REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

MCKINSEY & CO., (PHILIPPINES), INC., Petitioner,	**CTA CASE NO. 8078**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson* **CASANOVA,** *and* **MINDARO-GRULLA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** OCT 2 2 2012 4:20pm

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AMENDED DECISION

CASANOVA, *J.*:

For resolution are the following:

(a) petitioner's **"MOTION FOR PARTIAL RECONSIDERATION (Of the Decision dated 30 July 2012)"** filed on August 17, 2012, without respondent's comment despite notice; and

(b) respondent's **"MOTION FOR RECONSIDERATION"** filed on August 22, 2012, with petitioner's **"OPPOSITION/COMMENT (To Respondent's Motion for Reconsideration)"** filed on September 14, 2012.

Assailed by the parties in their respective motion is the Decision of this Court dated July 30, 2012 *(Assailed Decision)*, which partially granted the Petition for Review, 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 to petitioner the amount of P111,901,506.40, representing its excess creditable withholding tax for taxable years 2007 and 2008.

SO ORDERED."

We shall first discuss the merit of petitioner's Motion for Partial Reconsideration before addressing respondent's Motion for Reconsideration.

In its Motion, petitioner moves for a partial reconsideration of the Assailed Decision [(pertaining to the Court's ruling) disallowing the refund of P5,109,558.00] based on the following grounds:

1. Its Annual Income Tax Returns (ITR) for taxable years 2006 and 2007 are presumed valid and correct, and hence, said returns sufficiently prove the (i) existence of its prior year's excess credits in the amount of P90,373,448.00, and (ii) together with its Annual ITR for taxable year 2008, payment of Minimum Corporate Income Tax (MCIT) for taxable years 2007 and 2008;

2. The application of substantiated CWT against the MCIT liabilities for taxable years 2007 and 2008 of P5,109,558.00 amounts to set-off or compensation of taxes, that is prohibited under the law and jurisprudence;

3. The application of substantiated CWT for payment of alleged MCIT liabilities, which it has previously paid, amounts to double taxation; and

4. Assuming *arguendo* that it needs to prove its prior years' excess credits, it duly proved a portion of the same when it presented the certificate of tax withheld (Exhibit "O") issued in 2006 by Holcim Philippines, Inc., in the amount of P2,303,121.60.

Petitioner, therefore, prays that this Court will order respondent to refund in its favor the additional amount of P5,109,558.00 or, in the alternative, appreciate the certificate of tax withheld marked as Exhibit "O", as proof of its prior years' excess credit to the extent of P2,303,121.60, against which the MCIT liabilities may be applied and, accordingly, order respondent to refund the additional amount of P2,303,121.60.

Petitioner's stance that it is not required to prove its prior years' excess credit lacks merit.

To begin with, a taxpayer-claimant, like herein petitioner, which is claiming for refund of its excess creditable withholding tax (CWT)/tax payments pursuant to Section 76 of the National Internal Revenue Code (NIRC) of 1997, must prove not only the CWT for the current year but also its prior year's excess credit in order for the Court to ascertain the excess income tax paid/CWT which may be the subject of refund. The ruling of the Court of Tax Appeals En Banc in the case of Commissioner of Internal Revenue vs. Nissan Motor Philippines, Inc.[1] *(Nissan case)*, which was cited in the Assailed Decision, is very clear on this matter. At the risk of being repetitive, it is worthy to reiterate that pertinent portion of the decision in the Nissan case, *viz.*:

> "xxx ***Tax Overpayment* is composed of the taxpayer's prior year's credits, current year's tax payments, creditable taxes withheld for the current year and even foreign tax credits (if applicable). It is therefore necessary to prove or substantiate each and every component of the *Total Tax Credits/Payment* reflected on Nissan Motor's final adjustment return, including its prior year's excess tax credits, because ultimately the remaining balance of the *Total Tax Credits/Payments* after deducting its MCIT liability becomes the *Tax Overpayment*** which is precisely the subject of Nissan Motor's claim for refund in C.T.A. CASE No. 6622." (*Emphasis supplied)*

[1] CTA EB No. 137 & 139, October 6, 2006

Moreover, petitioner's reliance on the case of Citibank N.A. vs. Court of Appeals[2] *(Citibank case)*, in support of its contention that the ITR is presumed valid and the facts stated therein are true and correct, thus, it is not required to prove its prior's excess credit, is misplaced.

A careful analysis of the Citibank case shows that the factual circumstances of the said case are different from the present case. In the said case, Citibank reported a net loss during the taxable years 1979 and 1980, and there was no income tax due. The Supreme Court held that "the taxes withheld during the course of the taxable year, while collected legally under the aforesaid revenue regulation, became untenable and took on the nature of erroneously collected taxes at the end of the taxable year." In contrast, the present claim is for the refund of excess CWT under Sec. 76 of the NIRC, which can only be determined after taking into account the "Total Credits/Payment" consisting of prior year's excess credit and CWT for the current year, among others, and the tax liability for the year.

This Court, likewise, finds no merit in petitioner's contention that the application of the substantiated creditable withholding tax against the MCIT liabilities for taxable years 2007 and 2008 amounts to set-off or compensation of taxes and prohibited double taxation since the Court is merely computing the refundable amount based on available evidence. Neither are there two debts which are due and demandable in this case, nor the requisites of double taxation are present in this case. This case is just a claim for refund of excess creditable withholding tax, which as earlier stated, could only be determined after all the components of tax overpayments are considered.

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[2] G.R. No. 107434, October 10, 1997

With respect to petitioner's last argument, we find the same partly meritorious.

While the certificate marked as Exhibit "O" pertains to petitioner's 2006 CWT, the same does not represent petitioner's *excess* credits for taxable year 2006. In its 2006 Annual ITR[3], petitioner reflected an MCIT due of P82,634.00[4] which shall be deducted from the 2006 CWT of P2,303,121.60. Thus, only the amount of P2,220,487.60 (P2,303,121.60 less P82,634.00) represents petitioner's *excess* credits for taxable year 2006, which shall be applied against petitioner's MCIT liabilities for taxable years 2007 and 2008 in the total amount of P5,109,558.00. Consequently, only the remaining MCIT due for taxable years 2007 and 2008 in the amount of P2,889,070.40 shall be offset against petitioner's substantiated claim for 2007 and 2008 in the amount of P117,011,064.40 leaving a refundable amount of P114,121,994.00, representing petitioner's excess CWT for taxable years 2007 and 2008.

Having addressed petitioner's Motion for Partial Reconsideration, We shall now proceed to discuss respondent's Motion for Reconsideration.

In her Motion, respondent moves for the total denial of petitioner's claim on the ground that there is no showing on petitioner's returns for taxable years 2007 and 2008 that the income payments subjected to withholding tax are declared as part of its gross income. In support thereof, respondent states that petitioner's ITRs for 2007 and 2008 have no entry in the "Creditable Tax Withheld" column located in page 2 of the said ITRs

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[3] Exhibit "C"
[4] Exhbit "C", lines 25 and 27

specifically Schedule I, or the "Schedule of Sales/Revenues/Receipts/Fees"; and that this declaration can be taken to mean that no part of the gross income reported therein were ever subjected to creditable withholding tax, citing the case of Raytheon-Ebasco Overseas Ltd. – Philippine Branch vs. Commissioner of Internal Revenue.[5] Respondent also states that petitioner failed to present its "Management and Consultancy Agreement/Contract" entered into with its clients, which would show that the fees received by virtue of such contract which is related to the claimed CWT, form part of the taxable gross income. Respondent also questions petitioner for not presenting the Official Receipts, which petitioner was supposed to issue upon receipt of the said fees.

Lastly, respondent contends that proof of actual remittance to the BIR of taxes withheld and the testimonial evidence of the payors/withholding agents are required for the grant of petitioner's claim for refund. According to respondent, the certificates of creditable taxes withheld accomplished by the withholding agents, showing the amount deducted and withheld from 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.

In opposition to respondent's Motion for Reconsideration, petitioner states that it duly proved that it declared and reported in its annual ITR the income payments from which taxes were withheld. Furthermore, citing numerous decisions of this Court, petitioner states that since its gross revenue in its Annual ITR is higher than the income payments reflected in its

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[5] CTA EB No. 597, March 17, 2011

Certificates of Tax Withheld, the income payments are deemed included and declared as part of gross income in the said ITR.

Likewise, petitioner argues that the Tax Code, jurisprudence and BIR issuances do not require the presentation of Management and Consultancy Agreement/Contract and Official Receipts for a valid claim for refund of excess creditable withholding tax.

Lastly, petitioner argues that proof of actual remittance of the taxes withheld to the BIR is not required to prove the fact of withholding. Petitioner quotes Section 2.58.3(B) of Revenue Regulations No. 2-98, which states that proof of remittance is the responsibility of the withholding agent. Petitioner, likewise, cites the case of Commissioner of Internal Revenue vs. Asian Transmission Corporation,[6] which holds that proof of actual remittance to the BIR is not necessary to prove the withholding and remittance of tax. Petitioner further argues that, under prevailing case law, the testimonies of the payors/withholding agents are not required in a claim for refund.

Respondent's contentions fail to persuade this Court.

The Court finds the pronouncement of the Supreme Court in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation* (Formerly Southern Energy Quezon, Inc.)[7] instructive, pertinent portion of the High Court's ruling provide:

> "Verily, a claim for tax refund may be based on a statute granting tax exemption, or, as *Commissioner of Internal Revenue v. Fortune Tobacco Corporation* would have it, the result of legislative grace. In such case, the claim is to be construed *strictissimi juris* against the taxpayer, meaning that the claim cannot be made to rest on vague inference. Where the

[6] G.R. No. 179617, January 19, 2011
[7] G.R. No. 172129, September 12, 2008

> rule of strict interpretation against the taxpayer is applicable as the claim for refund partakes of the nature of an exemption, the claimant must show that he clearly falls under the exempting statute. On the other hand, a tax refund may be, as usually it is, predicated on tax refund provisions allowing a refund of erroneous or excess payment of tax. The return of what was erroneously paid is founded on the principle of *solutio indebiti*, a basic postulate that no one should unjustly enrich himself at the expense of another. The caveat against unjust enrichment covers the government. And as decisional law teaches, a claim for tax refund proper, as here, necessitates only the preponderance-of-evidence threshold like in any ordinary civil case." *(Citations omitted)*

Thus, a claim for tax refund may be based on a statute granting tax exemption (the result of legislative grace), or predicated on tax refund provisions allowing a refund of erroneous or excess payment of tax. For the first type of claim for refund, the same is construed strictissimi juris against the taxpayer and the claimant must show that he clearly falls under the exempting statute. On the other hand, the claim for refund predicated on tax refund provision (tax refund proper), necessitates only the "preponderance of evidence".

The case at bench is a claim for refund or issuance of tax credit certificate representing excess CWT. Clearly, this case falls under the second type of claim for refund, which necessitates "preponderance of evidence" as the level of proof. As this Court found in the Assailed Decision, petitioner properly declared in its ITR the gross income related to the substantiated CWT for taxable years 2007 and 2008 taking into consideration the evidence admitted during trial.

Finally, petitioner's submission on requiring proof of actual remittance of withheld taxes and the testimonial evidence of the payors does not hold water.

Suffice it to state that proof of remittance is the responsibility of withholding agent and the Certificates of Creditable Tax Withheld at Source issued by the withholding agents are prima facie proof of actual payment by the payee to the government.[8]

WHEREFORE, respondent's **"MOTION FOR RECONSIDERATION"** is hereby **DENIED** for lack of merit, while petitioner's **"MOTION FOR PARTIAL RECONSIDERATION (Of the Decision dated 30 July 2012)"** is hereby **PARTIALLY GRANTED.** The July 30, 2012 Decision of this Court is hereby **MODIFIED**. Accordingly, respondent is hereby **ORDERED** to refund to petitioner the amount of P114,121,994.00, representing its excess creditable withholding tax for taxable years 2007 and 2008.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

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

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

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[8] Commissioner of Internal Revenue vs. Asian Transmission Corporation, G.R. No. 179617, January 19, 2011 quoting the ruling of the Court En Banc

ATTESTATION

I attest that the conclusions in the above Amended 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 Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice