REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

KUWAIT AIRWAYS CORPORATION, Petitioner,	**CTA CASE NO. 9874**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson,* *and* **BACORRO-VILLENA,** *JJ.*
COMMISSIONER INTERNAL REVENUE, Respondent.	Promulgated: SEP 30 2021 11:15 AM

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RESOLUTION

CASTAÑEDA, JR., J.:

Submitted before this Court is respondent's **Motion for Partial Reconsideration Re: Decision dated 28 May 2021** filed on June 15, 2021, with petitioner's **Opposition Re: Motion for Partial Reconsideration dated June 15, 2021** filed on July 8, 2021.

On May 28, 2021, the Court promulgated a Decision partially granting petitioner's claim for refund for its erroneous overpayment of income tax based on its Gross Philippine Billings (GBPs), the dispositive portion of which reads as follows:

> "**WHEREFORE**, in light of the foregoing considerations, the present *Petition for Review* is **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED** to **ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner, in the reduced amount of **₱11,973,834.71**, representing the latter's overpaid income taxes for FY ended March 31, 2016.

SO ORDERED."

In his Motion, respondent primarily insists that petitioner is not entitled for the issuance of tax credit certificate considering that tax refunds, like tax exemptions, are construed strictly against the taxpayer. Respondent continues that in an action for refund, the burden of proof is on the taxpayer to establish its right thereto, and failure to sustain the burden is fatal to its claim for tax refund. He asserts that the taxpayer-applicant must prove not only entitlement to the claim but also compliance with all the documentary and evidentiary requirements.

More so, respondent avers that the availment of a tax treaty provision is not *ipso facto* granted to anyone who wishes to avail the benefits thereof since there are certain procedures which must first be complied with. As such, Revenue Memorandum Order (RMO) No. 1-2000[1] was issued by the Commissioner of Internal Revenue (CIR) to streamline the processing of tax treaty applications to improve efficiency in the service of taxpayers.

Respondent further stresses that petitioner must prove that the preferential tax rate is applicable to its GPB under the Philippines-Kuwait tax treaty. He admits that while petitioner was able to secure a Bureau of Internal Revenue (BIR) Ruling No. ITAD 034-17, the same is accompanied by a strong caveat that in the event that the facts alleged by the applicant turns out to be false, the said ruling shall be without force and effect. He also claims that petitioner has the burden to discharge that petitioner's claimed transactions are in all fours with the provisions of the tax treaty and as that represented in the said BIR ruling. In any case, respondent submits that petitioner cannot simply claim a blanket application of the relief provided under the tax treaty since its refund claim will still be subject to administrative and judicial scrutiny.

Lastly, respondent cites the Court of Tax Appeals (CTA) en banc case of *Mirant (Philippines) Operations Corporation (formerly: Southern Energy-Asia Pacific Operations [Phils.] Inc. v. Commissioner of Internal Revenue (CTA EB No. 40 [CTA Case No. 6382, June 7, 2005])*, (hereafter "Mirant case") wherein it was held that a foreign corporation wishing to avail of the benefits of a tax treaty should invoke the relevant provision of the tax treaty and prove that the said provision squarely applies to it, before the benefits may be extended

[1] "SUBJECT: Procedures for Processing Tax Treaty Relief Application," dated November 25, 1999.

to such corporation. Respondent likewise cites the CTA en banc case *CDL Hotels (Phils.) Corporation v. Commissioner of Internal Revenue (CTA EB No. 339, August 10, 2009)*, wherein it confirmed the *Mirant case* that the taxpayer-claimant must first file an application for entitlement of tax treaty relief before the International Tax Affairs Division (ITAD) of the BIR.

On the other hand, in its Opposition, petitioner claims that respondent's Motion for Partial Reconsideration contains self-serving statements and declarations that do not deserve any weight, credence, or value since they are unsubstantiated by any scintilla of proof. Petitioner further points out that the issues and arguments raised by respondent are mere rehashes of the same issues and arguments previously presented in his Answer to the Petition for Review, which have already been dealt with during the course of the proceedings.

Petitioner reiterates that no less than the CIR Caesar R. Dulay, confirmed in BIR Ruling No. ITAD 034-17 dated November 6, 2017 that petitioner is entitled to avail of the preferential income tax rate of 1½% on its GPB earned beginning January 1, 2014 under Article 8 of the Philippines-Kuwait tax treaty. Petitioner contends that from the time that the BIR Ruling was issued in 2017 there has been no investigation conducted by respondent or any of its officers that would dispute the favorable ruling granted to petitioner. It claims that respondent has not initiated an action that would warrant the reversal of said BIR Ruling.

More so, petitioner also asserts that during the cross examination of its witnesses, respondent did not challenge the validity of the BIR Ruling when it was presented as part of its evidence. Petitioner recalls that respondent even waived his right to present any documentary evidence and witnesses in spite of the fact that he has an adequate opportunity to do so and could have utilized this chance to refute the testimonies of petitioner's witnesses and material evidence.

Lastly, petitioner maintains that it has proven with substantial and concrete documentary and testimonial evidence its entitlement to the issuance of tax credit certificate and that respondent's mere unfounded and baseless allegations should not in any way disturb the Decision of this Court.

The Court finds respondent's Motion for Partial Reconsideration bereft of merit.

As correctly pointed out by petitioner, the arguments presented by respondent are essentially rehashes of what have been stated in his previous pleadings which have been considered, weighed, and resolved in the Decision he assails.

Verily, a tax treaty has been defined as an agreement entered into between sovereign states "for purposes of eliminating double taxation on income and capital, preventing fiscal evasion, promoting mutual trade and investment, and according fair and equitable tax treatment to foreign residents or nationals."[2] Observance of any treaty obligation binding upon the government of the Philippines is anchored on the constitutional provision that the Philippines "adopts the generally accepted principles of international law as part of the law of the land" under the fundamental international law principle of *pacta sunt servanda*.[3]

Perforce, Article 8 of the Philippine-Kuwait tax treaty provides that beginning January 1, 2014, profits from sources within the Philippines derived by an enterprise of Kuwait from the operation of ships or aircraft in international traffic shall be subject to income tax, either at: (1) 1½% of the gross revenue derived from the Philippines; or (2) the lowest rate that may be imposed on profits of the same kind derived under similar circumstances by a resident of a third State.

Bearing in mind the rationale of tax treaties, petitioner is entitled to the preferential tax rate of 1½% on its GPBs, in accordance with Article 8 of the Philippines-Kuwait tax treaty, especially since its entitlement to the same had already been confirmed by no less that respondent himself when he issued BIR Ruling No. ITAD 034-17 dated November 6, 2017. As held in the said BIR Ruling, "xxx that since the Philippines as of said date has not granted a most-favored-treatment to any international air carrier of a third country, petitioner is subject to income tax of 1½% on its GPB earned beginning January 1, 2014, pursuant to Article 8 of the Philippines-Kuwait tax treaty."

Moreover, respondent has not shown any evidence to prove that the facts presented by petitioner when it obtained its favorable ruling from the BIR, were false or mistaken. Jurisprudence has consistently

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[2] *Air Canada v. Commissioner of Internal Revenue*, G.R. No. 169507, January 11, 2016.
[3] *Ibid.*

held that the party who alleges a fact has the burden of proving it. Section 1, Rule 131 of the Rules of Court defines "burden of proof" as the duty of a party to present evidence on the facts in issue necessary to establish his claim or defense by the amount of evidence required by law." Thus, without evidence to support his claim, the BIR Ruling in favor of petitioner stands.

It is also worthy to note that the Supreme Court has already settled that the obligation to comply with a tax treaty must take precedence over the objective of RMO No. 1-2000, in the case of *Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue,*[4] as follows:

> "***Tax Treaty vs. RMO No. 1-2000***
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> Our Constitution provides for adherence to the general principles of international law as part of the law of the land. The time-honored international principle of *pacta sunt servanda* demands the performance in good faith of treaty obligations on the part of the states that enter into the agreement. Every treaty in force is binding upon the parties, and obligations under the treaty must be performed by them in good faith. More importantly, treaties have the force and effect of law in this jurisdiction.
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> Tax treaties are entered into 'to reconcile the national fiscal legislations of the contracting parties and, in turn, help the taxpayer avoid simultaneous taxations in two different jurisdictions.' *CIR v. S.C. Johnson and Son, Inc.* further clarifies that 'tax conventions are drafted with a view towards the elimination of international juridical double taxation, which is defined as the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for identical periods. The apparent rationale for doing away with double taxation is to encourage the free flow of goods and services and the movement of capital, technology and persons between countries, conditions deemed vital in creating robust and dynamic economies. Foreign investments will only thrive in a fairly predictable and reasonable international investment climate and the protection against double taxation is crucial in creating such a climate.' ✗

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[4] G.R. No. 188550, August 19, 2013.

Simply put, tax treaties are entered into to minimize, if not eliminate the harshness of international juridical double taxation, which is why they are also known as double tax treaty or double tax agreements.

'A state that has contracted valid international obligations is bound to make in its legislations those modifications that may be necessary to ensure the fulfillment of the obligations undertaken.' Thus, laws and issuances must ensure that the reliefs granted under tax treaties are accorded to the parties entitled thereto. The BIR must not impose additional requirements that would negate the availment of the reliefs provided for under international agreements. More so, when the RP-Germany Tax Treaty does not provide for any pre-requisite for the availment of the benefits under said agreement.

Likewise, it must be stressed that there is nothing in RMO No. 1-2000 which would indicate a deprivation of entitlement to a tax treaty relief for failure to comply with the 15-day period. We recognize the clear intention of the BIR in implementing RMO No. 1-2000, but the CTA's outright denial of a tax treaty relief for failure to strictly comply with the prescribed period is not in harmony with the objectives of the contracting state to ensure that the benefits granted under tax treaties are enjoyed by duly entitled persons or corporations.

Bearing in mind the rationale of tax treaties, the period of application for the availment of tax treaty relief as required by RMO No. 1-2000 should not operate to divest entitlement to the relief as it would constitute a violation of the duty required by good faith in complying with a tax treaty. The denial of the availment of tax relief for the failure of a taxpayer to apply within the prescribed period under the administrative issuance would impair the value of the tax treaty. At most, the application for a tax treaty relief from the BIR should merely operate to confirm the entitlement of the taxpayer to the relief.

The obligation to comply with a tax treaty must take precedence over the objective of RMO No. 1-2000. Logically, noncompliance with tax treaties has negative implications on international relations, and unduly discourages foreign investors. While the consequences sought to be prevented by RMO No. 1-2000 involve an administrative procedure, these may be remedied through other system management processes, e.g., the imposition of a fine or penalty. But we cannot totally deprive those who are entitled to the benefit of a treaty for failure to strictly comply with an administrative issuance requiring prior application for tax treaty relief."

Accordingly, it also bears reiterating that the application for a tax treaty relief from the BIR should merely operate to confirm the entitlement of the taxpayer to the relief.[5] While the taxpayer has an obligation to honestly pay the right taxes, the government has a corollary duty to implement tax laws in good faith; to discharge its duty to collect what is due to it; and to justly return what has been erroneously and excessively given to it.[6]

In view of the foregoing disquisitions, there being no new matter or substantial issue raised in respondent's Motion for Partial Reconsideration, the Court finds no compelling reason to reverse, amend, or modify the Decision dated May 28, 2021.

WHEREFORE, premises considered, respondent's Motion for Partial Reconsideration Re: Decision dated 28 May 2021 is **DENIED** for lack of merit.

SO ORDERED.

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

I Concur:

With due respect, I maintain my Concurring and Dissenting Opinion
JEAN MARIE A. BACORRO-VILLENA
Associate Justice

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[5] *CBK Power Company Limited v. Commissioner of Internal Revenue, et seq.,* G.R. Nos. 193383-84 and 193407-08, January 14, 2015.
[6] *Ibid.* citing the case of *Republic of the Philippines v. GST Philippines, Inc.*, G.R. No. 190872, October 17, 2013.