Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

MIRANT (PHILIPPINES) OPERATIONS CORPORATION (formerly: Southern Energy Asia-Pacific Operations [Phils.], Inc.),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA-E.B. NO. 40
(C.T.A. Case No. 6382)

Present:

Acosta, *P.J.*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, *JJ*.

Promulgated:
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DECISION

UY, J.:

This is a Petition for Review before the Court of Tax Appeals *en banc* filed on November 12, 2004 under Republic Act No. 9282, seeking for the reversal of the Decision and subsequent Resolution rendered by the then Court of Tax Appeals, in C.T.A. Case No. 6382, entitled Mirant (Philippines) Operations Corporation, petitioner v. Commissioner of Internal Revenue, respondent, which under R.A. No. 9282, is now a Division of the current Court of Tax Appeals, to wit:

> 1. Decision promulgated on May 27, 2004 denying petitioner's claim for refund in the amount of P20,088,435.78 and correspondingly dismissing the petition for review for lack of merit; and
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> 2. Resolution promulgated on September 22, 2004 denying petitioner's Motion for Reconsideration of the aforementioned Decision.

Briefly, these are the undisputed facts of this case.

Petitioner is a domestic corporation with business address at Barangay Ibabang Pulo, Pagbilao Grande Island, Pagbilao, Quezon Province, while respondent is the duly appointed Commissioner of the Bureau of Internal Revenue empowered to perform the duties of his office, which include among others, the duty to act on and approve claims for refund or tax credit, with office address at BIR National Office Building, Diliman, Quezon City.

Petitioner is primarily engaged in the business of designing, constructing, erecting, assembling, commissioning, operating, maintaining, rehabilitating and managing gas turbine and other power generating plants and related facilities for the conversion into electricity of coal, distillate and other fuel. It is originally registered under the name Hopewell Tileman Project Management Corporation with the Securities and Exchange Commission (SEC) in 1993 and with the Bureau of Internal Revenue (BIR) as a withholding agent in 1994. Upon approval by the SEC and notice to the BIR, the corporate name of the petitioner was changed to CEPA Tileman Project Management Corporation in 1994, CEPA Operations

(Philippines) Corporation in 1997, Southern Energy Asia-Pacific Operations (Philippines) Inc. in 2000 and in its present name, Mirant (Philippines) Operations Corporation in 2001.

On January 25, 2000, petitioner, then under the corporate name CEPA Operations (Philippines) Corporation, filed its Monthly Remittance Return of Income Taxes Withheld for the period December 1999 reflecting an amount of P3,206,268.17 as final taxes withheld from VHL Enterprises, a foreign corporation. The final withholding tax for December 1999 was paid on January 25, 2000 as evidenced by a Revenue Official Receipt No. 01333289 reflecting a total amount of P3,218,196.76 in full payment of final and expanded withholding taxes due for December 1999.

For the calendar year ending December 31, 2000, petitioner, still under the name of CEPA Operations (Philippines) Corporation, but which was subsequently amended to Southern Energy Asia-Pacific Operations (Philippines) Inc., withheld the total amount of (P16,882,167.61) as final taxes from its income payments made to VHL enterprises and WES World-wide Education Service Ltd., both foreign corporations with head offices at Alabama, USA and England, UK, respectively.

On December 18, 2001, petitioner, believing that it had erroneously withheld and remitted the above final withholding taxes instead of the 5% expanded/creditable withholding taxes, immediately availed of the Bureau of Internal Revenue's Voluntary Assessment Program (VAP), and consequently filed and remitted the amount of P1,743,438.25 for VHL Enterprises, and

P3,101,643.84 for WES World-Wide Education Service, Ltd., as expanded/creditable withholding taxes.

Subsequently, on January 23, 2002, petitioner filed an administrative claim for refund with the Bureau of Internal Revenue-RDO 60, Tayabas, Quezon, in the total amount of P20,088,435.78, representing the alleged erroneously withheld and remitted final taxes for December 1999 and various months for calendar year 2000. In the meantime, and in order that this claim may not be barred by prescription, petitioner filed a Petition for Review with this Court on January 24, 2002 praying for the refund or issuance of a tax credit certificate representing the alleged erroneously paid final withholding taxes.

On May 27, 2004, said petition was dismissed for lack of merit. Likewise, the Motion for Reconsideration thereof was denied in the Resolution dated September 22, 2004. Hence, this recourse.

The issues being raised by petitioner in this instant petition for review are as follows:

1. Whether or not VHL Enterprises and WES World-wide Education Service Ltd., each have established a permanent establishment in the Philippines pursuant to the RP-US and RP-UK Tax Treaties, respectively;

2. Whether or nor VHL Enterprises and WES World-wide Education Service, Ltd., are therefore to be treated for income tax purposes as resident foreign corporation which should be subject to the 5% creditable withholding tax; and

3. Whether or not petitioner is entitled to the refund or issuance of a tax credit certificate in the total amount of Twenty Million Eighty Eight Thousand Four Hundred

> Thirty Five and 78/100 (P20,088,435.78) representing erroneously paid final withholding tax for the month of December 1999 and various months for calendar year ended December 31, 2000.

A perusal of the above issues reveal that these issues have already been thoroughly discussed in this Court's assailed Decision of May 27, 2004 in C.T.A. Case No. 6382. Nonetheless, this Court deems it proper to discuss the issues relative to the instant petition.

In the instant petition for review, petitioner invokes the provisions of the RP-US and RP-UK Tax Treaties on the ground that the two foreign corporations, as resident corporations of the United States (VHL Enterprises) and United Kingdom (WES World-wide Education Service Ltd.), although without fixed place of businesses in the Philippines, through their alleged transactions with petitioner-corporation have nevertheless created "permanent establishments" in the Philippines for having "furnished services through their employees or other personnel for a period or periods the aggregate of which is more than 183 days in a twelve-month period."

Further, petitioner contends that generally, a foreign corporation that has a permanent establishment in the Philippines, shall be subject to a tax of 32% based on the taxable income that will be computed based on the net income on business profits/service fees attributable to the permanent establishment. However, if the foreign corporation has no permanent establishment in the Philippines, such business profits/service fees shall not be subject to any income tax in the Philippines. And according to petitioner, despite supervening hardships, such as conflict with the municipal law or prejudice to the national interest, the parties must comply with their commitments under a treaty and cannot ignore or modify its provisions without the consent of the other signatories.

On the other hand, respondent maintains that absent a showing that VHL Enterprises and WES World-wide Education Service Ltd. are resident-foreign corporations, they are subject to final withholding tax as provided under Section 28(b) of the Tax Code because it had not been shown that said corporations are "doing business" in the Philippines.

Crucial in the resolution of the issues raised in this case is a clear determination of whether the subject transactions between petitioner and the foreign corporations, VHL Enterprises and WES World Wide Education Service Ltd., have created "permanent-establishments" for the latter in the Philippines thereby making them liable to pay tax to the Philippine government.

We examine the provisions of Articles 5, and 7 and 8 on Permanent Establishments and Business Profits of both the RP-US and RP-UK Tax Treaties, which provide as follows:

RP-US TAX TREATY

Article 5
Permanent Establishment

(1) For the purposes of this Convention, the term *permanent establishment* means a fixed place of business through which a resident of one of the Contracting States engages in a trade or business.

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(j) The furnishing of services, including consultancy services, by a resident of one of the Contracting States through employees or other personnel, provided activities of that nature continue (for the same or connected project) within the other Contracting State for a period or periods aggregating more than 183 days.

Article 8
Business Profits

(1) Business profits of a resident of one of the Contracting States shall be taxable only in that State unless the resident had a permanent establishment in the other Contracting State. If the resident has a permanent establishment in that other Contracting State, tax may be imposed by that other Contracting State on the business profits of the resident but only on so much of them as are attributable to the permanent establishment.

RP-UK TAX TREATY

Article 5
Permanent Establishment

(1) For the purposes of this Convention, the term permanent establishment means a fixed place of business in which the business of the enterprise is wholly or partly carried on.

(3) An enterprise of a Contracting State shall likewise be deemed to have a permanent establishment in the other Contracting State if:

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(b) it furnishes services, including consultancy services, in that other Contracting State through its employees or other personnel (other than agents of an independent status within the meaning of paragraph (7) of this Article) for a period exceeding in the aggregate 183 days within any twelve-month period.

Article 7
Business Profits

(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as are directly or indirectly attributable to that permanent establishment.

The above-mentioned provisions enumerate what would constitute a "permanent establishment". And although VHL and WES World-wide Education Service Ltd. do not have a fixed place of business, nonetheless, they would still be considered as having established a "permanent establishment" if they have "furnished services through their employees or other personnel for a period or periods the aggregate of which is more than 183 days in a twelve-month period."

The treaty provision says that the business profits of an enterprise shall be taxable only if there is a permanent establishment. The key is, before any profit could be taxed, first, you have to ask this question: Will this enterprise make a profit, a business profit that is defined in the treaty? If so, does he have a permanent establishment in the Philippines? If the answer to both questions is yes, then the Philippine government can tax. If the answer to the second question is negative, there is no permanent establishment, then you cannot tax a profit (Tomas C. Toledo, International Aspects of Taxation, UP Law Center, 1976, p. 24).

Evidently, VHL Enterprises, with head office in Alabama, USA, and WES World-wide Education Service, Ltd. with head office in England, are both non-resident foreign corporations with no fixed place of business in the Philippines; and that these corporations rendered hands-on training, instructional and/or consultancy services to the employees of petitioner, respectively for a period or periods aggregating more than 183 days within a twelve-month period. Pursuant to these transactions, the Court is thus convinced that these foreign corporations have established "permanent-establishments" in the Philippines.

However, it must be remembered that a foreign corporation wishing to avail of the benefits of the tax treaty should invoke the provisions of the tax treaty and prove that indeed the provisions of the tax treaty applies to it, before the benefits may be extended to such corporation. In other words, a resident or non-resident foreign corporation shall be taxed according to the provisions of the National Internal Revenue Code, unless it is shown that the treaty provisions apply to the said corporation, and that, in cases the same are applicable, the option to avail of the tax benefits under the tax treaty has been successfully invoked.

Under Revenue Memorandum Order 01-2000 of the Bureau of Internal Revenue, it is provided that the availment of a tax treaty provision must be preceded by an application for a tax treaty relief with its International Tax Affairs Division (ITAD). This is to prevent any erroneous interpretation and/or application of the treaty provisions with which the Philippines is a signatory to. The implementation of the said Revenue Memorandum Order is in harmony with the objectives of the contracting state to ensure that the granting of the benefits under the tax treaties are enjoyed by the persons or corporations duly entitled to the same.

The Court notes that nowhere in the records of the case was it shown that petitioner indeed took the liberty of properly observing the provisions of the said order. Petitioner quotes various BIR, as well as ITAD, Rulings issued to several foreign corporations seeking for a tax relief from the office of the respondent. However, not any one of these rulings pertains to the petitioner. It must be stressed that BIR rulings are issued based on the facts and circumstances surrounding particular issue/issues in question and are resolved on a case-to-case basis. It would be thus erroneous to invoke the ruling of the respondent in specific cases, which have no bearing to the case of petitioner.

Lastly, it is petitioner's argument that, having established the existence of permanent establishments for VHL Enterprises and WES World-wide Education Service Ltd., they should be legally considered as resident foreign corporations for income tax purposes and the income payments to said corporations are subject only to the 5% creditable withholding tax under the provisions of Revenue Regulations No. 2-98, more particularly, Section 2.57.2 or the provision on income payments subject to creditable withholding tax. Correspondingly, petitioner availed of the Voluntary Assessment Program under Revenue Regulations No. 8-2001, and remitted the corresponding amount to herein respondent on December 18, 2001.

This Court finds petitioner's arguments untenable.

It must be pointed out that indubitably, VHL Enterprise and WES Worldwide Education Services are non-resident foreign corporations with fixed places of business and residences in the United States and United Kingdom, respectively. The finding that they have effectively created permanent-establishments makes them liable to pay taxes to the Philippine government for taxable transactions within the Philippines but it does not automatically convert their status into "resident foreign corporations" in the Philippines.

And inasmuch as petitioner failed to show that VHL Enterprises and WES World-wide Education Service, Ltd. are resident foreign corporations, then they cannot be considered as resident foreign corporations. Hence, they are subject to the final withholding tax as non-resident foreign corporations under Section 28(B) of the Tax Code.

With respect to the appropriate taxes for which petitioner should be held liable arising from the business dealings with VHL Enterprise and WES World-wide Education Services, we look at the provisions of Section 28(B)(1) of the National Internal Revenue Code of 1997 and Section 2.57-1 of Revenue Regulations 2-98, to wit:

> "**SEC. 28. Rates of Income Tax on Foreign Corporations**. -
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> **(B) Tax on Nonresident Foreign Corporation**. –
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> (1) In General. - Except as otherwise provided in this Code, a foreign corporation not engaged in trade or business in the Philippines shall pay a tax equal to thirty-five percent (35%) of the gross income received during each taxable year from all sources within the Philippines, such as interests, dividends, rents, royalties, salaries, premiums (except reinsurance premiums), annuities, emoluments or other fixed or determinable annual, periodic or casual gains, profits and income, and capital gains, except capital gains subject to tax under subparagraphs 5(c) and (d): *Provided*, That effective January 1, 1998, the rate of income tax shall be thirty-four percent (34%); effective January 1, 1999, the rate shall be thirty-three percent (33%); and, effective January 1, 2000 and thereafter, the rate shall be thirty-two percent (32%).
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> **REVENUE REGULATIONS NO. 2-98**
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> **SEC. 2.57 – WITHHOLDING OF TAX AT SOURCE**
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> **xxx xxx xxx**

> (I) *Income Derived From all Sources Within the Philippines by Non- Resident Foreign Corporation.* - The following shall be subject to final withholding tax based on the gross amount of income and at the rate of tax prescribed therefore:
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> (1) In general - On gross income derived from all sources within the Philippines such as interests, dividends, rents, royalties, salaries, premiums (except reinsurance premiums), annuities, emoluments, or other fixed or determinable annual, periodic or casual gains, profits and income and capital gains (except capital gains realized from sale, exchange, disposition of shares of stock in any domestic corporation which is subject to capital gains tax under Sec. 28(B)(5)(c) — at the following rates:
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> 34% - beginning January 1, 1998
> 33% - beginning January 1, 1999 and
> 32% - beginning January 1, 2000 and thereafter."

Revenue Regulations No. 2-98 was issued to implement the provisions of R.A. No. 8424, An Act Amending the NIRC, as amended, relative to the Withholding on Income subject to the Expanded Withholding Tax and Final Withholding Tax, Withholding of Income Tax on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes. Additionally, Section 57 of the NIRC speaks of "Withholding of Tax at Source" and it enumerates under Subsection (A) thereof, the specific sections in the NIRC when "Withholding of Final Tax on Certain Incomes" shall be imposed. The enumeration therein includes Section 28 (B) of the NIRC, or the provision on the taxability of the income of non-resident foreign corporations, as subject to the final tax at 32%.

These provisions are the applicable provisions in the case at bar. Thus, the income payments of petitioner to VHL Enterprises and WES Worldwide

Education Services Ltd., which are both non-resident foreign corporations, are subject to the final tax of 32%.

The provision on "creditable withholding tax" mentioned in Section 2.57.2 of Revenue Regulations No. 2-98, invoked by petitioner are not applicable in the case at bar because this section pertains to "Income payments subject to **creditable withholding tax** and the rates prescribed thereon" because this section pertains to income payments to persons residing in the Philippines. To reiterate, VHL Enterprises and WES World-wide Education Service Ltd. are non-resident foreign corporations.

Conversely, Revenue Regulations No. 8-2001 or the Voluntary Assessment Program of the respondent grants the taxpayer, in this case, herein petitioner, the privilege of last priority in the audit and investigation of the internal revenue taxes for the taxable year ending December 31, 2000 and prior years. The payment by petitioner of the 5% creditable withholding taxes under this program did not in any way give an assurance to and admission by the respondent that petitioner did pay the correct tax due.

It is basic that the government is not estopped from questioning the tax liability of a taxpayer even if payments have already been received. As the Certificate of Qualification so states, the availment of Revenue Regulations No. 8-2001 was merely to entitle the taxpayer to the privilege of last priority in the investigation and audit of its taxes.

Furthermore, a careful perusal of the subject revenue regulations show that the stated deadline for the availment of the said program was until October

31, 2001 (as amended by Revenue Regulations No. 10-2001). Admittedly, petitioner filed and remitted the corresponding amount of 5% creditable withholding tax only on December 18, 2001, or two months after the deadline set by the respondent.

All the foregoing considered, this Court *en banc* finds no merit in the instant Petition for Review.

WHEREFORE, the instant petition is **DENIED**. Accordingly, the assailed Decision dated May 27, 2004, and Resolution dated September 22, 2004 , are hereby **AFFIRMED** *in toto*.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

(On leave)
ERNESTO D. ACOSTA
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(On leave)
OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court before the case was assigned to the writer of the opinion of this Court.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice