REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

MATEX INTERNATIONAL, INC., Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE, Respondent.

CTA CASE NO. 10180

Members:

CASTAÑEDA, JR., *Chairperson*,
BACORRO-VILLENA, *and*
CUI-DAVID, *JJ.*

Promulgated:
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RESOLUTION

CASTAÑEDA, JR., J.:

Before the Court is petitioner's **Motion for Reconsideration (Re: Decision dated 15 February 2022)** filed on March 9, 2022, with respondent's **Opposition (To Motion for Reconsideration dated 9 March 2022)** filed on March 25, 2022.

On February 15, 2022, the Court promulgated a Decision denying petitioner's claim for refund of final withholding taxes (FWTs) on dividends in the amount of ₱10,694,149.20 for failing to sufficiently prove that it was erroneously paid, the dispositive portion of which is quoted as follows:

> "**WHEREFORE**, in light of the foregoing considerations, the present *Petition for Review* is **DENIED** for lack of merit.
>
> **SO ORDERED**."

In its Motion, petitioner assails the above Decision by asserting that the Court erred in ruling that it failed to prove that the subject

FWTs it paid/remitted on the subject dividends are erroneous or illegal, based on the following arguments, *viz.*:

(a) Securities and Exchange Commission (SEC) Memorandum Circular No. 11-2008 provides that *'unrestricted retained earnings'* is 'the amount of accumulated profits and gains realized out of the normal and continuous operations of the company';

(b) Section 73(c) of the National Internal Revenue Code (NIRC) of 1997, as amended, provides for a presumption that any distribution made to the shareholders or member of a corporation shall be deemed to have been made from the most recently accumulated profits or surplus;

(c) That petitioner had indicated the amount of ₱68,563,638.00 under Cumulative Earnings as of the fiscal year (FY) ended September 30, 2018 in its 2017 and 2018 Comparative Audited Financial Statements (AFS);

(d) Petitioner has sufficiently established the appropriate tax base for the subject refund claim; and,

(e) The erroneous dividend declaration of the petitioner resulted to an illegal or erroneous tax.

Petitioner further claims that the Court also erred in finding that it failed to prove that Matex Co., Ltd. is a tax resident of Japan as to warrant the application of preferential tax rate for dividends under the *Philippines-Japan Tax Treaty*, based on the following arguments, *viz.*:

(a) The totality of evidence submitted by petitioner is sufficient to prove that the recipient of the cash dividend, Matex Co., Ltd., is a resident of Japan;

(b) Section 3, Rule 130 of A.M. No. 19-08-15-SC (Amended Rules of Evidence) provides for exceptions that should have been considered and applied herein by the Court; and,

(c) A rigid application of the Revised Rules of Court will result to unjust enrichment on the part of the government resulting to a manifest or miscarriage of justice to the petitioner. *9z*

On the other hand, in his comment, respondent opposes petitioner's Motion for Reconsideration stressing that in claims for tax refund, it is the claimant who has the burden of proof to establish the factual basis of the claim. After all, tax refunds, like tax exemptions, are construed strictly against the taxpayer.[1] Respondent asserts that while petitioner argues that there was improper declaration of cash dividends – since there was no unrestricted retained earnings at the time of declaration thereby making the payment of FWT on dividends erroneous – it, nonetheless, miserably failed to discharge its burden to prove that the paid FWTs are indeed erroneously paid. Respondent continues that petitioner likewise failed to prove that the dividends declared were actually returned by its stockholders to its coffers.

Respondent further points out that the Report of the Independent Auditor stated that the 2017 AFS is complete and correct in all aspects and free from material misstatements, whether due to fraud or error. As such, respondent claims that petitioner fell short of proving the veracity of its claim of erroneous payment of FWT on dividends since there is no proof that the company has insufficient unrestricted retained earnings at the time of declaration and that dividends were actually returned to petitioner's capital.

The Court finds petitioner's Motion for Reconsideration bereft of merit. Notably, the arguments proffered by petitioner in its Motion were already thoroughly addressed by the Court in the Decision it assails.

Indeed, Section 2 of SEC Memorandum Circular No. 11, Series of 2008, defines *unrestricted retained earnings* as "the amount of accumulated profits and gains realized out of the normal and continuous operations of the company after deducting therefrom distributions to stockholders and transfers to capital stock or other accounts, and which is: (1) not appropriated by its Board of Directors for corporate expansion projects or programs; (2) not covered by a restriction for dividend declaration under a loan agreement; and (3) not required to be retained under special circumstances obtaining in the corporation such as when there is a need for a special reserve for probable contingencies." It must also be noted that Section 5 of the same circular clearly provides that "the surplus profits or income must be a bona fide income founded upon **actual earnings or profits**,"

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[1] Citing *Citibank N.A. v. Court of Appeals, et al.*, G.R. No. 107434, October 10, 1997; and *Commissioner of Internal Revenue v. Tokyo Shipping Co., Ltd., et al.*, G.R. No. L-68252, May 26, 1995.

which refers to the **net income for the year based on the audited financial statements**.

Herein, the Court reiterates that the supposed distribution of the subject dividends was neither founded upon petitioner's net income for any particular year nor is there any indication that it is based on any audited financial statements, as shown in petitioner's Board Resolution No. 2017-11. In such a case, the Court cannot ascertain whether the same are excessive and whether there was a corresponding excess in the FWTs paid or remitted.

Moreover, there is no indication that the supposed balance of the dividend payment in the amount of ₱68,563,638.00 formed part of petitioner's unrestricted retained earnings prior to the declaration and payment of the subject dividends on September 6, 2017, and September 26, 2017, respectively. Apparently, it shows that the said amount was merely determined by subtracting the amount of ₱106,940,858.00 with the earlier declared total dividends to be distributed in the amount of ₱175,504,496.00. Besides, petitioner has not clearly identified the amount of unrestricted retained earnings it had, prior to the payment of dividends in the amount of ₱175,504,496.00. Clearly, petitioner has not accurately shown the appropriate tax base for the subject refund claim.

The Court further overstresses that any error committed by petitioner in the determination of the appropriate tax base, or specifically, the total amount of dividends to be, or have been, distributed to its shareholders, does not automatically result to an *"erroneous or illegal tax"*. Petitioner must still also prove that the collected or paid FWTs are indeed erroneous or illegal, which it however failed to do.

Once more, it must be pointed out that petitioner's stockholders are composed of a corporate entity and individuals, and their income tax rates to be imposed on dividends are classified on the basis of their categorization. In this case, petitioner has not clearly established or identified as to which category its individual stockholders respectively belonged. As such, this Court cannot determine which income tax rate should be individually applicable to the said stockholders, and in turn, cannot ascertain whether the FWTs imposed on them, respectively, are erroneous or illegal.

As to petitioner's argument that Matex Co., Ltd. is a tax resident of Japan based on the totality of evidence submitted as to warrant the application of preferential tax rate for dividends under the *Philippines-Japan Tax Treaty*,[2] the Court does not agree.

Again, Article 1 of *Philippines-Japan Tax Treaty*, clearly provides that the provisions thereunder shall apply to persons who are residents of one or both of the Contracting States. Hence, only persons, natural or juridical, who are residents of one or both of the Contracting States may avail of the benefits of the tax rates provided under Article 10 of the *Philippines-Japan Tax Treaty*.

Perforce, to establish the fact of residency in a Contracting State, the nonresident income recipient should submit a *Certificate of Residence for Tax Treaty Relief (CORTT) Form*, pursuant to Section 4(3) of the Revenue Memorandum Order (RMO) No. 8-2017 otherwise known as "*Procedure for Claiming Tax Treaty Benefits for Dividend, Interest and Royalty Income of Nonresident Income Earners*," dated October 24, 2016, as follows:

"**SECTION 4.** *Definition* –

x x x

3. **Certificate of Residence for Tax Treaty Relief (CORTT) Form – This is the newly created BIR Form that replaces the old 0901 Forms intended for tax treaty relief application for dividend, interest and royalty incomes**. This is composed of two parts:

   Part I:

   A. Applicable Tax Treaty;
   B. Information of Income Recipient/Beneficial Owner (Individual);
   C. Information of Income Recipient/Beneficial Owner (Non-Individual); and
   D. Certification of Competent Authority or Authorized Tax Office of Country of Residence

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[2] Formally known as, "CONVENTION BETWEEN JAPAN AND THE REPUBLIC OF THE PHILIPPINES FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME," which took effect on January 1, 1991.

Part II:

A. Information of Withholding Agent/Income Payor;
B. Details of Withholding of Tax;
C. Type of Income Earned within the Philippines in Respect to which Relief is claimed;
D. Declaration of Income Recipient/Beneficial Owner; and
E. Declaration of Withholding Agent/ Income Payor.

The CORTT Form shall serve as proof of residency of the nonresidents. Residency is a minimum requirement for the availment of preferential tax treaty rates or tax exemption under all effective tax treaties of the Philippines." (*Emphases and underscoring supplied*)

Furthermore, Sections 4(4) and 5(2) and (5) of the said RMO state that failure to submit a *CORTT Form* to the withholding agent/income payor would make the nonresident and/or withholding agent noncompliant and ineligible to avail of the preferential treaty rates, to wit:

"**SECTION 4.** *Definition* –

x x x

4. **Noncompliant** – The nonresident and/or the withholding agent/income payor is noncompliant and ineligible to avail of preferential treaty rates or tax exemption based on any of the following reasons:

   a) **Failure to meet the requirements of the provision of the tax treaty being invoked**;

   b) Non-filing of 1601-F or 1604-CF and non-payment of withholding taxes due as required by the Tax Code; and

   c) Discrepancy between the information contained in the CORTT Form and the information on the 1601-F. There is discrepancy when the pieces of

> information provided in the CORTT Form and 1601-F are inconsistent.
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> x x x
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> **SECTION 5.** *General Policies and Guidelines*
>
> 2. Nonresidents are allowed to use the prescribed certificate of residency of their country of residence ("prescribed certificate of residency"). However, nonresidents are still required to accomplish A, B and C of Part I of the CORTT Form for monitoring purposes. If the prescribed certificate of residency is used, it shall be attached to the CORTT Form.
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> x x x
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> 5. Failure to submit a CORTT Form to the withholding agent/income payor would mean that the nonresident is not claiming any tax treaty relief and therefore such income be subject to the normal rate provided under the National Internal Revenue Code of 1997, as amended (Tax Code)."

From the above, the importance of the presentation and submission of the *CORTT Form* cannot be denied. To reiterate, the *CORTT Form* shall serve as proof of residency of the nonresidents, which is a minimum requirement for the availment of preferential tax treaty rates under all effective tax treaties of the Philippines, including the *Philippines-Japan Tax Treaty*.

Herein, records show that the *CORTT Form* and the *Certification of Japanese Tax Office of Matex Co. Ltd.,* offered as Exhibits "P-13" and "P-14", respectively, were denied admission by the Court for failure to submit the originals or certified true copies of these documents for comparison.[3]

Verily, a photocopy of a document has no probative value and is inadmissible in evidence.[4] The Court consistently requires some proof of authenticity or reliability as a condition for the admission of documents. Absent any such proof of authenticity, the photocopy of

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[3] See Court *Resolutions* promulgated on July 27, 2020 and December 4, 2020.
[4] *Tee Ling Kiat v. Ayala Corporation, et al.*, G.R. No. 192530, March 7, 2018.

the original duplicate should be considered inadmissible and, hence, without probative value.[5]

As to the introduction of secondary evidence, it must be noted that the exception provided in Section 3(a), Rule 130 of the Revised Rules on Evidence, as amended,[6] must be read in relation to Section 5 of the same Rule which states that "when the original document has been lost or destroyed, or cannot be produced in court, the offeror, **upon proof of its execution or existence and the cause of its unavailability** without bad faith on his or her part, may prove its contents by a copy, or by recital of its contents in some authentic document, or by the testimony of witnesses in the order stated."

Secondary evidence of the contents of a document refers to evidence other than the original document itself. A party may introduce secondary evidence of the contents of a written instrument not only when the original is lost or destroyed, but also when it cannot be produced in court, provided there is no bad faith on the part of the offeror. **However, a party must first satisfactorily explain the loss of the best or primary evidence before he can resort to secondary evidence**. **A party must first present to the court proof of loss or other satisfactory explanation for non-production of the original instrument**. The correct order of proof is as follows: *existence, execution, loss, contents,* although the court in its discretion may change this order if necessary.[7]

It is clear, therefore, that before secondary evidence as to the contents of a document may be admitted in evidence, the existence of the document must first be proved, likewise, its execution and its subsequent loss or the cause of non-production of the original instrument. In this case, petitioner failed to present evidence or offer any explanation to establish the basis for the presentation of secondary evidence.

On this score, there is no sufficient evidence to establish that the income recipient, Matex Co., Ltd., is a non-resident foreign corporation entitled to avail of the preferential treaty rates under the *Philippines-Japan Tax Treaty*. Consequently, the Court shall apply the normal rate

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[5] *Office of the Ombudsman, et al., v. Carmencita D. Coronel,* G.R. No. 164460, June 27, 2006.
[6] A.M. No. 19-08-15-SC, took effect on May 1, 2020.
[7] *Department of Education Culture and Sports v. Julia Del Rosario, et al.,* GR No. 146586, January 26, 2005; citing *Renato Lazatin, et al., v. Honorable Judge Jose C. Campos, Jr., et al.,* G.R. No. L-43955-56 July 30, 1979.

of thirty percent (30%), as provided in Section 28(B)(1) and (5)(b) of the NIRC of 1997, as amended, as to dividends paid to Matex Co., Ltd.

On the final note, the *doctrine of totality of evidence* cited by petitioner is applied when "[t]he fair and proper rule, to our mind, is to consider all the pieces of evidence adduced in their totality, and to consider any evidence otherwise inadmissible under our usual rules to be admissible if it is consistent with the admissible evidence adduced. In other words, we reduce our rules to the most basic test of reason *i.e.*, to the relevance of the evidence to the issue at hand and its consistency with all other pieces of adduced evidence. Thus, even hearsay evidence can be admitted if it satisfies this basic minimum test."[8]

Remarkably, the foregoing doctrine speaks of the use of flexibility in the consideration of evidence. However, the Court also wishes to point out that it is consistent in its ruling that actions for tax refund or credit, as in the instant case, are in the nature of a claim for exemption and the law is not only construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence presented entitling a taxpayer to an exemption is strictissimi scrutinized and must be duly proven.[9]

In view of the foregoing disquisitions, there being no new matter or substantial issue raised by petitioner in its Motion, the Court finds no compelling reason to reverse, amend, or modify the Decision promulgated on February 15, 2022.

WHEREFORE, premises considered, petitioner's Motion for Reconsideration (Re: Decision dated 15 February 2022) is **DENIED** for lack of merit.

SO ORDERED.

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

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[8] *In the Matter of the Petition for the Writ of Amparo and Habeas Data in favor of Noriel H. Rodriguez, et al. v. Gloria Macapagal-Arroyo, et al., et seq.*, G.R. No. 191805, November 15, 2011; citing *Gen. Avelino I. Razon, Jr., et al. v. Mary Jean B. Tagitis*, G.R. No. 182498, December 3, 2009.

[9] *Coca-Cola Bottlers Philippines, Inc. v. Commissioner of Internal Revenue*, G.R. No. 222428, February 19, 2018

We Concur:

(With due respect, I reiterate my Concurring and Dissenting Opinion)
JEAN MARIE A. BACORRO-VILLENA
Associate Justice

(I maintain my Separate Concurring Opinion)
LANEE S. CUI-DAVID
Associate Justice