REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

SAL OPPENHEIM JR. & CIE KOMMANDITGESELLSCHAFT AUF AKTIEN,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 906
(CTA Case No. 7923)

Present:

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

Promulgated:

AUG 15 2013 apolinario 9:00 a.m.

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DECISION

COTANGCO-MANALASTAS, J.:

Before the Court *En Banc* is a *Petition for Review* filed by petitioner, Sal Oppenheim Jr. & Cie Kommanditgesellschaft Auf Aktien, assailing the *Decision*[1] dated February 27, 2012, and the *Resolution*[2] dated April 30, 2012, of the former Second Division of the Court denying petitioner's claim for refund or issuance of tax credit certificate representing overpaid final withholding tax on dividends.

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[1] *Rollo*, pp. 141-162.
[2] *Rollo*, pp. 164-167.

The Facts

The facts, as found by the Court in Division, are reproduced hereunder:

> "Petitioner is a non-resident foreign corporation duly organized and existing under and by virtue of the laws of the Federal Republic of Germany, with principal place of business at PSB PBO Securities, Unter Sachsenhausen 4, 50667 Cologne, Germany, as evidenced by copies of petitioner's Certificates of Residence for 2007 and 2008 issued by the Tax Authority of the Federal Republic of Germany and excerpt from petitioner's Commercial Register Entry with the Local Court of Cologne, Germany.
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> Petitioner is not registered or engaged in trade or business in the Philippines, as evidenced by the Certification of Non-Registration of Corporation/Partnership issued by the Philippine Securities and Exchange Commission on August 28, 2008.
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> Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) vested with authority, among others, to act upon and approve claims for refund or tax credit of overpaid or erroneously paid internal revenue taxes, including final tax withheld on dividend income received by non-residents. She holds office at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.
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> Petitioner owns shares in Philippine domestic corporations, including, among others, PLDT, whose shares of stock are listed and traded in the Philippine Stock Exchange (PSE). For this purpose, petitioner appointed Brown Brothers Harriman and Co. (BBH) as its global custodian bank, to facilitate the settlement of the purchase and sale of shares as well as to collect dividends distributed pursuant to the shares of stock.
>
> BBH appointed Hongkong and Shanghai Banking Corporation (HSBC) as its sub-custodian in the Philippine market to perform said functions on its behalf and on behalf of its clients.
>
> Petitioner received dividends from its shareholdings in PLDT (ISIN PH7182521093) on April 20, 2007 and on September 24, 2007, the details of which are as follows:

Pay Date	Dividend per share	No. of shares	Gross dividends	35% FWT	Net dividends received by petitioner
04.20.07	P 50.00	163,850	P 8,192,500.00	P 2,867,375.00	P 5,325,125.00
09.24.07	P100.00	126,970	12,697,000.00	4,443,950.00	8,253,050.00
TOTAL			**P20,889,500.00**	**P7,311,325.00**	**P13,578,175.00**

Pursuant to Section 28 (B) (1) of the National Internal Revenue Code (NIRC) of 1997, as amended, the dividends received by petitioner from its PLDT shares were subjected to final withholding tax (FWT) at the rate of thirty-five percent (35%) or the total amount of P7,311,325.00 as petitioner's FWT on its dividend income. The same was remitted to the BIR by PLDT's transfer agent.

On February 12, 2009, petitioner filed a tax treaty relief application with the BIR International Tax Affairs Division (ITAD), requesting administrative confirmation that the dividend payments made by PLDT to petitioner are subject to the preferential withholding tax rate of fifteen percent (15%) pursuant to the RP-Germany Tax Treaty, and not to the 35% income tax rate under Section 28 (B) (1) of the Tax Code.

On February 18, 2009, petitioner filed with the BIR an administrative claim for refund or issuance of TCC in the amount of P4,177,900.00, representing the FWT erroneously withheld on the dividend income derived by petitioner on April 20, 2007 and on September 24, 2007 from its investments in shares of stock of PLDT.

Since respondent failed to act on petitioner's refund claim and in order to toll the running of the two-year period to claim a refund or tax credit, petitioner filed the instant Petition for Review on April 22, 2009.

Respondent, in her Answer filed on June 10, 2009, interposed the following Special and Affirmative Defenses:

'7. The claim for refund is still under examination by the respondent's Bureau;

8. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund or issuance of tax credit certificate;

9. The grant of claim for refund (is, sic) tantamount to an exemption from taxation which is construed strictly against the claimant and in favor of the taxing authority;

10. The taxes sought to be refunded were paid in accordance with law; the burden of proof to the contrary is upon the petitioner-claimant to show with clear and unambiguous provision of law supporting the same.'

During trial, petitioner presented seven (7) witnesses, namely: Ms. Ma. Katherine Dela Torre, Mr. Antonio Madrid Jr., Mr. Reinard Alexander Cuvin and Ms. Dorothy Guillen of HSBC, Ms. Cornelia Dagdag of Philippine Dealing System Group of Companies, Mr. Francis Carlo Tempongco and Ms. Merceditas Siapuatco of PLDT.

On December 10, 2010, petitioner filed its Formal Offer of Evidence, offering Exhibits "A" to "QQ", inclusive of sub-markings. In a Resolution dated January 20, 2011, this Court admitted said documentary exhibits, and with their admission, petitioner is deemed to have formally rested its case.

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On February 16, 2011, March 14, 2011, and May 2, 2011, the initial presentation of respondent's evidence was reset on the ground that respondent's counsel in the person of Atty. Amado Rey B. Pagarigan, had not yet received a reply from the International Tax Affairs Division on the status of petitioner's administrative claim for refund. On June 1, 2011, Atty. Pagarigan manifested that he is constrained to submit the case for decision considering that no BIR records were transmitted to his office. Thus, this Court gave counsels for both parties 'thirty (30) days from today's hearing to file their respective Memorandum' and thereafter, the instant case shall be submitted for decision.

On July 21, 2011, petitioner filed its Memorandum.

On July 28, 2011, the case was deemed submitted for decision, considering petitioner's Memorandum and the report of this Court's Records Division that respondent failed to file a memorandum."[3]

The former Second Division, in its *Decision*[4] dated February 27, 2012, denied petitioner's claim for refund or issuance of tax credit certificate in the amount of P4,177,900.00, representing overpaid final taxes on the dividends received by petitioner from its investments in PLDT on April 20, 2007 and September 24, 2007, for lack of merit.

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[3] *Rollo*, pp. 143-153.
[4] *Supra*, Note 1.

The Court in Division held that while petitioner is entitled to the 15% tax rate provided under the RP-German Tax Treaty, the Court cannot rule in favor of petitioner considering that it filed a tax treaty relief application with the BIR ITAD only on February 12, 2009 or after the subject final withholding taxes were paid. The Court in Division, citing the cases of *Mirant (Philippines) Operations Corporation (formerly: Southern Energy Asia-Pacific Operations [Phils.], Inc.) vs. Commissioner of Internal Revenue (CIR)*[5] and *Deutsche Bank AG Manila Branch vs. CIR*[6], ruled that under Revenue Memorandum Order (RMO) No. 01-2000, an application for tax treaty relief must be filed prior to the availment of the preferential tax rate under a treaty.

The Motion for Reconsideration[7] filed by petitioner was denied for lack of merit in the Resolution[8] dated April 30, 2012. The Court in Division held that the mandatory nature of the provision of RMO No. 1-2000 with respect to the filing of an Application for Relief from Double Taxation prior to the availment of the tax treaty relief was already explained in the case of *Manila North Tollways Corporation vs. CIR*[9].

Aggrieved, petitioner filed the subject *Petition for Review*[10].

Respondent was ordered to file her comment within ten (10) days from receipt of the *Resolution*[11] dated July 17, 2012. Records[12] show that respondent failed to file her comment within the period granted, thus, considering the issues raised in the subject *Petition for Review*, this Court resolved to give due course to the petition and ordered the parties to submit their respective memoranda[13].

Petitioner filed its *Memorandum*[14] on January 14, 2013.

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[5] CTA EB No. 40, June 7, 2005.
[6] CTA EB No. 456, May 29, 2009.
[7] *Division Docket*, pp. 587-605.
[8] *Supra*, Note 2.
[9] CTA Case No. 7864, Resolution, July 22, 2011.
[10] *Rollo*, pp 89-130.
[11] *Rollo*, pp. 180-181.
[12] *Rollo*, p. 208.
[13] *Rollo*, pp. 210-211, Resolution, October 23, 2012.
[14] *Rollo*, pp. 216-240.

Respondent failed to file her memorandum, thus, the above-captioned case was submitted for decision on February 21, 2013.

The Issue

As grounds for its appeal, petitioner raises the following[15]:

a. The prior filing of TTRA[16] under RMO No. 1-2000 is not applicable to this case because petitioner did not avail of the tax treaty benefit before filing its claim for refund;

b. The Honorable Court can grant tax relief to petitioner on the basis of its own determination that petitioner has met all the conditions for the availment of the preferential tax rate under Article 10, RP-Germany Tax Treaty;

c. Since the RP-Germany Tax Treaty does not require an application for tax treaty relief as condition precedent for the availment of tax treaty relief, RMO No. 1-2000 cannot impose such requirement. RMO No. 1-2000 cannot take precedence over the provisions of the tax treaties, in violation of well settled international law and principles;

d. It is incorrect to read RMO No. 1-2000 as imposing a mandatory requirement of a prior filing of a tax treaty relief application;

e. The Honorable Court itself ruled in several cases that tax refunds may be granted despite the taxpayer's failure to strictly comply with the procedure under RMO No. 1-2000;

f. Respondent herself, by issuing a draft Revenue Memorandum Circular, made a contemporaneous interpretation that availment of preferential tax rates and exemption under tax treaties need not be preceded by an application for tax treaty relief; and

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[15] *Rollo*, pp. 95-96.
[16] Tax Treaty Relief Application.

g. Technicalities should not be used to defeat substantive rights.

The Ruling of the Court

The Petition for Review has no merit.

As to the timeliness of the filing of the claim for refund, *We* find that petitioner filed both the administrative and judicial claims for refund or credit within the two-year prescriptive period prescribed by law.

In this case, the final withholding taxes were remitted to the BIR on May 11, 2007 [17] and October 15, 2007 [18]. Consequently, pursuant to Sections 204 (C) and 229 of the NIRC of 1997, petitioner had until May 10, 2009, at the earliest, within which to file its claim for refund with the BIR and the corresponding appeal before this Court.

Petitioner's administrative claim for refund was filed on February 18, 2009[19] and the Petition for Review was filed on April 22, 2009[20] before this Court, hence, as the Court in Division correctly ruled, the claim for refund was filed on time[21].

However, although the Court in Division found that petitioner is entitled to the preferential tax rate of 15% provided under the RP-Germany Tax Treaty, *We* agree with the ruling of the Court in Division that petitioner's claim for refund or issuance of tax credit certificate must, nevertheless, be denied.

We note that petitioner filed its tax treaty relief application with the BIR ITAD on February 12, 2009[22] or after the payment of the dividends and the corresponding final withholding taxes thereon.

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[17] *Exhibits "L-1" and "L", division docket*, pp. 338 and 336-337, respectively.
[18] *Exhibits "M-1" and "M", division docket*, p. 341 and 339-340, respectively.
[19] *Exhibit "B", division docket*, pp. 302-309.
[20] *Division docket*, pp. 1-10.
[21] *Rollo*, pp. 154-155.
[22] *Exhibit "A", division docket*, pp. 295-301.

In a number of cases[23], this Court has consistently ruled that the filing of an application for tax treaty relief is required prior to the availment of tax treaty provisions.

In the case of *Mirant (Philippines) Operations Corporation (formerly: Southern Energy Asia-Pacific Operations [Phils.], Inc.) vs. CIR*[24] (*Mirant* case), the Court En Banc, held that:

> "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.
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> 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." (Emphasis supplied)

The *Mirant* case was appealed to the Supreme Court via a Petition for Review docketed as G.R. No. 168531, which was however denied in a Resolution dated November 12, 2007. The Motion for Reconsideration was likewise denied in a Resolution dated February 18, 2008.[25]

Although the Court *En Banc*, in *CIR vs. CBK Power Company Limited* and *CBK Power Company Limited vs. CIR*[26], held that the Court in Division cannot cite and rely, as binding

