REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 2341** **(CTA Case No. 9012)**
-versus-	**Present:** **Del Rosario,** *P.J.,* **Castañeda, Jr.,** **Uy,** **Ringpis-Liban,** **Manahan,** **Bacorro-Villena,** **Modesto-San Pedro,** *and* **Reyes-Fajardo,** *JJ.*
DOLE FRESH FRUIT COMPANY, Respondent.	**Promulgated:** NOV 11 2021 1:45pm

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DECISION

RINGPIS-LIBAN, J.:

Before the Court *En Banc* is a Petition for Review filed by petitioner Commissioner of Internal Revenue (CIR) to seek nullification of the Decision[1] dated February 5, 2020 (assailed Decision), the dispositive portion thereof reads:

> "**WHEREFORE**, in light of the foregoing considerations, the instant Petition for Review is **GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is **ORDERED TO REFUND** in favor of petitioner Dole Fresh Fruit Company the amount of **₱9,036,864.40**, representing erroneously paid capital gains tax from sale of its shares of stock in Dole Philippines, Inc. to Dole Asia Holding Pte. Ltd.

[1] Rollo, CTA EB Case No. 2341 pp. 54-75.

SO ORDERED."

and the Resolution[2] dated September 8, 2020 (assailed Resolution) of the same Second Division of the Court (Court in Division) denying the CIR's Motion for Reconsideration, the dispositive portion thereof reads:

> "**WHEREFORE**, premises considered, respondent's Motion for Reconsideration is **DENIED** for lack of merit.
>
> **SO ORDERED.**"

THE PARTIES

Petitioner CIR is the duly appointed Commissioner of Internal Revenue with authority among others, to decide, approve, and grant tax credits and/or refunds of overpaid or erroneously paid internal revenue taxes.[3]

Respondent Dole Fresh Fruit Company (DFFC) is a corporation organized and existing under the laws of the State of Nevada, Unites States of America (US) with principal place of business at One East First Street, Reno, Washoe County, Nevada, US. It is principally engaged in any lawful activity for which corporations may be formed under the General Corporation Law of Nevada.[4]

THE FACTS

The facts of the case as found by the Court are as follows:

DFFC owns 0.64% of the total shareholdings of Dole Philippines, Inc. (DPI), equivalent to 1,527,600 common shares out of DPI's authorized capital stock of 2,528,120,000 common shares.[5] DPI is a corporation organized and existing under Philippine law.[6]

On February 19, 2013, DFFC sold and transferred to Dole Asia Holdings Pte. Ltd. (DAHL), a Singapore private limited company, all its rights, title and interests in and to the 1,527,600 Common B shares in DPI, for a purchase price of ₱105, 694,644.00[7]

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[2] Rollo, pp. 77-81.
[3] Petition, page 2.
[4] Decision, page 2.
[5] Exhibits "P-6" and "P-7."
[6] Exhibit "P-16."
[7] Exhibit "P-5."

On March 4, 2013, DFFC filed an application with the Bureau of Internal Revenue's (BIR) Internal Tax Affairs Division (ITAD) to request confirmation that the transaction is exempt from capital gains tax under the Republic of the Philippines-United States (RP-US) Tax Treaty.[8]

On March 5, 2013, DFFC filed its documentary stamp tax return and paid Documentary Stamp Tax (DST) in the amount of ₱57,725.00.[9]

On March 21, 2013, DFFC filed its capital gains tax (CGT) return and paid capital gains taxes in the amount of ₱9,036,864.40.[10]

On April 5, 2013, DFFC secured the Certificate Authorizing Registration (CAR) and tax clearance on the sale of shares.[11]

On October 1, 2014, DFFC filed with the BIR an Application for Tax Credits/Refund (Form No. 1914) to recover the erroneously paid capital gains taxes amounting to ₱9,036,864.40.[12]

On March 19, 2015, DFFC filed a Petition for Review with the Court in Division."[13]

On May 13, 2015, the CIR filed his Answer[14] on the Petition for Review.

On May 18, 2015, the Court in Division issued a Notice of Pre-Trial Conference setting the Pre-Trial Conference on July 16, 2015.[15]

Respondent filed a Motion to Take Deposition upon Written Interrogatories on June 25, 2015,[16] which was granted by the Court in Division on September 16, 2015.[17]

On January 13, 2016, DFFC submitted its Notice to Take Deposition Upon Written Interrogatories.[18]

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[8] Exhibit "P-15."
[9] Exhibits "P-10 and "P-11."
[10] Exhibits "P-8" and "P-9."
[11] Exhibit "12."
[12] Exhibit "P-13."
[13] Docket, CTA Case No. 9012, pp. 6-13, with annexes.
[14] Ibid., pp. 189-193.
[15] Ibid. pp. 194-195.
[16] Ibid., pp. 199-202.
[17] Ibid., pp. 228-232.
[18] Ibid., pp. 233-239.

On February 16, 2016, the Court in Division issued a Resolution[19] ordering respondent to serve his cross-interrogatories within ten (10) days from notice.

On April 1, 2016, the Court in Division issued a Resolution[20] setting the pre-trial conference on May 26, 2016.

On May 20, 2016, the Court in Division received the parties' respective Pre-Trial Briefs.[21]

On June 10, 2016, the parties filed their Joint Stipulations of Facts and Issues.[22] Thereafter, the Court issued the Pre-Trial Order dated July 27, 2016.[23]

Trial thereafter ensued. DFFC presented Mr. Teodoro C. Santos, Jr. Finance Manager of DPI and the Deposition Upon Written Interrogatories of Mr. Ronald Bouchard, President of DFFC.

On January 14, 2019, the CIR filed a "Manifestation and Compliance" manifesting that the presentation of his evidence be waived.[24]

On March 5, 2019, respondent filed its Memorandum.[25] On the other hand, on March 13, 2019, the Judicial Records Division of this Court issued a Records Verification Report stating that the CIR failed to file his Memorandum.[26]

In the Resolution[27] dated March 18, 2019, the Court in Division deemed the case submitted for decision.

On February 5, 2020, the Court in Division rendered the assailed Decision.[28]

On February 26, 2020, the CIR filed a "Motion for Reconsideration."[29]

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[19] Ibid., page 374.
[20] Ibid., pp. 398-399.
[21] Ibid., pp. 400-403 and 404-412.
[22] Ibid., pp. 633-638.
[23] Ibid., pp. 674-680.
[24] Ibid., pp. 1067-1068.
[25] Ibid., pp. 1077-1096.
[26] Ibid., p. 1097.
[27] Ibid., p. 1098.
[28] Ibid., pp. 1104-1125.
[29] Ibid., pp. 1126-1130.

On June 29, 2020, DFFC filed its "Comment (To: Motion for Reconsideration filed by Commissioner of Internal revenue dated 26 February 2020)."[30]

On September 8, 2020, the Court in Division issued the questioned Resolution.[31]

Aggrieved, the CIR filed within the extended period, this Petition for Review on October 15, 2020.[32]

In the Resolution[33] dated November 5, 2020, the CIR was ordered to submit duplicate original or certified true copies of the Assailed Decision and Assailed Resolution, within ten (10) days from notice.

On November 19, 2020, the CIR filed his "Compliance"[34] to the Court *En Banc's* Resolution dated November 5, 2020.

On December 9, 2020, the Court *En Banc* admitted the certified true copies of the Decision and Resolution and ordered respondent to file its comment in this case.[35]

On December 28, 2020, respondent filed its "Comment (to Commissioner of Internal Revenue's Petition for Review dated 15 October 2020)."[36]

In the Resolution[37] dated January 19, 2021, the Court noted respondent's "Comment (to Commissioner of Internal Revenue's Petition for Review dated 15 October 2020)." Accordingly, the instant case was deemed submitted for decision.

THE ISSUE

The Court *En Banc* is confronted with this main issue: ***Whether or not the Court in Division erred in declaring DFFC entitled to a refund of the capital gains taxes erroneously paid to and collected by the CIR.***

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[30] Ibid., pp. 1138-1151.
[31] Ibid., pp. 1154-1158.
[32] Rollo, CTA EB No. 2341, pp. 6-14, with Annexes.
[33] Ibid., 48-49.
[34] Ibid., pp. 50-52.
[35] Ibid., pp. 83-86.
[36] Ibid., pp. 86-99.
[37] Ibid., pp. 101-103.

THE ARGUMENTS

The CIR contends that the value of the assets shall be determined from the financial statements as of the date of sale, as verified by the BIR; that the reservation clause under the RP-US Tax Treaty applies to the sale of shares of stocks between DFFC and DAHL; DFFC failed to establish whether the real property interests in DPI are located in the Philippines or outside the Philippines; that DFFC failed to establish the actual real property interest of DPI located in the Philippines; and that tax exemptions are to be construed *strictissimi juris* against the petitioner.

On the other hand, DFFC counter argues that the CIR failed to show reversible error by the Court in Division in admitting into evidence and giving credence to DPI's audited financial statements for the year ended December 31, 2012 and dated May 17, 2013; that there is no basis to the argument that the reservation clause under the RP-US Treaty applies to the sale of shares of stocks between DFFC and DAHL; that there is no basis to the CIR's allegation that DFFC failed to establish that DPI's real property interests located in the Philippines are less than 50% of its total assets; and that CIR failed to show that the Court in Division committed reversible error in holding that DFFC is entitled to its refund.

THE RULING OF THE COURT *EN BANC*

The Petition for Review was timely filed.

On March 21, 2013, DFFC filed its capital gains tax return and paid capital gains taxes in the amount of ₱9,036,864.40.

On October 1, 2014, DFFC filed with the BIR an Application for Tax Credits/Refund (Form No. 1914) to recover the erroneously paid capital gains taxes amounting to P9,036,864.40.

Pursuant to Section 229 of the National Internal Revenue Code (NIRC) of 1997, as amended, DFFC filed a Petition for Review with the Court in Division on March 19, 2015, which is within the 2-year period to file cases for refund before the courts.

On February 5, 2020, a Decision was promulgated by the Court in Division.

On February 26, 2020, the CIR filed a Motion for Reconsideration of the Court in Division's Decision.

On September 8, 2020, the Court in Division issued a Resolution on the Motion for Reconsideration. Said Resolution was received by the CIR on September 15, 2020.

From receipt of the said Resolution on September 15, 2020, the CIR had until September 30, 2020 within which to file the Petition for Review before the Court *En Banc*. On September 30, 2020, the CIR filed a "Motion for Extension of Time to File Petition for Review" praying for an extension of fifteen (15) days from the expiration of the period to file Petition for Review or until October 15, 2020 within which to file a Petition for Review. On October 5, 2020, the Court *En Banc* issued a Minute Resolution granting petitioner's motion.[38]

Records show that on October 15, 2020, petitioner filed the instant Petition for Review. Hence, this Petition for Review was timely filed.

DFFC's capital gains derived from the transfer of its shares of stock are exempt from CGT pursuant to RP-US Tax Treaty

The CIR insists that DFFC's capital gains derived from the sale of its shares in DPI are not exempt from CGT in the Philippines. Yet it did not advance any new argument that will persuade this Court *En Banc* to overturn the assailed Decision.

We find that DFFC is entitled to refund of the capital gains taxes erroneously paid to and collected by the CIR. The sale of DFFC's shares is exempt from CGT in the Philippines pursuant to the RP-US Tax Treaty.

As stated in the Affidavit Certifying Copy of Certificate of Incorporation with attached Articles of Incorporation[39] and the Philippine Securities and Exchange Commission Certificate of Non-Registration,[40] it was shown that DFFC is not registered as a corporation or partnership in the Philippines. Hence, the provisions on Section 28(B)(5)(c) in relation to Sections 32(A)(3) and 32(B)(5) of the NIRC of 1997, as amended, shall apply in this case, viz:

"Sec. 28. Rates of Income Tax on Foreign Corporation. –

xxx xxx xxx

[38] Rollo, p. 5.
[39] Exhibit "P-4."
[40] Exhibit "P-4.1."

(B) Tax on Nonresident Foreign Corporation. -

xxx xxx xxx

(c) Capital Gains from Sale of Shares of Stock not Traded in the Stock Exchange. – A final tax at the rates prescribed below is hereby imposed upon the net capital gains realized under the taxable year from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation, except shares sold, or disposed of through the stock exchange:

Not over P100,000.......................................5%
On any amount in excess of P100,000..............10%

xxx xxx xxx

Sec. 32. Gross Income. –

(A) General Information. – Except when otherwise provided in this Title, gross income means all income derived from whatever source, including (but not limited to) the following items:

xxx xxx xxx

(3) Gains derived from dealing in property;

xxx xxx xxx

(B) Exclusions from Gross Income. – The following items shall not be included in gross income and shall be exempt from taxation under this Title:

xxx xxx xxx

(5) Income Exempt under Treaty. – Income of any kind, to the extent required by any treaty obligation binding upon the Government of the Philippines."

As ruled by the Court in Division:

"Generally, any gain by petitioner from the sale of shares in DPI should be subject to CGT. However, considering that the Philippines has a treaty with the US, the said income from the sale of shares may be exempted from income tax if the conditions set forth under the RP-US Tax Treaty are satisfied, which states:

> 'ARTICLE 14
> *Capital Gains*
>
> (1) Gains from the alienation of tangible personal (movable) property forming part of the business property of a permanent establishment which a resident of a Contracting State has in the other Contracting State or of tangible personal (movable) property pertaining to a fixed base available to a resident of a Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in the other State. However, gains derived by a resident of a Contracting State from the alienation of ships, aircraft or containers operated by such resident in international traffic shall be taxable only in that State, and gains described in Article 13 (Royalties) shall be taxable only in accordance with the provisions of Article 13 (Royalties).
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> (2) Gains from the alienation of any property other than those mentioned in paragraph (1) or in Article 7 (Income from Real Property) shall be taxable only in the Contracting State of which the alienation is a resident.'

Corollary to the foregoing, Article 1 of the Reservation Clause of the RP-US Tax Treaty provides:

> 'ARTICLE 1
>
> Notwithstanding the provisions of Article 14 of the Convention relating to capital gains, both the Philippines and the United States may tax gains from the disposition of an interest in a corporation <u>if its assets consist principally of a real property interest located in that country</u>. Likewise, both countries may tax gain from the disposition of an interest in a partnership, trust or estate to the extent the gain is attributable to a real property interest in one of the countries. The term "real property interest" is to have the meaning it has under the law of the country in which the underlying real property is located.' (Underlining supplied)

Thus, under the RP-US Tax Treaty, capital gains from the sale of shares of stock shall be taxable in the state where the alienator is a resident. However, the Reservation Clause provides that such sale may be taxed both by the Philippines and the US if the interest being disposed is in a corporation whose assets consist principally of a real property interest located in that country. On the reverse side, under the RP-US Tax Treaty, the subject capital gains may be exempt from Philippine tax the interest being disposed is in a corporation whose assets do not consist principally of a real property interest located in the Philippines.

In the instant case, it was proven that petitioner DFFC is a non-resident foreign corporation, and the shares transferred are of DPI which is a domestic corporation. It is now necessary to determine whether the assets of DPI consist principally of real property interest in the Philippines.

For purposes of determining whether under the applicable tax treaty, the assets of a corporation consist principally of real property interests, RR No. 4-86 dated April 2, 1986 was issued. It provided the guidelines for determining the composition of the company's assets. Under the said Revenue Regulation, the term "Real Property Interest" shall be understood to include real properties as understood under Philippine laws. "Real Property Interest" means any properties enumerated in Section 327 of the RR No. 4-86 which, are not, however, exclusive of others that are similarly situated. Moreover, the term "principally" means more than fifty percent (50%) of the entire assets in terms of value.

Furthermore, Section 4 of RR No. 4-86 provides that the basis for determining the composition of a company's assets shall be the value of all the assets of the subject corporation, both real and personal, as appearing in its financial statement on the date of the sale of the share or interest and as verified by the BIR.

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Summarizing the provisions thus: (1) capital gains derived by residents of other Contracting States from the disposition of shares or interests in the Philippine corporation are taxable in the Philippines only if the assets of the corporation consist principally of real property interest located in the Philippines; (2) real property interests are interests on properties enumerated in RR 4-86, including real properties as defined under Philippine law; (3)

principally means more than fifty percent (50%) of the entire assets in terms of value; and, (4) the value of the assets shall be determined from the financial statements as of the date of the sale, as verified by the BIR.

Applying the foregoing to the instant case, petitioner presented DPI's Audited Financial Statements for the year ended December 31, 2012 dated May 17, 2013. Evident from the said Audited Financial Statements that the percentage of DPI's real property interest over its total assets was only **17.80%,** to wit:

Assets	As of December 31, 2012
Property, plant and equipment	P 4,725,601,019.00
Total Assets	26,549,527,599.00
Percentage	17.80%

Petitioner likewise submitted the Comparative Schedule of Property, Plant and Equipment to show that the valuation of DPI's real property during the transaction date amounts to P4,568,099,916.00 which is way less than 50% of DPI's total assets.

As computed, the real property interest of DPI does not exceed 50%, thus it cannot be said to have assets consisting principally of a real property interest in the Philippines. Therefore, petitioner's capital gains derived from the transfer of its shares of stock in the DPI shall be exempt from CGT in the Philippines, pursuant to RP-US Tax Treaty."[41]

Well-settled in this jurisdiction is the fact that actions for tax refund, as in this case, are in the nature of a claim for exemption and the law is construed in *strictissimi juris* against the taxpayer. The pieces of evidence presented entitling a taxpayer to an exemption are also *strictissimi* scrutinized and must be duly proven.[42]

In the instant case, DFFC was able to prove that it is entitled to refund. It was able to establish by preponderance of evidence that it is an entity incorporated and residing in the US; that it is not registered either as a corporation or a partnership in the Philippines nor has been issued a license to

[41] Decision, Rollo, CTA EB No. 2341, pp. 31-35. Citations omitted.

[42] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue,* G.R. No. 159490, February 18, 2008.

do business in the Philippines; that the real properties of DPI that were sold do not consist of more than 50% of all its assets in the Philippines; and that it complied with all the requirements for a claim for refund of erroneously paid taxes.

In *Republic of the Philippines, represented by the Commissioner of Internal Revenue vs. Team (Phils.) Energy Corporation (formerly Mirant (Phils.) Energy Corporation),* [43] the Supreme Court ruled that "it is fundamental that the findings of fact by the CTA 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."

In view of the foregoing discussions, and there being no new matters or issues raised in the instant Petition for Review, the Court *En Banc* finds no cogent reason to disturb the assailed Decision and Resolution.

WHEREFORE, premises considered, the Petition for Review is **DENIED for lack of merit**.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

[43] G. R. No. 188016, January 14, 2015, citing Sea-Land Service, Inc. vs. Court of Appeals, G.R. No. 122605, April 30, 2001.

ERLINDA P. UY
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

(Inhibited)
MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

MARIAN IVY F. REYES-FAJARDO
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice