Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

__En Banc__

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 1368** (CTA Case No. 8472)
- versus -	Present: DEL ROSARIO, PJ, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, *and* MANAHAN, *J.J.*
MCKINSEY & CO., (PHILS.), Respondent.	Promulgated: FEB 27 2017 10:15 a.m.

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DECISION

CASANOVA, *J*.:

This is an appeal, via Petition for Review, under Section 4(b), Rule 8 of the Revised Rules of Court of Tax Appeals, filed by herein petitioner, Commissioner of Internal Revenue praying that the Decision dated April 17, 2015, and Resolution dated September 24, 2015 both rendered by the Court of Tax Appeals (CTA)-Third Division, be reversed and set aside.

The facts of the case as found by the CTA-Third Division and narrated in the Assailed Decision, are as follow:

> "Petitioner [respondent herein] McKinsey & Co., (Phils.) is a corporation organized and existing under the laws of the State of Delaware, United States of America, with principal place of business at 1209 Orange Street, Wilmington, Delaware 19801 U.S.A. It is authorized to

transact business in the Philippines as a branch office to engage primarily in management consultancy services pursuant to Securities and Exchange Commission (SEC) Registration No. A1998-675. Petitioner's branch office is located at 29F Equitable Bank Tower, 8754 Paseo de Roxas, Makati City. It is registered with the Bureau of Internal Revenue (BIR) Revenue District Office (RDO) No. 50-South Makati, with Taxpayer Identification No. 005-649-673-000.

Respondent (petitioner herein) is sued in her official capacity as the Commissioner of the Bureau of Internal Revenue, having been duly appointed to exercise the powers and perform the duties of her office including, *inter alia*, the power to decide disputed assessments, refunds of internal revenue taxes, fees and other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code (NIRC) of 1997, as amended. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner filed its Annual Income Tax Return (ITR) for calendar year (CY) 2009 on April 15, 2010, reporting an annual income tax due in the amount of ₱926,359.00 representing its Minimum Corporate Income Tax (MCIT). Petitioner's MCIT liabilities were then paid using a portion of its Prior Year's Excess Credits other than MCIT, which at the beginning of the year was in the amount of ₱85,263,890.00. At the end of 2009, petitioner had total tax credits/payments in the amount of ₱84,337,531.00 and unutilized creditable withholding taxes in the amount of ₱24,104,577.00. Petitioner chose to refund the CWT in 2009 by ticking the box 'To be refunded' in its Annual ITR for CY 2009.

Petitioner also filed its Annual Income Tax Return for taxable year 2010 on April 14, 2011, reporting an annual income tax due in the amount of ₱1,952,092.00 representing its MCIT for CY 2010. Petitioner's MCIT liabilities were then paid using its Prior Year's Excess Credits other than MCIT, which at the beginning of the year was in the amount of ₱84,337,531.00. At the end of 2010, petitioner had total tax credits/payments in the amount of ₱82,385,439.00 and unutilized creditable withholding taxes in the amount of ₱38,382,260.00. Petitioner likewise opted to refund the unutilized CWT for 2010 by ticking the box 'To be refunded' in its Annual ITR for CY 2010.

In sum, petitioner's Annual ITRs show unutilized CWT for CY 2009 and 2010 in the amount of ₱24,104,577.00 and ₱38,382,260.00, respectively, or the total amount of ₱62,486,837.00. The Court however notes that petitioner is claiming the refund of the lower amount of ₱62,476,710.65.

On March 29, 2012, petitioner filed with the BIR Revenue District Office No. 50-South Makati an administrative claim for refund of its purported excess CWT for CY 2009 and 2010, the amount of ₱24,104,576.00 and ₱38,372,134.65, respectively, or the aggregate amount of ₱62,476,710.65.

On April 13, 2012, alleging inaction on the part of respondent, petitioner filed the present Petition for Review and Motion for Time (To submit the Original Copy of Petitioner's Secretary's Certificate of Board Resolution).

On April 16, 2012, petitioner filed a Manifestation and Motion, submitting the original copy of the Secretary's Certificate.

Respondent filed a Motion for Extension of Time to File Answer through registered mail on May 21, 2012, which was received by this Court on May 25, 2012. The said motion was granted by the Court in its Order dated May 28, 2012.

On June 6, 2012, respondent filed her Answer with (1) Motion to Dismiss and (2) Comment/Opposition to Petitioner's Motion for Time, interposing as its Special and Affirmative Defenses that petitioner's claim for refund is still subject to investigation by the Bureau of Internal Revenue; that petitioner's claim of its entitlement for refund or the issuance of a refund or a tax credit certificate has no basis either in fact or in law, for its failure to show or demonstrate any evidence to the effect that the tax, which is the subject of this case, was erroneously or illegally collected; and that petitioner's alleged claim for refund or issuance of a tax credit certificate in the aggregate amount of ₱62,476,710.65 as alleged unutilized creditable withholding taxes for taxable years 2009 and 2010 were not fully substantiated by proper documents, such as sales invoices, official receipts and others.

Respondent also pointed out that the verification and certification against forum shopping was defective because the attached Secretary's Certificate is a mere photocopy and that Mr. Wilfredo Agustin is not authorized to sign the same, thus, the Petition for Review should be dismissed.

Petitioner filed its Opposition/Comment (To Respondent's Motion to Dismiss) on June 21, 2012, maintaining that Mr. Wilfredo Agustin was authorized to sign any and all documents, and to take such actions and execute and deliver such documents as may be necessary or appropriate; that the jurisprudence cited by respondent does not squarely apply to the instant petition; that Mr. Wilfredo Agustin as petitioner's accounting officer has the authority to sign the verification and certification against forum shopping, even without presenting proof of such authority; and that the Supreme Court has relaxed the rule on submission of verification and certification against forum shopping, under special circumstances and for compelling reasons, and where there is substantial compliance with the rule.

On August 2, 2012, the Court issued a Resolution denying respondent's Motion to Dismiss, ruling that Mr. Wilfredo Agustin, the Accounting Assistant of petitioner's Corporate branch in the Philippines, has been authorized to sign the verification and certification against forum shopping.

The case was set for pre-trial conference on October 4, 2012. Accordingly, petitioner's Pre-Trial Brief was filed on September 28, 2012; which respondent's Pre-trial Brief was filed on October 1, 2012.

Thereafter, the parties filed their Joint Stipulation of Facts and Issues on October 31, 2012, which the Court approved in the Pre-Trial Order dated November 13, 2012. In the same Order, the pre-trial was deemed terminated and the parties were ordered to proceed with the trial.

During the trial, petitioner presented its Accounting Officer, Ms. Maria Cristina O. Alon, as its sole witness. On November 11, 2013, petitioner filed it Formal Offer of Evidence. In the Resolution dated February 11, 2014, this court admitted as petitioner's evidence Exhibits 'A' to 'UUU', 'WWW' to 'AAAAA', and 'CCCCC', inclusive of submarkings but denied Exhibits 'VVV', 'VVV-1', 'VVV-2' 'BBBBB', and 'CCC'.

Petitioner then filed an Omnibus Motion (I) For Reconsideration of the Resolution dated 11 February 2014, and (II) For Correction of the Description of Exhibits 'PPP-1' and 'GGGG-1' in the Formal Offer of Evidence on March 6, 2014.

In the Resolution dated June 2, 2014, the Court admitted Exhibit 'BBBBB', noted the correction of the description of Exhibits 'PPP-1' and 'GGGG-1', and still denied Exhibit 'CCC'.

On the part of respondent, she filed a Manifestation praying for the submission of the case for resolution based on available records and requesting for a period of thirty (30) days to file her Memorandum. In the Resolution dated July 2, 2014, the Court noted respondent's Manifestation and cancelled the presentation of evidence previously scheduled. The Court also ordered both parties to submit their respective Memoranda within thirty (30) days from notice.

Petitioner filed a Motion for Additional Time to File Memorandum, which was granted by Court. Petitioner submitted its Memorandum on August 15, 2014, while respondent submitted her Memorandum on August 12, 2014.

Petitioner and respondent then submitted a Joint Motion to Admit (Supplemental Joint Stipulation of Facts) on August 18, 2014, which was noted and admitted by the Court.

In a Resolution dated September 8, 2014, the case was considered submitted for decision by the Court."

On April 17, 2015, CTA-Third Division promulgated the Assailed Decision[1] which granted respondent's Petition for Review.

[1] En Banc Rollo, pp. 12-30

Petitioner then filed, thru registered mail, on May 8, 2015, a Motion for Reconsideration[2]. Respondent filed its Comment/Opposition (To Respondent's Motion for Reconsideration)[3] on July 6, 2015.

On September 24, 2015, the CTA-Third Division rendered the Assailed Resolution[4] denying petitioner's Motion for Reconsideration.

On October 15, 2015, petitioner filed, thru registered mail, the instant Petition for Review[5]. Respondent filed its Comment/Opposition To Petition for Review[6] on January 7, 2016.

Thereafter, the Court *En Banc*, in its Resolution[7] dated January 28, 2016, resolved to give due course to petitioner's Petition for Review and, likewise, required the parties to submit their Memoranda within thirty (30) days from receipt of the Resolution. Upon submission of the Memoranda or the expiration of the period for filing the same, the Petition for Review shall be deemed submitted for decision.

On March 17, 2016, respondent filed its Memorandum[8] while petitioner filed, thru registered mail, on March 19, 2016, his Manifestation (In Lieu of Submission of Memoranda)[9] stating that he would be adopting all his pleadings filed in this case including the Judicial Affidavits of his witnesses, sans Memoranda, and praying that his Manifestation be duly noted.

On May 24, 2016, the case was deemed submitted for decision by the Court *En Banc* per its Resolution[10] promulgated on May 24, 2016.

Hence, this Decision.

Petitioner, in the instant Petition for Review, reiterates the following arguments, viz:

> "1. There is no showing on respondent's annual income tax return for years 2009 and 2010 that the income

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[2] Division Docket (Vol. III), pp. 1253-1260
[3] Ibid, pp. 1264-1270
[4] *En Banc* Docket, pp. 32-37
[5] Ibid, pp. 1-10
[6] Id., pp. 56-62
[7] Id., pp. 65-66
[8] Id., pp. 67-79
[9] Id., pp. 81-82
[10] Id., pp. 90-91

payments subjected to withholding tax were declared as part of its gross income.

2. Respondent failed to comply with the invoicing requirements under Sec. 113 of the 1997 Tax Code, as amended by R.A. No. 9337.

3. Respondent failed to show proof of 'Authority to Print' (ATP) Sales Invoices and Official Receipts mandated by Sec. 238 of the 1197 *(sic)* Tax Code, in relation to Sec. 113 of the same Code.

4. Proof of actual remittance to the BIR of the withheld taxes and testimonial evidence of payors and withholding agents required."

On the other hand, respondent, in its Comment/Opposition To Petition for Review, counter-argues that it was able to present all the necessary supporting documents in support of its claim; that, the facts of Raytheon Case[11], cited by petitioner, do not fall on all fours with the facts of this case; that the more recent case of *Commissioner of Internal Revenue vs. Sonoma Services, Inc.*[12] is more in point where this Court held that the failure to indicate the amount of creditable withholding taxes in the "Creditable Tax Withheld" column of the taxpayer's income tax return is not sufficient basis to deny the claim.

After a careful perusal and thorough evaluation of the arguments proffered by both parties, We find the Petition for Review unmeritorious.

The arguments advanced by petitioner in his Petition for Review are mere rehash of the arguments in his Memorandum and Motion for Reconsideration, filed in CTA Case No. 8472 before the CTA-Third Division.

We sustain the CTA-Third Division ruling in the Assailed Decision granting herein respondent's Petition for Review and ordering petitioner herein to refund in favor of respondent the amount of ₱62,476,710.65 representing its unutilized excess tax credits for calendar years 2009 and 2010.

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[11] Raytheon-Ebasco Overseas Ltd.-Philippine Branch vs. Commissioner of Internal Revenue, CTA EB Case No. 597, March 17, 2011

[12] CTA EB Case No. 931, December 11, 2013

We, likewise, uphold the exhaustive discussion of the CTA-Third Division in the Assailed Resolution disposing the same issues/arguments proffered by petitioner in the instant Petition for Review.

Finding no cogent reason to reverse or deviate from the Assailed Decision and Assailed Resolution, We deny petitioner's Petition for Review for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Associate Justice

JUANITO C. CASTAÑEDA, JR.
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(With Concurring Opinion)
CATHERINE T. MANAHAN
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

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COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA *EB* NO. 1368** (CTA Case No. 8472)
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-versus-	**DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
	Promulgated:
MCKINSEY & CO., (PHILS.), *Respondent.*	FEB 27 2017 10:15 a.m.

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Concurring Opinion

MANAHAN, J.:

I concur with the majority in denying the Petition for Review for lack of merit.

I wish to expound further on the fourth issue raised by the petitioner that the respondent failed to prove the actual remittance to the BIR of the taxes withheld on fees by its client for services rendered.

Section 57(B) and 58(A) of the National Internal Revenue Code of 1997, as amended, provides that:

SEC. 57. Withholding of Tax at Source. -

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> (B) Withholding of Creditable Tax at Source. - The Secretary of Finance may, upon the recommendation of the Commissioner, require the withholding of a tax on the items of income payable to natural or juridical persons, residing in the Philippines, **by payor-corporation/persons** as provided for by law, at the rate of not less than one percent (1%) but not more than thirty-two percent (32%) thereof, which shall be credited against the income tax liability of the taxpayer for the taxable year. (Emphasis supplied)
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> xxx xxx
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> SEC. 58. Returns and Payment of Taxes Withheld at Source. -
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> (A) Quarterly Returns and Payments of Taxes Withheld. - Taxes deducted and withheld under Section 57 **by withholding agents** shall be covered by a return and **paid to**, except in cases where the Commissioner otherwise permits, an authorized Treasurer of the city or municipality where the withholding agent has his legal residence or principal place of business, or where the withholding agent is a corporation, where the principal office is located.
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> **The taxes deducted and withheld by the withholding agent shall be held as a special fund in trust for the government until paid to the collecting officers.**
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> The return for final withholding tax shall be filed and the payment made within twenty-five (25) days from the close of each calendar quarter, while the return for creditable withholding taxes shall be filed and the payment made not later than the last day of the month following the close of the quarter during which withholding was made: Provided, **That the Commissioner, with the approval of the Secretary of Finance, may require these withholding agents to pay or deposit the taxes deducted or withheld at mmore frequent intervals when necessary to protect the interest of the government**. (Emphasis supplied)

Based on the above provisions, the law mandates that the one who has the obligation to remit the withholding taxes is the withholding agent and not the taxpayer from whom said taxes were deducted.

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Anent thereto, the Supreme Court in the case of *Commissioner of Internal Revenue v. Asian Transmission Corporation* [1] further ratiocinated, citing a CTA *En Banc* decision, to wit:

> At any rate, the CIR is correct in stating that the taxpayer bears the burden of proof to establish not only that a refund is justified under the law but also that the amount that should be refunded is correct. In this case, however, the CTA-First Division and the CTA-En Banc uniformly found that from the evidence submitted, ATC has established its claim for refund or issuance of a tax credit certificate for unutilized creditable withholding taxes for the taxable year 2001 in the amount of ₱27,325,856.58. The Court finds no cogent reason to rule differently. As correctly noted by the CTA-En Banc:
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>> x x x proof of actual remittance by the respondent is not needed in order to prove withholding and remittance of taxes to petitioner. Section 2.58.3 (B) of Revenue Regulation No. 2-98 clearly provides that **proof of remittance is the responsibility of the withholding agent and not of the taxpayer-refund claimant**. It should be borne in mind by the petitioner that payors of withholding taxes are by themselves constituted as withholding agents of the BIR. The taxes they withhold are held in trust for the government. In the event that the withholding agents commit fraud against the government by not remitting the taxes so withheld, such act should not prejudice herein respondent who has been duly withheld taxes by the withholding agents acting under government authority. Moreover, pursuant to Section 57 and 58 of the NIRC of 1997, as amended, the withholding of income tax and the remittance thereof to the BIR is the responsibility of the payor and not the payee. Therefore, respondent, x x x has no control over the remittance of the taxes withheld from its income by the withholding agent or payor who is the agent of the petitioner. The Certificates of Creditable Tax Withheld at Source issued by the withholding agents of

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[1] G.R. No. 179617, January 19, 2011.

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> the government are prima facie proof of actual payment by herein respondent-payee to the government itself through said agents. We stress that the pertinent provisions of law and the established jurisprudence evidently demonstrate that there is no need for the claimant, respondent in this case, to prove actual remittance by the withholding agent (payor) to the BIR. In this regard, We do not agree with petitioner's allegation that respondent failed to prove that creditable withholding taxes were duly supported by valid Certificates of Creditable Tax Withheld at Source. As aptly ruled by the Court in Division, and We reiterate, the evidence on record in which petitioner interposed no objection to its admission and was subsequently admitted by the Court in Division, show that respondent was able to substantiate its claim through the presentation of Exhibits J to P and R to Z, the Certificates of Creditable Tax Withheld At Source. The documentary evidence presented were sufficient to establish that respondent was withheld taxes and that there was an excess which remain unutilized and now subject of refund. (Emphasis supplied)

The rationale of the above decision was also adopted in the subsequent case of *Commissioner of Internal Revenue v. Philippine National Bank*[2], which was cited also in the assailed resolution, where the Supreme Court ruled that:

> Petitioner's posture that respondent is required to establish actual remittance to the Bureau of Internal Revenue deserves scant consideration. **Proof of actual remittance is not a condition to claim for a refund of unutilized tax credits**. Under Sections 57 and 58 of the 1997 National Internal Revenue Code, as amended, **it is the payor-withholding agent, and not the payee-refund claimant such as respondent, who is vested with the responsibility of withholding and remitting income taxes**. (Emphasis supplied)

Given the legal and jurisprudential citations, the relationship of the payor-withholding agent and the Bureau of

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[2] G.R. No. 180290, September 29, 2014.

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Internal Revenue (BIR) can be likened to a contract of agency. Article 1868 of the Civil Code defines the contract of agency as one whereby "a person binds himself to render some service or to do something in representation or on behalf of another, with the consent or authority of the latter."

Under the Philippine withholding tax system, the withholding agent by law acts as the agent of the BIR in collecting the tax at the source of payment. Hence, it is actually a system of advance collection of the payee's or income recipient's tax liability by the payor of any income item. The payor who has the control and custody of the funds from which income payments are sourced is constituted as the agent of the BIR to withhold a tax at the rates defined under existing law and its implementing revenue regulations, whether final or creditable.[3] Hence, the acts of the agent on behalf of the principal within the scope of the authority granted have the same legal effect and consequence as though the principal had been the one so acting in the given situation.[4]

In the instant case, the receipt by the withholding agent of the tax withheld is tantamount to a receipt of said tax by the BIR itself. Any failure on the part of the withholding agent to remit the amount withheld to the BIR is a breach on the part of such agent and not by the taxpayer. Hence, the latter should no longer be burdened to show proof of remittance in case of claims for tax refund or tax credit.

For all the foregoing, I concur with the denial of the petition for review.

Catherine T. Manahan

CATHERINE T. MANAHAN
Associate Justice

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[3] Revenue Regulations No. 2-98 as amended.
[4] Rallos v. Felix Go Chan & Sons Realty Corp., G.R. No. L-24332, January 31, 1978; Eurotech Industrial Technologies, Inc. v. Cuizon, G.R. No. 167552, April 23, 2007; Philex Mining Corp. v. CIR G.R. No. 148187, April 16, 2008.