REPUBLIC OF THE PHILIPPINES

# *Court of Tax Appeals*

QUEZON CITY

## *En Banc*

**DEUTSCHE KNOWLEDGE SERVICES PTE LTD.,**

*Petitioner,*

- *versus* -

**COMMISSIONER OF INTERNAL REVENUE,**

*Respondent.*

**CTA *EB* NO. 1290**
(CTA Case No. 7808)

Present:

*Del Rosario, P.J.*
*Castañeda, Jr.,*
*Bautista,*
*Uy,*
*Casanova,*
*Fabon-Victorino,*
*Mindaro-Grulla,*
*Cotangco-Manalastas, and*
*Ringpis-Liban, JJ.*

Promulgated:

AUG 16 2016 2:50 p.m.

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# *DECISION*

***BAUTISTA, J:***

### *The Case*

Before the Court *En Banc* is a Petition for Review[1] under *Section 4(b)*[2], *Rule 8 of the Revised Rules of the Court of Tax Appeals ("RRCTA")*

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[1] *Rollo, CTA EB Case No. 1290,* pp. 7-81, with annexes.

[2] "SECTION 4. *Where to Appeal; Mode of Appeal.* — xxx

(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court *En Banc* shall act on the appeal."

seeking to reverse the Decision[3] ("Assailed Decision") of the Special Second Division of the Court ("Court in Division") dated December 16, 2014, as well as the Resolution[4] ("Assailed Resolution") dated March 26, 2015.

## *The Parties*[5]

Petitioner Deutsche Knowledge Services, PTE Ltd. is the Philippine branch of a multinational company organized and existing under and by virtue of the laws of Singapore, with its registered office address at One Raffles Quay, #17-10 South Tower, Singapore 048583. It was registered with the Bureau of Internal Revenue ("BIR") on June 16, 2005 as a Value-Added Tax ("VAT") registered taxpayer with Taxpayer Identification No. ("TIN") 238-763-115-000.

Petitioner is licensed to do business as a regional operating headquarters ("ROHQ") in the Philippines by the Securities and Exchange Commission ("SEC") on April 25, 2005, pursuant to the *Omnibus Investment Code of 1987*, as amended by *Republic Act ("RA") No. 8756* and its implementing rules and regulations. Its primary purpose is to engage in general administration and planning, business planning and coordination, sourcing/procurement of raw materials and components, corporate finance advisory services, marketing control and sales promotion, training and personnel management, logistic services, research and development services and product development, technical support and maintenance, data processing and communication and business development.

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue ("CIR") empowered to perform the duties of her office, including among others, the duty to act upon and approve claims for refund or tax credit as provided by law, with office address at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

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[3] *Records, CTA Case No. 7808, Vol. 2, Assailed Decision,* pp. 591-606; penned by Associate Justice Caesar A. Casanova with Associate Justice Juanito C. Castañeda, Jr. and Associate Justice Cielito N. Mindaro-Grulla concurring.
[4] *Id., Assailed Resolution,* pp. 655-662.
[5] *Id., Assailed Decision,* pp. 591-592.

## *The Facts*

As stated in the Assailed Decision[6] dated December 16, 2014, the factual antecedents of this case are as follows:[7]

> Petitioner filed its original Quarterly VAT Returns for the 2nd, 3rd and 4th Quarters of [calendar year ("CY")] 2006 on the following dates:
>
> | **Quarter** | **Date Filed** |
> |---|---|
> | 2nd | July 25, 2006 |
> | 3rd | October 25, 2006 |
> | 4th | January 25, 2007 |
>
> On June 30, 2008, petitioner filed with the BIR Revenue District Office No. 47, Makati City, an application for Tax Credits/Refunds (BIR Form No. 1914) of its excess and unutilized input VAT for the 2nd to 4th quarters of CY 2006 in the amount of [Php]22,084,718.84.
>
> Due to the inaction of respondent on [] its administrative claim, petitioner filed [a] Petition for Review on July 14, 2008.
>
> On August 12, 2008, respondent filed her Answer with the following Special and Affirmative Defenses:
>
> "**SPECIAL AND AFFIRMATIVE DEFENSES:**
>
> > 5. Granting *arguendo* that petitioner filed a claim for refund, the same is subject to investigation by the [BIR].
> >
> > 6. Petitioner failed to demonstrate that the alleged tax sought for refund or tax credit has been or erroneously or illegally collected in violation of the tax laws relied upon by the petitioner.
> >
> > 7. Taxes paid and collected are presumed to be made in accordance with the laws and regulations, hence, not creditable or refundable.

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[6] *Records, CTA Case No. 7808, Vol. 2, Assailed Decision,* pp. 592-596.
[7] Emphases supplied.

> 8. It is incumbent upon the Petitioner to show that it has complied with the provision of *Sections 108 and 112* in relation to *Section 229 of the 1997* [*National Internal Revenue Code, as amended ("NIRC")*].
>
> 9. In an action for tax credit or refund, the burden is upon the taxpayer to prove that he is entitled thereto, and failure to discharge the said burden is fatal to the claim (*Emmanuel & Zenaida Aguilar v. [CIR], CA-G.R. No. Sp. 16432, March 30, 1990 cited in Aban, Law of Basic Taxation in the Philippines, 1st Edition, p. 206.*)
>
> 10. Claims for refund are construed strictly against the claimant, the same partake the nature of exemption from taxation (*[CIR v.] Ledesma, 31 SCRA 95*) and, as such, they are looked upon with disfavor (*Western Minolco Corp. [v. CIR], 124 SCRA 121*)."

On August 27, 2008, the Court issued a Notice of Pre-Trial Conference. Consequently, petitioner and respondent filed their Pre-Trial Briefs on September 30, 2008 and August 13, 2008, respectively, and thereafter, their Joint Stipulation of Facts and Issues on November 6, 2008.

In support of its Petition, petitioner presented the following witnesses: Mr. Michael Praxedes – Chief Financial Officer of petitioner; Mr. Romeo A. De Jesus – Independent Certified Public Accountant [("ICPA")]; Ms. Andrea S. Peralta – former Legal Entity Controller of petitioner; and Ms. Aileen Felix-Romano – Legal Entity Controller of petitioner.

Likewise, petitioner filed its Formal Offer of Evidence on May 7, 2010. In [the] Court's Resolution dated August 13, 2010, the Court admitted as evidence the following Exhibits: "A" to "P", "AA" to "CC", "AAA" to "IIII", and "$J^4$" to "$S^5$", inclusive of submarkings.

In the October 6, 2010 hearing, counsel for the respondent submitted the case for decision considering that there was no report of investigation on petitioner's claim for refund. Hence, the Court ordered the parties to submit their respective Memorand[a]. Petitioner filed its Memorandum on December 6, 2010 while respondent failed to file the same. As such, in [the] Court's Resolution dated December 23, 2010, the case was submitted for decision.

On June 1, 2011, the Court rendered a Decision, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **DISMISSED** on the ground that it was prematurely filed.
>
> **SO ORDERED**."

In the aforesaid Decision, the Court found that petitioner filed its administrative claim 106 days earlier prior to the expiration of the 120-day period within which respondent may act on the administrative claim. Thus, the Court dismissed the Petition on the ground that it was prematurely filed.

On June 17, 2011, petitioner filed its Motion for Reconsideration (Re: Decision dated June 1, 2011) and subsequently, the Court issued its Resolution dated September 7, 2011, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, petitioner's *Motion for Reconsideration (Re: Decision dated June 1, 2011)* is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

On October 10, 2011, petitioner appealed its case with the Court *En Banc*, docketed as *CTA EB No. 834*. In the Court *En Banc's* Resolution dated January 18, 2012, said appeal was given due course and the parties were ordered to file their respective Memorand[a] and after which, the case shall be deemed submitted for decision. Petitioner filed its Memorandum on March 19, 2012 while respondent failed to file the same *per* Resolution dated April 26, 2012. Thus, on February 4, 2013, the Court *En Banc* rendered a Decision, the dispositive portion of which reads:

> "**WHEREFORE**, on the basis of the foregoing considerations, the Petition for Review *En Banc* is **DISMISSED**. The assailed Decision dated June 1, 2011 and Resolution dated September 7, 2011 are hereby **AFFIRMED**.

> Accordingly, petitioner's judicial claim for refund of [Php]22,084,718.84 is **DENIED** for lack of jurisdiction.
>
> **SO ORDERED.**"

On March 4, 2013, petitioner filed its Motion for Reconsideration (Re: Decision dated February 4, 2013). On June 25, 2013, the Court *En Banc* issued an Amended Decision, the dispositive portion of which reads:

> "**WHEREFORE,** premises considered, petitioner's Motion for Reconsideration is **GRANTED**. The Court *En Banc's* Decision promulgated on February 4, 2013 is hereby **REVERSED** and **SET ASIDE**. However, as regards the granting of refund on its full amount, CTA Case No. 7808 is **REMANDED** to the CTA Second Division for a complete determination of petitioner's compliance with other legal requirements in relation with its subject claim for refund or issuance of tax credit certificate of its alleged unutilized input VAT for the second, third, and fourth quarters of taxable year 2006.
>
> **SO ORDERED.**"

Thereafter, on March 12, 2014, the Court issued a Resolution which reads:

> "Considering that the CTA *En Banc* issued an Amended Decision, granting petitioner's Motion for Reconsideration and remanding the case to the Special Second Division for a complete determination of petitioner's compliance with other legal requirements in relation with its subject claim for refund or issuance of tax credit certificate of its alleged unutilized input VAT for the second, third and fourth quarter of taxable year 2006, let this case be considered submitted for decision.
>
> **SO ORDERED.**"

On December 16, 2014, the Court in Division issued the Assailed Decision[8], denying petitioner's judicial claim for refund or

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[8] *Records, CTA Case No. 7808, Vol. 2, Assailed Decision,* pp. 591-606.

issuance of a tax credit certificate of its alleged unutilized input VAT paid on purchases of goods and services attributable to zero-rated sales during the second, third and fourth quarters of taxable year 2006 in the total amount of Php22,084,718.84. The *fallo* states:[9]

> **WHEREFORE,** in view thereof, the instant Petition for Review is hereby **DISMISSED** for insufficiency of evidence.
>
> **SO ORDERED.**

In denying the Petition for Review, the Court in Division stated that in order for the supply of services to be VAT zero-rated under *Section 108(B)(2) of the 1997 NIRC,* the following requisites must be met: *(1)* the services by a VAT registered person must be other than processing, manufacturing or repacking of goods; *(2)* payment for such services must be in acceptable foreign currency and accounted for in accordance with the [Bangko Sentral ng Pilipinas ("BSP")] rules and regulations; and *(3)* the recipient of such services is doing business outside the Philippines.

Jumping to the third requisite, to prove that its clients are non-resident foreign corporations doing business outside the Philippines, petitioner presented the following documents: *(1)* SEC Certifications of Non-Registration of Company; *(2)* Certifications from different government agencies in the country of origin of petitioner's clients, all duly authenticated by the nearest consulate of the Philippines; *(3)* Intragroup Service Agreements; and *(4)* Deutsche Bank List of Shareholdings 2008. However, the Court in Division found that the aforesaid documents *per se* do not constitute sufficient proof that petitioner's clients are non-resident foreign corporations doing business outside the Philippines. To be considered as non-resident foreign corporation doing business outside the Philippines, each entity must be supported, at the very least, by both SEC certificate of non-registration of corporation/partnership and certificate/articles of foreign incorporation/association/registration. Thus, only a number of petitioner's clients were considered as non-resident foreign corporations doing business outside the Philippines:

Unfortunately, petitioner failed to comply with the equally significant second requisite, *i.e.,* payments for its services must be in acceptable foreign currency and accounted for in accordance with the

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[9] *Records, CTA Case No. 7808, Vol. 2, Assailed Decision,* p. 606.

BSP rules. Hence, the Petition for Review was dismissed for insufficiency of evidence.

Unsatisfied with the Assailed Decision, on January 5, 2015, petitioner filed *via* registered mail a Motion for Reconsideration (Re: Decision dated December 16, 2014) (With Motion to Re-open Trial)[10]. Respondent did not file her Comment to petitioner's Motion.[11]

On March 26, 2015, the Court in Division issued the Assailed Resolution[12] which denied petitioner's Motion. The dispositive portion reads:

> **WHEREFORE**, in view thereof, petitioner's Motion for Reconsideration (Re: Decision dated December 16, 2014) (With Motion to Re-Open Trial), is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**

In the Assailed Resolution, the Court in Division ruled that while petitioner was able to show that there were inward remittances *per* Fund Transfer Credit Advices, it failed to present sufficient proof that the inward remittances actually pertained to its zero-rated sales. Moreover, the Court in Division rejected petitioner's motion to re-open trial applying the Supreme Court case entitled *Luzon Hydro Corporation vs. Commissioner of Internal Revenue.* The Court in Division ruled that the presentation of petitioner's proposed evidence would not merit a re-opening of the trial since the supplemental evidence could have been presented sooner. Accordingly, the Court in Division denied petitioner's Motion to Re-open Trial.

Aggrieved, on April 10, 2015, petitioner filed a Motion for Extension of Time to File Petition for Review[13] with the CTA *En Banc* requesting for an extension of fifteen (15) days from April 11, 2015 or until April 26, 2015 within which to file her Petition for Review, which the Court *En Banc* granted in a Minute Resolution[14] dated April 15, 2015.

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[10] *Records, CTA Case No. 7808, Vol. 2, Motion for Reconsideration (Re: Decision dated December 16, 2014) (With Motion to Re-Open Trial),* pp. 630-649.
[11] *Id.,* p. 653.
[12] *Id., Assailed Resolution,* pp. 655-662.
[13] *Rollo, CTA EB No. 1296, Motion for Extension of Time to File Petitioner for Review,* pp. 1-5.
[14] *Id.,* p. 6.

/v

Since April 26, 2015 falls on a Sunday, petitioner filed the instant Petition for Review[15] on April 27, 2015.

The CTA *En Banc* thereafter issued a Resolution[16] dated May 22, 2015, which ordered respondent to file her Comment to the Petition for Review, and not a Motion to Dismiss, within ten (10) days from receipt thereof.

On July 29, 2015, the Court *En Banc* issued a Resolution[17] stating that a Records Verification Report was issued by the Judicial Records Division stating that respondent failed to file her comment. The Court *En Banc* further required the parties to submit their respective memoranda within a period of thirty (30) days from receipt thereof.[18]

On September 2, 2015, petitioner filed a Motion for Extension of Time to File Memorandum[19] requesting for an extension of five (5) days from September 2, 2015 or until September 7, 2015 within which to file its Memorandum. The Court *En Banc* granted the Motion in a Minute Resolution[20] dated September 4, 2015.

In compliance to the resolution of the Court *En Banc*, petitioner filed its Memorandum[21] on September 7, 2015 by registered mail; while respondent failed to file her memorandum[22]. Consequently, the Court *En Banc* issued a Resolution[23] dated November 11, 2015 submitting the case for decision, hence, this Decision.

## *The Issues*[24]

Petitioner assigns three (3) errors allegedly committed by the Court in Division in its Petition for Review, to wit:

**WHETHER OR NOT THE COURT IN DIVISION ERRED IN NOT FINDING THAT PETITIONER HAS**

[15] *Rollo, CTA EB No. 1296, Petition for Review*, pp. 7-81, with annexes.
[16] *Id.*, pp. 83-84.
[17] *Id.*, pp. 87-88.
[18] *Id.*, p. 88.
[19] *Id., Motion for Extension of Time to File Memorandum*, pp. 89-91.
[20] *Id.*, p. 92.
[21] *Id., Memorandum*, pp. 93-124.
[22] *Id.*, p. 129.
[23] *Id.*, p. 127.
[24] *Id., Petition for Review*, pp. 16-17.

**DULY PROVEN BY PREPONDERANT EVIDENCE THAT ITS SALES FOR THE 2ND TO 4TH QUARTERS OF CY 2006 WERE ZERO-RATED AND MADE TO NON-RESIDENT CORPORATIONS DOING BUSINESS OUTSIDE THE PHILIPPINES;**

**WHETHER OR NOT THE COURT IN DIVISION ERRONEOUSLY CONCLUDED THAT PETITIONER FAILED TO PROVE THAT PAYMENTS FOR ITS ZERO-RATED SALES OF SERVICES WERE MADE IN ACCEPTABLE FOREIGN CURRENCY AND THAT ITS INWARD REMITTANCES CORRESPOND TO ITS ZERO-RATED SALES FOR THE 2ND TO 4TH QUARTERS OF CY 2006; and**

**WHETHER OR NOT THE COURT IN DIVISION ERRED IN DENYING PETITIONER'S MOTION TO RE-OPEN TRIAL.**

*The Arguments of Petitioner*

According to petitioner, the Court in Division erred twice in the Assailed Decision dated December 16, 2014, to wit: *(1)* when it ruled that the evidence submitted by petitioner, particularly the SEC Certifications of Non-Registration of Company, Intragroup Service Agreements, and Deutsche Bank List of Shareholdings in 2008, were insufficient to satisfy the third requisite of *Section 108(B)(2) of the 1997 NIRC* and as ruled by the Supreme Court in the case entitled *Commissioner of Internal Revenue v. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*[25] and *(2)* when it ruled that petitioner failed to prove that payments for its services were made in acceptable foreign currency and accounted for in accordance with the rules of the BSP due to the latter's failure to present any evidence to explain the discrepancies in its Schedule of Receipts/Collections from Zero-Rated Sales, Collection Amount *per* Bank Advice and Official Receipt ("OR") Amount.[26]

Concerning the first instance, petitioner alleges that a claim for input VAT refund, being civil in nature, requires a quantum of evidence of mere preponderance of evidence. Thus, the evidence

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[25] *Rollo, CTA EB No. 1296, Memorandum*, pp. 103-111.
[26] *Id.*, pp. 111-116.

presented by petitioner, *i.e.*, SEC Certifications of Non-Registration of Company, Intragroup Service Agreements, and Deutsche Bank List of Shareholdings in 2008, coupled with respondent's failure to present any evidence to contradict petitioner's documentary evidence, collectively prove with preponderance of evidence that petitioner's non-resident foreign clients are indeed doing business outside of the Philippines.[27]

With respect to the Assailed Resolution dated May 26, 2015, petitioner alleges that the Court in Division erred when it ruled to deny petitioner's motion to re-open trial on the ground that the additional evidence which petitioner intends to present constitute forgotten evidence which is not the proper subject of a motion to re-open trial.[28]

In view of the foregoing, it is petitioner's position that the Court *En Banc (1)* order the reversal of the December 16, 2014 Assailed Decision and the March 26, 2015 Assailed Resolution; and *(2)* remand the case to the Court in Division for the reception of petitioner's supplemental evidence for the purpose of complying with the additional documentary evidence.

## *The Ruling of the Court En Banc*

The Court *En Banc* finds no merit in the Petition for Review.

***The Court in Division correctly ruled that petitioner failed to prove its zero-rated sales were made to non-resident foreign corporations doing business outside the Philippines***

Anent the requisite that the recipient of services is doing business outside the Philippines, petitioner avers that the Certificates of Non-Registration of Corporation/Partnership issued by the SEC and Intra-Group Service Agreements with petitioner's foreign clients stating its clients' locations and addresses prove by preponderance of evidence that its sales for the 2nd to the 4th quarters of CY 2006 were

[27] *Rollo, CTA EB No. 1296*, pp. 106-107.
[28] *Id.*, pp. 116-120.

zero-rated and made to non-resident corporations doing business outside the Philippines.

The Court *En Banc* assents with the petitioner that in civil cases, the party having the burden of proof must establish his case by a preponderance of evidence. Preponderance of evidence is the weight, credit, and value of the aggregate evidence on either side and is usually considered to be synonymous with the term "greater weight of the evidence" or "greater weight of the credible evidence."[29] It is evidence which is more convincing to the court as worthy of belief than that which is offered in opposition thereto.

Following petitioner's line of thinking, petitioner has made out its *prima facie* case in its favor through the presentment of the aforementioned documents, and the burden to controvert the evidence of the petitioner shifted on to respondent CIR.

This is of no moment with the Court.

In *Commissioner of Internal Revenue v. Far East Bank & Trust Company, etc.*[30], the Supreme Court said:[31]

> **Entitlement to a tax refund is for the taxpayer to prove and not for the government to disprove.**
>
> xxx xxx xxx
>
> **Moreover, the fact that the petitioner [CIR] failed to present any evidence or to refute the evidence presented by respondent does not *ipso facto* entitle the respondent to a tax refund. It is not the duty of the government to disprove a taxpayer's claim for refund. Rather, the burden of establishing the factual basis of a claim for a refund rests on the taxpayer.**
>
> And while the petitioner has the power to make an examination of the returns and to assess the correct amount of tax, his failure to exercise such powers does not create a presumption in favor of the correctness of the returns. **The taxpayer must still present substantial evidence to prove his**

[29] *Go v. Court of Appeals*, G.R. No. 112550, February 5, 2001, 351 SCRA 145.
[30] G.R. No. 173854, March 15, 2010, 615 SCRA 417.
[31] Emphases ours.

> **claim for refund. As we have said, there is no automatic grant of a tax refund.**
>
> Hence, for failing to prove its entitlement to a tax refund, respondent's claim must be denied. Since tax refunds partake of the nature of tax exemptions, which are construed *strictissimi juris* against the taxpayer, evidence in support of a claim must likewise be *strictissimi* scrutinized and duly proven.

Substantial evidence has been construed to mean not necessarily preponderant proof as is required in ordinary civil action, but such kind of "relevant evidence as a reasonable man might accept as adequate in support of a conclusion."[32] Petitioner fell short of this requirement.

To prove that petitioner's clients are non-resident foreign corporations doing business outside the Philippines, it presented the SEC Certifications of Non-Registration of Company, and Intra-Group Service Agreements.[33]

The SEC Certificates of Non-Registration show that the named entities therein are not registered corporations/partnerships in the Philippines, however, the same do not prove that such entities are non-resident foreign corporations doing business outside the Philippines. Likewise, the Intra-Group Service Agreements only show the names and addresses of petitioner's customers to whom it rendered services but the same do not establish that such customers are non-resident foreign corporations doing business outside the Philippines.

The Court in Division correctly ruled that without proof of incorporation, association or registration in a foreign country, the Court cannot sufficiently determine if the alleged non-resident foreign clients are existing, operating and registered in a foreign country in satisfaction of the requisites of a valid zero-rated sale of services as ruled in the *Burmeister case.*

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[32] *CIR v. Manila Machinery & Supply Company, et. al.,* G.R. No. L-25653, February 28, 1983, 135 SCRA 8.

[33] *Rollo, CTA EB No. 1290, Memorandum,* p. 104-105.

***The Court in Division correctly ruled that petitioner failed to prove that its zero-rated sales were made in acceptable foreign currency.***

Anent the requisite that the payment for such services must be in acceptable foreign currency accounted for in accordance with the BSP rules and regulations, petitioner contends that it has duly complied with this requirement.

Petitioner states that *per* the ICPA Report, its zero-rated sales to non-resident entities were paid for in Euros which were inwardly remitted and duly accounted for in accordance with the regulations of the BSP.[34] Further, petitioner argues that nowhere in the rules of the BSP, specifically in the Manual of Regulations on Foreign Exchange Transactions, is it provided or implied that a procedure other than the above is legally imperative.[35]

The aforestated contention has been thoroughly considered and discussed by the Court in Division when it resolved the matter in its Assailed Resolution[36] dated March 26, 2015. The Court *En Banc* quotes:

> With regard to the findings of the ICPA, Section 3, Rule 13 of the Revised Rules of the CTA provides:
>
> > SEC. 3. Findings of independent CPA. — . . . The findings and conclusions of the independent CPA may be challenged by the parties and shall not be conclusive upon the Court, which may, in whole or in part, adopt such findings and conclusions subject to verification.
>
> While the Court finds that petitioner was able to show that there were inward remittances as per Fund Transfer Credit Advices, it failed to explain the discrepancies between its "Schedule of Receipts/Collections from Zero-Rated Sales", the amounts in the column "Collection Amount per Bank Advice", and the amount receipted under the column "OR Amount (Php)".

[34] *Rollo, CTA EB No. 1290, Memorandum,* pp. 113-114.
[35] *Id.,* p. 114.
[36] *Records, CTA Case No. 7808, Vol. 2, Assailed Resolution,* pp. 417-418.

> Petitioner failed to present sufficient proof that the inward remittances actually pertained to its zero-rated sales. Hence, the Court cannot adopt the findings of the ICPA that petitioner's zero-rated sales to non-resident entities were paid for in Euro which were inwardly remitted and duly accounted for in accordance with the regulations of the Bangko Sentral ng Pilipinas.

It is well established that a claimant has the burden of proof to establish the factual basis of his/her/its claim for tax credit or refund. Tax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the refund.[37] Accordingly, absent an explanation of the discrepancies, the Court *En Banc* affirms the Court in Division's ruling.

***The Court in Division correctly ruled to deny petitioner's Motion to Re-Open Trial***

Petitioner argues that the higher interest of substantial justice dictates that the Court in Division should have allowed the reopening of trial for the admission of additional documents that would have enabled the former to comply with the requirements of the latter, which petitioner alleges has no legal basis.[38]

In the preceding discussion, the Court *En Banc* has settled the issue that "[t]o be considered as non-resident foreign corporation doing business outside the Philippines, each entity must be supported, at the very least, by both SEC certificate of non-registration of corporation/partnership and certificate/articles of foreign incorporation/association/registration."[39] Consequently, the Court in Division's twin requirements in the Assailed Decision and Assailed Resolution dated December 16, 2014 and March 26, 2015, respectively, are with legal basis.

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[37] *Compagnie Financiere Sucres Et Denrees v. Commissioner of Internal Revenue,* G.R. No. 133834, August 28, 2006, 499 SCRA 664, citing *Far East Bank & Trust Company v. Court of Appeals,* G.R. No. 129130, December 9, 2005, 477 SCRA 49, and *Commissioner of Internal Revenue v. Phil. Long Distance Telephone Company,* G.R. No. 140230, December 15, 2005, 478 SCRA 61.
[38] *Rollo, CTA EB No. 1290,* p. 24.
[39] *Records, CTA Case No. 7808, Assailed Decision, Vol. 2,* pp. 603-604.

Concerning the denial of the Court in Division's Motion to Re-Open Trial, judgment has already been rendered through the Assailed Decision; hence, a motion to re-open trial is not the appropriate remedy.

A motion to re-open may properly be presented only after either or both parties have formally offered, and closed their evidence, but before judgment. The reopening of a case for the reception of additional evidence after a case has been submitted for decision but before judgment is actually rendered is, it has been said, controlled by no other rule than that of the paramount interests of justice, resting entirely in the sound judicial discretion of a Trial Court; and its concession, or denial, by said Court in the exercise of that discretion will not be reviewed on appeal unless a clear abuse thereof is shown.[40] Furthermore, it is in criminal cases where the rules allow re-opening even after promulgation but before finality of judgment pursuant to *Section 24, Rule 119 on the Revised Rules of Criminal Procedure*.[41]

In the instant case, petitioner filed a Motion for Reconsideration (Re: Decision dated December 16, 2014) (With Motion to Re-Open Trial)[42] seeking to present additional evidence which it failed to present during the hearing.

Pursuant to *Section 1*[43] *of Rule 15 of the RRCTA*, any aggrieved party may seek a reconsideration or new trial of any decision of the Court.

*Section 1 of Rule 37 of the Revised Rules of Court* provides the grounds for a motion for reconsideration or new trial. It states:

> Section 1. Grounds of and period for filing motion for new trial or reconsideration.

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[40] *Alegre v. Reyes*, G.R. No. L-56923, May 9, 1988, 161 SCRA 226.
[41] "Sec. 24. Reopening. - At any time before finality of the judgment of conviction, the judge may, *motu proprio* or upon motion, with hearing in either case, reopen the proceedings to avoid a miscarriage of justice. The proceedings shall be terminated within thirty (30) days from the order granting it."
[42] *Records, CTA Case No. 7808, Vol. 2*, pp. 630-647.
[43] "SECTION 1. Who may and when to file motion. - Any aggrieved party may seek a reconsideration or new trial of any decision, resolution or order of the Court. He shall file a motion for reconsideration or new trial within fifteen days from the date he received notice of the decision, resolution or order of the Court in question." (RCTA, Rule 13, sec. 1a)

> Within the period for taking an appeal, the aggrieved party may move the trial court to set aside the judgment or final order and grant a new trial for one or more of the following causes materially affecting the substantial rights of said party:
>
> (a) Fraud, accident, mistake or excusable negligence which ordinary prudence could not have guarded against and by reason of which such aggrieved party has probably been impaired in his rights; or
>
> (b) Newly discovered evidence, which he could not, with reasonable diligence, have discovered and produced at the trial, and which if presented would probably alter the result.
>
> Within the same period, the aggrieved party may also move for reconsideration upon the grounds that the damages awarded are excessive, that the evidence is insufficient to justify the decision or final order, or that the decision or final order is contrary to law.

From the above-quoted Section, the three (3) possible applicable grounds in the case at bar are: *(1)* that the evidence is insufficient to justify the decision or final order; or *(2)* that the decision or final order is contrary to law; or *(3)* that there is/are newly discovered evidence.

For the first and second aforementioned grounds, 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 express reference to the testimonial or documentary evidence or to the provisions of law alleged to be contrary to such findings or conclusions.[44] Pursuant to

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[44] *Section 2, Rule 37 of the Revised Rules of Court:*

Sec. 2. Contents of motion for new trial or reconsideration and notice thereof.

The motion shall be made in writing stating the ground or grounds therefor, a written notice of which shall be served by the movant on the adverse party.

A motion for new trial shall be proved in the manner provided for proof of motions. A motion for the cause mentioned in paragraph (a) of the preceding section shall be supported by affidavits of merits which may be rebutted by affidavits. A motion for the cause mentioned in paragraph (b) shall be supported by affidavits of the witnesses by whom such evidence is expected to be given, or by duly authenticated documents which are proposed to be introduced in evidence.

this ground, a motion for reconsideration cannot be used as a vehicle to introduce new evidence.[45]

For the third ground, a motion for new trial based on newly discovered evidence, the same cannot be granted.

In order that newly discovered evidence may be a ground for allowing a new trial, it must be fairly shown that: *(1)* the evidence is discovered after the trial; *(2)* such evidence could not have been discovered and produced at the trial even with the exercise of reasonable diligence; *(3)* such evidence is material, not merely cumulative, corroborative, or impeaching; and *(4)* such evidence is of such weight that it would probably change the judgment if admitted.[46]

In *Custodio, et al. v. Sandiganbayan, et al.,*[47] the Supreme Court said:[48]

> It should be emphasized that the applicant for new trial has the **burden of showing that the new evidence he seeks to present has complied with the requisites to justify the holding of a new trial.**
>
> The **threshold question in resolving a motion for new trial based on newly discovered evidence is whether the proffered evidence is in fact a 'newly discovered evidence which could not have been discovered by due diligence.' The question of whether evidence is newly discovered has two aspects**: a **temporal one**, *i.e.,* when was the evidence discovered, and a **predictive one**, *i.e.,* when should or could it have been discovered. It is to the latter that the requirement of due diligence has relevance. We have held that in order that a particular piece of evidence may be properly regarded as newly discovered to justify new trial, what is essential is not

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A motion for reconsideration shall 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 express reference to the testimonial or documentary evidence or to the provisions of law alleged to be contrary to such findings or conclusions.

A pro forma motion for new trial or reconsideration shall not toll the reglementary period of appeal.

[45] *Casino v. CA,* G.R. No. 125799, August 21, 2008, 409 SCRA 403.
[46] *Luzon Hydro Corporation v. CIR,* G.R. No. 188260, November 13, 2013, 709 SCRA 462.
[47] G.R. Nos. 96027-28, March 8, 2005, 453 SCRA 24.
[48] Emphases ours.

so much the time when the evidence offered first sprang into existence nor the time when it first came to the knowledge of the party now submitting it; what is essential is that the offering party had exercised **reasonable diligence in seeking to locate such evidence before or during trial but had nonetheless failed to secure it.**

The Rules do not give an exact definition of due diligence, and whether the movant has exercised due diligence depends upon the particular circumstances of each case. **Nonetheless, it has been observed that the phrase is often equated with 'reasonable promptness to avoid prejudice to the defendant.' In other words, the concept of due diligence has both a time component and a good faith component. The movant for a new trial must not only act in a timely fashion in gathering evidence in support of the motion; he must act reasonably and in good faith as well. Due diligence contemplates that the defendant acts reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him.**

In the instant case, petitioner failed to establish that it exercised reasonable diligence in obtaining the documents with respect to the other corporations. It is noteworthy to mention that petitioner rendered services to twenty-one (21) entities for the 2nd to the 4th quarters of CY 2006.[49] Out of these twenty-one 21 entities, petitioner only presented proof of incorporation, association or registration in a foreign country for twelve (12) entities.[50] Evidently, the Court *En Banc* finds it hard to believe that petitioner exercised reasonable diligence in obtaining such evidence before or during trial but had nonetheless failed to secure it.

Clearly, the alleged "additional evidence" of petitioner should be treated as "forgotten evidence." Forgotten evidence refers to evidence already in existence or available before or during trial, which was known to and obtainable by the party offering it and, which could have been presented and offered in a seasonable manner were it not for the oversight or forgetfulness of such party or his counsel.[51]

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[49] *Records, CTA Case No. 7808, Vol. 2, Assailed Decision,* pp. 602-603.
[50] *Id.*, p. 604.
[51] *Tumang v. CA, et. al.*, G.R. No. 82072, April 17, 1989, 172 SCRA 328.

It is apparent from factual antecedents there was an oversight or forgetfulness on the part of petitioner as regards the evidence in question, since it was able to present proof of incorporation, association or registration in a foreign country for twelve (12) entities.[52] It is further apparent that petitioner merely realized such an oversight or forgetfulness when the Assailed Decision was promulgated.

Presentation of forgotten evidence is disallowed because it results in a piecemeal presentation of evidence, a procedure that is not in accord with orderly justice and serves only to delay the proceedings. A contrary ruling may open the floodgates to an endless review of decisions, whether through a motion for reconsideration or for a new trial, in the guise of newly discovered evidence.[53]

More importantly, petitioner did not explain the belated presentation of the additional documentary evidence but merely reasoned that the Motion to Re-Open is "in the interest of substantial justice, and in order to aid the Court in judiciously evaluating the merits of this case." Thus, petitioner had no justification for the delay in presenting said evidence.

Finding no reversible error, the Court *En Banc* affirms the Assailed Decision dated December 16, 2014 and Assailed Resolution dated March 26, 2015 of the Court in Division.

**WHEREFORE**, premises considered, the Petition for Review filed by petitioner is hereby **DENIED.** The Court *En Banc* hereby **AFFIRMS *IN TOTO*** the Decision of the Special Second Division dated December 16, 2014, as well as its Resolution dated March 26, 2015.

**SO ORDERED.**

**LOVELL R. BAUTISTA**
Associate Justice

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[52] *Records, CTA Case No. 7808, Vol. 2, Assailed Decision,* p. 604.
[53] *Office of the Ombudsman v. Coronel,* G.R. No. 164460, June 27, 2006, 493 SCRA 392.

**WE CONCUR:**

see Concurring & Dissenting Opinion

**ROMAN G. DEL ROSARIO**
Presiding Justice

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**CAESAR A. CASANOVA**
Associate Justice

**ESPERANZA R. FABON-VICTORINO**
Associate Justice

**CIELITO N. MINDARO-GRULLA**
Associate Justice

**AMELIA R. COTANGCO-MANALASTAS**
Associate Justice

**MA. BELEN M. RINGPIS-LIBAN**
Associate Justice

## CERTIFICATION

Pursuant to *Article VIII, Section 13 of the Constitution,* 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.

**ROMAN G. DEL ROSARIO**
Presiding Justice

REPUBLIC OF THE PHILIPPINES
**Court of Tax Appeals**
QUEZON CITY

*EN BANC*

**DEUTSCHE KNOWLEDGE SERVICES, PTE LTD.,**
Petitioner,

- versus -

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

**CTA EB NO. 1290**
(CTA Case No. 7808)

*Present:*
Del Rosario, *P.J.*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, *and*
Ringpis-Liban, *JJ.*

Promulgated:
AUG 16 2016 2:50 p.m.

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## CONCURRING AND DISSENTING OPINION

***DEL ROSARIO, PJ:***

I agree with my esteemed colleague in denying the Petition for Review which thereby affirms the Court in Division's denial of petitioner's claim for refund of its alleged unutilized input tax attributable to zero-rated sales of services under Sec. 108(B)(2)[1] of the National Internal Revenue Code of 1997 (NIRC), as amended, for the second to the fourth quarters of taxable year 2006 due to insufficiency of evidence, particularly due to petitioner's failure to

[1] SEC. 108. Value-added Tax on Sale of Services and Use or Lease of Properties. – xxx
(B) Transactions Subject to Zero Percent (0%) Rate. — The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:
(1) Processing, manufacturing or repacking goods for other persons doing business outside the Philippines which goods are subsequently exported, where the services are paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);
(2) Services other than those mentioned in the preceding paragraph rendered to a person engaged in business conducted outside the Philippines or to a nonresident person not engaged in business who is outside the Philippines when the services are performed, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);

prove that payments for services were made in acceptable foreign currency and duly accounted for in accordance with the rules of the *Bangko Sentral ng Pilipinas* (BSP).

Truth to tell, for the purpose of claiming input tax refund pursuant to Sec. 112 of the NIRC[2] which is attributable to zero-rated sales under Sec. 108(B)(2) of the NIRC, the taxpayer must prove compliance with the following requirements for zero-rating, namely:

1. **Nature of Service**: The services must be other than those mentioned in the *[first] paragraph [of Section 108 (b)] (which means other than processing, manufacturing or repacking of goods)*;

2. **Recipient of Service**: The services must be rendered to a person engaged in business conducted outside the Philippines *or* to a nonresident person not engaged in business who is outside the Philippines when the services are performed; and

3. **Accounting of Foreign Currency Consideration**: The consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the BSP.

As there was failure to prove that payments for services were made in acceptable foreign currency and duly accounted for in accordance with BSP rules, petitioner's sales cannot qualify for zero-rating; hence, the claim for refund of input tax attributable thereto must necessarily be denied.

The point of my dissent relates to the discussion anent the second requirement for zero-rating quoted above, *i.e., the services*

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[2] SEC. 112. Refunds or Tax Credits of Input Tax. —
(A) Zero-Rated or Effectively Zero-Rated Sales. — Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provide, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (b) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales: Provided, finally, That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

*were made to non-resident persons doing business outside the Philippines*, which according to the *ponencia,* was not likewise established by petitioner. Foremost, it must be stressed that the Court in Division made a finding that certain clients of petitioner are considered as *non-resident foreign corporations doing business outside the Philippines,* but the services related thereto were eventually adjudged as not qualified for zero-rating under Sec. 108(B)(2) of the NIRC for failure of petitioner to account the foreign currency payment.[3]

It was the conclusion of the Court in Division that in order to be considered as non-resident foreign corporation doing business outside the Philippines, each entity must be supported, at the very least, by **both** SEC certificate of non-registration of corporation/partnership <u>and</u> certificate/articles of foreign incorporation/association/registration. The *ponencia* agrees with the Court in Division in holding that it cannot be determined if the alleged non-resident foreign clients are existing, operating and registered in a foreign country without proof of their incorporation, association or registration in a foreign country, notwithstanding the presence of SEC Certifications of Non-Registration of Company, and Intra-Group Service Agreements which were presented by petitioner to prove that its clients are non-resident foreign corporation.

With due respect, while it is indispensable to present the SEC certificate of non-registration of corporation/partnership, the other evidence presented by petitioner, that is -- the Intra-Group Service Agreements, should appropriately be given probative value in lieu of the certificate/articles of foreign incorporation/association/registration required by the Court. The Intra-Group Service Agreements do not only show the names of petitioner's customers to whom it rendered service. More importantly, these documents confirm that the entities mentioned therein are doing business outside the Philippines as they specify the nature of services that petitioner renders in support of its customers' business process.

Thus, aside from those clients of petitioner already considered by the Court in Division in the assailed Decision as non-resident foreign corporations, certain clients of petitioner whose identities are supported with the corresponding SEC Certificates of Non-Registration **<u>and</u>** Intra-Group Service Agreements may still be

[3] Assailed Decision, CTA *En Banc* Rollo, pp. 57-72, 70.

considered as non-resident foreign corporation for zero-rating purpose.

The apparent compliance, however, with respect to the second requirement for purposes of zero-rating under Sec. 108(B)(2) of the NIRC would not change the outcome of the case due to petitioner's failure to prove that payments for the services were made in acceptable foreign currency as discussed earlier.

All told, I vote to DENY the Petition for Review of Deutsche Knowledge Services Pte Ltd.

**ROMAN G. DEL ROSARIO**
Presiding Justice