REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

NEW COAST HOTEL, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1758
(CTA Case No. 9146)

Present:

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

Promulgated:
APR 15 2019
3:17 p.m.

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DECISION

CASTAÑEDA, JR., J.:

This Petition for Review filed by petitioner New Coast Hotel, Inc., seeks to reverse the Decision[1] dated September 19, 2017 and the Resolution[2] dated December 4, 2017, respectively, of the CTA Third (3rd) Division.

For easy reference, the dispositive portion of the assailed Decision reads:

> "**WHEREFORE**, in view of the foregoing, the Petition for Review filed by petitioner New Coast Hotel, Inc., claiming

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1 Penned by Retired Associate Justice Lovell R. Bautista, with Associate Justice Ma. Belen M. Ringpis-Liban concurring and Associate Justice Esperanza R. Fabon-Victorino concurring,Court in Division Docket, pp. 406-430.

2 Court in Division Docket, pp. 464-470.

for the refund or the issuance of a tax credit certificate in the amount of Php592,273.32, is hereby **DENIED** for lack of merit.

SO ORDERED."[3]

On the other hand, the dispositive portion of the assailed Resolution reads:

"**WHEREFORE**, premises considered, petitioner's Motion for Reconsideration (Re: Decision dated September 19, 2017) filed on October 11, 2017 is hereby **DENIED** for lack of merit. Accordingly, the Assailed Decision dated September 19, 2017 is hereby **AFFIRMED** and **UPHELD**.

SO ORDERED."[4]

THE FACTS

The following are the facts as found by the Court in Division:

"On August 11, 2012, petitioner filed its Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded) (BIR Form No. 1601-E) for the month of July 2012 ('July EWT Return') through the Electronic Filing and Payment System ('eFPS') of the BIR, where it reported EWT in the amount of Php947,273.49. The EWT was paid on August 13, 2012.

On September 5, 2012, petitioner filed an amended Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded) (BIR Form No. 1601-E) for the month of July 2012 ('July Amended EWT Return') through the eFPS of the BIR, where it reported EWT in the amount of Php606,504.33, and provided as tax payment the amount previously remitted per July EWT Return of Php947,273.49; thus, resulting to an over remittance of Php340,769.16. In the July Amended EWT Return, petitioner indicated its intention to refund the over remittance by marking the 'To be Refunded' box.

On September 13, 2012, petitioner filed its Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded) (BIR Form No. 1601-E) for the month of August 2012 ('August EWT Return') through the eFPS of the BIR, where it reported EWT in the amount of Php577,147.73. It applied as credit the Php340,769.16 over remittance

3 See Note 1, p. 429.
4 See Note 2, p. 470.

per July Amended EWT Return, and paid the balance of Php236,378.57.

Thereafter, on March 20, 2014, petitioner received a Preliminary Notice dated March 12, 2014 from the Large Taxpayers-Document Processing and Quality Assurance Division ('LT-DPQAD') issued by Mr. Alfredo V. Misajon ('Mr. Misajon'), Officer-in-Charge ('OIC')-Assistant Commissioner, Large Taxpayers Service ('LTS') of the BIR, with an attached Audit Results/Assessment Notice dated March 10, 2014, stating that petitioner's August EWT Return cannot be processed due to underpayment of tax in the amount of Php340,769.16, plus penalty of Php205,757.07.

On March 26, 2014, petitioner responded through a letter dated March 25, 2014, addressed to Mr. Misajon of LT-DPQAD, explaining the nature of the alleged underpayment.

On May 6, 2014, petitioner received a letter dated April 1, 2014 from Mr. Misajon, stating that offsetting of EWT is not allowed; and that, thus, petitioner is advised to pay the total assessed amount of Php546,526.23. In the said letter, petitioner was also advised to formally request for a refund or for the issuance of a TCC on the overpayment made in its remittances of EWT in July at the Large Taxpayers Regular Audit Division 2 ('LTRAD 2') of the BIR.

On May 29, 2014, petitioner submitted a letter dated May 28, 2014, addressed to Mr. Misajon of LT-DPQAD, requesting for reconsideration of the letter dated April 1, 2014.

Thereafter, on June 5, 2014, petitioner filed a letter addressed to the CIR, praying for the cancellation and withdrawal of the assessment made by LT-DPQAD for deficiency EWT for the month of August 2012 *per* letter dated April 1, 2014.

Without waiting for the decision of the CIR, on December 1, 2014, petitioner paid the Php592,273.32 amount representing the alleged deficiency EWT for the month of August 2012, inclusive of surcharge, interest, and compromise penalty.

Subsequently, on March 3, 2015, petitioner submitted a letter dated February 27, 2015 with the CIR, stating that it already paid the alleged deficiency EWT, but nevertheless, maintains its previous appeal; and that, it is requesting for the refund or issuance of a TCC for the erroneously paid or collected EWT for the month of August 2012 in the total amount of Php592,273.32.

On June 30, 2015, petitioner received Letter of Authority ('LOA') No. 125-2015-00000027 SN: eLA201100086791 dated June 15, 2015, issued by Mr. Nestor S. Valeroso ('Mr. Valeroso'), OIC-Assistant Commissioner of the LTS, authorizing Revenue Officer ('RO') Janice Joy So and Group Supervisor ('GS') Fe Caling to examine petitioner's books of accounts and other accounting records for EWT for the period of August 2012 pursuant to Mandatory Claims for Tax Credit on Erroneous/Double Tax Payments.

On July 6, 2015, petitioner filed a letter addressed to Mr. Mitchell L. Yu, Chief, LTRAD 2 of the BIR, in response to the LOA, and reiterated its request for the granting of the claim for refund or issuance of a TCC.

On August 17, 2015, petitioner received an undated letter signed by Mr. Valeroso, denying its claim for refund or issuance of a TCC for the alleged erroneous payment of EWT in the amount of Php592,273.32 for lack of legal basis.

Consequently, on September 16, 2015, petitioner filed the instant Petition for Review.

After being granted extension, respondent filed his Answer on November 13, 2015, interposing the following Special and Affirmative Defenses: (1) that the Court has no jurisdiction to hear the case because the claim for refund was filed out of time; (2) that assuming that the Court has jurisdiction over the present controversy, the CIR has authority to ascertain the correctness of the tax return; (3) that there was no erroneous or unlawful payment of tax by petitioner for the month of August 2012; (4) that the application of the excess EWT for the month of July, as credit against petitioner's EWT liability for the month of August, is improper for lack of legal basis; (5) that petitioner's alleged reliance on the advice of the BIR RO cannot set aside its liability to pay the correct and exact amount of EWT for the month of August; and (6) that it is incumbent upon petitioner to prove that it is entitled to the refund sought, which it failed to do.

Petitioner and respondent filed their Pre-Trial Briefs on February 18, 2016 and February 17, 2016, respectively.

On March 14, 2016, the parties filed their Joint Stipulation of Facts and Issues ('JSFI'); and, a Pre-Trial Order was issued on April 27, 2016.

Trial ensued. Thereafter, on June 1, 2016, petitioner filed its Formal Offer of Evidence ('FOE'), offering Exhibits xxx as evidence. This was resolved by the Court in a Resolution dated July 11, 2016, admitting all of the foregoing exhibits.

On August 1, 2016, respondent filed his FOE, offering Exhibits xxx as evidence. The Court admitted all the offered evidence in a Resolution dated September 8, 2016.

Respondent filed his Memorandum on October 19, 2016 *via* registered mail; and after being granted extension, on November 2, 2016, petitioner also filed its Memorandum.

On November 7, 2016, the Court promulgated a Resolution submitting the case for decision; hence, this Decision."[5]

On September 19, 2017, the Court in Division rendered the assailed Decision. On October 11, 2017, petitioner filed its Motion for Reconsideration (Re: Decision dated September 19, 2017), which was denied by the Court in Division in the assailed Resolution dated December 4, 2017.

On January 11, 2018, petitioner filed the instant Petition. On the other hand, on March 1, 2018, respondent filed his Comment/Opposition. On March 23, 2018, the Court *En Banc* issued a Resolution[6] directing the parties to file their respective memoranda.

On May 3, 2018, respondent filed his Memorandum while on May 25, 2018, petitioner filed its Memorandum. Thus, on June 21, 2018,[7] the Court *En Banc* issued a Resolution submitting the case for decision. Hence, this Decision.

THE ISSUES

Petitioner presented the following issues before the Court *En Banc*: *ge*

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5 See Note 1, pp. 407-411.

6 Court *En Banc* Docket, pp. 84-85.

7 Court En Banc Docket, pp. 131-132.

"(a) The CTA-Division erred in holding that respondent's deficiency EWT assessment for August 2012 had already attained finality pursuant to Section 228, National Internal Revenue Code of 1997 (the 'Tax Code'), Section 3.1.5 Revenue Regulations (Rev. Regs.) No. 12-99, and Section 3(A)(2), Rule 4 of the Revised Rules of Court of Tax Appeals (RRCTA) when petitioner filed its Petition for Review with the CTA-Division on September 16, 2015;

(b) There is no valid assessment for petitioner's alleged deficiency EWT for August 2012 because the Large Taxpayers Service Document Processing and Quality Assurance Division's (LTS-DPQAD) Preliminary Notice, with attached Audit Results/Assessment Notice dated March 12, 2014 (*Exhibit 'P-6'*), does not qualify as an assessment notice under Section 3, Rev. Regs. No. 12-99;

(c) Even assuming for the sake of argument that there was a valid assessment, there is no legal basis to disallow the application of petitioner's excess EWT payment for July 2012 as a credit against its EWT liability for August 2012 because there is no express prohibition on offsetting of EWT in the Tax Code or in any administrative regulation; and

(d) Petitioner should not be held liable for deficiency EWT for August 2012 because it merely relied on the advice of respondent's Revenue Officer."[8]

Based therefrom, the issues can be summarized as follows: (1) Whether there was a valid assessment that has already become final; and (2) Whether petitioner is entitled to its claim for refund.

THE RULING

The Petition is bereft of merit.

The assessment proceeding was terminated in its initiatory stages through voluntary payment by petitioner

A review of the antecedent facts reveals that the controversy arose when respondent, through its authorized representative, issued a Preliminary Notice to petitioner. It pertinently reads:

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8 Grounds in Support of Petition for Review, Petition for Review, Court *En Banc* Docket, pp. 11-12.

> "This is to inform you that the **Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded)** BIR Form **1601E** for the period ending **August 31, 2012** which was filed on **September 13, 2012**, cannot be processed due to:
>
> xxx xxx xxx
>
> **Underpayment of tax due per return pursuant to Sections 248 and 249 of the NIRC, RMO 19-2007 and RR 26-2002 (P 340,769.16 – deficiency tax + P 205,757.07 – penalties)**
>
> xxx xxx xxx
>
> Consequently, any tax payment or tax credit shown in your return will not be credited to your account until you have sent us the necessary explanation/information or correction within 30 days from receipt of this letter."[9]

Consequently, petitioner sent its explanation letter[10] regarding the said underpayment. Thereafter, respondent, again through its authorized representative, issued a letter dated April 1, 2014 which pertinently reads:

> "Your overpayment for Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded) for July 2012 in the amount of P340,769.16 was applied to August 31, 2012, resulting to underpayment of tax due.
>
> Please be informed that offsetting is allowed only to withholding tax on compensation pursuant to Revenue Regulations No. 2-98 [Sec. 2.79(b), Step 6, 2nd paragraph]. There are no expressed provisions in the offsetting of expanded withholding taxes.
>
> **You are, therefore advised to pay the total assessed amount of P546,526.23 five days from the receipt of this letter**. Please be further advised to formally request for a tax refund/credit of the overpayment made on your July 2012 remittances at the Large Taxpayers Regular Audit Division 2 (LTRAD 2) which is the appropriate office to address your concern."*(Emphasis supplied)*

9 Exhibit "P-6".
10 Exhibit "P-7".

However, during the pendency of the assessment proceeding, petitioner opted to pay the amount assessed. Meanwhile, it manifested its desire to refund the subject amount, as follows:

> "In order to stop the further accumulation of interest and notwithstanding the pendency of the Administrative Appeal, the Company paid under protest the deficiency EWT assessment for August 2012 in the total amount of Php592,273.32, inclusive of surcharge and interest, on December 1, 2014. xxx
>
> Since the Company paid the deficiency EWT under protest, it is respectfully manifested that such payment does not constitute a withdrawal or abandonment of the Company's Administrative Appeal on the deficiency EWT assessment for August 2012.
>
> Nevertheless, since the EWT had been paid, the Company respectfully requests the refund or issuance of a tax credit certificate for the erroneously paid EWT for August 2012 in the amount of Php592,273.32, inclusive of surcharge and interest."[11]

Ironically, petitioner now argues that the Preliminary Notice and the April 1, 2014 letter of respondent do not contain a definite and unequivocal demand for payment of taxes.

The Court *En Banc* disagrees with petitioner.

With respect to the Preliminary Notice, Section 3.1.2 of RR No. 12-99 provides:

> "3.1.2 *Preliminary Assessment Notice (PAN).* – If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the **proposed assessment**, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based xxx If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said

11 Exhibit "P-12".

> Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties."*(Emphasis supplied)*

Based on the foregoing, a PAN need not contain a definite and unequivocal demand for payment of taxes because it merely informs the taxpayer of the **proposed assessment**. Thus, respondent did not err *vis-à-vis* the contents of the subject Preliminary Notice because he was merely informing petitioner of the proposed assessment.

On the other hand, the April 1, 2014 letter of respondent merely advised petitioner to pay the subject assessed amount. As such, petitioner is obviously correct in arguing that the same does not contain a definite and unequivocal demand for payment of taxes.

However, the Court *En Banc* notes that the said letter merely forms part of the preliminary assessment proceeding. In fact, petitioner categorically recognized the pendency of its administrative appeal at the time it paid the subject tax. In other words, petitioner expressly recognized that the administrative appeal was still on-going. At any rate, it still decided to pay the subject tax and decided to convert its action initially as a protest against an assessment into a claim for refund.

Thus, considering that petitioner already paid the subject tax, it would be a mere surplusage on the part of respondent to still issue a Final Assessment Notice (FAN) that is being referred to by petitioner. Again, respondent's obligation to issue a FAN in observance of petitioner's right to due process already ceased when it paid the proposed tax under the subject Preliminary Notice. Simply put, it is useless for respondent to continue with the assessment when the tax had already been paid.

Hence, there is no final assessment to speak of in this case due to petitioner's voluntary payment of the proposed assessment in the Preliminary Notice and prior to the issuance of the FAN. As such, the Court *En Banc* shall now determine whether petitioner is entitled to its claim for refund.

Petitioner is not entitled to its claim for refund

In this regard, the Court in Division extensively discussed the matter, in this wise:

"Basic is the rule in statutory construction that 'if a statute is clear, plain and free from ambiguity, it must be given its literal meaning and applied without interpretation.' This principle rests on the presumption that the words used by the legislature in a statute correctly express its intent or will and preclude the court from construing it differently. The legislature is presumed to know the meaning of the words employed and to have expressed its intent by use of such words as are found in the statute. *Verba legis non est recedendum*, or from the words of a statute there should be no departure.

Both *Sections 204 (C) and 229 of the 1997 NIRC* have expressly and unequivocally provided that in case of erroneously or illegally assessed or collected tax, the taxpayer has only two (2) options, to ask for: (1) a refund; or (2) the issuance of a TCC. In fine, the right of taxpayers to claim a refund or issuance of a TCC does not entitle them to credit or offset to other tax liabilities. The pronouncement of the Supreme Court in the case of *Philex Mining Corporation v. Commissioner of Internal Revenue* on offsetting of taxes is instructive, *viz.*:

> In several instances prior to the instant case, we have already made the pronouncement that <u>taxes cannot be subject to compensation for the simple reason that the government and the taxpayer are not creditors and debtors of each other. There is material distinction between a tax and debt</u>. Debts are due to the Government in its corporate capacity, while taxes are due to the Government in its sovereign capacity. We find no cogent reason to deviate from the aforementioned distinction.

Prescinding from this premise, in *Francia v. Intermediate Appellate Court*, we categorically held that taxes cannot be subject to set-off or compensation, thus:

> We have consistently ruled that <u>there can be no off-setting of taxes against the claims that the taxpayer may have against the government. A person cannot refuse to pay a tax on the ground that the government owes him an amount equal to or greater than the tax being collected</u>. <u>The collection of tax cannot await the results of a lawsuit against the government.</u>

The ruling in *Francia* has been applied to the subsequent case of *Caltex Philippines, Inc. v. Commission on Audit*, which reiterated that:

> . . . a taxpayer may not offset taxes due from the claims that he may have against the government. Taxes cannot be the subject of compensation because the government and taxpayer are not mutually creditors and debtors of each other and <u>a claim for taxes is not such a debt, demand, or contract or judgment as is allowed to be offset</u>.

Evidently, the over remittance of EWT when petitioner filed its July EWT Return cannot be used to offset or be treated as advance tax payment to the succeeding EWT for which it may be held liable. Accordingly, any erroneous payment of EWT in the month of July in the amount of Php340,769.16 cannot be offset or credited against the EWT due for the month of August in the amount of Php577,147.73. When it did, petitioner availed of a remedy which is not sanctioned by law.

Notably, the Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded) (BIR Form No. 1601-E), under Line 18 thereof, allows taxpayers to choose from any of two (2) options provided therein in case of over remittance by marking the 'To be refunded' box, or the 'To be issued a [TCC]' box. Clearly, the option to carry-over the excess to the subsequent month/s is not a remedy. However, the Php340,769.16 amount was applied as credit by petitioner under the belief that the same constituted as an advance payment made, hence, presented under Line 15B in the August EWT Return.

The Court holds that to treat the over remittance as an 'advance payment' which may be claimed as credit is erroneous. Before any advance payment may be credited against the EWT due for a particular month, proof of payment, that is, Payment Form (BIR Form No. 0605) must be attached. The Court takes notice that BIR Form No. 0605 is accomplished every time a taxpayer pays taxes and fees which do not require the use of a tax return, such as second installment payment for income tax, deficiency tax, delinquency tax, registration fees, advance payments, deposits, installment payments, etc. In case of over remittance, BIR Form No. 0605 is not accomplished. In fact, the only proof of excess remittance is the Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded) (BIR Form No. 1601-E) and payment confirmation from the BIR. Clearly, the 'advance payments made' contemplated under Line 15B of Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded) (BIR Form No. 1601-E) does not refer to an over remittance of EWT made from previous month/s. ge

> Based on the foregoing, the Court concludes that it is erroneous for petitioner to apply as credit (in the form of advance payments) the alleged over remittance in July 2012 from its EWT due for the month of August 2012. Hence, for remitting only Php236,378.57 in August 2012, instead of Php577,147.73, petitioner rightfully paid the deficiency; and is not entitled to the refund sought."[12]

The Court *En Banc* sees no cogent reason to disturb the above-ruling of the Court in Division. Indeed, petitioner's erroneous payment of EWT in the month of July in the amount of Php340,769.16 cannot be offset or credited against the EWT due for the month of August in the amount of Php577,147.73, as explained above.

In sum, it is not incumbent upon respondent to still issue a FAN when the tax due had already been paid. Meanwhile, petitioner is not entitled to its claim for refund because it is improper to offset its erroneous payment of EWT for the month of July against its EWT due for the month of August because taxes cannot be the subject of set-off or compensation. Hence, the denial of petitioner's present claim for refund is in order.

WHEREFORE, the instant Petition for Review is **DENIED**, for lack of merit. Accordingly, the Decision dated September 19, 2017 and the Resolution dated December 4, 2017 are **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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12 See Note 1, pp. 426-429, where the Court in Division cited *Republic of the Philippines, represented by the Department of Public Works and Highways, Commission on Audit and The National Treasurer v. Carlito Lacap*, G.R. No. 158253, March 2, 2007, 517 SCRA 255; *Commissioner of Internal Revenue v. Central Luzon Drug Corporation*, G.R. No. 159647, April 15, 2005, 456 SCRA 414; *National Federation of Labor v. National Labor Relations Commission*, G.R. No. 127718, March 2, 2000, 383 Phil. 910; *Enjay, Inc. v. National Labor Relations Commission*, G.R. No. 110240, July 4, 1995, 245 SCRA 588; *Commissioner of Internal Revenue v. Central Luzon Drug Corporation*, G.R. No. 159610, June 12, 2008, 554 SCRA 398; *Southern Cross Cement Corporation v. Philippine Cement Manufacturers Corporation*, G.R. No. 158540, July 8, 2004, 434 SCRA 65; Bolos v. Bolos, G.R. No. 186400, October 20, 2010, 634 SCRA 429; *Padua v. People*, G.R. No. 168546, July 23, 2008, 559 SCRA 519; *Enjay, Inc. v. National Labor Relations Commission*, G.R. No. 110240, July 4, 1995, 245 SCRA 588; *Globe-Mackay Cable and Radio Corporation v. National Labor Relations Commission*, G.R. No. 82511, March 3, 1992, 206 SCRA 701; and G.R. No. 125704, August 28, 1998, 294 SCRA 687, cited in *South African Airways v. Commissioner of Internal Revenue*, G.R. No. 180356, February 16, 2010, 612 SCRA 665.

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
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