REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

KEPPEL PHILIPPINES PROPERTIES, INC. (FOR ITSELF AND ON BEHALF OF KEPPEL LAND LIMITED), *Petitioner,*	**CTA CASE NO. 8908** Members:
-versus-	***Bautista,*** *Chairperson* ***Fabon-Victorino,*** *and* ***Ringpis-Liban,*** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: JUL 19 2016 10:38 a.m.

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DECISION

BAUTISTA, J:

The Case

This is a Petition for Review[1] filed by petitioner Keppel Philippines Properties, Inc. ("KPPI") for itself and on behalf of Keppel Land Limited ("KLL") pursuant to *Section 229*[2] *of the 1997 National Internal Revenue Code* ("NIRC") and *Section 7(a)(2)*[3] *of Republic Act*

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[1] *Records, CTA Case No. 8908, Vol. 1, Petition for Review,* pp. 6-21, with annexes.

[2] SECTION 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.

[3] Sec. 7. *Jurisdiction.* - The CTA shall exercise:

a. Exclusive appellate jurisdiction to review by appeal, as herein provided: xxx

2. Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relations

("RA") *No. 1125*, as amended by *RA No. 9282* and *RA No. 9503*, praying for the Court to declare petitioner's redemption of Thirteen Million Six Hundred Thousand (13,600,000) preferred shares held by KLL on September 28, 2012 as exempt from Final Withholding Tax ("FWT"), pursuant to the RP-Singapore Tax Treaty; and to refund or issue a tax credit certificate ("TCC") to petitioner in the amount of Twenty Million Four Hundred Twenty Thousand Pesos (Php21,420,000.00) representing erroneously paid FWT in relation to the said redemption.[4]

The Parties[5]

Petitioner KPPI is a domestic corporation duly organized and existing by virtue of Philippine laws with business address located at Units 2203-2204 Raffles Corporate Center, F. Ortigas Jr. Road, Pasig City. It holds investments in subsidiaries and associates involved in property holding and development.

In connection with the instant Petition for Review, KPPI is in possession of a power of attorney[6] from KLL to receive, in the former's name the TCC or refund arising from this case.

Respondent Commissioner of Internal Revenue ("CIR") is the officer vested by law with authority to grant TCCs and/or to refund taxes erroneously or illegally collected. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

The Facts

On June 10, 2003, KPPI's Articles of Incorporation was amended to increase its capital stock to One Hundred Thirty Five Million Seven Hundred Thousand (135,700,000) preferred shares with a par value of One Peso (Php1.00) per share, which was approved[8] by the Securities and Exchange Commission ("SEC") on October 17, 2003.[10]

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thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial; xxx"

[4] *Records, Vol. 1, Petition for Review*, pp. 12-13.

[5] *Id., Vol. 2, Joint Stipulation of Facts and Issues ("JSFI")*, pp. 723-724.

[6] *Id., Vol. 1, Exhibit "P-17-b," Power of Attorney*, pp. 17-18.

[8] *Id., Vol. 2, Exhibit "P-4," SEC Certificate*, pp. 1140-1168, with annexes.

[10] *Id., JSFI*, p. 724.

KLL is a foreign company organized and existing under and by virtue of the laws of Singapore.[11] It is not registered as a corporation or as a partnership in the Philippines.[12]

In 2003, KLL[13] subscribed and paid by way of conversion of advances to equity 73,074,100 preferred shares of KPPI amounting to Php730,741,000.00, which was recorded as preferred share issuance of Php73,074,100 at the par value of Php1.00 per share and capital paid in excess of par value of Php657,666,900.00 at Php9.00 per share, at the issue price of Php10.00 per share.[14]

On December 30, 2010, KPPI and KLL entered into a Memorandum of Agreement[17] whereby the former agreed to redeem 13,600,000 of its preferred shares from the latter at the redemption price of Php278,800,000.00.

On January 29, 2011, KPPI and KLL executed a Redemption Agreement[18] whereby the former shall redeem KLL's preferred shares for and in consideration of the concurrence of two (2) conditions: *(1)* the payment of Php278,800,000.00; and *(2)* a favorable ruling or approved Tax Treaty Relief Application ("TTRA") from the International Tax Affairs Division ("ITAD") under BIR Revenue Memorandum Order ("RMO") No. 72-2010 that such redemption will not be subject to Philippine Capital Gains Tax ("CGT") under the Convention Between the Republic of the Philippines and the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("RP-Singapore Tax Treaty")[19].

In November 28, 2011, KPPI received a letter[20] from the ITAD dated November 2, 2011 (hereinafter referred to as the "ITAD Letter"), where the latter stated that it cannot process the requested ruling since the suspensive condition "of a favorable ruling on the TTRA renders the transaction a 'hypothetical situation' which falls within the ambit

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[11] *Records, CTA Case No. 8908, Vol. 2, Exhibit "P-10-b,"* pp. 1550-1552.
[12] *Id., Exhibit "P-10-f,"* p. 1576.
[13] *Id., Vol. 1, Exhibit "P-1-b," General Information Sheet ("GIS") as of July 10, 2004,* p. 85.
[14] *Id., Vol. 2, Exhibits "P-5-a-i" and "P-5-a-ii,"* pp. 1171 and 1182.
[17] *Id., Vol. 1, Exhibit "P-7," Memorandum Agreement,* pp. 563-564.
[18] *Id., Exhibit "P-10," Redemption Agreement,* pp. 1542-1546.
[19] Dated January 1, 1977, effective August 1, 1977.
[20] *Records, Vol. 2, Exhibit "P-12,"* pp. 689-690.

of a 'No-Ruling Area' under *Sections 1 and 2(t) of Revenue Bulletin No. 1-2003*." The ITAD Letter further informed KPPI's counsel that the TTRA may be refiled provided that the pertinent condition is excluded from the Redemption Agreement.[21]

Accordingly, on February 2, 2012, KPPI and KLL executed an "Amendment to the Redemption Agreement"[22] deleting the second condition and scheduling the redemption of the preferred shares seventy-five (75) working days after the execution of the amendment.

Subsequent thereto, KPPI refiled its TTRA[24] with the ITAD on February 7, 2012.[25]

In accordance to the Amendment to the Redemption Agreement, on September 28, 2012, in 2012, KPPI redeemed KLL's preferred shares for and in consideration of Php20.50 per share or a total of Php278,800,000.00, total reduction in preferred stock is Php136,000,000.00[26] as a return of the issue price of the preferred shares; in additional paid-in capital ("APIC") is Php122,400,000.00; and retained earnings is Php142,800.00.[27]

On October 10, 2012, KPPI filed the Monthly Remittance Return of Final Withholding Taxes Withheld or BIR Form No. 1601-F; and paid to Land Bank of the Philippines - Shaw Boulevard Branch, as BIR's authorized agent bank, Php21,420,000.00 representing FWT on the redemption of the preferred shares based on the tax treaty rate of 15%.[28]

To date, the ITAD has yet to act on the re-filed TTRA.[29]

Believing that it is entitled to the refund or the issuance of TCC for the amount of Php21,420,000.00, representing the 15% FWT which was allegedly erroneously and unduly received by the BIR, KPPI filed a Final Demand for Refund of Erroneously Paid FWT[30] with the CIR

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[21] *Records, Vol. 2, Exhibit "P-12," ITAD Letter,* pp. 689-690.
[22] *Id., Exhibit "P-13," Amendment to the Redemption Agreement,* pp. 691-692.
[24] *Id., Vol. 3, Exhibits "P-14" to "P-14-c,"* pp. 1659-1664, with annexes.
[25] *Id., Vol. 2, JSFI,* p. 724.
[26] At Php10.00 par value.
[27] *Records, Vol. 3, Exhibits "P-5-j-i," "P-5-j-ii," and "P-5-j,"* pp. 1486, 1512 and 1513.
[28] *Id., Vol. 2, Exhibits "P-15-a," "P-15-b," and "P-15-b-1",* pp. 700-701.
[29] *Id., JSFI,* p. 724.
[30] *Id., Exhibit "P-16," Administrative Claim,* p. 702.

on September 12, 2014, pursuant to *Sections 204 and 229 of the National Internal Revenue Code of the Philippines, as amended* ("*1997 NIRC*"). The administrative claim for refund or issuance of TCC remains pending with the CIR.[32]

On October 10, 2014, KPPI filed with this Court the instant Petition for Review.[33]

The CIR filed her Answer[34] through registered mail on December 12, 2014, interposing the following Special and Affirmative Defenses:[35]

> **<u>It is incumbent upon petitioner to prove that it is entitled to the refund sought because a claim for refund is not *ipso facto* granted upon filing of the claim.</u>**
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> 4. As a matter of course, a claim for refund is subject to investigation as it involves removal of accrued revenue from the coffers of the Government. It has been held by the Supreme Court that a claim for refund is not *ipso facto* granted because the [CIR] still has to investigate and ascertain the veracity of the claim.
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> 5. [The CIR] submits that [KPPI] failed to demonstrate that the amount of [Php]21,420,000.00 which is the subject of the case at bar was erroneously or illegally collected. Taxes remitted to the BIR are presumed to have been made in the regular course of business and in accordance with provisions of law.
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> 6. [KPPI] failed to substantiate its claim for refund/issuance of [TCC] in the amount of [Php]21,420,000.00 representing alleged erroneously paid [FWT] for the tax[able] year 2012.
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> 7. In the case entitled ***Commissioner of Internal Revenue vs. Rosemarie Acosta***, the Supreme Court had the occasion to say:

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[32] *Records, Vol. 2, JSFI*, p. 724.
[33] *Id., Vol. 1, Petition for Review*, pp. 6-21, with annexes.
[34] *Id., Answer*, pp. 30-39.
[35] *Id., Answer*, pp. 31-36; emphases retained.

> "xxx Noteworthy, the requirements under *Section 230 (now Section 204) [of the 1997 NIRC]* for refund claims are as follows:
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> 1. A **written claim** for refund or tax credit must be filed by the taxpayer with the [CIR];
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> 2. The claim for refund must be a **categorical demand** for reimbursement;
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> 3. The claim for refund or tax credit must be filed, or the suit or proceeding therefor must be commenced in court **within two (2) years from date of payment of the tax or penalty regardless of any supervening cause**.
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> In our view, the law is clear. A claimant must first file a written claim for refund, **<u>categorically demanding recovery of overpaid taxes</u>** with the CIR, before resorting to an action in court. This obviously is intended, first, **<u>to afford the CIR an opportunity to correct the action of subordinate officers</u>**; and second, to notify the government that such taxes have been questioned, and the notice should then be borne in mind in estimating the revenue available for expenditure xxx." xxx

8. Likewise, [KPPI] must prove that the administrative and judicial claims were filed within the period prescribed by law, as provided in *Sections 204(c) and 229 of the 1997 NIRC* on the prescriptive period for claiming tax refund/credit, which provides:

> "**SEC. 204.** ***Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.*** -
> The Commissioner may -
> (A) xxx
>
> (B) 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. **<u>No credit or refund of taxes or</u>**

> **penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) 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.
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> **SEC. 229.** ***Recovery of Tax Erroneously or Illegally Collected.*** - [N]o 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 any penalty claimed to have been collected without authority, 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.
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> 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 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."

9. [KPPI] alleged that it filed its initial administrative claim for refund on [September 12, 2014] amounting to Php21,420,000.00 representing erroneously paid [FWT] for tax[able] period 2012. It bears stressing that exactly twenty eight (28) days after the filing of the aforesaid alleged administrative claim or on [October 10, 2014], it filed before the Honorable Court its *Petition for Review*.

10. [CIR] therefore, was not accorded the fullest opportunity to act appropriately on the matter. It would be highly improbable to grant or deny the claim for refund in a matter of twenty eight (28) days.

11. In fact, [KPPI] was very much aware of the two (2) year prescriptive period embodied in *Section 229 of the [1997 NIRC]*. As found in Paragraph 24 of its Petition for Review,

Section 229 of the [1997 NIRC], was even made the basis for the filing of the administrative claim for refund of the alleged excess [FWT]. Mindful of *Section 229 [of the 1997 NIRC]*, [KPPI] should have at least filed its application for tax refund earlier so that respondent will be given ample time to review and evaluate its application for tax refund.

12. In cases such as this, before judicial inquiry into the issue of whether taxpayers, in general, are entitled to a refund/tax credit under substantive law may be considered, they have an initial burden to discharge. They must prove that they complied with all the administrative requirements continuing up to judicial review. In other words, before **trial de novo** proceeds and disposes of the issue of refund entitlement under **substantive** law, it must be first be proved that there was **procedural** compliance in pursuing the administrative claim leading to the **appellate** proceedings. As stated by the Honorable Supreme Court in the case of ***Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue***:

> "Petitioner's contention that non-compliance with Revenue Regulations 3-88 could not have adversely affected its case in the CTA indicates a failure on its part to appreciate the nature of the proceedings in that court. **First, a judicial claim for refund or tax credit in the CTA is by no means an original action but rather an appeal by way of petition for review of a previous, unsuccessful administrative claim. Therefore, as in every appeal or petition for review, a petitioner has to convince the appellate court that the quasi-judicial agency a quo did not have any reason to deny its claims. In this case, it was necessary for petitioner to show the CTA not only that it was entitled under substantive law to the grant of its claims but also that it satisfied all the documentary and evidentiary requirements for an administrative claim for refund or tax credit.** Second, cases filed in the CTA are litigated de novo. Thus, a petitioner should prove every minute aspect of its case by presenting, formally offering and submitting its evidence to the CTA. **Since it is crucial for a petitioner in a judicial claim for refund or tax credit to show that its administrative claim should have been granted in the first place, part of the evidence to be submitted to the CTA must necessarily**

include whatever is required for the successful prosecution of an administrative claim." xxx

13. As can be seen, proper substantiation begins in the administrative level. So if the denial (by inaction) of the administrative claims is because of non-compliance with legal procedural requirements, then true to its appellate nature, the Honorable Court must sustain the decision of the BIR since it suffers no infirmity.

14. The purpose of requiring the filing of the administrative claim for refund/tax credit and submission of supporting documents relevant to a claim for tax refund/credit is to give the administrative agency concerned the opportunity to ascertain the veracity and validity of the claim. This is the very essence, the very substance of the doctrine of exhaustion of administrative remedies. The doctrine rests upon the presumption that the administrative body, board, or officer, if given matter and decide it properly. Thus, non-compliance with a condition precedent renders the Petition for Review dismissible.

15. The doctrine of exhaustion of administrative remedies ensures an orderly procedure which favors of preliminary sifting process, particularly with respect to matters peculiarly within the competence of the administrative agency. After this sifting process comes the availability of judicial review of administrative decisions entail the Court to examine the method in which the decision was arrived at, and finding no error, lets the administrative decision stand. This is precisely because there are matters peculiarly within the competence of the administrative agency.

16. The failure of [KPPI] to substantiate its claim for refund before the office of the [CIR] and the filing of the instant petition before this Honorable Court deprived respondent of the opportunity to fully exercise her function to decide claims for refund, correct or modify or affirm the findings of her subordinates. It must be remembered that in the case of ***Jariol vs. Commission on Elections***, the Supreme Court reasoned that a party must not merely initiate the prescribed administrative procedure to obtain relief, the party concerned must pursue this relief until the appropriate conclusion takes place before seeking judicial intervention in order to give the administrative body an opportunity to decide the matter by itself correctly and prevent unnecessary and premature resort to the court.

> 17. Finally, claims for refund are constructed strictly against the claimant for the same partake of the nature of exemption from taxation and as such, they are looked upon with disfavor. Basic is the rule that tax refunds are regarded as tax exemptions that are in derogation of the sovereign authority and are to be construed in *strictissimi juris* against the person or entity claiming the exemption. 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.
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> 18. Based on the foregoing, [KPPI's] claim for refund has no basis in fact and in law. Thus, the instant petition should be denied for lack of merit.

KPPI and [the CIR] filed their respective Pre-trial Briefs on March 13, 2015[36] and March 6, 2015.[37]

On March 26, 2015, the parties filed their Joint Stipulation of Facts and Issues ("JSFI"),[38] and thus a Pre-Trial Order[39] was issued on April 15, 2015.

On June 5, 2015, KPPI filed its Formal Offer of Evidence[41] ("FOE"), which was resolved by the Court in its Resolution dated July 6, 2015.[42]

During the hearing held on July 6, 2015, the CIR manifested in open court that she has no evidence to present, hence, the parties were granted thirty (30) days or until August 5, 2015 to file their respective Memoranda.[43] This was confirmed in the July 10, 2015 Resolution[44] of the Court, which further provided that subsequent thereto, the case shall be deemed submitted for decision.

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[36] *Records, Vol. 2,* pp. 708-717.
[37] *Id., Vol. 1,* pp. 49-53.
[38] *Id., Vol. 2, JSFI,* pp. 723-732.
[39] *Id., Pre-Trial Order,* pp. 743-750.
[41] *Id., Formal Offer of Evidence ("FOE"),* pp. 1033-1047.
[42] *Id., Vol. 3, Resolution on FOE,* pp. 1668-1669; the Court admitted all the exhibits offered by petitioner.
[43] *Records, Vol. 3, July 6, 2015 Minutes of Hearing,* p. 1673.
[44] *Id.,* p. 1675.

In compliance to the Resolution, KPPI filed its Memorandum[47] on August 5, 2105, while the CIR filed a Manifestation[48] on August 4, 2015, stating that she is adopting her Answer to the Petition for Review as her Memorandum, which was noted[49] by the Court on August 6, 2015.

On August 18, 2015, the Court promulgated a Resolution[50] submitting the case for decision, hence, this Decision.

The Issue[51]

WHETHER KPPI IS ENTITLED TO A REFUND OR A TCC OF PHP21,420,000.00 AS ERRONEOUSLY PAID FWT ON THE REDEMPTION OF THE PREFERRED SHARES HELD BY KLL.

Petitioner's Arguments

KPPI alleges that it is entitled to a refund or issuance of a TCC in the amount of Php21,420,000.00 representing erroneously paid FWT on the redemption of its 13,600,000 preferred shares held by KLL on September 28, 2012, based on three (3) grounds, to wit: *(1)* KPPI has duly complied with the two (2) -year prescriptive period requirement under *Sections 204 and 229 of the 1997 NIRC* to file a judicial claim for refund; *(2)* KPPI's redemption of the 13,600,000 preferred shares resulted in capital gains and not dividends; and *(3)* the capital gain realized from the redemption of preferred shares was exempt from income tax pursuant to the *RP-Singapore Tax Treaty*.

KPPI submits that the subject tax was paid on October 10, 2012, accordingly, it had until October 10, 2014 to file a claim for refund with the CIR and to file a case for refund before this Court, which were complied with on September 12, 2014 and October 10, 2014, respectively. Thus, KPPI asserts that both the administrative and the judicial claims for refund were made within the two (2)-year prescriptive period, in compliance with the requirements set forth under *Sections 204 and 229 of the 1997 NIRC*.

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[47] *Records, Vol. 3, Memorandum*, pp. 1678-1690.
[48] *Id., Manifestation*, pp. 1676-1677.
[49] *Id.*, p. 1692.
[50] *Id.*, p. 1694.
[51] *Id., Vol. 2, Pre-Trial Order*, p. 745.

Relying on *Section 9 of the BIR Revenue Regulations ("RR") No. 6-2008,*[52] *The SEC Rules Governing Redeemable and Treasury Shares dated April 26, 1982,*[53] and the CTA *En Banc* decision in *Commissioner of Internal Revenue v. Goodyear Philippines, Inc.*[54], KPPI further argues that its transaction with KLL is a redemption of preferred shares, which resulted in capital gains and not dividends.

Finally, KPPI relies on *Article 13 of the RP-Singapore Tax Treaty* which provides CGT exemption to KLL's redemption of preferred shares.

In view thereof, KPPI posits that it is entitled to a refund or issuance of a TCC in the amount of Php21,420,000.00 representing erroneously paid FWT on the redemption of its 13,600,000 preferred shares held by KLL.

Respondent's Counter-Arguments

The CIR's sole counter-argument to the Petition for Review is that it is incumbent upon KPPI to prove its entitlement to the refund sought because a claim for refund is not *ipso facto* granted upon filing of the claim.[55]

Commissioner asserts that no less than KPPI itself admits that the prescriptive period embodied in *Section 229 of the 1997 NIRC* is two (2) years. Accordingly, KPPI should have at least filed its application for tax refund or issuance of TCC earlier to afford the CIR ample time to review and evaluate its application.[56]

She submits that KPPI failed to accord her the fullest opportunity to act appropriately on the matter; that she was only given twenty eight (28) days to either grant or deny KPPI's claim, which was an improbable task;[57] that KPPI failed to exhaust administrative

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[52] *Records, Vol. 3,* p. 1682.
[53] *Id.,* p. 1684.
[54] *Id.,* p. 1683.
[55] *Id., Vol. 1,* p. 31.
[56] *Id.,* p. 34.
[57] *Id.,* pp. 33-34.

remedies, rendering the filing of its Petition for Review premature, thus, the same must be dismissed for lack of merit.[58]

Finally, Commissioner avers that a claim for tax refund is akin to a claim for tax exemption which must be construed *strictissimi juris* against the claimant, herein KPPI.[59]

The Ruling of the Court

KPPI complied with the 2-year prescriptive period mandated by Sections 204 and 229 of the 1997 NIRC.

At the outset, the Court finds the need to rule on the issue of prescription, pertinent thereto are *Sections 204 and 229 of the 1997 NIRC*, to wit:[61]

> SECTION 204. *Authority of the Commissioner to Compromise, Abate, and Refund or Credit Taxes.* – The Commissioner may –
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> xxx xxx xxx
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> (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) 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.
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> xxx xxx xxx
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> SECTION. 229. *Recovery of Tax Erroneously or Illegally Collected.* - No suit or proceeding shall be maintained in any

[58] *Records, Vol. 1,* p. 36.
[59] *Id.*
[61] Underscoring ours.

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, of any sum alleged to have been excessively or in any manner wrongfully 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.

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 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 instituted within two (2) years from the date of payment of the tax or penalty.

Further, the long standing doctrine laid down by the Supreme Court in *Commissioner of Internal Revenue v. Victorias Milling, Co., Inc.*[62] has been that both administrative and judicial claims must be filed within the 2-year prescriptive period, despite the pendency of the administrative claim. The Supreme Court stated that "[i]f, however, the Collector takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector."

To prove that KPPI paid the subject 15% FWT in the amount of Php21,420,000.00 on October 10, 2012, it presented a Landbank of the Philippines BIR Tax Payment Deposit Slip[64]. From the date of payment on October 10, 2012, KPPI had until October 10, 2014 to file both claims for refund. Accordingly, on September 12, 2014, KPPI filed an

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[62] G.R. No. L-24108, January 3, 1968, 22 SCRA 12.

[64] *Records, Vol. 2, Exhibits "P-15-b" and "P-15-b-i,"* p. 701.

administrative claim for refund or issuance of TCC on the amount remitted with the BIR.[65] Subsequent thereto, on October 10, 2014, KPPI filed the instant Petition for Review.[66]

From the above factual findings, both the administrative and the judicial claims for refund were made within the two (2)-year prescriptive period, in compliance with the requirements provided for under *Sections 204(C) and 229 of the 1997 NIRC.*

Having settled the issue on jurisdiction, it is imperative to consider whether the net capital gain (difference between the Redemption Price and Issue Price) is considered as dividends subject to 15% FWT, imposed under *Section 28(B)(5)(b)*[81] *of the 1997 NIRC.* The Court will not dwell on the issue of CGT since this has no effect on the refund sought by KPPI.

The net capital gain from the redemption of preferred shares is not a dividend under Article 10(4) of the RP-Singapore Tax Treaty, and Section 73(A)(B) of the 1997 NIRC.

[65] *Records, Vol. 2, Exhibit "P-16," Administrative Claim,* p. 702.

[66] *Id., Vol. 1, Petition for Review,* pp. 6-21, with annexes.

[81] SEC. 28. Rates of Income Tax on Foreign Corporations. -

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(B) Tax on Nonresident Foreign Corporation. -

(1) In General. - Except as otherwise provided in this Code, a foreign corporation not engaged in trade or business in the Philippines shall pay a tax equal to thirty-five percent (35%) of the gross income received during each taxable year from all sources within the Philippines, such as interests, dividends, rents, royalties, salaries, premiums (except reinsurance premiums), annuities, emoluments or other fixed or determinable annual, periodic or casual gains, profits and income, and capital gains, except capital gains subject to tax under subparagraph 5(c): Provided, That effective January 1, 2009, the rate of income tax shall be thirty percent (30%).

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(5) Tax on Certain Incomes Received by a Nonresident Foreign Corporation. -

xxx xxx xxx

(b) Intercorporate Dividends. - A final withholding tax at the rate of fifteen percent (15%) is hereby imposed on the amount of cash and/or property dividends received from a domestic corporation, which shall be collected and paid as provided in Section 57(A) of this Code, subject to the condition that the country in which the nonresident foreign corporation is domiciled, shall allow a credit against the tax due from the nonresident foreign corporation taxes deemed to have been paid in the Philippines equivalent to twenty percent (20%), which represents the difference between the regular income tax of thirty-five percent (35%) and the fifteen percent (15%) tax on dividends as provided in this subparagraph: Provided, That effective January 1, 2009, the credit against the tax due shall be equivalent to fifteen percent (15%), which represents the difference between the regular income tax of thirty percent (30%) and the fifteen percent (15%) tax on dividends;

Section 28(B)(5)(b) of the 1997 NIRC states:

> ***SEC. 28. Rates of Income Tax on Foreign Corporations. -***
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> xxx xxx xxx
>
> (B) Tax on Nonresident Foreign Corporation. -
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> xxx xxx xxx
>
> (5) Tax on Certain Incomes Received by a Nonresident Foreign Corporation. -
>
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>
> (b) Intercorporate Dividends. - A final withholding tax at the rate of fifteen percent (15%) is hereby imposed on the amount of cash and/or property dividends received from a domestic corporation, which shall be collected and paid as provided in Section 57(A) of this Code, subject to the condition that the country in which the nonresident foreign corporation is domiciled, shall allow a credit against the tax due from the nonresident foreign corporation taxes deemed to have been paid in the Philippines equivalent to twenty percent (20%), which represents the difference between the regular income tax of thirty-five percent (35%) and the fifteen percent (15%) tax on dividends as provided in this subparagraph: Provided, That effective January 1, 2009, the credit against the tax due shall be equivalent to fifteen percent (15%), which represents the difference between the regular income tax of thirty percent (30%) and the fifteen percent (15%) tax on dividends; xxx

From the above-quoted Section of the *1997 NIRC*, cash and/or property dividends received from a domestic corporation by a foreign corporation such as KLL, shall generally be subject to FWT at the rate of 15%.

Nonetheless, since KLL is a resident of Singapore[84], *Article 10(4) of RP-Singapore Tax Treaty* authorizes the definition and interpretation of the term "dividend income" to be determined by the taxation law of the State of which the corporation making the distribution is a resident. It states:[85]

> 4. The term "dividends" as used in this Article means income from shares, "jouissance" shares or jouissance rights, mining shares, founder's shares or other rights, not being debt-claims, participating in profits, as well as income assimilated to income from shares by the taxation law of the State of which the company making the distribution is a resident.

Reference should then be made to Philippine income tax laws and jurisprudence for purposes of determining whether the difference between the Redemption Price and the Issued Price, could be classified as "dividends."

Section 73(A) of the 1997 NIRC provides the definition of "dividends" for income tax purpose. The Court quotes:

> ***SECTION 73. Distribution of Dividends or Assets by Corporations.*** -
>
> (A) *Definition of Dividends.* - The term 'dividends' when used in this Title means any distribution made by a corporation to its shareholders out of its earnings or profits and payable to its shareholders, whether in money or in other property.
>
> Where a corporation distributes all of its assets in complete liquidation or dissolution, the gain realized or loss sustained by the stockholder, whether individual or corporate, is a taxable income or a deductible loss, as the case may be.

In the CTA case entitled *Goodyear Philippines, Inc. vs. Commissioner of Internal Revenue*[86] (hereinafter referred to as the "*Goodyear Philippines, Inc. Case*"), the Honorable Court extensively discussed, citing the Supreme Court, when net capital gain is considered a dividend subject to 15% FWT, it explained *Sections 28(B)(5)(b) and 73(A) of the 1997 NIRC*, to wit:

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[84] *Records, Vol. 3, Exhibit "P-10-b,"* pp. 1550-1552.
[85] Underscoring ours.
[86] CTA Case No. 8188, March 25, 2013.

The Supreme Court has already interpreted the abovecited provision (which was formerly Section 25(a) of the Income Tax Law, Act No. 2833 of the Philippines, as amended by Section 4 of Act No. 376) in the case of Wise & Co., Inc. eta/. vs. Bibiano L. Meer, as follows:

> 'In Holmby Corporation vs. Comm'r (83 Fed. [2d], 548-550), the court said:
>
> ... the fact that the distributions were called 'dividends' and were made, in part, from earnings and profits, and that some of them were made before liquidation or dissolution proceedings were commenced, is not controlling... The determining element is whether the distributions were in the ordinary course of business and with intent to maintain the corporation as a going concern, or after deciding to quit and with intent to liquidate the business...
>
> xxx xxx xxx
>
> The amounts thus distributed among the plaintiffs were not in the nature of a recurring return on stock — in fact, they surrendered and relinquished their stock in return for said distributions, thus ceasing to be stockholders of the Hongkong Company, which in turn ceased to exist in its own right as a going concern during its more or less brief administration of the business as trustee for the Manila Company, and finally disappeared even as such trustee.
>
> The distinction between a distribution in liquidation and an ordinary dividend is factual; the result in each case depending on the particular circumstances of the case and the intent of the parties. If the distribution is in the nature of a recurring return on stock it is an ordinary dividend. However, if the corporation is really winding up its business or recapitalizing and narrowing its activities, the distribution may properly be treated as in complete or partial liquidation and as payment by the corporation to the stockholder for his stock. The corporation is, in the latter instances, wiping out all parts of the

> stockholders' interest in the company... (Montgomery, Federal Income Tax Handbook [1938-1939], 258; emphasis supplied.)

The difference therefore between the original acquisition cost of the shares and its purchase price in cases of liquidation, whether complete or partial, should be considered capital gains but subject to ordinary income tax rates, said difference or gain cannot be treated as dividends as it is not a recurring return on stock.

xxx xxx xxx

Moreover, this Court noted that there is only one provision in the [1997] NIRC, which treats as dividends the gain derived from redemption or buy back of shares. Section 73(8) of the [1997] NIRC, refers to situations when stock dividends are redeemed whether pursuant to a partial or complete liquidation of corporations. Section 73(8) of the NIRC, as amended, is quoted hereunder:

> SEC. 73. Distribution of Dividends or Assets by Corporations. -
>
> xxx xxx xxx
>
> (B) Stock Dividend. - A stock dividend representing the transfer of surplus to capital account shall not be subjected to tax. **However, if a corporation cancels or redeems stock issued as a dividend at such time and in such manner, as to make the distribution and cancellation or redemption, in whole or in part, essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock shall be considered as taxable income to the extent that it represents a distribution of earnings or profits.** (Emphasis supplied)

In the case of **Commissioner of Internal Revenue vs. The Court of Appeals, Court of Tax Appeals and A. Soriano Corporation**/ the Highest Tribunal made a pronouncement with regard to the application of Section 73(B) of the NIRC [...] [then Section 83(b) of the NIRC], to wit:

> As qualified by the phrase 'such time and in such manner,' the exception was not intended to

> characterize as taxable dividend every distribution of earnings arising from the redemption of stock dividend. So that, whether the amount distributed in the redemption should be treated as the equivalent of a 'taxable dividend' is a question of fact, which is determinable on 'the basis of the particular facts of the transaction in question. No decisive test can be used to determine the application of the exemption under Section 83(b).
>
> xxx xxx xxx
>
> **For the exempting clause of Section 83(b) to apply, it is indispensable that: (a) there is redemption or cancellation; (b) the transaction involves stock dividends and (c) the 'time and manner' of the transaction makes it 'essentially equivalent to a distribution of taxable dividends.** xxx (Emphasis supplied; citations omitted)

> Based on the above-cited provision of the [1997 NIRC], as amended, it is only in cases of redemption of shares previously issued as stock dividends that the difference between the par value of the shares and the redemption price may be treated as taxable dividends. The Supreme Court even clarified that the law did not intend to automatically characterize as taxable dividend every distribution of earnings arising from redemption of stock dividends as the taxability of said distribution as dividends will still have to be determined on a case to case basis.

It bears noting that the *Goodyear Philippines, Inc. Case* was confirmed by the CTA *En Banc* in a Decision[87] and Resolution[88] dated August 14, 2014 and January 5, 2015, respectively.

From the foregoing discussion, a net capital gain cannot be treated as dividend subject to the 15% FWT, since an ordinary dividend is a distribution in the nature of a recurring return of stock, made in the ordinary course of business and with intent to maintain the corporation as a going concern.

While, a distribution made when the corporation is winding up its business or recapitalizing and narrowing its activities may be

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[87] CTA *EB* No. 1041 (CTA Case No. 8188).
[88] *Id.*

treated as a complete or partial liquidation and as payment for the stockholder's stock. In such a case, the excess of the purchase price over the original acquisition cost of the shares should be considered as a capital gain and subject to ordinary income tax rates.

The CTA elaborated further that the only instance where the gain derived from redemption may be treated as a dividend is the case of redemption of stock dividends, whether pursuant to a partial or complete liquidation. Accordingly, if a corporation cancels or redeems stock issued as a dividend at such time and in such manner as to make the distribution and cancellation or redemption, in whole or in part, essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock will be considered as taxable income to the extent of earnings or profits.

In the instant case, KLL's net capital gain could not be classified as dividends since it did not represent a recurring return on the shares redeemed. Furthermore, it is clear that the preferred shares redeemed by KPPI from KLL are not stock dividends but were subscribed and paid by way of conversion of shares by KLL.

Moreover, the mere fact that the Redemption Price came from KPPI's retained earnings is incidental.[90] Without KPPI's redemption of its preferred shares, KLL would not have derived the net capital gain.

In view of the foregoing, KLL's net capital gain from the redemption of preferred shares is not a dividend under *Article 10(4) of the RP-Singapore Tax Treaty,* and *Sections 28(B)(5)(b), 73(A), and 73(B) of the 1997 NIRC.*

The net capital gain realized from the redemption of the preferred shares is exempt from income tax under the RP-Singapore Tax Treaty.

Since KLL is a resident of Singapore[95], *Article 13 of RP-Singapore Tax Treaty* shall apply in determining the Philippine income taxation of the net capital gain that KLL derived from the redemption by KPPI

[90] *Records, Vol. 3, Exhibit "P-5-j,"* p. 1513.
[95] *Id., Exhibit "P-10-b,"* pp. 1550-1552.

of its 136,000 preferred shares, which were reclassified as treasury shares in the books of petitioner.[97]

Article 13 of RP-Singapore Tax Treaty provides:[98]

Article 13 GAINS FROM THE ALIENATION OF PROPERTY

1. xxx

2. xxx

3. Gains from the alienation of shares of a company, the property of which consists principally of immovable property situated in a Contracting State, may be taxed in that State. Gains from the alienation of an interest in a partnership or a trust, the property of which consists principally of immovable property situated in a Contracting State, may be taxed in that State.

4. Gains from the alienation of any property, other than those mentioned in paragraphs 1, 2, and 3 shall be taxable only in the Contracting State of which the alienator is a resident.

In addition to above-quoted, *Article 6 of the RP-Singapore Tax Treaty* defines the term "immovable property:"[99]

Article 6 INCOME FROM IMMOVABLE PROPERTY

xxx xxx xxx

2. For the purpose of this Convention, the term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.

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[97] *Records, Vol. 3, Exhibit "P-5-j,"* p. 1513.
[98] Underscoring ours.
[99] Underscoring ours.

A reading of *Articles 13(3) and 6(2) of the RP-Singapore Tax Treaty* imparts that if the company's assets are principally immovable property located in the Philippines, the gain may be taxed in the Philippines pursuant to *Article 13(3) of the RP-Singapore Tax Treaty.* Otherwise, *Article 13(4) of the RP-Tax Treaty* applies and the gain can only be taxed in Singapore. It is, thus, imperative to determine the definition of "principally" and immovable property."

RR No. 4-86[100] defines the term "principally" as "more than fifty percent of the entire assets in terms of value."[101]

While *Article 415 of the Civil Code of the Philippines*[102] defines "immovable property:"

> ***Art. 415. The following are immovable property***:
>
> (1) Land, buildings, roads and constructions of all kinds adhered to the soil;
>
> (2) Trees, plants, and growing fruits, while they are attached to the land or form an integral part of an immovable;
>
> (3) Everything attached to an immovable in a fixed manner, in such a way that it cannot be separated therefrom without breaking the material or deterioration of the object;
>
> (4) Statues, reliefs, paintings or other objects for use or ornamentation, placed in buildings or on lands by the owner of the immovable in such a manner that it reveals the intention to attach them permanently to the tenements;
>
> (5) Machinery, receptacles, instruments or implements intended by the owner of the tenement for an industry or works which may be carried on in a building or on a piece of land, and which tend directly to meet the needs of the said industry or works;
>
> (6) Animal houses, pigeon-houses, beehives, fish ponds or breeding places of similar nature, in case their owner has

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[100] Determination of Whether the Assets of a Corporation Consist Principally of Real Property Interest under the Philippine Tax Treaties, April 2, 1986.
[101] *Id., Section 2(b).*
[102] *RA No. 386,* An Act to Ordain and Institute the Civil Code of the Philippines, June 1949.

placed them or preserves them with the intention to have them permanently attached to the land, and forming a permanent part of it; the animals in these places are included;

(7) Fertilizer actually used on a piece of land;

(8) Mines, quarries, and slag dumps, while the matter thereof forms part of the bed, and waters either running or stagnant;

(9) Docks and structures which, though floating, are intended by their nature and object to remain at a fixed place on a river, lake, or coast;

(10) Contracts for public works, and servitudes and other real rights over immovable property.

Considering that redemption took place in 2012, the Court finds it relevant to compute based on the Audited Financial Statement ("AFS")[103] of KPPI is for both taxable year ended December 31, 2011 and December 31, 2012, its assets are broken down as follows:

ASSETS	2011	2012
Current Assets		
Cash and cash equivalents (Notes 6 and 20)	291,932,683.00	148,965,057.00
Receivables (Notes 7 and 20)	1,024,393.00	215,101.00
Due from related parties (Notes 14 and 20)	368,534,052.00	328,708,280.00
Other current assets (Notes 8 and 19)	15,786,520.00	16,478,587.00
Total Current Assets	677,277,648.00	494,367,025.00
Noncurrent Assets		
Available-for-sale financial assets (Note 9)	225,000.00	79,512,230.00
Investments in subsidiaries, associates and a joint venture (Note 10)	804,961,207.00	725,673,977.00
Property and equipment - net (Note 11)	1,857,519.00	981,818.00
Refundable deposits (Note 20)	56,108.00	56,108.00
Deferred tax assets - net (Note 17)	166,509.00	
Total Noncurrent Assets	807,041,343.00	806,224,133.00
TOTAL ASSETS	**1,484,318,991.00**	**1,300,591,158.00**

A scrutiny of the line items reveal that the Current Assets of KPPI are not immovable properties, as defined by *Article 415 of the Civil Code of the Philippines*. As to the Noncurrent Assets, the AFS shows the following:

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[103] *Records, Vol. 3, Exhibit "P-5-j,"* p. 1486.

The "Available-for-sale financial assets" account consists of unquoted investments, *i.e.*, equity securities, preferred and club shares,[104] hence, movable property.

"Investments in subsidiaries, associate and a joint venture" is a self-explanatory account,[105] which does not fall under the definition of an immovable property.

"Property and equipment" account consists of transportation equipment, office equipment, and furniture and fixtures, broken down as follows:[106]

		2011	2012
Transportation Equipment	P	150,134.00	64,342.00
Office Equipment		272,829.00	227,203.00
Furniture and Fixtures		1,434,556.00	690,273.00
TOTAL	**P**	**1,857,519.00**	**981,818.00**

Transportation Equipment, being movable property, only Office Equipment and Furniture and Fixtures can be considered as immovable property.

The "Refundable deposit" account arose from lease contracts and serves as collateral for any unpaid rent due to the lessor,[107] hence not an immovable property.

The "Deferred tax assets" account is a net amount calculated by deducting deferred tax liability from deferred tax assets,[110] which is clearly not an immovable property.

As correctly pointed out by KPPI, the entire values of the property and equipment for the years 2011 and 2012, respectively, comprise less than 50% of its total assets for said years, respectively, to wit:

	2011	2012
Property and equipment[111]	1,707,385.00	917,476.00

[104] *Records, Vol. 3, Exhibit "P-5-j," Note 9,* p. 1508.
[105] *Id., Exhibit "P-5-j," Note 10,* pp. 1509-1511.
[106] *Id., Exhibit "P-5-j," Note 11,* p. 1511.
[107] *Id., Exhibit "P-5-j," Note 20 on Credit Risk and Liquidity Risk,* pp. 1520-1521.
[110] *Id., Exhibit "P-5-j," Note 12 on Deferred Tax,* p. 1518.
[111] Less Transportation Equipment.

Total Assets	1,484,318,991.00	1,300,591,158.00
Percentage of Subtotal to Total Assets	0.12%	0.07%

Considering, KPPI's assets do not consist principally of immovable property, the net capital gain derived by KLL in the redemption of its 136,000 preferred shares by the former is beyond the taxing jurisdiction of the Philippines, pursuant to *Article 13(4) of the RP-Tax Treaty.*

Petitioner is entitled to a refund of erroneously paid FWT.

Having proven that KPPI paid the subject 15% FWT in the amount of Php21,420,000.00 on October 10, 2012 through a Landbank of the Philippines BIR Tax Payment Deposit Slip[112] and that the subject gain is beyond the taxing jurisdiction of the Philippines, the Court finds KPPI entitled to a refund or the issuance of a TCC in the amount of Php21,240,000.00 representing erroneously withheld and remitted 15% FWT to the BIR.

WHEREFORE, premises considered, the Petition for Review is hereby **GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is hereby **ORDERED** to **REFUND** or to **ISSUE A TAX CREDIT CERTIFICATE** in the amount of Twenty-One Million Two Hundred Forty Thousand Pesos (Php21,240,000.00) to petitioner Keppel Philippines Properties, Inc., representing erroneously withheld and remitted Final Withholding Tax.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ESPERANZA R. FABON-VICTORINO
Associate Justice

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

[112] *Records, Vol. 2, Exhibits "P-15-b" and "P-15-b-i,"* p. 701.

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