REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

OAKWOOD MANAGEMENT SERVICES (PHILIPPINES), INC., Petitioner,	**C.T.A. CASE NO. 6758**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson* **UY,** *and* **PALANCA-ENRIQUEZ,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** SEP 0 6 2007

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DECISION

CASTAÑEDA, JR., *J*.:

This is a Petition for Review seeking a refund of or issuance of a tax credit certificate in the amount of ₱235,329.65 allegedly representing the amount of surcharges, interests and compromise penalties erroneously paid and remitted for 2000 and 2001.

Petitioner is a domestic corporation duly organized and existing under the laws of the Philippines; and has principal office address at 6th Floor

Glorietta 4, Ayala Center, Makati City.[1] It is engaged in the business of managing and operating service apartments in the Philippines.[2]

Respondent is vested by law to enforce and implement the provisions of the National Internal Revenue Code ("NIRC"), other related statutes and their implementing rules and regulations, including *inter alia*, the power and authority to act and decide upon applications for refund or tax credit of excess internal revenue tax payments, to issue deficiency tax assessment, to evaluate and decide on the merits disputed assessments pursuant to law, with office address at BIR National Office Building, Diliman, Quezon City.[3]

On January 15, 2000, petitioner allegedly entered into a Service Agreement with Oakwood Asia Pacific Limited ("Oakwood Asia"), a non-resident foreign private limited corporation duly incorporated and existing in Labuan, Malaysia.[4] According to the agreement, Oakwood Asia shall provide general consultancy and management, training and personnel development, financial and budgetary planning, and marketing services in the interest of petitioner. In consideration of the said services, petitioner shall pay Oakwood Asia, a service fee in the sum of ₱4,000,000.00, or its equivalent in any other foreign currency to be designated by Oakwood Asia, for 2000; and ₱500,000.00, or its equivalent in any other foreign currency to be designated by Oakwood Asia, per month beginning January 1, 2001.[5]

On February 7, 2001, petitioner filed with the BIR-National Office a request for confirmation that the Service Fees payable by petitioner to

[1] Paragraph 1 of the Joint Stipulation of Facts; docket, p.192.
[2] Paragraph 1 of Exhibit AA.
[3] Paragraph 2 of the Joint Stipulation of Facts; docket, pp. 192-193.
[4] Exhibit YY; docket, pp. 511-517.
[5] Docket, pp. 512-513.

Oakwood Asia under the SA are *exempt* from value-added tax ("VAT") in view of the fact that the Service Fees are being paid for services *performed offshore* by a non-resident foreign corporation.[6]

On July 25, 2001, petitioner started to file and remit, in behalf of Oakwood Asia, returns for the 10% VAT (including the corresponding surcharges, interests and compromise penalties) on Service Fees paid by petitioner to Oakwood Asia for the years 2000 and 2001, evidenced and summarized as follows:

TABLE 1		Official			PENALTIES								Total	
Tax Period	Date Filed/Paid	Receipt No	VAT Paid	Exh.	Surcharge	Exh.	Interest	Exh.	Compromise	Exh.	Total	Exh.	Payments	Exh.
4th Quarter of 2000	Aug-22-2001	712381 (Exh. A)	P 400,000.00	B-2	100,000.00	B-3	46,465.75	B-4	16,000.00	B-5	162,465.75	B-6	562,465.75	B-7
Jan 2001	Aug-22-2001	712382 (Exh. C)	50,000.00	D-2	12,500.00	D-3	4,958.90	D-4	4,000.00	D-5	21,458.90	D-6	71,458.90	D-7
Feb 2001	Aug-22-2001	712383 (Exh. E)	50,000.00	F-2	12,500.00	F-3	4,191.78	F-4	-	F-5	16,691.78	F-6	66,691.78	F-7
1st Quarter of 2001	Aug-22-2001	712384 (Exh. G)	150,000.00	H-2	37,500.00	H-4	12,493.15	H-5	4,000.00	H-6	53,993.62	H-7	65,842.47	H-8
Apr 2001	Aug-22-2001	712385 (Exh. I)	50,000.00	J-2	12,500.00	J-3	2,520.55	J-4	-	J-5	15,020.55	J-6	65,020.55	J-7
May 2001	Aug-22-2001	712386 (Exh. K)	50,000.00	L-2	12,500.00	L-3	1,671.23	L-4	-	L-5	14,171.23	L-6	64,171.23	L-7
2nd Quarter of 2001	Jul-25-2001	712074 (Exh. M)	50,000.00	N-2	-		-		-		-	N-3	50,000.00	N-4
Jul 2001	Aug-09-2001	712212 (Exh. O)	50,000.00	P-2	-		-		-		-	P-3	50,000.00	P-4
Aug 2001	Sep-10-2001	none (Exh. Q)	-	Q-2	-		-		-		-	Q-4	-	Q-5
3rd Quarter of 2001	Oct-25-2001	755804 (Exh. R)	100,000.00	S-2	-		-		-		-	S-5	100,000.00	P-4 &S-6
Oct 2001	Nov-09-2001	756114 (Exh. T)	50,000.00	U-2	-		-		-		-	U-3	50,000.00	U-4
Nov 2001	Dec-10-2001	none (Exh. V)	-	V-2	-		-		-		-	V-4	-	V-5
4th Quarter of 2001	Jan-25-2002	none (Exh. W)	-	W-4	-		-		-		-	W-5	-	W-6
			P 1,000,000.00		P 187,500.00		P 72,301.36		P 24,000.00		P 283,801.83		P 1,145,650.68	

On August 21, 2002, respondent, through BIR Legal Services Assistant Commissioner Milagros V. Regalado, issued BIR Ruling No. DA-ITAD-145-02 and, among others, ruled:

> "3. *Whether the service fees and reimbursement are not subject to value-added tax in view of the fact that the services therein being remunerated are performed outside of the Philippines and the reimbursements pertain to such services so rendered.*
>
> Inasmuch as it has been the representation that the abovementioned services <u>will be performed by Oakwood Asia in Malaysia or in some other jurisdiction outside the Philippines and from time to time, Oakwood Asia may have to send its personnel to the Philippines,</u> for short periods which should not, in aggregate, exceed 183 days in any calendar year, <u>the fees paid by Oakwood Phils. [petitioner] for services rendered in the</u>

[6] Par. 10 of Joint Stipulation of Facts; docket, p. 195.

> Philippines are subject to the 10% value-added tax pursuant to Section 108 of the Tax Code of 1997. Accordingly, Oakwood Phils. [petitioner] being the payor in control of the payment shall be responsible for the withholding of VAT on such fees on behalf of Oakwood Asia by filing a separate VAT return for and on behalf of Oakwood Asia using BIR Form No. 1600 (Monthly Remittance Return of Value-Added Tax and Other Percentage Taxes Withheld). The duly filed BIR Form 1600 and proof of payment thereof shall serve as sufficient basis for the claim of input tax to be applied against the output tax that may be due from Oakwood Phils. [petitioner] if it is a VAT-registered taxpayer. In case Oakwood Phils. [petitioner] is a non-VAT registered taxpayer, the passed-on VAT withheld shall form part of the cost of the service purchased or treated as expense, whichever is applicable. In addition, Oakwood Asia Phils. [petitioner] is required to issue the Certificate of Creditable Tax Withheld at Source (BIR Form 2307) in quadruplicate upon request of Oakwood Asia, the first three copies thereof to be given to Oakwood Asia and the fourth copy to be retained by Oakwood Phils. [petitioner] as its file copy. (Section 4 & 6, Revenue Regulation 4-2002)
>
> It will be noted that the Philippines has an existing treaty with Malaysia for the avoidance of double taxation. However, inasmuch as all the subject services will be performed by Oakwood Asia outside of the Philippines, as represented, the said RP-Malaysia tax treaty will have no application as the transaction does not give rise to a case of double taxation. Under the Tax Code of 1997, non-resident foreign corporations are taxable only for income derived in the Philippines. Relative thereto, compensation for labor or personal services performed outside the Philippines are not income from sources within the Philippines."[7] (Underscoring Supplied)

On August 20, 2003, petitioner filed an administrative claim for refund with the respondent in the amount of ₱235,329.65 representing the amount of allegedly erroneously paid surcharges, interests and compromise penalties paid for the year 2001.[8]

On August 21, 2003, because of respondent's inaction on its claim for refund, petitioner instituted the present Petition for Review before this Court. Je

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[7] Exhibit AA
[8] Par. 11 of the Joint Stipulation of Facts; docket, p. 195.

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In his Answer, filed on October 13, 2003, respondent alleged the following special and affirmative defenses:

> "6. Petitioner's alleged claim for refund is still subject to administrative routinary investigation/examination by the respondent's Bureau;
>
> 7. Taxes paid and collected are presumed to have been made in accordance with law, hence, not refundable;
>
> 8. Petitioner failed to prove the following:
>
> a. That the total amount of P235,329.65 representing alleged aggregate amount of surcharge, interest and compromise penalty erroneously paid on the excess withholding VAT withheld for the taxable year 2001 were fully substantiated.
>
> b. That petitioner failed to prove that the alleged VAT payments from which the taxes were withheld were included in its gross receipts for taxable year 2001;
>
> 9. Assuming but without admitting the fact that petitioner is entitled to tax refund, it is incumbent upon the latter to show that it has complied with the provisions under Sections 204 in relation to Section 230 (now 229) of the Tax Code. Otherwise, its failure to prove the same is fatal to its claim for refund;
>
> 10. Claims for refund are construed strictly against the claimant for the same partakes the nature of exemption from taxation xxx and as such, they are looked upon with disfavor xxx."[9]

Petitioner presented its testimonial and documentary evidence; while respondent, through counsel, submitted the case for decision based on the pleadings after he manifested that this case has no report of investigation.[10]

On January 18, 2007, the case was submitted for decision after petitioner filed its Memorandum on April 19, 2006 and for respondent's failure to file a Memorandum within the prescribed period.[11]

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[9] Docket, pp. 164-165.
[10] Docket, p. 439.
[11] *Ibid.*

The parties jointly stipulated that the issues to be resolved by this Court are as follows:[12]

> "1. Whether or not the service fees payable by petitioner to Oakwood Asia under the Service Agreement are exempt from VAT to the extent that they pertain to services outside of the country.
>
> 2. Whether or not BIR Ruling No. DA-ITAD-145-02 dated August 21, 2002 is applicable to the issues involved in the instant case.
>
> 3. Whether or not petitioner incurred erroneous/excessive payments of surcharge, interest and compromise penalty on withholding VAT imposed on Service Fees.
>
> 4. Whether or not the allocation of the Service Fees considered subject to VAT correct.
>
> 5. Whether or not petitioner is entitled to the refund of the excess surcharges, penalties and interests previously imposed on the VAT payment on the portion of the Service Fees otherwise exempt from VAT.
>
> 6. Whether or not petitioner's alleged erroneous/excessive payments of surcharge, interest and compromise penalty on withholding VAT imposed on Service Fees for the year 2001 were duly substantiated.
>
> 7. Whether or not petitioner is entitled to the refund or issuance of a tax credit certificate in the sum of P235,329.65 as alleged erroneous/excessive payments of surcharge, interest and compromise penalty on the withholding VAT erroneously imposed on the full amount of the Service Fees earned by Oakwood Asia from fourth quarter of 2000 to May 2001 and remitted to the BIR in 2001."

Section 108 of the NIRC states:

> "SEC. 108. *Value-Added Tax on Sale of Services and Use or Lease of Properties.* –
>
> "(A) Rate and Base of Tax. — There shall be levied, assessed and collected, a value-added tax equivalent to ten

[12] *Ibid.*, pp. 195-196.

> percent (10%) of gross receipts derived from the sale or exchange of services, including the use or lease of properties.
>
> "The phrase 'sale or exchange of services' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration, including those performed or rendered by construction and service contractors; stock, real estate, commercial, customs and immigration brokers; lessors of property, whether personal or real; warehousing services; lessors or distributors of cinematographic films; persons engaged in milling, processing, manufacturing or repacking goods for others; proprietors, operators or keepers of hotels, motels, resthouses, pension houses, inns, resorts; proprietors or operators of restaurants, refreshment parlors, cafes and other eating places, including clubs and caterers; dealers in securities; lending investors; transportation contractors on their transport of goods or cargoes, including persons who transport goods or cargoes for hire and other domestic common carriers by land, air and water relative to their transport of goods or cargoes; services of franchise grantees of telephone and telegraph, radio and television broadcasting and all other franchise grantees except those under Section 119 of this Code; services of banks, non-bank financial intermediaries and finance companies; and non-life insurance companies (except their crop insurances), including surety, fidelity, indemnity and bonding companies; and similar services regardless of whether or not the performance thereof calls for the exercise or use of the physical or mental faculties. The phrase 'sale or exchange of services' shall likewise include:
>
> "xxx xxx xxx."

From the above section, it is clear that the service fees payable to Oakwood Asia under the Service Agreement are not subject to VAT insofar as the services performed or rendered outside the Philippines. However, the law subjects the services performed or rendered in the Philippines subject to VAT.

Now, the uncontroverted evidence shows that petitioner paid and remitted the 10% VAT, including the surcharges, interest, and compromise, without regard as to whether the services were performed in or out of the

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Philippines.[13] Petitioner is therefore correct in asserting the need to allocate the service fees between services actually rendered in the Philippines and those performed outside the Philippines to determine the portion of the service fees subject to VAT.

Three (3) employees of Oakwood Asia went to the Philippines in 2000 and 2001.[14] Their names as well as their corresponding number of days stayed are summarized as follows:

	Name	Position	No. of days within the Philipines CY 2000	No. of days within the Philipines CY 2001	TOTAL
1	Mr. Puryan Karimbil G. Mathew	Managing Director	32	17	49
2	Ms. Catherine McNabb	Director of Sales & Marketing	0	5	5
3	Ms. Chai Soo Chaio	Financial Controller	0	2	2
	TOTAL		**32**	**24**	**56**

Each employee has 261 working days per year, or the three employees have an aggregate of 783 working days per year. The estimated daily rate per employee is computed by dividing the service fee per year by the total number of mandays. Thus, for 2000, the daily rate is ₱4,000,000.00/783 mandays, or ₱5,108.56; for 2001, the daily rate is ₱6,000,000.00/783 mandays, or ₱7,662.84.

Based from the above summary and estimated daily rate per employee, the portion of Service Fees that may be allocated to services performed within the Philippines is ₱163,473.92 (₱5,108.56 X 32 days) for

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[13] See Exhibits A to W, and BB to KK.

[14] Exhibits LL, MM and attached copies of Oakwood Asia's employees' duly stamped passports.

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2000. The portion of Service Fees that may be allocated to services performed within the Philippines for 2001 is computed as follows:[15]

Month (A)	No. of Days (B)	Allocated Monthly Service Fees (B X P7,662.94)
January	6	45,977.04
February	1	7,662.84
March	0	0
April	0	0
May	2	15,325.68
June	5	38,314.20
July	0	0
August	2	15,325.68
September	3	22,988.52
October	3	22,988.52
November	0	0
December	2	15,325.68
	24	183,908.16

On the basis of the allocation, the amount of VAT due on the Service Fees earned by Oakwood Asia for services performed within the Philippines can be determined by multiplying such Service Fees with the VAT rate of 10%. For 2000, the 10% VAT due is ₱16,347.39; while for 2001, the amount of VAT due is ₱18,390.81.

Considering the VAT on the Service Fees reported and remitted by petitioner for 2000 and 2001 were based on the full amounts of the Service Fees actually paid to Oakwood Asia, which included non-VATable portions pertaining to services performed outside the Philippines, the VAT payments made in said years were erroneous and excessive. And, since the penalties, surcharges and interests actually paid by petitioner were based on actual VAT payments which were erroneous, such penalties, surcharges and interests were likewise erroneous and excessive. Section 204(C) in relation to Section 229 of the 1997 NIRC, provide:

[15] Id.

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"**SECTION 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes**. — The Commissioner may —

(A) x x x

(B) x x x

(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.

x x x x x x x x x."

"**SECTION. 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 payment: *Provided, however*, That the Commissioner may, even without a written claim therefore, 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." (Italics Supplied)

Consequently, the surcharges, interests and compromise penalties are recomputed as follows:

TABLE 2

Period Services were rendered	Date Service Fees were Paid	VAT due date	Date of Payment	Exh.	Days Delay	10% VAT on Services	PENALTIES Surcharge (A)	Interest (B)	Compromise (C)	Total(X)	Penalties Paid (Y)	Exh.	Refundable Amount (Y-X)
Year 2000	February 2001	January 10, 2001	August 22,2001	B-2	223	16,347.39	4,086.85	2,025.26	4,000.00	10,112.11	162,465.75	B-6	152,353.64
Jan 2001	February 2001	February 12, 2001	August 22,2001	D-2	190	4,597.70	1,149.43	485.31	1,000.00	2,634.74	21,458.90	D-6	18,824.17
Feb 2001	February 2001	March 12, 2001	August 22,2001	F-2	163	766.28	191.57	346.95	400.00	938.52	16,691.78	F-6	15,753.26
Mar 2001	March 2001	April 10, 2001	August 22,2001	H-2	133	-	-	-	-	-	15,842.47	H-7	15,842.47
Apr 2001	April 2001	May 10, 2001	August 22,2001	J-2	103	-	-	-	-	-	15,020.55	J-6	15,020.55
May 2001	May 2001	June 11, 2001	August 22,2001	L-2	71	1,532.57	383.14	64.45	700.00	1,147.59	14,171.23	L-6	13,023.64
					P	**23,243.94**	**5,810.99**	**2,921.97**	**6,100.00**	**14,832.95**	**245,650.68**	P	**230,817.73**

(A) 25% (Section 248 of 1997 Tax Code)

(B) 10% VAT x 20% x (Days Delay / 360days) Section 249 of 1997 Tax Code

(C) Based on Revised Shedule of Compromise Penalties

(Rev. Memo. Cir. No. 1-90, Nov. 28, 1989)

Petitioner, in its memorandum, is also claiming to refund the amount of ₱38,500.00 allegedly representing additional compromise penalties. Pursuant to the above-quoted sections of the NIRC, the claim for refund pertaining to this amount should be DENIED for the same was not included in petitioner's administrative claim for refund as well as in this Petition for Review.

WHEREFORE, the Petition is hereby **PARTIALLY GRANTED**. Respondent is **ORDERED** to **REFUND** petitioner the reduced amount of **Two Hundred Thirty Thousand Eight Hundred Seventeen and 73/100** (₱230,817.73) representing erroneously paid surcharges, interest and compromise penalties.

SO ORDERED.

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

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
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.

ERNESTO D. ACOSTA
Presiding Justice

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