

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

MILWAUKEE INDUSTRIES
CORPORATION,

Petitioner,

C.T.A. EB NO. 486
(C.T.A. Case No. 6202)

Present:

-versus-

*Acosta, P.J.
Castañeda, Jr.
Bautista,
Uy,
Casanova, and
Palanca-Enriquez,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, JJ.*

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

Promulgated:

FEB 18 2010

*By: [Signature]
[Signature]*

X-----X

DECISION

BAUTISTA, J.:

The Case

Before the Court *En Banc* is a Petition for Review¹ filed by Milwaukee Industries Corporation on May 20, 2009 pursuant to Section 18 of Republic Act No. 1125, as amended by Republic Act No. 9282, praying for the Court *En Banc* to give

¹ *Rollo*, C.T.A. EB No. 486 (C.T.A. Case No. 6202), pp. 27-221, with Annexes.

due course to this Petition for Review *En Banc* and set aside the Amended Decision² promulgated by the Second Division of the Court ("Court in Division") on April 14, 2009, for having been rendered moot and academic in view of petitioner's avilment and full compliance with all the requirements of the Tax Amnesty Act of 2007 granting it immunity from payment of all internal revenue tax liabilities for 2005; or in the alternative, to order the withdrawal and/or cancellation of petitioner's remaining liabilities, particularly:

- a) the deficiency income tax in the reduced amount of P16,706,973.96;
- b) the deficiency value-added tax ("VAT") in the reduced amount of P46,280,162.38; and
- c) the imposition of twenty percent (20%) delinquency interest per annum on the total amount of P67,637.59, computed from January 21, 2000 until full payment thereof.

Antecedent Facts

The relevant antecedents are succinctly recited by the Court in Division in its Decision dated January 16, 2008 as follows:

Milwaukee Industries Corporation (Petitioner) is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines.

On the other hand, the Commissioner of Internal Revenue (Respondent) is the public officer authorized under the National Internal Revenue Code of 1997 (Tax Code) to examine and to assess any taxpayer the correct amount of internal revenue tax.

² Penned by Associate Justice Erlinda P. Uy, with Associate Justices Juanito C. Castañeda, Jr. and Olga Palanca-Enriquez, concurring.

In July 1998, respondent served Letter of Authority No. 000018418 on petitioner to examine the latter's books of accounts and other accounting records for "all internal revenue taxes" for "1997 & unverified prior years." In the course of the examination, petitioner submitted the documents requested by respondent and became part of the BIR records.

On January 21, 2000, petitioner received three (3) undated assessment notices with an accompanying demand letter and details of discrepancies. The deficiency income, expanded withholding, and value-added taxes in the aggregate amount of P173,063,711.58, inclusive of increments, were computed as follows:

	Basic Tax	Interest	Compromise Penalty	Total
Deficiency Income Tax ST-Income-97- 0093-2000	P 43,114,980.66	P20,264,040.91	25,000.00	P63,404,021.57
Deficiency Expanded Withholding Tax ST- EWT-97-0092-2000	19,438.95	9,284.23	1,000.00	29,723.18
Deficiency Value- Added Tax ST-VAT- 97-0091-2000	72,108,530.81	37,496,436.02	25,000.00	109,629,966.83
TOTALS	P115,242,950.42	P57,769,761.16	P51,000.00	P173,063,711.58

On February 21, 2000, petitioner through counsel protested the assessment by requesting reconsideration thereof. On April 24, 2000, petitioner submitted all relevant documents in support of the protest and manifested that its protest dated February 21, 2000 and the documents previously submitted to the BIR examiners which formed part of the BIR records, constituted as relevant supporting documents of the protest in compliance with Section 228 of the Tax Code.

To date, no decision has been made by respondent on the protest, notwithstanding that one hundred eighty (180) days had passed since the submission of the documents on April 24, 2000. Consequently, in order to comply with the thirty (30)-day period for filing an appeal with the Court of Tax Appeals counted from the 180-day period given to respondent to decide the protest, the Petition for Review was filed on November 20, 2000 for the purpose of having the assessment cancelled and/or withdrawn.

On January 16, 2001, respondent through counsel filed an Answer and asserted the following Special and Affirmative Defenses:

"5. Investigation conducted revealed that petitioner realized a gross profit in the amount of P90,713,406.43 as a result of a consummated sale between Petitioner and Littlegiant Steel Pipe Corporation, an

affiliate, but was not recorded in petitioner's books as purchases in 1997 although payments thereof in domestic Letters of Credit have been recorded in the books as loans.

6. Verification disclosed that the claim that the merchandise were forthwith returned and Littlegiant issued checks to reimburse Petitioner for drawings against LCs and subsequently deposited with RCBC is negated by the following:

6.1. The dates of the checks issued by Littlegiant per Certification under oath of Mr. Benson Hari-Ong, Vice-President, RCBC are the dates when the LCS were opened/granted. Hence, when the same were deposited with RCBC, Milwaukee's liability under the LCS was extinguished. However, the Debit Advices issued by RCBC to Milwaukee for drawings of Littlegiant on the LCs spanned a period from September 26, 1997 to January 26, 1998 with corresponding bank charges and interest of P10,025,576.94, per available documents, which were in turn claimed by Milwaukee as deduction in its 1997 Income Tax Returns. However, Milwaukee failed to record in its books of accounts its liability to RCBC.

6.2. The checks mentioned above allegedly issued by Littlegiant were not recorded in its books of accounts.

7. Petitioner did not intend to report the sale by Littlegiant in its 1997 Income Tax Return as shown by the following facts:

7.1. Only Pro-Forma Invoices were issued to cover the same instead of regular sales invoices;

7.2. Delivery receipts issued do not belong to the series used during 1997;



7.3. The sales, whether aborted or consummated, were not recorded in the books of accounts of Littlegiant for 1997.

8. Interest and Bank charges amounting to P18,128,498.26 were disallowed for the following reasons:

8.1 Only the interest expenses on the Prime Currency (US Dollar) loan from PBC and the interests and bank charges on the repurchase of the assigned Prime Currency (US Dollar) with PBC Capital and Investment Corporation (PBCCAP) were recorded in petitioner's 1997 books of accounts and not the liability. Said interests and bank charges were subsequently claimed as deduction in Petitioner's 1997 Income Tax return.

8.2 Petitioner did not receive the proceeds of, neither did it benefit from, the Prime Currency loan and its reassignment with PBCCAP because the bank accounts used (Milwaukee's Account No. 1041-01768-6 and Prime Currency Savings Account No. 2-534-00391-1, both with PBC) are not recorded in the Petitioner's books of accounts.

9. The purchases of scrap materials from junk shops in the amount of P9,040,701.37 in 1997 are not properly documented. Said purchases are too substantial to be considered as 'marginal economic activity' on the part of junk shops so as to exempt them from the requirement of issuing official receipts in their sale or transfer of merchandise.

10. Miscellaneous expenses consisting of petty cash charged to expense and foreign exchange losses (P4,429,982.42) were not properly documented.

11. Unrecorded sales amounting to P283,745,406.43 traceable to unaccounted purchases of raw materials (21,448.0 metric tons of hot rolled steel) from Littlegiant Steel Pipe Corporation resulted to a deficiency value-added tax.

12. Petitioner failed to subject to expanded withholding tax some of its income payments representing freight and delivery as well as professional fees, hence, the deficiency EWT.

13. The assessments were issued in accordance with law and regulations;

14. All presumptions are in favor of the correctness of tax assessments."

Trial proceeded and both parties presented their respective testimonial and documentary evidence. The case was submitted for decision on January 18, 2007 after considering petitioner's Memorandum sans respondent's Memorandum.³

The Ruling of the Court in Division

The following issues were stipulated by the parties for resolution by the Court in Division:

1. Whether the assessment for deficiency income tax in the amount of ₱63,404,021.57 inclusive of increments, has basis in fact and in law. Such assessment is broken down as follows:
 - 1.1. Whether there are alleged unrecorded sales of ₱90,713,406.43 from Littlegiant Steel Pipes Corporation.
 - 1.2. Whether the interest and bank charges amounting to ₱18,128,498.26 are proper deductions.
 - 1.3. Whether purchases of scrap materials from junk shops in the amount of ₱9,040,701.37 are proper deductions.
 - 1.4. Whether miscellaneous expenses consisting of petty cash charged to expense (₱1,214,393.18) and foreign exchange losses (₱4,429,982.42) are allowable as deductions.

³ Rollo, pp. 66-70.

- 1.5. Whether the 13th month pay and cost of subsistence of Petitioner's employees should be allowed as proper deductions.
2. Whether the assessment for deficiency value-added tax in the amount of ₱109,629,966.83, inclusive of increments, has basis in fact and in law. Such assessment is broken down, as follows:
 - 2.1. Whether there are alleged unrecorded purchases from Littlegiant Steel Pipes Corp. amounting to ₱283,749,406.43 which should be subject to VAT.
 - 2.2. Whether sales discounts by the Petitioner are allowable deductions from the gross selling price.
 - 2.3. Whether the sales to Ciriaco Corporation, being a domestic corporation enjoying tax exemption privileges are subject to VAT.
 - 2.4. Whether the input VAT by the petitioner should be allowed as deductions from the gross VATable sales.
3. Whether the assessment for deficiency expanded withholding tax in the amount of ₱29,723.18 is valid.⁴

Deficiency Income Tax - ₱63,404,021.57

On respondent's disallowance of petitioner's interest expense in the amount of ₱18,128,498.26, the Court in Division ruled that petitioner failed to show proof of actual utilization of the proceeds of the subject loans pursuant to Section 29(b) of the National Internal Revenue Code of 1977 ("1977 Tax Code"), as amended. Albeit the Court-commissioned Independent Certified Public Accountant ("CPA") Edgardo S. Licuanan, Jr. rendered a report stating that the claimed interest expense and bank charges were necessary business expense, the records are bereft of evidence that indeed the proceeds of the loans were used by petitioner in connection with the

⁴ *Id.*, at pp. 71-72.



carrying on of its business. The interest paid by petitioner thereon in the amount of P18,128,498.26 cannot qualify for deduction against its 1997 taxable income. Thus, the Court in Division affirmed the disallowance made by the respondent.

As to the untaxed gross profit of unrecorded purchase from an affiliate in the amount of P90,713,406.43, the Court in Division held that the documentary evidence of petitioner was sufficient to support its claim that there were no unrecorded purchases since all the hot rolled steel coils were returned and the sales by Littlegiant were cancelled. It also cited the Decision of the Court's First Division in another but similar case entitled *Littlegiant Steel Pipe Corp. v. Commissioner of Internal Revenue*, C.T.A. Case No. 6203, July 18, 2005, which involved the very same transaction where sales of petitioner of hot rolled steel coils were cancelled. Consequently, the Court in Division pronounced that respondent's allegation that petitioner had gross profit on sales traceable to unrecorded purchases from Littlegiant amounting to P90,713,406.43 was without basis.

On respondent's disallowance of petitioner's unsupported purchases in the amount of P9,040,701.37, the Court in Division emphasized that BIR Ruling No. 085-94 dated April 6, 1994, which exempts junk shops from the requirement of issuing official receipts in their sale or transfer of merchandise refers only to those raw materials bought from small-time or "backyard" scraps or junk vendors who trade their junks by means of push-carts and who are in the same category as the "magdidiyaryo-bote", and hence, considered as people conducting "marginal economic activity." Considering the amount involved for each voucher, the same can hardly be considered as purchases from small-time vendors who cannot issue

the required invoice and/or receipt in their sales or transfer or merchandise pursuant to Section 238 of the 1977 Tax Code, as amended. Further, Chapter IV of Revenue Regulations No. V-1, as amended, which provides that the Commissioner of Internal Revenue may exempt certain groups of persons from the requirement of issuing official receipts on their sale of merchandise, does not, however, include junk shops. Thus, respondent is correct in disallowing the scrap materials purchased by petitioner from various junk shops.

On respondent's disallowance of unsupported miscellaneous expenses in the amount of P4,429,982.42, the Court in Division held that a loss which is the result of a foreign exchange fluctuation, ascertained and realized during the taxable period, and not compensated by insurance or otherwise, except those provided in Section 29(d) of the 1977 Tax Code, is deductible from gross income of the said taxable period, albeit it may relate to transaction of prior years. It likewise ruled that to ascertain actual or transactional loss realized, petitioner must show proof of historical cost of liability at the time of availment as compared to the actual or prevailing exchange at the time of termination of debt. However, petitioner merely submitted documents establishing its actual payment of the amount of P39,140,375.25. Hence, for failure to submit loan documents establishing its trust receipts payable balance of P34,710,392.33, petitioner's claimed foreign exchange loss in the amount of P4,429,982.42 was properly disallowed as deduction from its 1997 taxable gross income.



Finally, as to the claimed creditable withholding taxes in the amount of P1,532,443.97, the Court in Division upheld the denial made by respondent for the failure of petitioner to refute respondent's findings that said claim was unsupported.

In sum, petitioner's 1997 deficiency income tax amounted to P16,706,973.96, computed as follows:

Taxable net income per return		P 873,070.55
Add: Adjustments to taxable net income		
Interest Expense	P 18,128,498.26	
Unsupported Purchases	9,040,701.37	
Unsupported Miscellaneous Expense	4,429,982.42	31,599,182.05
Total taxable net income per investigation		<u>P 32,472,252.60</u>
Income tax due thereon		P 11,365,288.41
Less: Income tax paid per return	P -	
Unsupported Creditable Withholding Taxes	-	
Total		<u>-</u>
Deficiency income tax due		P 11,365,288.41
Add: Interest		<u>5,341,685.55</u>
Total deficiency income tax payable		<u>P16,706,973.96</u>

The compromise penalty of P25,000.00 was, however, not imposed due to the absence of mutual agreement between the parties.

Value-Added Tax - P109,629,966.83

As regards the unreported sales traceable to unrecorded purchases from Little Giant Steel Pipe Construction in the amount of P283,745,406.43, the Court in Division confirmed its earlier findings of cancellation of the unrecorded purchases; hence, there was no taxable transaction.

On the discrepancy in the net sales in the amount of P155,163.56, the Court in Division ruled that by virtue of Certificate of Tax Exemption No. 97-25 issued by Clark Special Economic Zone in favor of Ciriaco Corporation, the latter is exempt

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from VAT pursuant to Section 15 of Republic Act No. 7227/Executive Order No. 62, Section 5 of Executive Order No. 80/Proclamation No. 163, BIR Revenue Regulation No. 1-95 and further confirmed by BIR Ruling No. 946-95 dated March 3, 1995. Thus, petitioner's sales to Ciriaco Corporation are effectively zero-rated for VAT purposes in accordance with Section 100(a)(2)(C) of the 1977 Tax Code, as amended, and Section 4.100-2(c) of Revenue Regulations No. 7-95. It stressed, however, that petitioner must substantiate its effectively zero-rated sales to Ciriaco Corporation in the amount of P155,163.56 by proper VAT invoices as provided in Section 108(a) of the 1977 Tax Code, as amended. However, the Court in Division found that the invoice covering the sales amount of P155,163.56 failed to reflect that the said sales is VAT-zero-rated for the word "zero-rated" was not imprinted thereon. Consequently, the sales to Ciriaco Corporation are taxable and petitioner is liable to pay the VAT thereon.

On the disallowance of input VAT, the Court in Division ascertained that the input VAT with no supporting papers available in the amount of P1,550,495.91 must be denied outright, as well as the input VAT carry-over from the previous year in the amount of P21,560,097.46 for petitioner's failure to prove its existence through VAT invoices, receipts, and quarterly VAT returns of the previous year. As to the input VAT of P28,662,239.99, a part thereof in the amount of P5,061,208.22 without supporting documents was disallowed. From the P23,601,031.77 remaining input VAT with supporting documents, the amount of P5,118,015.35 was disallowed for it was not properly substantiated with VAT invoices/receipts and only the amount of P18,483,016.42 represents petitioner's valid input VAT pursuant to the invoicing

requirements under Section 108(a), in relation to Section 104(a)(2) of the 1977 Tax Code, and Section 4.104-5 of Revenue Regulations No. 7-95. Thus, the input VAT amount of P18,483,016.42 was applied against petitioner's output tax in computing the amount of VAT still due and payable.

In sum, petitioner's 1997 deficiency value-added tax is the reduced amount of P49,490,793.79, computed as follows:

Sales declared per VAT returns	P	519,323,448.20
Add: Adjustments to vatable sales per investigation:		
Sales to Ciriaco Company		<u>155,163.56</u>
Total Sales subject to 10% VAT	P	<u>519,478,611.76</u>
 VAT due thereon	P	 51,947,861.18
Less: VAT paid per return	P	905,112.00
Allowable input tax (<i>See details per Annex A</i>)		<u>18,483,016.42</u>
Total		<u><u>19,388,128.42</u></u>
Deficiency VAT due	P	32,559,732.76
Add: Interest		<u>16,931,061.03</u>
Total deficiency VAT payable	P	<u><u>49,490,793.79</u></u>

The compromise penalty of P25,000.00 was, likewise, not imposed in the absence of mutual agreement between the parties.

Expanded Withholding Tax - P29,723.18

The Court in Division stated that since the assessment notices were issued on January 21, 2000, the 1997 Tax Code applies. Thus, the demand letter and assessment notices for taxable year 1997, sent by respondent to petitioner, particularly the attached Final Decision on Disputed Assessment, failed to indicate how respondent's examiner arrived at the alleged deficiency expanded withholding tax and the legal basis for such assessment, in violation of Section 228 of the 1997 Tax Code. Accordingly, the deficiency expanded withholding tax assessment is invalid.

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With that the Court in Division disposed of the case as follows:

WHEREFORE, the instant Petition for Review is hereby **PARTIALLY GRANTED**. The deficiency expanded withholding tax assessment in the amount of P29,723.18 is hereby **CANCELLED** and **WITHDRAWN**. However, the deficiency income tax and value-added tax assessments are hereby **AFFIRMED but in the reduced amounts of P16,706,973.96 and P49,490,793.79, respectively, or in the total amount of P66,197,767.75.**

Accordingly, petitioner is hereby **ORDERED to PAY** the following deficiency assessments:

	Basic	Interest	Total
Deficiency Income Tax	P11,365,288.41	P 5,341,685.55	P16,706,973.96
Deficiency Value-Added Tax	32,559,732.75	16,931,061.03	49,490,793.79
Totals	P43,925,021.16	P22,272,746.58	P66,197,767.75

In addition, petitioner is **ORDERED TO PAY** 20% delinquency interest per annum on the total amount of P66,197,767.75 computed from January 21, 2000 until full payment thereof, pursuant to Section 249(C) of the 1997 Tax Code.

SO ORDERED.

Aggrieved, petitioner filed a Motion for Partial Reconsideration on February 8, 2008, and a Supplemental Motion for Partial Reconsideration on March 28, 2008; on the other hand, respondent filed a Motion for Partial Reconsideration on February 12, 2008.

On April 14, 2009, the Court in Division promulgated an Amended Decision with the following pronouncement:

WHEREFORE, premises considered, respondent's *MOTION FOR PARTIAL RECONSIDERATION* is hereby **DENIED** for lack of merit; while petitioner's *MOTION FOR PARTIAL RECONSIDERATION* and *SUPPLEMENTAL MOTION FOR PARTIAL RECONSIDERATION* are hereby **PARTIALLY GRANTED**. This Court's Decision dated January 16, 2008 is hereby **MODIFIED**. Accordingly, petitioner is hereby **ORDERED TO PAY** respondent, its deficiency income tax and value-



added tax in the reduced amount of P16,706,973.96 and P46,280,162.38, respectively, or in the total amount of P62,987,136.34.

In addition, petitioner is hereby **ORDERED** to **PAY** twenty percent (20%) delinquency interest per annum on the total amount of P62,987,136.34, computed from January 21, 2000 until full payment thereof, pursuant to Section 249(c) of the NIRC of 1997, as amended.

SO ORDERED.

The Issues

Hence, the instant Petition for Review filed on May 20, 2009, where petitioner alleges the following:

- a. THE HONORABLE SECOND DIVISION OF THE CTA ERRED IN UPHOLDING THE DISALLOWANCE OF INTEREST AND BANK CHARGES, DESPITE LACK OF FACTUAL BASIS THEREFOR AND IN INSISTING, DESPITE COMPLIANCE WITH ALL THE REQUISITES OF DEDUCTIBILITY, THAT ACTUAL UTILIZATION OF THE PROCEEDS OF THE LOAN IS FATAL TO ITS CLAIM OF DEDUCTION.
- b. THE HONORABLE SECOND DIVISION OF THE CTA ERRED IN UPHOLDING THE DISALLOWANCE OF FOREIGN EXCHANGE LOSSES IN THE AMOUNT OF P4,429,982.42 ON THE GROUND THAT IT DID NOT SUBMIT DOCUMENTS PROVING THE ACTUAL FOREIGN EXCHANGE RATES USED AT THE TIME IT OBTAINED SAID LOANS.⁵

Petitioner's Arguments

Petitioner asseverates that it has fully complied with all the requisites for the deductibility of its interest expense. It contends that neither law nor jurisprudence requires that actual utilization of the proceeds of the loan is mandatory considering that it only became material based on the findings of the respondent that the loan was not recorded in the 1997 books of accounts, leading to an assumption that petitioner did not receive nor benefit from the proceeds of the loan. Petitioner posits

⁵ *Id.*, at p. 43.

that so long as the indebtedness was contracted in furtherance of the business, trade or profession of the taxpayer, the actual utilization of the proceeds is immaterial. Hence, the fact that the proceeds of the loan are made available for the need of the business, specified, contingent or otherwise, is enough to establish the requisite that the indebtedness must be connected with the business, trade or profession of the taxpayer.

Petitioner also asserts that the 1997 loans were but a continuation of the loans made in 1996. It points out that the Audited Financial Statements for the year 1997 would show that even in 1996, petitioner was already in the state of illiquidity. It being undisputed that petitioner's financial position in 1996 is not much better than in 1997, the purpose of obtaining the loans applies with equal force to its 1996 as well as 1997 loans.

Petitioner likewise argues that it complied with all the requisites for the deductibility of losses. It avers that no jurisprudence requires proof of historical cost of liability at the time of availment as compared to the actual or prevailing rate at the time of termination of the debt in order to ascertain actual or transactional loss incurred. It claims that it offered in evidence the relevant Debit Advices reflecting the source loan documents/letters of credit and the Partial Report of Mr. Edgardo S. Licuanan, Jr., the Court-commissioned Independent CPA, dated March 19, 2002, which contained the Summary of Foreign Exchange Losses on Trust Receipts Payable for the Year 1997 clearly showing the balance of the Trust Receipts. Considering that the Independent CPA affirmatively stated that verifications were conducted on the propriety and accuracy of the voluminous documents and papers



which were used by petitioner to support its claims; thus, the same comprises competent evidence establishing that it had a trust receipts payable balance in the amount of P34,710,392.33.

Finally, petitioner claims that on September 21, 2007, it availed of the tax amnesty under Republic Act No. 9480, otherwise known as the "Tax Amnesty Act of 2007." Pursuant thereto, it submits the following: (a) Notice of Availment of Tax Amnesty;⁶ (b) Balance Sheet/ Statement of Assets, Liabilities and Networth ("SALN") as of December 31, 2005;⁷ (c) Tax Amnesty Return (BIR Form No. 2116);⁸ (d) Tax Amnesty Payment Form/Acceptance of Payment Form (BIR Form No. 0617);⁹ and (e) Land Bank of the Philippines BIR Tax Payment Deposit Slip dated September 21, 2007.¹⁰

However, due to Revenue Memorandum Circular ("RMC") No. 69-2007, dated November 7, 2007, which prescribes that only companies reflecting positive networth can avail of the tax amnesty law, petitioner filed an Amended Notice of Availment of Tax Amnesty¹¹ on December 14, 2007, with the following attachments: Second Amended SALN as of December 31, 2005;¹² Amended Tax Amnesty Return (BIR Form No. 2116);¹³ Tax Amnesty Payment Form/Acceptance of Payment Form

⁶ *Id.*, at p. 195.

⁷ *Id.*, at pp. 196-206.

⁸ *Id.*, at p. 207.

⁹ *Id.*, at p. 208.

¹⁰ *Id.*, at p. 209.

¹¹ *Id.*, at p. 210.

¹² *Id.*, at p. 211.

¹³ *Id.*, at p. 212.

(BIR Form No. 0617);¹⁴ and Philippine National Bank BIR Payment Slip dated December 13, 2007.¹⁵

On December 18, 2007, the BIR issued RMC No. 90-2007 stating that companies in a deficit position can likewise avail of the tax amnesty provided that amendments to the balance sheet shall be made resulting to a reduction in the reported deficit. In view of the availment of the tax amnesty and the immunities and privileges granted under Section 6 of the Tax Amnesty Act of 2007, petitioner claims that the issues subject of the Amended Decision are deemed moot and academic.

The Ruling of the Court En Banc

Petitioner anchored its claim on Section 34(A)(1) of the NIRC of 1997, as amended, which provides:

(A) *Expenses.* -

(1) *Ordinary and Necessary Trade, Business or Professional Expenses.* -

(a) *In General.* - There shall be allowed as deduction from gross income all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on or which are directly attributable to, the development, management, operation and/or conduct of the trade, business or exercise of a profession, xxx:

Petitioner insists that the actual utilization of the proceeds of the debt before an interest expense becomes deductible is neither intended nor contemplated by the above-quoted provision.

Inasmuch as the interest and bank charges amounting to P18,128,498.26 claimed by petitioner as deduction from its gross income was incurred for the

¹⁴ *Id.*, at p. 213.

¹⁵ *Id.*, at p. 214.



taxable year 1997, and Republic Act No. 8424, entitled "An Act Amending the National Internal Revenue Code, as amended" or the Tax Reform Act of 1997, took effect only on January 1, 1998, then the applicable provision is Section 29(b) of the 1977 Tax Code, as amended, which provides as follows:

SEC. 29. Deductions from gross income. — xxx

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(b) Interest. — (1) In general. — The amount of interest paid or accrued within a taxable year on indebtedness in connection with the taxpayer's profession, trade or business, except on indebtedness incurred or continued to purchase or carry obligation the interest upon which is exempt from taxation as income under this Title.

Pursuant thereto, the requisites to validly claim deductibility of interest expense are the following:

1. there must be an indebtedness;
2. the indebtedness must be that of the taxpayer;
3. the indebtedness must be connected with the business, trade or profession of the taxpayer;
4. the interest must have been paid or accrued during the taxable year; and
5. the interest must have been stipulated in writing.¹⁶

The Court in Division succinctly held that there is no question as to petitioner's compliance with the first, second, fourth and fifth requisites, considering that respondent does not dispute that petitioner paid interests and bank charges in the amount of P18,128,498.26 in 1997 on loans obtained from Philippine Banking Corporation ("PBC") and on repurchase of assigned accounts with PBC Capital and Investment Corporation; and that said loans from PBC were covered by promissory notes, which indicated the stipulated interest rates.

¹⁶ Delfin Ma. V. Cruz, Jr., v. The Court of Tax Appeals and The Commissioner of Internal Revenue, CA-G.R. SP No. 25308, April 7, 1992.

The issue, however, is petitioner's compliance with the third requisite, and that is whether the loans were used in connection with its business.

Albeit in the Report dated May 23, 2003, the Court-commissioned Independent CPA made a finding that the claimed interest and bank charges of P18,128,498.26 were necessary business expenses, the records are bereft of proof that the proceeds of the subject loans were used in connection with the carrying on of its business.

Petitioner contends, however, that so long as the indebtedness was contracted in furtherance of the business, trade or profession of the taxpayer, the actual utilization of the proceeds is immaterial.

The Court *En Banc* does not agree.

As correctly explained by the Court in Division, the third requisite for the deductibility of interest expense requires that there must be sufficient and relevant relationship between the taxpayer's incurrence of the loans and the taxpayer's business, which can only be established through the presentation of proof showing actual utilization of the proceeds of the loans upon which the claimed deduction for interest expense was paid or incurred.

Well-settled is the rule that the claimant has the burden of proving the factual and legal bases of its claim, hence, the argument that the debt is presumed to have been contracted in furtherance of or in connection with petitioner's business deserves scant consideration.

It may not be amiss to note further that while petitioner claims that the interest and bank charges which originated from loans from Philbank and PBC

Capital were recorded in its 1997 books of account, it claims in its protest letter and *Memorandum* that the liability from which the interest charges arose was not recorded in 1997 because the loan was obtained in 1996.

Petitioner failed to justify its inconsistencies but rather discussed in length that it was in a state of illiquidity whereby its 1997 loans were but a continuation of the loans made in 1996.

It bears stressing, however, that to allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level would be to sanction a procedure whereby the court — which is supposed to *review* administrative determinations — would not review, but determine and decide for the first time, a question not raised at the administrative forum.¹⁷ Well-settled is the principle that a party is bound by the theory he adopts and by the cause of action he stands on and cannot be permitted after having lost thereon to repudiate his theory and cause of action and adopt another and seek to re-litigate the matter anew either in the same forum or on appeal.¹⁸

Anent the disallowance of the foreign exchange losses in the amount of P4,429,982.42, petitioner founded its claim on Sections 29, 37 and 39 of the 1977 Tax Code, to wit:

SEC. 29. *Deductions from gross income.*

(D) *Losses.* —

¹⁷ *Aguinaldo Industries Corporation v. Commissioner of Internal Revenue*, G.R. No. L-29790, February 25, 1982, 112 SCRA 136.

¹⁸ *Arroyo v. House of Representative Electoral Tribunal*, G.R. No. 118597, July 14, 1995, 246 SCRA 284, citing *Bashier v. COMELEC*, 43 SCRA 238.

(2) *By corporation.* – In the case of a corporation, all losses actually sustained and charged off within the taxable year and not compensated for by insurance or otherwise.

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SEC. 37. General rule. – The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner of Internal Revenue does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year, as defined in section twenty or if the taxpayer has no annual accounting period, or does not keep books, or if the taxpayer is an individual, the net income shall be computed on the basis of the calendar year.

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SEC. 39. Period for which deductions and credits taken. – The deductions provided for in this Title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions should be taken as of a different period.

To prove its compliance, petitioner cites the Partial Report of the Court-commissioned Independent CPA dated March 19, 2002, which classified its foreign exchange losses as Miscellaneous Expenses in its book for the year 1997, summarized as follows:

REFERENCE	TRUST RECEIPTS BALANCE	TRUST RECEIPTS PAYMENTS	DEDUCTIBLE EXPENSES FOREIGN EXCHANGE LOSSES
171-008426	P15,750,000.00	P15,822,650.00	P 72,650.00
FXOC96-068 C	10,001,250.00	12,969,464.00	2,968,214.00
BO096-5027	3,207,983.63	4,075,666.82	867,683.19
BFX109LC96-006429	3,156,600.00	3,162,200.00	5,600.00
BO096-6297	968,024.00	1,293,520.00	325,496.00
FOREIGN EXCHANGE LOSSES	<u>P34,710,392.33</u>	<u>P39,140,375.25</u>	<u>P4,429,982.42</u>

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The table readily shows the amount of trust receipts balance as compared to the amount of trust receipts payments, with the resulting difference in the aggregate amount of P4,429,982.42 due to foreign exchange fluctuations.

However, the Court *En Banc* still finds the same insufficient.

The documents submitted by petitioner such as bank debit advices and cash vouchers to support the Report of the Court-commissioned Independent CPA established the actual payment of the amount of P39,140,375.25. However, petitioner failed to submit the documents substantiating the amount of P34,710,392.33 which pertains to the summary of trust receipts payable balance.

Section 1 of Rule 13 of the Revised Rules of the Court of Tax Appeals allows a party desiring to present voluminous documents in evidence to secure the services of an independent Certified Public Accountant, who shall be commissioned as an officer of the Court solely for the purpose of performing such audit functions, as may be directed.

Corollary thereto, CTA Circular No. 1-95, as amended by CTA Circular No. 10-97, provides:

1. The party who desires to introduce as evidence such voluminous documents must present: (a) a Summary containing the total amount/s of the tax account or tax paid for the period involved and a chronological or numerical list of the numbers, dates and amounts covered by the invoices or receipts; and (b) a Certification of an independent Certified Public Accountant attesting to the correctness of the contents of the summary after making an examination and evaluation of the voluminous receipts and invoices. Such summary and certification must properly be identified by a competent witness from the accounting firm.

2. The method of individual presentation of each and every receipt or invoice or other documents for marking, identification and comparison with the originals thereof need not be done before the

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Court or the Commissioner anymore after the introduction of the summary and CPA certification. It is enough that the receipts, invoices and other documents covering the said accounts or payments **must be pre-marked by the party concerned and submitted to the Court** in order to be made accessible to the adverse party whenever he/she desires to check and verify the correctness of the summary and CPA certification. However, the originals of the said receipts, invoices or documents should be ready for verification and comparison in case of doubt on the authenticity of the particular documents presented is raised during the hearing of the case. (*Boldfacing supplied*)

In the case of *Commissioner of Internal Revenue v. Manila Mining Corporation*,¹⁹ the Supreme Court enunciated that there is nothing, however, in CTA Circular No. 1-95, as amended by CTA Circular No. 10-97, which either expressly or impliedly suggests that summaries and schedules, even if certified by an independent CPA, suffice as evidence. The circular, in the interest of speedy administration of justice, was promulgated to avoid the time-consuming procedure of presenting, identifying and marking of documents before the Court. It does not relieve the claimant of its imperative task of pre-marking photocopies and submitting the same to the court after the independent CPA shall have examined and compared them with the originals.

In the case at bar, petitioner failed to support the summaries made by the Independent CPA. For lack of evidence proving the payable amount of P34,710,392.33, the Court *En Banc* cannot verify the authenticity and veracity of the independent auditor's conclusions; hence, the claimed foreign exchange loss in the amount of P4,429,982.42 cannot be allowed as deduction from petitioner's 1997 taxable gross income.



¹⁹ G.R. No. 153204, August 31, 2005, 468 SCRA 571.

Furthermore, the Court *En Banc* objects to petitioner's stance that it was not given an opportunity to present the loan documents establishing its trust receipts payable. Petitioner was given an opportunity to present its rebuttal evidence. In fact, in the Resolution²⁰ dated June 1, 2006, the Court in Division noted that it was petitioner who asked for several postponements of trial and commissioner's hearing which led to an issuance of final warnings on October 26, 2005, January 16, 2006 and January 30, 2006. Petitioner cannot now shift the blame to the Court in Division since it was given sufficient opportunity therefor.

The other issues not being raised will stand as ruled by the Court in Division. In sum, petitioner is liable to pay the deficiency income tax and value-added tax in the reduced amount of P16,706,973.96 and P46,280,162.38, respectively, or in the total amount of P62,987,136.34, plus the twenty percent (20%) delinquency interest per annum, computed from January 21, 2000 until full payment thereof, pursuant to Section 249(c) of the NIRC of 1997, as amended.

However, the Court *En Banc* takes note of petitioner's availment of the Tax Amnesty Program under Republic Act No. 9480 ("R.A. No. 9480").

A tax amnesty is a general pardon or the intentional overlooking by the State of its authority to impose penalties on persons otherwise guilty of violation of a tax law. It partakes of an absolute waiver by the government of its right to collect what is due it and to give tax evaders who wish to relent a chance to start with a clean slate. A tax amnesty, much like a tax exemption, is never favored nor presumed in



²⁰ Records, pp. 1060-1062.

law. The grant of a tax amnesty, similar to a tax exemption, must be construed strictly against the taxpayer and liberally in favor of the taxing authority.²¹

Sections 1 and 8 of R.A. No. 9480, entitled "An Act Enhancing Revenue Administration and Collection by Granting an Amnesty on All Unpaid Internal Revenue Taxes Imposed by the National Government for Taxable Year 2005 and Prior Years," provide as follows:

SEC. 1. *Coverage.* – There is hereby authorized and granted a tax amnesty which shall cover all national internal revenue taxes for the taxable year 2005 and prior years, with or without assessments duly issued therefor, that have remained unpaid as of December 31, 2005: Provided, however, That the amnesty hereby authorized and granted shall not cover persons or cases enumerated under Section 8 hereof.

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SEC. 8. *Exceptions.* – The tax amnesty provided in Section 5 hereof shall not extend to the following persons or cases existing as of the effectivity of this Act:

- (a) Withholding agents with respect to their withholding tax liabilities;
- (b) Those with pending cases falling under the jurisdiction of the Presidential Commission on Good Government;
- (c) Those with pending cases involving unexplained or unlawfully acquired wealth or under the Anti-Graft and Corrupt Practices Act;
- (d) Those with pending cases filed in court involving violation of the Anti-Money Laundering Law;
- (e) Those with pending criminal cases for tax evasion and other criminal offenses under Chapter II of Title X of the National Internal Revenue Code of 1997, as amended, and the felonies of frauds, illegal exactions and transactions, and malversation of public funds and property under Chapters III and IV of Title VII of the Revised Penal Code; and

²¹ Commissioner of Internal Revenue v. Marubeni Corporation, G.R. No. 137377, December 18, 2001, 372 SCRA 588.

- (f) Tax cases subject of final and executory judgment by the courts.

From the above-quoted provisions, income tax and value added tax are covered by the Tax Amnesty Program; likewise, petitioner, not falling within any of the exceptions enumerated, is qualified to avail the tax amnesty benefits under Section 6 of RA No. 9480, to wit:

SEC. 6. Immunities and Privileges. – Those who availed themselves of the tax amnesty under Section 5 hereof, and have fully complied with all its conditions shall be entitled to the following immunities and privileges:

1. The taxpayer shall be immune from the payment of taxes, as well as additions thereto, and the appurtenant civil, criminal or administrative penalties under the National Internal Revenue Code of 1997, as amended, arising from the failure to pay any and all internal revenue taxes for taxable year 2005 and prior years.

Petitioner submitted the following documents, stamped “certified machine copy from the documents on file” by OIC-Assistant Revenue District Officer Fritz S. Buendia:

- a) Notice of Availment of Tax Amnesty filed on September 21, 2007;²²
- b) Balance Sheet/Statement of Assets, Liabilities and Networth (“SALN”) as of December 31, 2005;²³
- c) Tax Amnesty Return (BIR Form No. 2116);²⁴
- d) Tax Amnesty Payment Form/Acceptance of Payment Form (BIR Form No. 0617) in the amount of P1,040,411.70;²⁵

²² *Rollo*, p. 195.

²³ *Id.*, at pp. 196-206.

²⁴ *Id.*, at p. 207.

²⁵ *Id.*, at p. 208.

- e) Land Bank of the Philippines BIR Tax Payment Deposit Slip dated September 21, 2007 in the amount of P1,040,411.70;²⁶
- f) Amended Notice of Availment of Tax Amnesty filed on December 14, 2007;²⁷
- g) Second Amended SALN as of December 31, 2005;²⁸
- h) Amended Tax Amnesty Return (BIR Form No. 2116);²⁹
- i) Tax Amnesty Payment Form/Acceptance of Payment Form (BIR Form No. 0617) in the amount of P9,835,230.39;³⁰ and
- j) Philippine National Bank BIR Payment Slip dated December 13, 2007 in the amount of P9,835,230.39.³¹

Upon perusal of the documents submitted by petitioner, the Court *En Banc* finds that petitioner has fully complied with the requirements of R.A. No. 9480. The Court *En Banc* has previously resolved that taxpayers found to have fully complied with the documentation requirements of R.A. No. 9480 are entitled to the immunities as found under Section 6 thereof.³² More importantly, in the case of *Philippine Banking Corporation (Now: Global Business Bank, Inc.) v. Commissioner of Internal Revenue*,³³ the Supreme Court declared that the completion of these requirements shall be deemed full compliance with the tax amnesty program, and the law mandates that the taxpayer shall thereafter be immune from payment of taxes, and

²⁶ *Id.*, at p. 209.

²⁷ *Id.*, at p. 210.

²⁸ *Id.*, at p. 211.

²⁹ *Id.*, at p. 212.

³⁰ *Id.*, at p. 213.

³¹ *Id.*, at p. 214.

³² *Metropolitan Bank and Trust Company v. Commissioner of Internal Revenue*, C.T.A. EB No. 354 (C.T.A. Case No. 7154), August 29, 2008; *Commissioner of Internal Revenue v. PILMICO Foods Corporation*, C.T.A. EB No. 430 (C.T.A. Case No. 6868), March 31, 2009.

³³ G.R. No. 170574, January 30, 2009, 597 SCRA 366.

additions thereto, as well as the appurtenant civil, criminal or administrative penalties under the NIRC of 1997, as amended, arising from failure to pay any and all internal revenue taxes for taxable year 2005 and prior years.

Petitioner availed of the Tax Amnesty Program on September 21, 2007 and December 14, 2007. Section 4 of R.A. No. 9480 provides:

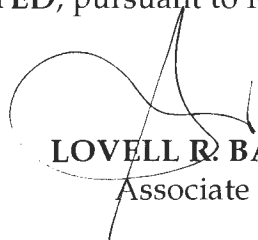
SEC. 4. *Presumption of Correctness of the SALN.* — The SALN as of December 31, 2005 shall be considered as true and correct except where the amount of declared networth is understated to the extent of thirty percent (30%) or more as may be established in proceedings initiated by, or at the instance of, parties other than the BIR or its agents: **Provided, That such proceedings must be initiated within one year following the date of the filing of the tax amnesty return and the SALN. Findings of or admission in congressional hearings, other administrative agencies of government, and/or courts shall be admissible to prove a thirty percent (30%) under-declaration.** (*Boldfacing supplied*)

The one-year period stated in the aforequoted provision for the investigation or audit of the documents and/or representations made by taxpayer in connection with the availment of the tax amnesty benefit had already lapsed. To date, there is nothing in the records which would show that proceedings have been filed under the said section.

In fine, petitioner duly complied with the requisites enumerated under R.A. No. 9480.

WHEREFORE, the Petition for Review is hereby **GRANTED**. Accordingly, the subject income and VAT deficiencies against petitioner are hereby **CANCELLED** and the case is **CLOSED** and **TERMINATED**, pursuant to R.A. No. 9480.

SO ORDERED.


LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

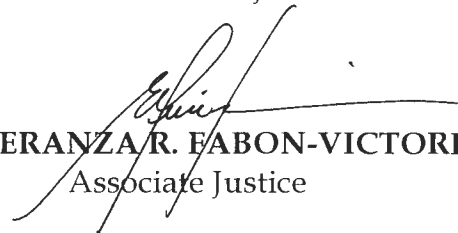

ERNESTO D. ACOSTA
Presiding Justice


JUANITO C. CASTAÑEDA, JR.
Associate Justice

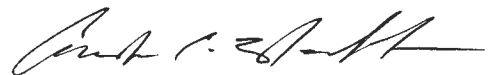

ERILINDA P. UY
Associate Justice


CAESAR A. CASANOVA
Associate Justice


OLGA PALANCA-ENRIQUEZ
Associate Justice


ESPERANZA R. FABON-VICTORINO
Associate Justice


CIELITO N. MINDARO-GRULLA
Associate Justice


AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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 this Court.


ERNESTO D. ACOSTA
Presiding Justice