REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

DEUTSCHE BANK AG MANILA BRANCH,
Petitioner,

C.T.A. EB NO. 456
(C.T.A. Case No. 7344)

Present:

-versus-

Acosta, P.J.
Castañeda, Jr.
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, JJ.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAY 2 9 2009 [signature] 1:30 p.m.

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DECISION

BAUTISTA, J.:

The Case

Before Us is a Petition for Review[1] filed by Deutsche Bank AG Manila Branch pursuant to paragraph 2, Section 18 of Republic Act No. 1125, as amended by

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[1] *Rollo*, C.T.A. EB No. 456 (C.T.A. Case No. 7344), pp. 7 – 105, with Annexes.

Republic Act No. 9282 and Rule 8, Section 3(b) of the Revised Rules of the Court of Tax Appeals, praying for the reversal of:

1. the Decision[2] dated August 29, 2008 rendered by the Second Division of the Court ("Court in Division") in CTA Case No. 7344, which dismissed petitioner's Petition for Review, thereby denying its claim for a tax refund or issuance of a tax credit certificate in the amount of ₱22,562,851.17, representing its alleged excess Branch Profits Remittance Tax ("BPRT") paid on its remitted branch profits to Deutsche Bank Germany in taxable year 2002 and prior years; and
2. the Resolution of the Court in Division promulgated on January 14, 2009, which denied petitioner's Motion for Reconsideration.

Antecedent Facts

As summarized by the Court in Division, the facts are:

> "Petitioner, Deutsche Bank AG Manila Branch, is the Philippine branch office of Deutsche Bank Germany, a company organized and existing under the laws of Germany whose principal office is in Frankfurt, Germany. It is duly registered with the Securities and Exchange Commission under S.E.C. Amended License No. F-1228 dated July 12, 1995, as a branch office with full banking authority in the Philippines. It is likewise registered with the Bureau of Internal Revenue (BIR), with Tax Identification No. 000-449-586-000.
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> Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue empowered to perform the duties of said office including, among others, the power to decide, approve and grant refunds or tax credits of erroneously or excessively paid taxes. She[3] holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.
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> On October 21, 2003, petitioner withheld and remitted to respondent the amount of Php67,688,553.51, representing a fifteen percent (15%) Branch Profit Remittance Tax (BPRT) on its 2002 and prior taxable years' Regular Banking Unit

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[2] Penned by *Associate Justice Erlinda P. Uy*, with *Associate Justices Juanito C. Castañeda, Jr. and Olga Palanca Enriquez* concurring.
[3] Now "He".

(RBU) Net Income due for remittance to Deutsche Bank Germany (DB Germany) pursuant to Section 28(A)(5) of the National Internal Revenue Code (NIRC) of 1997, which states that:

> 'SEC. 28. **Rates of Income Tax on Foreign Corporations. –**
>
> **(A) Tax on Resident Foreign Corporations. –**
>
> xxx xxx xxx
>
> **(5) Tax on Branch Profits Remittances.** – Any profit remitted by a branch to its head office shall be subject to a tax of fifteen percent (15%) which shall be based on the total profits applied or earmarked for remittance without any deduction for the tax component thereof (except those activities which are registered with the Philippine Economic Zone Authority). The tax shall be collected and paid in the same manner as provided in Sections 57 and 58 of this Code: Provided, That interests, dividends, rents, royalties, including remuneration for technical services, salaries, wages, premiums, annuities, emoluments or other fixed or determinable annual, periodic or casual gains, profits, income and capital gains received by a foreign corporation during each taxable year from all sources within the Philippines shall not be treated as branch profits unless the same are effectively connected with the conduct of its trade or business in the Philippines.'

On the belief that it made an overpayment of BPRT to respondent, petitioner filed on October 4, 2005 an administrative claim for refund or issuance of tax credit certificate in the amount Php22,562,851.17 with the BIR Large Taxpayers Assessment and Investigation Division. On the same date, it requested confirmation of its entitlement to the preferential tax rate of 10% under the RP-Germany Tax Treaty with the International Tax Affairs Division.

As there was no action on petitioner's administrative claim for refund, petitioner filed before this Court a Petition for Review on October 18, 2005 praying for the refund or issuance of tax credit certificate representing its alleged excess Branch Profits Remittance Tax paid on its remitted branch profits to Deutsche Bank Germany in taxable year 2002 and prior years likewise for the same total amount of twenty two million five hundred sixty two thousand eight hundred fifty one pesos and seventeen centavos (Php22,562,851.17).

In support of its claim that the BPRT rate applicable to its remittance of its branch profits (as a Philippine branch of a resident of Germany) should only be ten percent (10%), petitioner invokes the provisions of Article 10 paragraph (6) of the 'Agreement Between the Federal Republic of Germany and the Republic of the Philippines for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital' (RP-Germany Tax Treaty). Said provision reads as follows:

> **'ARTICLE 10. DIVIDENDS. –**
>
> xxx xxx xxx
>
> 6. Where a resident of the Federal Republic of Germany has a branch in the Republic of the Philippines, this branch may be subject to a

branch profits remittance tax withheld at source in accordance with Philippine law. However, the tax so charged shall not exceed 10 percent of the gross amount of the profits remitted by that branch to the head office.'

In her Answer, respondent submits the following arguments, to wit:

4. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue (BIR);

5. The amount of Twenty Two Million Five Hundred Sixty Two Thousand Eight Hundred Fifty One and 17/100 Pesos (Php22,562,851.17) being claimed by petitioner allegedly representing overpayment of Branch Profits Remittance Tax (BPRT) was not properly documented;

6. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;

7. Petitioner must prove that it is entitled to avail of the preferential tax treaty rate of 10% on its remittances of branch profits, based on the Philippines-Germany tax treaty;

8. Petitioner must prove that it actually paid BPRT to the BIR the amount of Sixty Seven Million Six Hundred Eighty Eight Thousand Five Hundred Fifty Three and 51/100 Pesos (Php67,688,553.51) on its branch profits remittance in the year 2003;

9. Petitioner must prove that it has complied with Sections 204(C) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit;

10. Claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation (*Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95*) and as such, they are looked upon with disfavor (*Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211*).

During trial, petitioner presented its documentary and testimonial evidence, while respondent submitted the case for decision without presenting any evidence. As directed by the Court, petitioner and respondent filed their Memoranda on October 22, 2007 and November 5, 2007, respectively. Subsequently, in the Resolution dated December 10, 2007, the Court granted petitioner's 'Motion to Admit Supplemental Memorandum', admitted petitioner's Supplemental Memorandum attached thereto and considered the instant case submitted for decision."[4] *(Citations omitted)*

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[4] *Rollo*, pp. 43 – 47.

The Ruling of the Court in Division

On August 29, 2008, the Court in Division rendered a decision in favor of respondent, with a *fallo* reading:

> "**WHEREFORE** all the foregoing considered, the instant Petition for Review is hereby **DISMISSED** for lack of merit.
>
> **SO ORDERED.**"

The Court in Division found that based on documentary and testimonial evidence, petitioner actually remitted to Deutche Bank Germany ("DB Germany") in the year 2003 the amount of EUR5,174,847.38 (or ₱330,175,961.88 at ₱63.804:1EURO), net of the 15% BPRT, representing branch profits of the Regular Banking Unit ("RBU") for the year 2002 and that it actually paid 15% BPRT on its 2002 RBU profits remitted to DB Germany, in the amount of ₱67,688,553.51.

The Court in Division also ruled that both the administrative and judicial actions were filed before the expiration of the two-year prescriptive period under Section 229 of the 1997 National Internal Revenue Code ("NIRC") in relation to Section 204 (C) of the same Code. As the BPRT was paid on October 21, 2003 and its Monthly Remittance Return of Final Income Taxes Withheld under BIR Form No. 1601-F was also filed on even date, petitioner had two years therefrom, or until October 21, 2005, within which to file its administrative and judicial claims for refund or issuance of a tax credit for its alleged erroneous remittance of BPRT. The administrative claim for refund was filed on October 4, 2005 with the BIR Large Taxpayers Assessment and Investigation Division, while the petition for review was filed with the Court in Division on October 18, 2005.

However, as to whether petitioner is entitled to its claimed refund or credit, the Court in Division ruled in the negative since petitioner's application for a tax treaty relief with the BIR International Tax Affairs Division ("ITAD") was not filed prior to its payment of the BPRT and actual remittance of its branch profits to DB Germany. Neither was it done prior to petitioner's availment of the preferential rate of ten percent (10%) under the RP-Germany Tax Treaty provision, thereby violating the fifteen (15) day period mandated under Section III paragraph (2) of Revenue Memorandum Order ("RMO") No. 01-2000. The Court in Division cited the case of ***Mirant (Philippines) Operations Corporation (formerly: Southern Energy Asia-Pacific Operations [Phils.], Inc.) v. Commissioner of Internal Revenue,***[5] as basis for the denial of petitioner's claim. In the *Mirant* case, the Court *En Banc* ruled that a foreign corporation wishing to avail of the benefits of the tax treaty should invoke the provisions of the tax treaty and prove that indeed the provisions of the tax treaty applies to it, before the benefits may be extended to such corporation.

Aggrieved, petitioner filed a Motion for Reconsideration[6] on September 18, 2008 which the Court in Division denied for lack of merit in its Resolution dated January 14, 2009.

Petitioner now comes before Us alleging that the Court in Division erred in denying its claim for refund of or issuance of tax credit for the amount of ₱22,562,851.17.

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[5] C.T.A. EB No. 40 (CTA Case No. 6382), June 7, 2005, penned by *Associate Justice Erlinda P. Uy* and affirmed by the Supreme Court in the Resolutions dated November 12, 2007 and February 18, 2008 in G.R. No. 168531.

[6] *Rollo*, pp. 64 – 83.

The Issue

The lone legal issue raised in this Petition for Review is whether compliance with RMO No. 1-2000 is a condition precedent to the availment of the benefits under a tax treaty.

Petitioner's Arguments

Petitioner submits that there is nothing in RMO No. 1-2000 which states that a taxpayer cannot avail of the benefits under a tax treaty provision simply because of a failure to apply for tax treaty relief.

Petitioner also avers that even assuming that RMO No. 1-2000 requires the filing of a tax treaty relief application prior to the availment of the preferential treaty rate under pain of disqualification from such relief, petitioner did not avail of the preferential tax treaty rate at the time of remittance of the dividends. As such, RMO No. 1-2000 does not apply.

Petitioner likewise posits that since the RP-Germany Tax Treaty does not require an application for tax treaty relief as a condition precedent for the availment of tax treaty relief, RMO No. 1-2000 cannot impose such requirement. RMO No. 1-2000 cannot take precedence over the provisions of tax treaties.

Petitioner further claims that it has in fact applied for a tax treaty relief with the ITAD of the BIR and thus, the BIR cannot defeat the petitioner's right by not acting on the tax treaty relief application.

Lastly, petitioner maintains that the Supreme Court resolution in the *Mirant* case is not controlling since the Supreme Court did not rule squarely on the issue of whether or not a tax treaty relief application is necessary before enjoying the benefits under a tax treaty.

Respondent, on the other hand, failed to submit his Comment within the period prescribed by the Court. Thus, this case was submitted for decision on April 14, 2009.[7]

The Ruling of the Court En Banc

The Petition for Review has no merit.

We have consistently held that a ruling from the International Tax Affairs Division (ITAD) of the BIR must be secured prior to availing a preferential tax rate under a tax treaty.[8] Our basis for such ruling is the aforementioned *Mirant* case where We stated that:

> "However, it must be remembered that a foreign corporation wishing to avail of the benefits of the tax treaty should invoke the provisions of the tax treaty and prove that indeed the provisions of the tax treaty applies to it, before the benefits may be extended to such corporation. In other words, a resident or non-resident foreign corporation shall be taxed according to the provisions of the National Internal Revenue Code, unless it is shown that the treaty provisions apply to the said corporation, and that, in cases the same are applicable, the option to avail of the tax benefits under the tax treaty has been successfully invoked.
>
> Under Revenue Memorandum Order 01-2000 of the Bureau of Internal Revenue, it is provided that the availment of a tax treaty provision must be preceded by an application for a tax treaty relief with its International Tax Affairs Division (ITAD). This is to prevent any erroneous interpretation and/or application of the treaty provisions with which the Philippines is a signatory to. The implementation of the said Revenue Memorandum Order is in harmony with the objectives of the contracting state to ensure that the granting of the benefits under the tax treaties are enjoyed by the persons or corporations duly entitled to the same.

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[7] *Rollo*, p. 151.

[8] CBK Power Company Limited v. Commissioner of Internal Revenue, C.T.A. Case Nos. 6699, 6884 & 7166, February 12, 2009; CDL Hotels (Phils.) Corporation v. Commissioner of Internal Revenue, C.T.A. Case No. 6585, July 12, 2007; Mirant Sual Corporation v. Commissioner of Internal Revenue, C.T.A. Case No. 6388, August 22, 2005.

> The Court notes that nowhere in the records of the case was it shown that petitioner indeed took the liberty of properly observing the provisions of the said order. Petitioner quotes various BIR, as well as ITAD Rulings issued to several foreign corporations seeking for a tax relief from the office of the respondent. However, not any one of these rulings pertains to the petitioner. It must be stressed that BIR rulings are issued based on the facts and circumstances surrounding particular issue/issues in question and are resolved on a case-to-case basis. It would be thus erroneous to invoke the ruling of the respondent in specific cases, which have no bearing to the case of petitioner."

Mirant appealed Our Decision to the Supreme Court via a Petition for Review docketed as G.R. No. 168531, which was however denied in a Resolution dated November 12, 2007 as follows:

> "Considering the allegations, issues and arguments adduced in the petition for review on certiorari, the Court resolves to **DENY** the petition for failure to sufficiently show any reversible error in the assailed judgment to warrant the exercise by the Court of its discretionary appellate jurisdiction in this case, and for raising substantially factual issues."

Aggrieved, *Mirant* moved for reconsideration but the Supreme Court resolved to deny the same in its Resolution dated February 18, 2008, *viz*:

> "Acting on petitioner's motion for reconsideration dated 9 January 2008 of the Resolution dated 12 November 2007 which denied the petition for review on certiorari, the Court resolves to **DENY** the motion for reconsideration with **FINALITY**, no substantial argument having been adduced to warrant the reconsideration sought."

Based on the foregoing Resolutions, the Supreme Court clearly found no reversible error in Our ruling in the *Mirant* case. Hence, under the principle of *stare decisis et non quieta movere* (follow past precedents and do not disturb what has been settled), it is Our duty to apply Our ruling in *Mirant* to the instant case. Once a case has been decided one way, any other case involving exactly the same point at issue should be decided in the same manner.[9]

[9] Commissioner of Internal Revenue v. Trustworthy Pawnshop, Inc., G.R. No. 149834, May 2, 2006, 488 SCRA 538.

It is well to note that in the recent case of ***CBK Power Company Limited v. Commissioner of Internal Revenue***,[10] the First Division of this Court relaxed the application of the 15-day rule under RMO No. 1-2000 and partially granted CBK Power Company Limited's claim for refund of excess final withholding taxes on the basis of BIR-ITAD rulings issued to CBK Power Company Limited after the payment of the subject final withholding taxes, to wit:

> "Records show that petitioner only failed to obtain an ITAD-ruling with respect to its transactions with Fortis Bank (Nederland) N.V. Thus, the initial refund granted in the amount of P15,672,958.42 shall be reduced to P14,835,720.39 computed as follows: xxx"

Here, while petitioner filed with the BIR-ITAD on October 4, 2005 a request for confirmation that the remittance of branch profits to Deutsche Bank AG is subject to the preferential tax rate of 10% pursuant to Article 10 of the RP-Germany tax treaty,[11] no ruling has been issued to date by the said office.

Thus, there is no basis for Us to depart from Our ruling in the *Mirant case*.

WHEREFORE, the instant Petition for Review is hereby **DISMISSED**. Accordingly, the assailed Decision dated August 29, 2008 and the Resolution dated January 14, 2009 are hereby **AFFIRMED**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

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[10] *Supra* note 8, penned by *Associate Justice Caesar A. Casanova* and concurred in by *Presiding Justice Ernesto D. Acosta* and *Associate Justice Lovell R. Bautista.*
[11] *Records*, pp. 240 – 246, Exhibit "D".

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ERNESTO D. ACOSTA
Presiding Justice