Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION

DGA ILIJAN B.V.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case Nos. 8911
For: Refund

Members:

DEL ROSARIO, P.J., *Chairperson*
UY, and
MINDARO-GRULLA, JJ.

Promulgated:
JUN 28 2018 : 3:00 pm

x- -x

DECISION

MINDARO-GRULLA, J.:

This is a Petition for Review filed by DGA Ilijan B.V. against the Commissioner of Internal Revenue, pursuant to Section 7(a)(2)[1] of Republic Act (RA) No. 1125, otherwise known as "An Act Creating the Court of Tax Appeals", as amended, as well as Section 3(a)(2)[2] of Rule 4 and Section 4(a)[3] of Rule 8 of the Revised Rules of the Court of Tax Appeals, as amended.

---

[1] SEC. 7. *Jurisdiction.* - The CTA shall exercise:
(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
xxx
(2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relations thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial;

[2] SEC. 3. *Cases within the jurisdiction of the Court in Division.* – The Court in Division shall exercise:
(a) Exclusive original over or appellate jurisdiction to review by appeal the following:
xxx
(2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code or other applicable law provides a specific period for action: xxx;

[3] SEC. 4. *Where to appeal; mode of appeal.* –

Petitioner seeks the refund or the issuance of a tax credit certificate (TCC) in the amount of Eleven Million Thirteen Thousand Five Hundred Eighty-Three and 11/100 Pesos (₱11,013,583.11), allegedly representing excess and erroneously paid final withholding tax (FWT), inclusive of interest and compromise penalty.

Petitioner DGA Ilijan B.V. is a non-resident foreign corporation, organized and existing under the laws of the Netherlands, with address at Claude Debussylaan 28 12 1082 MD Amsterdam. The company's purpose is, among others, to incorporate, to finance, to participate in, to manage and to supervise companies and other enterprises.[4]

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) who has the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the National Internal Revenue Code (NIRC) or other laws or portions thereof administered by the BIR. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On June 10, 2011, petitioner entered into a Deed of Exchange with Mitsubishi Corporation ("Mitsubishi" for brevity), where Mitsubishi transferred 12,370,688 common shares of TeaM Diamond Holding Corporation (TDHC) to petitioner.[5]

On the same date, petitioner and Mitsubishi also entered into a Declaration of Trust, where the parties agreed that Mitsubishi will hold in trust for the benefit of petitioner the TDHC shares, and that the trust will automatically terminate following the issuance by the Bureau of Internal Revenue of a Certificate Authorizing Registration with respect to the transfer of shares from Mitsubishi to petitioner and upon

---

(a) An appeal from a decision or ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claim for refund of internal revenue taxes erroneously or illegally collected, the decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, and the Regional Trial Court in the exercise of their original jurisdiction, shall be taken to the Court by filing before it a petition for review as provided in Rule 42 of the Rules of Court. The Court in Division shall act on the appeal.

[4] Exhibits "P-1" and "P-2", Docket, vol. II, pp. 707-736.

[5] Exhibit "P-4", Docket, vol. I, pp. 354-357.

l

recording of the shares in the name of petitioner in the stock and transfer book of TDHC.[6]

On January 11, 2012, the Board of Directors of TDHC approved the declaration of dividend in the amount of $8,577,000.00 payable to all of its stockholders of record as of January 11, 2012.[7]

On January 17, 2012, petitioner filed a Tax Treaty Relief Application (TTRA) with the BIR's International Tax Affairs Division (ITAD) in order to confirm that the dividend income from TDHC is entitled to the ten percent (10%) preferential rate provided under Article 10(2)(a) of the Convention between the Kingdom of the Netherlands and the Republic of the Philippines for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("Philippines-Netherlands tax treaty" for brevity).[8]

On February 8, 2012, TDHC filed, through the BIR's Electronic Filing and Payment System (EFPS), its Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F), and remitted the amount of ₱19,329,314.87 representing the 10% FWT withheld from petitioner.[9]

Subsequently, respondent issued BIR Ruling No. ITAD 328-12 dated September 3, 2012 denying petitioner's TTRA on the ground that the application was not filed before the date of transaction, *i.e.*, dividend payment, in alleged violation of Revenue Memorandum Order (RMO) No. 72-2010.[10]

Petitioner appealed respondent's ruling to the Secretary of Finance, who denied the same and affirmed BIR Ruling No. ITAD 328-12.[11]

Meanwhile, since the TTRA was denied by the BIR, petitioner remitted the amount of $275,000 to TDHC to pay for the difference between the preferential tax rate of 10% under Article 10(2)(a) of the

---

[6] Exhibit "P-5", Docket, vol. II, p. 738.
[7] Exhibit "P-10", Docket, vol. I, p. 391.
[8] Exhibits "P-6", "P-6-1", "P-6-2", "P-6-3", P-6-4", P-6-5", P-6-6", "P-6-7", "P-6-8", "P-6-9", "P-6-10", and "P-6-11", Docket, vol. I, pp. 361-372.
[9] Par. 3, Joint Stipulation of Facts and Issues (JSFI), Docket, vol. I, p. 457.
[10] Exhibit "P-7", Docket, vol. I, pp. 373-375; Par. 4, JSFI, Docket, vol. I, p. 457.
[11] Exhibit "P-8", Docket, vol. I, pp. 376-378; Pars. 5 and 6, JSFI, Docket, vol. I, p. 457.

/

Philippines-Netherlands tax treaty and the rate of fifteen percent (15%) imposed under Section 28(B)(5)(b) of the National Internal Revenue Code of 1997, as amended, and the corresponding interest and penalties thereon.[12] The unused amount of $8,327.29 was subsequently remitted back to petitioner by TDHC.[13]

Thus, on October 22, 2012, TDHC paid to the BIR on behalf of petitioner the total amount of ₱11,013,583.11 consisting of (a) additional 5% FWT on the dividends amounting to ₱9,664,657.43, (b) interest of ₱1,323,925.68, and (c) compromise penalty of ₱25,000.00.[14]

On August 19, 2013, the Supreme Court promulgated its decision in the case of *Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue*[15] (*Deutsche Bank*), holding that the period of application for the availment of tax treaty relief should not operate to divest entitlement to the relief as it would constitute a violation of the duty required by good faith in complying with a tax treaty.

On this basis, petitioner filed on April 21, 2014 an administrative claim for refund of excess and erroneously paid FWT, inclusive of interest and penalties, amounting to ₱11,013,583.11.[16]

Due to respondent's inaction on petitioner's administrative claim for refund, petitioner filed the instant Petition for Review on October 20, 2014.[17]

On January 22, 2015, respondent filed his Answer[18] and interposed the following special and affirmative defenses:

> "5. Respondent reproduces and repleads all the foregoing allegations insofar as they are relevant to her defenses which are discussed hereunder and incorporates

[12] Exhibit "P-21", Docket, vol. I, p. 444.
[13] Exhibits "P-22" and "P-23", Docket, vol. II, pp. 784-785.
[14] Exhibit "P-20", Docket, vol. II, pp. 782-783.
[15] G.R. No. 188550, August 19, 2013.
[16] Exhibits "P-9", "P-9-2", "P-9-3", "P-9-4", "P-9-5", "P-9-6", "P-9-7", "P-9-8", "P-9-9", "P-9-10", "P-9-11", and "P-9-12", Docket, vol. I, pp. 379-390; Par. 7, JSFI, Docket, vol. I, p. 457.
[17] Docket, vol. I, pp. 6-16; Par. 8, JSFI, Docket, vol. I, p. 457.
[18] Docket, vol. I, pp. 109-111.

l

them herein by way of reference and, in addition thereto, most respectfully avers THAT:

6. Petitioner's alleged claim for issuance of tax credit certificate is still subject to administrative routinary investigation/examination by the respondent's Bureau.

7. Taxes paid and collected are presumed to have been made in accordance with law, hence, not refundable.

8. Petitioner's claim for refund or issuance of tax credit certificate in the amount of Php11,013,583.11, allegedly representing excess and erroneously paid final withholding tax (FWT) inclusive of interest and compromise penalty.

9. In an action for refund/credit, the burden of proof is on the petitioner to establish its right to claimed refund and failure to adduce sufficient proof is fatal to the claim for tax refund/credit.

10. Petitioner failed to comply with the conditions/requirements under Section 112(A)(B)(C) of the 1997 Tax Code.

11. It is incumbent upon the latter to show that it has complied with the provisions under Section 204 (c) in relation to Section 229 of the Tax Code. Otherwise, its failure to prove the same is fatal to its claim for refund.

12. Claims for refund are construed strictly against herein petitioner since the same partakes the nature of exemption from taxation (***Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95***) and as such, they are looked upon with disfavor (***Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211***)."

ℓ

Since respondent filed his Answer two (2) days late without any written explanation, the Court deemed the Answer as not filed.[19] Respondent filed a Motion for Reconsideration (with Motion to Admit Answer)[20], which the Court granted[21] on May 19, 2015. Hence, respondent's Answer was admitted by the Court on the same date.

Thereafter, a Notice of Pre-Trial Conference[22] was issued by the Court on May 25, 2015, setting the case for pre-trial conference on July 23, 2015. Accordingly, Petitioner's Pre-Trial Brief[23] was filed on July 15, 2015; while the Pre-Trial Brief (for the Respondent)[24] was filed on July 7, 2015.

Pre-trial ensued. The parties filed their Joint Stipulation of Facts and Issues[25] on August 7, 2015. Thereafter, a Pre-Trial Order[26] was issued on August 28, 2015 and the pre-trial was deemed terminated.

During trial, petitioner presented Ms. Ng Yu Mei May[27], Atty. Rosalie F. Factor[28], Ms. Marienette Marcelino[29], and Ms. Mary Ruth L. Calderon[30].

Ms. Ng Yu Mei May, Controller of Diamond Generating Asia, Limited (DGA), an affiliate of petitioner, testified that she is responsible for providing tax and accounting services to petitioner. She stated that TDHC withheld the amount of ₱19,329,314.87 as 10% FWT due on the dividends to be given to petitioner. She further testified that TDHC withheld FWT at the rate of 10% and not 15% because they were advised by their tax advisor that since petitioner is a resident of

---

[19] Order dated February 6, 2015, Docket, vol. I, p. 113.
[20] Docket, vol. I, pp. 114-116.
[21] Resolution dated May 19, 2015, Docket, vol. I, pp. 128-131.
[22] Docket, vol. I, pp. 132-133.
[23] Docket, vol. I, pp. 311-322.
[24] Docket, vol. I, pp. 447-448.
[25] Docket, vol. I, pp. 456-462.
[26] Docket, vol. I, pp. 466-473.
[27] Sworn Statement of Ms. Ng Yu Mei May to Questions Propounded by Atty. Jerome Joseph B. Arnaldo, Docket, vol. I, pp. 493-501; Minutes of the Hearing dated November 3, 2015, Docket, vol. I, pp. 480-484.
[28] Sworn Statement of Atty. Rosalie F. Factor to Questions Propounded by Atty. Joanness S. Batimana, Docket, vol. I, pp. 231-236; Minutes of the Hearing dated December 8, 2015, Docket, vol. I, pp. 514-515.
[29] Sworn Statement of Ms. Marienette Marcelino to Questions Propounded by Atty. Alexis Joseph R. Noble, Docket, vol. II, pp. 618-622; Minutes of the Hearing dated September 20, 2016, Docket, vol. II, pp. 659-660.
[30] Sworn Statement of Ms. Mary Ruth L. Calderon to Questions Propounded by Atty. Alexis Joseph R. Noble, Docket, vol. II, pp. 630-638; Minutes of the Hearing dated September 27, 2016, Docket, vol. II, pp. 664-667.

ℒ

Netherlands and TDHC is a resident of the Philippines, the payment of dividends would be covered by the Philippines-Netherlands tax treaty. Ms. Ng testified that upon the BIR's denial of petitioner's TTRA, its tax advisor advised them that the cash dividends from TDHC is subject to FWT of 15% pursuant to the tax sparing clause under Section 28(B)(5)(b) of the Tax Code. Since there was a deficiency FWT of 5%, petitioner remitted to TDHC the amount of $275,000 to pay for the deficiency FWT as well as interest and penalty. Out of this amount, TDHC used $266,672.71 to pay for the deficiency FWT, and the unused amount of $8,327.29 was remitted back to petitioner.

Atty. Rosalie F. Factor, Corporate Secretary of TDHC, testified that petitioner is the beneficial owner of 12,370,688 shares of stock of TDHC or 51.21% of TDHC's outstanding capital stock. She explained that these shares of stock were originally owned by Mitsubishi Corporation, and that subsequently, TDHC was furnished copies of (1) the Deed of Exchange dated June 10, 2011 where Mitsubishi transferred its TDHC shares to petitioner, and (2) the Declaration of Trust stating that Mitsubishi is holding the TDHC shares in trust for the benefit of petitioner until such time that the BIR issues a Certificate Authorizing Registration of the said shares and these shares are recorded in petitioner's name in TDHC's stock and transfer book. Atty. Factor likewise testified that TDHC paid to petitioner such dividends corresponding to the 12,370,688 shares that petitioner acquired from Mitsubishi.

Ms. Marienette Marcelino, Treasury Senior Manager of TDHC, testified that sometime in November 2014, she received a request from petitioner's representative for a bank certification relative to petitioner's remittance to TDHC's bank account on October 19, 2012 of the amount of $275,000.00. She further testified that on November 14, 2014, Citibank N.A. issued a Certification confirming the said inward remittance from Bank of Tokyo-Mitsubishi UFJ (Holland) N.V., by order of petitioner, and that of this amount, TDHC used $266,672.71 to pay the BIR on behalf of petitioner. The unused amount of $8,327.29 was remitted back to petitioner.

Lastly, **Ms. Mary Ruth L. Calderon**, Tax Senior Analyst of TDHC, testified that petitioner initially received the amount of $3,953,184.43, equivalent to ₱173,963,833.83, from TDHC on January 12, 2012. This amount represents the dividends of $4,392,427.14 to which petitioner was entitled, which is equivalent to ₱193,293,148.70,

L

less the amount of ₱19,329,314.87 which was the FWT deducted from the said dividends. However, sometime in October 2012, petitioner returned the amount of ₱9,664,657.43 from the dividends that it received from TDHC, and requested TDHC to remit the said amount to the BIR representing the 5% deficiency FWT, together with interest of ₱1,323,925.68 and compromise penalty of ₱25,000.00. She likewise stated that she prepared and filed, through the Electronic Filing and Payment System, the Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F) for January 2012, and the Certificate of Final Tax Withheld at Source (BIR Form No. 2306) which was given to petitioner as proof that the amount of ₱19,329,314.87 was deducted as withholding tax. She testified that subsequently, TDHC issued a Revised Certificate of Final Tax Withheld at Source (BIR Form No. 2306) in the amount of ₱28,993,972.31 as proof of the aggregate amount withheld in connection with the payment of dividends to petitioner on January 12, 2012, and prepared an Amended Monthly Remittance Return of Final Taxes Withheld (BIR Form No. 1601-F) for the month of January 2012 as proof of remittance to the BIR of the additional FWT, interest, and compromise penalty.

Petitioner filed its Formal Offer of Evidence[31] on November 17, 2016, and in the Resolution[32] dated February 8, 2017, the Court admitted all of petitioner's exhibits.

The documentary evidence offered by the petitioner are as follows:

Exhibit	Document
P-1	Petitioner's Deed of Incorporation duly authenticated by the Philippine Embassy in the Netherlands
P-2	Petitioner's Declaration of Residence dated January 19, 2012 duly authenticated by the Philippine Embassy in the Netherlands
P-3	Petitioner's Certification of Non-Registration issued by the Securities and Exchange Commission (SEC) of the Philippines
P-4	Deed of Exchange between Mitsubishi Corporation and Petitioner dated June 10, 2011 and duly authenticated by the Philippine Embassy in Tokyo, Japan

[31] Docket, vol. II, pp. 688-706.
[32] Docket, vol. II, pp. 793-795.

L

P-5	Declaration of Trust between Mitsubishi Corporation and Petitioner dated June 10, 2011
P-5-1	Signature of Mr. Hiroshi Sakuma
P-6, inclusive of sub-markings	Petitioner's Tax Treaty Relief Application (TTRA) and BIR Form 0901-D filed with the BIR on January 17, 2012
P-6-1 to P-6-9	Letter dated January 12, 2012 addressed to the Bureau of Internal Revenue, International Tax Affairs Division
P-6-9-a	Signature of Mr. Wilfredo U. Villanueva
P-6-10	TTRA for Dividend Income (BIR Form No. 0901-D)
P-6-10-a	Signature of Mr. Wilfredo U. Villanueva
P-6-11	Dorsal portion of P-6-10
P-7	BIR Ruling No. ITAD 328-12 issued by the BIR on 3 September 2012
P-8	Ruling of the Secretary of Finance dated December 12, 2012 upholding the denial of Petitioner's TTRA
P-9, inclusive of sub-markings	Claim for refund and BIR Form 1914 that SGV & Co. filed with the BIR on April 21, 2014 on behalf of Petitioner
P-9-1	Application for Tax Credits/Refunds (BIR Form No. 1914) dated 16 April 2014
P-9-1-a	Signature of Atty. Jonald R. Vergara
P-9-2 to P-9-12	SGV's letter dated 16 April 2014 explaining the basis for Petitioner's claim for refund
P-9-12-a	Signature of Atty. Jonald R. Vergara
P-10	Secretary's Certificate dated January 16, 2012
P-10-1	Signature of Ms. Rosalie F. Factor
P-11	Secretary's Certificate dated January 16, 2012
P-11-1	Signature of Ms. Rosalie F. Factor
P-12	Stock Certificate No. 20 of Southern Diamond Holding Corporation
P-13	Stock Certificate No. 24 of Southern Diamond Holding Corporation
P-14	Certificate of Filing of Amended Articles of Incorporation dated June 21, 2001
P-15	Certificate of Filing of Amended Articles of Incorporation dated August 13, 2007
P-16	TDHC's General Information Sheet for the year 2012
P-17	Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F) for January 2012
P-18	Certificate of Final Tax Withheld at Source (BIR Form No. 2306) showing a tax withheld of Php19,329,314.87
P-18-1	Signature of Mr. Kazunobu Takijima
P-18-2	Initials of Ms. Taryn Uberita
P-19	Certificate of Final Tax Withheld At Source (BIR Form No. 2306)

L

P-19-1	Signature of Mr. Kazunobu Takijima
P-19-2	Initials of Ms. Taryn Uberita
P-20	Amended Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F) for the month of January 2012, with Filing Reference No. 201200006484454
P-21	Certification of Citibank N.A. Philippines – Makati Branch dated November 14, 2014
P-21-1	Signature of Ms. Catherine T. Paz
P-22	Application of Funds Transfer duly received and processed by Citibank N.A. Philippines – Makati Branch
P-22-1	Signatures of Hirofumi Yasuhara and Kazunobu Takajima
P-22-2	Signature of Marienette Marcelino
P-23	Debit Advice issued by Citibank N.A. Philippines – Makati Branch
P-25	Sworn Statement of Ms. Ng May Mei Yu to Questions propounded by Atty. Jerome Joseph B. Arnaldo dated November 3, 2015
P-25-1	Signature of Ms. Ng May Mei Yu appearing on the above document
P-26	Sworn Statement of Ms. Rosalie F. Factor to Questions Propounded by Atty. Joanness S. Batimana dated January 29, 2015[33]
P-26-a	Signature of Ms. Rosalie F. Factor appearing on the above document
P-27	Sworn Statement of Ms. Marinette Marcelino to Questions Propounded by Atty. Alexis Joseph R. Noble dated May 12, 2016[34]
P-27-1	Signature of Ms. Marinette Marcelino appearing on the above document
P-28	Sworn Statement of Ms. Mary Ruth L. Calderon to Questions Propounded by Atty. Alexis Joseph R. Noble dated May 12, 2016[35]
P-28-1	Signature of Ms. Mary Ruth L. Calderon appearing on the above document

On the other hand, respondent manifested that he will no longer be presenting any evidence in this case since the BIR revenue examiner who handled petitioner's application for refund has no final report.[36]

[33] Exhibit "P-26", inclusive of submarking, already forms part of the records of the case.
[34] Exhibit "P-27", inclusive of submarking, already forms part of the records of the case.
[35] Exhibit "P-28", inclusive of submarking, already forms part of the records of the case.
[36] Manifestation filed by respondent on February 9, 2017, Docket, vol. II, pp. 796-797.

L

The case was deemed submitted for decision on July 6, 2017,[37] considering petitioner's Memorandum[38] filed on May 25, 2017 and respondent's failure to file his memorandum despite notice.[39]

The parties submitted the following issue for this Court's resolution:[40]

> Whether or not petitioner is entitled to its claim for cash refund, or otherwise, issuance of a TCC, in the amount of ₱11,013,583.11 representing excess and erroneously paid FWT on dividends, inclusive of interest and compromise penalty.

DISCUSSION/RULING

The Petition for Review was timely filed

The Court shall first determine petitioner's compliance with the procedures governing the filing of claims for refund under Sections 204(C) and 229 of the NIRC of 1997, as amended, quoted hereunder for ready reference:

> "SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –
>
> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of

[37] Resolution dated July 6, 2017, Docket, vol. II, p. 869.
[38] Docket, vol. II, pp. 846-863
[39] Records Verification dated June 29, 2017, Docket, vol. II, p. 866.
[40] Issue, JSFI, Docket, vol. I, p. 457.

L

destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty:** *Provided, however*, that a return filed showing an overpayment shall be considered as a written claim for credit or refund." *(Emphasis supplied)*

"SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however*, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." *(Emphasis supplied)*

Based on the afore-quoted provisions, both the administrative and the judicial claims must be filed within two (2) years from the date of payment of the tax. Section 204(C) applies to administrative claims filed with the BIR, while Section 229 refers to judicial actions for the recovery of taxes erroneously or illegally collected and filed with the Court.[41]

Records show that petitioner paid the 5% additional FWT on October 22, 2012.[42] Counting from said date, it had until October 22,

---

[41] *PMFTC, Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 8691, July 27, 2015.
[42] Exhibit "P-20", Docket, vol. II, p. 782.

L

2014 within which to file its claim for refund administratively and judicially.

Petitioner's administrative claim for refund was filed on April 21, 2014[43]; while the instant Petition for Review was filed on October 20, 2014[44]. Hence, both the administrative and the judicial claims for refund were timely filed.

Failure to file a TTRA before the date of transaction does not deprive a taxpayer of entitlement to treaty relief

In denying petitioner's TTRA, respondent ruled that petitioner violated the requirement of RMO No. 72-2010, which states that filing of the TTRA should be made before the transaction. The pertinent portions of respondent's decision are quoted hereunder:

> "Relative thereto, please be informed that Section 14 of **Revenue Memorandum Order ('RMO') No. 72-2010,** published in the Manila Bulletin on October 20, 2010, and effective November 4, 2010, provides that:
>
> > ***'SECTION 14. WHEN AND WHERE TO FILE THE TTRA*** –
> >
> > *All tax treaty relief applications (updated BIR Forms No. 0901-D, 0901-I, 0901-R, 0901-P, 0901-S, 0901-T, 0901-O and 0901-C) relative to the implementation and interpretation of the provisions of Philippine tax treaties shall only be submitted to and received by the International Tax Affairs Division (ITAD). If the forms of any necessary documents are submitted to any other BIR office, the application shall be considered as improperly filed.*

[43] Exhibits "P-9", "P-9-2", "P-9-3", "P-9-4", "P-9-5", "P-9-6", "P-9-7", "P-9-8", "P-9-9", "P-9-10", "P-9-11", and "P-9-12", Docket, vol. I, pp. 379-390; Par. 7, JSFI, Docket, vol. I, p. 457.
[44] Docket, vol. I, p. 6.

L

<u>Filing should always be made BEFORE the transaction. Transaction for purposes of filing the TTRA shall mean before the occurrence of the first taxable event.</u>

<u>Failure to properly file the TTRA with ITAD within the period prescribed herein shall have the effect of disqualifying the TTRA under this RMO.</u>' *(Emphasis Supplied)*

This condition was emphasized by the Court of Tax Appeals in **Mirant (Philippines) Operations Corporation vs. Commissioner of Internal Revenue (C.T.A. Case No. 6382 dated June 7, 2005)** where it ruled:

xxx xxx xxx

This decision was also upheld by the Supreme Court in a Resolution (G.R. No. 168531) dated February 18, 2008.

Furthermore, the necessary requirement laid down in RMO 1-2000 is reiterated in subsequent rulings of the Court of Tax Appeals: **Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue (C.T.A. Case No. EB 456 dated May 29, 2009), CBK Power Company Ltd. vs. Commissioner of Internal Revenue (C.T.A. Case Nos. 6699, 6844 and 7166 dated March 29, 2010)** and **Manila North Tollways Corporation vs. Commissioner of Internal Revenue (C.T.A. Case No. 7864 dated April 12, 2011)**.

In view of the foregoing and considering that the dividends received by **DGA BV** were paid on **January 12, 2012** per Certification dated May 28, 2012, while the subject TTRA was only filed on **January 17, 2012**, in violation of the requirement of RMO 72-2010 that filing of the TTRA should be made BEFORE the transaction, that is the payment of dividend, this Office holds that the subject TTRA is hereby denied. Accordingly, said dividend payment shall be subject to tax at the rate of 30 percent as provided in Section 28 of the Tax Code of 1997, as amended."

Petitioner cites the *Deutsche Bank* case and argues that failure to file a TTRA does not operate to divest entitlement to treaty relief, and that the BIR must not impose additional requirements that would negate the availment of the reliefs provided for under international agreements.

The Court finds for petitioner.

The issue which confronts this Court has already been settled by the Supreme Court in *Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue*[45] in the following manner:

"***Tax Treaty vs. RMO No. 1-2000***

Our Constitution provides for adherence to the general principles of international law as part of the law of the land. The time-honored international principle of *pacta sunt servanda* demands the performance in good faith of treaty obligations on the part of the states that enter into the agreement. Every treaty in force is binding upon the parties, and obligations under the treaty must be performed by them in good faith. More importantly, treaties have the force and effect of law in this jurisdiction.

Tax treaties are entered into 'to reconcile the national fiscal legislations of the contracting parties and, in turn, help the taxpayer avoid simultaneous taxations in two different jurisdictions.' *CIR v. S.C. Johnson and Son, Inc.* further clarifies that 'tax conventions are drafted with a view towards the elimination of international juridical double taxation, which is defined as the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for

[45] G.R. No. 188550, August 19, 2013.

identical periods. The apparent rationale for doing away with double taxation is to encourage the free flow of goods and services and the movement of capital, technology and persons between countries, conditions deemed vital in creating robust and dynamic economies. Foreign investments will only thrive in a fairly predictable and reasonable international investment climate and the protection against double taxation is crucial in creating such a climate. Simply put, tax treaties are entered into to minimize, if not eliminate the harshness of international juridical double taxation, which is why they are also known as double tax treaty or double tax agreements.

'A state that has contracted valid international obligations is bound to make in its legislations those modifications that may be necessary to ensure the fulfillment of the obligations undertaken.' **Thus, laws and issuances must ensure that the reliefs granted under tax treaties are accorded to the parties entitled thereto. The BIR must not impose additional requirements that would negate the availment of the reliefs provided for under international agreements.** More so, when the RP-Germany Tax Treaty does not provide for any pre-requisite for the availment of the benefits under said agreement.

Likewise, it must be stressed that there is nothing in RMO No. 1-2000 which would indicate a deprivation of entitlement to a tax treaty relief for failure to comply with the 15-day period. We recognize the clear intention of the BIR in implementing RMO No. 1-2000, but the CTA's outright denial of a tax treaty relief for failure to strictly comply with the prescribed period is not in harmony with the objectives of the contracting state to ensure that the benefits granted under tax treaties are enjoyed by duly entitled persons or corporations.

Bearing in mind the rationale of tax treaties, the period of application for the availment of tax treaty relief as required by RMO No. 1-2000 should not operate to divest entitlement to relief as it would constitute a violation of the duty required by

L

good faith in complying with a tax treaty. The denial of the availment of tax relief for the failure of a taxpayer to apply within the prescribed period under the administrative issuance would impair the value of the tax treaty. At most, the application for a tax treaty relief from the BIR should merely operate to confirm the entitlement of the taxpayer to the relief.

The obligation to comply with a tax treaty must take precedence over the objective of RMO No. 1-2000. Logically, noncompliance with tax treaties has negative implications on international relations, and unduly discourages foreign investors. While the consequences sought to be prevented by RMO No. 1-2000 involve an administrative procedure, these may be remedied through other system management processes, e.g., the imposition of a fine or penalty. But we cannot totally deprive those who are entitled to the benefit of a treaty for failure to strictly comply with an administrative issuance requiring prior application for tax treaty relief." *(Citations omitted and emphasis supplied)*

This was reiterated by the Supreme Court in the subsequent case of *CBK Power Company Limited vs. Commissioner of Internal Revenue*[46], thus:

"The objective of RMO No. 1-2000 in requiring the application for treaty relief with the ITAD before a party's availment of the preferential rate under a tax treaty is to avert the consequences of any erroneous interpretation and/or application of treaty provisions, such as claims for refund/credit for overpayment of taxes, or deficiency tax liabilities for underpayment. However, as pointed out in *Deutsche Bank,* the underlying principle of prior application with the BIR becomes **moot in refund cases** – as in the present case – where the very basis of the claim is **erroneous or there is excessive payment** arising from the non-availment of a tax treaty relief at the first instance. Just as Deutsche Bank was not faulted by the Court for not complying with RMO No. 1-2000 prior to the transaction, so should CBK Power. In parallel, CBK Power could not

[46] G.R. Nos. 193383-84, January 14, 2015.

ℒ

have applied for a tax treaty relief 15 days prior to its payment of the final withholding tax on the interest paid to its lenders **precisely because it erroneously paid said tax** on the basis of the regular rate as prescribed by the NIRC, and not on the preferential tax rate provided under the different treaties. As stressed by the Court, the prior application requirement under RMO No. 1-2000 then becomes **illogical**.

Not only is the requirement illogical, but it is also an imposition that is **not found at all in the applicable tax treaties**. In *Deutsche Bank*, the Court categorically held that the BIR should not impose additional requirements that would negate the availment of the reliefs provided for under international agreements, especially since said tax treaties do not provide for any prerequisite at all for the availment of the benefits under said agreements.

It bears reiterating that the application for a tax treaty relief from the BIR should **merely operate to confirm** the entitlement of the taxpayer to the relief. Since CBK Power had requested for confirmation from the ITAD on June 8, 2001 and October 28, 2002 before it filed on April 14, 2003 its administrative claim for refund of its excess final withholding taxes, the same should be **deemed substantial compliance** with RMO No. 1-2000, as in *Deutsche Bank.* To rule otherwise would defeat the purpose of Section 229 of the NIRC in providing the taxpayer a remedy for erroneously paid tax solely on the ground of failure to make prior application for tax treaty relief. As the Court exhorted in *Republic v. GST Philippines, Inc.*, while the taxpayer has an obligation to honestly pay the right taxes, the government has a corollary duty to implement tax laws in good faith; to discharge its duty to collect what is due to it; and to **justly return what has been erroneously and excessively given to it**." *(Citations omitted)*

From the foregoing disquisitions of the Supreme Court on the matter, it is clear that a prior application for tax treaty relief is not required before a taxpayer can avail of the preferential tax treatments under Philippine tax treaties. Hence, petitioner's failure to file a TTRA

ℓ

before the date of the transaction does not deprive it of entitlement to treaty relief.

Petitioner is entitled to a refund or issuance of a tax credit certificate

Petitioner avers that it complied with the requirements under the Philippine-Netherlands tax treaty, and hence, is qualified for the application of the 10% preferential tax rate granted under Article 10(2)(a) of the same. Thus, it contends that it is entitled to the refund of the additional 5% FWT, with interest and penalties, which it paid to the BIR.

Section 28(B) of the NIRC of 1997, as amended, provides that a non-resident foreign corporation is subject to income tax at the rate of thirty percent (30%) on income from sources within the Philippines, to wit:

> "SEC. 28. *Rates of Income Tax on Foreign Corporations.* –
>
> xxx xxx xxx
>
> (B) *Tax on Nonresident Foreign Corporation.* –
>
> (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 subparagraph 5(c): *Provided,* That effective January 1, 2009, the rate of income tax shall be thirty percent (30%)."

ℓ

For intercorporate dividends received by a non-resident foreign corporation, FWT of fifteen percent (15%) may be imposed, instead of the 30% income tax, on the amount of dividends received from a domestic corporation, subject to the conditions laid down by Section 28(B)(5)(b) of the NIRC of 1997, as amended, which states:

> "SEC. 28. *Rates of Income Tax on Foreign Corporations.* –
>
> xxx xxx xxx
>
> (B) *Tax on Nonresident Foreign Corporation.* –
>
> xxx xxx xxx
>
> (5) *Tax on Certain Incomes Received by a Nonresident Foreign Corporation.* –
>
> xxx xxx xxx
>
> (b) *Intercorporate Dividends.* – A final withholding tax at the rate of fifteen percent (15%) is hereby imposed on the amount of cash and/or property dividends received from a domestic corporation, which shall be collected and paid as provided in Section 57(A) of this Code, subject to the condition that the country in which the nonresident foreign corporation is domiciled, shall allow a credit against the tax due from the nonresident foreign corporation taxes deemed to have been paid in the Philippines equivalent to twenty percent (20%), which represents the difference between the regular income tax of thirty-five percent (35%) and the fifteen percent (15%) tax on dividends as provided in this subparagraph: *Provided,* that effective January 1, 2009 the credit against the tax due shall be equivalent to fifteen percent (15%), which represents the difference between the regular income tax of thirty percent (30%) and the fifteen percent (15%) tax on dividends;"

ℓ

However, the Tax Code also provides that such income may be exempted from income tax or subjected to a reduced income tax to the extent required by any treaty obligation of the Philippines, to wit:

> "SEC. 32. *Gross Income.* –
>
> xxx xxx xxx
>
> (B) *Exclusions from Gross Income.* – The following items shall not be included in gross income and shall be exempt from taxation under this Title:
>
> xxx xxx xxx
>
> (5) *Income Exempt under Treaty.* – Income of any kind, to the extent required by any treaty obligation binding upon the Government of the Philippines."

The Philippines-Netherlands tax treaty provides for the following guidelines with regard to dividends:

> "ARTICLE 10
> *Dividends*
>
> 1. Dividends paid by a company which is a resident of one of the States to a resident of the other State may be taxed in that other State.
>
> 2. However, such dividends may also be taxed in the State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:
>
> > a) 10 per cent of the gross amount of the dividends if the recipient is a company the capital of which is wholly or partially divided into shares and which holds directly at least 10

L

> per cent of the capital of the company paying the dividends;
>
> b) 15 per cent of the gross amount of the dividends in all other cases.
>
> xxx xxx xxx
>
> 5. The term 'dividends' as used in this Article means income from shares, 'jouissance' shares or 'jouissance' rights, mining shares, founders' shares or other rights participating in profits, as well as income from debt-claims participating in profits and income from other corporate rights which is subjected to the same taxation treatment as income from shares by the taxation law of the State of which the company making the distribution is a resident.
>
> 6. The provisions of paragraphs 1 and 2 shall not apply if the recipient of the dividends, being a resident of one of the States, carries on business in the other State, of which the company paying the dividends is a resident, through a permanent establishment situated therein or performs in that other State professional services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply."

Based on the above-quoted provisions, the Philippines may tax the dividends paid by a Philippine company to a resident of the Netherlands at a rate not exceeding (a) 10% of the gross amount of the dividends if the recipient is a company the capital of which is wholly or partly divided into shares and which holds directly at least 10% of the capital of the company paying the dividends; and (b) in all other cases, 15% of the gross amount of dividends. Moreover, to be entitled to the preferential tax rates, the recipient of the dividends who is a resident of the Netherlands must not carry on business in the Philippines pursuant to Article 10(6) above.

L

After a careful evaluation of the evidence on record, the Court finds that petitioner was able to comply with the foregoing provisions.

To prove the fact of withholding and remittance of the additional 5% FWT, petitioner presented the Amended Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F) for the month of January 2012; which shows that while TDHC has previously remitted the amount of ₱19,329,314.87, the tax required to be withheld is ₱28,993,972.30. Hence, the "Tax Amount Still Due" amounts to ₱11,013,583.11, consisting of basic tax of ₱9,664,657.43, interest of ₱1,323,925.68, and compromise of ₱25,000.00. Petitioner also presented the EFPS Payment Details showing TDHC's remittance to the BIR of ₱11,013,583.11 on October 22, 2012.[47]

The allegation that petitioner is a resident of the Netherlands is also sufficiently proven by the (1) Declaration of Residence issued by the inspector of the Tax Administration Rivierenland, the Netherlands, dated January 16, 2012; and (2) the Certificate of Non-Registration of Company issued by the Securities and Exchange Commission on January 11, 2012.

Petitioner was also able to comply with the requirement that its capital must be wholly or partly divided into shares. It presented its Deed of Incorporation which shows that petitioner's authorized capital amounts to Ninety Thousand Euros (EUR 90,000), divided into ninety thousand (90,000) shares, each share having a nominal value of One Euro (EUR 1).[48]

Lastly, to prove that petitioner is the beneficial owner of 51.21% of TDHC's outstanding capital stock, it submitted the following documents:

1. Deed of Exchange[49] between Mitsubishi Corporation and petitioner;
2. Declaration of Trust[50] between Mitsubishi Corporation and petitioner; and

[47] Exhibit "P-20", Docket, vol. II, pp. 782-783.
[48] Exhibit "P-1", Docket, vol. II, pp. 707-733.
[49] Exhibit "P-4", Docket, vol. I, pp. 354-357.
[50] Exhibit "P-5", Docket, vol. II, p. 738.

3. Secretary's Certificate[51] dated January 16, 2012 executed by Atty. Factor.

Petitioner also presented TDHC's General Information Sheet[52] for the year 2012, showing that TDHC has 40,000,000 authorized capital stocks, and 24,155,982 subscribed and paid-up capital.

From these documents, it is established that Mitsubishi transferred the 12,370,688 TDHC shares to petitioner on June 10, 2011, but held it in trust for the benefit of petitioner pending the issuance by the BIR of a Certificate Authorizing Registration and the recordation of the shares in the name of petitioner in the stock and transfer book of TDHC.

Out of the 24,155,982 subscribed and paid-up capital of TDHC, records prove that petitioner is the beneficial owner of 12,370,688 shares, or 51.21%, of TDHC.

Therefore, considering that petitioner, a resident of the Netherlands, is a company the capital of which is wholly divided into shares and holds directly 51.21% of TDHC, then the dividend payment of the latter to petitioner is subject to 10% preferential tax rate based on the gross amount of the dividends, pursuant to Article 10(2)(a) of the Philippines-Netherlands tax treaty.

Consequently, since the dividends received by petitioner were subjected to 15% FWT instead of the 10% preferential tax rate, then it is proper to grant petitioner its refund claim representing the additional 5% FWT it paid amounting to ₱9,664,657.43, plus interest of ₱1,323,925.68, and compromise penalty of ₱25,000.00.

WHEREFORE, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, respondent is **ORDERED TO REFUND OR ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the amount of ₱11,013,583.11, representing the following:

Excess 5% FWT paid on dividends	₱ 9,664,657.43

[51] Exhibit "P-11", Docket, vol. I, pp. 392-393.
[52] Exhibit "P-16", Docket, vol. II, pp. 772-779.

Interest	1,323,925.68
Compromise penalty	25,000.00
Total	**₱11,013,583.11**

SO ORDERED.

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

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

C E R T I F I C A T I O N

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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice
Chairperson, 1st Division