entry in the Alphalist showing that one of the payees of the FWT is PCD Nominee Corporation – Foreign Max WHT with gross dividends of ₱436,394,500.00 and final tax withheld in the amount of ₱152,378,075.00 |
| II | Bangko Sentral ng Pilipinas Electronic Fund Transfer Instruction System (EFTIS) Confirmation Receipt for FWT remittance for April 2007 dated May 11, 2007 |
| JJ | Portion of the Alphalist of PLDT's payment of FWT uploaded to the BIR's EFPS on May 11, 2007 |
| JJ-1 | Entry in the May 11, 2007 Alphalist showing that one of the payees of the FWT is PCD Nominee Corporation-Germany with gross dividends of ₱8,339,500.00 and final tax withheld in the amount of ₱2,918,825.00 |
| KK | Sworn Statement of Mr. Francis Carlo M. Tempongko dated March 17, 2010 |
| KK-1 | Signature of Mr. Francis Carlo M. Tempongko appearing on page 11 of the Sworn Statement |
| KK-2 | Compliance dated March 17, 2010 covering the Sworn Statement |
| LL | Sworn Statement of Ms. Dorothy L. Guillen dated March 17, 2010 |
| LL-1 | Signature of Ms. Dorothy L. Guillen appearing on page 7 of the Sworn Statement |
| LL-2 | Compliance dated March 17, 2010 covering the Sworn Statement |
| MM | Sworn Statement of Ms. Merceditas Siapuatco dated April 14, 2010 |
| MM-1 | Signature of Ms. Merceditas Siapuatco appearing on page 7 of the Sworn Statement |
| MM-2 | Compliance dated April 14, 2010 covering the Sworn Statement |
| NN | Resolution authorizing the declaration of special cash dividend in favor of all existing shareholders of PLDT as of August 24, 2007 payable on September 24, 2007 |

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| OO | Letter from the Philippine Depository & Trust Corporation dated March 28, 2007 with an attached EQ Cash Dividend Withholding Tax Summary Report from the Philippine Central Depository dated March 28, 2007 |
| PP | Sworn Statement of Mr. Antonio B. Madrid, Jr. dated May 13, 2010 |
| PP-1 | Signature of Mr. Antonio B. Madrid, Jr. appearing on page 4 of the Sworn Statement |
| PP-2 | Compliance dated May 13, 2010 covering the Sworn Statement |
| QQ | Petitioner's letter to the ITAD of the BIR dated May 20, 2010, stamped received on May 21, 2010, whereby petitioner submitted additional documents required by the ITAD of the BIR |

On February 16, 2011, March 14, 2011, and May 2, 2011, the initial presentation of respondent's evidence was reset on the ground that respondent's counsel in the person of Atty. Amado Rey B. Pagarigan, had not yet received a reply from the International Tax Affairs Division on the status of petitioner's administrative claim for refund. On June 1, 2011, Atty. Pagarigan manifested that he is constrained to submit the case for decision considering that no BIR records were transmitted to his office. Thus, this Court gave counsels for both parties "thirty (30) days from today's hearing to file their respective Memorandum" and thereafter, the instant case shall be submitted for decision.

On July 21, 2011, petitioner filed its Memorandum.

On July 28, 2011, the case was deemed submitted for decision, considering petitioner's Memorandum and the report of this Court's Records Division that respondent failed to file a memorandum.

The parties submitted the following issue for this Court's resolution:

> "Whether or not petitioner is entitled to the refund or issuance of a TCC in the amount of ₱4,177,900.00, representing the FWT erroneously withheld on the dividend income derived by petitioner on April 20, 2007 and September 24, 2007 from its investments in shares of stock of PLDT."

However, the issue may be broken down into the following sub-issues:

1. Whether or not the dividend income derived by petitioner on April 20, 2007 and September 24, 2007 from its investments in shares of stock of PLDT are subject to FWT at the rate of 15% on the gross amount of dividends pursuant to Article 10(2)(b) of the RP-Germany Tax Treaty, and not to the 35% income tax rate under Section 28(B)(1) of the Tax Code; and

2. Whether or not petitioner filed its administrative and judicial claims for refund or issuance of TCC in the amount of ₱4,177,900.00, representing the FWT erroneously withheld on the dividend income derived by petitioner on April 20, 2007 and September 24, 2007 from its investments in shares of stock of PLDT, within the two-year prescriptive period provided under Sections 204(C) and 229 of the Tax Code.

Initially, the issue of timeliness of filing of the refund claim must be addressed.

Sections 204(C) and 229 of the National Internal Revenue Code, as amended, state the requirements for the recovery of tax erroneously or illegally collected, to wit:

> "SEC. 204. *Authority of the Commissioner to Compromise, Abate, and Refund or Credit Taxes.* – The Commissioner may –
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> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: *Provided, however*, That a return filed showing an overpayment shall be considered as a written claim for credit or refund."
>
> "SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the **recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected**, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, **no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax** or penalty regardless of any supervening cause that may arise after the payment: *Provided, however*, That the Commissioner may, even **without** a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." *(Emphasis supplied)*

Based on the afore-quoted provisions, claims for refund of erroneously paid tax must be filed within two (2) years from the date of payment of the tax, both administratively and judicially.

In the instant case, the final withholding taxes were remitted to the BIR on May 11, 2007 and October 15, 2007. Consequently, petitioner had until May 10, 2009, at the earliest, within which to file its claim for refund with the BIR and the corresponding appeal before this Court.

Clearly, petitioner's administrative claim for refund filed on February 18, 2009 and the Petition for Review filed on April 22, 2009 before this Court fall within the two-year prescriptive period.

Thus, the questions pertaining to the applicable tax rate and petitioner's entitlement to a refund are discussed hereunder.

Petitioner owns shares of stock in Philippine domestic corporations, including, among others, PLDT shares of stock through BBH and HSBC. BBH acts as petitioner's global custodian bank, facilitating the settlement of the purchase and sale of shares as well as the collection of dividends therefrom; while HSBC acts as BBH's sub-custodian in the Philippine market.

As testified to by Ms. Maria Katherine C. Dela Torre, HSBC's Assistant Vice President of Custody and Clearing Department, the PLDT shares of stock owned by petitioner are scripless securities which are listed in the Philippine Stock Exchange, and they are not evidenced by a stock certificate, but instead they are represented by electronic records in the depository system of the Philippine Depository and Trust

Corporation (PDTC). Hence, the PLDT shareholdings of BBH's clients (including petitioner's shares) are represented by electronic entries under BBH's Omnibus Securities Account No. 000-453332-569 with HSBC and these are also reflected in HSBC's Omnibus Account with PDTC (*i.e.*, HSBC-Account 10), wherein the equity investments of all of HSBC's foreign clients are lodged.

The PSE adopted the scripless system whereby the settlement of purchases, sales of shares of stock and distribution of dividends are made through the electronic book entry system, rather than by the physical movement of certificates and documents.

When PLDT declared dividends consisting of ₱50.00 per share of common stock to holders of record on March 20, 2007, which was payable on April 20, 2007 and ₱60.00 plus ₱40.00 per share of common stock to holders of record on August 24, 2007, which was payable on September 24, 2007, HSBC certified that petitioner held the following number of outstanding shares of PLDT stock as of the afore-mentioned dates:

| EXH. | DATE | DIVIDEND PER SHARE | NO. OF SHARES | GROSS ENTITLEMENT | TAX AMOUNT (35%) | NET ENTITLEMENT |
|---|---|---|---|---|---|---|
| R-1 | 20-Mar-07 | ₱ 50.00 | 163,850 | ₱ 8,192,500.00 | ₱ 2,867,375.00 | ₱ 5,325,125.00 |
| R-2 | 24-Aug-07 | ₱100.00 | 126,970 | 12,697,000.00 | 4,443,950.00 | 8,253,050.00 |
| TOTAL | | | | ₱20,889,500.00 | ₱7,311,325.00 | ₱13,578,175.00 |

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BBH likewise issued a Proof of Final Distribution of the subject dividends.

In turn, the corresponding withholding agent/payor filed Monthly Remittance Returns of Final Income Taxes Withheld (BIR Form No. 1601-F) for FWT withheld in the months of April and September 2007, detailed as follows:

| EXHIBIT | DATE FILED | WITHHOLDING AGENT | TOTAL FWT REMITTED |
|---|---|---|---|
| L-1 and L | 11-May-07 | HSBC | ₱1,262,416,735.43 |
| M-1 and M | 15-Oct-07 | PLDT | ₱2,656,843,465.84 |

Suffice it to state that not all holdings in the HSBC Custody Account are petitioner's holdings. Consequently, not all final taxes withheld are from the dividends received by petitioner on its shareholdings in PLDT.

As stipulated upon by the parties, the dividends received by petitioner were subjected to final withholding tax amounting to ₱7,311,325.00 pursuant to Section 28(B)(1) of the NIRC of 1997, as amended, at the rate of 35% and that the same were remitted to the BIR by PLDT's transfer agent. Furthermore, the Revenue Accounting Division of the BIR issued certifications that it received the following payments:

| EXHIBIT | DATE | TAXPAYER | FWT |
|---|---|---|---|
| CC | 11-May-07 | HSBC | ₱1,262,416,735.43 |
| BB and BB-1 | 28-Sep-07 | PLDT | ₱2,591,872,335.00 |
| BB and BB-2 | 15-Oct-07 | PLDT | ₱ 64,971,130.84 |

In order to bolster its entitlement to the preferential tax rate, petitioner submitted the following documents to prove that it is a resident of the Federal Republic of Germany:

1. Certificate of Non-Registration of Corporation/Partnership issued by the Securities and Exchange Commission;

2. Certificate of Residence for 2007 issued by the Tax Authority of the Federal Republic of Germany; and

3. Certificate of Residence for 2008 issued by the Tax Authority of the Federal Republic of Germany.

Petitioner filed an application to avail of the benefits of the RP-Germany Tax Treaty on February 12, 2009.

The pertinent provisions of the said tax treaty are quoted as follows:

"ARTICLE 10
DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the law of that State, but the tax so charged shall not exceed:

(a) 10 per cent of the gross amount of the dividends if the recipient is a company (excluding partnerships) which owns directly at least 25 per cent of the capital of the company paying the dividends;

(b) in all other cases, 15 per cent of the gross amount of dividends."

Petitioner asserts that based on the said treaty the applicable tax rate for the dividends it received should only be 15% since it only has the following shares of stock in the outstanding common shares of PLDT as of the following record dates:

| Date | No. of Shares | Total number of PLDT Outstanding Common Shares (Exhibit "H") | Percentage of petitioner's shares |
|---|---|---|---|
| 20-Mar-07 | 163,850 | 188,574,293 | 0.087% |
| 24-Aug-07 | 126,970 | 188,707,593 | 0.067% |

Petitioner is claiming the refund of the twenty percent (20%) difference between the tax rate imposed as FWT under Section 28(B)(1) of the NIRC of 1997 and the 15% tax rate that allegedly should be applied under the RP-Germany Tax Treaty.

While petitioner is entitled to the 15% tax rate provided under the RP-German Tax Treaty, this Court cannot rule in favor of petitioner considering that it has filed a tax treaty relief application with the BIR ITAD only on February 12, 2009; which is **after** the subject final withholding taxes were paid but before it filed its administrative and judicial claims for refund.

In the case of *Mirant (Philippines) Operations Corporation (formerly: Southern Energy Asia-Pacific Operations [Phils.], Inc.) vs. Commissioner of Internal Revenue,* the Court of Tax Appeals *En Banc,* explained that the availment of a tax treaty provision must be preceded by an application for a tax treaty relief with the BIR's International Tax Affairs Division, to wit:

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

In the case of *Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue,* this Court *En Banc* again held that an application for tax treaty relief must be filed prior to the payment of the tax and prior to its availment of the preferential tax rate under a treaty, *viz*:

> "However, as to whether petitioner is entitled to its claimed refund or credit, the Court in Division ruled in the negative since petitioner's application for a tax treaty relief with the BIR International Tax Affairs Division ('ITAD') was not filed prior to its payment of the BPRT and actual remittance of its branch profits to DB Germany. Neither was it done prior to petitioner's availment of the preferential rate of ten percent (10%) under the RP-Germany Tax Treaty provision, thereby violating the fifteen (15) day period mandated under Section III paragraph (2) of Revenue Memorandum Order ('RMO') No. 01-2000. The Court in Division cited the case of *Mirant (Philippines) Operations Corporation (formerly: Southern Energy Asia-Pacific Operations [Phils.], Inc.) v. Commissioner of Internal Revenue*, as basis for the denial of petitioner's claim. xxx
>
> xxx xxx xxx
>
> *Mirant* appealed Our Decision to the Supreme Court via a Petition for Review docketed as G.R. No. 168531, which was however denied in a Resolution dated November 12, 2007 as follows:

xxx xxx xxx

> Aggrieved, *Mirant* moved for reconsideration but the Supreme Court resolved to deny the same in its Resolution dated February 18, 2008, *viz*:
>
> xxx xxx xxx
>
> Based on the foregoing Resolutions, the Supreme Court clearly found no reversible error in Our ruling in the *Mirant* case. Hence, under the principle of *stare decisis et non quieta movere* (follow past precedents and do not disturb what has been settled), it is Our duty to apply Our ruling in *Mirant* to the instant case. Once a case has been decided one way, any other case involving exactly the same point at issue should be decided in the same manner."

In fine, petitioner's claim for refund or issuance of a tax credit certificate in the amount of ₱4,177,900.00, representing overpaid final taxes on the dividends received by petitioner from its investments in PLDT on April 20, 2007 and September 24, 2007, must be denied.

**WHEREFORE**, the instant Petition for Review is hereby **DENIED** for lack of merit.

**SO ORDERED.**

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

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

CAESAR A. CASANOVA
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's Division.

**ERNESTO D. ACOSTA**
Presiding Justice