REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

CORAL BAY NICKEL CORPORATION, Petitioner,	CTA CASE NO. 8756
	Members:
-versus-	BAUTISTA, *Chairperson*; FABON-VICTORINO, and RINGPIS LIBAN, JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: APR 26 2017 2:05 p.m.

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RESOLUTION

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

Before the Court is respondent's *Motion for Reconsideration* dated February 1, 2017, assailing the Decision dated January 13, 2017, the dispositive portion of which reads:

> **WHEREFORE**, the Petition for Review dated January 8, 2014 filed by Coral Bay Nickel Corporation is hereby GRANTED. Accordingly, the FDDA dated December 6, 2013 issued by respondent Commissioner of Internal Revenue against petitioner for taxable year 2007 for deficiency FWT in the amount of ₱254,721,476.95, inclusive of interest and compromise penalty is hereby **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED.**[1]

[1] Docket, p. 962.

Respondent claims that contrary to the Court's ruling his right to assess petitioner for the months of January to March 2007 has not prescribed. Allegedly, the amount assessed against petitioner is not a tax but a penalty for its failure to withhold tax from its payments made in favor of non-resident foreign entities, a clear violation of its legal obligation as collection agent of the government under the NIRC, as amended. On this account, the three-year prescriptive period to assess and collect taxes under Section 203 of the Tax Code finds no application. Otherwise stated, the subject assessment is imprescriptible and may be issued at any time.

And even if the rule on prescription is applicable, the first waiver of defense of prescription executed by petitioner on April 20, 2010 is valid and binding as respondent's prior consent and acceptance of the said first waiver is inconsequential to its efficacy. Respondent believes that since the reckoning point of the three-year period is April 20, 2010, or the date when the first waiver was executed by petitioner, and not the date when he accepted the same on April 30, 2010, the assessment issued on May 29, 2013 is within the extended prescriptive period, hence, valid.

On the assessment for the periods of April to December 2007, respondent opines that the principle of *Pacta Sunt Servanda* elucidated by the Supreme Court in *Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue*[2] *(Deutsche)* is inapplicable to the present case, since the two cases have different factual milieu and were of different nature. The *Deutsche* case is a claim for refund while the present controversy is an assessment for purposes of collecting taxes.

Further, petitioner violated Section III (2)[3] of Revenue Memorandum Order (RMO) No. 01-2000 which requires the filing of an application to avail tax treaty relief at least 15 days before the subject transaction, i.e. its payment of dividends, interests and royalties in favor of non-resident

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[2] G.R. No. 188550, August 19, 2013.

[3] 2. Any availment of the tax treaty relief shall be preceded by an application by filing BIR Form No. 0901 (Application for Relief from Double Taxation) with ITAD at least 15 days before the transaction i.e. payment of dividends, royalties, etc., accompanied by supporting documents justifying the relief xxx.

foreign entities. In this case, petitioner filed its tax treaty relief applications with respect to the interests and royalties it paid to non-resident foreign entities beyond the fifteen (15)-day period allowed under the pertinent provision. Also, the dividends paid by petitioner did not meet all the requisites for preferential tax treatment under the subject tax treaty. For this reason, the assessment he issued against petitioner should be upheld.

On the other hand, petitioner points out that Section 203 of the Tax Code applies in this case as final withholding tax (FWT) is but a class of internal revenue taxes contemplated under the Tax Code. For this reason, Section 203 of the Tax Code providing the 3-year period to assess and collect taxes applies. Given that respondent's assessment was issued beyond the 3-year prescriptive period on May 29, 2013, the same has clearly prescribed.

Further, the waiver of defense of prescription is a bilateral act between the taxpayer and the Commissioner of Internal Revenue (CIR). It is only upon the acceptance by the CIR of the waiver executed by taxpayer that the waiver becomes effective. Since the first waiver executed by petitioner was accepted by respondent after the 3-year prescriptive period had lapsed, no valid extension was made. Therefore, the assessment for FWT for the periods of January to March 2007 has been barred by prescription.

Invoking the doctrine enunciated in *Deutsche*, petitioner argues that non-compliance with the period prescribed under RMO No. 1-2000 should not deprive it of the benefits it may reap under a Tax Treaty for contracting States should comply with their respective treaty obligations in good faith under the *Pacta Sunt Servanda* principle.

Finally, petitioner claims that respondent may not invoke the presumption of the correctness of assessment as it was able to sufficiently established all the requirements for its entitlement to the relief sought under the Tax Treaty, justifying the cancellation of the assessment for deficiency FWT.

Respondent's motion must fail.

First, the issue of prescription insofar as the deficiency assessment for FWT for the months of January, February, March 2007 is concerned had been amply determined and discussed by the Court in the assailed Decision dated January 13, 2017, particularly in pages 7 to 10 thereof. Apart from the discussion, the tabular presentation of the significant dates clearly shows that the questioned assessment for FWT included in the FLD with attached Details of Discrepancies and Assessment Notices received by petitioner on May 29, 2013 was issued beyond the 3-day prescriptive period mandated in Section 203 of the NIRC, as amended.

The fact that petitioner executed a Waiver of the Defense of Prescription on April 20, 2010 is inconsequential since it became effective only on April 30, 2010, when respondent accepted it. Note that respondent had until February 15, 2010, March 15, 2010 and April 16, 2010 to assess petitioner deficiency FWT for the months of January, February and March 2007, respectively. Thus, when the first Waiver gained efficacy on April 30, 2010, respondent's right to assess for the months January, February and March 2007 had already prescribed.

On respondent's theory that the amount assessed is not a tax but a penalty imposed upon petitioner for its failure to withhold taxes from its payments to non-resident foreign entities, suffice it to say that several provisions of the Tax Code, as amended, indicate that FWT is an internal revenue tax. Foremost of these provisions is Section 21 which enumerates the taxes considered as national internal revenue taxes, thus:

> **Section 21.** *Sources of Revenue.* - The following taxes, fees and charges are deemed to be national internal revenue taxes:
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> (a) Income tax;
> (b) Estate and donor's taxes;
> (c) Value-added tax;
> (d) Other percentage taxes;
> (e) Excise taxes;
> (f) Documentary stamp taxes; and

(g) Such other taxes as are or hereafter may be imposed and collected by the Bureau of Internal Revenue.

The provisions of income tax are in turn enshrined in Title II of the Tax Code, with Sections 57 to 58 thereof as the specific statutory bases for the FWT imposed to certain income payees which are withheld, remitted and paid by the payor to the government

Anent respondent's rejection to the claimed entitlement of petitioner to tax relief under the RP-Japan Tax Treaty, again, the same has been amply discussed in pages 11 to 17 of the assailed Decision. As ruled by the Court, petitioner is entitled to and correctly applied the preferential tax treaty rate of 10% on dividends, interest, and royalties it paid to non-resident foreign entities justifying the cancellation of deficiency FWT assessment for the months of April to December 2007, for lack of legal basis.

WHEREFORE, there being no compelling legal arguments raised that will depart, much less modify the assailed Decision of January 13, 2017, respondent's *Motion for Reconsideration* dated February 1, 2017 is **DENIED**, for lack of merit.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

LOVELL R. BAUTISTA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice