REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

MCKINSEY & CO. (PHILS.),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8805

Members:

CASTAÑEDA, JR., *Chairperson,*
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:
JAN 13 2017 2:30 pm

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RESOLUTION

CASTAÑEDA, JR., *J.*:

For the Court's resolution are the following:

1. petitioner's **Motion for Reconsideration (of the Decision dated 11 August 2016)**, filed on August 30, 2016, without respondent's comment as per Records Verification dated October 19, 2016; and

2. respondent's **Motion for Reconsideration** filed through registered mail on August 19, 2016 and received by the Court on September 1, 2016, with petitioner's **Comment/Opposition (To Respondent's Motion for Reconsideration)**, filed on October 17, 2016.

Both parties move for the reconsideration of the Decision[1] promulgated on August 11, 2016, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **₱56,946,464.84**, representing its excess and unutilized creditable withholding taxes for calendar years 2011 and 2012.
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> **SO ORDERED**."

Petitioner's Motion for Reconsideration

Petitioner requests that the Court reconsider its Decision based on the following considerations:

1. The discrepancy in the name of the Company is merely a clerical error since the tax identification number (TIN) of petitioner is properly indicated in Creditable Withholding Tax (CWT) Certificates; and

2. Petitioner has sufficient tax credits from calendar year (CY) 2006 to offset its Minimum Corporate Income Tax (MCIT) liabilities for CYs 2011 and 2012.

Respondent's Motion for Reconsideration

Respondent contends that proof of actual remittance to the Bureau of Internal Revenue (BIR) of the withheld taxes and testimonial evidence of the payors and withholding agents are required. On the other hand, petitioner claims that proof of actual remittance of the taxes withheld to the BIR is not indispensable in a claim for refund of excess CWTs in line with the doctrine laid down in

[1] Docket, Vol. II, pp. 991-1008.

the case of *Commissioner of Internal Revenue vs. Sonoma Services, Inc.*[2]

We DENY both parties' Motion for Reconsideration.

As to petitioner's Motion for Reconsideration, it argues that while the name of the petitioner was not accurately reflected on the CWT Certificates issued by Vicsal Development Corporation and Valueshop Market Market Inc. (Exhibits "P-18", "P-19", "P-21", "P-24", "P-26", and "P-33"), petitioner's TIN was, however, indicated in these certificates. Petitioner asserts that its BIR Certificate of Registration and its Annual Income Tax Return (ITR) show that its TIN is 005-649-673-000, the same TIN reflected in the CWT Certificates.

With respect to the CWT Certificate issued by Vicsal Development Corporation marked as Exhibit "P-27", petitioner submits that this Court should still give credence and probative value to the same notwithstanding the error in TIN considering that there is no entity registered in the Philippines with the name "McKinsey Phils., Inc." In support of this allegation, petitioner presented and attached as Annex "A", the Certification of Non-Registration of Company issued by the Securities and Exchange Commission (SEC) dated August 25, 2016.

Petitioner further claims that all the income payments related to the creditable withholding taxes reflected in Exhibits "P-18", "P-19", "P-21", "P-24", "P-26", "P-27" and "P-33" were reported in petitioner's Annual ITR for 2011 and 2012 as shown in its General Ledger Transaction Detail for CY's 2011 and 2012. Thus, petitioner claims that its customers, Vicsal Development Corporation and Valueshop Market Market Inc., merely made a clerical error in indicating petitioner's name and TIN.

The Court, however, cannot consider the Certification of Non-Registration issued by SEC as part of petitioner's evidence since the same has not been formally offered[3] and admitted as evidence in this case.

Section 34, Rule 132 of the Rules of Court provides: *Jr*

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[2] CTA EB Case No. 931, December 11, 2013.
[3] Docket, Vol. II, pp. 632-658.

> **Section 34.** *Offer of evidence.* — The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified.

In the case of *Heirs of Mabborang vs. Mabborang, et al.*[4], the Supreme Court discussed the importance of formal offer of evidence, as follows:

> Section 34, Rule 132 of the Rules of Court provides that "the court shall consider no evidence which has not been formally offered." This is to enable the trial judge to know the purpose or purposes for which the proponent is presenting the evidence. Also, it allows opposing parties to examine the evidence and object to its admissibility. A formal offer is necessary because judges are mandated to rest their findings of facts and judgment strictly and only upon the evidence offered by the parties at trial. Consequently, review by the appellate court is facilitated for it will not be required to review documents not previously scrutinized by the trial court. Hence, strict adherence to this basic procedural rule is required, lest evidence cannot be assigned any evidentiary weight or value:
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> > Thus, the trial court is bound to consider only the testimonial evidence presented and exclude the documents not offered. Documents which may have been identified and marked as exhibits during pre-trial or trial but which were not formally offered in evidence cannot in any manner be treated as evidence. Neither can such unrecognized proof be assigned any evidentiary weight and value. xxx It must be emphasized that any evidence which a party desires to submit for the consideration of the court must formally be offered by the party; otherwise, it is excluded and rejected.
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> In certain instances, however, this Court has relaxed the procedural rule and allowed the trial court to

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[4] G.R. No. 182805, April 22, 2015.

> consider evidence not formally offered on the condition that the following requisites are present: (1) the evidence must have been duly identified by testimony duly recorded; and (2) the same must have been incorporated in the records of the case.

None of the conditions in order for the Court to allow the relaxation of procedural rule, are present in this case. It must be noted that this is the first time that petitioner presented the said document before this Court.

Moreover, in the case of *Cansino and De Jesus vs. Court of Appeals*[5], the Supreme Court ruled that a motion for reconsideration cannot be used as a vehicle to introduce new evidence:

> Under Rule 37 of the Revised Rules of Court, a party may file a motion for reconsideration on the ground, among others, that "x x x, the evidence is insufficient to justify the decision or final order, or the decision or final order is contrary to law." It requires the motion to point out specifically the findings or conclusions of the judgment or final order which are not supported by the evidence or which are contrary to law, making specific reference to the testimonial or documentary evidence presented or to the provisions of law alleged to be violated.
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> **It is implicitly clear from Rule 37 that a motion for reconsideration cannot be used as a vehicle to introduce new evidence**. Petitioners correctly contend that if respondents wanted to present further evidence, they should have filed a motion for new trial based on newly discovered evidence. However, for newly discovered evidence to warrant a new trial, (a) it must have been discovered after trial, (b) it could not have been discovered or produced at the trial despite reasonable diligence, (c) it must be material and not merely collateral, cumulative, corroborative or purely for impeaching a witness, merely important evidence being not enough, and (d) if presented, would probably alter the result of the action. (*Emphasis supplied*)

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[5] G.R. No. 125799, August 21, 2003.

"Procedural rules are designed to facilitate the adjudication of cases. Courts and litigants alike are enjoined to abide strictly by the rules. While in certain instances, the Court allows a relaxation in the application of the rules, there is no intention to forge a weapon for erring litigants to violate the rules with impunity. The liberal interpretation and application of rules apply only in proper cases of demonstrable merit and under justifiable causes and circumstances. While it is true that litigation is not a game of technicalities, it is equally true that every case must be prosecuted in accordance with the prescribed procedure to ensure an orderly and speedy administration of justice. Party litigants and their counsel are well advised to abide by – rather than flaunt – procedural rules for these rules illumine the path of the law and rationalize the pursuit of justice."[6]

It is also well settled ruled that "tax refunds, which are in the nature of tax exemptions, are construed strictly against the taxpayer and liberally in favor of the government. This is because taxes are the lifeblood of the nation. Thus, the burden of proof is upon the claimant of the tax refund to prove the factual basis of his claim."[7]

Guided by the foregoing laws and jurisprudence, the Court is therefore, bound to resolve this case solely on the basis of evidence formally offered and admitted. Petitioner failed to offer the Certification of Non-Registration of Company issued by the SEC during the trial phase of this case. Accordingly, the said document cannot be considered by the Court as part of petitioner's evidence.

Considering the foregoing, the Court finds no error in the assailed Decision which ruled that the supporting certificates showing the amount of ₱39,056,074.49 issued to McKinsey Phils., Inc. [instead of McKinsey & Co. (Phils.), the registered name of petitioner] should be deducted from petitioner's claim in the amount of ₱97,725,782.80, thus resulting to ₱58,669,708.31 as the total CWT with proper certification.[8]

Moreover, petitioner asserts that it has sufficient tax credits from CY 2006 to offset its MCIT liabilities for CYs 2011 and 2012. Petitioner states that in *McKinsey & Co, (Phils.) vs. Commissioner of Internal Revenue* (CTA Case No. 8472, April 17, 2015), this Court

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[6] *Hernandez vs. Agoncillo*, G.R. No. 194122, October 11, 2012.
[7] *Eastern Telecommunications Philippines, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 168856, August 29, 2012.
[8] Docket, Vol. II, pp. 1000-1001.

found that it has excess credits from CY 2006 in the total amount of ₱17,862,115.50 remain unutilized as of December 31, 2008. Thus, there are enough credits from calendar year 2006 to cover the MCIT liabilities of petitioner from CYs 2009 to 2012. Consequently, the MCIT liability for CYs 2011 and 2012 should not have been deducted from petitioner's claim for CYs 2011 and 2012.

Apparently, the foregoing is basically a reiteration of reasons and arguments previously set forth in petitioner's Memorandum[9] filed before this Court, and which the latter had already considered, weighed, and resolved before it rendered its decision now sought to be reconsidered.

For emphasis, the Court reiterates its findings in the assailed Decision regarding petitioner's alleged prior years' excess credits to offset its MCIT liabilities for calendar years 2011 and 2012, as follows:

> To prove the existence of its prior year's excess credits of ₱82,385,439.00, petitioner presented Certificates of Creditable Tax Withheld at Source (BIR Form No. 2307) for calendar years 1999 to 2002 and 2004 to 2006. The sum, however, of the CWTs refelected in the certificates amounts only to ₱77,475,382.25 xxx
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> xxx xxx xxx
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> Unfortunately, the Court cannot ascertain whether the above-enumerated CWTs actually pertain to the excess of petitioner's total tax credits over its income tax liabilities for the years 1999 to 2006, since petitioner failed to submit its Annual ITRs for the said years. Hence, considering that petitioner failed to substantiate it prior year's excess tax credits of ₱82,385,439.00, its MCIT liabilities for calendar years 2011 and 2012 in the respective amounts of ₱614,393.14 and ₱1,108,850.33 shall be offset against the properly supported CWT of ₱58,669,708.31.
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> xxx xxx xxx

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[9] Docket, Vol. II, p. 969.

For petitioner's failure to substantiate its prior year's excess tax credits, the MCIT liabilities for calendar years 2011 and 2012 should therefore be deducted from petitioner's claim for calendar years 2011 and 2012.

On the other hand, in respondent's Motion for Reconsideration, he contends that petitioner is not entitled to the refund as the evidence presented, i.e. certificates of creditable taxes withheld at source, accomplished by its withholding agents showing the amount deducted and withheld from its income in support of the tax refund, do not constitute conclusive evidence of payment and remittance to the BIR of the withheld taxes on petitioner's income. Respondent claims that the act of withholding is one thing while the act of remittance is another thing. Respondent argues that the best evidence or proof of remittance is the certification from the BIR's Revenue Accounting Division as to the fact of remittance of the tax withheld. Respondent asserts that petitioner failed to prove that the creditable taxes withheld by the payors were indeed remitted to the BIR. Respondent also claims that petitioner even failed to present the various payors and withholding agents in order to establish the fact of withholding and remittances made.

Respondent's arguments deserve scant consideration.

In the case of *Commissioner of Internal Revenue vs. Philippine National Bank*[10], the Supreme Court stressed that proof of actual remittance is not a condition to claim for a refund of unutilized tax credits, as follows:

> Petitioner's posture that respondent is required to establish actual remittance to the Bureau of Internal Revenue deserves scant consideration. Proof of actual remittance is not a condition to claim for a refund of unutilized tax credits. Under Sections 57 and 58 of the 1997 National Internal Revenue Code, as amended, it is the payor-withholding agent, and not the payee-refund claimant such as respondent, who is vested with the responsibility of withholding and remitting income taxes.
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> This court's ruling in *Commissioner of Internal Revenue v. Asian Transmission Corporation*, citing the Court of Tax Appeals' explanation, is instructive: Jz

[10] G.R. No. 180290, September 29, 2014.

> . . . proof of actual remittance by the respondent is not needed in order to prove withholding and remittance of taxes to petitioner. Section 2.58.3 (B) of Revenue Regulation No. 2-98 clearly provides that proof of remittance is the responsibility of the withholding agent and not of the taxpayer-refund claimant. It should be borne in mind by the petitioner that payors of withholding taxes are by themselves constituted as withholding agents of the BIR. The taxes they withhold are held in trust for the government. In the event that the withholding agents commit fraud against the government by not remitting the taxes so withheld, such act should not prejudice herein respondent who has been duly withheld taxes by the withholding agents acting under government authority. Moreover, pursuant to Section 57 and 58 of the NIRC of 1997, as amended, the withholding of income tax and the remittance thereof to the BIR is the responsibility of the payor and not the payee. Therefore, respondent . . . has no control over the remittance of the taxes withheld from its income by the withholding agent or payor who is the agent of the petitioner. The Certificates of Creditable Tax Withheld at Source issued by the withholding agents of the government are *prima facie* proof of actual payment by herein respondent-payee to the government itself through said agents.

Moreover, in the same case, the Supreme Court ruled that it is not required for the person who executed and prepared the certificate of creditable tax withheld at source to be presented to prove the authenticity of the certificates, as follows:

> The certificate of creditable tax withheld at source is the competent proof to establish the fact that taxes are withheld. It is not necessary for the person who executed and prepared the certificate of creditable tax withheld at source to be presented and to testify personally to prove the authenticity of the certificates.[11]

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[11] *Commissioner of Internal Revenue, vs. Philippine National Bank,* supra. note 10.

The Supreme Court has also addressed the issue regarding the presentation of the various withholding agents/payors to testify on the validity of the contents of the certificates of creditable tax withheld at source in the case of *Commissioner of Internal Revenue vs. Team [Philippines] Operations Corporation [formerly Mirant (Phils) Operations Corporations]*[12], as follows:

> On the first ground, [petitioner] argues that [respondent] failed to present the various withholding agents/payors to testify on the validity of the contents of the Certificates of Creditable Tax Withheld at Source ("certificates"). Thus, the certificates presented by [respondent] are not valid. And even assuming that the certificates are valid, this Court cannot entertain the claim for refund/tax credit certificates because the certificates were not submitted to [petitioner].
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> [Petitioner's] arguments are untenable since the certificates presented (Exhibits "R", "S", "T", "U", "V", "W", and "X") were duly signed and prepared under penalties of perjury, the figures appearing therein are presumed to be true and correct. Thus, the testimony of the various agents/payors need not be presented to validate the authenticity of the certificates.

Clearly, proof of actual remittance to the BIR of the taxes withheld as well as the testimony of the payors/withholding agents are not necessary to establish or prove the fact of withholding and remittance of taxes to BIR.

Considering the foregoing, the Court finds respondent's Motion for Reconsideration bereft of merit.

WHEREFORE, premises considered, petitioner's **Motion for Reconsideration (of the Decision dated 11 August 2016)** and respondent's **Motion for Reconsideration** are **DENIED** for lack of merit.

SO ORDERED.

[12] G.R. No. 179260, April 2, 2014.

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

WE CONCUR:

CAESAR A. CASANOVA
Associate Justice

(TOOK NO PART)
CATHERINE T. MANAHAN
Associate Justice