REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

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COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 1612** (CTA Case No. 8478)
- versus -	
HERBALIFE INTERNATIONAL PHILIPPINES, INC., Respondent.	

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HERBALIFE INTERNATIONAL PHILIPPINES, INC., Petitioner,	**CTA EB No. 1631** (CTA Case No. 8478)
	Present:
- versus -	**DEL ROSARIO,** *P.J.*, **CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA,** and **MODESTO-SAN PEDRO,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** OCT 11 2019 3:39 p.m.

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RESOLUTION

UY, *J.*:

For this Court's resolution are the following:

1) The **"MOTION FOR RECONSIDERATION"** filed by the

Commissioner of Internal Revenue (CIR) on December 19, 2018,[1] with **"COMMENT (To: Motion for Reconsideration)"** filed by Herbalife International Philippines, Inc. (Herbalife) on February 28, 2019;[2] and

2) The **"PARTIAL MOTION FOR RECONSIDERATION"** filed by Herbalife on March 5, 2019,[3] without comment from the CIR despite due notice.[4]

In both *Motions*, the CIR assails the Court *En Banc*'s Decision promulgated on November 15, 2018, the dispositive portion of which reads:

> "**WHEREFORE,** considering that the required affirmative votes of five (5) members of the Court *En Banc* was not obtained in the instant case pursuant to Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9503 in relation to Section 3 of Rule 2 of the Revised Rules of the Court of Tax Appeals, the *Petition for Review* in CTA EB No. 1612 filed by the CIR and the *Petition for Review* in CTA EB No. 1631 filed by Herbalife are hereby **DISMISSED.**
>
> The assailed Decision dated November 3, 2016 and Resolution dated March 14, 2017 issued by the Court in Division in CTA Case No. 8478 are hereby **AFFIRMED**.
>
> **SO ORDERED.**"

The CIR's arguments:

In his *Motion for Reconsideration*, the CIR disagrees with the ratiocination of the majority members of the *Court En Banc* for being erroneous, misplaced and bereft of factual and legal basis.

The CIR contends that based on the evidence presented by the CIR, as well as, the factual findings and conclusions of Associate Justice Ma. Belen M. Ringpis-Liban, in her Dissenting Opinion dated November 15, 2018, Revenue Officer (RO) Fatima B. Pre was given

[1] EB Docket (CTA EB No. 1612), pp. 236 to 252.
[2] EB Docket (CTA EB No. 1612), pp. 264 to 268.
[3] EB Docket (CTA EB No. 1612), pp. 285 to 291.
[4] Records Verification Report dated May 27, 2019, EB Docket (CTA EB No. 1488), p. 305.

the authority to continue the audit and examination of Herbalife's books of accounts and other accounting records by way of a Revalidation Notice, duly issued by Revenue Regional Director Alfredo V. Misajon on December 22, 2009 pertaining to Letter of Authority (LOA) No. 00069261 dated June 4, 2008, authorizing RO Pre and Group Supervisor Santiago to replace the previously assigned Revenue Officer, RO Santos. According to the CIR, the same was validly done, pursuant to Sections 6 and 10 (c)(h) of the 1997 Tax Code and the laws on agency under the Civil Code of the Philippines. Furthermore, according to the CIR, the case of *Medicard Philippines, Inc. vs. Commissioner of Internal Revenue,*[5] is not applicable on all fours with the instant case and should not be applied therein.

Moreover, the CIR raises the following grounds for each deficiency tax, for the reversal of the Court in Division's Decision dated November 3, 2016, to wit:

Deficiency Income Tax:

The CIR contends that Herbalife clearly failed to withhold and remit in full the corresponding Expanded Withholding Tax (EWT), Withholding Tax on Compensation (WTC) and Final Withholding Tax (FWT) on certain expenses in violation of RR No. 2-98, as amended, hence, the said expenses were disallowed as deduction from gross income pursuant to Section 34(K) of the National Internal Revenue Code (NIRC) as amended.

Deficiency VAT:

The CIR argues that Herbalife clearly failed to refute the BIR findings that there was under-declaration of commission expenses after reconciling the amount per its Income Tax Return/Financial Statement for CY 2007 as against per BIR forms 1601E. According to the CIR, the said amount was considered as unaccounted source of cash which led to the inference that part of Herbalife's income has not been declared, as enunciated by the Supreme Court in the case of *Perez vs. Court of Tax Appeals and Collector of Internal Revenue*[6]. Thus, the amount has been assessed pursuant to Sections 27 and 32 of the 1997 Tax Code.

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[5] G.R. No. 222743, April 5, 2017.
[6] G.R. No. L-10507, May 30, 1958.

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As to the adjustments for over/under accruals, Herbalife presented only print-outs of its general ledger entries to support its claim, but still it failed to submit substantial proof that the same were not yet subjected to EWT in the previous years (considering that the obligation of the payor to deduct and withhold the tax arises at the time an income is paid or payable, whichever comes first, pursuant to Section 2.57.4 of RR No. 2-98) or that the said items were actually included in the list of transactions per alphalist of payees which were subjected to the expanded withholding tax during the year. Hence, according to the CIR, his original assessment should be upheld.

Deficiency EWT:

The CIR alleges that Herbalife clearly failed to withhold and remit to the BIR the corresponding withholding tax on certain income payments, which were previously disallowed under Schedule 1 (FDDA/FAN) as deductions from gross income. Hence, according to the CIR, his original assessment should be upheld, pursuant to Section 2.57 of RR No. 2-98, as amended.

Deficiency WTC:

The CIR claims that Herbalife failed to withhold and remit to the BIR the corresponding withholding tax on the salaries and wages in the amount of ₱727,797.05 previously disallowed as deductions from its gross income. It was allegedly disclosed that the account "Temporary Pay" pertains to reimbursement of employee expenses and uniform allowance, and hence, may be considered as employee benefits, which should be considered in the analysis of withholding tax on compensation. Moreover, Herbalife still failed to support with source documents the retirement fund and amortization of PSC. Hence, the original assessment of the CIR should be upheld, pursuant to Section 2.78.1 of RR No. 2-98.

Deficiency FWT:

The CIR contends that Herbalife failed to subject to FWT the royalties and other income payments paid to resident and non-resident foreign corporation in violation of Sections 28(B)(1)(a) and 28(B)(5)(a) of the 1997 Tax Code. Thus, it was disclosed that the ₱12,116,340.00 total production cost was attributable to Herbalife's payments made to resident and non-resident foreign corporations, hence, such amount should be subjected to final tax, pursuant to Sections 28(b)(1)(a) and 28(B)(5)(a) of the

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1997 Tax Code. In addition, Herbalife allegedly failed to present substantial proof to support its claim that the production bonus and royalty payments made to resident and non-foreign corporations are not subject to withholding tax.

Deficiency FWT-VAT:

Lastly, the CIR argues that the interest payments of Herbalife were made to non-resident foreign corporations, and pursuant to Section 28(B)(1)(a) of the 1997 Tax Code, it should be charged with a 20% Final Tax. However, according to the CIR, Herbalife clearly failed to submit the corresponding invoices and official receipts to support its claim against the assessed interest expense.

Herbalife's arguments/counter-arguments:

Herbalife argues that the majority members of the Court *En Banc* correctly held that the tax assessments for taxable year 2007 is void, on the ground that RO Fatima B. Pre was not authorized to conduct the examination of Herbalife's books, accounts and accounting records for 2007; and that the law is clear that RO Pre should be equipped with an LOA. It further contends that a Revalidation Notice is not the LOA contemplated by Section 13 of the NIRC; that without the required Letter of Authority, the tax assessment on the taxpayer is void; and that in this case, since RO Pre was not authorized through an LOA, the assessment on Herbalife is void.

Moreover, Herbalife contends that assuming that Revalidation Notice qualifies as a valid LOA, RO Pre is still not authorized to perform the assessment on Herbalife's books of accounts and records for taxable year 2007. According to Herbalife, a Revalidation Notice is issued to the authorized revenue officer in case he is unable to submit the final report within the 120-day period required under RMC No. 36-99; and in case he is unable to submit the report within this period, he is required to submit a progress report and the Letter of Authority for revalidation. Furthermore, Herbalife avers that a revalidation Notice is a revalidation of authority, the authority of RO Pre must be existing prior to revalidation; that RO Pre was not named in the Letter of Authority No. 200100069261; and that since she was not named in the said Letter of Authority, her supposed authority could not have been revalidated.

THE COURT *EN BANC'S* RULING

The *Motion for Reconsideration* filed by the CIR and *Partial Motion for Reconsideration* filed by Herbalife are not meritorious.

A careful reading of the said *Motions* would reveal that the respective arguments of the parties rest on the supposition that the Court *En Banc* dismissed their separate *Petitions for Review* on the basis of the majority opinion expressed in the assailed Decision, *i.e.*, that since RO Pre was not duly authorized by a new LOA, the subject tax assessments, which came about as a result of her examination of Herbalife's books of accounts and accounting records for taxable year 2007, are void. However, it is clear in the dispositive portion of the said Decision that the ground for the dismissal of the said *Petitions* is that the required affirmative votes under the law and rules were not attained.

To reiterate, Section 2 of Republic Act (RA) No. 1125,[7] as last amended by RA No. 9503, provides as follows:

> "SEC. 2. *Sitting En Banc or Division; Quorum; Proceedings.* — The CTA may sit en banc or in three (3) Divisions, each Division consisting of three (3) Justices.
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> Five (5) Justices shall constitute a quorum for sessions *en banc* and two (2) Justices for sessions of a Division: *Provided*, That when the required quorum cannot be constituted due to any vacancy, disqualification, inhibition, disability, or any other lawful cause, the Presiding Justice shall designate any Justice of other Division of the Court to sit temporarily therein.
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> **The affirmative votes of five (5) members of the Court *en banc* shall be necessary to reverse a decision of a Division** but a simple majority of the Justices present necessary to promulgate a resolution or decision in all other cases or two (2) members of a Division, as the case may be, shall be necessary for the rendition of a decision or resolution in the Division level." *(Emphasis supplied)*

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[7] AN ACT CREATING THE COURT OF TAX APPEALS.

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As a corollary, Section 3, Rule 2 of the Revised Rules of the Court of Tax Appeals (RRCTA), reads:

> "SEC. 3. *Court en banc; quorum and voting.* — The presiding justice or, if absent, the most senior justice in attendance shall preside over the sessions of the Court *en banc*. The attendance of five (5) justices of the Court shall constitute a quorum for its session *en banc*. **The presence at the deliberation and the affirmative vote of five (5) members of the Court *en banc* shall be necessary to reverse a decision of a Division** but only a simple majority of the justices present to promulgate a resolution or decision in all other cases. **Where the necessary majority vote cannot be had, <u>the petition shall be dismissed</u>**; in appealed cases, the judgment or order appealed from shall stand affirmed; and on all incidental matters, the petition or motion shall be denied." *(Emphases and underscoring supplied)*

Based on the foregoing, the affirmative votes of five (5) members of this Court sitting *En Banc* are necessary to reverse a Decision of a Division thereof. If the said votes are not had, as in the instant consolidated cases, the petition for review shall be dismissed. As a logical outgrowth of such dismissal, the assailed Decision dated November 3, 2016 and Resolution dated March 14, 2017, rendered by the Third Division of this Court in CTA Case No. 8478, are deemed valid in all respects.

Since the parties failed to point out, in their respective *Motions*, that the said dismissal was not made in accordance with law and rules, the instant *Motions* must fail.

WHEREFORE, premises considered, the CIR's *Motion for Reconsideration* and the Herbalife's *Partial Motion for Reconsideration* are both **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

(I reiterate my Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

(Took no part)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

(I maintain my stand in the assailed Decision)
ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(I maintain my Dissenting Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice