REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

MIRANT (NAVOTAS II) CORPORATION, ***Petitioner,*** -versus- COMMISSIONER OF INTERNAL REVENUE, ***Respondent.***	**C.T.A. EB NO. 754** **(C.T.A. CASE NO. 7618)** Present: ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, JJ. **Promulgated:** JUN 05 2012

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review filed by Mirant (Navotas II) Corporation (hereafter "petitioner") under *Section 11 of RA 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43* of the *1997 Rules of Civil Procedure, as amended,* which seeks to set aside the Decision dated July 12, 2010 and Resolution dated March 21, 2011 rendered by the

Special First Division of this Court in C.T.A. Case No. 7618, the respective dispositive portions of which read, as follows:

> "**WHEREFORE**, premises considered, the Petition for Review is hereby **DENIED** for insufficiency of evidence.
>
> **SO ORDERED.**"
>
> "**WHEREFORE**, premises considered, petitioner's Motion for Reconsideration is hereby **DENIED** for insufficiency of evidence.
>
> **SO ORDERED.**"

THE PARTIES

Petitioner is a domestic corporation organized and existing under the laws of the Republic of the Philippines with principal business address at the 5th floor CTC Building, 2232 Roxas Boulevard, Pasay City.

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of said office including, among others, the power to decide, approve, and grant claims for refund and tax credit as provided by law. She holds office at the BIR National Office Building, located at Agham Road, Diliman, Quezon City.

THE FACTS

The antecedent facts, as culled from the records, are as follows:

Petitioner was originally registered with the Securities and Exchange

Commission (SEC) under the name Hopewell Tileman (Philippines) Corporation. On March 23, 1999, petitioner changed its name to Southern Energy Navotas II Power, Inc. and again to Mirant (Navotas II) Corporation on April 26, 2001.

Petitioner is primarily engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation (NPC).

Petitioner filed its quarterly income tax returns for the first, second and third quarters of taxable year 2005 on May 30, 2005, August 26, 2005 and November 29, 2005, respectively.

The NPC issued certificates of creditable taxes withheld at source in favor of petitioner for taxable year 2005, to wit:

Exhibit	Period		Income Payment	Income Tax Withheld
"X"	02/01/05 to 02/28/05		P52,253,933.00	P1,045,078.66
"K"	01/01/05 to 04/30/05		51,974,946.50	1,039,498.93
"L"	05/01/05 to 05/31/05		25,986,281.00	519,725.62
"M"	06/01/05 to 06/30/05		26,539,485.00	530,789.70
"N"	07/01/05 to 07/31/05		26,869,023.00	537,380.46
		Total	P183,623,668.50	P3,672,473.37

On April 10, 2006, petitioner filed its Annual Income Tax Return for the year 2005. Petitioner partially applied the CWT of P3,672,473.37 against its Minimum Corporate Income Tax (MCIT) due for the year 2005 in the amount of P1,503,741.52, leaving an excess tax credit of P2,168,731.85 as of December 31, 2005, computed as follows:

Creditable tax withheld for the first three quarters of 2005	P 3,672,473.37
Less: MCIT for the taxable year 2005	(1,503,741.52)
Excess unutilized CWT as of Dec. 31, 2005	**P2,168,731.85**

On February 5, 2007, petitioner filed a claim for refund of its excess income tax payment or creditable withholding taxes paid in the year 2005 with the BIR Revenue District Office No. 51.

Alleging inaction, on April 18, 2007, petitioner filed a Petition for Review with the Court in Division docketed as C.T.A. Case No. 7618.

After trial on the merits, on July 12, 2010, the Special First Division rendered a Decision denying petitioner's claim for refund for insufficiency of evidence.

On July 29, 2010, petitioner filed a "Motion for Reconsideration" praying that a hearing be set for the identification and admission into evidence of the Supplemental Judicial Affidavit of its witness Roger Quingquing, and the exhibits attached thereto.

In a Resolution dated August 26, 2010, the Special First Division set the case for hearing on September 16, 2010.

On September 8, 2010, respondent filed a "Motion for Reconsideration" of the Resolution dated August 26, 2010.

On September 27, 2010, petitioner filed a "Formal Offer of Evidence (Re: Motion for Reconsideration dated July 29, 2010)".

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On December 20, 2010, the Special First Division issued a Resolution denying respondent CIR's "Motion for Reconsideration" and admitting petitioner's "Formal Offer of Evidence".

On March 21, 2011, the Special First Division denied petitioner's "Motion for Reconsideration" for insufficiency of evidence.

Not satisfied, petitioner filed the instant Petition for Review raising the sole:

ISSUE

WHETHER OR NOT PETITIONER IS ENTITLED TO A REFUND IN THE AMOUNT OF Ph2,168,761.85, REPRESENTING ITS EXCESS CWT FOR TAXABLE YEAR 2005.

On May 23, 2011, without necessarily giving due course to the petition, respondent was ordered to file her comment, within ten (10) days from notice.

On June 9, 2011, respondent filed her "Comment (on Petitioner's Petition for Review)".

On June 27, 2011, both parties were ordered to file their simultaneous memoranda within thirty (30) days from notice.

On August 25, 2011, petitioner filed its "Memorandum". On the other hand, on July 8, 2011, respondent manifested that she is adopting her "Comment" to the Petition for Review as her memorandum.

Thus, September 20, 2011, this case was deemed submitted for decision.

Petitioner's Arguments

Petitioner contends that there is no rule or jurisprudence which requires the presentation of source documents in a claim for CWT refund; that requiring the presentation of source documents would be superfluous and assuming *arguendo* that source documents are required to be presented, petitioner now submits source documents, such as sales invoices and official receipts, subsidiary ledgers and Judicial Affidavit of Mr. Roger Quingquing to identify the foregoing documents.

Respondent's Counter-Arguments

On the other hand, respondent asserts that petitioner is not entitled to present further evidence as it was not presented during its administrative claim; that the same constitutes forgotten evidence which is proscribed by rules and jurisprudence; and that petitioner failed to submit relevant documents to the Special First Division to prove that income upon which the taxes were withheld were included in the return of petitioner.

THE COURT *EN BANC*'S RULING

We deny the Petition.

Well-settled is the rule that to be entitled to a claim for refund or issuance of a tax credit certificate of creditable withholding tax, the taxpayer must satisfy three (3) conditions, to wit:

1) that the claim is filed with the CIR, within the two (2) year period from the date of payment of the tax;
2) that the fact of withholding is established by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of the tax withheld therefrom; and
3) that it is shown on the return of the recipient that the income payment received was declared as part of the gross income *(Banco Filipino Savings and Mortgage Bank vs. Court of Appeals, et.al, 519 SCRA 93).*

After a careful examination of the evidence on record, We agree with the Special First Division that the first and second conditions had been complied with by petitioner.

First Requisite –
Claim For Refund Was
Filed Within the Two-year
Prescriptive Period

As regards the first condition, *Section 229 of the NIRC of 1997, as amended,* provides that claims for refund or credit of erroneously, illegally or excessively collected tax must be filed within two (2) years from the payment of the tax. However, the rule is settled that the two (2)-year prescriptive period provided in *Section 229* should be computed from the time of the filing of the final adjustment return and final payment of the tax for the year *(ACCRA Investments Corp. vs. Court of Appeals, et al, 204 SCRA 9637, Commissioner of Internal Revenue vs. TMX Sales Incorporated, 205 SCRA 191, Commissioner of Internal Revenue vs. Philippine American Life Insurance Co., 244 SCRA 453,* and *Philippine Bank of Communication vs. Commissioner of Internal Revenue, 302 SCRA 251).*

In this case, petitioner's claim involves a refund of excess creditable withholding tax for taxable year 2005, for which petitioner filed its Annual Income Tax Return on April 10, 2006 *(Exhibit "I").* Thus, petitioner had until April 10, 2008 within which to file both its administrative and judicial claims for refund or tax credit. Considering that petitioner filed its administrative claim on February 5, 2007 *(Exhibit "C-1")* and the Petition for Review on April 18, 2007 *(C.T.A. Case No. 7618, Original Docket, p. 1)*, petitioner's claim, therefore, was filed within the prescribed period under *Section 229*.

Second Requisite –
Taxes Withheld Are Duly Supported
by Certificates of Tax Withheld

Likewise, we agree with the Special First Division that petitioner has satisfied the second condition. To prove the fact of withholding, petitioner presented various Certificates of Creditable Tax Withheld (*Exhibits "X", "K" to "N")* issued by its sole client, the NPC, for taxable year 2005. The Certificates of Creditable Tax Withheld at Source issued by the withholding agents are prima facie proof of actual payment by petitioner to the government itself through said agents. The said certificates show that a total of P3,672,472.37 was withheld from the income payments amounting to P183,623,668.50. The income tax withheld of P3,672,472.37, includes the claimed amount of P2,168,731.85. Thus, we find the documentary evidence presented sufficient to establish that petitioner was withheld of income taxes.

Third Requisite –
The Income Withheld Made Part
of Petitioner's Gross Income

As regards the third requisite, the Special First Division found that petitioner declared in its Annual Income Tax Return for taxable year 2005 a total revenue of P190,104,970.00 *(Exhibit "V-7")* from its sales of services. However, the Certificates of Creditable Tax Withheld at Source presented by petitioner reflected a total of P183,623,668.50 revenues only.

Clearly, there is a marked discrepancy between petitioner's declared income in its 2005 annual ITR and the Certificates issued by the NPC for taxable year 2005 in the amount of P6,481,301.50.

Petitioner contends, as explained by its Senior Tax Analyst, Mr. Roger B. Quingquing, in his Judicial Affidavit dated July 18, 2008 *(Exhibit "Y")*, that the discrepancy of P6,481,301.67 between the gross income payments of P183,623,668.40 as appearing in the certificates, as against the revenues of

P190,104,970.07, reflected per petitioner's Annual Income Tax Return for taxable year 2005 was caused by four specific factors, namely: a) there were sales revenues billed in 2005, but remained uncollected as of December 31, 2005; b) there were sales revenues billed in 2004, but were collected in 2005; c) there were sales revenues billed in 2004 but were written off in 2005; and d) there were foreign exchange differences between the rate at which the sales were recorded and billed and the rate prevailing at the time collection was made.

In support of the testimony of said witness, petitioner presented a reconciliation schedule *(Exhibit "U")*, reflecting the following:

Revenue per Annual ITR for 2005 *(Exhibit "V-7")*		P190,104,970.07
Reconciling Items:		
a) Uncollected 2005 revenue *(Exhibit "U-11")*	P (62,588,059.57)	
b) 2004 revenue collected in 2005 *(Exhibit "U-14")*	52,253,933.00	
c) 2004 revenue written off in 2005 *(Exhibit "U-26")*	2,822,695.80	
d) Foreign exchange difference *(Exhibit "U-33")*	1,030,129.10	(6,481,301.67)
Income payments per withholding certificates		**P183,623,668.40**

However, the Special First Division found the reconciliation schedule insufficient to prove that petitioner declared the income upon which the claimed creditable withholding taxes were withheld. Thus, petitioner now presents before the Court *En Banc* the following documents to prove its contentions and support the reconciliation schedule it previously presented, to wit:

1) various invoices and official receipts *(Annexes "L" to "Z")*;

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2) Schedule of Sales for the taxable year 2004 *(Annex "AA")*; and
3) 2nd Supplemental Judicial Affidavit of Mr. Roger B. Quingquing *(Annex "BB")*.

In effect, petitioner is introducing new evidence on appeal with this Court *En Banc*. It must be stressed, however, that the introduction of evidence after trial and after judgment has been rendered can only be done in a new trial on the ground of newly discovered evidence. Petitioner's prayer to present additional evidence partakes of the nature of a motion for new trial under *Section 1, Rule 37 of the 1997 Rules of Civil Procedure, as amended.* Settled is the rule that failure to present evidence already existing at the time of trial does not warrant the grant of a new trial because said evidence can no longer be considered newly discovered, but is more in the nature of forgotten evidence. Forgotten evidence refers to evidence already in existence or available before or during a trial; known to and obtainable by the party offering it; and could have been presented and offered in a seasonable manner, were it not for the sheer oversight or forgetfulness of the party or the counsel. Presentation of forgotten evidence is disallowed, because it results in a piecemeal presentation of evidence, a procedure that is not in accord with orderly justice and serves only to delay the proceedings. A contrary ruling may open the floodgates to an endless review of decisions, whether through a motion for reconsideration or for a new trial, in the guise of newly discovered evidence *(Office of the Ombudsman vs. Coronel, 493 SCRA 404).*

In this case, the invoices and official receipts already existed during the trial before the Special First Division, thus, said documents will not qualify as newly discovered evidence. Petitioner was given an opportunity to present its evidence during trial of this case. Further, in the Resolution dated August 26, 2010, the Special First Division had already relaxed the rules on technicality in favor of petitioner when it allowed the presentation of additional evidence even after judgment had already been rendered. Despite the leniency accorded by the Special First Division to petitioner, it still failed to present all the evidence which will prove its entitlement to a refund. Petitioner did not even move for a new trial, but instead opted to appeal the decision of the Special First Division, to this Court *En Banc*; and merely attached its supporting documents to its Petition for Review. The Supreme Court has consistently ruled that it goes against the orderly administration of justice to allow a party to submit forgotten evidence which it could have offered with the exercise of ordinary diligence, more so when a decision has already been rendered *(Atlas Consolidated Mining and Development Corp. vs. Commissioner of Internal Revenue, 546 SCRA 162).* Therefore, the invoices and official receipts should now be treated as forgotten evidence considering that the same already existed or were available before or during the trial, which was known and obtainable to petitioner and could have been presented were it not for petitioner's oversight or forgetfulness. Accordingly, at this stage, we cannot allow the presentation of additional evidence considering that this is already an appeal from the decision rendered by the Special First Division.

Basic is the rule that a claimant has the burden of proof to establish the factual basis of his or her claim for tax credit or refund. This is because tax refunds are in the nature of tax exemptions, the statutes of which are construed *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority. Taxes are the lifeblood of the nation, therefore statutes that allow exemptions are construed strictly against the grantee and liberally in favor of the government *(Philippine Phosphate Fertilizer Corporation vs. Commissioner of Internal Revenue, 461 SCRA 384)*.

Finding no reversible error, We affirm the assailed Decision dated July 12, 2010 and Reso2lution dated March 21, 2011.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED DUE COURSE**, and accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

Cielito N. Mindaro-Grulla
ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice