REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

MANILA NORTH TOLLWAYS CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7870

Members:

UY, *Chairperson and*
FABON-VICTORINO, JJ.

Promulgated:

DEC 05 2013 ; 3:32 p.m.

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AMENDED DECISION

***Fabon-Victorino, J.*:**

This case pertains to petitioner's claim for refund or issuance of tax credit certificate (TCC) of its alleged overpaid creditable withholding tax (CWT) for the year 2006 in the amount of P16,960,448.65, which was denied by the Court in this wise:

> **WHEREFORE**, the instant Petition for Review is hereby **DENIED** for insufficiency of evidence.
>
> **SO ORDERED.**

The Court denied the petition for lack of proof that would allow it to determine the timeliness of the actions taken by petitioner, proof of the alleged erroneous remittance of 5% CWT in the amount of P28,267,414.42 to the BIR which included the amount subject of refund, and

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proof that the subject amount was not utilized or credited against its income tax liabilities.

On October 17, 2011, petitioner filed a Motion for Reconsideration and moved to reopen the case for presentation of additional evidence.[1] In the interest of substantial justice, the Court granted the Motion for Reconsideration in the Resolution[2] dated February 1, 2012, and reopened the case to allow petitioner to adduce additional evidence to fully substantiate its claim.

During the reception of additional evidence, petitioner recalled to the witness stand its Assistant Vice President HUGER L. LABANG, who identified petitioner's Original Creditable Withholding Tax Return for the month of December 2006 filed on January 15, 2007. The said Return reflected the creditable income taxes withheld by petitioner in the amount of P41,158,628.61. The said amount was remitted to the BIR as shown in the same return bearing stamp mark receipt of Equitable PCI Bank dated January 15, 2007 and in the machine validated Equitable PCI Bank Payment slip of even date.

Witness explained that the CWT of P41,158,628.61 indicated in the Return is different from that in the Alphalist of Payees in the amount of P12,891,214.19. The latter figure represents the 2% CWT that should be withheld by petitioner from Philippine National Construction Corporation (PNCC) while the amount in the Return comprises the entire 5% CWT withheld and erroneously remitted to the BIR together with the other taxes paid by petitioner.

Petitioner also recalled MIRIAM M. PASETES, the Chief Financial Officer and Treasurer of the Philippine National Construction Corporation (PNCC). She testified that PNCC was not able to apply any portion of the subject CWT in its 2005 ITR since at the time petitioner issued the CWT Certificate on May 2, 2007, PNCC already received a Letter of Authority (LOA) from the BIR pertaining to its tax liability for the year 2005. The subject CWT was not also applied or utilized in the succeeding years as evidenced by its ITR for

[1] Docket, Volume II, pp. 594-613.
[2] Docket, Volume II, pp. 642-647.

the years 2007 to 2011, and the Alphalist of Withholding Taxes attached therein.

In the Resolution[3] dated January 31, 2013, the Court admitted the following additional documents formally offered in evidence by petitioner on October 15, 2012:[4]

Description	**Exhibit Marking**
Petitioner's Original Creditable Withholding Tax for the month of December 2006	"HHH", "HHH-1" to "HHH-3"
Machine-validated Equitable PCI Bank BIR Payment Slip dated January 15, 2007	"HHH-4"
Alphalist of Payees from whom Taxes were Withheld, attached as Schedule 1 to Exhibit "HHH"	"HHH-5"
Annual Income Tax Returns of PNCC for taxable years 2007, 2008, 2009, 2010 and 2011 with attachments thereto	"II", "JJ" "KK" "LL" , "FFF"
Supplemental Sworn Statement of Mr. Huger L. Labang dated May 14, 2012	"MM", "MM-1"
BIR Forms No. 2307 (Certificates of Creditable Tax Withheld at Source) issued by petitioner, as payor, to PNCC, as payee for the years 2007, 2008, 2009 and 2010	"NN" to "ZZ", "AAA" to "DDD"
Supplemental Sworn Statement of Ms. Miriam M. Pasetes dated July 9, 2012	"GGG", "GGG-1"

In compliance with the Court's directive, the parties filed their respective Memoranda.

With the additional evidence on hand, the Court is again confronted with the question of whether petitioner is entitled to refund or issuance of TCC in the amount of P16,960,448.65.

To be entitled, petitioner must establish that both its administrative and judicial claims for refund were seasonably filed pursuant to Sections 204 and 229 of the National

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[3] Docket, Volume II, p. 812.
[4] Docket, Volume II, pp. 711-723.

Internal Revenue Code (NIRC), as amended; must prove the alleged overpayment to the BIR of CWT at the rate of 3% of the revenue share paid in 2006 by petitioner to PNCC for the period February 20005 to November 2006 in the amount of P16,960,448.65; and that petitioner has the legal personality to claim refund of the said amount.

Petitioner maintains that both its administrative and judicial claims for refund were filed within the two-year period prescribe under Sections 204 and 229 of the NIRC.

Up against this contention is respondent's allegation that by filing the instant petition for review on February 12, 2009, or barely fifty-one (51) days after its administrative claim for refund/TCC was lodged on December 23, 2008, petitioner deprived her of the opportunity to evaluate the merit of the claim. By so doing, petitioner failed to exhaust administrative remedies justifying dismissal of the case for lack of cause of action under the Rules of Court.

The Ruling of the Court

Sections 204 and 229 of the NIRC pertinently provide as follows:

> SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* - The Commissioner may -
>
> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit**

> **or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty:** *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund. *(Emphasis supplied)*
>
> SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> **In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment:** *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid. *(Emphasis supplied)*

The above provisions govern all kinds of refund or credit of internal revenue taxes – imposed and collected erroneously or illegally, pursuant to the NIRC. Section 204 applies to administrative claims filed with respondent, while Section 229 refers to judicial action for recovery of tax. However, settled is the rule that both the application for refund with respondent and the subsequent appeal to this Court must be filed within two (2) years from the date of payment of tax. This requirement is mandatory and jurisdictional and non-compliance therewith is fatal to the claimant's cause.

The mandatory two-year period is a limitation of action not only in filing of application for refund or credit with respondent but in lodging an appeal before this Court as well. Hence, the taxpayer must file its administrative claim for refund with respondent within two (2) years after the payment of tax; however, if the period of two (2) years is about to end and no action from respondent is forthcoming, the taxpayer may seek judicial intervention before this Court *via* a petition for review before the lapse of the prescribed two-year period. In other words, when the two-year period is about to prescribe and no action has been taken by respondent, the taxpayer should file a petition for review with this Court to preserve his right to seek judicial recourse.[5]

In the case at bar, the CWT of ₱16,960,448.65 subject of the claim for refund/TCC together with the other taxes due was remitted by petitioner to the BIR on January 15, 2007.[6] Counting from the said date, petitioner had until January 15, 2009 within which to file its claim both in the administrative and judicial levels. Hence, petitioner's administrative claim for refund filed on December 23, 2008[7] and appeal to this Court filed through registered mail on January 14, 2009, were both within the two-year prescriptive period, therefore, seasonably filed.

With respect to petitioner's entitlement to its claim, record reveals that petitioner is the builder of the North Luzon Expressway (NLEX) and is the authorized concessionaire with rights to operate, maintain and charge tolls on the NLEX, its extensions, linkages and diversions, as assignee of the PNCC's franchise over the NLEX. As

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[5] Commissioner of Internal Revenue vs. Philippine National Bank, CTA EB No. 499, November 26, 2009 with Entry of Judgment on October 11, 2010.
[6] Exhibits "HHH" and "HHH-4".
[7] Exhibit "H-1".

assignee of PNCC's franchise, petitioner shall pay to PNCC, 6% of its gross revenues from the operation of the NLEX.[8]

For the period covering February 2005 to November 2006, PNCC's NLEX revenue share plus interests amounted to ₱625,759,831.24, broken down as follows:

Revenue Share for February to December 2005 with interest of P9,463,014.43 which accrued from January to June 2006	P 313,419,877.43	Exhibits "DD", "EE", and "GG"
Interest on the Feb.-Dec. 2005 Revenue Share which accrued from July to August 4, 2006	2,020,468.81	Exhibits "CC", "FF", and "GG"
Revenue Share for January to November 2006	310,319,485.00	Exhibits "CC", "GG", "HH-2", and "X-1"
Total	**P 625,759,831.24**	

On August 4, 2006 and January 12, 2007, PNCC issued official receipts[9] in favor of petitioner, acknowledging receipt of the afore-stated share in the NLEX toll revenues. The official receipts indicate that petitioner withheld 5% CWT from the said payment in the amount of ₱28,267,414.42, computed based on petitioner's payment of ₱565,348,288.42, exclusive of Value Added Tax (VAT) of ₱60,411,542.82.[10]

A scrutiny of petitioner's original BIR Form No. 1601-E[11] for the month of December 2006 with the corresponding

[8] Exhibits "R", "R-1" and "S-1".
[9] Exhibits "CC", "DD", "EE" and "FF" .
[10] Exhibits "GG", Q & A No. 23, pp. 5-6.
[11] Exhibit "HHH".

machine-validated Equitable PCI Bank BIR Payment Slip[12] and Alphalist of Payees From Whom Taxes Were Withheld[13] shows that on January 15, 2007, petitioner indeed paid to the BIR a total amount of ₱41,158,628.61[14] in creditable withholding taxes, which included the amount of ₱28,267,414.42,[15] representing 5% CWT on PNCC's NLEX revenue share plus interest for February 2005 to November 2006 in the amount of ₱625,759,831.24, inclusive of 10% VAT.

In other words, petitioner withheld 5% CWT in the amount of P28,267,414.42 from PNCC's NLEX revenue share for February 2005 to November 2006 and remitted the said amount to the BIR.

However, petitioner is of the position that the remittance of the 5% CWT in amount of P28,267,414.42 was erroneous citing BIR Ruling No. DA-282-07 dated May 2, 2007 which states that payments to PNCC based on a share or percentage of the toll revenue of petitioner from the NLEX are subject to the regular corporate income tax of 35% and to 2% creditable withholding tax. The pertinent portion of said BIR Ruling reads:

> Based on the foregoing, PNCC's share in the toll revenues in return for the assignment of its rights under the franchise is service income derived in active pursuit of its business, hence subject to regular corporate income tax of 35% under Section 27 (C) of the National Internal Revenue Code of 1997, as amended by Republic Act No. 9337.
>
> It is worthy to note, however, that pursuant to its legislative franchise granted under PD 1113, as amended by PD 1894, PNCC is exempt from any present or future taxes in connection with the exercise of its

[12] Exhibit "HHH-4".
[13] Exhibit "HHH-5".
[14] Exhibit "HHH-3".
[15] ₱41,158,628.61 CWT per Exhibit "HHH" less ₱12,891,214.19 CWT per Exhibit "HHH-4" and "A-7".

right and privilege under the franchise and/or in connection with its activities pursued in accordance with the grant of its franchise, except for income tax and real property tax.

xxx xxx xxx

Anent the matter of withholding, Section 2.57.2 (M) of RR No. 2.98, as amended by RR No. 17-2003 provides:

'Sec.2.57.2. Income payments subject to creditable withholding tax and rates prescribed thereon. — Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:

xxx xxx xxx

(M) *Income payments made by the top ten thousand (10,000) private corporations to their* local/resident supplier of goods and *local/resident supplier of services other than those covered by other rates of withholding tax. — Income payments made by any of the top ten thousand (10,000) private corporations, as determined by the Commissioner, to their local/resident supplier of goods and local/resident supplier of services*, including non-resident alien engaged in trade or business in the Philippines

Supplier of goods — One percent (1 %)

Supplier of services — Two percent (2%)

Top ten thousand (10,000) private corporations shall include a corporate taxpayer who has been determined and

> notified by the Bureau of Internal Revenue (BIR) . . .' (emphasis supplied)
>
> In view of all the foregoing, we confirm your opinion that payments to PNCC based on a percentage of the toll revenue of MNTC Corporation ('MNTC') from the NLEX are subject to the regular corporate income tax and to two percent (2%) creditable withholding tax, to be withheld by MNTC. Consequently, the amount of tax withheld shall be creditable against PNCC's income tax liability for the relevant taxable period.

However, respondent claims that when she filed her Answer to the instant petition, she effectively revoked the ruling relied upon by petitioner.

But let it be noted that while PNCC's share of petitioner's NLEX toll revenues is income subject to the regular corporate income tax under Section 27(C) of the NIRC of 1997, as amended by Republic Act (RA) No. 9337, such income is not service income on the part of PNCC but rather income from the assignment of its franchise to petitioner. Put differently, such income is not derived by PNCC from sales of services to petitioner but a consideration for the assignment of its franchise to petitioner.

This is evident in the Amended and Restated Shareholders' Agreement dated September 30, 2004, executed among First Philippine Infrastructure Development Corporation, PNCC, Egis Projects, S.A., Leighton Asia (Sourthern) Limited and petitioner, the relevant provisions of which read as follows[16]:

> 5.02 PNCC's Share in the Project Revenue Collection
>
> Subject to the Financing Agreements, as soon as the Toll Roads are completed,

[16] Exhibit "S-1".

delivered and commercially operational, PNCC, in consideration of the assignment of its franchise, shall be entitled to receive a share of the gross toll revenue collected from the Toll Roads in the following amounts:

Open System:	C5-NLE South:	6%
Closed System:	NLE North:	6%
Subic Leg		2%

PNCC's share of the gross toll revenue collection shall be subordinated to Operating Expenses and the requirements of the Financing Agreements and shall be paid out subject to availability of funds. If the Company's cash flow is not sufficient to pay any or all of the amount of the revenue share that PNCC is entitled to receive in any year, then any unpaid balance for the year, along with any unpaid balance for the previous year/s, shall be carried forward to the following year, provided, that it shall remain subordinated to Operating Expenses and any other such payments that rank above it in the Financing Agreements for such following year. Any unpaid balance carried forward will accrue interest at the rate of the latest Philippine 91-day treasury bill rate plus one (1) percent per annum, inclusive of value-added taxes from the day it becomes payable. The carrying forward of any unpaid balance of PNCC's revenue share shall not give rise to any ground for default or a cause of action against the Company or its Shareholders under the STOA or any other agreement.

Since PNCC's share in the NLEX toll revenues is not service income on the part of PNCC, the same does not represent petitioner's purchase of services. Thus, even assuming that petitioner belongs to the top 10,000 corporations,[17] PNCC's NLEX toll revenue share is not subject

[17] Exhibit "U".

to 2% CWT under Section 2.57.2(M) of RR No. 02-98, as amended by RR No. 17-03.

In addition, Section 2.57.2 of RR No. 02-98, as amended, enumerates the income payments subject to creditable withholding tax, the pertinent portion of which reads as follows:

> *Sec. 2.57.2 Income payment subject to creditable withholding tax and rates prescribed thereon* - Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:
>
> (A) Professional fees, talent fees, etc., for services rendered by individuals x x x
>
> (B) Professional fees, talent fees, etc. for services of taxable juridical persons x x x
>
> (C) Rentals x x x
>
> (D) Cinematographic film rentals and other payments x x x
>
> (E) Income payments to certain contractors x x x
>
> (F) Income distribution to the beneficiaries[18] x x x
>
> (G) Income payments to certain brokers and agents x x x
>
> (H) Income payments to partners of general professional partnerships x x x
>
> (I) Professional fees paid to medical practitioners x x x

[18] of estates and trusts.

(J) Gross selling price or total amount of consideration or its equivalent paid to the seller/owner for the sale, exchange or transfer of real property classified as ordinary asset x x x

(K) Additional income payments to government personnel from importers, shipping and airline companies, or their agents x x x

(L) Certain income payments made by credit card companies

(M) Income payments made by the top ten thousand (10,000) private corporations to their local/resident supplier of goods and local/resident supplier of services other than those covered by other rates of withholding tax x x x

(N) Income payments made by the government to its local/resident supplier of goods and local/resident supplier of services other than those covered by other rates of withholding tax x x x

(O) Commissions of independent and/or exclusive sales representatives, and marketing agents of companies x x x

x x x x x x x x x

(Q) Payments made by pre-need companies to funeral parlors x x x

(R) Payments made to embalmers x x x

(S) Income payments made to suppliers of agricultural products x x x

(T) Income payments on purchases of minerals, mineral products and quarry resources as defined and discussed in Section 151 of the Code x x x

x x x x x x x x x

> (W) Income payments made by the top five thousand (5,000) Individual Taxpayers to their local/resident suppliers of goods and local/resident supplier of services other than those covered by other rates of withholding tax x x x
>
> (X) Income payments made by political parties and candidates of local and national elections of all their purchase of goods and services x x x

Since petitioner's payment to PNCC which is the latter's share in NLEX toll revenues by virtue of the assignment of PNCC's franchise to petitioner is not among the above listed income payments subject to CWT, there is no legal basis for subjecting the same to CWT.

In fine, the amount of ₱16,960,448.65 representing the withheld 3% CWT on PNCC's NLEX toll revenue share plus interest covering the period of February 2005 to November 2006 erroneously remitted to the BIR by petitioner which amount was not applied by PNCC against its income tax liabilities for the years 2005 to 2011, [19] constitutes erroneously paid tax which may be a proper subject of a claim for refund under Sections 204(C) and 229 of the NIRC of 1997, as amended.

While jurisprudence dictates that it is the statutory taxpayer who must file a claim for refund of excess and unutilized CWT, in the instant case, it was established that petitioner already paid/reimbursed PNCC the amount corresponding to the 3% it wrongfully withheld from PNCC and inadvertently remitted to the BIR. [20] Such being the case, there is no question that petitioner as the withholding agent has the legal personality to institute the instant Petition for Review and request for the refund of the wrongfully withheld and remitted CWT.

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[19] Exhibits "Z", "HH" to "LL", "FFF", "NN" to "ZZ", "AAA" to "DDD".
[20] See Letter dated May 22, 2007, Exhibit "G".

Record also shows that PNCC utilized the portion corresponding to the 2% CWT of the 5% CWT remitted to the BIR by petitioner.[21]

WHEREFORE, the Petition For Review dated January 14, 2009 filed by petitioner Manila North Tollways Corporation, is hereby **GRANTED.**

Accordingly, let a tax refund or tax credit certificate be issued in favor of petitioner in the amount of P16,960,448.65, representing erroneously withheld income tax on PNCC's NLEX toll revenue share for the period covering February 25, 2005 to November 2006.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

I Concur:

ERLINDA P. UY
Associate Justice

[21] Exhibit II Annual Income Tax Return of PNCC for TY 2007.

ATTESTATION

I attest that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ERLINDA P. UY
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Amended 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