REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

DGA ILIJAN B.V.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8911

Members:

DEL ROSARIO, *P.J., Chairperson,*
UY, *and*
MINDARO-GRULLA, *JJ.*

Promulgated:

DEC 18 2018 ; 10:30 a.m.

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RESOLUTION

MINDARO-GRULLA, J.:

For the Court's resolution is respondent's **Motion for Reconsideration**, filed by registered mail on July 18, 2018 and received by this Court on July 30, 2018, with petitioner's **Comment/Opposition (Re: CIR's Motion for Reconsideration dated July 18, 2018)**, filed on September 26, 2018.

Respondent moves for the reconsideration of the Court's Decision dated June 28, 2018 (assailed Decision), the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, respondent is **ORDERED TO REFUND OR ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the amount of ₱11,013,583.11, representing the following:

Excess 5% FWT paid on dividends	₱ 9,664,657.43
Interest	1,323,925.68
Compromise penalty	25,000.00
Total	**₱ 11,013,583.11**

SO ORDERED."

In his motion, respondent submits that petitioner failed to sufficiently establish and prove its entitlement under the Philippines-Netherlands tax treaty. He also argues that pursuant to Revenue Memorandum Order (RMO) No. 72-2010, filing of the tax treaty relief application should always be made before the transaction, and hence, the dividend payment in this case should be subjected to tax at the rate of 30 percent since the tax exemption was filed only on July 17, 2012, or five days after the Board of Directors of TeaM Diamond Holding Corporation (TDHC) approved the declaration of dividend.

Lastly, respondent cites the case of *UST Cooperative Store vs. The City of Manila*[1], and avers that there is erroneous payment of taxes only when a taxpayer pays under a mistake of fact. According to respondent, petitioner was fully aware of the existence of the Philippines-Netherlands tax treaty when the declaration of dividends was made, and hence, petitioner cannot claim a refund of its tax payment.

In its Comment/Opposition, petitioner avers that respondent never presented any evidence to refute petitioner's claim, and neither did he file a memorandum to support his objection to respondent's claim for refund. He merely relied on the general assertion that petitioner's evidence were insufficient. Petitioner alleges that the records of the case is replete with proof that petitioner has sufficiently complied with the requirements of the Philippines-Netherlands tax treaty to support its entitlement to the claim for refund of excess and erroneously paid FWT, interest, and compromise penalty.

Petitioner also contends that the application for tax treaty relief with the International Tax Affairs Division of the Bureau of Internal Revenue (BIR) should merely operate to confirm the entitlement of the taxpayer to the relief but not operate as a condition to the

[1] G.R. No. L-17133, December 31, 1965.

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availment of the benefits provided by tax treaties. Petitioner states that this is bolstered by respondent's recent issuance, RMO No. 8-2017, which provides that Tax Treaty Relief Application (TTRA) is no longer required to be filed for dividends, interests, and royalties, and instead, a Certificate of Residence for Tax Treaty Relief shall be used.

Lastly, petitioner cites the case of *Commissioner of Internal Revenue vs. Lawl Pte. Ltd.*[2] and avers that respondent is in error to conclude that a claim for refund may be sustained only when the tax payment was made under a mistake of fact. Petitioner argues that there is wrongful payment in this case because what was paid by petitioner is not legally due.

After careful evaluation of respondent's arguments, the Court finds that these have already been considered and passed upon by this Court in the assailed Decision. The Court held therein that the issue in this case has already been settled by the Supreme Court in *Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue*[3], and reiterated in the subsequent case of *CBK Power Company Limited vs. Commissioner of Internal Revenue*[4]. From these cases, the Court ruled that a prior application for tax treaty relief is not required before a taxpayer can avail of the preferential tax treatments under Philippine tax treaties, and hence, petitioner's failure to file a TTRA before the date of the transaction does not deprive it of entitlement to treaty relief.

The Court has also held that petitioner is entitled to a refund or issuance of a tax credit certificate, to wit:

> "After a careful evaluation of the evidence on record, the Court finds that petitioner was able to comply with the foregoing provisions.
>
> To prove the fact of withholding and remittance of the additional 5% FWT, petitioner presented the Amended Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F) for the month of January 2012; which shows that while TDHC has previously remitted the amount of ₱19,329,314.87, the tax required to be withheld is ₱28,993,972.30. Hence, the

[2] CTA EB No. 1118 (CTA Case No. 8307), May 12, 2015.
[3] G.R. No. 188550, August 19, 2013.
[4] G.R. Nos. 193383-84, January 14, 2015.

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'Tax Amount Still Due' amounts to ₱11,013,583.11, consisting of basic tax of ₱9,664,657.43, interest of ₱1,323,925.68, and compromise of ₱25,000.00. Petitioner also presented the EFPS Payment Details showing TDHC's remittance to the BIR of ₱11,013,583.11 on October 22, 2012.

The allegation that petitioner is a resident of the Netherlands is also sufficiently proven by the (1) Declaration of Residence issued by the inspector of the Tax Administration Rivierenland, the Netherlands, dated January 16, 2012; and (2) the Certificate of Non-Registration of Company issued by the Securities and Exchange Commission on January 11, 2012.

Petitioner was also able to comply with the requirement that its capital must be wholly or partly divided into shares. It presented its Deed of Incorporation which shows that petitioner's authorized capital amounts to Ninety Thousand Euros (EUR 90,000), divided into ninety thousand (90,000) shares, each share having a nominal value of One Euro (EUR 1).

Lastly, to prove that petitioner is the beneficial owner of 51.21% of TDHC's outstanding capital stock, it submitted the following documents:

1. Deed of Exchange between Mitsubishi Corporation and petitioner;
2. Declaration of Trust between Mitsubishi Corporation and petitioner; and
3. Secretary's Certificate dated January 16, 2012 executed by Atty. Factor.

Petitioner also presented TDHC's General Information Sheet for the year 2012, showing that TDHC has 40,000,000 authorized capital stocks, and 24,155,982 subscribed and paid-up capital.

From these documents, it is established that Mitsubishi transferred the 12,370,688 TDHC shares to petitioner on June 10, 2011, but held it in trust for the benefit of petitioner pending the issuance by the BIR of a

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Certificate Authorizing Registration and the recordation of the shares in the name of petitioner in the stock and transfer book of TDHC.

Out of the 24,155,982 subscribed and paid-up capital of TDHC, records prove that petitioner is the beneficial owner of 12,370,688 shares, or 51.21%, of TDHC.

Therefore, considering that petitioner, a resident of the Netherlands, is a company the capital of which is wholly divided into shares and holds directly 51.21% of TDHC, then the dividend payment of the latter to petitioner is subject to 10% preferential tax rate based on the gross amount of the dividends, pursuant to Article 10(2)(a) of the Philippines-Netherlands tax treaty.

Consequently, since the dividends received by petitioner were subjected to 15% FWT instead of the 10% preferential tax rate, then it is proper to grant petitioner its refund claim representing the additional 5% FWT it paid amounting to ₱9,664,657.43, plus interest of ₱1,323,925.68 and compromise penalty of ₱25,000.00." (*Citations omitted*)

As to respondent's last argument, petitioner correctly cites the case of *Commissioner of Internal Revenue vs. Lawl Pte. Ltd.*[5], where the CTA *En Banc* ruled that wrongful payment may also pertain to 'one levied without statutory authority', *viz:*

"<u>A plain reading of the foregoing jurisprudence would reveal that nowhere was it stated or implied that refund claims may only be granted when the taxpayer pays under a mistake of fact. At most, what can be taken from the said pronouncement is that a tax payment under a mistake of fact is just an example of an 'erroneous payment'.</u>

In *Commissioner of Internal Revenue vs. Pilipinas Shell Petroleum Corporation*, the Supreme Court defines what constitutes 'erroneous or illegal tax' as understood

[5] Supra, note 2.

under Section 229 of the NIRC of the NIRC of 1997, to wit:

> 'Section 229 of the NIRC of 1997 allows recovery of taxes erroneously or illegally collected. **An 'erroneous or illegal tax' is defined as one levied without statutory authority, or upon property *not subject to taxation*** or by some officer having no authority to levy the tax, or one which is some other similar respect is illegal.' (*Emphasis supplied*)

Furthermore, in *Commissioner of Internal Revenue vs. San Roque Power Corporation, etseq.*, the Supreme Court said:

> 'From the plain text of Section 229, it is clear that what can be refunded or credited is a tax that is 'erroneously, x x x illegally, x x x excessively or **in any manner wrongfully** collected.' <u>In short, there must be a wrongful payment because what is paid, or part of it, is not legally due.</u> As the Court held in *Mirant*, Section 229 should '**apply only to instances of erroneous payment of illegal collection of internal revenue taxes**.' <u>Erroneous or wrongful payment includes excessive payment because **they all refer to payment of taxes not legally due**</u>. xxx' (*Underscoring supplied*)

On the basis of the foregoing pronouncements, petitioner is in error to conclude that a claim for refund may be sustained only when the tax payment was made under a mistake of fact.

In this case, there is wrongful payment because what was paid is not legally due. In other words, the CGT and interest that were paid by petitioner is *'one levied without statutory authority'*." (*Underscoring supplied*)

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Based on the foregoing, the Court holds that there is no cogent reason or overriding justification to disturb the assailed Decision.

WHEREFORE, premises considered, respondent's **Motion for Reconsideration** is **DENIED** for lack of merit.

SO ORDERED.

CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice