REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

KEPCO PHILIPPINES CORPORATION,
Petitioner,

- versus -

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8761

Members:

DEL ROSARIO, *Chairperson,*
UY, *and*
MINDARO-GRULLA, *JJ.*

Promulgated:

JUL 24 2017 ; 1:42 p.m.

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RESOLUTION

MINDARO-GRULLA, *J.*:

Before this Court are:

1. petitioner's **Motion for Partial Reconsideration**, filed on March 22, 2017, with respondent's **Comment (Re: Petitioner's Motion for Partial Reconsideration)**, filed on April 17, 2017; and

2. respondent's **Motion for Partial Reconsideration (Re: Decision promulgated on 06 March 2017)**, filed on March 22, 2017, with petitioner's **Comment (To the respondent's Motion for Partial Reconsideration)**, filed on April 10, 2017.

Both parties seek reconsideration of the Court's Decision promulgated on March 6, 2017, the dispositive portion of which reads as follows:

> "**WHEREFORE**, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. The assessment issued by respondent against petitioner for the taxable year 2009 covering deficiency final withholding tax in the amount of ₱133,166,690.62 is **CANCELLED** and **SET ASIDE**. However, the assessments issued by respondent against petitioner for taxable year 2009 covering deficiency final withholding VAT and deficiency VAT are **AFFIRMED** with **MODIFICATIONS**.
>
> Accordingly, petitioner is **ORDERED TO PAY** respondent the following:
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> a) Basic final withholding VAT in the amount of ₱27,769,598.67 plus 25% surcharge of ₱6,942,399.67;
>
> b) Basic deficiency VAT in the amount of ₱25,485,133.56 plus 25% surcharge of ₱6,371,283.39; and
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> c) Delinquency interest at the rate of 20% per annum on ₱66,568,415.29, representing the total of the amounts stated under (a) and (b), computed from February 1, 2014 until full payment thereof, pursuant to Section 249 (C) of the National Internal Revenue Code (NIRC) of 1997, as amended.
>
> **SO ORDERED.**"

Petitioner's Motion for Partial Reconsideration

In assailing the aforesaid Decision, petitioner argues that the Court erred in upholding the final withholding value-added tax assessment and in finding petitioner liable to pay value-added tax (VAT) on its interest income for the financial assistance that it extended to its affiliates.

Petitioner argues that payment for services rendered offshore of non-resident foreign corporations cannot be the subject of any VAT. According to petitioner, the services rendered by Korean Electric Power Corporation (KEPCO) under the Technical Services Agreement (TSA) have onshore and offshore components. Allegedly, petitioner has paid the necessary final withholding VAT on the services rendered in the Philippines (onshore) by KEPCO personnel, as evidenced by the Monthly Remittance Returns of Value Added Tax and Other Percentage Taxes Withheld which are attached in the instant motion. Petitioner further claims that KEPCO has billed petitioner for the services performed on a quarterly basis. An alleged comparison of the said returns will show that it matches the service months provided in KEPCO'S certification in the number of days and the dates that its personnel stayed in the Philippines in 2009 to render services to the petitioner. Petitioner explains that the Return for July corresponds to the final withholding VAT paid for the services rendered onshore from April to May but was billed on the second quarter of 2009; while the Return for December corresponds to the services rendered onshore from September to October but was billed on the fourth quarter of 2009.

As regards the assessment for deficiency VAT on petitioner's interest income for the financial assistance that it extended to its affiliates, petitioner asserts that it is not habitually engaged in the business of lending or investing to other companies. Petitioner points out that its primary purpose for incorporation is to rehabilitate, operate, maintain and manage the Malaya Power Plant and other power generating plants or related facilities. Petitioner claims that it is neither a holding company nor a financing company. Petitioner insists that the two loans granted to KEPCO Ilijan Corporation (KEILCO) and KEPCO Philippines Holdings, Inc. (KPHI) were isolated transactions, because at the time the loans were made, KEILCO and KPHI were not yet established for them to be recognized by lending institutions. Also, petitioner posits that such acts of extending those isolated loans do not qualify under the definition of the term "incidental" in relation to the phrase "in the course of trade or business", as provided in Section 105 of the National Internal Revenue Code (NIRC) of 1997, as amended.

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On the other hand, respondent opposes petitioner's motion stating that the place where KEPCO rendered its services to petitioner was not raised as an issue in this case. Allegedly, petitioner has not presented any evidence to prove that the services rendered by KEPCO were not performed in the Philippines. Respondent posits that since KEPCO rendered services to petitioner which is a domestic corporation doing business in the Philippines, it means that the services were rendered in the Philippines and KEPCO derived gross receipts from sources within the Philippines. Respondent claims that the presentation of petitioner's Monthly Remittance Returns of Value Added Tax and Other Percentage Taxes Withheld does not prove that KEPCO performed onshore and offshore services to petitioner.

Respondent further avers that this Court has correctly affirmed that petitioner is liable for deficiency VAT on loans extended by the latter to its affiliates.

Respondent's Motion for Partial Reconsideration

Respondent assails the above-mentioned Decision on the ground that petitioner was correctly assessed for deficiency final withholding tax (FWT), VAT, and withholding VAT for taxable year 2009.

Allegedly, the management and technical service fees petitioner paid to KEPCO are subject to FWT and withholding VAT. Respondent asserts that since KEPCO rendered services to petitioner for several years under the TSA, it exceeds the 183-day period provided for in the tax treaty. Respondent states that reliance on mere certification from KEPCO signed by its Senior Manager of Overseas Project Management Department does not prove that KEPCO has no permanent establishment in the Philippines. Respondent posits that KEPCO has been providing services regularly and continuously to petitioner for a substantial number of years; thus, it disproves petitioner's allegation that KEPCO has no permanent business establishment in the country.

Respondent further claims that the assessment for VAT should be maintained as petitioner was informed in writing of the law and facts on which the assessment was made. It is respondent's position that considering the assessments are *prima facie* correct, respondent need not prove the presumption of regularity of the assessment.

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Moreover, it is alleged by respondent that petitioner is liable for compromise penalties and deficiency interest. Respondent also avers that due to failure of petitioner to withhold and remit the tax due, it is liable for compromise penalties provided for in the Revised Consolidated Schedule of Compromise Penalties for Violations of the NIRC of 1997, as amended, pursuant to Revenue Memorandum Order (RMO) No. 7-2015 in relation to RMO No. 1-90.

On the other hand, petitioner objects to respondent's motion claiming that the service fees paid to KEPCO are exempt from any FWT or final withholding VAT under the RP-Korea Tax Treaty.

Petitioner expresses that the 183 days shall be counted for every twelve-month period. Petitioner insists that KEPCO's personnel only stayed in the Philippines for an aggregate period of 35 days in 2009, thus, it cannot be considered to have a permanent establishment in the Philippines.

As regards the interest income, petitioner claims that respondent did not raise any credible argument to show the validity of the VAT assessed. Petitioner alleges that the two loans given to its affiliates were not done in the course of its trade or business. The alleged aforementioned loans have nothing to do with petitioner's primary purpose which is to rehabilitate, operate, maintain and manage the Malaya Power Plant and other power generating plants or related facilities.

Further, petitioner expresses that the Court has correctly ruled that the former is not liable to pay any compromise penalty or any VAT deficiency interest.

Ruling of the Court

After a careful evaluation of the foregoing arguments, the Court finds that the same are mere rehash of the same facts and issues which have already been passed upon extensively in the assailed Decision.

Nevertheless, the Court shall clarify some of the arguments set forth by the parties.

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As regards the Monthly Remittance Returns of Value Added Tax and Other Percentage Taxes Withheld which are attached to the petitioner's motion, the same cannot be considered as they are forgotten evidence.

Forgotten evidence, not presented during the trial nor formally offered, is not newly found evidence that merits a new trial. 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.[1]

As to respondent's statement that this Court merely relied on the certification issued by KEPCO's Senior Manager of Overseas Project Management Department to prove the absence of KEPCO's permanent establishment in the Philippines, the Court finds this without legal basis. It is worthy to emphasize that the Court has considered several documentary evidence to arrive at the ruling that KEPCO has no permanent establishment in the Philippines, to wit:

> "The **Certification of Non-Registration of Company**[2] issued by the Securities and Exchange Commission, certifying that KEPCO is not registered as a corporation or a partnership in the Philippines, establishes that it is unlikely for KEPCO to have a branch, an office or any other fixed place of business in the Philippines. Moreover, the **Certification from KEPCO**[3] signed by the Senior Manager of its Overseas Project Management Department, as supported by the **breakdown of managerial and technical services rendered by KEPCO personnel** and **copies of their passports**, shows that such services were rendered for an aggregate period not exceeding 183 days within a twelve-month period, *i.e.,* taxable year 2009, as broken down below:

Name of Dispatched Personnel	Position/ Designation	Service Rendered Itinerary	Travel		Duration	No. of Day	Service Area
			from	to			
Lim IckHun	General Manager	Calibration of over/under excitation limitation settings etc.	9-Apr-09	15-Apr-09	7	7	Malaya
Ryu Ho Sun	General Manager	Confirm the reliability and capability of K2 Generator AVR components etc.	3-May-09	6-May-09	4	4	Malaya

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[1] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.
[2] Exhibit "P-17", docket, vol. II, p. 1018.
[3] Exhibit "P-19", docket, vol. II, pp. 1034 to 1048.

Kim, Byeong-Rae Lee YoungJun	General Manager General Manager	Close examination of Generator, Exciter, PT and Current Transformer etc.	23-Sep-09	30-Sep-09	8	8	Malaya
Bae Chun Hee Chang Jung Chel	General Manager General Manager	Visual inspection of Generator, Boiler WW, SH, RH Tube etc.	8-Oct-09	16-Oct-09	9	9	Malaya
Lim IckHun	General Manager	Close examination of Generator AVR K1 and K2	12-Oct-09	18-Oct-09	7	7	Malaya
						35	

Clearly, KEPCO, as properly contended by petitioner, does not have a PE in the Philippines for TY 2009. Hence, the profits derived by KEPCO from the rendition of services under the TSA shall not be subject to Philippine income tax pursuant to Article 7(1) in relation to Article 5 of the RP-Korea Tax Treaty." (*Emphasis supplied.*)

With respect to the allegation of respondent on the imposition of compromise penalties based on RMO No. 7-2015, the Court finds that the same does not apply in this case.

The pertinent portions of RMO No. 7-2015 are quoted as follows:

REVENUE MEMORANDUM ORDER NO. 007-15

SUBJECT : The Revised Consolidated Schedule of Compromise Penalties for Violations of the National Internal Revenue Code

TO : All Internal Revenue Officers and Others Concerned

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II. Policies:

The applicable policies and guidelines prescribed under RMO No. 19-2007 shall remain for the strict compliance by all concerned, and are quoted as follows:

1. **In all cases of criminal violations of the NIRC**, not involving the commission of fraudulent act, it is directed that henceforth, compromise penalties to be

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imposed shall follow strictly the amounts in the attached "Revised Schedule of Compromise Penalties", marked as Annex "A" and made an integral part hereof.

2. Certain acts/violations which are commonly resorted to by taxpayers as means of tax evasion are deleted from the coverage thereof for having met the requirements of the definition of fraudulent acts.

III. Guidelines and Instructions:

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4. Although **all amounts of compromise penalties incident to violations** shall be itemized in the assessment notice and/or demand letter, the same should not form part of assessment notice that reflects deficiency basic tax, surcharge and interest but **should appear in a separate assessment notice/demand letter as the amount suggested to the taxpayer to pay in lieu of criminal prosecution**. If paid, the compromise penalties shall be collected and accounted for under the usual procedures, as internal revenue collection.

5. Since **compromise penalties are only amounts suggested in settlement of criminal liability, and may not therefore be imposed or exacted on the taxpayer**, the violation shall be referred to the appropriate office for criminal action in the event that a taxpayer refuses to pay the suggested compromise penalty.

xxx xxx xxx" (*Emphasis supplied*)

From the foregoing, it is clear that the compromise penalties provided therein refers to criminal violations of the provision of NIRC of 1997, as amended, and that the same are mere amounts suggested in settlement of criminal liability which may not therefore be imposed or exacted on the taxpayer. Since the instant case does not involve criminal violations of the NIRC, and that petitioner did not

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agree to settle its tax liability[4], the compromise penalties assessed should not imposed, thus, the same was properly cancelled by the Court.

WHEREFORE, premises considered, petitioner's **Motion for Partial Reconsideration** and respondent's **Motion for Partial Reconsideration (Re: Decision promulgated on 06 March 2017)** are **DENIED** for lack of merit.

SO ORDERED.

CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

[4]Decision dated March 6, 2017, p. 41.