REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-*versus*-

FLUOR DANIEL, INC.-PHILIPPINES,
Respondent.

CTA *EB* NO. 1555
(CTA Case No. 8444)

Present:

DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

Promulgated:

FEB 12 2018 4:08 p.m.

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D E C I S I O N

MANAHAN, J.:

Before the Court *En Banc* is a Petition for Review, pursuant to Rule 8, Section 3(b)[1] of the Revised Rules of the Court of Tax Appeals (RRCTA), seeking the nullification of the Decision and Resolution, dated July 11, 2016 and November 2, 2016, respectively of the Court's Third Division. The assailed Decision and Resolution cancelled the assessment against

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[1] Rule 8. Procedure in Civil Cases
Section 3. Who may appeal; period to file petition.
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(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

respondent Flour Daniel, Inc.-Philippines for deficiency Final Withholding Tax (FWT) for taxable year 2008 in the total amount of Php69,592,164.18. The same also granted respondent's claim for refund of the FWT on royalties paid under protest amounting to Php29,825,213.22.

The Facts

Petitioner Commissioner of Internal Revenue (CIR) is the government official duly charged with the duty of assessing and collecting internal revenue taxes and the power to cancel disputed assessments, with office address at the BIR National Office Building, BIR Road, Diliman, Quezon City.[2]

Respondent Fluor Daniel, Inc. – Philippines (Flour Daniel) is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office located at Asian Star Building, 2402-2404 ASEAN Drive, Muntinlupa City; and is registered with the Bureau of Internal Revenue (BIR) under Tax Identification No. 000-159-649-000. It is engaged in the business of providing detailed engineering design, procurement, controls and project management services for a wide range of projects applicable to industries such as electronics, petroleum and petrochemicals, pharmaceuticals and biotechnology.[3]

The relevant antecedents as found by the Court in Division are as follows:

> On October 26, 2011 [respondent] received a duly executed and authentic Formal Letter of Demand (FLD) with attached Final Assessment Notices (FAN), all dated October 5, 2011, assessing [respondent] the alleged deficiency taxes in the total amount of Php634,418,443.46, inclusive of interest computed up to October 31, 2011 and the alleged deficiency FWT in the amount of Php43,038,190.32, exclusive of interest, on software maintenance service fees paid by [respondent] to Fluor Intercontinental, Inc. (FII) on the ground that the same constitutes royalties. xxx
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> xxx xxx xxx

[2] *Rollo*, CTA EB No. 1555, Petition for Review, p. 8.
[3] *Id.*

On November 15, 2011, [respondent] filed its protest to the FLD.

The parties entered into a Taxpayer's Agreement Form (TAF) wherein [respondent] voluntarily bound itself to pay the amount of Php166,586,113.90, xxx

xxx xxx xxx

Payments in the total amount of Php166,586,113.90 were made to the BIR, as follows:

	AMOUNT	BIR FORM 0605	FILING DATE	PAYMENT DATE
INCOME TAX	Php 484,592.46	Exhibit "E"	February 8, 2012	February 10, 2012
VAT	25,000.00	Exhibit "H"	February 8, 2012	February 10, 2012
FINAL TAX ON DIVIDENDS	136,251,308.22	Exhibit "F"	February 8, 2012	February 10, 2012
FINAL TAX ON ROYALTIES	29,825,213.22	Exhibit "G"	February 8, 2012	February 10, 2012
TOTALS	**Php166,586,113.90**			

On February 22, 2012, [respondent] received an authentic and duly executed FDDA containing [petitioner]'s final decision on [respondent]'s protest.[4]

On March 23, 2012, respondent filed its Petition for Review before the Court in Division,[5] with petitioner filing his Answer on May 21, 2012.[6]

On February 5, 2014, respondent filed its claim for refund or issuance of a tax credit certificate (TCC) in the total amount of Php29,825,213.22 representing a portion of the deficiency FWT assessment; and its Application for Tax Credits/Refunds or BIR Form No. 1914.[7]

On February 7, 2014, respondent filed its Motion for Leave to Admit Supplemental Motion with attached Supplemental Petition for Review, with the former granted and the latter admitted by the Court in Division in its April 25,

[4] *Rollo*, Decision dated July 11, 2016, pp. 34-35.
[5] *Rollo*, Decision dated July 11, 2016, p. 35.
[6] *Rollo*, Decision dated July 11, 2016, p. 36.
[7] *Rollo*, Decision dated July 11, 2016, p. 43.

2014 Resolution.[8] Petitioner filed her Supplemental Answer on May 13, 2014.[9]

After trial, the Court in Division promulgated the assailed Decision which disposed of the case, as follows:

> WHEREFORE, the instant Petition for Review is hereby GRANTED.
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> The Final Decision on Disputed Assessment dated February 13, 2012 and the relating assessment for Final Withholding Tax against [respondent] Flour Daniel Inc. – Philippines in the total amount of SIXTY-NINE MILLION FIVE HUDNRED NINETY-TWO THOUSAND ONE HUNDRED SIXTY-FOUR AND 18/100 PESOS (Php69,592,164.18) is hereby CANCELLED and SET ASIDE.
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> Accordingly, [petitioner] is hereby ORDERED TO REFUND OR TO ISSUE A TAX CREDIT CERTIFICATE in favor of petitioner in the amount of TWENTY-NINE MILLION EIGHT HUNDRED TWENTY-FIVE THOUSAND TWO HUNDRED THIRTEEN AND 22/100 PESOS (Php29,825,213.22) representing Final Withholding Tax on Royalties paid under protest.
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> SO ORDERED.[10]

Petitioner's Motion for Reconsideration was likewise denied in the Resolution dated November 2, 2016. Aggrieved, petitioner filed the instant Petition for Review[11] before the Court *En Banc* on December 7, 2016.[12] After notice[13] and extension,[14] respondent filed its Comment (To the Petition for Review dated December 6, 2016)[15] on February 2, 2017.

The Court *En Banc* ordered the parties to file their respective Memoranda.[16] Petitioner filed his Memorandum[17] am

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[8] *Rollo*, Decision dated July 11, 2016, p. 43.
[9] *Rollo*, Decision dated July 11, 2016, p. 43.
[10] *Rollo*, Decision dated July 11, 2016, p. 65.
[11] *Rollo*, pp. 7-32.
[12] Within the extended period granted, per Minute Resolution dated November 23, 2016, *rollo*, p. 6.
[13] *Rollo*, Resolution dated December 21, 2016, pp. 76-77.
[14] *Rollo*, Minute Resolution dated January 25, 2017, p. 82.
[15] *Rollo*, pp. 83-107.
[16] *Rollo*, Resolution dated February 23, 2017, pp. 109-110.
[17] *Rollo*, pp. 127-145.

on May 8, 2017, while respondent filed its Memorandum[18] May 12, 2017.

On June 5, 2017, the case was deemed submitted for decision.[19]

Issues

The CIR raises the following assigned errors[20]:

I. The Honorable CTA Third Division erred in ruling that software maintenance service fees paid by respondent to Fluor Intercontinental Inc. (FII) are beyond the taxing jurisdiction of the Philippine taxing authority and exempt from income tax in the form of final withholding tax.

II. The Honorable CTA Third Division erred in ruling that the case of Deutsche Bank AG Manila Branch vs. CIR, G.R. No. 188550, promulgated on August 19, 2013 is applicable to the instant case.

CIR's Arguments[21]

The CIR argues that the software maintenance service fees paid by respondent to Fluor Intercontinental Inc. (FII) are considered royalties within the definition of Revenue Memorandum Circular No. (RMC) 77-2003, as further amended by RMC 44-2005, which are subject to FWT; that the case of *Deutsche Bank AG Manila Branch v. CIR* (*Deutsche Bank* case) promulgated on August 19, 2013 should not be applied to the instant case; that respondent's act of payment is tantamount to waiving its right to question the assessment issued against it; and, that in a case for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund.

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[18] *Rollo*, pp. 151-179.
[19] *Rollo*, Resolution dated June 5, 2017, pp. 184-185.
[20] *Rollo*, Petition for Review, pp. 11-12.
[21] *Rollo*, Petition for Review, p. 12.

Fluor Daniel's Counter-Arguments

Respondent argues that the CIR's arguments are a mere restatement of previous arguments raised before and already ruled upon by the Court in Division.

Respondent asserts that based on the Commentaries on the 2010 Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital (OECD Commentary), the CIR's own issuances, and respondent's testimonial and documentary evidence, the Court in Division correctly held that the software maintenance fees paid by respondent to FII do not constitute royalty payments. Further, respondent asserts that the *Deutsche Bank* case is applicable to the instant case; that respondent did not waive its right to question the assessment when it paid the assessment under protest; and, that it has sufficiently proven its entitlement to its claim for refund by clear and convincing evidence.

Ruling of the Court

The petition lacks merit.

The Court *En Banc* has jurisdiction over the present petition.

The Court in Division issued the assailed Resolution, denying CIR's Motion for Reconsideration, on November 2, 2016,[22] which was received by the CIR on November 7, 2016.[23] Pursuant to Rule 4, Section 2(a)(1),[24] in relation to Rule 8, Section 3(b) of the RRCTA, the CIR had fifteen (15) days or until November 22, 2016 within which to file his petition for review.

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[22] *Rollo*, Resolution dated November 2, 2016, pp. 67-71.
[23] Docket, CTA Case No. 8444, Vol. II, p. 987.
[24] Rule 4 Jurisdiction of the Court

Sec. 2. Cases within the jurisdiction of the Court *en banc*. – The Court *en banc* shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Divisions in the exercise of its exclusive appellate jurisdiction over:

(1) Cases arising from administrative agencies – Bureau of Internal Revenue, xxx

On November 21, 2016, the CIR filed a Motion for Additional Time to File Petition for Review with Entry of Appearance, praying for an additional twenty (20) days from November 22, 2016, or until December 12, 2016 within which to file his petition for review. The Court *En Banc* granted the extension, but only for fifteen (15) days or until December 7, 2016.[25] The CIR timely filed his Petition for Review on December 7, 2016, hence, the Court *En Banc* has jurisdiction.

There is no compelling reason to reverse or modify the Court in Division's Decision and Resolution.

Records reveal that arguments raised by the CIR are substantially the same arguments raised before the Court in Division and which have already been considered and resolved therein.

Respondent's payments of software maintenance fees are business profits.

The pivotal issue is whether the software maintenance fees paid by respondent to FII are royalties or business profits.

The software maintenance fees are paid by respondent to FII pursuant to a Contract,[26] the provisions of which are summarized by the Court in Division, as follows:

> On January 1, 2004, [respondent] and FII entered into a Licensing Contract whereby the latter, as licensor and user of the suite of software, granted the former a non-exclusive, non-transferrable free authority to access and use the said suite, a necessary tool in the performance of its activities. It is, likewise, stipulated therein that access and usage are free but [respondent] is required to pay a maintenance service fee, to FII as an independent service contractor, for every home office and field staff project hour. It further provides that services are rendered outside the Philippines; that [respondent] shall not make use of the software for

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[25] *Rollo*, p. 6.
[26] Docket, Vol. I, Exhibit "T", pp. 378-385.

time-sharing or otherwise allow third parties to use the same without FII's approval; that [respondent] can make copies of the software for distribution to its employees to the extent necessary for [respondent]'s use and access but not to third parties; and that [respondent] is not allowed to decompile, disassemble, reverse-engineer, modify, adapt, or create derivative works from, the software.[27]

In determining whether said payments are royalties or business profits, the following provisions of the *Republic of the Philippines – United States of America Tax Treaty*[28] (*RP-US Tax Treaty*) should be referred to:

Article 8
Business Profits

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

(2) Where a resident of one of the Contracting States has a permanent establishment in the other Contracting State, there shall in each Contracting State be attributed to the permanent establishment the business profits which would reasonably be expected to have been derived by it if it were an independent entity engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the resident of which it is a permanent establishment.

(3) There may also be attributed to that permanent establishment the business profits derived from the sale of goods or merchandise of the same or similar kind as those sold, or from other business activities of the same or similar kind as those effected, through that permanent establishment if the sale or activities had been resorted to in order to avoid taxation.

[27] *Rollo*, Decision dated July 11, 2016, p. 56.
[28] Convention Between the Government of the Republic of the Philippines and the Government of the United States of America with Respect to Taxes on Income, signed on October 1, 1976, and which took effect on January 1, 1983.

(4) In the determination of the business profits of a permanent establishment, there shall be allowed as deductions ordinary and necessary expenses which are reasonably allocable to such profits, including executive and general administrative expenses, whether incurred in the Contracting State in which the permanent establishment is situated or elsewhere. However, no such deductions shall be allowed in respect of amounts paid or payable (other than reimbursement of actual expenses) by the permanent establishment to the head office of the resident of which it is a permanent establishment or any of its other offices, by way of –

(a) royalties, fees or other similar payments in return for the use of patents or other rights;

(b) commission, for specific services performed or for management; and

(c) interest on moneys lent to the permanent establishment, except in the case of a banking institution.

(5) No profits shall be attributed to a permanent establishment of a resident of one of the Contracting States in the other Contracting State merely by reason of the purchase of goods and merchandise by that permanent establishment for the account of the resident.

(6) The term "business profits" means income derived from any trade or business whether carried on by an individual, corporation or any other person, or group of persons, including the rental of tangible (movable) property.

(7) Where business profits include items of income which are dealt with separately in other articles of this Convention, then the provisions of those articles shall not be affected by the provisions of this Article.

Article 13
Royalties

(1) Royalties derived by a resident of one of the Contracting States from sources within the other Contracting State may be taxed by both Contracting States.

(2) However, the tax imposed by that other Contracting State shall not exceed –

(a) In the case of the United States, 15 percent of the gross amount of the royalties, and

(b) In the case of the Philippines, the least of:

(i) 25 percent of the gross amount of royalties,

(ii) 15 percent of the gross amount of the royalties, where the royalties are paid by a corporation registered with the Philippine Board of Investments and engaged in preferred areas of activities, and

(iii) the lowest rate of Philippine tax that may be imposed on royalties of the same kind paid under similar circumstances to a resident of a third State.

(3) The term "royalties" as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematographic films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or other like right of property, or for information concerning industrial, commercial or scientific experience. The term "royalties" also includes gains derived from the sale, exchange or other disposition of any such right or property which are contingent on the productivity, use, or disposition thereof.

(4) The provisions of paragraphs (1) and (2) shall not apply if the recipient of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State professional services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 8 (Business Profits) or Article 15 (Independent Personal Services), as the case may be, shall apply.

(5) Where an amount is paid to a related person would be treated as a royalty but for the fact that it exceeds an amount which would have been paid to an unrelated person, the provisions of this article shall apply only to so much of the amount as would have been paid to an unrelated person. In such a case, the excess amount may be taxed by each Contracting State according to its own law, including the provisions of this Convention where applicable.

Based on the foregoing, "royalties" are "payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, ... or for information concerning industrial, commercial or scientific experience." On the other hand, "business profits" are "income derived from any trade or business whether carried on by an individual, corporation or any other person, or group of persons, including the rental of tangible personal (movable) property."

In determining the nature of the software maintenance fees, the Court *En Banc* finds helpful the following statements in the *Commentaries on the Articles of the Model Tax Convention* (*OECD Commentaries*)[29]:

COMMENTARY ON ARTICLE 12
CONCERNING THE TAXATION OF ROYALTIES

II. Commentary on the provisions of the Article

xxx xxx xxx

Paragraph 2

xxx xxx xxx

12. Whether payments received as a consideration for computer software may be classified as royalties poses difficult problems but is a matter of considerable importance in view of the rapid development of computer technology in recent years and the extent of transfers of such technology across national borders. In 1992, the Commentary was amended to describe the principles by which such classification should be made. Paragraphs 12 to 17 were further amended in 2000 to

[29] Condensed Version, 2010 (ISBN 978-92-64-08948-8).

refine the analysis by which business profits are distinguished from royalties in computer software transactions. In most cases, the revised analysis will not result in a different outcome.

12.1 Software may be described as a program, or series of programs, containing instructions for a computer required either for the operational processes of the computer itself (operational software) or for the accomplishment of other tasks (application software). It can be transferred through a variety of media, for example in writing or electronically, on a magnetic tape or disk, or on a laser disk or CD-Rom. It may be standardized with a wide range of applications or be tailor-made for single users. It can be transferred as an integral part of computer hardware or in an independent form available for use on a variety of hardware.

12.2 The <u>character of payments received in transactions involving the transfer of computer software depends on the nature of the rights that the transferee acquires under the particular arrangement regarding the use and exploitation of the program</u>. The rights in computer programs are a form of intellectual property. xxx Transfers of rights in relation to software occur in many different ways ranging from the alienation of the entire rights in the copyright in a program to the sale of a product which is subject to restrictions on the use to which it is put. The consideration paid can also take numerous forms. These factors make it difficult to determine where the boundary lies between software payments that are properly to be regarded as royalties and other types of payment. The difficulty of determination is compounded by the ease of reproduction of computer software, and by the fact that acquisition of software frequently entails the making of a copy by the acquirer in order to make possible the operation of the software.

13. The transferee's rights will in most cases consist of partial rights or complete rights in the underlying copyright ...., or they may be (or equivalent to) partial or complete rights in a copy of the program (the "program copy"), whether or not such copy is embodied in a material medium or provided electronically ... In unusual cases, the transaction may represent a transfer of "know-how" or secret formula ...

13.1 Payments made for the acquisition of partial rights in the copyright (without the transferor fully alienating the copyright rights) will represent a royalty where the consideration is for granting of rights to use the program in a manner that would, without such license, constitute an infringement of copyright. Examples of such arrangements include licenses to reproduce and distribute to the public software incorporating the copyrighted program, or to modify and publicly display the program. In these circumstances, the payments are for the right to use the copyright in the program (i.e. to exploit the rights that would otherwise be the sole prerogative of the copyright holder). xxx

14. In other types of transactions, the rights acquired in relation to the copyright are limited to those necessary to enable the user to operate the program, for example, where the transferee is granted limited rights to reproduce the program. This would be the common situation in transactions for the acquisition of a program copy. xxx Regardless of whether this right is granted under law or under a license agreement with the copyright holder, copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilizing the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analyzing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as commercial income in accordance with Article 7 [Article 8 in the RP-US Treaty].

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14.2 The ease of reproducing computer programs has resulted in distribution arrangements in which the transferee obtains rights to make multiple copies of the program for operation only within its own business. Such arrangements are commonly referred to as "site licenses", "enterprise licenses", or "network licenses." Although these arrangements permit the making of multiple copies of the program, such rights are generally limited to those necessary for the purpose of enabling the operation of the program on the licensee's computers or network, and reproduction for any other purpose is not permitted under the license. Payments under such arrangements will in most cases be dealt

> with as business profits in accordance with Article 7 [Article 8 in the RP-US Treaty].
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> 17. Software payments may be made under mixed contracts. Examples of such contracts include sales of computer hardware with built-in software and concessions of the right to use software combined with the provision of services. The methods set out in paragraph 11 above for dealing with similar problems in relation to patent royalties and know-how are equally applicable to computer software. Where necessary the total amount of the consideration payable under a contract should be broken down on the basis of the information contained in the contract or by means of a reasonable apportionment with the appropriate tax treatment being applied to each apportioned part.[30] (*Underscoring supplied*)

Examination of the rights acquired by respondent would, under the abovequoted *OECD Commentaries*, render the fees paid by respondent as business profits and not royalties.

Under the contract between FII and respondent, respondent acquires the following rights: a non-exclusive, non-transferable free authority to access or use the software;[31] and, respondent is permitted to make and distribute to its employees copies of the documentation and related materials, but only to the extent that such reproduction and distribution shall be necessary for respondent's access or use of the software.[32] These rights fall under *paragraph 14 and 14.2 of the OECD Commentaries* quoted above, and are to be treated as business profits and not royalties.

A look at the restrictions imposed upon respondent further reinforces the conclusion that the payments are not royalties, to wit: respondent shall not make any use of the software for time-sharing or otherwise allow its use by third parties or development tools for its or their publications or other products;[33] respondent is not permitted to make any

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[30] OECD Commentaries on the Model Tax Convention`(Condensed Version), 2010 (ISBN 978-92-64-08948-8), pp. 227 - 230.
[31] Docket, Vol. I, Exhibit "T", Article 1, par. 1, p. 378.
[32] Docket, Vol. I, Exhibit "T", Article 1, par. 3, p. 378.
[33] Docket, Vol. I, Exhibit "T", Article 1, par. 2, p. 378.

copies of the software for distribution to third parties;[34] and, respondent shall not decompile, disassemble or otherwise reverse-engineer the software or any portion thereof, nor modify or adapt the software or documentation, nor create derivative works therefrom.[35] These restrictions remove the above grant of rights from the coverage of royalties, as provided in *paragraph 13.1 of the OECD Commentaries* quoted above.

From the foregoing, the Court *En Banc* finds that the rights granted to respondent will not give rise to royalty payments but only to business profits.

As to whether the payment for maintenance service fees should be considered as royalties, p*aragraph 17 of the OECD Commentaries on Article 12,* also aforequoted, speaks of mixed contracts like a contract for the right to use software combined with the provision of services; and, where necessary, the total amount of consideration payable under a contract should be broken down on the basis of the information contained in the contract or by means of a reasonable apportionment with the appropriate tax treatment being applied to each apportioned part.

The instant contract between FII and respondent is one such contract. As contained in the Contract, access or usage of the software shall be free,[36] however, respondent shall pay a maintenance service fee[37] in return for FII providing software maintenance services.[38] Considering that respondent's Contract with FII clearly states that the access or usage of the software shall be free and the fees paid shall be for the maintenance service, and in light of the Court's conclusion that the rights of access and usage to the software does not give rise to royalties, the situation in *paragraph 17 of the OECD Commentaries* regarding the necessity of apportionment does not exist in the instant case.

Instead, the Court finds that FII's rendition of software maintenance service to respondent is a contract for the provision of services. A contract for the provision of services is

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[34] Docket, Vol. I, Exhibit "T", Article 1, par. 3, p. 378.
[35] Docket, Vol. I, Exhibit "T". Article 1, par. 4, p. 378.
[36] Docket, Vol. I, Exhibit "T", Article 3, par. 1, p. 378.
[37] Docket, Vol. I, Exhibit "T", Article 3, par. 1, pp. 378-379.
[38] Docket, Vol. I, Exhibit "T", Article 2, par. 1, p. 378.

discussed in *paragraph 11.2 of the OECD Commentaries*, which differentiates it from a know-how contract:

> 11.2 This type of contract thus differs from contracts for the provision of services, in which one of the parties undertakes to use the customary skills of his calling to execute work himself for the other party. Payments made under the latter contracts generally fall under Article 7 [Article 8 in the RP-US Treaty]. (*Underscoring supplied*)

All the foregoing circumstances convince the Court *En Banc* that the payments made by respondent for software maintenance service fees are business profits and not royalties.

As business profits, the same is taxable in the Philippines only if FII has a permanent establishment (PE) in the Philippines. As found by the Court in Division, FII does not have a PE in the Philippines, as demonstrated by the following:

1. Duly consularized Certificate of Amendment of Articles of Incorporation, which provides that FII is a California Corporation;

2. Certification of Non-Registration of Company issued by SEC, which states that FII is not registered as a corporation or as a partnership in the Philippines;

3. Official Receipts that provide that the maintenance services were performed in the United States; and

4. Mr.Ramon M. Villaflores' Judicial Affidavit (JA) and Revised Supplemental JA, which stipulate the following:

    a. That FII does not maintain an office in the Philippines; and

    b. That, in the course of the performance of maintenance services, FII did not provide or second personnel to petitioner.[39]

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[39] *Rollo*, Decision dated July 11, 2016, pp. 55-56.

FII having no PE in the Philippines, the payments it received from respondent for software maintenance services are not taxable in the Philippines.

Deutsche Bank case is applicable.

Petitioner also argues that *Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue* (*Deutsche Bank* case),[40] should not be applied following the principle of prospectivity of statutes. According to petitioner, at the time respondent filed its petition with the Court in Division, the prevailing doctrine on the matter was that laid down in *Mirant (Philippines) Operations Corporation vs. CIR*[41], thus, strict compliance with RMO No. 1-2000 is necessary.

We disagree. The Supreme Court, in the *Deutsche Bank* case, specifically addressed this issue, to wit:

> ***A minute resolution is not a binding precedent***
>
> At the outset, this Court's minute resolution on *Mirant* is not a binding precedent. The Court has clarified this matter in *Philippine Health Care Providers, Inc. v. Commissioner of Internal Revenue* as follows:
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>> It is true that, although contained in a minute resolution, our dismissal of the petition was a disposition of the merits of the case. When we dismissed the petition, we effectively affirmed the CA ruling being questioned. As a result, our ruling in that case has already become final. When a minute resolution denies or dismisses a petition for failure to comply with formal and substantive requirements, the challenged decision, together with its findings of fact and legal conclusions, are deemed sustained. But what is its effect on other cases?
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>> **With respect to the same subject matter and the same issues concerning the same parties, it constitutes *res judicata*. However, if other parties or another** con—

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[40] G.R. No. 188550, August 19, 2013.
[41] G.R. No. 168531, SC Minute Resolutions dated November 12, 2007 and February 18, 2008.

> **subject matter (even with the same parties and issues) is involved, the minute resolution is not binding precedent.** xxx
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> Besides, there are substantial, not simply formal, distinctions between a minute resolution and a decision. The constitutional requirement under the first paragraph of Section 14, Article VIII of the Constitution that the facts and the law on which the judgment is based must be expressed clearly and distinctly applies only to decisions, not to minute resolutions. A minute resolution is signed only by the clerk of court by authority of the justices, unlike a decision. It does not require the certification of the Chief Justice. Moreover, unlike decisions, minute resolutions are not published in the Philippine Reports. Finally, the proviso of Section 4(3) of Article VIII speaks of a decision. Indeed, as a rule, this Court lays down doctrines or principles of law which constitute binding precedent in a decision duly signed by the members of the Court and certified by the Chief Justice. (Emphasis supplied)

This ruling was squarely applied by the CTA *En Banc* in *CIR v. Masin-AES Pte. Ltd.- Philippine Branch*,[42] as follows:

> *The* **Mirant** *case is not a binding precedent. Thus, the prospective application of the ruling in the* **Deutsche Bank** *case is not an issue.*
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> It is the argument of petitioner that the *Deutsche Bank* case should not be applied prospectively because it has overruled that supposed doctrine laid down in the *Mirant* case. According to petitioner, applying retroactively the *Deutsche Bank* case is oppressive to the interest of the government.
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> . . ., it is clear that a minute resolution may amount to a final action on the case but it is not a

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[42] CTA EB No. 1201, October 28, 2015.

> precedent, and cannot bind non-parties to the action. Conversely, the doctrines or principles of law which constitute binding precedent are embodied in decisions by the Supreme Court, not in its minute resolutions.
>
> Considering that the *Mirant* case was disposed merely through minute resolutions by the Supreme Court, no doctrine, principle of law or binding precedent was ever enunciated therein. Thus, it is erroneous on the part of the petitioner to assume that the *Deutsche Bank* case overruled or abandoned the ruling in the *Mirant* case.
>
> Such being the case, the principle of prospectivity of a new jurisprudential doctrine is not applicable to the *Deutsche Bank* case. Hence, We see no reason not to apply the ruling in the said case to the case at bar.

Thus, based on the foregoing, the Court *En Banc* reiterates the Court in Division's reliance on the Supreme Court ruling in the *Deutsche Bank* case. For emphasis, a portion of said ruling is quoted below:

> <u>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</u>. 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 the relief as it would constitute a violation of the duty required by 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 a prescribed period under the administrative issuance would impair the value of a 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.[43] (*Citations omitted, underscoring supplied*)

In view of the foregoing, the Court *En Banc* finds no cogent reason to reverse or modify the findings of the Court in Division.

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

SO ORDERED.

CATHERINE T. MANAHAN
Associate Justice

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[43] *Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue*, G.R. No. 188550, August 19, 2013.

WE CONCUR:

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Presiding Justice

Juanito C. Castañeda, Jr.
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CAESAR A. CASANOVA
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ESPERANZA R. FABON-VICTORINO
Associate Justice

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

MA. BELEN M. RINGPIS-LIBAN
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