REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

MCKINSEY & CO. (PHILS.), *Petitioner,*	**CTA EB No. 952** (CTA Case No. 8078)
- versus-	
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	

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COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB No. 955** (CTA Case No. 8078)
	Present:
- versus-	Del Rosario, *PJ,* Castañeda,Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Cotangco-Manalastas, and Ringpis-Liban, *JJ.*
MCKINSEY & CO. (PHILS.),	Promulgated:
Respondent.	APR 21 2014 9:05 a.m.

x- -x

D E C I S I O N

COTANGCO-MANALASTAS, J.:

Before the Court *En Banc* are the consolidated petitions for review, filed by the parties, to appeal the Decision[1] dated July 30, 2012, and the Amended Decision[2] dated October 22, 2012, of the CTA Former Second Division. The Decision granted McKinsey's claim for refund in the amount of

[1] *Rollo*, E.B. Case No. 952, pp. 26-43.
[2] *Rollo*, pp. 45-54.

P111,901,506.40, representing its excess creditable withholding tax for taxable years 2007 and 2008. The amount was increased to P114,121,994.00 in the Amended Decision.

On October 29, 2012, McKinsey received a copy of the Amended Decision dated October 22, 2012. It then filed its petition for review with the Court *En Banc* on November 13, 2012, docketed as CTA EB Case No. 952.

The Commissioner of Internal Revenue (CIR) received the Amended Decision dated October 22, 2012 on October 25, 2012. She filed a motion for extension of time to file petition for review on November 9, 2012, which was granted by the Court. On November 23, 2012, within the period of extension allowed by the Court, the CIR filed her petition for review through registered mail which was docketed as CTA EB Case No. 955.

On January 7, 2013, CTA EB No. 955 was consolidated with CTA EB No. 952.

The Facts

The facts, as narrated in the Decision, are as follows:

> "Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, United States of America. It is authorized to transact business in the Philippines as a branch office primarily to engage in management consultancy services.
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> Respondent is sued in her official capacity as the Commissioner of Internal Revenue, having been duly appointed to exercise the powers and perform the duties of her office including, *inter alia*, the power to decide disputed assessments, refunds of internal revenue taxes, fees and other charges, penalties imposed in relation thereto, or other matters arising under the Tax Code.
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> For calendar year ending December 2006, petitioner reported a tax overpayment in the amount of P90,373,448.00 in its Annual Income Tax Return. In the said return, petitioner indicated its intention to carry over the said tax overpayment by marking the box "To be carried over as tax credit next year/quarter."

On April 15, 2008, petitioner filed with the Bureau of Internal Revenue (BIR) its Annual Income Tax Return for calendar year ending December 2007 which show a Minimum Corporate Income Tax (MCIT) of P2,721,265.00. The MCIT due is offsetted against Prior Year's Excess Credits other than MCIT in the amount of P90,373,448.00, Creditable Tax Withheld for the First Three Quarters in the amount of P2,24,133.00 and Creditable Tax Withheld per BIR Form No. 2307 for the Fourth Quarter in the amount of P17,721,832.00. This leaves the petitioner a Tax Overpayment in the amount of P131,620,148.00. Petitioner manifested its intention to avail of tax refund when it marked the box "To be refunded" on the said Tax Return.

On April 17, 2009, petitioner filed its Annual Income Tax Return for calendar year ending 2008. The said Income Tax Return reveals that it has a Minimum Corporate Income Tax in the amount of P2,388,293.00 which was offsetted against its Prior Year Excess Credits other than MCIT in the amount of P87,652,183.00, Creditable Tax Withheld for the First Three Quarters in the amount of P51,427,440.00 and Creditable Tax Withheld per BIR Form No. 2307 for the Fourth Quarter in the amount of P24,298,192.00. Petitioner indicated that it wishes to avail of a tax refund by marking the box with the said option.

Thereafter, petitioner filed an administrative claim on March 31, 2010, before the BIR requesting for the issuance of a tax credit certificate in(*sic*) refund of excess creditable withholding tax for taxable years 2007 and 2008 in the amounts of P43,588,554.00 and P76,105,045.00, respectively.

Alleging that respondent did not act upon its administrative claim, petitioner filed the instant Petition on April 14, 2010."[3]

After trial, the Former Second Division issued the Assailed Decision, dated July 30, 2012, disposing of the case, as follows:

"WHEREFORE, premises considered, the instant Petition for Review is hereby PARTIALLY GRANTED. Accordingly, respondent is hereby ORDERED to refund to petitioner the amount of P111,901,506.40, representing

[3] *Rollo*, pp. 26-28.

its excess creditable withholding tax for taxable years 2007 and 2008."[4]

On motion for reconsideration, the Former Second Division issued an Amended Decision, dated October 22, 2012, increasing the amount to be refunded:

> "WHEREFORE, respondent's "MOTION FOR RECONSIDERATION" is hereby DENIED for lack of merit, while petitioner's "MOTION FOR PARTIAL RECONSIDERATION (Of the Decision dated 30 July 2012)" is hereby PARTIALLY GRANTED. The July 30, 2012 Decision of this Court is hereby MODIFIED. Accordingly, respondent is hereby ORDERED to refund to petitioner the amount of P114,121,994.00, representing its excess creditable withholding tax for taxable years 2007 and 2008."[5]

McKinsey and the CIR filed their respective Petitions for Review with the Court *En Banc*, which were later consolidated.

Prior to consolidation with CTA EB Case No. 952, the CIR was ordered to file Comment, which despite notice, the CIR failed to do. In CTA EB Case No. 955, respondent McKinsey & Co. (Phils.) filed its Opposition/Comment on April 29, 2013.[6]

On May 17, 2013, the Court *En Banc* resolved to give due course to the petitions, and ordered the filing of memoranda.[7] McKinsey & Co. (Phils.) [hereafter, petitioner] filed its memorandum on July 5, 2013.[8] On the other hand, the Commissioner of Internal Revenue [hereafter, respondent] failed to file its memorandum despite notice.

The instant case was deemed submitted for resolution on September 18, 2013.

Issues

The issues raised by petitioner and respondent in their respective petitions for review are summarized as follows:

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[4] *Rollo*, p. 42.
[5] *Rollo*, p. 53.
[6] *Rollo*, pp. 71-85.
[7] *Rollo*, pp. 89-90.
[8] *Rollo*, pp. 91-120.

I. Whether or not the Honorable Court's Second Division erred in holding that Petitioner is not entitled to a portion of its claim for refund of excess CWT in the amount of P2,889,070.40 because it failed to prove its prior years' excess tax credits by not presenting in evidence the corresponding certificates of tax withheld for the said periods.

II. Whether or not the Honorable Court's Second Division erred in holding that Petitioner is entitled to the claim for refund of excess CWT in the amount of P114,121,994.00, even if it did not indicate the amount of CWT in the "Creditable Tax Withheld" column of Schedule 1 or the "Schedule of Sales/Revenues/ Receipts/Fees", on page 2 of the annual income tax returns.

III. Whether or not the Honorable Court's Second Division erred in holding that Petitioner is entitled to the claim for refund of excess CWT in the amount of P114,121,994.00, even if it failed to present in evidence the Management and Consultancy Agreement/Contract between Petitioner and its clients, in proving the income payments.

IV. Whether or not the Honorable Court's Second Division erred in holding that Petitioner is entitled to the claim for refund of excess CWT in the amount of P114,121,994.00, even if it failed to present the official receipts, in proving the income payments.

V. Whether or not the Honorable Court's Second Division erred in holding that Petitioner is entitled to the claim for refund of excess CWT in the amount of P114,121,994.00, even if Petitioner failed to present proof of actual remittance to the BIR of the taxes withheld and the testimony of the payors/withholding agents.[9]

Ruling of the Court

The issues raised by the parties boil down to whether the Former Second Division erred in granting the partial refund of excess CWT in the amount of P114,121,994.00.

Respondent argues that petitioner has not sufficiently proved its entitlement to the claimed refund, whereas petitioner argues that the Former Second Division erred in reducing the amount granted for refund.

Petitioner's and respondent's arguments have been extensively considered and discussed in the assailed Decision dated July 30, 2012, and again in the Amended Decision, dated October 22, 2012, and this Court finds no compelling reason to reverse or modify the same. However, this Court finds reason to reiterate the need for proving petitioner's prior year's excess CWT.

It is well-settled that a taxpayer claiming for a tax credit or refund of CWT must comply with the following requisites:

1) The claim must be filed with the CIR within the two-year period from the date of payment of the tax;

2) It must be shown on the return that the income received was declared as part of the gross income; and

3) The fact of withholding must be established by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of the tax withheld.

As found by the Former Second Division, petitioner has sufficiently complied with the foregoing, *to wit*:

> "Applying the foregoing provisions in the case at bench, the present claim covers taxable years 2007 and 2008 for which petitioner filed its Annual Income

[9] *Rollo*, p. 97.

Tax Returns on April 15, 2008 and April 17, 2009, respectively. Counting two years from these dates, petitioner's administrative claim filed on March 31, 2010 and the subsequent appeal via a Petition for Review filed before this Court on April 14, 2010, were therefore timely filed within the two-year prescriptive period.

xxx

With respect to the third requisite, petitioner presented Certificates of Creditable Tax Withheld at Source (BIR Form No. 2307), detailed as follows:

xxx

Based on the foregoing table, it can be inferred that the certificates supporting petitioner's claimed excess/unutilized CWT for taxable year 2007 only showed the amount of P43,588,554.00 instead of the reported amount of P43,967,965.00. Since the difference of P379,411.00 is without supporting certificates, the same shall be deducted from petitioner's claim. Moreover, the certificate marked as Exhibit "O" with CWT of P2,303,121.60 is dated outside the period of claim, hence, must likewise be deducted from its claim. Consequently, the excess/unutilized CWT for taxable year 2007 with valid certificates amounted only to P41,285,432.40, computed as follows:

xxx

As regards petitioner's claimed excess/unutilized CWT for taxable year 2008, this Court notes that the CWT shown per certificates in the amount of P76,105,044.42 is higher than the CWT of P75,725,632.00 reflected per petitioner's 2008 Annual Income Tax Return. Applying Section 76 of the NIRC of 1997, as amended, which requires that the excess CWT be reflected on the Annual Income Tax Return, any amount, therefore, in the supporting withholding tax certificates, that exceeds the amount declared in the Annual Income Tax Return cannot be allowed. Thus, although the amount P76,105,044.42 is supported by proper withholding tax certificates, only the declared CWT of P75,725,632.00 shall be deemed valid.

In fine, petitioner complied with the third requisite but only to the extent of P117,011,064.40 out of the total claimed CWT of P119,693,598.42 for taxable years 2007 and 2008, computed as follows:

xxx

> With reference to the second requisite, the certificates revealed that the creditable income taxes of P41,285,432.40 and P76,105,044.42 were withheld on management and technical consultancy fees received by petitioner in the amounts of P287,937,695.00 and P513,126,580.23 for taxable years 2007 and 2008, respectively, as shown below:
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> xxx
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> In other words, petitioner properly declared in its income tax return the gross income related to the substantiated CWT for taxable years 2007 and 2008 in the respective amounts of P41,285,432.40 and P75,725,632.00 or in the sum of P117,011,064.40."[10]

Furthermore, prior to the grant of refund, the Court must verify that the amount of CWT claimed for refund is the proper subject of a refund claim and is actually unutilized. The Former Second Division found that petitioner clearly indicated its option to be refunded, but failed to prove that said amount was fully unutilized, *to wit:*

> "In the instant case, petitioner unequivocally express(*sic*) its option to be refunded of its excess creditable withholding tax for taxable years 2007 and 2008 by placing an 'x' mark in the box corresponding to the said choice. Inasmuch as only the excess creditable withholding tax from taxable year 2006 were carried-over in petitioner's Quarterly Returns and Annual Income Tax Returns for taxable years 2008 and 2009, the substantiated CWT for taxable years 2007 and 2008 in the amount of P117,011,064.40 may be refunded pursuant to Section 76 of the NIRC of 1997, as amended.
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> However, records show that petitioner did not present its withholding tax certificates to prove the existence of its prior year's (2006) excess tax credits of P90,373,448.00. xxx
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> xxx
>
> In this regard, a mere allegation by the taxpayer that it has prior year's excess credits in its Annual Income Tax Returns will not suffice. Thus, in the case at bar, petitioner must prove that, other than the claimed amount of P117,011,064.40, it had enough prior year's excess credits to cover its declared MCIT liabilities for taxable years 2007 and 2008 in the

[10] *Rollo*, pp. 33-37.

> respective amounts of P2,721,265.00 and P2,388,293.00, totaling P5,109,558.00."[11]

Petitioner's appeal hinges on its position that prior year's excess credits need not be proven in a claim for refund of excess CWT. We do not agree. Considering that petitioner has MCIT due for the taxable years 2006, 2007, and 2008, it becomes incumbent upon petitioner to prove not only the CWT for the current year but also its prior year's excess credits in order to ascertain the excess income tax paid/CWT which may be the subject of refund.[12] Thus, we agree with the Division's findings in its Amended Decision:

> "While the certificate marked as Exhibit "O" pertains to petitioner's 2006 CWT, the same does not represent petitioner's *excess* credits for taxable year 2006. In its 2006 Annual ITR, petitioner reflected an MCIT due of P82,634.00 which shall be deducted from the 2006 CWT of P 2,303,121.0. Thus, only the amount of P2,220,487.60 (P2,303,121.60 less P82,634.00) represents petitioner's *excess* credits for taxable year 2006,which shall be applied against petitioner's MCIT liabilities for taxable years 2007 and 2008 in the total amount of P5,109,558.00. Consequently, only the remaining MCIT due for taxable years 2007 and 2008 in the amount of P2,889,070.40 shall be offset against petitioner's substantiated claim for 2007 and 2008 in the amount of P117,011,064.40 leaving a refundable amount of P114,121,994.00, representing petitioner's excess CWT for taxable years 2007 and 2008."[13]

The importance of determining the excess and unutilized CWT is emphasized by the nature of the CWT. In one case, the Supreme Court explained that "money is a fungible property" and the amount to be applied against the income tax due in the final adjustment return of petitioner may be taken from its excess credits in a prior year or from those withheld in the current year or from both.[14] Thus, a *Tax Overpayment* is composed of the taxpayer's prior year's credits, current year's tax payments, creditable taxes withheld for the current year

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[11] *Rollo*, pp. 39-41.
[12] *Rollo*, p. 47.
[13] *Rollo*, p. 49
[14] *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*, G.R. Nos. 156637 and 162004, December 14, 2005.

and even foreign tax credits (if applicable).[15] In the instant case, since petitioner has opted to claim a refund of its excess CWT for taxable years 2007 and 2008, in its entirety, it becomes incumbent upon petitioner to prove that it has sufficient prior year's excess CWT to cover its MCIT liabilities for taxable years 2006, 2007, and 2008. Failing to do so, petitioner has sufficiently proven its entitlement to the refund only in the reduced amount of P114,121,994.00.

WHEREFORE, premises considered, the instant Petitions for Review are hereby **DISMISSED** for lack of merit.

Accordingly, the July 30, 2012 Decision of the Former Second Division, as modified in its October 22, 2012 Amended Decision, ordering the refund of the amount of P114,121,994.00, representing petitioner's excess creditable withholding tax for taxable years 2007 and 2008, is hereby **AFFIRMED**.

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

(On Leave)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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[15] *Commissioner of Internal Revenue vs. Nissan Motor Phil.*, C.T.A. EB Case Nos. 137 & 139, October 6, 2006.

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

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