REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

WATERFRONT CEBU CITY HOTEL & CASINO, INC.,
Respondent.

CTA EB NO. 991
(CTA Case No. 8005)

Present:

Del Rosario, PJ
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, *and*
Ringpis-Liban, JJ.

Promulgated:

JAN 29 2014 apolinario 8:30 a.m.

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DECISION

DEL ROSARIO, PJ:

THE CASE

This involves a Petition for Review filed by the Commissioner of Internal Revenue (CIR) pursuant to Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals which seeks the nullification of the Decision of the former Second Division[1] of this Court *(Court in Division)* dated December 12, 2012, which cancelled the disputed deficiency income tax assessment in the amount of ₱2,579,289.48 for taxable year 2006, and its subsequent Resolution dated March 1, 2013 which denied the CIR's motion for reconsideration.

[1] Composed of Senior Associate Justice Juanito C. Castañeda, Jr., Associate Justice Caesar A. Casanova and Associate Justice Cielito N. Mindaro-Grulla.

THE PARTIES

Petitioner is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) empowered to perform the duties of her office, including among others, the duty to act upon and approve claims for refund or tax credit as provided by law, with office address at the 4th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City, where she may be served with summons and other legal processes of this Honorable Court.[2]

Respondent Waterfront Cebu City Hotel & Casino, Inc., on the other hand, is a domestic corporation duly organized and existing under the laws of the Philippines with principal office at Salinas Drive, Lahug, Cebu City.[3]

THE FACTS

Records disclose that the BIR issued a Letter of Authority for the investigation of respondent's business operations and books of accounts for calendar year 2006; that a Formal Letter of Demand (FLD) was issued by the BIR, which was duly protested by respondent; and that a Final Decision on Disputed Assessment (FDDA) was subsequently issued seeking collection of deficiency assessments, *i.e., ₱2,579,289.48 deficiency income tax, ₱1,389,389.61 deficiency value-added tax (VAT) and ₱1,732.20 deficiency expanded withholding tax (EWT) assessments.* Respondent settled the deficiency VAT and EWT assessments but appealed to the Court in Division petitioner CIR's decision anent the disputed deficiency income tax *via* Petition for Review filed on December 8, 2009.[4]

The disputed deficiency income tax assessment of ₱2,579,289.43 *(inclusive of interest)* for year 2006 stems from the BIR's findings of discrepancy, particularly, an overstatement on declared prior year's excess tax credits by ₱1,506,576.00 in view of the erroneous carry-over of the amount of ₱12,785,038.00 in respondent's 2006 income tax return (ITR), instead of the ₱11,278,461.95 tax overpayment declared in year 2005, and disallowance of creditable tax withheld at source amounting to ₱212,950.27.[5]

Respondent explained in its protest to the FLD that the discrepancy in the prior year's excess credit were adjusted in year 2008 and this has no

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[2] The Parties, Petition for Review; *Rollo*, p. 11.
[3] Assailed Decision; *Rollo*, p. 19.
[4] Assailed Decision; *Rollo*, p. 20-21.
[5] Assailed Decision; *Rollo*, p. 24-25.

effect in the amount to be paid in 2006.[6] Petitioner, however, did not consider in her FDDA the adjustment made in respondent's 2008 ITR on the ground that said adjustment allegedly affected the succeeding taxable year 2007, which accordingly is under investigation.[7] As aforestated, respondent appealed the FDDA to the Court in Division on December 8, 2009.

After trial, the Court in Division rendered the assailed Decision on December 12, 2012, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, petitioner's Petition for Review is hereby **GRANTED**. Accordingly, the assessment for deficiency income tax in the amount of P2,579,289.48 for taxable year 2006 is hereby **CANCELLED**.
>
> **SO ORDERED**."

In arriving at the foregoing conclusion, the Court in Division ruled that the assessed amount of ₱1,506,576.00 on prior year's excess credits would not give rise to a deficiency income tax liability because the assessed amount does not in any way pertain to an expense or income account which could affect the income tax due (before deduction for tax credits/payments is made) for taxable year 2006; and had the respondent been able to declare in its 2006 ITR the prior year's excess credit of ₱11,278,461.95 instead of ₱12,785,038.00, it would still have an overpayment of ₱7,983,293.75 as of December 31, 2006. The Court in Division further stated that the tax benefit derived based on the adjusted total overpayment for 2006 redounded to the succeeding year 2007 which is beyond the scope of assessment and since the tax benefit will be in the succeeding year, respondent may only be assessed, at most, in succeeding year 2007. With regard to the issue of disallowance of creditable tax withheld, the Court in Division, after considering the evidence offered by respondent, considered only the amount of ₱254.44 as supported by original certificates out of the total disallowed amount of ₱212,950.27. In fine, the Court in Division found respondent not liable for deficiency income tax, instead, it ruled that respondent has a tax overpayment in the amount of ₱7,770,596.95 which respondent may carry over to the succeeding taxable year.

Aggrieved, petitioner filed her Motion for Reconsideration (Re: Decision Promulgated 12 December 2012) on January 2, 2013, but the same was denied in the Court in Division's Resolution dated March 1, 2013.[8] om

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[6] Assailed Decision; *Rollo*, p. 25.
[7] Assailed Decision; *Rollo*, p. 26.
[8] Rollo, p. 32-33.

Hence, the CIR filed the present Petition for Review[9] on April 3, 2013. The Petition for Review was filed within the extended period allowed by this Court.[10]

In the Resolution dated May 14, 2013, this Court required respondent to file its comment on the petition within ten (10) days from receipt thereof.[11] Respondent, however, failed to file its comment.[12] On August 7, 2013, this Court issued a Resolution giving due course to the petition, and directing the parties to file their simultaneous memoranda within a non-extendible period of thirty days from receipt thereof.[13]

With the filing of petitioner's Manifestation[14] on September 20, 2013, stating that she is adopting the arguments raised in her petition as her memorandum, which manifestation was noted in the Court's minute resolution[15] dated September 24, 2013, and considering that respondent already filed its Memorandum[16] on October 4, 2013, this case was deemed submitted for decision in the Resolution of this Court dated November 6, 2013.

Hence, the Court's present decision.

THE PARTIES' ARGUMENTS

Petitioner insists that respondent is liable for the assessed deficiency income tax. She argues that respondent's unilateral effort in correcting its error committed in 2006, anent the erroneously carried-over excess income tax credits, in its 2008 ITR should have persuaded the Court to rule in favor of the correctness of the assessed amount as it formed part of respondent's admission as to the validity of the assessment. She also argues that respondent cannot escape liability by adjusting its 2008 ITR to offset the erroneously carried-over excess tax credits in 2006 since an assessment was already issued by petitioner. Finally, petitioner makes an issue on the Court in Division's computation which deducted the adjusted disallowed creditable withholding tax against the total tax credits of respondent.

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[9] *Rollo*, p. 10-17.
[10] *Rollo*, p. 8.
[11] *Rollo*, pp. 38-39.
[12] *Rollo*, p. 40.
[13] *Rollo*, pp. 42-43.
[14] *Rollo*, pp. 44-45.
[15] *Rollo*, p. 47.
[16] *Rollo*, pp. 48-53.

Respondent counter-argues that the erroneous carry-over from year 2005 to year 2006 of excess tax credits by ₱1,506,576.00 will not result in a disallowance of an expense or misdeclaration of revenues that may justify the issuance of an income tax assessment; that the discrepancy of ₱1,506,576.00 will not result in any financial prejudice to the Government since even if it declared the correct prior year's excess credit of ₱11,278,461.95 instead of ₱12,785,038.00, it would still have an overpayment of ₱7,983,293.75 for year 2006; that it made the necessary correction and adjustment in its 2008 ITR by reducing its prior year's excess credit by ₱1,506,576.00; and that the assessment should be cancelled as petitioner did not provide the legal basis to substantiate the assessment.

THE ISSUE

Whether or not respondent is liable for the disputed deficiency income tax assessment in the amount of ₱2,579,289.48 for taxable year 2006.

THE RULING OF THE COURT *EN BANC*

An assessment is the official action of an administrative officer in determining the amount of tax due from a taxpayer, or it may be a notice to the effect that the amount therein stated is due from the taxpayer as a tax with a demand for payment of the tax or deficiency stated therein.[17] The assessment made by the tax assessor whereby the correct amount of tax is determined after an examination or investigation is conducted is called *deficiency assessment*.[18] The rules regarding determination of deficiency income tax assessment are encapsulated in Section 56(B) of the National Internal Revenue Code[19] (NIRC) of 1997, which provides:

> "SEC. 56. Payment and Assessment of Income Tax for Individuals and Corporation. –
>
> (A) Payment of Tax. -xxx
>
> (B) Assessment and Payment of Deficiency Tax. - After the return is filed, the Commissioner shall examine it and assess the correct amount of the tax. The tax or deficiency income tax so discovered shall be paid upon notice and demand from the Commissioner.
>
> As used in this Chapter, in respect of a tax imposed by this Title, the term **'deficiency' means**:

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[17] Law of Basic Taxation in the Philippines, Revised Edition by Benjamin B. Aban, p. 175.
[18] *Id*, p. 176.
[19] Republic Act No. 8424.

(1) **The amount by which the tax imposed by this Title exceeds the amount shown as the tax by the taxpayer upon his return**; but the amount so shown on the return shall be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amount previously abated, credited, returned or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon this return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed or collected without assessment shall first be decreased by the amounts previously abated, credited returned or otherwise repaid in respect of such tax." *(Emphasis supplied)*

Applying the foregoing definition of deficiency income tax, the Court *En Banc* holds that petitioner erroneously assessed respondent for deficiency income tax for the year 2006.

The ITR[20] of respondent for year 2006 disclosed an overpayment of ₱9,489,869.80, *viz.*:

Sales/Revenues/Receipts/Fees	₱768,747,351.00
Less: Cost of Sales/Services	433,324,345.00
Gross Income from Operation	335,423,006.00
Add: Non-Operating & Other Income	564,909.00
Total Gross Income	335,987,915.00
Less: Deductions	289,407,183.00
Taxable Income	46,580,732.00
Rate	35%
Income Tax	16,303,256.20
MCIT	6,719,758.30
Tax Due	16,303,256.20
Aggregate Income Tax Due	16,303,256.20
Less: Prior Year's Excess Credits	12,785,038.00
Creditable Tax Withheld for 1st 3 Quarters	8,816,550.00
Creditable Tax Withheld for 4th Quarter	4,191,538.00
Total Amount Payable/(Overpayment)	₱(9,489,869.80)

On the other hand, the items of assessment involved in this case, *i.e., discrepancy on prior year's excess tax credits claimed of ₱1,506,576.00 and adjusted disallowed creditable tax withheld at source of ₱212,695.83 (₱212,950.27 disallowed by the BIR less ₱254.44 allowed by the CTA Division),* in the total amount of ₱1,719,271.83 *(₱1,506,576.00+ ₱212,695.83)* do not pertain to either of the income or cost/expense accounts in the 2006 ITR, which could affect respondent's income tax due; hence, the Court *En Banc* holds there could be no deficiency income tax so to speak.

[20] Assailed Decision; *Rollo*, pp. 24-25.

In fact, as correctly found by the Court in Division, respondent will still have a tax overpayment of ₱7,770,597.92, after adjustment of over-claimed prior year's excess tax credit of ₱1,506,576.00 and adjusted disallowed creditable tax withheld of ₱212,695.83, computed as follows:

Tax Credits Reflected in 2006 ITR	
Prior Year's Excess Credits	₱12,785,038.00
Creditable Tax Withheld for 1st 3 Quarters	8,816,550.00
Creditable Tax Withheld for 4th Quarter	4,191,538.00
Total Tax Credits	₱25,793,126.00
Less: Overstatement of Tax Credit Carried Over from Previous Quarter	1,506,576.05
Disallowed Tax Credit for the Year	212,695.83
Adjusted Tax Credits	₱24,073,854.12
Less: Income Tax Due	16,303,256.20
Adjusted Tax Overpayment	₱ 7,770,597.92

Petitioner's proposition for the Court *En Banc* to rule in favor of the correctness of the assessment in view of the unilateral effort made by respondent in correcting the over-claimed prior year's excess credit in 2006 in its 2008 ITR, as it allegedly formed part of respondent's admission to the validity of the assessment, is bereft of merit. As shown above, respondent did not derive any tax benefit in 2006 when it erroneously carried over the income tax credits in the amount of ₱12,785,038.00 to 2006, instead of the amount of ₱11,278,461.95. Clearly, petitioner erroneously issued the assessment since the circumstances of the case show that there is no such deficiency income tax collectible from respondent for the year 2006.

Lastly, petitioner erred in faulting the Court in Division from deducting the adjusted disallowed creditable withholding tax of ₱212,695.83 against the total declared tax credits of ₱25,793,126.00. To be sure, petitioner impliedly recognized the existence of respondent's tax credits for 2006 in the amount of ₱11,278,461.95 as she only questioned the over-claimed prior year's excess credit of ₱1,506,576.00 and the unsubstantiated creditable tax withheld at source of ₱212,950.27 *(which amount was subsequently reduced to ₱212,695.83 by the Court in Division)*. The ultimate effect of such disallowance, as illustrated earlier, would only decrease respondent's tax overpayment in year 2006 to ₱7,770,597.92, but without imposing upon it an additional tax liability.

It has been said that the CIR's failure to exercise the power to make an examination of the returns and to assess the correct amount of tax does

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not create a presumption in favor of the correctness of the return.[21] Conversely, once the CIR exercised the power and made examination of the return, the contents and amounts declared in the return, unchallenged by the CIR, can be considered to be true and correct.

There being no reversible error committed by the Court in Division in this case, the Court *En Banc* finds no cogent reason to reverse and set aside its assailed Decision promulgated on December 12, 2012 and its assailed Resolution dated March 1, 2013.

WHEREFORE, premises considered, the Petition for Review filed by the Commissioner of Internal Revenue is hereby **DENIED** for lack of merit. Accordingly, the Decision of the former Second Division of this Court dated December 12, 2012, which cancelled the deficiency income tax assessment in the amount of ₱2,579,289.48 for taxable year 2006 issued against Waterfront Cebu City Hotel & Casino, Inc., and its Resolution dated March 1, 2013 which denied the Commissioner of Internal Revenue's motion for reconsideration, are hereby **AFFIRMED** *in toto*.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

[21] Commissioner of Internal Revenue v. Far East Bank & Trust Company (now Bank of the Philippine Islands), G.R. No. 173854, March 15, 2010.

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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.

ROMAN G. DEL ROSARIO
Presiding Justice