REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

MANILA NORTH TOLLWAYS CORPORATION,
Petitioner,

CTA CASE NO. 7864

- versus -

Members:
CASTAÑEDA, JR.,*Chairperson*
CASANOVA, *and*
MINDARO-GRULLA, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
APR 1 2 2011
4:30 p.m.

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DECISION

CASTAÑEDA, JR., *J.*:

STATEMENT OF THE CASE

This Petition for Review seeks the refund or issuance of tax credit certificate in the amount of ₱8,640,240.00, representing petitioner's overpaid Final Withholding Tax (FWT) on the dividends it paid to its stockholder Egis Projects S.A. (hereafter referred to as "Egis") for the year 2006.

STATEMENT OF FACTS

Manila North Tollways Corp. (Petitioner) is a corporation duly registered and operating under the laws of the Republic of the Philippines, with business office at the NLEX Compound, Balintawak, Caloocan City, Philippines. Petitioner is the builder of the North Luzon Expressway (NLEX) and is the authorized concessionaire with rights to operate, maintain and charge tolls on the NLEX.[1]

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), vested under the appropriate laws with the authority to carry out all the functions, duties, and responsibilities of said office, including, *inter alia*, the power to decide, approve, and grant refunds and/or tax credits of erroneously paid or illegally collected internal revenue taxes.

On November 27, 2006, petitioner's Board of Directors declared cash dividends of seventy pesos (₱70.00) per share payable on or before December 21, 2006. Among petitioner's stockholders is Egis, a *sociedad anonima* incorporated in France, which owns 2,468,640 shares or 13.9% of the outstanding capital stock of petitioner.

For that reason, petitioner, pursuant to Article 10 of the "Convention between the Government of the Republic of the Philippines and the Government of the French Republic for the Avoidance of Double Taxation" (hereafter referred to as "RP-France Tax Treaty"), withheld and paid 15% of the declared dividends as FWT on the dividends so declared in favor of Egis.

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[1] Par. 1, Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 133.

Consequently, Egis protested the withholding done by petitioner, stating that pursuant to the "Protocol to the Tax Convention between the Government of the Republic of the Philippines and the Government of the French Republic," (hereafter referred to as "Protocol to the Tax Treaty") the proper tax rate is only 10%. Egis therefore demanded for the 5% difference. Petitioner acceded with the understanding that petitioner would be authorized to claim a refund of the overpaid FWT for and on behalf of Egis.

On December 23, 2008, petitioner filed with the International Tax Affairs Division (ITAD) of the Bureau of Internal Revenue its Application for Relief from Double Taxation and Refund ("Application and Refund") in the amount of ₱8,640,240.00.[2]

Subsequently, on January 13, 2009, petitioner submitted additional documents in support of its "Application and Refund".

Despite the filing of its "Application and Refund", respondent has not acted with finality on petitioner's "Application and Refund" prior to the expiration of the two-year period prescribed under Section 204 of the National Internal Revenue Code (NIRC) of 1997. Hence, on January 14, 2009, petitioner filed the instant Petition for Review before this Court through registered mail.

In his Answer[3] dated April 7, 2009, respondent raised the following Special and Affirmative Defenses:

"<u>SPECIAL AND AFFIRMATIVE DEFENSES</u>

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[2] Exhibits "H" and "I"; Par. 3, Stipulated Facts, JSFI, docket, p. 134.
[3] Docket, pp. 90-95.

8. It is a well-settled principle that tax refunds are in the nature of tax exemptions and are to be construed in *strictissimi juris* against the entity claiming the same. Exemptions from taxation are highly disfavored, so much that they may be odious to the law. The law does not look with favor on tax exemptions and that he who would seek to be thus privileged must justify it by words too plain to be mistaken and too categorical to be misinterpreted. A state cannot be stripped off this most essential power by doubtful words and of this highest attribute of sovereignty by ambiguous language. He who claims an exemption must be able to point the provision of the law creating said right.

9. Petitioner must prove that it is entitled to avail of the preferential tax treaty rate of 10% on final withholding tax on dividends pursuant to the Protocol on Tax Convention between the Government of the Republic of the Philippines and Government of the French Republic.

10. Petitioner must prove that it actually paid final withholding tax on dividends to the BIR in the amount of Twenty-Five Million Nine Hundred Twenty Thousand and (Seven Hundred) Twenty Pesos (₱25,920,720.00) for the year 2006."

On June 5, 2009, the parties submitted a "Joint Stipulation of Facts and Issues"[4], wherein they both admitted the existence of ITAD Ruling No. 196-03 dated December 30, 2003, the Convention Between the Government of the Republic of the Philippines and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Income Taxes, and the Protocol to the Tax Convention between the Government of the Republic of the Philippines and the Government of the French Republic signed on January 9, 1976.

In a Resolution[5] dated June 10, 2009, the Court approved the Joint Stipulation of Facts and Issues submitted by the parties. *gc*

[4] *Id.* at 133-136.
[5] *Id.* at 137.

During trial, petitioner presented its testimonial and documentary evidence; while respondent waived his right to present evidence and submitted the case based on the pleadings. In a Resolution[6] dated February 3, 2010, the parties were ordered to submit their respective Memorandum before the Court.

On June 2, 2010, the case was submitted for decision after both parties filed their memoranda.

STATEMENT OF ISSUE

> Whether petitioner is entitled to claim for refund of the overpaid FWT for dividends remitted in 2006 in the amount of Eight Million Six Hundred Forty Thousand Two Hundred Forty Pesos (₱8,640,240.00).

THE COURT'S RULING

In its Memorandum, petitioner avers that the dividends it paid to Egis in 2006 are subject to only 10% FWT, and not 15% pursuant to the RP-France Tax Treaty, as amended by the Protocol to the Tax Treaty. Hence, it is petitioner's stance that it is entitled to a refund since it complied with all the requirements laid down under Section 229 of the NIRC including the timely filing of the administrative and judicial claims within the two-year period required by law.

Conversely, respondent asserts that petitioner failed to file a timely and appropriate written claim for refund. He argues that petitioner should have filed its claim for refund with the Large Taxpayer's Division, it being a large taxpayer, and not with the ITAD.

Respondent further posits that petitioner failed to comply with Revenue Memorandum Order (RMO) No. 1-2000, which provides that any availment of tax

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[6] *Id.* at 246.

treaty provisions should be preceded by an application for tax treaty relief with the ITAD.

Lastly, respondent contends that petitioner failed to provide relevant documents in support of its claim for refund inasmuch as it never presented the Original Monthly Remittance Return of Final Income Tax (BIR Form No. 1601-F) and the supporting documents showing the details of the computation of its FWT remittance.

Petitioner's claim must be denied.

Article 10 of the Tax Treaty entered into between the Government of the Republic of the Philippines and the Government of the French Republic supports petitioner's argument that dividends paid by a company, which is a resident of the Philippines, to a resident of the French Republic may be taxed in the Philippines at 15% of the gross amount of the dividends if the company which is a resident of the French Republic holds directly at least 10% of the voting shares of the company paying the dividends.[7]

However, Article 10 of the afore-mentioned treaty was amended by Article 5 of the "Protocol to the Tax Convention between the Government of the Republic of the Philippines and the Government of the French Republic", which states that the

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[7] ARTICLE 10. *Dividends* --

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.
2. However, such dividends may be taxed in the Contracting State of which the company paying the dividends in a resident, and according to the law of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:
   a) 15 percent of the gross amount of the dividends if the recipient is a company (excluding partnership) which holds directly at least 10 percent of the voting shares of the company paying the dividends;
   b) in all other cases, 25 percent of the gross amount of the dividends.

rates mentioned in Article 10 of the "RP-France Tax Treaty" would be reduced to 10% and 15%, to wit:

"ARTICLE 5

In Article 10 of the Convention:

- in paragraph 2 the rates of '***15 percent***' and '*25 percent*' are replaced respectively by '***10 percent***' and '*15 percent*';" (*Emphasis supplied*)

Without a doubt, petitioner is correct in claiming that the cash dividends it gave Egis should be subject to only 10% FWT pursuant to the Protocol to the Tax Treaty.

In fact, the Bureau of Internal Revenue, in ITAD Ruling No. 196-03 dated December 30, 2003, had the occasion to rule that pursuant to the "Protocol to the Tax Treaty," dividends paid by a Philippine corporation to a resident of France may be taxed at a rate not exceeding 10% of the gross amount of the dividends if the recipient is a company which holds directly at least 10% of the capital of the Philippine corporation.

While it is undisputed that petitioner should withhold only 10% of the cash dividends it remitted to Egis, petitioner did not comply however with the guidelines set under RMO No. 1-2000, which provides that any availment of tax treaty relief should be preceded by an application for tax treaty relief with ITAD at least fifteen (15) days before the payment of dividends. Said RMO No. 1-2000 explicitly provides:

"2. **Any availment of the tax treaty relief shall be preceded by an application** by filing BIR Form No. 0901 **(Application for Relief from Double Taxation) with ITAD at least 15 days *before* the transaction** i.e. payment of dividends, royalties, etc., accompanied by supporting documents justifying the relief.

> Consequently, BIR Form Nos. TC 001 and TC 002 prescribed under RMO 10-92 are hereby declared obsolete." (*Emphasis supplied*)

Here, petitioner filed its Application for Relief from Double Taxation only on December 23, 2008 or more than one year from the payment of dividends to its stockholders. Clearly, it did not comply with the requirement laid down in RMO No. 1-2000; hence, it cannot avail of the tax treaty relief provisions laid down in the Protocol to the Tax Treaty.

As a matter of fact, in *Commissioner of Internal Revenue vs. CBK Power Company, Ltd.*[8], the CTA *En Banc* had the occasion to rule that a prior application for tax treaty relief is required before a taxpayer can avail of the preferential tax treatment under Philippine tax treaties, to wit:

> "Furthermore, as can be gleaned from the objectives of RMO 1-00, the issuance thereof is not without reason or foundation. Said objectives are as follows:
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> > 'This Order is issued to streamline the processing of the tax treaty relief application in order to improve efficiency and service to the taxpayers.
> >
> > Furthermore, it is to the best interest of both the taxpayer and the Bureau of Internal Revenue that any availment of the tax treaty provisions be preceded by an application for treaty relief with the International Tax Affairs Division (ITAD). **In this way, the consequences of any erroneous interpretation and/or application of the treaty provisions** (*i.e.* claim for tax refund/credit for overpayment of taxes, or deficiency tax liabilities for underpayment) **can be averted before proceeding with the transaction and or paying the tax liability covered by the tax treaty.**' (*Emphasis supplied*)
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> It can be readily gathered from the foregoing that RMO 1-00 requires that an application for treaty relief must be filed with the ITAD prior to any availment of tax treaty provisions to avoid the

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[8] CTA EB Nos. 469 and 494, March 29, 2010.

consequences of any erroneous interpretation and/or application of treaty provisions prior to the transaction and/or payment of tax liability covered by a tax treaty. This requirement is reasonably in accord with the strict construction of tax exemptions.

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'III. Policies

In order to achieve the above-mentioned objectives, the following policies shall be observed:

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2. Any availment of the tax treaty relief **shall be preceded by an application** by filing BIR Form No. 0901 (Application for Relief from Double Taxation) with ITAD at least 15 days before the transaction *i.e.* payment of dividends, royalties, etc., accompanied by supporting documents justifying the relief.' xxx (*Emphases and underscoring supplied*)

Notably, in formulating the above policy, the word '**shall**' was used in paragraph 2. Needless to state, in common or ordinary parlance and in its ordinary significance, the term '**shall**' is a word of command, and one which has always and which must be given a compulsory meaning, and it is generally imperative or mandatory. It has the invariable significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning or when public interest is involved or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."

In addition, in *CDL Hotels (Phils.) Corporation vs. Commissioner of Internal Revenue*[9], the CTA *En Banc* stated that the requirement to file an application for tax treaty before the ITAD of the BIR for the availment of the provisions of any tax treaty has been confirmed in the case of *Mirant (Philippines) Operations Corporation*

[9] CTA EB No. 339, August 10, 2009.

[formerly: Southern Energy Asia-Pacific Operations [Phils], Inc] vs. CIR[10]. Pertinent portion of the *Mirant*[11] case is quoted, as follows:

> **"However, it must be remembered that a foreign corporation wishing to avail of the benefits of the tax treaty should invoke the provisions of the tax treaty and prove that indeed the provisions of the tax treaty applies to it, before the benefits may be extended to such corporation.** In other words, a resident or non-resident foreign corporation shall be taxed according to the provisions of the National Internal Revenue Code, unless it is shown that the treaty provisions apply to the said corporation, and that, in cases the same are applicable, the option to avail of the tax benefits under the tax treaty has been successfully invoked.
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> Under Revenue Memorandum Order 01-2000 of the Bureau of Internal Revenue, it is provided that the availment of a tax treaty provision must be preceded by an application for a tax treaty relief with its International Tax Affairs Division (ITAD). This is to prevent any erroneous interpretation and/or application of the treaty provisions with which the Philippines is a signatory to. The implementation of the said Revenue Memorandum Order is in harmony with the objectives of the contracting state to ensure that the granting of the benefits under the tax treaties are enjoyed by the persons or corporations duly entitled to the same." (Emphasis supplied.)

Moreover, the Court agrees with respondent's claim that petitioner did not file an appropriate written claim for refund with respondent. This Court finds that its alleged claim for refund is actually an "Application for Relief from Double Taxation" filed with the ITAD and not a claim for refund filed with respondent. As can be gleaned from its "Application for Relief from Double Taxation"[12] filed on December 23, 2008, petitioner expressly requested a ruling from the ITAD and not a categorical claim for refund with respondent as required by Section 229 of the National Internal Revenue Code, *viz*:

"III. *Request* gr

[10] CTA EB Case No. 40, June 7, 2005, which was affirmed in a Minute Resolution under GR No. 168531 dated February 18, 2008.
[11] *Ibid.*
[12] Docket, pp. 193-197.

> In view of the foregoing, we respectfully **request for a ruling that the dividends paid out to Egis by MNTC are subject to final withholding tax at the preferential rate of 10 percent pursuant to Article 10 of the Tax Treaty**. We also request that the said preferential rate of 10% be applicable to all remittances of dividends by MNTC to Egis. Consequently, upon such finding, we request that the amount of Php8,640,240.00 be refunded, or in the alternative, that our request for refund be endorsed to the proper office for processing and further action.[13]" (*Emphasis supplied*)

Finally, petitioner never presented the Original BIR Form No. 1601-F which is the document from which petitioner's right to claim for refund springs. Notably, what petitioner presented in support of the remittance of the FWT on the dividends it paid to Egis are the "Amended Monthly Remittance Return of Final Income"[14] and the receipt[15] issued by Equitable PCI Bank showing payment of ₱70,887,162.57 to the BIR. Even though petitioner presented a receipt showing payment of ₱70,887,162.57 to the BIR on January 15, 2007, said receipt does not show for what the said amount was paid. Hence, it would have been imperative for petitioner to attach and present in evidence the Original BIR Form No. 1601-F for the Court to determine the exact date when said FWT was paid to the BIR.

As correctly argued by respondent, without the tax return (Original BIR Form No. 1601-F), it is error to grant the refund since it would be virtually impossible to identify the correctness of the refund when the very tax returns pertaining to the Original BIR Form No. 1601-F filed in support of the FWT remittance on January 15, 2007 was not presented in evidence. Also, this Court cannot consider the

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[13] *Id.* at 196.
[14] *Id.* at 185.
[15] *Id.* at 187.

"Certificate of Final Tax Withheld at Source" or BIR Form No. 2306[16] filed by Egis with the BIR to support petitioner's claim for refund since said return does not show the fact of payment made by petitioner to support the FWT remittance of ₱70,887,162.57.

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

SO ORDERED.

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

WE CONCUR:

CAESAR A. CASANOVA
Associate Justice

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

ATTESTATION

I attest 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's Division.

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

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[16] *Id.* at 192.

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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.

ERNESTO D. ACOSTA
Presiding Justice