REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ISLAND POWER CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 5922

Promulgated:
MAY 17 2004
[signature]

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DECISION

This case seeks for the nullification and setting aside of Assessment Notice No. 000292 involving the amount of P63,097,199.81 for petitioner's alleged Deficiency Withholding Tax, inclusive of interest, on its payments made to Edison Global Electric Limited for the year 1995.

The facts as culled from the records are as follows:

Petitioner is a corporation duly established and registered under the laws of the Republic of the Philippines. It is engaged in the business of power generation *(par. 1, Joint Stipulation of Facts)*.

On December 21, 1993, a contract was entered into between petitioner Island Power Corporation and Edison Global Electric Ltd. *(Edison, for brevity)*, denominated as "Contract for the Engineering, Supply, Delivery (CIF Site) Construction, Erection, Testing and Commissioning (Turn-Key) of Total of 7 MW Two (2) Units Enterprise DSR-48 Electric Generator Sets at San Jose, Occidental Mindoro, Philippines," for a total contract price of P118,036,870.00 *(Exhs. G-G-15; Exh. 9)*.

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On April 15, 1996, petitioner filed its Annual Income Tax reporting a "nil" taxable income as it was still in its pre-operating stage *(Exh. 2)*.

On March 5, 1998, petitioner received a letter from respondent, informing it that inasmuch as it has not reported an income from 1993 to 1995 taxable years and failed to withhold 35% on the fees/income paid to Edison Global Electric, Ltd., it is held liable for violation of Section 53(b)(2) [now 50] of the Tax Code, in relation to Section 25(b)(1) of the same Code.

On December 15, 1998, petitioner received Assessment Notice No. 000292 dated September 14, 1998 involving the aggregate amount of P63,097,199.81 for Deficiency Withholding Tax and Interest covering the period 1995, details of which are shown below *(Exh. B)*:

Withholding Tax

Tax Due	P41,312,905.00
Add: Interest 1/25/96 to 9/14/98	21,784,294.81
Total Amount Payable	P63,097,199.81

On January 14, 1999, petitioner filed its letter-protest dated December 23, 1998, with the Assessment Division of Revenue Region No. 7 *(Exh. C)*, claiming that it does not have any obligation to withhold 35% of its payment to Edison because Sections 50(a) and 25(b)(1) of the NIRC is inapplicable to Edison, the latter being a "resident foreign corporation."

A Preliminary Collection Letter dated March 29, 1999 was subsequently issued by respondent for the payment of petitioner's deficiency withholding tax including interest *(Exh. D)*.

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For failure on the part of petitioner to reply to the Preliminary Collection Letter, a Final Notice Before Seizure was then issued by respondent on April 22, 1999 *(Exh. E)*, which was received by petitioner on April 30, 1999.

On May 6, 1999, petitioner filed its reply letter dated May 3, 1999 and alleged that a protest letter questioning the subject assessment was filed but which has not yet been resolved *(Exh. F)*; hence, the issuance of the "Preliminary Collection Letter" and the "Final Notice Before Seizure" was premature as the assessment has not yet become final.

On July 30, 1998, petitioner received a letter from the Collection Division of Revenue Region No. 7 *(Exh. 1)*, denying petitioner's protest on the ground that petitioner failed to dispute the correctness of the assessment within the 30-day reglementary period. Thus, the assessment had allegedly become final and executory.

On August 12, 1999, petitioner appealed the denial of its protest by filing the instant petition for review.

Respondent filed his Answer on October 22, 1999, and raised the following Special and Affirmative Defenses:

> "8. That sometime in December 1993, petitioner which was then engaged in power generation business entered into a contract with Edison Global Electric Ltd., a non-resident foreign corporation for the said Edison Global Electric Ltd. to supply power generation for the municipality of San Jose Occidental Mindoro for a contact price of which Php 18,036,870.00 was paid by the petitioner in 1995, but failed to withhold the amount equivalent to thirty five (35%) percent as withholding tax under Section 25(b)(1) in relation to Section 50(B)(2) both of the Tax Code of 1977, the law then applicable in this case;
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> 9. That because of the failure of petitioner to withhold and remit the aforesaid amount there is due from petitioner the amounts provided for under Section 251 both of the tax code of 1977 and 1997;

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10. That the amounts due from the petitioner Php 41,312,905.00, the amount the petitioner should have withheld and remitted to respondent, and the amount of Php 21,784,294.81 as interest for a total of Php 63,997,199.81;

11. That the payment of the aforesaid total amount was demanded from petitioner by respondent in annex "A";

12. That the payment of the aforesaid total amount although contained in an assessment notice form is not an assessment and collection of taxes under Title II of the tax code of 1997 but demand implementing Title X, Summary Offenses and Penalties of the same code specifically section 251 thereof;

13. That such being the case, it cannot be the subject matter of a protest because a protest as provided for under section 228 of the tax code of 1997 can only be made in assessment under Title II of the tax code of 1997;

14. That granting without necessarily admitting that petitioner's protest is valid and proper, the same was filed after the demand has become final and executory;

15. That again granting without necessary (sic) admitting that the filing of petitioner's protest (Annex "B") is valid and proper then petitioner's protest has been denied when respondent thru the Chief Collection Division of Revenue Region No. 7 sent petitioner a preliminary collection letter dated March 29, 1999 (Annex "C") and even if the letter dated May 3, 1999 and received by petitioner on the same day which is denominated "Final Notice Before Seizure" is to be considered the final decision, then the thirty (30) day period within which petitioner, pursuant to Section 7 in relation to section 11 both of Republic Act No. 1125, had only up to June 2, 1999 within which to file the instant petition for review;

16. That as the instant petition for review was filed only on August 12, 1995 (sic) it is clear that this Honorable Court has no jurisdiction over the case;

17. That the demand of respondent to pay the aforesaid amount in annex "A" is in accordance with law."

The following issues are presented for our determination, to wit:

1. Whether or not petitioner's protest of the Assessment Notice dated September 14, 1998 was filed within the reglementary period provided by law.

2. Whether or not Edison Global Limited is a resident foreign corporation within the purview of the National Internal Revenue Code and related laws.

3. Whether or not petitioner is liable for deficiency withholding tax and interest for the year 1995 in the amount of P63,097,199.81.

As to whether or not petitioner's protest of the Assessment Notice dated September 14, 1998 was filed within the reglementary period provided by law, we rule in the affirmative.

Records disclose that on December 15, 1998, petitioner received Assessment Notice No. 000292 dated September 14, 1998. While bearing petitioner's old address at "103 Court Felicidad Condo., Wack-Wack Rd., Mandaluyong", the notice was sent to petitioner's current address at the "4th Floor, One Magnificent Mile, San Miguel Ave., Ortigas Center, Pasig City" *(par. 3, Petition for Review)* and was stamped received by "Ogden Energy, Philippine Holdings, Inc." and not by herein petitioner, Island Power Corporation *(Exhs. B-4, B-5 and B-6)*. To prove that petitioner validly received the assessment notice on December 15, 1998, petitioner presented its witness, Ms. Emerita Tolibas, during the hearing held on July 17, 2000, who testified that Ogden Energy owns 40% of Island Power Corporation and that the two corporations share the same office and the same staff *(pp. 6 & 7, TSN)*.

On January 14, 1999, petitioner filed its protest assailing the assessment for deficiency withholding tax.

Section 228 of the 1997 Tax Code provides:

> "SEC. 228. Protesting of Assessment. - xxx
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> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
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The assessment notice was validly received on December 15, 1998; thus, petitioner had thirty (30) days from receipt of the assessment notice within which to file its administrative protest with the respondent's Bureau, or until January 14, 1999. Based on the records, the protest was filed on January 14, 1999 *(Exhs. C, C-1, and C-2)*, which was clearly within the reglementary period prescribed by law.

With respect to the second issue, petitioner claimed that Edison is a resident foreign corporation as it is engaged in trade or business within the Philippines and that it has established a Philippine office. Further, it asserted that Edison "has been, and still is, engaged in projects similar to petitioner's Mindoro project. By entering into such projects, Edison is performing the purpose and object of its organization. It also shows its intention to continue its commercial dealings and arrangements here in the Philippines" *(Exh. C)*. To support its position that Edison is a resident foreign corporation, petitioner offered in evidence various documents such as:

1. "Contract for the Engineering Supply, Delivery (CIF Site) Construction, Erection, Testing and Commissioning (Turn-key) of Total of 7MW Two (2) Units Enterprise DSR-48 Electric Generator Sets at San Jose, Occidental Mindoro, Philippines" *(Exhs. "G" to "G-15")* - to prove that Edison Global Electric Ltd. entered into a turn-key contract with petitioner for the construction, installation, erection, and testing of 2 generator sets at San Jose, Occidental, Mindoro;

2. Letter of Edison Global Electric Ltd. addressed to petitioner dated January 25, 1995 *(Exhs. "H" & "H-1")* - to prove that Edison Global Electric Ltd. maintains a Philippine office, care of Edison Energy Corp. P.O. Box 12290 Ortigas Center, Pasig, MM; and

3. Certification from the Bureau of Immigration of the travel records of David Tan for the years 1994 to 1996 *(Exhs. "J" & "J-1")* - to prove that David Tan, as president and Philippine representative of Edison Global Electric Ltd., traveled between Hongkong and the Philippines several times from 1994 to 1996.

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On the other hand, respondent maintained that Edison is a non-resident foreign corporation based on the letterhead of the letter dated January 25, 1995 sent by Edison, to petitioner, through its President, Mr. Francis T. Delgado, whereby it requested "to make all checks payable in favor of Edison Global Electric Ltd., as follows: "Edison Industries, Inc. for the account of Edison Global Electric Ltd.-IPC Project" *(Exh. 3)*. Moreover, respondent's witness, Mr. Teodoro R. Matibag, testified during the hearing held on February 28, 2002 that upon his verbal inquiry with the Securities and Exchange Commission, he discovered that Edison is a "non-resident foreign corporation, non-existing at the Securities and Exchange Commission."

Pertinent to the resolution of the second issue are the following provisions of the old Tax Code and related laws:

"Sec. 20. Definitions.- xxx

> *(h) The term "resident foreign corporation" applies to a foreign corporation engaged in trade or business within the Philippines.*
>
> *(i) The term "non-resident foreign corporation" applies to a foreign corporation not engaged in trade or business within the Philippines*
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> *xxx xxx xxx"*

"SECTION 25. Rates of tax on foreign corporation.-

> *(a) Tax on resident foreign corporations (1) In general. - Unless otherwise provided, a corporation organized, authorized, or existing under the laws of any foreign country, engaged in trade or business within the Philippines, shall be subject to a tax equivalent to 35% of the taxable income derived in the preceding taxable year from all sources within the Philippines.*
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> *xxx xxx xxx*

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> (b) *Non-resident foreign corporations.- (1) In general.- Unless otherwise provided, a foreign corporation not engaged in trade or business in the Philippines shall pay a tax equal to 35% of the gross income received during each taxable year from all sources within the Philippines such as interest, dividends, rents, royalties, salaries, premiums (except reinsurance premiums), annuities, emoluments or other fixed or determinable annual, periodical or casual gains, profits and income, and capital gains, except capital gains subject to tax under sub-paragraph 5 (C).*"

The term "doing business" has been defined in the Omnibus Investments Code as:

> *"ART. 44. Definition of Terms. - As used in this Book, the term "investment" shall mean equity participation in any enterprise formed, organized or existing under the laws of the Philippines; and the phrase "doing business" shall include soliciting orders, purchases, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totalling one hundred eighty (180) days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines, and any other act or acts that imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business corporation."*

The phrase "doing business" has been interpreted by the Supreme Court in the case of ***The Mentholatum Co., Inc. vs. Mangaliman*, 72 Phil. 524** and we quote:

> "No general rule or governing principles can be laid down as to what constitutes "doing" or "engaging in" or "transacting" business. Indeed, each case must be judged in the light of its peculiar environmental circumstances. The true test, however, seems to be whether the foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another. *(Traction Cos. vs. Collectors of Internal Revenue [C.C.A., Ohio], 223 F., 984, 987).* The term implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions

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> normally incident to, and in progressive prosecution of, the purpose and object of its organization."

Moreover, in the case of ***ABB Power Generation Ltd. vs. Commissioner of Internal Revenue,*** **CTA Case No. 4888, February 6, 1996,** this court, citing the case of ***Pacific Micronesian Line, Inc. vs. Del Rosario and Pelingon*****, 96 Phil. 30** passed upon the issue in this wise:

> "It is a rule generally accepted that one single or isolated business transaction does not constitute 'doing business' within the meaning of the law, and that transactions which are occasional, incidental and casual, that of a character to indicate a purpose to engage in business do not constitute the doing or engaging in business contemplated by law. In order that a foreign corporation may be regarded as doing business in a State, there must be continuity of conduct and intention to establish a continuous business, such as the appointment of a local agent, and not one of a temporary character."

This court believes that the letter dated January 25, 1995 *(Exh. H)* addressed to petitioner did not prove that Edison was doing business in the Philippines. While the address of the alleged Philippine office of Edison was printed at the lower right portion of the letter, it did not, however, establish the fact that it actually maintained a branch office in the Philippines. It is not even a business address. P.O. Box 12290, Ortigas Center, Pasig, Metro Manila is a postal office address.

Moreover, the travel records of Mr. David C. Tan relative to his Philippine travels merely showed that he came to the Philippines and Hongkong during the period March 7, 1994 to September 2, 1996. There was, however, no other document to show proof that his various travels to the Philippines during the said period were incurred in furtherance of the Contract entered into with herein petitioner, that is, for the purpose of the construction of the power plant in Occidental Mindoro.

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While Edison completed the construction of the power plant in Occidental Mindoro after almost two years (the construction of the power plant commenced in January 1994 and was completed in September 1995) [*pp. 20-25, TSN, January 29, 2001*], Edison cannot be considered as doing business in the Philippines as there was no clear and convincing proof that it continued its business operations in the Philippines even after the completion of the construction of the power plant. It is, thus, considered, as engaged in an "isolated transaction" which does not constitute 'doing business' within the meaning of the law.

In other words, petitioner failed to present any clear and convincing proof that Edison is a resident foreign corporation. Assuming *arguendo* that Edison is in fact a resident foreign corporation, petitioner could have easily presented the Income Tax Return of Edison which is a vital document to prove that it is, indeed, a resident foreign corporation. This court cannot rule on this issue on mere assumptions and conjectures. Failure on the part of petitioner to establish such fact, this court cannot consider Edison as a resident foreign corporation. Thus, the imposition of the 35% tax rate on the income payments made by petitioner to Edison was proper.

In conclusion, petitioner failed to satisfactorily refute the findings of the revenue examiners, hence, the presumption of correctness of the assessment subsists. Assessments are *prima facie* presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties an assessment will not be disturbed. All presumptions are in favor of the correctness of tax assessments ***(Bonifacia Sy Po vs. Hon. Court of Tax Appeals and Hon. Commissioner of Internal Revenue, G.R. No. L-81446, August 18, 1988)***. Failure to present proof of error in the assessment will justify judicial affirmance of said assessment ***(Delta Motors Corp. vs. Commissioner of Internal Revenue, CTA Case No. 3782, May 21, 1986)***.

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WHEREFORE, the instant petition for review is hereby **DENIED** for lack of merit. Accordingly, Assessment Notice No. 000292 is hereby **UPHELD** and petitioner is **ORDERED** to **PAY** the respondent the amount of P63,097,199.81 representing deficiency withholding tax for the taxable year 1995, inclusive of interest. In addition, petitioner is **ORDERED** to **PAY** the respondent 20% delinquency interest computed from October 14, 1998 until full payment thereof pursuant to Section 249 (a)(c)(3) of the old Tax Code.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

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

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Justice

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