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[23] *Mirant (Philippines) Operations Corporation (formerly: Southern Energy Asia-Pacific Operations [Phils.]Inc. vs. CIR* (CTA EB Case No. 40, June 7, 2005*), Deutsche Bank AG Manila Branch vs. CIR* (CTA EB Case No. 456, May 29, 2009), *CIR vs. CBK Power Company Limited* and *CBK Power Company Limited vs. CIR* (CTA EB Case Nos. 469 and 494, March 29, 2010) and *Manila North Tollways Corporation vs. CIR* (CTA EB Case No. 812, October 11, 2012).
[24] *Ibid.*
[25] *Deutsche Bank AG Manila Branch vs. CIR* (CTA EB Case No. 456, May 29, 2009).
[26] *Supra*, Note 23.

precedents, the minute resolutions issued by the High Court in the *Mirant* case[27], in disposing of CBK Power's claim for refund, it nevertheless held that Court may still exercise its, as it is endowed with, judicial power in deciding the present case, notwithstanding the absence of a binding precedent.

Moreover, although only the decisions of the Supreme Court establish jurisprudence or doctrines in this jurisdiction, nonetheless the decisions of subordinate courts have a persuasive effect and may serve as judicial guides. It is even possible that such a conclusion or pronouncement can be raised to the status of a doctrine if, after it has been subjected to test in the crucible of analysis and revision the Supreme Court should find that it has merits and qualities sufficient for its consecration as a rule of jurisprudence.[28]

In *CIR vs. CBK Power Company Limited* and *CBK Power Company Limited vs. CIR*[29], the Court *En Banc* had occasion to rule on the same issue at hand, and ruled in this wise:

> "It is well-settled that administrative issuances, such as RMO 1-2000 issued by the BIR, have the force and effect of law. They benefit from the same presumption of validity and constitutionality enjoyed by statutes. Thus, while it may be true that treaties become part of the law of the land through transformation pursuant to Article VII, Section 21 of the 1987 Constitution, RMO 1-2000 is just as equally binding.
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> Furthermore, as can be gleaned from the objectives of RMO 1-00, the issuance thereof is not without reason or foundation. Said objectives are as follows:
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>> 'This Order is issued to streamline the processing of the tax treaty relief application in order to improve efficiency and service to taxpayers.
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>> Furthermore, it is to the best interest of both the taxpayer and the Bureau of Internal Revenue that any availment of the tax treaty provisions be preceded by an application for treaty relief with the

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[27] Citing *Philippine Health Care Providers, Inc. vs. Commissioner of Internal Revenue* (G.R. No. 167330, September 18, 2009).
[28] *CIR vs. Court of Appeals, Atlas Consolidated Mining and Development Corporation and Court of Tax Appeals* and *Atlas Consolidated Mining and Development Corporation vs. Court of Appeals, CIR and Court of Tax Appeals*, G.R. Nos. 104151 and 105563, March 10, 1995 citing Paras, E., Civil Code of the Philippines Annotated, Vol. 1, Twelfth Edition, 58-59, citing *Vda. de Miranda, et al. vs. Imperial, et al.*, 77 Phil. 1066 (1947).
[29] *Supra*, Note 23.

> International Tax Affairs Division (ITAD). **In this way, the consequences of any erroneous interpretation and/or application of the treaty provisions** (*i.e.*, claim for tax refund/credit for overpayment of taxes, or deficiency tax liabilities for underpayment) **can be averted before proceeding with the transaction and or paying the tax liability covered by the tax treaty.**" *(Emphases supplied)*

It can be readily gathered from the foregoing that RMO 1-00 requires that an application for treaty relief must be filed with the ITAD prior to any availment of tax treaty provisions to avoid the consequences of any erroneous interpretation and/or application of treaty provisions prior to the transaction and/or payment of tax liability covered by a tax treaty. This requirement is reasonably in accord with the strict construction of tax exemptions.

Contrary thereto however, it is CBK Power's view that under the plain language of RMO 1-2000, it is not mandatory that there be an application for treaty relief with the ITAD. To support its stance, CBK Power points to the above-quoted objectives of RMO 1-2000.

We disagree considering that CBK Power failed to read the other parts of the said issuance, particularly, part III thereof, to wit:

> "III. Policies
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> **In order to achieve the above-mentioned objectives,** the following policies shall be observed:
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> xxx xxx xxx
>
> 2. Any availment of the tax treaty relief **shall be preceded by an application** by filing BIR Form No. 0901 (Application for Relief from Double Taxation) with ITAD at least 15 days before the transaction *i.e.*, payment of dividends, royalties, etc., accompanied by supporting documents justifying the relief. . . .
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> xxx xxx xxx." *(Emphases and underscoring supplied)*

Notably, in formulating the above policy, the word **"shall"** was used in paragraph 2. Needless to state, in common or ordinary parlance and in its ordinary significance, the term **"shall"** is a word of command, and one which has

> always and which must be given a compulsory meaning, and it is generally imperative or mandatory. It has the invariable significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning or when public interest is involved or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears." (*Citations omitted*)

Considering that petitioner filed its Application for Tax Treaty Relief with the BIR ITAD only on February 12, 2009, or after the payment of dividends on April 20, 2007[30] and September 24, 2007[31], then, petitioner failed to comply with the requirements prescribed in RMO No. 1-2000. Consequently, petitioner's claim for refund or credit must necessarily be denied.

Petitioner argues that prior filing of a TTRA under RMO No. 1-2000 does not apply when the income of a non-resident foreign corporation derived from sources within the Philippines has been erroneously subjected to the regular corporate income tax rate instead of the lower tax rate under the tax treaty. It does not preclude or prevent such foreign corporation from seeking a refund of taxes erroneously withheld and judicial relief.

RMO No. 1-2000, particularly part III on Policies, expressly provides that "3. Claims for tax credit/refund **pertinent to the tax treaty relief requested** filed with ITAD within the two (2)-year period prescribed by Section 229 of the NIRC, as amended under RA 8424. The Tax Credit Certificate for this purpose shall be issued for the account of the 'non-resident taxpayer/recipient of the income'." Based on the foregoing, it is clear that the claim for refund or credit must be pertinent to the tax treaty relief *requested*. Hence, there must first be a request for a tax treaty relief, before a claim for refund or credit in connection with the tax treaty relief is filed.[32]

Petitioner also alleges that respondent issued an exposure draft of a Revenue Memorandum Circular dated 7 October 2008 relative to the Guidelines on the Processing of Applications for Relief from Double Taxation Pursuant to Existing Philippine Tax Treaties. Under Section 18 of the said

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[30] *Exhibits "I"* and *"K", division docket*, pp. 333 and 335, respectively.
[31] *Exhibits "J"* and *"K", division docket*, pp. 334 and 335, respectively.
[32] *Manila North Tollways Corporation vs. CIR* (CTA EB Case No. 812, October 11, 2012).

exposure draft, respondent was unequivocal that the availment of preferential tax rates and exemptions provided under Philippines tax treaties need not be preceded by an application for tax treaty relief. Hence, this pronouncement by the respondent represents her contemporaneous interpretation of a provision of a statute or in this case, a tax treaty.

However, as stated by petitioner, this is merely an exposure *draft* which cannot be used as basis by petitioner. Significantly, respondent subsequently issued RMO No. 72-2010 or the *Guidelines on the Processing of Tax Treaty Relief Applications (TTRA) Pursuant to Existing Philippine Tax Treaties,* which provides that filing of the TTRA should always be made before the transaction. *Transaction* for purposes of filing the TTRA shall mean before the occurrence of the first taxable event. Failure to properly file the TTRA with ITAD within the period prescribed shall have the effect of disqualifying the TTRA under the RMO. Following petitioner's line of argument, then this issuance represents respondent's contemporaneous interpretation on the effect of non-filing of a prior application for tax treaty relief.

The foregoing conclusion renders unnecessary the discussion of the other issues raised by petitioner for being moot and academic.

Finding no reversible error, we affirm the assailed *Decision* dated February 27, 2012 and *Resolution* dated April 30, 2012 of the former Second Division.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

Ma. Belen M. Ringpis-Liban
MA. BELEN M. RINGPIS-LIBAN
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 *En Banc* before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice