REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

DOOSAN HEAVY INDUSTRIES & CONSTRUCTION CO. LTD. (PHILIPPINE BRANCH),
Respondent.

CTA EB CASE NO. 1090
(CTA Case No. 8462)

Present:

DEL ROSARIO, *PJ,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

AUG 04 2014 apolinario 9:00 a.m.

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DECISION

DEL ROSARIO, PJ.:

This is a Petition for Review filed by petitioner Commissioner of Internal Revenue on December 09, 2013 seeking the reversal and setting aside of the Decision[1] dated September 23, 2013 and the Resolution[2] dated November 7, 2013 of the Second Division[3] of this Court in CTA Case No.

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[1] *Rollo*, pp. 16 to 27.
[2] *Rollo*, pp. 29 to 32.
[3] Composed of Senior Associate Justice Juanito C. Castañeda, Jr. as Chairperson, Associate Justice Caesar A. Casanova and Associate Justice Amelia R. Cotangco-Manalastas as members.

8462, entitled *Doosan Heavy Industries & Construction Co. Ltd. (Philippine Branch) vs. Commissioner of Internal Revenue.*

The respective dispositive portions of the assailed Decision and Resolution are quoted hereunder:

Assailed Decision:

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **GRANTED.** Accordingly, respondent is hereby **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the full amount of P38,380,606.00, representing petitioner's excess creditable withholding taxes as of December 31, 2009.
>
> **SO ORDERED.**"

Assailed Resolution:

> "**WHEREFORE**, premises considered, the instant Motion for Reconsideration is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

THE PARTIES

Petitioner is the Commissioner of Internal Revenue (CIR), who is duly appointed and empowered to perform the duties of her office, including, among others, the duty to act and approve claims for refund or tax credit as provided by law, with office address at the Bureau of Internal Revenue (BIR), National Office Building, BIR Road, Diliman, Quezon City.[4]

Respondent Doosan Heavy Industries & Construction Co. Ltd. (Philippine Branch) (Doosan) is a foreign company organized and existing under and by virtue of the laws of the Republic of Korea. It established its Philippine Branch and obtained a license to transact business in the Philippines from the Securities and Exchange Commission (SEC) on April 4, 2008. It started commercial operation in April 2008 and has its principal office at KEPCO Power Plant, Colon, City of Naga, Cebu.[5]

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[4] Petition for Review, *Rollo*, p. 6.
[5] *Id.*, pp. 6 to 7.

THE FACTS

On April 14, 2010, respondent Doosan filed with the BIR its Annual Income Tax Return (Annual ITR) for calendar year 2009 which shows a net loss of ₱387,622,107.00 and an overpayment of income tax of ₱38,380,606.00. Respondent Doosan opted to be issued a tax credit certificate (TCC) by marking the appropriate box in the ITR. [6]

On January 21, 2011, respondent Doosan filed a written claim for issuance of a TCC with the BIR [7] in the amount of ₱38,380,606.37, representing respondent Doosan's excess/unutilized creditable withholding taxes (CWTs) for taxable year 2009.

On April 12, 2012, in order to preserve its right and to toll the running of the prescriptive period for its judicial claim, respondent Doosan filed a Petition for Review before the Court in Division.

On May 23, 2012, petitioner filed her Answer and raised the following special and affirmative defenses: (a) respondent Doosan failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected; (b) Section 76 of the National Internal Revenue Code (NIRC) of 1997, as amended, explicitly states that once a taxpayer chooses the option of carry-over, it shall be irrevocable for the taxable period and no application for a tax refund or TCC shall then be allowed *(Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, G.R. Nos. 156637/162004, December 14, 2005)*; (c) taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable; (d) the burden of proof is on the taxpayer to establish its right to refund and failure to adduce sufficient proof is fatal to the action for tax/credit; (e) it is incumbent upon respondent Doosan to show that it has complied with the provisions of Section 76 in relation to Sections 204 and 229 of the NIRC of 1997, as amended, including Revenue Regulations (RR) No. 2-98, as amended; and, (f) claims for refund are construed strictly against the claimant for the same partakes the nature of exemption from taxation *(Commissioner of Internal Revenue vs. Ledesma, G.R. No. L-13509, January 30, 1970, 31 SCRA 95)* and as such, they are looked upon with disfavor *(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121)*.

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[6] Exhibit "A".
[7] Exhibit "M".

After trial, the Court in Division issued the assailed Decision granting the petition for review and ordering the refund or issuance of a TCC in favor of respondent Doosan in the amount of ₱38,380,606.00. Aggrieved, petitioner CIR filed a Motion for Reconsideration on October 10, 2013 which was however denied by the Court in Division in the assailed Resolution.

Hence, petitioner CIR filed the subject Petition for Review before the Court *En Banc* on December 9, 2013, and raised the following issues and grounds, *viz*:

> **"ISSUE**
>
> Whether or not the evidence presented by respondent are sufficient enough to conclude that respondent is entitled to its claim for refund of its alleged unutilized creditable withholding taxes for taxable year 2009.
>
> **GROUND FOR THIS PETITION**
>
> 1. The Second Division of the Honorable Tax Court erred in ordering the refund in favor of respondent on [sic] its alleged unutilized creditable withholding taxes for taxable year 2009 despite the fact that there is no proof of actual remittance to the BIR of the withheld taxes and its failure to present the withholding agent/payor who will attest on the validity of the contents of the CWT certificates.
>
> 2. The Second Division of the Honorable Tax Court erred in not applying the rule that tax refunds being in the nature of tax exemption are construed *strictissimi juris* against the person or entity claiming the exemption."[8]

After the filing of respondent Doosan's Comment on December 23, 2013, the Court *En Banc* required both parties to submit their respective memoranda within thirty (30) days from notice.[9] Respondent Doosan filed its Memorandum[10] on March 03, 2014. Petitioner CIR, on the other hand, failed to file her memorandum within the prescribed period.[11] On May 19, 2014, the Court *En Banc* submitted the case for decision.[12]

[8] Petition for Review, *Rollo*, pp. 7 to 8.
[9] Resolution dated February 03, 2014, *Rollo*, pp. 54 to 55.
[10] *Rollo*, pp. 56 to 72.
[11] *Rollo*, p. 73.
[12] *Rollo*, unpaginated.

THE PARTIES' ARGUMENTS

Petitioner CIR's Arguments

In insisting that respondent Doosan is not entitled to its claim for refund of its alleged unutilized creditable withholding taxes for taxable year 2009, petitioner CIR argues that proof of actual remittance to the BIR of the withheld taxes and testimonial evidence of the payors and withholding agents are required to prove the withholding of said taxes. Petitioner CIR stressed that the best proof of remittance is the certification from the Revenue Accounting Division (RAD) of the BIR. Since respondent Doosan did not present the payor and withholding agent and considering that it did not present a certification from BIR RAD, petitioner CIR concludes that respondent Doosan failed to prove the fact of withholding and the remittance made to the BIR. Respondent point out that the Certificates of Creditable Withholding Tax at Source were identified by a person other than the one who issued them; hence, such should not have been given probative value for being hearsay pursuant to Section 36, Rule 130 of the Rules of Court.

Citing the ruling of this Court in *Jardine Lloyd Thompson Insurance Brokers, Inc. vs. Commissioner of Internal Revenue*[13] *(Jardine case)* and *Havi Food Services, Phils., Inc. vs. Commissioner of Internal Revenue*[14] *(Havi case),* petitioner CIR further asserts that respondent Doosan's failure to present the necessary documents whereby the income payments related to the claimed creditable withholding taxes may be traced and confirmed as forming part of the taxable income in the income tax return is fatal to its claim.

Respondent Doosan's Counter-Arguments

Respondent Doosan posits that proof of actual remittance to the BIR and the testimony of the withholding agent are not necessary to prove withholding of tax under the law and settled jurisprudence. Petitioner Doosan invokes *CIR vs. Asian Transmission Corporation*[15] where the Supreme Court, in interpreting the provision of RR No. 2-98, categorically stated that the claimant-taxpayer need not prove actual remittance of the tax withheld by the withholding agent to the BIR. This notwithstanding,

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[13] CTA Case No. 7916, September 23, 2011.
[14] CTA Case No. 7735, February 28, 2011.
[15] G.R. No. 179617, January 19, 2011.

respondent Doosan presented as its Exhibit "O" the Certificate of Remittances issued by the BIR Revenue Accounting Division.

Respondent Doosan further explains that petitioner CIR's failure to make an objection or opposition when respondent Doosan formally offered its documentary evidence serves as a waiver of its right to question the probative value of the same. Notably, no objection or comment on respondent Doosan's Formal Offer of Evidence dated November 21, 2012 was ever filed by petitioner CIR before the Court in Division. It was only in her Motion for Reconsideration of the assailed Decision wherein petitioner CIR raised the issue on the probative value of respondent Doosan's documentary evidence.

Respondent Doosan stresses that it was able to prove that the income payments from which taxes were withheld was included in its gross income as reflected in the income tax return as shown by the evidence it presented in court.

Lastly, respondent Doosan submits that petitioner CIR's reliance on the *Jardine and Havi* cases is misplaced. Unlike in the *Jardine* and *havi* cases, respondent Doosan allegedly was able to present documentary and testimonial evidence which sufficiently proved that the income from which the CWTs being claimed for refund were withheld was included as part of the gross income reflected in its Annual Income Tax Return for taxable year 2009.

THE RULING OF THE COURT EN BANC

In the assailed Decision, the Court in Division aptly declared that aside from compliance with Section 76 of the 1997 NIRC, as amended, a taxpayer must satisfy the following requisites to be entitled to a refund or issuance of a TCC representing excess CWTs, to wit:

1. The claim must be filed with the CIR within the two-year period from the date of payment of the tax;

2. It must be shown on the return that the income received was declared as part of the gross income; and,

3. The fact of withholding must be established by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of tax withheld.

In the instant petition for review, petitioner CIR *in esse* questions respondent Doosan's compliance with the above-stated second and third requisites.

With regard to the second requisite, petitioner CIR insists that respondent Doosan's failure to present documents such as, but not limited to, official receipts, sales invoices, detailed general ledger, sales register, reconciliation schedules or any other documents whereby the income payments related to the claimed creditable withholding taxes may be traced and confirmed as forming part of the taxable income reflected in the Annual Income Tax Returns, is fatal to its claim.

The Court *En Banc* finds petitioner's contentions bereft of merit.

A scrutiny of the evidence on record shows that respondent Doosan presented the following documentary and testimonial evidence to prove that income from which taxes were withheld forms part of its gross income:

Exhibit	Nature of Documents
A	Annual Income Tax Return for CY 2009 and Certificates of Creditable Withholding Tax at Source and other attachments
E and E-5	Annual Income Tax Return for CY 2010, both original and amended returns with their attachments
J	Annual Income Tax Return for CY 2008 and attachments
M	Letter to BIR RDO No. 83 dated January 21, 2011 requesting for issuance of Tax Credit Certificate
M-3	Application for Tax Credit/Refunds – BIR Form 1914
M-7	Progress Rate for Construction Work
N	Schedule of Sales for 2009
P	Summary of Billings and attachments
P-5 to P-17	Billings
Q	Summary of Collections for CY 2009
R, R-1 to R-12	Official Receipts Nos. 0013 to 22, 24, 25 and 27
S	Summary of VAT Returns for CY 2009
S-3, S-4, S-5 and S-6	Quarterly VAT Returns for the 1st and 4th quarters of CY 2009
T and CC	Judicial Affidavit of witness Ms. Emma Bacus
U	Construction Contract between Kepco SPC Power Corporation and Doosan Heavy Industries & Construction Co., Ltd.
V	Change Order dated September 15, 2009

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W	Quarterly VAT Returns for the 4th Quarter of CY 2008
Y	ICPA Report dated September 15, 2012
Z	Judicial Affidavit of ICPA, Ms. Luisa A. Caleon
AA	Supplemental Judicial Affidavit of ICPA, Ms. Luisa A. Caleon
BB	Supplemental ICPA Report dated October 9, 2012

After reviewing the afore-said documents, the Court *En Banc* concurs with the findings of the Court in Division that respondent Doosan was able to prove that the subject income payments were declared as part of its gross income for CY 2009. The Court *En Banc* quotes with approval the disquisition of the Court in Division on this matter, *viz.*:

> "Records show that the claimed CWT in the amount of P38,380,606.37 were withheld on income payments in the amount of P1,919,030,319.06 received by petitioner (now respondent) in the year 2009 from its contract with Kepco SPC Power Corporation in the construction of Cebu Coal Fired Power Plant which is the very same amount reflected in petitioner's Summary of Billings and Summary of Collections. However, out of the total collections of P1,919,030,319.06. only the amount of P1,512,027,856.00 was declared as Contract Revenues in petitioner's (now respondent) 2009 Annual ITR and Statement of Comprehensive Income. This is due to the fact that petitioner (now respondent) uses the Percentage of Completion Method in determining the appropriate amount of revenues to be recognized in a given period which is in accordance with Section 48 of the NIRC of 1997, as amended. Furthermore, petitioner (now respondent), in determining the stage of completion, made reference to the weight of the project at the end of each reporting period as a percentage of total estimated weight (per engineering plan) of the project.
>
> Consequently, the Contract Revenues of P1,512,027,856.00 reflected in petitioner's (now respondent) 2009 Annual ITR was arrived at by multiplying the Revised Contract Price of P3,545,606,981.00, net of VAT, with the percentage of completion rate of 54.235% as of December 31, 2009, less the Realized Contract Revenue in CY 2008, as shown below:
>
> xxx xxx xxx
>
> The remaining amount of P407,002,463.06 was recorded as liability under the account "Unearned Contract Revenues".
>
> The Independent CPA confirmed the computations and findings as correct and in order, as stated in her report in the following manner:
>
>> 2.1 I found that the income reported for the year is computed based on the percentage of completion at the end of the calendar year which is in accordance with Section 48

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> of the Tax Code requiring the reporting of income based on percentage of completion for long term contracts.
>
> The Contract Revenue for CY 2009 is correct and computed based on the Contract Price under the Construction Contract and Change Order multiplied by the agreed percentage of completion rate of 54.235% at December 31, 2009 less the amount accomplished in CY 2008.
>
> 2.2 As shown in Findings and Observations 1 of this report, I noted that the income payments on billings collected in CY 2009 which was subjected to creditable withholding tax amounted to P1,919,030,319.06. Portion of the billings was recorded as Contract Revenues in the amount of P1,512,027,855.74 and the balance of P407,002,463.32 is taken up as Unearned Contract Revenues.
>
> 2.3 The cumulative balance of the Unearned Contract Revenue at December 31, 2009 was recognized as part of the income realized in CY 2010 amounting to P1,444,788,657.
>
> Hence, petitioner (now respondent) has sufficiently proven that the income payment from which the creditable withholding tax of P38,380,606.00 was withheld was declared in the Annual ITR for CY's 2009 and 2010."[16]

Based on the documentary and testimonial evidence presented by respondent Doosan, it has sufficiently established that the income from which the CWTs being claimed for refund were withheld was indeed included as part of the gross income reflected in its Annual Income Tax Return for taxable year 2009.

Petitioner CIR also questions respondent Doosan's compliance with the third requirement and maintains that the best proof of actual remittance of the taxes withheld to the BIR is the certification from the BIR RAD.

As pronounced by the Court in Division in the assailed Resolution, respondent Doosan need not prove that there was an actual remittance of the taxes withheld to the BIR. Pursuant to Section 2.58.3 of RR No. 2-98, the remittance of the taxes withheld to the BIR is the responsibility of the withholding agent and not the payee. On this point, the pronouncement of

[16] Rollo, pp. 24 to 25.

the Supreme Court in *Commissioner of Internal Revenue vs. Asian Transmission Corporation,*[17] is instructive:

> "xxx **proof of actual remittance by the respondent is not needed in order to prove withholding and remittance of taxes to petitioner.** Section 2.58.3 (B) of Revenue Regulation No. 2-98 clearly provides that proof of remittance is the responsibility of the withholding agent and not of the taxpayer-refund claimant. It should be borne in mind by the petitioner that payors of withholding taxes are by themselves constituted as withholding agents of the BIR. The taxes they withhold are held in trust for the government. In the event that the withholding agents commit fraud against the government by not remitting the taxes withheld, **such act should not prejudice herein respondent who has been duly withheld taxes by the withholding agents acting under government authority.** Moreover, pursuant to Section 57 and 58 of the NIRC of 1997, as amended, the withholding of income tax and the remittance thereof to the BIR is the responsibility of the payor and not the payee. Therefore, respondent, x x x has no control over the remittance of the taxes withheld from its income by the withholding agent or payor who is the agent of the petitioner. The Certificates of Creditable Tax Withheld at Source issued by the withholding agents of the government are *prima facie* proof of actual payment by herein respondent-payee to the government itself through said agents. **We stress that the pertinent provisions of law and established jurisprudence evidently demonstrate that there is no need for the claimant, respondent in this case, to prove actual remittance by the withholding agent (payor) to the BIR."** (*Emphasis supplied*)

In other words, proof of actual remittance of the taxes withheld to the BIR is not indispensable in a claim for refund of excess CWTs. Respondent Doosan is only required to establish the fact of withholding through the withholding tax certificates (BIR Form No. 2307) duly issued by its payors.[18] This notwithstanding, respondent Doosan even presented as Exhibit "O" the Certification of Remittances issued by the BIR RAD.

Accordingly, the Court *En Banc* sustains the ruling of the Court in Division with regard to respondent Doosan's compliance with the third requisite, to wit:

> "Petitioner (now respondent) likewise satisfied the third requisite. Petitioner presented Certificates of Creditable Tax Withheld at Source (BIR Form No. 2307) duly issued by KEPCO SPC Power Corporation. In addition, petitioner presented the two reports of the Court-commissioned

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[17] G.R. No. 179617, January 19, 2011.
[18] Commissioner of Internal Revenue vs. Mirant (Philippines) Operations, Corporation, G.R. No. 171742, June 15, 2011, citing Commissioner of Internal Revenue v. Far East Bank & Trust Company (now Bank of the Philippine Islands), G.R. No. 173854, March 15, 2010, 615 SCRA 417.

> Independent Certified Public Accountant (CPA) dated September 15, 2012 and October 9, 2012. The Independent CPA confirmed that the total creditable withheld at source were properly supported by certificates issued by the customer of petitioner (now respondent) showing CWT in the total amount of P38,380,606.00, xxx"

Lastly, anent Petitioner CIR's argument that the Certificates of Creditable Tax Withheld at Source are not sufficient to establish the fact of withholding as the withholding agent who executed the aforementioned forms was not presented in open court, the Court *En Banc* finds the same insignificant in determining respondent Doosan's entitlement to the claim for refund or issuance of tax credit certificate. Parenthetically, the Court *En Banc* found that the Certificates of Creditable Tax Withheld at Source submitted in evidence by respondent Doosan are complete with relevant details which are needed to evaluate respondent Doosan's claim. Besides, respondent Doosan even went as far as to submit the Certificate of Remittances (Exhibit "O") issued by the BIR RAD to prove the actual remittance of the CWTs to the BIR. In fine, respondent has sufficiently established not only the fact of withholding of the CWTs but also their remittance to the BIR.

Finding no reversible error, the Court *En Banc* has no alternative, but to sustain the findings and conclusion of the Second Division which granted the subject claim for refund or issuance of TCC.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the assailed Decision dated September 23, 2013 and the Resolution dated November 7, 2013 of the Second Division of this Court which granted respondent Doosan's claim for refund representing its excess and unutilized creditable withholding taxes for CY 2009 in the total amount of **THIRTY EIGHT MILLION THREE HUNDRED EIGHTY THOUSAND SIX HUNDRED SIX PESOS (Php38,380,606.00)** are hereby **AFFIRMED.**

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII 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 *En Banc*.

ROMAN G. DEL ROSARIO
Presiding Justice