REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

NES GLOBAL TALENT LIMITED,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9065

Members:
BAUTISTA, Chairperson
FABON-VICTORINO, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

SEP 06 2017
10:35 a.m.

X---X

DECISION

RINGPIS-LIBAN, *J.*:

This is a Petition for Review[1] filed on June 9, 2015 by NES Global Talent Limited against the Commissioner of Internal Revenue to seek the refund of the amount of ₱14,608,018.37, allegedly representing final withholding tax (FWT) erroneously paid and collected by petitioner for the months of October to December 2012 and April to July 2013.

THE FACTS

Petitioner NES Global Talent Limited is the Philippine Branch of NES Global Pte. Limited, a foreign company organized and existing under the laws of the Republic of Singapore, with office address at 115 Amoy Street, #03-03,

[1] Docket, Vol. I, pp. 10-22.

Singapore 069935.[2] NES Global Pte. Limited is duly licensed by the Securities and Exchange Commission (SEC) to establish its branch office in the Philippines under the name of petitioner, with License No. FS201215433 issued on September 6, 2012, to provide consulting services to the oil and gas industry.[3] NES Global Pte. Limited is a registered taxpayer in the Philippines with Taxpayer Identification Number (TIN) 008-353-389-000. Its registered address is at Regus 9-F, Filinvest One Bldg., Northgate, Cyberzone, Filinvest City, Alabang.[4]

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue, vested under the appropriate laws with the authority to carry out the functions, duties and responsibilities of said office, including *inter alia,* the power to decide disputed assessments, grant tax refunds and issue tax credit certificates, pursuant to the provisions of the NIRC and other tax laws, rules and regulations, with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.

NES Global Pte. Limited entered into a contract denominated as "Provision of Contractor Agency and Recruitment Services" with Inpex Australia Pty. Ltd.[5] ("Inpex" for brevity), a company engaged in oil and gas operations in Australia, with address at Level 22, 100 St. Georges Terrace, Perth, Western Australia. The Contract provides that NES Global Pte. Limited will recruit and provide fully skilled, competent and experienced personnel for Inpex's Ichthys Gas Field Development Project. In particular, NES Global employees were assigned in the construction and assembly of portions of oil rigs for Inpex. The said contract commenced on September 1, 2012 and completed on September 1, 2016.

NES Global Pte. Limited entered into another contract with Fluor Daniel, Inc. - Philippines ("FDIP" for brevity) to provide specialist staff support solutions for its offshore high level key positions. FDIP is a domestic corporation engaged in the business of providing specialty, technical and consultation services to foreign or domestic projects including the performance of any and all implementation works. FDIP's principal office address is at 3rd Floor, Asian Star Building, ASEAN Drive, Filinvest, Corporate City, Alabang, Muntinlupa City.[6]

To perform its obligations under the contracts with Inpex and FDIP, NES Global Pte. Limited employed foreign and Filipino nationals. The foreign

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[2] Par. 1.1, Joint Stipulation of Facts and Issues (JSFI), Docket, Vol. I, p. 215.
[3] Par. 1.1, JSFI, Docket, Vol. I, p. 215; Exhibit "P-34", Docket, Vol. I, p. 434.
[4] Exhibit "P-35", Docket, Vol. I, p. 435.
[5] Exhibit "P-36-A", Docket, Vols. I and II, pp. 436-504.
[6] Exhibit "P-36-B", Docket, Vol. II, pp. 630-641.

nationals[7] were paid on a net day rate basis; while the Filipino nationals[8] were paid on a gross rate basis.

Petitioner paid FWT for its employees at the rate of 15% and remitted the same to the BIR, pursuant to Section 25(E) of the National Internal Revenue Code of 1997, as amended, on the following dates:

EXHIBIT REFERENCE	MONTH COVERED	DATE OF FILING OF RETURN/ PAYMENT OF FWT	TOTAL FWT PAID
"P-1"; "P-2"	October 2012; November 2012; December 2012[9]	June 26, 2013/June 27, 2013	₱ 2,432,071.22[10]
"P-3"; "P-4"	April 2013	June 10, 2013/June 14, 2013	1,516,063.14[11]
"P-5"; "P-6"	May 2013	June 10, 2013	1,702,557.83
"P-7"; "P-8"	June 2013	July 10, 2013	4,093,841.42
"P-9"; "P-10"	July 2013	August 12, 2013	4,863,484.74
Total			**₱14,608,018.35**
Unaccounted difference			**.02**
Total per Petition for Review			**₱14,608,018.37**

Subsequently, petitioner subjected the same compensation of the same individuals to withholding tax on compensation (WTC) and paid correspondingly on the basis that the subject foreign and Filipino nationals are employees of petitioner.[12]

On September 25, 2014, petitioner filed its administrative claim for refund or issuance of a tax credit certificate (TCC) with Revenue District Office (RDO) No. 53B of the BIR.[13]

Due to respondent's inaction, petitioner filed the present Petition for Review on June 9, 2015.

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[7] Exhibit "P-37-A", Docket, Vol. II, pp. 512-542.
[8] Exhibit "P-37-B", Docket, Vol. II, pp. 543-562.
[9] The covering month which was indicated per return is May 2013 but FWT payment actually pertains to the months of October, November and December 2012 (See Exhibit "P-32", p. 1).
[10] Includes penalty payment for late filing amounting to ₱ 501,004.52.
[11] Includes penalty payment for late filing amounting to ₱ 342,459.72.
[12] Exhibits "P-11" to "P-26" and "P-45" to "P-48".
[13] Exhibits "P-29" and "P-30", Docket, Vol. I. p. 181-190, Par. 1.3, JSFI, Docket, Vol. I, p. 216.

Respondent filed his Answer[14] through registered mail on July 24, 2015 and received by the Court on July 31, 2015, interposing the following Special and Affirmative Defenses:

"**SPECIAL AND AFFIRMATIVE DEFENSES**

3. She reiterates and repleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses;

4. Taxes paid and collected are presumed to have been made in accordance with law and implementing regulations, hence, not refundable.

5. In an action for refund/credit, the burden of proof is upon petitioner to establish its right to the claimed refund and failure to adduce sufficient proof is fatal to its claim.

6. Petitioner's claim for refund/ issuance of tax credit in the amount of **Php14,608,018.37**, as alleged erroneously paid Final Withholding Taxes (FWT) for taxable years 2012 and 2013 were not duly substantiated by proper documentary evidence.

7. Petitioner failed to prove that the amount subject of its claim was remitted in full to the BIR.

8. Petitioner failed to comply with the requirements prescribed under Section 76 of the 1997 Tax Code.

9. Petitioner failed to comply with the requirements under *Sections 204 of the 1997 Tax Code in relation to Section 229 of the same Code.*

10. Claims for refund are construed strictly against herein petitioner for the same partakes the nature of exemption from taxation (*Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95*) and as such, they are looked upon with disfavor (*Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211*)."

Petitioner filed its Reply[15] on August 10, 2015.

[14] Docket, Vol. I, pp. 81-83.
[15] Docket, Vol. I, pp. 87-96.

The case was set for Pre-Trial Conference on October 6, 2015.[16] Respondent's Pre-Trial Brief[17] was filed on September 30, 2015; while petitioner's Pre-Trial Brief[18] was filed on October 2, 2015.

The parties filed their Joint Stipulation of Facts and Issues[19] on October 21, 2015. Thereafter, the Court issued a Pre-Trial Order[20] on November 26, 2015.

During trial, petitioner presented two (2) witnesses, namely: (1) Mr. Lee Coleman[21] and (2) Independent Certified Public Accountant (ICPA) Mr. Glenn Ian D. Villanueva.[22]

On March 11, 2016, petitioner filed its Formal Offer of Documentary Evidence[23], offering Exhibits "P-1", "P-2", "P-3", "P-4", "P-5", "P-6", "P-7", "P-8", "P-9", "P-10", "P-11", "P-12", "P-13", "P-14", "P-15", "P-16", "P-17", "P-18", "P-19", "P-20", "P-21", "P-22", "P-23", "P-24", "P-25", "P-26", "P-27", "P-28", "P-29", "P-30", "P-31", "P-31-A", "P-32", "P-33", "P-34", "P-35", "P-36-A", "P-36-B", "P-37-A", "P-37-B", "P-38", "P-39", "P-40", "P-41", "P-42", "P-43", "P-44", "P-45", "P-46", "P-47", "P-48", "P-49", and "P-49-A", as its documentary evidence. Respondent, however, failed to file a comment on petitioner's Formal Offer of Documentary Evidence.[24]

In the Resolution[25] dated June 7, 2016, the Court admitted Exhibits "P-1", "P-2", "P-3", "P-4", "P-5", "P-6", "P-7", "P-8", "P-9", "P-10", "P-11", "P-12", "P-13", "P-14", "P-15", "P-16", "P-17", "P-18", "P-19", "P-20", "P-21", "P-22", "P-23", "P-24", "P-25", "P-26", "P-27", "P-28", "P-29", "P-30", "P-31", "P-31-A", "P-32", "P-33", "P-34", "P-35", "P-36-A", "P-36-B", "P-37-A", "P-37-B", "P-38", "P-39", "P-40", "P-41", "P-42", "P-43", "P-44", "P-45", "P-46", "P-47", "P-48", "P-49", and "P-49-A".

Respondent manifested that upon verification with RDO No. 53B, no final report on petitioner's claim for refund was submitted by revenue officers;

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[16] Notice of Pre-Trial Conference, Docket, Vol. I, pp. 97-98.
[17] Docket, Vol. I, pp. 105-106.
[18] Docket, Vol. I, pp. 191-209.
[19] Docket, Vol. I, pp. 215-220.
[20] Docket, Vol. I, pp. 222-227.
[21] Minutes of the hearing on January 25, 2016, Docket, Vol. I, p. 253.
[22] Minutes of the hearing on February 22, 2016, Docket, Vol. II, p. 619.
[23] Docket, Vol. II, pp. 644-659.
[24] Records Verification dated March 23, 2016, Docket, Vol. II, p. 660.
[25] Docket, Vol. II, pp. 666-667.

hence, he would not present evidence.[26] The parties were then granted a period of thirty (30) days within which to file their respective memoranda.

Petitioner filed its Memorandum[27] on September 7, 2016. On even date, respondent, on the other hand, filed his Manifestation and Motion[28], stating that he is adopting all the factual and legal arguments and affirmative defenses in his Answer dated July 24, 2015 as his Memorandum in this case. Hence, the case was declared submitted for decision.[29]

THE ISSUE

The parties submitted the following issue for the Court's resolution:[30]

Whether petitioner is entitled to a tax refund or the issuance of a TCC for its erroneously paid FWT pertaining to compensation paid to its employees in 2012 and 2013 in the amount of ₱14,608,018.37.

THE RULING OF THE COURT

At the outset, the Court finds the need to rule on the issue of prescription. Pertinent thereto are Sections 204 and 229 of the NIRC of 1997, as amended, which provides as follows:

> "SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –
>
> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2)**

[26] Minutes of the hearing on August 8, 2016, Docket, Vol. II, p. 669; Order dated August 8, 2016, Docket, Vol. II, p. 670.
[27] Docket, Vol. II, pp. 671-685.
[28] Docket, Vol. II, pp. 688-689.
[29] Resolution dated September 9, 2016, Docket, Vol. II, p. 691.
[30] Par. 2.1, JSFI, Docket, Vol. I, p. 216.

> **years after the payment of the tax or penalty:** *Provided, however*, that a return filed showing an overpayment shall be considered as a written claim for credit or refund." *(Emphasis supplied)*
>
> "SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> **In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment:** *Provided, however*, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." *(Emphasis supplied)*

Thus, in order to be entitled to a refund of erroneously or illegally collected tax, the following requisites must be satisfied:[31]

1. That there must be an erroneous or illegal collection of tax, or a penalty collected without authority, or sum excessively or wrongfully collected;

2. That the claim for refund has been duly filed with the Commissioner, within two (2) years after the payment of tax or penalty; and

3. That the suit or proceeding is instituted with this Court within two (2) years from the date of payment of the tax or penalty.

From the foregoing, it is clear that in order for a taxpayer to be entitled to a tax refund or tax credit for erroneous payment, it must prove not only that the

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[31] *Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue*, CTA EB No. 1078, July 27, 2015.

taxes paid were illegally or erroneously collected but also that both the administrative claim with the CIR and the judicial claim with the Court were filed within two (2) years from the date of payment of the tax or penalty.

The following are the pertinent dates to petitioner's claim for refund:

Exhibit Reference	Month Covered	Date of Filing of Return/ Payment of FWT	Total FWT Paid	End of Two-Year Prescriptive Period	Date of Filing of Adm. Claim for Refund	Date of Filing of Judicial Claim for Refund
"P-1"; "P-2"	October 2012; November 2012; December 2012[32]	June 26, 2013/June 27, 2013	₱ 2,432,071.22[33]	June 27, 2015	September 25, 2014	June 9, 2015
"P-3"; "P-4"	April 2013	June 10, 2013/June 14, 2013	1,516,063.14[34]	June 14, 2015		
"P-5"; "P-6"	May 2013	June 10, 2013	1,702,557.83	June 27, 2015		
"P-7"; "P-8"	June 2013	July 10, 2013	4,093,841.42	July 10, 2015		
"P-9"; "P-10"	July 2013	August 12, 2013	4,863,484.74	August 12, 2015		
Total			**₱14,608,018.35**			
Unaccounted difference			**.02**			
Total per Petition for Review			**₱14,608,018.37**			

Based on the above table, petitioner was clearly able to file the administrative and judicial claims within the two-year prescriptive period mandated under Sections 204 and 229 of the NIRC of 1997, as amended.

Having settled the issue on prescription, the Court shall now proceed to determine whether the FWT of ₱14,608,018.37, which is the subject of the present claim for refund, was erroneously withheld and remitted.

[32] The covering month which was indicated per return is May 2013 but FWT payment actually pertains to the months of October, November and December 2012 (See Exhibit "P-32", p. 1).

[33] Includes penalty payment for late filing amounting to ₱501,004.52.

[34] Includes penalty payment for late filing amounting to ₱342,459.72.

The provision for the imposition of FWT is provided in Section 25(E) of the NIRC of 1997, as amended, as follows:

> "SEC. 25. *Tax on Nonresident Alien Individual.* –
>
> xxx xxx xxx
>
> (E) *Alien Individual Employed by Petroleum Service Contractor and Subcontractor* - An **Alien individual who is a permanent resident of a foreign country but who is employed and assigned in the Philippines by a foreign service contractor or by a foreign service subcontractor engaged in petroleum operations in the Philippines** shall be liable to a tax of fifteen percent (15%) of the salaries, wages, annuities, compensation, remuneration and other emoluments, such as honoraria and allowances, received from such contractor or subcontractor: *Provided, however,* That the same tax treatment shall apply to a Filipino employed and occupying the same position as an alien employed by petroleum service contractor and subcontractor.
>
> Any income earned from all other sources within the Philippines by the alien employees referred to under Subsections (C), (D) and (E) hereof shall be subject to the pertinent income tax, as the case may be, imposed under this Code." *(Emphasis supplied)*

In this regard, Section 2 of Revenue Regulations No. 6-2001[35] issued on July 31, 2001 also provides:

> "SECTION 2.57.1. *Income Payments Subject to Final Withholding Tax.* – xxx
>
> xxx xxx xxx
>
> (F) *Income of Aliens Employed by Foreign Petroleum Service Contractors and Subcontractors.* – A final withholding tax equivalent to fifteen percent (15%) shall be withheld from the gross income of an alien individual who is a permanent resident of a foreign country

[35] Amending Pertinent Provisions of Revenue Regulations Nos. 1-98, 2-98, as Amended, and 7-95, as Amended, and Revenue Memorandum Circular No. 1-98 Relative to the Inclusion of Additional Taxpayers to be Subject to Final Withholding Tax, Revision of the Withholding Tax Rates on Certain Income Payments Subject to Creditable Withholding Tax, Time for the Filing of Various Tax Returns and Payment of the Taxes Due Thereon and Others.

but who is employed and assigned in the Philippines by a **foreign service contractor or by a foreign service subcontractor who is engaged in petroleum operations in the Philippines**. His gross income includes salaries, wages, annuities, compensation, remuneration, and other emoluments, such as honoraria and allowances received from such contractor or subcontractor.

The same tax treatment is applicable to Filipinos employed and occupying the same position as those aliens employed by foreign petroleum service contractors and subcontractors, regardless of whether or not there is an alien executive occupying the same position." *(Emphasis supplied)*

Section 2 of Article XII of the Constitution provides that the exploration, development, and utilization of natural resources shall be under the full control and supervision of the State, as follows:

"Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish-workers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution."

Section 4 of Presidential Decree (PD) No. 87[36], otherwise known as "The Oil Exploration and Development Act of 1972", provides:

"SECTION 4. *Government may undertake petroleum exploration and production.* – Subject to the existing private rights, the government may directly explore for and produce indigenous petroleum. It may also indirectly undertake the same under service contracts as hereafter provided. These contracts may cover free areas, national reserve areas and/or petroleum reservations, as provided for in the Petroleum Act of 1949, whether on-shore or off-shore. In every case, however, the contractor must be technically competent and financially capable as determined by the Board to undertake the operations required in the contract."

Based on the foregoing, only the income of the following individuals qualifies for the preferential 15% FWT rate under Section 25(E) of the NIRC of 1997, as amended:

a. Alien individuals and Filipinos employed by a foreign service contractor who is under a service contract with the Philippine Government to engage in petroleum operations in the Philippines; and

b. Alien individuals and Filipinos employed by a foreign service subcontractor of a petroleum service contractor in (a) above.

Section 3 of PD No. 87 also provides:

[36] Amending Presidential Decree No. 8 issued on October 2, 1972, and Promulgating an Amended Act to Promote the Discovery and Production of Indigenous Petroleum and Appropriate Funds Therefor.

"SECTION 3. *Definition of terms.* – As used in this Act, the following shall have the following respective meanings:

(a) 'Petroleum' shall include any mineral oil hydrocarbon gas, bitumen, asphalt, mineral gas and all other similar or naturally associated substances with the exception of coal, peat, bituminous shale and/or other stratified mineral fuel deposits.

xxx xxx xxx

(d) **'Petroleum operations' means searching for and obtaining petroleum within the Philippines through drilling and pressure or suction or the like, and all other operations incidental thereto**. It includes the transportation, storage, handling and sale (whether for export or for domestic consumption) of petroleum so obtained but does not include any: (1) transportation of petroleum outside the Philippines; (2) processing or refining at a refinery; or (3) any transaction in the products so refined.

xxx xxx xxx

(j) 'Government' means the Government of the Republic of the Philippines.

(k) 'Contractor' means the contractor in a service contract whether acting alone or in consortium with others." (*Emphasis supplied*)

Section 2 of Revenue Regulations (RR) No. 15-78[37] issued on October 10, 1978, defines the terms "service contractor" and "sub-contractor, as follows:

"SECTION 2. Definition of Terms. – For purposes of these regulations, unless the context otherwise indicates, the following definition of terms are hereby adopted:

[37] Regulations governing taxation of sub-contractors and alien individuals employed by service contractors and sub-contractors engaged in the Petroleum operations in the Philippines under Presidential Decree No. 87, as provided for under Presidential Decree No. 1354.

a) 'Service contractor' means the contractor in a service contract whether acting alone or in consortium with others, engaged in petroleum operations under Presidential Decree No. 87.

b) 'Subcontractor' means a foreign or domestic entity engaged by a service contractor for a specific undertaking in pursuance of a service contract under Presidential Decree No. 87, excluding administrative contracts defined under sub-paragraph (f) hereof."

A review of the records[38] shows that Inpex is a non-resident foreign corporation organized under the laws of Australia. It entered into a contract with NES Global Pte. Limited for the latter to recruit and provide fully skilled, competent and experienced personnel for Inpex's Ichthys Gas Field Development Project, which is based in Australia. In this regard, NES Global Pte. Limited employed foreign and Filipino nationals to perform its obligations under the contract with Inpex. The performance of the agreement commenced on September 1, 2012 until September 1, 2016. Similarly, FDIP, a domestic corporation[39], contracted NES Global Pte. Limited to provide specialist staff support solutions for its offshore high level key positions. Thus, NES Global Pte. Limited also employed foreign nationals to render services to FDIP.

The contracts are in the nature of a "contract of service", whereby the foreign and Filipino nationals have agreed to work exclusively for NES Global Pte. Limited and be assigned to the Philippines for Inpex and FDIP projects.

As can be seen, neither Inpex nor FDIP qualifies as foreign service contractors engaged in petroleum operations in the Philippines, as defined in Section 3 of PD No. 87, based on the following considerations: (1) Inpex is not under any service contract with the Government to engage in petroleum operations within the Philippines; and (2) assuming for the sake of argument that Inpex entered into a service contract with the Government: (a) the Ichthys Project is in Australia; and (b) the construction and assembly of portions of oil rigs in the Philippines does not fall under the definition of "petroleum operations" under PD No. 87. Moreover, FDIP is a domestic corporation. It must be stressed that the law requires a **"foreign service contractor"**. Hence, the determination of whether FDIP is a qualified petroleum service contractor is irrelevant.

Considering that both INPEX and FDIP do not qualify as foreign service contractors engaged in petroleum operations within the Philippines, petitioner

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[38] Exhibit "P-36-A", Docket, Vols. I and II, pp. 436-504.
[39] Exhibit "P-36-B", Docket, Vol. II, pp. 630-641.

therefore does not qualify as foreign petroleum service subcontractor, as contemplated under PD No. 87. As such, income payments made by petitioner to its employees who were assigned in the Philippines for the Inpex and FDIP projects were not qualified for 15% preferential income tax treatment for employees of foreign service contractors and subcontractors engaged in petroleum operations in the Philippines, under Section 25(E) of the NIRC of 1997, as amended. Rather, their income is subject to the regular tax rate of 5%-32% WTC. Petitioner, therefore, has erroneously paid the 15% FWT attributable to the compensation paid to the assigned employees.

To ascertain whether petitioner was able to substantiate its claimed erroneously paid FWT in the amount of ₱14,608,018.37, the Court shall look into the following:

1. Whether petitioner actually paid the FWT being claimed for refund amounting to ₱14,608,018.37, and whether petitioner also paid the WTC; and

2. Whether the compensation used as tax base for the FWT erroneously paid is the same compensation used in computing for the WTC that was subsequently paid.

Petitioner presented BIR Form No. 1601-F or Monthly Remittance Returns of Final Income Taxes Withheld[40] it filed for the months of October 2012, November 2012, December 2012, April 2013, May 2013, June 2013 and July 2013 and the corresponding Bank Deposit Slips[41] proving payment of FWT in the total amount of ₱14,608,018.37.

Likewise, petitioner submitted BIR Form No. 1601-F or Monthly Remittance Returns of Final Income Taxes Withheld and the related Bank Deposit Slips/Revenue Official Receipts[42] for the months of November 2012, December 2012 and April to July 2013 proving that it paid WTC for the said months.

However, there was no BIR Form No. 1601-C provided to support the WTC paid for the month of October 2012. Based on the ICPA report, the tax due on compensation paid to certain assigned foreign employees for the month of October 2012 was remitted by the employee-recipients through their

[40] Exhibits "P-1", "P-3", "P-5", "P-7", and "P-9".
[41] Exhibits "P-2", "P-4", "P-6", "P-8", and "P-10".
[42] Exhibits "P-11" to "P-25".

individual Annual Income Tax Returns for the Taxable Year 2012 (BIR Form No. 1700), presented as Exhibit "P-39".[43]

Without the corresponding Bank Deposit Slips/Revenue Official Receipts, the Court finds the said BIR Forms No. 1700 insufficient to prove the withholding and actual remittance of the required WTC on the compensation for the month of October 2012. Hence, the FWT that forms part of the claim in the amount of ₱850,733.37[44] shall be disallowed outright because there appears to have no WTC withheld and remitted for the month of October 2012.

Meanwhile, in order to determine petitioner's refundable claim, the Court shall determine whether petitioner properly and correctly subjected the same compensation to WTC.

The Court-commissioned ICPA, made comparison of the compensation subjected to FWT with that subjected to WTC and noted the following findings:[45]

Particulars	Reference	Amount	
Compensation subjected to FWT per Monthly Payroll Summary	Procedure No. 6 Annex 3/ Exhibit P-38		₱ 62,806,682.55
Compensation subjected to WTC			
Assigned Foreign Employees per Monthly Supporting Computation of WTC	Procedure No. 8(A) and 8(B)/ Annexes 5-A to 5-G/ Annexes 10A and 10B/ Exhibits P-40 and P-41	₱ 37,931,412.45	
Assigned Filipino Employees, including Mr. Shanmugam and Mr. Dinbandali, per WTC per Monthly WTC returns and per Annualized Computation of WTC per employee	Procedure No. 8(C)/Annexes 11-A to 11-D/Exhibits P-42	23,818,905.81	61,750,318.26
Discrepancy			**₱ 1,056,364.29**

The discrepancy was accounted for as follows:

[43] Exhibit "P-32", footnote no. 5, p. 11, Docket, Vol. I, p. 269.
[44] Exhibit "P-32", p. 1, Docket, Vol. I, p. 259.
[45] Exhibit "P-32", pp. 14 -15, Docket, Vol. I, pp. 272 - 273.

Particulars	Reference	Amount
1. Income Payments subjected to FWT not included in claim for refund	Annex 1, ICPA Report	₱ (1,521,691.13)
2. Discrepancy noted and accounted in Procedure No. 8(A) -- Assigned Foreign Employees	Annexes 7, 8, 5-A to 5-G, 9	(5,495,625.08)
3. Compensation paid to Mr. Shanmugam and Mr. Dinbandali in April 2013 subjected to WTC but not erroneously subjected to FWT	Annexes 11-A to 11-D	(1,533,434.59)
4. FWT on compensation paid to assigned foreign employees not considered in determining tax bases in computing monthly WTC	Annexes 13, 5-A to 5-G	9,607,115.09
Discrepancy		**₱ 1,056,364.29**

Since the discrepancies under numbers 1 and 3 do not form part of the subject claim for refund, the same shall be disregarded.

With regard to the ₱5,495,625.08 discrepancy under number 2, the same was arrived at by the ICPA by comparing the amount of compensation paid to each assigned foreign employee exclusive of the erroneously withheld and remitted 15%/32% FWT, per Monthly Payroll Summary Supporting the FWT Returns[46] to the amount of compensation subjected to WTC per Monthly Supporting Computation of WTC Supporting the WTC Returns[47] and Supporting Computation of Income Payments to Foreign Employees, Previously Subjected to FWT, Subjected to WTC-with Foreign Currency Translation.[48]

The Court-commissioned ICPA's comparison resulted in the following:

Compensation				
Reference	Per Monthly Payroll Summaries (FWT)	Reference	Per Monthly Supporting Computation of WTC	Difference
Exhibit P-38, Page 1	₱ 4,820,822.43	Exhibit P-41, Page 1; Exhibit P-39	₱ 4,811,383.27	₱ 9,439.16
Exhibit P-38, Page 2	3,789,112.06	Exhibit P-41, Page 2; Exhibit P-40, Page 1	3,756,456.17	32,655.89
Exhibit P-38, Page 3	2,332,776.76	Exhibit P-41, Page 3; Exhibit P-40, Page 2	2,368,990.50	(36,213.74)
Exhibit P-38, Page 4	3,280,123.08	Exhibit P-41, Page 4	8,764,522.06	(5,484,398.98)
Exhibit P-38, Page 5	5,010,234.26	Exhibit P-41, Page 5	5,010,234.26	-

[46] Exhibit "P-38".
[47] Exhibit "P-40".
[48] Exhibit "P-41"; Exhibit "P-32", Discussion 8(A), Docket, Vol. I, pp. 268-270.

Exhibit P-38, Page 6	7,039,301.78	Exhibit P-41, Page 6	7,056,413.20	(17,111.42)
Exhibit P-38, Page 7	6,163,417.00	Exhibit P-41, Page 7	6,163,412.99	4.01
	₱32,435,787.37		**₱37,931,412.45**	**₱ (5,495,625.08)**

The above discrepancy was accounted for as follows:

Particulars	Reference	Amount
1. Difference in Cost of Living Allowance (COLA) amount used in computing FWT and WTC	Exhibit "P-32", Annex 7	₱ 45,346.30
2. Difference in foreign exchange conversion rate used in converting net basic pay from Australian Dollars (AUD) to Philippine Pesos (PHP)	Exhibit "P-32", Annex 8	129,327.84
3. Compensation subjected to WTC but not erroneously subjected to FWT	Exhibit "P-32", Annex 5-D	(5,613,726.82)
4. Unaccounted difference	Exhibit "P-32", Annex 9	(56,572.40)
Discrepancy		**₱ (5,495,625.08)**

In this breakdown, the discrepancy under number 3 amounting to ₱5,613,726.82 does not form part of the instant claim. The same holds true with the discrepancy under number 4 amounting to ₱56,572.40 as this represents compensation subjected to WTC but not to FWT.

However, the Court shall disallow the discrepancies under numbers 1 and 2 in the respective amounts of ₱45,346.30 and ₱129,327.84, where the tax base of FWT exceeds that of WTC, which means that the WTC is under-withheld. Considering that the FWT claim for October 2012 has already been denied as discussed earlier, that pertaining to the said month shall be excluded from the amount of ₱45,346.30.

Meanwhile, going back to the ICPA's summary of findings above, we shift our focus to item no. 4 in the amount of ₱9,607,115.09, which represents the FWT borne by the petitioner on the compensation of its assigned foreign employees.[49]

Based on the Contracts of Service[50], the ICPA noted that the assigned foreign employees were paid on a net rate basis (*i.e.*, petitioner agreed to shoulder the tax due on the assigned foreign employees' compensation), while the Filipino employees were paid on a gross rate basis (*i.e.*, Filipino employees will shoulder

[49] Exhibit "P-32", Annex 13, Docket, Vol. I, p. 297.
[50] Exhibits "P-37-A" and "P-37-B", Docket, Vol. II, pp. 512-562.

the tax due on their compensation). According to Mr. Lee Coleman, the compensation paid to the assigned foreign employees were grossed-up by 85% for the months of October, November and December 2012, and April and May 2013, and 68% for July 2013, before determining the FWT to be withheld thereon. For the month of June 2013, some of the payments were grossed up by 85%, while others were grossed up by 68%, before determining the FWT to be withheld thereon.[51]

In light of the foregoing, the Court finds that petitioner's shouldering of the tax expenses of its assigned foreign employees is considered compensation that benefitted the employees, which is taxable. Hence, the WTC shouldered by petitioner for the subject period amounting to ₱10,422,965.85 represents additional compensation for its assigned foreign employees that should be subjected to WTC, detailed as follows:

MONTH COVERED	AMOUNT OF WTC PAID	EXHIBITS
November 2012	₱ 1,189,316.30	"P-11", "P-40", p. 1
December 2012	617,826.63	"P-13", "P-40", p. 2
April 2013	2,783,397.61	"P-15", "P-40", p. 3
May 2013	1,582,025.51	"P-17", "P-40", p. 4
June 2013	2,236,802.77	"P-21", "P-19", "P-40", p. 5
July 2013	2,013,597.03	"P-23", "P-40", p. 5
Total	**₱ 10,422,965.85**	

Therefore, the amount of ₱4,238,957.62, representing understatement of WTC on compensation paid by petitioner to its assigned foreign employees, shall be disallowed from the claim, computed as follows:

Findings	WTC Base	WTC Rate	Disallowed Portion of Claim	Exhibit Reference
1. FWT claim for October 2012 outrightly denied because no proof of WTC remittance was submitted			₱ 850,733.37	
2. Difference in Cost of Living Allowance (COLA) amount used in computing FWT and WTC found in October to December 2012	₱ 45,346.30			*Exhibit "P-32", Annex 7*

[51] Exhibit "P-32", Discussion 6, p. 9, Docket, Vol. I, p. 267.

Less: Amount pertaining to denied claim for October 2012	9,439.22			
	₱ 35,907.08	32%	11,490.27	
3. Difference in foreign exchange conversion rate used in converting net basic pay from Australian Dollars (AUD) to Philippine Pesos (PHP) found in the month of April 2013	129,327.84	32%	41,384.91	*Exhibit "P-32", Annex 8*
4. WTC shouldered by petitioner on compensation paid to assigned foreign employees	10,422,965.85	32%	3,335,349.07	*Exhibit "P-32", Annex 13*
	₱10,588,200.37	32%	**₱4,238,957.62**	

Accordingly, on the basis that petitioner's employees' compensation is subject to WTC instead of FWT, the claimed amount of ₱10,369,060.73, as computed below, constitutes erroneously paid FWT which is refundable pursuant to Sections 204 and 229 of the NIRC of 1997, as amended.

Amount of FWT claim	₱ 14,608,018.35
Less: Disallowed amount pertaining to understatement of WTC on compensation paid by petitioner to its assigned foreign employees	4,238,957.62
Refundable erroneously paid FWT	**₱10,369,060.73**

WHEREFORE, premises considered, the Petition for Review is **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED TO REFUND** the amount of **₱10,369,060.73**, representing petitioner's erroneously paid FWT for the months of November to December 2012 and April to July 2013.

SO ORDERED.

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

ESPERANZA R. FABON-VICTORINO
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.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13 of Article VIII 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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice