Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

NOKIA (PHILIPPINES), INC., Petitioner,	**CTA EB No. 1313** (CTA Case No. 8405)
	Present:
- versus -	**DEL ROSARIO,** *PJ,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA,** *and* **RINGPIS-LIBAN,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** SEP 22 2016 3:15 p.m.

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DECISION

CASANOVA, *J.*:

This is an appeal, by way of a Petition for Review[1], filed by petitioner Nokia (Philippines), Inc. on June 25, 2015 assailing the Decision[2] dated November 7, 2014 and Resolution[3] dated May 11, 2015 of the Court of Tax Appeals' (CTA) First Division in CTA Case No. 8405, which denied petitioner's claim for refund or issuance of tax credit certificate in the amount of ₱16,134,824.44, allegedly representing its creditable input value-added tax (VAT) for the fourth quarter of 2009.

[1] CTA *En Banc* Rollo, pp. 17-42
[2] Division Docket, pp. 413-442
[3] *Ibid.*, pp. 490-507

Petitioner Nokia (Philippines), Inc. is a VAT-registered entity, under Certificate of Registration No. OCN 8RC0000019384, with address at the 40th Floor, Philamlife Tower, 8767 Paseo de Roxas Street, Salcedo Village, Makati City.[4]

Respondent Commissioner of Internal Revenue is the head of the Bureau of Internal Revenue (BIR), holding office at the BIR National Office, Diliman, Quezon City.

On January 21, 2010, petitioner filed its Quarterly VAT Return for the 4th quarter of 2009 *via* e-filing, wherein it reported its input VAT for the said quarter in the total amount of ₱16,260,487.45.[5]

Subsequently, on September 2, 2011, petitioner filed an administrative claim with the BIR for the refund or issuance of TCC [*tax credit certificate*] for its alleged unutilized input VAT for the 3rd and 4th quarters of 2009.[6]

Upon the belief that the two (2)-year prescriptive period to file a judicial action under Section 112(A) of the National Internal Revenue Code (NIRC) is about to expire, and considering that the claim for refund or tax credit is still pending with respondent, petitioner was allegedly constrained to file the instant Petition for Review on January 2, 2012, with regard to petitioner's creditable input VAT for the 4th quarter of 2009 in the amount of ₱16,134,842.44. The case was raffled to the Former Second Division of this Court.[7]

In the meantime, by virtue of CTA Administrative Circular No. 01-2013 dated March 26, 2013 entitled "Reorganization of the Three (3) Divisions of the Court of Tax Appeals", the instant case was transferred to the First Division of this Court.

On June 6, 2013, Presiding Justice Roman G. Del Rosario, as Chairperson of the First Division, voluntarily inhibited himself from sitting in the proceedings or participating in the decision process in accordance with Section 1, Rule 137 of the Revised Rules of Court and Section 6 (a) and (b) of the RRCTA [*Revised Rules of the Court of Tax*

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[4] The Facts, Decision, CTA Docket, p. 413
[5] *Id.*, p. 414
[6] *Id.*
[7] *Id.*

Appeals], because the instant case was being handled by his former division at the Office of the Solicitor General.[8]

Thereafter, trial ensued.

On November 7, 2014, the CTA First Division promulgated the Decision[9] being assailed in this wise:

> "**WHEREFORE**, all the foregoing considered, the instant Petition for Review is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

Not satisfied with the Decision, petitioner filed a Motion for Reconsideration on November 28, 2014, praying that the above Decision be reconsidered and set aside and a new one be rendered ordering respondent to refund or issue a TCC in favor of petitioner in the amount ₱16,134,824.44.

On May 11, 2015, the Court *a quo* promulgated the assailed Resolution[10], denying petitioner's Motion for Reconsideration for lack of merit.

After several extensions of time, petitioner elevated the matter to the Court *En Banc* on June 25, 2015 *via* a Motion for Leave to File and to Admit (In the Interest of Justice)[11], attaching therewith the instant Petition for Review. Petitioner prays that the Court *En Banc* render judgment ordering respondent to refund or issue a TCC in favor of petitioner in the amount ₱16,134,824.44.

In the Resolution[12] dated August 3, 2015, the Court *En Banc* granted petitioner's Motion thereby admitting the instant Petition for Review attached therewith. Further, respondent was directed to file his Comment within ten (10) days from receipt thereof.

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[8] *Id.*, pp. 417-418
[9] *Supra* No. 2
[10] *Supra* No. 3
[11] CTA *En Banc* Rollo, pp. 14-16
[12] *Ibid.*, pp. 109-112

In compliance, respondent filed a Manifestation and Submission[13] on September 7, 2015, attaching therewith his Comment (To Petitioner's Petition for Review)[14]. In his comment, respondent prays that the Petition for Review be denied for utter lack of merit.

On September 24, 2015, the Court *En Banc* issued a Resolution[15] which gave due course to the instant Petition and granted the parties a period of thirty (30) days within which to file their respective memorandum.

On November 3, 2015, petitioner filed its Memorandum[16] while, on the other hand, respondent manifested[17] on November 6, 2015 that he will no longer file a memorandum and instead adopts all his arguments in the Comment as his Memorandum. In a Minute Resolution[18] dated November 12, 2015, the Court *En Banc* noted respondent's Manifestation.

Accordingly, in the December 28, 2015 Resolution[19], the Court *En Banc* deemed the case submitted for decision.

In its Petition, petitioner raised the sole issue[20] of whether it is entitled to refund or the issuance of a TCC for its alleged input VAT payments attributable to its zero-rated sales for the 4th quarter of taxable year 2009 in the amount of ₱16,134,842.44.

Petitioner claims that the court *a quo*, in effect, denied its claim based only on the issues of *whether the services rendered by petitioner were performed in the Philippines*, and *whether Nokia Corporation (Finland) is a non-resident corporation, doing business outside the Philippines*. Thus, in refuting the Decision, petitioner insists and reiterates that the services it rendered were indeed performed entirely in the Philippines; it argues that the VAT zero-rated official receipts[21],

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[13] *Id.*, pp. 124-125
[14] *Id.*, pp. 126-132
[15] *Id.*, pp. 134-135
[16] *Id.*, pp. 146-155
[17] Manifestation dated November 5, 2015, CTA En Banc Rollo, pp. 156-159
[18] CTA *En Banc* Rollo, p. 160
[19] *Ibid.*, pp. 162-163
[20] Issues, Petition for Review, *Id.*, p. 24
[21] Exhibit "O"

VAT zero-rated sales invoices[22] and the testimony of Ms. Bridgette C. Redolfin in her Judicial Affidavit[23] sufficiently establishes its claim. Also, petitioner insists that the cases of Accenture, Inc. vs. Commissioner of Internal Revenue[24] (*"Accenture case"*) and Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.[25] (*"Burmeister case"*), which the court *a quo* relied unto as basis for its decision, are not applicable herein since the circumstances prevalent in the said cases are not present on the case at hand. Further, petitioner asserts that, contrary to the conclusion reached by the court *a quo*, Nokia Corporation (Finland) is actually a non-resident foreign corporation doing business outside the Philippines as evidenced by a Certificate of Non Registration of Company[26] issued by the Securities and Exchange Commission (SEC), Extract from the Trade Register of Finland[27] and Certificate of Fiscal Residence issued by the Tax Authority of Finland[28]. Lastly, petitioner stresses that tax refund cases are not exemptions, thus, the courts should refrain from construing them in the nature of *strictissimi juris*, since, they are civil cases in nature wherein the quantum of proof needed is only a preponderance of evidence.

On the other hand, respondent asserts that the arguments raised by petitioner in the Petition for Review are mere rehash of its previous arguments in the court *a quo* that have already been thoroughly discussed and resolved in the Decision and Resolution promulgated on November 7, 2014 and May 11, 2015, respectively.

After due consideration of the arguments and thorough evaluation of the records of this case, the Court *En Banc* finds merit in the instant Petition.

The VAT zero-rated official receipts and sales invoices do not sufficiently establish that the services were indeed performed in the Philippines.

[22] Exhibit "O-1"
[23] Exhibit "X"
[24] G.R. No. 190102, July 11, 2012
[25] G.R. No. 153205, January 22, 2007
[26] Exhibit "H"
[27] Exhibit "J"
[28] Exhibit "K"

Petitioner states that being in the nature of an excise tax, VAT imposed on the sale of services can only be levied by the State when the acts, privileges or businesses are performed within the jurisdiction of the Philippines. Based thereon, petitioner argues that where the payment of the services were receipted with VAT zero-rated official receipts and, thereafter, collected by the government, such shows that the services were performed within the Philippines; thus, the matter of whether or not the services were rendered within the Philippines should not be an issue anymore.

To bolster its premise, petitioner claims that the significance of issuing VAT official receipts and invoices can be found in Section 113 (A)[29] of the NIRC of 1997, as amended, which clearly mandates a VAT-registered person to issue a VAT invoice for every sale, barter or exchange of goods or properties, and a VAT official receipt for every lease of goods or properties, and for every sale, barter or exchange of services. Petitioner continues that the next logical step would be to determine what is meant by the phrase "sale, barter or exchange of services." Thus, in resolving the matter, petitioner cites Section 108 of the same code wherein the pertinent portion which provides that:

> "**SEC. 108. Value-added Tax on Sale of Services and Use or Lease of Properties. -**
>
> (A) Rate and Base of Tax. - *x x x*
>
> *x x x*
>
> The phrase '**sale or exchange of services**' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration, including those performed or rendered by *x x x*
>
> *x x x.*"

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[29] "**SEC. 113.** ***Invoicing and Accounting Requirements for VAT-Registered Persons.*** -
(A) Invoicing Requirements. - A VAT-registered person shall issue:

(1) A VAT invoice for every sale, barter or exchange of goods or properties; and

(2) A VAT official receipt for every lease of goods or properties, and for every sale, barter or exchange of services."

From the foregoing, petitioner concludes that the phrase "sale of service" means all kinds of services performed or rendered in the Philippines. Thus, it therefore follows that the VAT zero-rated official receipts and sales invoices are themselves proof that the services were performed in the Philippines.

We are not persuaded.

Invoices are merely written accounts of the particulars of merchandise shipped or sent to a purchaser or consignee with the value or prices and charges annexed.[30] As such, it may be used to evidence a sale or transfer, or an agreement to sell or transfer goods and services.

On the other hand, an official receipt is a more formal and official evidence of a transaction. For purposes of VAT pursuant to Section 108 of the NIRC, as amended, it is a proof of sale of service and/or leasing of properties which shall be the basis of the output tax liability of the seller and the input tax claim of the buyer. It is a written admission or acknowledgment of the fact that money has been paid and received for the payment or settlement between persons rendering services and its customers.[31]

While it is true that VAT official receipts and invoices are proofs of the parties' business transactions - to prove sale or lease of goods or services and payment thereof, the same, however, does not *ipso facto* equate that the said sale or lease were actually rendered within the Philippines. Nowhere in the said documents is it stated or shown that the services were actually performed in the Philippines. As correctly held by the court *a quo*, the determination of whether a certain sale or lease of a good or service is performed within or outside of the Philippines is a question of fact which should, therefore, be duly proven and substantiated.

Moreover, *We* agree with the court *a quo* that the phrase "performance of all kinds of services in the Philippines", as mentioned in Section 108 (A), merely recognizes the country's taxing jurisdiction. In fact, Section 108 only provides for the rate and base of VAT derived from sale or exchange of services and use of lease of properties. Notably, legislative intent must be ascertained from consideration of the statute

[30] Philippine Law Dictionary, 3rd Ed., p. 495
[31] Section 2.2, Revenue Regulations No. 18-2012 dated October 22, 2012

as a whole and not of an isolated part or a particular provision alone. For taken in the abstract, a word or phrase might easily convey a meaning quite different from the one actually intended and evident when the word or phrase is considered with those in which it is associated.

The *Accenture case* and *Burmeister case* are applicable in the instant case.

Petitioner asserts that the *Accenture case* and *Burmeister case* do not fall on all fours with the instant case since the circumstances prevalent in the said cases are not present in the case on hand. Petitioner claims that, in the *Accenture case*, the Court found that the documents submitted by Accenture were incomplete to prove that the recipient of the services was a non-resident foreign corporation since it failed to present the Certificates/Articles of Foreign Incorporation/Association of the foreign corporation; while, in the *Burmeister case*, the presence of foreign corporations through consortium in the Philippines was established and proven with competent and direct evidence, thereby declaring that the foreign entities were "doing business in the Philippines." As such, reliance on the pronouncements made therein was clearly misplaced.

We do not agree.

Petitioner seemed to have misappreciated the doctrinal pronouncement in the cited cases.

In the *Burmeister case*, the Supreme Court harmonized sub-paragraphs (b)(1) and (b)(2) of Section 102 of the 1977 Tax Code, which pertains to zero-rated transactions. It was held that an essential condition for entitlement to zero-percent (0%) VAT is that the recipient of the service is a person doing business outside the Philippines, *viz*:

> "This can only be the logical interpretation of Section 102(b)(2). If the provider and recipient of the 'other services' are both doing business in the Philippines, the payment of foreign currency is irrelevant. Otherwise, those subject to the regular VAT under Section 102(a) can avoid

> paying the VAT by simply stipulating payment in foreign currency inwardly remitted by the recipient of services. To interpret Section 102(b)(2) to apply to a payer-recipient of services doing business in the Philippines is to make the payment of the regular VAT under Section 102(a) dependent on the generosity of the taxpayer. The provider of services can choose to pay the regular VAT or avoid it by stipulating payment in foreign currency inwardly remitted by the payer-recipient. Such interpretation removes Section 102(a) as a tax measure in the Tax Code, an interpretation this Court cannot sanction. A tax is a mandatory exaction, not a voluntary contribution.
>
> *xxx xxx xxx*
>
> Further, when the provider and recipient of services are both doing business in the Philippines, their transaction falls squarely under Section 102(a) governing domestic sale or exchange of services. Indeed, this is a purely local sale or exchange of services subject to the regular VAT, unless of course the transaction falls under the other provisions of Section 102(b).
>
> Thus, when Section 102(b)(2) speaks of **'services other than those mentioned in the preceding subparagraph,'** <u>the legislative intent is that only the services are different between subparagraphs 1 and 2. The requirements for zero-rating, including the essential condition that the recipient of services is doing business outside the Philippines, remain the same under both subparagraphs.</u>" *(Underscoring Ours)*

The above ruling was further elaborated in the *Accenture case,* which correlated Section 102 (b)(1) and (b)(2) of the 1977 Tax Code with the current NIRC of 1997, as amended, particularly Section 108 (B)(1) and (B)(2), the Supreme Court rationalized that:

> "We rule that the recipient of the service must be doing business outside the Philippines for the transaction to qualify for zero-rating under Section 108(B) of the Tax Code.

> This Court upholds the position of the CTA en banc that, because Section 108(B) of the 1997 Tax Code is a verbatim copy of Section 102(b) of the 1977 Tax Code, any interpretation of the latter holds true for the former.
>
> *x x x x x x x x x*
>
> Lastly, it is worth mentioning that prior to the promulgation of Burmeister, Congress had already clarified the intent behind Sections 102(b)(2) of the 1977 Tax Code and 108(B)(2) of the 1997 Tax Code amending the earlier provision. R.A. 9337 added the following phrase: 'rendered to a person engaged in business conducted outside the Philippines or to a nonresident person not engaged in business who is outside the Philippines when the services are performed.'"

Evidently, it cannot be overstated that an essential condition to qualify for VAT zero-rating is that the recipient of the service is doing business outside the Philippines. It is for that reason why the Court *a quo* cited the *Accenture case* and *Burmeister case*, which is precisely to bear emphasis on the importance of satisfying the requirement that Nokia Corporation (Finland) should be a non-resident foreign corporation doing business outside the Philippines. The wisdom of the said rulings is to avoid the situation that those subject to the regular VAT under Section 108 (B)(1) can avoid paying the VAT by simply stipulating payment in foreign currency inwardly remitted by the recipient of services. To interpret Section 108 (B)(2) to apply to a payer-recipient of services doing business in the Philippines is to make the payment of the regular VAT under Section 108 (B)(1) dependent on the generosity of the taxpayer. The provider of services can choose to pay the regular VAT or avoid it by stipulating payment in foreign currency inwardly remitted by the payer-recipient, an interpretation the Court cannot sanction. A tax is a mandatory exaction, not a voluntary contribution.[32]

Nokia Corporation (Finland) is a non-resident foreign corporation doing business outside the Philippines.

[32] *See* Sitel Philippines Corporation (Formerly Clientlogic Philippines, Inc) vs. Commissioner of Internal Revenue, CTA Case No. 7623, March 3, 2010

We'll now proceed to the crux of the controversy.

In the assailed Decision, the court *a quo* concluded that Nokia Corporation (Finland) is doing business within the Philippines based mainly on petitioner's Note 1 of the Notes to Financial Statements as of and for the years ended December 31, 2009 and 2008[33]. As such, the court *a quo* ruled that, "[w]e cannot say that Nokia Corporation is a 'nonresident foreign corporation' or 'a foreign corporation not engaged in trade or business within the Philippines.' In fact, petitioner's evidence discloses that Nokia Corporation is doing or engaging in business in the Philippines. *xxx* Based on the foregoing, the services rendered or to be rendered by petitioner primarily consists of 'handling any specific or general business matter that may arise with respect to Nokia's business in the Philippines.' Thus, petitioner's service to Nokia Corporation is anticipatory and is premised on the fact that the latter has an existing business in the Philippines. Such being the case, Nokia Corporation cannot be treated as a 'nonresident foreign corporation' or 'a foreign corporation not engaged in trade or business within the Philippines.'"[34]

In assailing the above conclusion, petitioner insists that the Certificate of Non Registration of Company[35] issued by the SEC, Extract from the Trade Register of Finland[36] and Certificate of Fiscal Residence issued by the Tax Authority of Finland[37] are sufficient evidence to prove that Nokia Corporation (Finland) is a non-resident foreign corporation doing business outside the Philippines. Thus, it questions the court *a quo's* sole reliance on Note 1 of the Notes to Financial Statements as of and for the years ended December 31, 2009 and 2008 in concluding that Nokia Corporation (Finland) is doing business within the Philippines.

We find petitioner's argument tenable.

Time and again, *We* have consistently held in a plethora of cases[38] that for an entity to be considered a non-resident foreign corporation

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[33] Exhibit "R-08"
[34] Pages 28-29 of the Decision, Division Docket, pp. 440-441
[35] Exhibit "H"
[36] Exhibit "J"
[37] Exhibit "K"
[38] Emerson Electric (Asia) Limited-ROHQ vs. Commissioner of Internal Revenue, CTA Case No. 8532, October 19, 2015; Deutsche Knowledge Services PTE, LTD. vs. Commissioner of Internal Revenue, CTA Case Nos. 8510, 8546 & 8595, October 13, 2015; Deutsche Knowledge Services PTE, LTD. vs. Commissioner of Internal Revenue, CTA Case No. 8300, July 10, 2015; Galileo Asia, LLC-Philippine Branch, vs. Commissioner of Internal Revenue,

doing business outside the Philippines, the said entity must be supported **at the very least** by the Certification of Non-Registration of Corporation/Partnership duly issued by the SEC **and** proof of incorporation or registration in a foreign country (e.g., Certificate of Incorporation, Memorandum and Articles of Association, and Certificate of Registration) or any other equivalent document.

In the instant case, petitioner's Certificate of Non Registration of Company[39] issued by the SEC, Extract from the Trade Register of Finland[40] and Certificate of Fiscal Residence issued by the Tax Authority of Finland[41] are deemed adequate to prove that Nokia Corporation (Finland) is indeed a non-resident foreign corporation doing business outside the Philippines. As to the Note 1 of the Notes to Financial Statements as of and for the years ended December 31, 2009 and 2008, *We* cannot give credence that the same tends to prove that Nokia Corporation (Finland) is doing business within the Philippines.

Perusal of the Financial Statements as of and for the years ended December 31, 2009 and 2008[42] reveals that whether or not Nokia Corporation (Finland) is doing business in the Philippines cannot be merely inferred from Note 1 thereof. This is so because the Independent Auditor's Report to the Board of Directors and Stockholder of Nokia (Philippines), Inc.[43] explicitly states that the report was based on their opinion founded on the management's fair representation of the financial documents presented. In other words, the Notes to Financial Statements as of and for the years ended December 31, 2009 and 2008 were based on the materials presented by petitioner for the main purpose of conducting an audit report. It does not fairly determine whether or not Nokia Corporation (Finland) is actually doing business in the Philippines, a portion of the report provides:

> *Auditor's responsibility*
>
> Our responsibility is to express an opinion on these financial statements based on our audits. We conducted our audits in accordance with Philippines Standards on Auditing. *x x x*

CTA Case No. 8419, June 10, 2015; Chevron Holdings, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 8436, October 22, 2014.
39 *Supra* No. 35
40 *Supra* No. 36
41 *Supra* No. 37
42 Exhibit "R"
43 Exhibit "R-02" to "R-03"

> An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. An Audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.
>
> We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Accordingly, the conclusion that Nokia Corporation (Finland) is doing business within the Philippines is a mere personal inference of the external auditor who prepared petitioner's Financial Statements based on the documents it reviewed. It was a deduction based on not of what the auditor knows himself but of what he has heard from others, such remark would therefore constitute as hearsay statement.

Furthermore, the Appendix 1 of petitioner's Service Agreement[44] with Nokia Corporation (Finland) which states that Nokia Corporation (Finland) shall render, among others, marketing support services, global services, market research and support services which may include communications, finance and control, HR, legal, security, sourcing, treasury and workplace resources services; and that Nokia Corporation (Finland) may provide other services such as repair, including a proviso that it may also establish contacts with petitioner's potential customers in the Philippines for market research, are all questions of fact which should be alleged and, thereafter, duly proven. They cannot be merely inferred considering that the Service Agreement employed the words "may" and "potential customers", to which the existence of the condition connotes uncertainty that can, but has not yet, come into being.

Over and over again, *We* stress that the Court of Tax Appeals, being a Court of record,[45] is required to conduct a formal trial (*trial de novo*) where the parties must present their evidence accordingly if they

[44] Annex "H" of the Petition for Review, Division Docket, pp. 34-40
[45] Section 8, RA No. 1125, as amended

desire this Court to take such evidence into consideration.[46] To rely merely on the inference made by the external auditor constitutes hearsay testimony which has no, if not little, probative value since it is not based on the personal knowledge of the witness.

Tax refund cases are in the nature of *strictissimi juris*

Lastly, petitioner seeks to clarify the quantum of evidence needed in tax refund cases. Petitioner assails the court *a quo's* ruling that tax refunds in relation to the VAT are in the nature of tax exemptions which are construed *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority. In relation thereto, petitioner theorizes that claims for refund of erroneously paid taxes are in the nature of civil cases under the principle of *solutio indebiti*, as such, only preponderance of evidence therefore is required.

Apparently, petitioner's argument is flawed.

In the hierarchy of evidentiary values, proof beyond reasonable doubt is at the highest level, followed by clear and convincing evidence, then by preponderance of evidence, and lastly by substantial evidence, in that order.[47] Perforce thereto, preponderance of evidence means that the evidence adduced by one side is, as a whole, superior to or has greater weight than that of the other. It means evidence which is more convincing to the court as worthy of belief than that which is offered in opposition thereto.[48]

Indeed, tax refunds are based on the general premise that taxes have either been erroneously or excessively paid. While *We* agree with petitioner that the quantum of evidence needed in claiming tax refund or credit is only preponderance of evidence, however, by concluding that the nature of tax refund is based on the principle of *solutio indebiti*, *We* cannot accede to the same.

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[46] Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, G.R. No. 145526, March 16, 2007
[47] Siao Aba, et al., vs. Attys. Salvador De Guzman, Jr., et al., A.C. No. 7649, December 14, 2011
[48] *Ibid., citing* Habagat Grill vs. DMC-Urban Property Developer, Inc., G.R. No. 155110, March 31, 2005; Bank of the Philippine Islands vs. Jesusa P. Reyes, et al., G.R. No. 157177, February 11, 2008; and Republic of the Philippines vs. Donatilla R. Bautista, et al., G.R. No. 169801, September 11, 2007

Incidentally, there is *solutio indebiti* where: (1) payment is made when there exists no binding relation between the payor, who has no duty to pay, and the person who received the payment; **and** (2) the payment is made through mistake, and not through liberality or some other cause.[49] Here, in the instant case, the first requisite is lacking.

We still uphold that tax refunds should be construed *strictissimi juris* against the claimant thereof. Case law dictates that the applicant must prove not only entitlement to the claim but also compliance with all the documentary and evidentiary requirements therefor. Such is a question of fact which could only be answered after reviewing, examining, evaluating, or weighing all over again the probative value of the evidence before the Court.[50] Thus, tax refunds partake of the nature of tax exemptions, which are construed strictissimi juris against the taxpayer, evidence in support of a claim must likewise be strictissimi scrutinized and duly proven.[51]

WHEREFORE, the instant Petition for Review is hereby **PARTIALLY GRANTED**. The Decision dated November 7, 2014 and Resolution dated May 11, 2015 in CTA Case No. 8405 are **REVERSED** and **SET ASIDE**. Accordingly, the instant case is hereby **REMANDED** to the CTA First Division for determination of the amount refundable.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

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[49] Commissioner of Internal Revenue vs. Manila Electric Company (MERALCO), G.R. No. 181459, June 9, 2014
[50] Chevron Holdings, Inc., [formerly Caltex (Asia) Limited] vs. Commissioner Of Internal Revenue, EB Case No. 1146, April 14, 2015
[51] Chevron Holdings, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 8436, April 13, 2015, *citing* Commissioner of Internal Revenue vs. Far East Bank & Trust Company, (Now Bank of the Philippine Islands), G.R. No. 173854, March 15, 2010

WE CONCUR:

(Inhibited)
ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

(With Dissenting Opinion)
ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

(I join the Dissenting Opinion of Justice Uy)
CIELITO N. MINDARO-GRULLA
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 with the members of the Court *en banc* before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

****

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COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:***
	SEP 22 2016 3:15 p.m.

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DISSENTING OPINION

UY, J.:

With all due respect to my esteemed colleagues, I dissent to the majority opinion of this Court, and therefore, vote to **DENY** the instant Petition for Review upon the ground that respondent Nokia (Philippines), Inc. is not engaged in zero-rated or effectively zero-rated sales.

In the Decision, the Court *En Banc* ruled that it cannot give credence to the supposed inference made in Note 1 of the Audited Financial Statements December 31, 2009 and 2008 of petitioner[1] to prove that Nokia Corporation (Finland) is doing business within the Philippines. According to the Court *En Banc*, to rely merely on the

[1] Exhibit "R-08".

inference made by the external auditor constitutes hearsay testimony which has no, if not little, probative value since it is not based on the personal knowledge of the witness.

I respectfully disagree.

For easy reference, part of said Note 1 reads:

> "The Company's business operations are now currently focused in providing support services to Nokia and other facilities. **The Company has an existing agreement with Nokia which states that Company shall provide services to Nokia in handling any specific or general business matter that may arise <u>with respect to Nokia's business in the Philippines</u> and other territories defined in the agreement.** These services include marketing support service related to Nokia products and solutions, market research in the Philippines and other support services as defined in the service agreement (Note 12).
>
> The Company's parent company is Nokia Corporation (Nokia), incorporated in Finland and which shares of stock are listed in the Stock Exchanges of Helsinki, Frankfurt and New York.
>
> xxx xxx xxx." *(Emphasis and underscoring supplied).*

The Notes to the Audited Financial Statements is entitled to probative value which may be given weight in resolving the issue of whether respondent's sale of service is made to a person doing business outside the Philippines.

This is so because the subject Audited Financial Statements, including the Notes thereto, have become public documents, and thus, are admissible in evidence even without further proof of their due execution and genuineness.

The Notes are an integral part of petitioner's Audited Financial Statements, not only because the said Financial Statements themselves say so,[2] but also this is in accordance with Section 2 of

[2] Exhibits "R-04" to "R-07".

Revenue Regulations (RR) No. 7-2007,[3] to wit:

> "SEC. 2. COVERAGE. — The Financial Statements shall be composed of the following
>
> a) Balance Sheet;
> b) Income Statement/Profit and Loss Statement;
> c) Statement of Changes in Equity, showing either:
> d) Statement of Cash Flow;
> e) **Notes, comprising a summary of significant accounting policies and other explanatory notes**; and
> f) Schedules attached to the afore-cited statements.
>
> **The submission of the above statements is mandatory** even if there is no income, retained earnings, etc.
>
> xxx xxx xxx." *(Emphases supplied)*

As such, said Financial Statements, including the Notes thereto, are required to be filed with the Bureau of Internal Revenue.[4] Correspondingly, Financial Statements, including the Notes thereto, become public documents, in accordance with the case of *Salas vs. Sta. Mesa Market Corporation, et al.*,[5] wherein the Supreme Court declared as follows:

> "xxx. Financial statements (which include the balance sheet, income statement and statement of cash flow) show the fiscal condition of a particular entity within a specified period. **The financial statements prepared by external auditors who are certified public accountants (like those presented by petitioner) are audited financial statements.** Financial statements, whether audited or not, are, as general rule, private documents. **However, once financial statements are**

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[3] SUBJECT: Amending Certain Provisions of Revenue Regulations No. 21-2002, Implementing Section 6(H) of the Tax Code of 1997, Authorizing the Commissioner of Internal Revenue to Prescribe Additional Procedural and/or Documentary Requirements in Connection with the Preparation and Submission of Financial Statements Accompanying the Tax Returns.

[4] Section 1, RR No. 7-2007.

[5] G.R. No. 157766, July 12, 2007.

> **filed with a government office pursuant to a provision of law, they become public documents.**
>
> Whether a document is public or private is relevant in determining its admissibility as evidence. **Public documents are admissible in evidence even without further proof of their due execution and genuineness.** On the other hand, private documents are inadmissible in evidence unless they are properly authenticated." *(Emphases supplied)*

Furthermore, still with all due respect, the Court *En Banc* must not simply dismiss outright the said Notes for treating them as merely an *"inference made by the external auditor"*, since any statement made by the latter therein are required to be verified, lest the said external auditor expose himself to criminal prosecution under Section 257 of the National Internal Revenue Code (NIRC) of 1997, to wit:

> "SEC. 257. *Penal Liability for Making False Entries, Records or Reports, or Using Falsified or Fake Accountable Forms.—*
>
> (A) Any financial officer or **independent Certified Public Accountant engaged to examine and audit books of accounts of taxpayers** under Section 232(A) **and any person under his direction who**:
>
> (1) **Willfully falsifies any report or statement bearing on any examination or audit, or renders a report**, including exhibits, **statements,** schedules or other forms of accountancy work **which has not been verified by him personally or under his supervision or by a member of his firm or by a member of his staff in accordance with sound auditing practices; or**
>
> (2) **Certifies financial statements of a business enterprise containing an essential misstatement of facts or omission in respect of the transactions**, taxable income, deduction and/or exemption of his client; or
>
> xxx xxx xxx
>
> shall, upon conviction for each act or omission, be punished by a fine of not less than Fifty thousand pesos (P50,000) but not more than One hundred thousand pesos (P100,000) and suffer imprisonment of not less

than two (2) years but not more than six (6) years.

> If the offender is a Certified Public Accountant, his certificate as a Certified Public Accountant shall be automatically revoked or cancelled upon conviction.
>
> xxx xxx xxx." *(Emphases supplied)*

As a corollary, it is presumed that the law has been obeyed.[6] Thus, the external auditor could not have simply come up with unverified statements in the said Notes.

Nevertheless, even granting that Note 1 of petitioner's Audited Financial Statements December 31, 2009 and 2008, may be treated as hearsay, the same may still be considered in concluding that petitioner is not engaged in zero-rated or effectively zero-rated sales.

Needless to state, the hearsay rule is not absolute. There are exceptions, such as that stated in Section 43, Rule 130, of the Rules of Court, to wit:

> "SEC. 43. *Entries in the course of business.* Entries made at, or near the time of the transactions to which they refer, by a person deceased, or unable to testify, who was in a position to know the facts therein stated, may be received as *prima facie* evidence, if such person made the entries in his professional capacity or in the performance of duty and in the ordinary or regular course of business or duty."

Under this exception to the hearsay rule, the requisites for admission in evidence of entries in the course of business are: (1) the person who made the entry is dead, outside the country, or unable to testify; (2) the entries were made at or near the time of the transactions to which they refer; (3) the person who made the entry was in a position to know the facts stated in the entries; (4) the entries were made in a professional capacity or in the performance of a duty; and (5) the entries were made in the ordinary or regular course of business or duty.[7]

Here, all the requisites are present: (1) Isla Lipana & Co, the firm who audited petitioner and prepared the Audited Financial

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[6] Section 3(ff), Rule 131, Rules of Court.

[7] *Jose,Jr. vs. Michaelmar Phils., Inc., et al.*, G.R. No. 169606, November 27, 2009.

Statements as of December 31, 2009 and 2008 of petitioner, (including the Notes thereto), represented by Ms. Gina S. Detera, is unable to testify; (2) the entry, *i.e.*, Note 1, was made near the time the audit was conducted; (3) Isla Lipana & Co, through Ms. Gina S. Detera, was in a position to know the facts made in the said entry; (4) Isla Lipana & Co, through Ms. Gina S. Detera, made the same Note 1 in their professional capacity and in the performance of their duty; and (5) the said Note 1 was made in the ordinary or regular course of business or duty.

As can be gleaned from the aforequoted Note 1, the services rendered or to be rendered by petitioner primarily consists of *"handling any specific or general business matter that may arise with respect to Nokia's business in the Philippines".* Thus, petitioner's services to Nokia Corporation (Finland) are anticipatory and premised on the fact that the latter has an existing business in the Philippines. Such being the case, Nokia Corporation (Finland) cannot be treated as a *"nonresident foreign corporation"* or *"a foreign corporation not engaged in trade or business within the Philippines".*

Correspondingly, the transaction between petitioner and Nokia Corporation (Finland) cannot be treated as subject to zero-rated VAT under Section 108(B)(2) of the NIRC of 1997, as amended by Republic Act No. 9337. Therefore, the subject claim for refund or tax credit of input VAT must perforce be denied.

Finally, it must be emphasized that statues that grant tax exemptions are construed *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority. Tax refunds in relation to the VAT are in the nature of such exemptions.[8]

All the foregoing considered, I vote to **DENY** the instant Petition for Review.

ERLINDA P. UY
Associate Justice

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[8] *Panasonic Communication Imaging Corporation of the Philippines vs. Commissioner of Internal Revenue,* G.R. No. 178090, February 8, 2010.