REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

MCKINSEY & CO. (PHILS.),
Respondent.

CTA EB NO. 2089
(CTA Case No. 9332)

Present:

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, and
MODESTO-SAN PEDRO, *JJ.*

Promulgated:
SEP 30 2020
4:15 p.m.

x - x

DECISION

BACORRO-VILLENA, J.:

Before the Court is a Petition for Review[1] pursuant to Rule 8, Section 3(b)[2] of the Revised Rules of the Court of Tax Appeals

1 Filed 04 July 2019, *Rollo*, pp. 6-15.

2 **Sec. 3.** *Who may appeal; period to file petition.* –

...

(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an

(RRCTA), filed by petitioner Commissioner of Internal Revenue (**petitioner/CIR**) seeking the reversal of the Decision dated 17 January 2019[3] and Resolution dated 28 May 2019[4], respectively, of the Special Second Division[5] in CTA Case No. 9332, entitled *Mckinsey & Co. (Phils.) v. Commissioner of Internal Revenue.*

The antecedent facts follow.

On 15 April 2014, respondent McKinsey & Co. (Phils.) [**respondent/MCP**] filed its Annual Income Tax Return (**ITR**) for calendar year (**CY**) 2013[6], declaring a creditable withholding tax (**CWT**) in the amount of ₱36,610,118.00. Exactly a year after, respondent filed its ITR for CY 2014[7] indicating a CWT in the amount of ₱37,547,131.00. In both ITRs, it expressed its choice to be refunded of the amounts paid by marking the option – "to be refunded".[8]

On 08 April 2016, respondent filed an administrative claim for refund or tax credit certificate[9] (**TCC**) before the Bureau of Internal Revenue (**BIR**), Regional District Office (**RDO**) No. 50. On 14 April 2016, it also filed a Petition for Review[10] before this Court and the same was raffled to this Court's Second Division.

During trial, respondent presented its lone witness, Elena D. Cabahug (**Cabahug**) who testified on the existence of the unutilized CWT and the fact that the same was not carried over to succeeding taxable quarters. She also testified regarding the filing of respondent's administrative claim before the BIR.

Petitioner, on the other hand, manifested that he will not be presenting evidence from his end. Accordingly, in its Order dated 04

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additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

3 Division Docket, Volume II, pp. 802-816.

4 Id., pp. 837-841.

5 With Hon. Justice Juanito C. Castañeda as *ponente* and Hon. Justice Catherine T. Manahan, concurring.

6 Exhibit "P-7", Division Docket, Volume I, p. 248.

7 Exhibit "P-11", id., p. 262.

8 Exhibits "P-7-a" to "P-7-b" and "P-11-a" to "P-11-b", id., pp. 248 and 262.

9 Exhibits "P-56" and "P-57", id., pp. 392-400.

10 Id., pp. 10-20.

December 2017[11], the Second Division ordered both parties to file their respective Memoranda.

In compliance with the above directive, petitioner filed his Memorandum on 20 December 2017[12] while respondent filed its Memorandum on 29 January 2018.[13] Thereafter, the case was deemed submitted for decision.[14]

On 17 January 2019, the Special Second Division promulgated its now assailed Decision, granting respondent's Petition for Review. The dispositive portion of which read:

> ...
>
> **WHEREFORE**, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND OR TO ISSUE A TAX CREDIT CERTIFICATE** in the amount of **₱74,157,249.00** in favour of petitioner, representing its excess and unutilized creditable withholding taxes for calendar years 2013 and 2014.
>
> **SO ORDERED.**[15]
>
> ...

Petitioner filed his Motion for Reconsideration (**MR**) on 07 February 2019[16] but the same was denied in the equally assailed 28 May 2019 Resolution.[17]

Before the Court *En Banc*, petitioner now questions the Special Second Division's disposition of the case and forwards the following issue for resolution -

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11 Id., Volume II, p. 761.
12 Id., pp. 762-766.
13 Id., pp. 778-797.
14 See Resolution dated 01 February 2018.
15 Supra at note 3.
16 Division Docket, Volume II, pp. 817-820.
17 Supra at note 4.

WHETHER THE COURT'S SPECIAL SECOND DIVISION ERRED IN GRANTING RESPONDENT'S PETITION FOR REVIEW WHICH ORDERS PETITIONER TO REFUND OR ISSUE A TAX CREDIT CERTIFICATE TO RESPONDENT IN THE AMOUNT OF ₱74,157,249.00, REPRESENTING THE LATTER'S EXCESS AND UNUTILIZED CREDITABLE WITHHOLDING TAX FOR THE CALENDAR YEARS 2013 AND 2014.

In support of this petition, petitioner claims that respondent failed to comply with the invoicing requirements under Section 113(A)[18] of the National Internal Revenue Code (**NIRC**) of 1997, as amended. He particularly relies on the case of *Western Mindanao Power Corporation v. Commissioner of Internal Revenue*[19] (**Western Mindanao Power Corporation**), wherein the Supreme Court emphasized the necessity of a taxpayer's compliance with the aforesaid requirements.

Petitioner contends further that the certificates of creditable taxes withheld presented by respondent are not conclusive evidence of its remittance to the BIR. It likewise contends that testimonies of payors and withholding agents are required to prove respondent's claim.

On the other hand, respondent debunks petitioner's claims and states that it had adequately complied with the invoicing requirements by presenting the official receipts (**ORs**) corresponding to the billing invoices. It specifically points to its Exhibits "P-71" to "P-123" or the ORs issued to its clients for services rendered.

Respondent also contends that the duty to prove actual remittance to the BIR falls upon the payors who are themselves constituted withholding agents thereof and not the taxpayer-claimant. In support of its argument, it cites the case of *Asian Transmission Corporation v. Commissioner of Internal Revenue*[20] wherein the

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[18] **Sec. 113.** *Invoicing and Accounting Requirements for VAT-registered Persons.* —
(A) *Invoicing Requirements.* — A VAT-registered person shall issue:
(1) A VAT invoice for every sale, barter or exchange of goods or properties; and
(2) A VAT official receipt for every lease of goods or properties, and for every sale, barter or exchange of services.

[19] G.R. No. 181136, 13 June 2012.

[20] G.R. No. 230861, 19 September 2018.

Supreme Court held that, "the Certificates of Creditable Tax Withheld at Source issued by the withholding agents of the government are *prima facie* proof of actual payment by herein respondent-payee to the government itself through said agents".

This Court *En Banc* rules below.

At the outset, We observe that petitioner's Petition for Review before Us replicates the arguments put forth in its petition and MR before the Special Second Division. After a second hard look into these rehashed issues, We find no cogent reason to deviate from the assailed 17 January 2019 Decision and Resolution dated 28 May 2019.

We amplify the reasons, *in seriatim*.

NON-COMPLIANCE WITH
THE INVOICING REQUIREMENTS
IS NOT FATAL TO RESPONDENT'S
CLAIM FOR A TAX CREDIT

The invoicing requirements under Section 113(A)[21] of the NIRC of 1997, as amended by Republic Act (**RA**) No. 9337, are under the provisions on Value-Added Tax (**VAT**) whereas, the subject claim herein are excess and unutilized CWTs. Therefore, petitioner's reliance on the *Western Mindanao Power Corporation* case appears misplaced. The said case pertains to a claim for refund of unutilized input VAT on zero-rated sales and *not* to a claim for refund of excess CWT as herein case. Even assuming *arguendo* that VAT invoicing requirements were to apply similarly to excess CWTs, a perusal of the records would show that respondent presented both the billing invoices[22] and official receipts[23] it issued for services rendered to its clients. We echo the Special Second Division's disquisition on the matter when it denied petitioner's MR[24], to wit:

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21 Supra at note 18.

22 Division Docket, Volume II, pp. 711-740.

23 Exhibits "P-71" to "P-76", "P-79", "P-83" to "P-84", "P-86", "P-89" to "P-90", "P-92", "P-94", "P-97" to "P-98", "P-101" to "P-103", "P-106" to "P-107", "P-112" to "P-113", "P-115" to "P-117", "P-119" to "P-121", "P-123", "P-126" to "P-127", id., Volume I, pp. 501-559.

24 Id., Volume II, pp. 838-839.

> ...
>
> The Supreme Court, in the case of *Winebrenner & Iñigo Insurance Brokers, Inc. vs. Commissioner of Internal Revenue*, citing the case of *Commissioner of Internal Revenue vs. Mirant (Philippines) Operations Corporation*, laid down the requirements which a taxpayer must comply in seeking refund of excess and unutilized CWTs, to wit:
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> 1. File the claim with the CIR within the two-year period from the date of payment of the tax;
>
> 2. Show on the return that the income received was declared as part of the gross income; and
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> 3. Establish the fact of withholding by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of tax withheld.
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> Consequently, [petitioner's] assertion that [respondent] should have submitted VAT official receipts to substantiate its claim for refund is misplaced. Such requirement is **specifically for claims for refund of excess or unutilized input taxes under Section 113 of the NIRC of 1997, as amended, and not for claims for refund of excess and unutilized CWTs**. Neither the NIRC of 1997, as amended, nor Revenue Regulations (RR) No. 2-98 require the submission of official receipts to substantiate claims for refund of CWTs.[25]
>
> ...

It is fundamental that the findings of fact by the Court in Division are not to be disturbed without any showing of grave abuse of discretion considering that the members of the Division are in the best position to analyze the documents presented by the parties.[26] There being no showing of grave abuse of discretion, the said findings of fact stand.

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25 Supra at note 4; Emphasis supplied.

26 *Republic of the Philippines, represented by the Commissioner of Internal Revenue v. Team (Phils.) Energy Corporation [formerly Mirant (Phils.) Energy Corporation]*, G.R. No. 188016, 14 January 2015, citing *Sea-Land Service, Inc. v. Court of Appeals*, G.R. No. 122605, 30 April 2001, 357 SCRA 441, 445-446.

PROOF OF ACTUAL REMITTANCE TO THE BUREAU OF INTERNAL REVENUE OF THE WITHHELD TAXES IS NOT REQUIRED

Petitioner likewise claims that respondent, by presenting the Certificates of Creditable Tax Withheld at Source (BIR Form No. 2307), failed to prove the actual remittance to the BIR of the taxes withheld on payments made by respondent's clients for services rendered. Petitioner also adds that the best evidence of the fact of remittance (of the tax withheld) is the certification from the BIR's Revenue Accounting Divisions. Despite these arguments, Sections 57(B) and 58(A) of the NIRC of 1997, as amended, provide:

> ...
> **Sec. 57**. *Withholding of Tax at Source.* –
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> ...
> (B) *Withholding of Creditable Tax at Source.* – The Secretary of Finance may, upon the recommendation of the Commissioner, require the withholding of a tax on the items of income payable to natural or juridical persons, residing in the Philippines, **by payor-corporation/persons** as provided for by law, at the rate of not less than one percent (1%) but not more than thirty-two percent (32%) thereof, which shall be credited against the income tax liability of the taxpayer for the taxable year.
> ...
>
> **Sec. 58**. *Returns and Payment of Taxes Withheld at Source.* –
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> (A) *Quarterly Returns and Payments of Taxes Withheld.* – Taxes deducted and withheld under Section 57 **by withholding agents** shall be covered by a return and **paid to**, except in cases where the Commissioner otherwise permits, an authorized agent bank, Revenue District Officer, Collection Agent, or duly authorized Treasurer of the city or municipality where the withholding agent has his legal residence or principal place of business, or where the withholding agent is a corporation, where the principal office is located.
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> **The taxes deducted and withheld by the withholding agent shall be held as a special fund in trust for the government until paid to the collecting officers.**

> The return for final withholding tax shall be filed and the payment made within twenty-five (25) days from the close of each calendar quarter, while the return for creditable withholding taxes shall be filed and the payment made not later than the last day of the month following the close of the quarter during which withholding was made: *Provided,* **That the Commissioner, with the approval of the Secretary of Finance, may require these withholding agents to pay or deposit the taxes deducted or withheld at more frequent intervals when necessary to protect the interest of the government.**[27]
>
> ...

The cited provisions mandate that the person who has the obligation to remit withholding taxes is the withholding agent and not the taxpayer from whom said taxes were deducted.

Moreover, as respondent correctly points out, the Supreme Court in *Commissioner of Internal Revenue v. Asian Transmission Corporation*[28], in approval of the CTA *En Banc's* decision[29], rejected BIR's contention that proof of actual remittance is required before a refund of excess or unutilized creditable withholding taxes may be granted, to wit:

> ...
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> At any rate, the CIR is correct in stating that the taxpayer bears the burden of proof to establish not only that a refund is justified under the law but also that the amount that should be refunded is correct. In this case, however, the CTA-First Division and the CTA-En Banc uniformly found that from the evidence submitted, ATC has established its claim for refund or issuance of a tax credit certificate for unutilized creditable withholding taxes for the taxable year 2001 in the amount of P27,325,856.58. The Court finds no cogent reason to rule differently. As correctly noted by the CTA-En Banc:
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>> x x x **proof of actual remittance by the respondent is not needed in order to prove withholding and remittance of taxes to petitioner. Section 2.58.3 (B) of Revenue Regulations No. 2-98 clearly provides that proof of remittance is the responsibility of the**

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27 Emphasis supplied.

28 655 Phil. 186-198 (2011).

29 *Commissioner of Internal Revenue v. Asian Transmission Corporation*, CTA EB No. 205 (CTA Case No. 6648), 16 July 2007.

> **withholding agent and not of the taxpayer-refund claimant.** It should be borne in mind by the petitioner that payors of withholding taxes are by themselves constituted as withholding agents of the BIR. The taxes they withhold are held in trust for the government. In the event that the withholding agents commit fraud against the government by not remitting the taxes so withheld, such act should not prejudice herein respondent who has been duly withheld taxes by the withholding agents acting under government authority. Moreover, pursuant to Sections 57 and 58 of the NIRC of 1997, as amended, the withholding of income tax and the remittance thereof to the BIR is the responsibility of the payor and not the payee. Therefore, respondent, x x x has no control over the remittance of the taxes withheld from its income by the withholding agent or payor who is the agent of the petitioner. The Certificates of Creditable Tax Withheld at Source issued by the withholding agents of the government are prima facie proof of actual payment by herein respondent-payee to the government itself through said agents. We stress that the pertinent provisions of law and the established jurisprudence evidently demonstrate that there is no need for the claimant, respondent in this case, to prove actual remittance by the withholding agent (payor) to the BIR. In this regard, We do not agree with petitioner's allegation that respondent failed to prove that creditable withholding taxes were duly supported by valid Certificates of Creditable Tax Withheld at Source. As aptly ruled by the Court in Division, and We reiterate, the evidence on record in which petitioner interposed no objection to its admission and was subsequently admitted by the Court in Division, show that respondent was able to substantiate its claim through the presentation of Exhibits "J" to "P" and "R" to "Z", the Certificates of Creditable Tax Withheld at Source. The documentary evidence presented were sufficient to establish that respondent was withheld taxes and that there was an excess which remain unutilized and now subject of refund.[30]

...

The Supreme Court elaborates further in the case of *Commissioner of Internal Revenue v. Philippine National Bank*[31], which the Special Second Division quoted accordingly in the assailed Resolution, to wit:

[30] Emphasis supplied.
[31] 744 Phil. 299-312 (2014).

> ...
>
> Petitioner's posture that respondent is required to establish actual remittance to the Bureau of Internal Revenue deserves scant consideration. **Proof of actual remittance is not a condition to claim for a refund of unutilized tax credits. Under Sections 57 and 58 of the 1997 National Internal Revenue Code, as amended, it is the payor-withholding agent, and not the payee-refund claimant such as respondent, who is vested with the responsibility of withholding and remitting income taxes.**[32]
>
> ...

Based on the foregoing, the relationship of the payor-withholding agent and the BIR is akin to a contract of agency. Article 1868 of the Civil Code defines the contract of agency as one whereby "a person binds himself to render some service or to do something in representation or on behalf of another, with the consent or authority of the latter".

Under the Philippine withholding tax system, the withholding agent acts as the government's agent for the collection of taxes in order to ensure its payment. It is actually a system of advance collection of the payee's or income recipient's tax liability by the payor of any income item.[33] The payor who has the control and custody of the funds from which income payments are sourced is constituted as the agent of the BIR to withhold a tax at the rates defined under existing law and its implementing revenue regulations[34], whether final or creditable. Hence, the acts of the agent on behalf of the principal within the scope of the authority granted have the same legal effect and consequence as though the principal had been the one so acting in the given situation.[35]

In the instant case, the withholding agent's receipt of the tax withheld is tantamount to the BIR's receipt thereof. Any failure on the

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32 Emphasis supplied.

33 *Rizal Commercial Banking Corporation v. Commissioner of Internal Revenue*, 672 Phil. 514, 528-529 (2011).

34 Revenue Regulations No. 2-98, SUBJECT: *Implementing Republic Act No. 8424, "An Act Amending the National Internal Revenue Code, 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.*

35 *Philex Mining Corp. v. Commissioner of Internal Revenue*, 574 Phil. 571-586 (2008).

part of the withholding agent to remit the amount withheld to the BIR is a breach on the part of the agent and not by the taxpayer.[36] Therefore, respondent should no longer be burdened to show proof of actual remittance in case of claims for tax refund or tax credit.

WHEREFORE, the foregoing considered, petitioner Commissioner of Internal Revenue's Petition for Review filed on 04 July 2019 is **DENIED**. Accordingly, the assailed Decision and Resolution dated 17 January 2019 and 28 May 2019, respectively, of the Special Second Division in CTA Case No. 9332, entitled *Mckinsey & Co. (Phils.) v. Commissioner of Internal Revenue*, are hereby **AFFIRMED**.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

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36 See also *Philippine Airlines, Inc. (PAL) v. Commissioner of Internal Revenue*, G.R. No. 206079-80, 17 January 2018.

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice