REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-*versus*-

TRUMP MARKS PHILIPPINES, LLC,
Respondent.

CTA *EB* NO. 1826
(CTA Case No. 8969)

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TRUMP MARKS PHILIPPINES, LLC,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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CTA *EB* NO. 1830
(CTA Case No. 8969)

Present:

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, *and*
MODESTO-SAN PEDRO, *JJ.*

Promulgated:

NOV 08 2019
4:22 p.m.

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DECISION

MANAHAN, J.:

For review before this Court are the Petitions for Review filed by petitioner Commissioner of Internal Revenue (CIR) on April 10, 2018 docketed as CTA *EB* No. 1826 and by petitioner Trump Marks Philippines LLC (Trump Marks) filed on May 2, 2018 and docketed as CTA *EB* No. 1830 pursuant to Section 7 of Republic Act No.1125, as amended and Rule 4, Section 2 (a) (2) of the Revised Rules of the Court of Tax Appeals (RRCTA). Both petitions seek the reversal and setting aside of the Decision of the First Division (Court in Division) promulgated on November 3, 2017 (CTA Case No. 8969) and its Resolution dated March 21, 2018.

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

Decision dated November 3, 2017:

WHEREFORE, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED TO REFUND** to petitioner the amount of **P14,483,633.30** representing excess FWT remittances on royalty payments made by Century City to petitioner for the months of December 2012 to July 2014.

SO ORDERED.

Resolution dated March 21, 2018:

WHEREFORE, premises considered, respondent's **Motion for Reconsideration (Re: Decision dated November 03, 2017),** and petitioner's **Motion for Partial Reconsideration (of Decision dated 3 November 2017)** are hereby **DENIED** for lack of merit.

SO ORDERED.

THE PARTIES

Trump Marks is a non-resident foreign corporation duly organized and existing under the laws of Delaware, United States of America (USA) with principal office address at 725 Fifth Avenue, New York, USA.

On the other hand, respondent is the Commissioner of the Bureau of Internal Revenue duly appointed and empowered to perform the duties of his office, including, among others, the duty to act on and approve claims for refund or tax credit as provided by law. He holds office at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

THE FACTS

The facts as stated in the Decision of the Court in Division and as established by the records of this case, read as follows:

> "On May 8, 2008, Mr. Donald J. Trump and petitioner entered into an Assignment Agreement where Mr. Trump assigned to petitioner his right, title and interest to the use of the Trump Mark in the Philippines.
>
> The Trump Mark consists of names and marks "TRUMP" and "TRUMP TOWER" as used on or in connection with a variety of goods and services such as real estate services, construction and development and listing, leasing and managing commercial and residential properties.
>
> Petitioner and Century Luxury Properties, Inc., ("Century Luxury" for brevity) entered into a License Agreement, where petitioner granted Century Luxury a non-exclusive, non-assignable and non-transferrable right to use Trump Mark in connection with the construction and marketing of first-class, high rise, luxury residential condominium building on a certain land owned by Century City Development Corporation ("Century City" for brevity) located at Kalayaan Avenue and Salamanca Street, Makati City, Philippines.
>
> Petitioner is not engaged in business in the Philippines as evidenced by a Certification of Non-Registration of the Company issued by the Securities and Exchange Commission (SEC); while Century Luxury and Century City are domestic corporations duly organized and existing in the Philippines, with office address at 21st Floor, Pacific Star Building, Senator

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Gil J. Puyat Avenue corner Makati Avenue, Makati City, Philippines.

On May 29, 2009, petitioner and Century Luxury amended the License Agreement and entered into the First Amendment.

On July 25, 2011, Century Luxury and Century City entered into a Deed of Assignment and Assumption of Obligations, where Century Luxury transferred to Century City its rights and obligations under the License Agreement, as amended.

Its consideration for the use of the Trump Mark, Century City agreed to pay petitioner license fees which consist of the up-front fee, extension fees, gross sales fees, and commercial component rent fee.

The License Agreement and its Amendment have been duly registered with the Philippine Intellectual Property Office (IPO) under Certificate of Registration No. 5-2008-00058.

On November 22, 2011, petitioner filed an Application for Tax Treaty Relief (TTRA) with the BIR's International Tax Affairs Division (ITAD) to request confirmation that the royalties paid by Century City to petitioner are subject to preferential income tax treaty rate of ten percent (10%) pursuant to Article 13(2) (b) (iii) of the Convention between the Government and the Republic of the Philippines and the Government of the United States of America with Respect to Taxes on Income (hereinafter referred to as "RP-US Tax Treaty").

The BIR issued BIR Ruling No. ITAD 026-14 on April 4, 2014, confirming the applicability of the preferential income tax treaty rate of 10% on royalties paid by Century City to petitioner from November 23, 2011 and thereafter, pursuant to Article 13 (2) (b) (iii) of the RP-US Tax Treaty.

For the months of December 2011 to July 2014, while the TTRA was being processed, Century City allegedly remitted to petitioner royalty payments in the aggregate amount of P98,894,977.00 and withheld from said payments thirty percent (30%) final withholding tax (FWT) in the aggregate amount of P29,668,492.94) instead of the 10%preferential tax rate in the aggregate amount of P9,889,497.70.

Thus, on December 1, 2014, petitioner filed with the BIR Revenue District Office No. 39 an administrative claim for cash refund in the total amount of P19,778,995.24, corresponding to the alleged excess final withholding tax (FWT) on royalty payments withheld and remitted by Century City for the period covering December 2011 to July 2014, with the following details:

Date of Remittance of Royalties	Royalties Paid	30% Withholding Tax Paid	Date of Payment	10% Withholding Tax Due	Excess Withholding Tax
7-Dec-11	₱ 509,564.00	₱ 152,869.20	10-Jan-12	₱ 50,956.40	₱ 101,912.80
9-Jan-12	1,710,796.00	513,238.80	10-Apr-12	171,079.60	342,159.20
10-Feb-12	4,870,641.00	1,461,192.20	10-Apr-12	487,064.10	974,128.10
7-Mar-12	2,252,675.00	675,802.50	10-Apr-12	225,267.50	450,535.00
10-Apr-12	2,727,685.00	818,305.49	10-May-12	272,768.50	545,536.99
16-May-12	3,536,790.00	1,061,037.13	11-Jun-12	353,679.00	707,358.13
4-Jun-12	1,344,490.00	403,346.86	10-Jul-12	134,449.00	268,897.86
3-Jul-12	1,913,188.00	573,956.32	10-Sep-12	191,318.80	382,637.52
31-Jul-12	2,265,559.00	679,667.62	10-Sep-12	226,555.90	453,111.72
4-Sep-12	1,812,681.00	543,804.18	12-Nov-12	181,268.10	362,536.08
9-Oct-12	2,122,028.00	636,608.28	12-Nov-12	212,202.80	424,405.48
12-Nov-12	2,573,140.00	771,942.00	15-Jan-13	257,314.00	514,628.00
11-Dec-12	3,298,285.00	989,485.40	15-Jan-13	329,828.50	659,656.90
2-Jan-13	6,935,729.00	2,080,718.58	11-Mar-13	693,572.90	1,387,145.68
7-Feb-13	4,816,768.00	1,445,030.28	11-Mar-13	481,676.80	963,353.48
1-Apr-13	1,666,378.00	499,913.26	11-Apr-13	166,637.80	333,275.46
5-Apr-13	1,021,016.00	306,304.80	9-May-13	102,101.60	204,203.20
10-May-13	1,499,745.00	449,923.56	10-Jun-13	149,974.50	299,949.06
6-Jun-13	7,071,359.00	2,121,407.70	10-Jul-13	707,135.90	1,414,271.80
18-Jul-13	3,896,996.00	1,169,098.75	8-Aug-13	389,699.60	779,399.15
1-Aug-13	1,485,548.00	445,664.40	11-Sep-13	148,554.80	297,109.60
28-Aug-13	6,251,897.00	1,875,569.11	11-Sep-13	625,189.70	1,250,379.41
25-Sep-13	4,702,377.00	1,410,713.10	14-Oct-13	470,237.70	940,475.40
9-Nov-13	1,767,583.00	530,274.92	10-Dec-13	176,758.30	353,516.62
13-Dec-13	2,239,154.00	671,746.20	20-Jan-14	223,915.40	447,830.80
9-Jan-14	1,526,754.00	458,026.20	20-Jan-14	152,675.40	305,350.80
3-Feb-14	3,545,319.00	1,063,595.76	10-Mar-14	354,531.90	709,063.86
4-Mar-14	2,998,603.00	899,580.90	13-May-14	299,860.30	599,720.60
15-Apr-14	3,037,512.00	911,253.57	9-Jun-14	303,751.20	607,502.37
21-May-14	7,936,867.00	2,381,060.10	9-Jun-14	793,686.70	1,587,373.40
5-Jun-14	3,341,968.00	1,002,590.55	11-Jul-14	334,196.80	668,393.75
9-Jul-14	2,215,882.00	664,764.63	14-Aug-14	221,588.20	443,176.43
	₱98,894,977.00	**₱29,668,492.94**		**₱9,889,497.70**	**₱19,778,995.24**

Due to the inaction of respondent on petitioner's administrative claim, the instant Petition for Review was filed before this Court on January 14, 2015.

On March 25, 2015, respondent filed his Answer interposing the defense of prescription."

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On November 3, 2017, the Court in Division rendered the assailed Decision partially granting a tax refund in favor of Trump Marks in the amount of P14,483,633.30 representing the excess FWT remittances on royalty payments made by Century City to Trump Marks for the months of December 2012 to July 2014.

On November 20, 2017, the CIR filed a *Motion for Reconsideration (Re: Decision dated November 03, 2017)* while Trump Marks filed a *Motion for Partial Reconsideration (of the Decision dated 3 November 2017)* on November 22, 2017.

In a Resolution dated March 21, 2018, the Court in Division denied both motions for lack of merit.

On April 2, 2018, Trump Marks received a copy of the Resolution dated March 21, 2018 and subsequently filed a Petition for Review before the Court *En Banc* on May 2, 2018 docketed as CTA *EB* No. 1830 assailing the Decision promulgated by the Court in Division on November 3, 2017.

On March 23, 2018, the CIR received a copy of the Resolution dated March 21, 2018 and subsequently filed a Petition for Review before the Court *En Banc* docketed as CTA *EB* No. 1826 on April 10, 2018.

In a Resolution dated May 30, 2018[1], the Court *En Banc* ordered both respondents (in CTA *EB* Nos. 1826 and 1830) to file their respective comments to the Petitions for Review. In compliance, respondent Trump Marks filed its Comment on July 6, 2018 in CTA *EB* No. 1830, while respondent CIR failed to file his Comment in CTA *EB* No. 1826 within the time prescribed by the Court.

In the Resolution dated July 30, 2018[2], the Court *En Banc* directed both parties to file their respective memoranda in the consolidated cases (CTA *EB* Nos. 1526 and 1830) within thirty (30) days from receipt thereof.

On October 1, 2018, Trump Marks filed its *Memorandum* while the CIR failed to file his Memorandum within the time prescribed by the Court. Thereafter, in a Resolution dated

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[1] EB Docket, (CTA EB No. 1826), pp. 55-56.
[2] EB Docket, (CTA EB No. 1826), pp. 69-70.

November 15, 2018[3], the consolidated cases were deemed submitted for decision by the Court *En Banc*.

ISSUES AND ASSIGNMENT OF ERRORS

For CTA *EB* No. 1830

Trump Marks assigns the following alleged error committed by the Court in Division in its Petition for Review, to wit:

> "The Honorable First Division erred in denying Petitioner's claim for refund with respect to the Subject Claim on the ground that the same was filed beyond the two-year prescriptive period for filing administrative and judicial claims for refund as provided under Sections 204 (C) and 229 of the 1997 National Internal Revenue Code."

Trump Marks' arguments:

Trump Marks initially challenges the denial by the Court of a portion of its claim for refund for being filed out of time. In particular, the assailed Decision reduced the amount of refund by P5,013,219.32 which corresponds to the period of the claim which was filed beyond the two-year period, detailed as follows:

Exhibit	Period Covered	Date of Payment of FWT	Last Day to File Administrative and Judicial Claims	Excess FWT Paid
P-15 ,P-15-1	Dec. 2011	10-Jan-12	10-Jan-14	₱ 101,912.75
P-17, P-17-1	March 2012	10-Apr-12	10-Apr-14	1,766,822.33
P-18, P-18-1	April 2012	10-May-12	10-May-14	545,536.99
P-19, P-19-1	May 2012	11-Jun-12	11-Jun-14	707,358.09
P-20, P-20-1	June 2012	10-Jul-12	10-Jul-14	268,897.91
P-21, P-21-1	Aug. 2012	10-Sep-12	10-Sep-14	835,749.29
P-22, P-22-1	Oct. 2012	12-Nov-12	12-Nov-14	786,941.96
			Prescribed Claim	**₱5,013,219.32**

Trump Marks submits the theory that the two-year prescriptive period for filing the administrative and judicial claims for refund as provided under Section 204 (C) and Section 229 of the 1997 National Internal Revenue Code (NIRC), as amended, should be deemed suspended during the

[3] EB Docket, CTA EB No. 1826, pp.100-101.

time when Revenue Memorandum Order (RMO) No. 72-2010 was in effect. Trump Marks claims that it was precluded from pursuing a claim for refund because the rules prevailing from August 2010 to August 2013 (due to RMO 72-2010) issued on August 25, 2010, imposed a condition of first securing an approved Tax Treaty Relief Application (TTRA) before it may be entitled to the preferential tax rate under the applicable tax treaty. According to Trump Marks, even the CTA *En Banc* held that a favorable ruling from the ITAD is necessary prior to the availment of the preferential tax rate under a tax treaty. Trump Marks further narrates that it was only in 2013 when the Supreme Court ruled that the application for the availment of a tax treaty relief with the BIR should not operate to divest entitlement to the preferential tax rate under an applicable treaty.[4] That prior to these developments, Trump Marks was not able to file the necessary claims for refund and reiterates that the two year period (for claiming internal revenue taxes) should be suspended in its favor.

Trump Marks also invokes the principle of *solutio indebiti* to establish its entitlement to the claim for refund. It opines that if it has clearly proven during trial that it actually remitted the taxes to the BIR, then the overpaid amount should be returned by the government to the taxpayer as a matter of right. It cited numerous Supreme Court decisions that recognize and applied the principle of *solutio indebiti* even against the government and in particular to tax cases.[5]

Finally, Trump Marks argues that justice, equity and fair play dictate that petitioner is entitled to its claim for refund and that its failure to timely file some of its claims for refund with the administrative and judicial bodies was not its fault but was attributable to the following:

1. It took the CIR two years to act on its TTRA;

2. Erroneous interpretation and implementation of the law which was subsequently reversed by the Supreme Court;

3. There was no issuance from the CIR withdrawing RMO 72-2010. It was only on March 28, 2017 when the CIR

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[4] Deutsche Bank AG Manila Branch vs. CIR, G.R. No. 188550, August 19, 2013.
[5] Southern Philippines Corp. vs. CIR, G.R. No. 179632, October 19, 2011; CIR vs. Fortune Tobacco Corp. vs. CIR, G.R. Nos 167274-75, July 21, 2008.

issued RMO 8-17 amending RMO 72-10 with respect to the procedures to be followed in claiming the preferential tax rates.

The records show that the CIR neither submitted a Comment or Memorandum to articulate its opposition to the above arguments presented by Trump Marks in its Petition for Review.

For CTA *EB* No. 1826:

On the other hand, the CIR raises the following arguments relative to the decision of the Court in Division:

A. Trump Marks is not entitled to a refund or issuance of a tax credit certificate for the total amount of Php14,483,633.30, corresponding to the withholding tax remittances on royalty payments made by Century City to petitioner for the months of December 2011 to July 2014.

B. Respondent being a non-resident foreign corporation, is subject to thirty percent (30%) income tax on royalties from Philippine sources.

The CIR then submitted the following issue for the resolution of the Court *En Banc*:

> "Whether or not respondent is entitled to a refund or issuance of tax credit certificate for the total amount of P14,483,633.30, corresponding to the withholding tax remittances on royalty payments made by Century City to petitioner for the months of December 2011 to July 2014."

CIR's arguments

The CIR avers that Trump Marks is not entitled to a refund for the entire amount claimed because it failed to comply with the legal and documentary requirements provided under Section 229 of the 1997 NIRC, as amended, one of which is the timely filing of the administrative and judicial claims for refund. The CIR claims that Trump Marks should have filed both the administrative and judicial claims for refund within two (2) years from the date of payment of the final withholding taxes (FWT). He asserts that, considering that the Petition for Review with the Court in Division was filed only on January 14, 2015, Trump Marks is already barred from claiming a refund of withholding taxes paid and remitted by Century City on December 7, 2011 up to January 3, 2013.

Finally, the CIR argues that being a non-resident foreign corporation, Trump Marks is subject to thirty (30) percent income tax on royalties from Philippine sources pursuant to Section 28 (B) (1) of the 1997 NIRC, as amended and not to the 10% preferential tax rate.

Trump Mark's counter-arguments

As to the allegation that it did not comply with the legal and documentary requirements to the claim for refund, Trump Marks points to the records of the case showing quite clearly that it sufficiently established its right to the tax refund claimed.

Trump Marks also found the allegation of the CIR that it is subject to the 30% income tax rate, without merit, because it is clear that Article 13 (2) (b) (iii) of the Philippines-United States (US) Tax Treaty, in relation to the Philippines-China Tax Treaty and Article 12 (2) of the Philippines – United Arab Emirates (UAE) Tax Treaty, a preferential withholding tax rate of 10% on royalty payments it received from Century City should be applied and imposed.

THE COURT EN BANC'S RULING

The Court *En Banc* denies the consolidated Petitions for Review.

We first consider Trump Marks' arguments and assignments of error individually.

1. The two-year prescriptive period should be suspended during the effectivity of RMO 72-10

Trump Marks gives importance to the promulgation of the Supreme Court decision in the case of *Deutsche Bank AG Manila Branch vs. CIR* (*Duetsche* case) on August 19, 2013 because this case effectively invalidated the requirement of filing an application for TTRA as a condition to avail of the preferential tax rate under a tax treaty. Petitioner insists that the two-year period for filing a claim for refund should be suspended during the period prior to the promulgation of the *Deutsche* case because at the time it was still disqualified from pursuing a tax refund.

We analyze.

Sections 204(C) and 229 of the 1997 NIRC, as amended, govern the refund or credit of internal revenue taxes collected erroneously or illegally, pursuant to the Tax Code,[6] and we quote:

> "SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –
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> xxx xxx xxx
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> (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)
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> "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.
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> **In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of**

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[6] *Commissioner of Internal Revenue vs. Central Azucarera Don Pedro,* G.R. No. L-28467, February 28, 1973, citing Commissioner of Internal Revenue vs. Insular Lumber Co., G.R. No. L-24221, December 11, 1967.

> **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)*

Section 204(C) applies to administrative claims filed with the BIR, while Section 229 of the 1997 NIRC, as amended, refers to judicial actions for the recovery of the tax or penalty. However, the settled rule is that both the claims for refund with the BIR and the subsequent appeal to the Court of Tax Appeals (the Court) must be filed within the two-year period from the *date of payment* of the tax.

In a case where the claim for refund involves alleged overpaid FWT on royalties paid by Century City to Trump Marks, it is imperative for the latter to prove the following:

1. The claim was filed within the two-year period both in the administrative and judicial levels as provided under Sections 204 (C) and 229 of the 1997, NIRC, as amended;
2. That there was over remittance of the FWT on royalties.

The pieces of evidence on record show that Century City remitted royalties to Trump Marks for the period December 2011 to July 2012 and consequently paid the 30% FWT on various dates.

Records also show that Trump Marks filed its administrative claim for refund with the BIR on December 1, 2014 and its Petition for Review with the Court on January 14, 2015.

Applying the afore-quoted Sections 204 (C) and 229 of the 1997 NIRC, as amended, the Court in Division correctly ruled that the following claims and the corresponding amount of Php5,013,219.32 are already barred by the two-year prescriptive period:

Exhibit	Period Covered	Date of Payment of FWT	Last Day to File Administrative and Judicial Claims	Excess FWT Paid
P-15 ,P-15-1	Dec. 2011	10-Jan-12	10-Jan-14	₱ 101,912.75
P-17, P-17-1	March 2012	10-Apr-12	10-Apr-14	1,766,822.33
P-18, P-18-1	April 2012	10-May-12	10-May-14	545,536.99
P-19, P-19-1	May 2012	11-Jun-12	11-Jun-14	707,358.09

P-20, P-20-1	June 2012	10-Jul-12	10-Jul-14	268,897.91
P-21, P-21-1	Aug. 2012	10-Sep-12	10-Sep-14	835,749.29
P-22, P-22-1	Oct. 2012	12-Nov-12	12-Nov-14	786,941.96
			Prescribed Claim	**₱5,013,219.32**

Following the dictum that both the administrative and judicial claims for refund (of internal revenue taxes) should be filed within two years from payment of the tax, payments made prior to January 14, 2013 should no longer be considered.

As to Trump Marks' contention that the two-year period should have been suspended during the effectivity of RMO 72-2010 until the *Deutsche* case was promulgated on August 28, 2013, we find this without merit for the following reasons:

1. The instant claim for refund is anchored on the provisions of the RP-US Tax Treaty's preferential tax rate provision in relation to Article 12 (2) (B) of the Philippine – UAE Tax Treaty, and we quote:

RP-US Tax Treaty

" Article 13

Royalties

1) Royalties derived by a resident of one of the Contracting States from sources within the other Contracting State may be taxed by both Contracting States.
2) However, the tax imposed by that Contracting State shall not exceed:

a) In the case of the United States, 15 percent of the gross amount of the royalties and
b) In the case of the Philippines, the least of

(i) 25 per cent of the gross amount of the royalties;
(ii) 15 percent of the gross amount of the royalties where the royalties are paid by a corporation registered with the Philippine Board of Investments and engaged in preferred areas of activities; and
(iii) The lowest rate of Philippine tax that may be imposed on royalties of the same kind paid under similar circumstances to a resident of a third State.

3) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic, or scientific

> work, including cinematographic film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or other like right or property, or for the information concerning industrial commercial or scientific experience. The term 'royalties" also includes gains derived from the sale, exchange or other disposition thereof." (emphasis supplied)

<u>RP-UAE Tax Treaty</u>

> "Article 12
> Royalties
>
> 1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
> 2. **However, the royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed 10 percent of the gross amount of the royalties.** The competent authorities of the Contracting States, shall, by mutual agreement, settle the mode of application of this limitation." (emphasis supplied)

The rationale of the phrase "royalties of the same kind paid under similar circumstances" was explained by the Supreme Court in the landmark case of *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc.* [7] in this manner:

> "The purpose of a most favored nation clause is to grant to the contracting party treatment not less favorable than that which has been or may be granted to the "most favored" among other countries. The most favored nation clause is intended to establish the principle of equality of international treatment by providing that the citizens or subjects of the contracting nations may enjoy the privileges accorded by either party to those of the most favored nation. **The essence of the principle is to allow the taxpayer in one state to avail of more liberal provisions granted in another tax treaty to which the country of residence of such taxpayer is also a party provided that the subject matter of taxation, in this case royalty payments, is the same as that in the tax treaty under which the taxpayer is liable.** xxx." (emphasis supplied)

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[7] G.R. No. 127105, June 25, 1999.

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The "most favored nation" clause resulting to entitlement to a preferential tax rate is based on similarity of circumstances in payment of taxes, and we again quote the ruling of the Supreme Court in the *S.C. Johnson* case, thus:

> "Given the purpose underlying tax treaties and the rationale for the most favored nation clause, the concessional tax rate of 10 percent provided for in the RP-Germany Tax Treaty should apply only if the taxes imposed upon royalties in the RP-US Tax Treaty and in the RP-Germany Tax Treaty are paid under similar circumstances. This would mean that private respondent must prove that the RP-US Tax Treaty grants similar tax reliefs to resident of the United States in respect of taxes imposable upon royalties earned from sources within the Philippines as those allowed to their German counterparts under the RP-Germany Tax Treaty."

The BIR confirmed the applicability of the preferential income tax rate of 10% on royalties paid by Century City to Trump Marks beginning November 23, 2011 in the International Tax Affairs Division (ITAD) Ruling No. 026-14 issued on April 4, 2014,and we quote relevant portions, thus:

> "Under Article 13, royalties arising in the Philippines and paid to a resident of the United States are subject to the lowest rate of Philippine income tax that may be imposed on royalties of the same kind and paid to a resident of a third State under similar circumstances (also known as *most-favored-nation treatment* or *MFN treatment*).
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> With respect to MFN treatment, the Supreme Court, in *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc. and Court of Appeals (G.R. No. 127105 dated June 25, 1999) ('SC Johnson case'),* had required two conditions for such treatment to apply. *First,* royalties arising in the Philippines and paid to a resident of the United States must be of the *same kind* as those derived in the Philippines by a resident of a third State and where such are subject to an MFN treatment under the applicable tax treaty between the Philippines and the third State. A survey of existing tax treaties to date discloses an MFN rate of *10 percent. Second,* royalties paid to the United States resident must be *paid under similar circumstances* vis-à-vis royalties paid to the third State resident. xxx
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> xxx xxx xxx
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> For this purpose, *The Agreement between the Government of the Republic of the Philippines and the*

> *Government of the United Arab Emirates for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital ('Philippines-United Arab Emirates or UAE tax treaty') effective January 1, 2009* is applicable herein.
>
> With respect to the *first condition*, under paragraphs 1, 2 and 3, Article 12 of the Philippines-UAE tax treaty, royalties for the use of, or the right to use, *trademark* and other intangible properties are subject to income tax at a single rate of *10 percent*, xxx
>
> xxx xxx xxx
>
> With respect to the *second condition*, under paragraph 1, Article 23 of the Philippines-United States tax treaty and paragraph 2, Article 23 of the Philippines-UAE tax treaty, the foreign tax credit or deduction which the United States and UAE allow their residents with respect to income arising in the Philippines (except dividends paid to a United States resident) and subjected to income tax therein is limited to the actual amount of Philippine income tax levied on such income, xxx
>
> xxx xxx xxx
>
> Considering an MFN rate of 10 percent under Article 12 of the Philippines-UAE tax treaty, this is the amount of foreign tax credit that UAE will allow its residents who derive royalties in the Philippines. Since the same amount of foreign tax credit will be allowed by the United States on royalties subjected to MFN treatment in the Philippines which is the actual amount of Philippine income tax levied on the income, it follows that royalties paid to a UAE resident and those paid to a United States resident are *paid under similar circumstances*."

The legal basis of its entitlement to the claim for refund is the excess payment made by Century of FWT due to the difference between the regular tax rate of 30% and the preferential tax rate of 10% based on the above discussion. It is not based on the provisions of a mere Revenue Memorandum Order particularly RMO 72-2010 which only provides the guidelines on the processing of the TTRAs pursuant to existing Philippine tax treaties, hence, it cannot serve as a condition for entitlement to the preferential tax rate under the RP-US Tax Treaty, neither can it be a basis for suspending the two-year period to file a claim for refund.

2. Section 229 of the 1997 NIRC, as amended provides clearly that both the claim for refund with the BIR and the subsequent appeal to the Court must be filed within the two-year period from the date of payment of the tax regardless of any supervening cause that may arise after payment. The phrase "regardless of any supervening facts that may arise after payment" connotes that the two-year period provided under Section 229 of the 1997 NIRC, as amended is mandatory and does not contemplate of any condition suspending the running of the two-year period to file the administrative and judicial claims for refund.

Even assuming that the *Deutsche* case served to pave the way for Trump Marks' entitlement to the claim for refund, still it should have filed its claim for refund as early as August 19, 2013, the date when the said *Deutsche* case was promulgated by the Supreme Court. The records reveal that Trump Marks only filed its administrative claim for refund on December 1, 2014 and its Petition for Review with this Court on January 14, 2015, more than one and two years, respectively, thereby negating Trump Marks' reasons for the suspension of the prescriptive period.

2.*Solutio indebiti* is applicable in this case and justice and equity dictate that petitioner is entitled to its claim for refund.

We likewise find Trump Marks' above argument to be untenable.

Trump Marks argues that even if the suspension of the two-year prescriptive period is not applicable, it is still entitled to the return of the excess taxes it paid under the principle of *solutio indebiti* and the principles of justice and equity.

Trump Marks must be reminded that equity, which has been aptly described as "justice outside legality," is applied only in the absence of, and never against statutory law. [8] The subject claim for refund is based on the clear provisions of the aforequoted Section 204 (C) and Section 229 of the 1997 NIRC, as amended, and taxpayer claimants are expected to comply with the requisites and conditions imposed therein. Calls for the application of justice and equity may be considered only in

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[8] GF Equity, Inc. vs. Arthur Valenzona, G.R. No. 156841, June 30, 2005.

the absence of law and not as its replacement.[9] The Supreme Court has consistently ruled that "all abstract arguments based only on equity should yield to positive rules, which pre-empt and prevail over such persuasions." In addition, the Supreme Court said, "emotional appeals for justice, while they may wring the heart of the Court, cannot justify disregard of the mandate of the law as long as it remains in force."[10] Considering that Trump Marks' claims for refund are subject to the two-year prescriptive period, claims filed outside said period are barred.

Further, a claim for tax refund like a claim for tax exemption, is construed strictly against the taxpayer.[11]

We now proceed to the CIR's arguments embodied in his Petition for Review.

1. Trump Marks is not entitled to its entire claim for refund as it is bereft of legal and factual bases.

We find CIR's above contention bereft of merit.

It is clear from our earlier discussion that Trump Marks is legally entitled to the preferential income tax rate of 10% under Article 13 (2) (b) (iii) of the RP-US Tax Treaty, in relation to Article 12 (2) of the Philippines – UAE Tax Treaty

As to the factual bases of the excess payments subject of the claim for refund, we adhere to the comprehensive evaluation of the evidence conducted by the Court in Division in its assailed Decision dated November 3, 2017 and its conclusion that Trump Marks is partially entitled to said claim for refund, as we quote with approval, thus:

> "Moreover, to prove the fact of withholding and remittance of 30% FWT on royalties received from Century City for the subject period of claim, petitioner submitted the following:
>
> 1. Monthly Remittance Returns of Final Income Taxes Withheld (BIR Form No. 1601-F) with attached BTR-BIR Deposit/Payment Slips and EFPS Payment Confirmations for the months of December 2011, March to June 2012, August 2012, October 2012, December 2012, February to

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[9] Francisco Lim Tupas and Ignacio Lim Tupas vs. The Court of Appeals and People of the Philippines, G.R. No. 89571, February 6, 1991.
[10] Supra.
[11] Applied Food Ingredients Company, Inc. vs. CIR, G.R. No. 184266, November11, 2013.

September 2013, November to December 2013, February 2014, April 2014 to July 2014;

2. Annual Information Returns of Income Taxes Withheld on Compensation and Final Withholding Taxes (BIR Form No. 1604-CF) and the corresponding Alphalists for the years 2011, 2012 and 2013;

3. Alphalists for the months of February and April to July 2014filed by Century City; and

4. Certification issued by the BIR's Revenue Accounting Division (RAD).

A perusal of the above documents shows that Century City withheld and remitted to the BIR 30% FWT in the amount of ₱29,245,278.98 from the royalties it paid to petitioner in the amount of ₱97,484,263.41 for the period covering December 2011 to July 2014. Since petitioner is entitled to the 10% preferential tax rate on the said royalties, there was an over-remittance of the 20% difference in tax rates, equivalent to ₱19,496,852.62, detailed as follows:

Reference Exhibit	Period Covered	Date of Payment of FWT	Amount of Royalties (In PHP)	30% FWT Paid (In PHP)	Exh.	10% FWT Due (In PHP)	Excess FWT Paid (In PHP)
P-15, P-15-1	Dec. 2011	10-Jan-12	509,563.72	152,869.12		50,956.37	101,912.75
		Subtotal	509,563.72	152,869.12	P-16, P-42	50,956.37	101,912.75
P-17, P-17-1	March 2012	10-Apr-12	8,834,111.65	2,650,233.50		883,411.17	1,766,822.33
P-18, P-18-1	April 2012	10-May-12	2,727,684.95	818,305.49		272,768.50	545,536.99
P-19, P-19-1	May 2012	11-Jun-12	3,536,790.43	1,061,037.13		353,679.04	707,358.09
P-20, P-20-1	June 2012	10-Jul-12	1,344,489.52	403,346.86		134,448.95	268,897.91
P-21, P-21-1	Aug. 2012	10-Sep-12	4,178,746.46	1,253,623.94		417,874.65	835,749.29
P-22, P-22-1	Oct. 2012	12-Nov-12	3,934,709.80	1,180,412.94		393,470.98	786,941.96
P-23, P-23-1	Dec. 2012	15-Jan-13	5,871,424.67	1,761,427.40		587,142.47	1,174,284.93
		Subtotal	30,427,957.48	9,128,387.26	P-24, P-43	3,042,795.76	6,085,591.50
P-25, P-25-1	Feb. 2013	11-Mar-13	11,752,496.20	3,525,748.86		1,175,249.62	2,350,499.24
P-26, P-26-1	March 2013	11-Apr-13	1,499,710.87	449,913.26		149,971.09	299,942.17
P-27, P-27-1	April 2013	9-May-13	1,187,683.37	356,305.01		118,768.34	237,536.67
P-28, P-28-1	May 2013	10-Jun-13	1,499,745.20	449,923.56		149,974.52	299,949.04

P-29, P-29-1	June 2013	11-Jul-13	7,071,359.00[12]	2,121,407.70[13]		707,135.90	1,414,271.80
P-30, P-30-1	July 2013	12-Aug-13	3,896,995.83	1,169,098.75		389,699.58	779,399.17
P-31, P-31-1	Aug. 2013	11-Sep-13	7,737,445.03	2,321,233.51		773,744.50	1,547,489.01
P-32, P-32-1	Sept. 2013	14-Oct-13	3,291,664.07	987,499.22		329,166.41	658,332.81
P-33, P-33-1	Nov. 2013	10-Dec-13	1,767,583.07	530,274.92		176,758.31	353,516.61
P-34, P-34-1	Dec. 2013	20-Jan-14	3,765,908.00	1,129,772.40		376,590.80	753,181.60
		Subtotal	43,470,590.64	13,041,177.19	P-35, P-44	4,347,059.07	8,694,118.12
P-36, P-36-1	Feb. 2014	15-Mar-14	3,545,319.20	1,063,595.76	P-45	354,531.92	709,063.84
P-37, P-37-1	April 2014	15-May-14	2,998,602.87	899,580.80	P-46	299,860.29	599,720.51
P-38, P-38-1	May 2014	16-Jun-14	10,974,378.90	3,292,313.67	P-47	1,097,437.89	2,194,875.78
P-39, P-39-1	June 2014	15-Jul-14	3,341,968.50	1,002,590.55	P-48	334,196.85	668,393.70
P-40, P-40-1	July 2014	14-Aug-14	2,215,882.10	664,764.63	P-49	221,588.21	443,176.42
		Subtotal	23,076,151.57	6,922,845.41		2,307,615.16	4,615,230.25
		Total	97,484,263.41	29,245,278.98		9,748,426.36	19,496,852.62

In sum, the Court finds that petitioner has sufficiently proven its entitlement to a refund of erroneously paid FWT on royalties only for the months covering December 2012 to July 2014 in the amount of ₱14,483,633.30, computed as follows":

Total Substantiated FWT Claim	₱ 19,496,852.62
Less: Prescribed Portion	5,013,219.32
Total Refundable Amount	**₱14,483,633.30**

2. Being a non-resident foreign corporation, Trump Marks is subject to 30% income tax on royalties from Philippine sources pursuant to Section 28 (B) (1) of the 1997 NIRC, as amended and not to the 10% preferential tax rate.

The last and final argument of the CIR refers to his insistence that as a non-resident foreign corporation, Trump Marks is subject to the 30% income tax rate on royalties received from Philippine sources.

This argument lacks merit.

[12] Amount per claim (Amount per return of ₱63,942,072.90 includes payments other than those made to petitioner).

[13] Amount per claim.

It has already been earlier discussed that Trump Marks has sufficiently established that it is subject to the 10% preferential withholding tax rate on the royalty payments it received from Century City based on Article 13 (2) (b) (iii) of the RP-US Tax Treaty, in relation to Article 12 (2) of the Philippines – UAE Tax Treaty. Further, his contention is inconsistent with the pronouncements made by his own office, BIR, in ITAD Ruling No. 026-14 dated April 4, 2014 which confirmed the applicability of the preferential income tax treaty rate of 10% on royalties paid by Century City to Trump Marks beginning November 23, 2011.

WHEREFORE, the consolidated Petitions for Review filed by Trump Marks Philippines, LLC and the Commissioner of Internal Revenue are hereby **DENIED** for lack of merit.

Accordingly, the assailed Decision dated November 3, 2017 and the assailed Resolution dated March 21, 2018 are hereby **AFFIRMED.**

SO ORDERED.

CATHERINE T. MANAHAN
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

(On Leave)
CIELITO N. MINDARO-GRULLA
Associate Justice

Ma. Belen S.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
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 cases were assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice