REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB NO. 1775
(CTA Case No. 9144)

-versus-

Present:

Del Rosario, *P.J.,*
Castañeda, Jr.,
Uy,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban, *and*
Manahan, *JJ.*

GE CONSUMER FINANCE, INC.,
Respondent.

Promulgated:

JUL 0 5 2019 4:01 p.m.

x---x

DECISION

RINGPIS-LIBAN, J.:

Before the Court *En Banc* is a Petition for Review[1] filed by petitioner[2] Commissioner of Internal Revenue (CIR) to seek nullification of the Decision[3] dated October 25, 2017 (assailed Decision), the dispositive portion thereof reads:

> "**WHEREFORE**, the instant Petition for Review is hereby **GRANTED**. Respondent Commissioner of Internal

[1] Rollo, CTA EB CASE NO. 1775, pp. 6-14, with annexes.
[2] Respondent in CTA Case No. 9144.
[3] Rollo, CTA EB CASE NO. 1775, pp. 16- 29.

Revenue is **ORDERED TO REFUND** in favor of petitioner GE Consumer Finance, Inc. the amount of **Php 54,243,781.00**, representing erroneously paid capital gains tax on the transfer by petitioner of its shares of stock in GEC RF Global Services Philippines, Inc.

SO ORDERED."

and the Resolution[4] dated January 12, 2018 (assailed Resolution) of the same Second Division of the Court (Court in Division) denying the CIR's Motion for Reconsideration, the dispositive portion thereof reads:

"**WHEREFORE**, the instant Motion for Reconsideration is **DENIED**.

SO ORDERED."

THE FACTS

The facts as stated in the assailed Decision[5] are as follows:

"Petitioner[6] GE Consumer Finance, Inc. is a company incorporated under the laws of the State of Delaware, United States of America (USA) with registered office address at 1209 Orange Street, Wilmington, Delaware 19801, New Castle County, USA. Petitioner is not registered as a corporation or partnership with the Securities and Exchange Commission (SEC) of the Philippines as shown by the Certificate of Non-Registration of Company dated March 25, 2013.

Respondent[7] is the duly appointed Commissioner of Internal Revenue (CIR) with principal office address at the 5th Floor, Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Diliman, Quezon City. Respondent is vested with authority to administer and enforce all laws pertaining to internal revenue taxes and has jurisdiction to decide on refunds and disputed assessments.

---

[4] Rollo, pp. 31-34.
[5] Citations omitted.
[6] Respondent GE Consumer Finance, Inc. in this case.
[7] Petitioner in this case.

Petitioner is the owner of 101,995 shares of common stock and the beneficial owner of five (5) shares of common stock of GEC RF Global Services Philippines, Inc. (GECRF PH) held in the names of its nominee directors, for a total of 102,000 shares in GECRF PH. For the year 2013, petitioner was reflected as said owner of the above shares in GECRF PH's General Information Sheet (GIS) filed with the SEC on May 30, 2013.

On August 12, 2013, a Deed of Assignment was executed where petitioner transferred its ownership of the 102,000 GECRF PH shares to GE Capital Retail Finance Corporation (GE Capital). On August 14, 2013, petitioner filed its Application for Registration (BIR Form No. 1904) applying for registration as a one-time taxpayer with Tax Identification Number (TIN) 439-940-725-000.

On September 4, 2013, believing that the gain from the transfer of the shares is exempt from capital gains tax (CGT) pursuant to Article 14 in relation to Article 1 of the Reservation Clause of the RP-US Tax Treaty, petitioner filed an application for tax treaty relief on the capital gains from the transfer of shares.

On September 10, 2013, petitioner paid the CGT amounting to Php54,243,781.00 in order to obtain the certificate authorizing registration (CAR) and tax clearance certificate (TCC).

On September 4, 2015, petitioner filed its administrative claim for refund of its erroneously paid CGT in the amount of Php54,243,781.00.

On September 10, 2015, petitioner filed the instant Petition for Review. Within the extended period granted, respondent filed his Answer on October 28, 2015. On February 17, 2016, the parties filed their Joint Stipulation of Facts and Issues (JSFI) which was approved and adopted in the Pre-Trial Order dated March 1, 2016."

The parties submitted the following issues[8] for resolution of the Court in Division:

1. Whether the administrative and the judicial claims were seasonably filed; and N/

[8] Joint Stipulation of Facts and Issues, Docket, CTA Case No. 9144, p. 370.

2. Whether or not petitioner is entitled to a tax refund/credit certificate amounting to Pesos: *Fifty Four Million Two Hundred Forty Three Thousand Seven Hundred Eighty One (P54,243,781.00)* representing its erroneously paid CGT on the gain arising from the transfer of the company shares to GEC RF Global Services Philippines, Inc.

On October 25, 2017, the Court in Division rendered the assailed Decision. On January 12, 2018, the Court in Division rendered the questioned Resolution.

Aggrieved, the CIR filed within the extended period, this Petition for Review before the Court *En Banc* on February 19, 2018.

In the Resolution[9] dated March 16, 2018, respondent GE Consumer Finance, Inc. was directed by the Court *En Banc* to file its comment in this case.

On April 11, 2018, respondent filed its "Comment/Opposition (to the Petition for Review filed by the Commissioner of Internal Revenue)".[10]

In the Resolution dated April 18, 2018,[11] the Court *En Banc* gave due course to this Petition for Review. Thereafter, the parties were ordered to file their respective Memoranda.

On June 6, 2018, respondent filed its "Memorandum."[12]

On June 14, 2018, the Judicial Records Division of this Court issued a Records Verification Report stating that petitioner failed to file his Memorandum.

Hence, on July 12, 2018, the Court *En Banc* issued a Resolution[13] submitting the case for decision.

THE ISSUES

The Court *En Banc* is confronted with these main issues: Whether or not the Court in Division erred in 1) denying petitioner's Motion for

[9] Rollo, pp. 40-42.
[10] Ibid. pp. 42-47.
[11] Ibid pp. 62-63.
[12] Ibid., pp. 51-61.
[13] Ibid., pp. 69-70.

Reconsideration; and 2) in ordering petitioner CIR to refund the amount of Php 54,243,781.00 representing erroneously paid capital gains tax on the transfer by petitioner of its shares of stock in GEC RF Consumer Services Philippines, Inc.

THE ARGUMENTS

Petitioner CIR contends that respondent's capital gains derived from the transfer of its shares of stock in GECRF PH are not exempt from CGT in the Philippines; that respondent's financial statement dated July 31, 2017 is not a duly audited financial statement since it is not the financial statement required under Revenue Regulations (RR) No. 4-86; that the said financial statement is not audited by an external auditor; that the unaudited financial statement is unreliable since it does not disclose actual facts; that respondent failed to establish whether the real property interests in GECRF PH are located in the Philippines or outside the Philippines; that respondent failed to establish the actual real property interest of GECRF PH located in the Philippines; that the real property interest ratio located in the Philippines in GECRF PH is not adjusted as required under RR No. 4-86; and that tax exemptions are to be construed *strictissimi juris* against the respondent.

On the other hand, respondent GE Consumer Finance, Inc. argues that the Petition for Review does not have complete proof of service in compliance with Section 11 in relation to Section 13, Rule 13 of the Revised Rules of Court; that the errors assigned by petitioner are bereft of merit and misleading; that since its audited financial statement was not yet available to sustain its eligibility on the exemption from capital gains derived from the transfer of shares of stock in GECRF PH, it deemed prudent to submit its most recent financial statement available which is its statement of financial position as of July 31, 2013 to support its eligibility, in compliance with RR No. 4-86; that petitioner did not submit controverting evidence during trial of the case to question the financial statements submitted; that petitioner tried to mislead the Court by linking the value of GECRF PH's total assets as stated in its interim financial statement and the value/consideration for the transfer of GECRF PH's shares to GE Capital; that there is no merit in stating that petitioner failed to establish the actual real property interest of GECRF PH in the Philippines; and that petitioner is likewise wrong in stating that respondent failed to establish whether the real property interest of GECRF PH are located in the Philippines or not.

THE RULING OF THE COURT *EN BANC*

After a careful review of the CIR's arguments and the records of the case, the Court *En Banc* finds no reason to reverse the assailed Decision and assailed Resolution of the Court in Division. The records of the case show that the Court in Division had fully and exhaustively resolved the issues raised in this petition. Moreover, the CIR's opportunity to appeal has already lapsed since the assailed Decision has become final and executory for failure of the CIR to file a motion for reconsideration in accordance with the rules. Nonetheless, the Court *En Banc* shall pass upon the CIR's arguments.

JURISDICTION OF THE COURT *EN BANC*

On November 10, 2017, the CIR filed before the Court in Division a "Motion for Reconsideration."[14] In the said motion, the CIR states that he received a copy of the Decision on October 26, 2017. The Court *En Banc* agrees with the finding of the Court in Division that the assailed "Motion for Reconsideration" failed to comply with Section 13, Rule 13 of the Rules of Court.

A perusal of the said motion shows that it does not have the necessary Affidavit of Service. The Affidavit of Service is mandatory in a motion. It is specifically provided in Sections 4, 5 and 6 of Rule 15, and Sections 11 and 13 of Rule 13 of the 1997 Rules of Court.

Sections 4, 5 and 6, Rule 15 of the Rules of Court provide:

> **SEC. 4.** ***Hearing of motion.*** - Except for motions which the court may act upon without prejudicing the rights of the adverse party, every written motion shall be set for hearing by the applicant.
>
> **Every written motion required to be heard and the notice of the hearing thereof shall be served in such a manner as to ensure its receipt by the other party at least three (3) days before the date of hearing**, unless the Court for good cause sets the hearing on shorter notice.
>
> **SEC. 5.** ***Notice of hearing.*** – The notice of hearing shall be addressed to all parties concerned, and shall specify the time and date of the hearing which must not be later than ten (10) days after the filing of the motion.
>
> **SEC. 6.** ***Proof of service necessary.*** - **No written motion set for hearing shall be acted upon by the Court without proof of service thereof.**

---

[14] Docket, CTA Case No. 9144, pp. 738-745.

Sections 11 and 13, Rule 13 of the 1997 Rules of Court provide:

> **SEC. 11. *Priorities in modes of service and filing.*-** Whenever practicable, the service and filing of pleadings and other papers shall be done personally. Except with respect to papers emanating from the court, **a resort to other modes must be accompanied by a written explanation why the service or filing was not done personally. A violation of this Rule may be cause to consider the paper as not filed.**
>
> **SEC. 13. *Proof of service.*** – Proof of personal service shall consist of a written admission of the party served, or the official return of the server, or the affidavit of the party serving, containing a full statement of the date, place and manner of service. If the service is by ordinary mail, proof thereof shall consist of an affidavit of the person mailing of facts showing compliance with section 7 of this Rule. **If service is by registered mail, proof shall be made by such affidavit and the registry receipt issued by the mailing office.** The registry return card shall be filed immediately upon its receipt by the sender, or in lieu thereof the unclaimed letter together with the certified or sworn copy of the notice given by the post master to the addressee.

Service of a copy of a motion containing notice of the time and place of hearing of said motion is a mandatory requirement and the failure of the movant to comply with the said requirements renders his motion fatally defective.[15]

Hence, a motion for reconsideration without the necessary proof of service is a mere scrap of paper that does not toll the running of the period to appeal. There is no motion for reconsideration of the Decision which could have been considered as filed before the Court in Division. The CIR's opportunity to appeal has already lapsed since the assailed Decision has become final and executory for failure of the CIR to file a motion for reconsideration in accordance with the rules. Accordingly, during the time that the instant Petition for Review was filed before this Court, the Court *a quo* has already lost its jurisdiction over the case.

The CIR's right to appeal is a statutory privilege that must be exercised in the manner provided by law.

---

[15] *Pedro G. Resurreccion, Joseph Cometa and Criseforo Litera To, Jr. vs. People of the Philippines*, G.R. No. 192866, July 9, 2014, citing Pojas v. Gozo-Dalole, G.R. No. 76519, December 21, 1990.

Section 1, Rule 8 of the Revised Rules of the Court of Tax Appeals provides:

> SECTION 1. *Review of cases in the Court en banc.* – In cases falling under the exclusive appellate jurisdiction of the Court *en banc*, the petition for review of decision or resolution of the Court in Division must be preceded by the filing of a timely motion for reconsideration or new trial with the Division.

Sections 6 and 7 of Rule 14 of the Revised Rules of the Court of Tax Appeals provide:

> SECTION 6. *Entry of Judgment and Final Resolution.* – If no appeal or motion for reconsideration or new trial is filed within the time provided in these Rules, the Clerk of Court shall forthwith enter the judgment or final resolution in the book of judgment. The date when the judgment or final resolution becomes necessary shall be deemed the date of its entry. The entry shall contain the dispositive part of the judgment or final resolution and shall be signed by the Clerk of Court, with a certification that such judgment or resolution has become final and executory. *(Rules of Court, Rule 51, sec. 10a)*
>
> SECTION 7. *Execution of Judgment.* – Upon the expiration of the period to appeal from a judgment or order that disposes of the action or proceeding and no appeal has been duly perfected, execution shall issue as a matter of right, on motion.
>
> If an appeal has been duly perfected and finally resolved, execution may be forthwith applied for in the court of origin, on motion of the judgment obligee, submitting therewith a certified true copy of the judgment or final order sought to be enforced and of its entry, with notice to the adverse party. *(Rules of Court, Rule 39, sec. 1a)*

Respondent GE Consumer Finance, Inc. is entitled to refund of erroneously paid CGT

Petitioner insists that respondent's capital gains derived from the transfer of its shares of stock in GECRF PH are not exempt from CGT in the Philippines.

The Court *En Banc* agrees with the findings of the Court in Division that the CIR's arguments are unmeritorious. Contrary to petitioner's claim, the Court *En Banc* finds that respondent's capital gains derived from the transfer of its shares of stock in GECRF PH is exempt from CGT in the Philippines pursuant to the RP-US Tax Treaty.

As aptly discussed in the assailed Decision:[16]

> "Petitioner presented the following documents to show that it is a corporation duly organized and existing under the laws of the USA: Certificate of Incorporation of Retailer Financial Services, Inc., including the various Certificates of Amendment of Certificate of Incorporation, to show the renaming of the Corporation to GE Consumer Finance, Inc.; and the Certificate of Tax Residence issued by the USA Department of Treasury – Internal Revenue Service. Petitioner also presented the Certification of Non-Registration of Company issued by the Philippine Securities and Exchange Commission (SEC) to show that it is not registered either as a corporation or as a partnership in the Philippines.
>
> Petitioner owned 102,000 shares of GECRF PH, which is a domestic corporation. On August 12, 2013, said shares were transferred to GE Capital Retail Finance Corporation through a Deed of Assignment of Shares and not through the stock exchange.
>
> As to the requirement for application for tax treaty relief, petitioner complied with the following as shown by its Letter-Application for Tax Treaty Relief on Capital Gains, and Application for Relief From Double Taxation on Capital Gains (BIR Form No. 0901-C), both stamped received by the BIR on September 4, 2013. While the BIR confirmatory ruling requested by petitioner is yet to be issued, it has been ruled that non-compliance with the prior application rule as required by Revenue Memorandum Order (RMO) No. 1-2000 should not operate to automatically divest entitlement to the tax treaty relief as it would constitute a violation of the duty required by good faith in complying with a tax treaty and would impair the value of the tax treaty. xxx
>
> xxx xxx xxx
>
> As discussed in the previous section, the application for refund before the BIR and the judicial claim before the CTA were both timely filed. Further, the application for refund was

---

[16] Citations omitted.

supported by petitioner's duly accomplished Application for Tax Credits/Refunds (BIR Form No. 1914), and other documents, as required by RMO No. 01-2000.

Considering petitioner's compliance with the requirements for claim for refund, the issuance remains whether the said amount paid as CGT should be refunded due to petitioner's exemption from payment thereof pursuant to the RP-US Treaty Tax Treaty.

Xxx xxx, generally, any gain realized by petitioner from the sale of shares in GECRF PH should be subject to CGT. However, considering that the Philippines has a tax treaty with the USA, said income from the sale of shares may be exempt from CGT if the conditions set forth under the RP-US Tax Treaty are met.

The relevant provisions of the RP-US Treaty are:

ARTICLE 14

Capital Gains

(1) Gains from the alienation of tangible personal (movable) property forming part of the business property of a permanent establishment which a resident of a Contracting State has in the other Contracting State or of tangible personal (movable) property pertaining to a fixed base available to a resident of a Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in the other State. However, gains derived by a resident of a Contracting State from the alienation of ships, aircraft or containers operated by such resident in international traffic shall be taxable only in that State, and gains described in Article 13 (Royalties) shall be taxable only in accordance with the provisions of Article 13.

(2) Gains from the alienation of any property other than those mentioned in paragraph (1) or in Article 7 (Income from Real Property) shall be taxable only in the Contracting State of which the alienation is a resident.

The Reservation Clause of the treaty states in part:

ARTICLE 1

> Notwithstanding the provisions of Article 14 of the Convention relating to capital gains, both the Philippines and the United States may tax gains from the disposition of an interest in a corporation if its assets consists principally of a real property interest located in that country. Likewise, both countries may tax gain from the disposition of an interest in a partnership, trust or estate to the extent the gain is attributable to a real property interest in one of the countries. The term "real property interest" is to have the meaning it has under the law of the country in which the underlying real property is located.

Thus, under the RP-US Tax Treaty, capital gains from the sale of shares of stock shall be taxable in the state where the alienator is a resident. However, the Reservation Clause provides that such sale may be taxed by both the Philippines and the USA if the interest being disposed is in a corporation whose assets consist principally of a real property interest located in that country. On the reverse side, under the RP-US Tax Treaty, the subject capital gains may be exempt from the Philippine tax if the interest being disposed in a corporation, and the shares transferred are of GECRF PH which is a domestic corporation.

In the instant case, it was proven that petitioner GE Consumer Finance, Inc. is a non-resident foreign corporation, and the shares transferred are of GECRF PH which is a domestic corporation.

xxx xxx xxx

It is now necessary to determine whether the assets of GECRF PH consist principally of real property interest in the Philippines. On this matter, Revenue Regulations (RR) No. 4-86 is helpful. xxx

Summarizing the provisions thus: (1) capital gains derived by residents of other Contracting States from the disposition of shares or interests in a Philippine corporation are taxable in the Philippines only if the assets of the corporation consist principally of real property interest located in the Philippines; (2) real property interests are interests on properties enumerated in RR 4-

86, including real properties as defined under Philippine law; (3) principally means more than fifty percent (50%) of the entire assets in terms of value; and (4) the value of the assets shall be determined from the financial statements as of the date of the sale, as verified by the BIR.

Applying the foregoing to the instant case, petitioner presented GECRF PH's 2012 Audited Financial Statements, and unaudited Statement of Financial Position and Comprehensive Income for 2013. Examination of the foregoing documents show the real property interest for the following years:

	July 31, 2013 (unaudited)	December 31, 2012	December 31, 2011 (restated)
Property and equipment – net	Php 141,654	Php 157,198,206	Php 6,147,384
Total Assets	865,162	777,766,697	657,675,196
Real Property Interest Ratio	**16.37%**	**20.21%**	**00.93%**

As computed, the real property interest of GECRF PH does not exceed 50%, thus it cannot be said to have assets consisting principally of a real property interest in the Philippines. Therefore, petitioner's capital gains derived from the transfer of its shares of stock in GECRF PH shall be exempt from CGT in the Philippines, pursuant to the RP-US Tax Treaty."

Considering the foregoing discussion, the Court *En Banc* finds no cogent reason to disturb the assailed Decision and assailed Resolution.

WHEREFORE, premises considered, the Petition for Review is **DENIED** for lack of merit. The assailed Decision dated October 25, 2017 and the assailed Resolution dated January 12, 2018 are **AFFIRMED**.

SO ORDERED.

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

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