REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

TOLEDO POWER COMPANY, Petitioner,	CTA CASE NO. 9465
	Members:
-versus-	DEL ROSARIO, *P.J., Chairperson* FABON-VICTORINO, *and* MANAHAN, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JUN 08 2020 1:35 pm

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DECISION

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

In this Petition for Review[1] filed on September 8, 2016, petitioner Toledo Power Company prays for the refund or issuance of tax credit certificate (TCC) in the total amount of ₱18,391,219.94, representing its alleged erroneously paid taxes arising from income payments made to a non-resident foreign corporation exempt from tax under the RP-Japan Tax Treaty, as amended.

THE PARTIES

Petitioner Toledo Power Company is a general partnership formed to undertake the business of acquiring, owning, maintaining and operating coal-fired and oil-fired electrical generation facilities, with business address at TPC Power Plant, Daang Lungsod, Toledo City, Cebu.

[1] Vol. 1 Docket, pp. 10-36.

It is registered with the Securities and Exchange Commission (SEC) with Company Registration No. APO94-900,[2] and with the Bureau of Internal Revenue (BIR) with Tax Identification Number (TIN) 003-883-626-00000.[3]

Respondent, on the other hand, is the Commissioner of Internal Revenue (CIR) with authority to act upon and approve claims for refund or tax credit, pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997, as amended, and other tax laws. He holds office at the BIR National Office Building, Diliman Quezon City.

THE FACTS AND THE PROCEEDINGS

On November 28, 2013, a part of petitioner's equipment in generating power called Turbine Generator 5 (TG5) was placed on maintenance shutdown due to malfunctioning. Assessment showed that certain parts of TG5 need to be replaced. In view thereof, petitioner secured the repair services of Yashima & Co. Ltd. (Yashima), as evidenced by the Contract of Supply of Labor, Equipment and Materials.[4] Yashima is a Japanese corporation[5] not registered to do business in the Philippines per SEC Certification.[6]

Petitioner paid the repair services of Yashima and withheld from such income payment the amount of ₱18,391,219.94, which it remitted to the BIR.

On August 26, 2016, petitioner filed with the BIR's International Tax Affairs Division (ITAD), a *Tax Treaty Relief Application (TTRA) for Business Profits*,[7] together with a letter dated August 25, 2016[8] requesting for confirmation of its opinion that its income payments to Yashima was exempt

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[2] Exhibits "P-1" and "P-2".
[3] Exhibit "P-3".
[4] Exhibit "P-14".
[5] Exhibits "P-15" to "P-16".
[6] Exhibit "P-17".
[7] Exhibit "P-21".
[8] Exhibit "P-20".

from income tax, pursuant to the RP-Japan Tax Treaty,[9] as amended.[10]

On September 5, 2016, petitioner filed with the BIR's Large Taxpayers Division - Cebu, an *Application for Tax Credits/Refunds*,[11] with a letter dated September 2, 2016,[12] asking for the refund of erroneously paid final withholding taxes (FWTs) remitted during the taxable years (TYs) 2014 and 2015, representing taxes withheld from its income payments to Yashima in the total amount of ₱18,391,219.94.

Three (3) days thereafter or on September 8, 2016, petitioner filed the instant *Petition for Review,* which was initially raffled to the Third Division.

In his *Answer*,[13] respondent moved to dismiss the case on the ground of prematurity or lack of cause of action for failure of petitioner to exhaust administrative remedies before elevating the case to the Court thereby depriving him of the opportunity to act on its administrative claim. Besides, petitioner is allegedly not the party in interest to claim for refund being a mere withholding agent and not the person or entity required by law to pay the tax. Under the law, it is the taxpayer who should file for refund/tax credit and not the withholding agent.

Further, petitioner failed to file the TTRA before the transaction or occurrence of the first taxable event, as required under Revenue Memorandum Order (RMO) No. 72-10. In the case at bar, the earliest taxable event occurred on August 2014 and the payment of the FWT was on September 10, 2014. From September 10, 2014 to October 13, 2015, petitioner withheld and remitted to the BIR the amount of ₱18,391,219.94 representing final taxes withheld. However, prior to or during the said period, neither

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[9] CONVENTION BETWEEN REPUBLIC OF THE PHILIPPINES AND JAPAN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME.
[10] PROTOCOL AMENDING THE CONVENTION BETWEEN REPUBLIC OF THE PHILIPPINES AND JAPAN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME.
[11] Exhibits "P-25" to "P-26".
[12] Exhibit "P-24".
[13] Vol. 1 Docket, pp. 152 to 164.

petitioner nor Yashima filed any TTRA with the BIR's ITAD. Having slept on their right, petitioner and Yashima are in no position to seek relief from the Court for failure to timely file the required TTRA required under RMO No. 72-10 which has the force and effect of law and enjoys the presumption of legality until set aside with finality.

A claim for refund is also not *ipso facto* granted, thus, petitioner must substantiate the same but petitioner failed, respondent added.

After the pre-trial conference, the parties filed their Joint Stipulation of Facts and Issues (JSFI),[14] on the basis of which a Pre-Trial Order was issued on March 27, 2017.[15]

To substantiate its contentions, petitioner presented as witnesses, Mary Ann C. Vergara, Emmanuel Y. Mendoza and Bernardito R. Vergara.

In her Judicial Affidavit,[16] **Mary Ann C. Vergara** declared that she is the current Tax Compliance Officer of petitioner's parent company, Global Business Power Corporation (GBPC). She monitors and ensures petitioner's compliance with tax rules and regulations. She has custody of petitioner's tax returns, BIR Certificate of Registration and also has access to petitioner's other permits and reportorial requirements with the BIR, ERC and other government agencies, and other documents relevant to its tax compliance and claims for refund.

Petitioner is engaged, among others, in the business of acquiring, owning, maintaining and operating coal-fired and oil-fired electrical generation facilities.

On August 27, 2014, petitioner and Yashima, a Japanese corporation, entered into a Service Agreement for the repair of petitioner's equipment used for generating electricity. Consequently, petitioner paid Yashima for the services rendered in accordance with the terms of the

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[14] Vol. 1 Docket, pp. 447 to 453.
[15] *Ibid.*, pp. 455 to 460.
[16] Exhibits "P-200" and "P-200-a".

Service Agreement.[17] Petitioner filed Income Tax Returns (ITRs)[18] reflecting its income payment to Yashima, a non-resident foreign company, and paid the corresponding tax to the BIR.

However, under Articles 5 and 7 of the RP-Japan Tax Treaty,[19] as amended, the income earned by a non-resident foreign company is exempt from income tax. The provisions state that income considered as business profits are exempt from the coverage of income tax provided that it is not earned in connection with a permanent establishment. Since the payment for the repairs made by Yashima was considered business profits as Yashima's main line of business included repairs of electric generators, and considering that the repair personnel sent by Yashima did not stay in the Philippines for more than six months[20], the income payment made to Yashima should not be subjected to FWT per the RP-Japan Treaty. Thus, petitioner erroneously withheld tax from its income payments to Yashima.

On August 25, 2016, petitioner filed with BIR's ITAD a TTRA together with a duly-accomplished BIR Form No. 0901-P[21] to confirm its opinion on Yashima's tax exemption. Petitioner also submitted a Special Power of Attorney (SPA)[22] executed by Yashima in its favor, granting it authority to file a TTRA with ITAD, together with the photocopies of the passports of the Japanese repair personnel.

To cap her testimony, the witness declared that on September 5, 2016, petitioner filed with the BIR's Large Taxpayers Division a Letter-Request for the refund of its erroneously paid withholding taxes in the total amount of ₱18,391,219.94, with a duly-accomplished BIR Form No. 1914[23].

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[17] Exhibit "P-14".
[18] Exhibits "P-4" to "P-13".
[19] Exhibit "P-18".
[20] Exhibit "P-19".
[21] Exhibits "P-20" to "P-21-1".
[22] Exhibit "P-23".
[23] Exhibits "P-24" to "P-26-1".

The Court-commissioned Independent Certified Public Accountant (ICPA) **Emmanuel Y. Mendoza** testified[24] that he audited and evaluated petitioner's documents and financial records in support of the subject claim for tax refund/credit of the FWT it paid in relation to income payments to a non-resident foreign corporation, in the amount of ₱18,391,219.94.

He indicated in his ICPA Report dated June 14, 2017[25] that petitioner is entitled to a refund of ₱18,391,219.94, representing the FWTs it erroneously deducted from its income payments to Yashima in connection to the services the latter rendered to it. Being a non-resident foreign corporation based in Japan, Yashima is not subject to income tax on its business profits as provided under the RP-Japan Tax Treaty. Per Yashima's Certificate of Registration issued by Japanese Authorities and SEC Certificate of Non-Registration, Yashima has no presence in the Philippines. An examination of the passports of the repair personnel together with the certificate issued by Yashima shows that the foreign personnel stayed in the Philippines for a total of 87 days for CY 2014 and 38 days for CY 2015.

Petitioner's last witness, **Bernardito R. Vergara**, testified[26] that he is petitioner's TPC1 Maintenance Manager since 2013. As such, he oversees responses to contingencies that occur within petitioner's power facility like repair of malfunctioning equipment. As part of petitioner's Standard Operating Procedure (SOP), his team, in case of equipment breakdown, shall first determine the nature of such breakdown. Thereafter, they shall determine if the breakdown can be adequately addressed by petitioner's own facilities, lest, it shall be outsourced usually to the vendor of the equipment as occurred in this case.

After examination of the equipment, they prepared a failure report detailing the nature of the malfunction indicating therein that petitioner had no capability for such repair prompting it to engage the repair services of Yashima. The latter sent personnel who finished the repair of TG5 in

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[24] Exhibits "P110" and "P-110-a".
[25] Exhibit "P-111" to "P-111-a".
[26] Exhibits "P-160" to "P-160-a".

ninety-two (92) days in 2014 and in thirty-eight (38) days in 2015.[27]

After its last witness, petitioner rested as shown in the Resolutions dated April 23, 2018,[28] May 23, 2018[29] and August 2, 2018.[30]

In the meantime, on May 7, 2018, respondent's counsel manifested that he would no longer present any evidence as there was no investigation report on petitioner's administrative claim for refund.[31]

On August 24, 2018, petitioner filed a Motion to Reopen Proceedings (With Motion to Defer Filing of Memorandum)[32] which the Court denied in the Resolution dated October 29, 2018.[33]

By virtue of the Order dated September 21, 2018,[34] the instant case was transferred to the Court's First Division.

On November 27, 2018, petitioner submitted its Tender of Excluded Evidence (With Motion to Defer Filing of Memorandum),[35] which the Court noted in the Resolution dated December 18, 2018.[36]

The instant case was submitted for decision on March 13, 2019.[37]

THE ISSUES

The parties submitted the following issues[38] for the Court's resolution:

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27 Exhibits "P-27" to "P-56".
28 Vol. 2 Docket, pp. 777 to 779.
29 *Ibid.*, pp. 930 to 932.
30 *Ibid.*, pp. 952 to 954.
31 Order dated May 7, 2018, vol. 2 docket, pp. 780 to 781.
32 Vol. 2 Docket, pp. 955 to 959.
33 *Ibid.*, pp. 974 to 978.
34 *Ibid.*, p. 971.
35 *Ibid.*, pp. 979 to 983.
36 *Ibid.*, p. 986.
37 *Ibid.*, p. 1028.
38 Summary Statement of Issues, JSFI, vol. 1 docket, p. 448.

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1. Whether petitioner, as withholding agent, has the personality to claim the refund from respondent.

2. Whether petitioner is entitled to the refund of taxes withheld and remitted to the BIR in behalf of Yashima in the amount of Eighteen Million Three Hundred Ninety-One Thousand Two Hundred Nineteen Pesos and 94/100 (₱18,391,219.94).

Petitioner's arguments:

Petitioner argues that as withholding agent, it has personality to file the instant claim for refund. It deemed the services performed by Yashima in its favor as business profits which, under the RP-Japan Treaty, as amended, were not subject to income tax, thus, it is entitled to the refund of taxes in the amount of ₱18,391,219.94 it erroneously withheld and remitted to the BIR in behalf of Yashima.

Further, the filing of a TTRA is not indispensable in claiming the benefits of tax treaties. As pronounced by the Supreme Court in the case of *Deutsche Bank AG v. Commissioner of Internal Revenue,*[39] the BIR must not impose additional requirements that would negate the availment of the relief provided for under international agreements.

Lastly, in accordance with Sections 204 and 229 of the NIRC of 1997, as amended, it timely filed its claim for refund within two (2) years from the payment of tax subject of the present claim for refund.

Respondent's counter-arguments:

Respondent, on the other hand, insists that petitioner is without any personality to claim for a refund as the right belongs to the person on whom the tax is imposed by the

[39] G.R. No. 188550, August 28, 2013.

statute. As such, petitioner has no locus standi to pursue the present Petition since it is not the real party in interest.

Petitioner also failed to file any TTRA with the BIR's ITAD before the transaction or occurrence of the first taxable event, as required under RMO No. 72-10. And since the case is for refund of taxes withheld, it is incumbent upon petitioner to prove the fact of withholding of taxes and their remittance to the BIR which petitioner failed to do.

Finally, a tax refund is in the nature of a tax exemption which must be construed *strictissimi juris* against the taxpayer, says respondent.

THE COURT'S RULING

Petitioner, as withholding agent, has personality to file the claim for refund on behalf of Yashima

Sections 204(C) and 229 of the NIRC of 1997 provide as follows:

> SEC. 204. *Authority of the Compromise, Abate, and Refund or Credit Taxes.* – The Commissioner may –
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> xxx xxx xxx
>
> (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.

> 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 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 therefore, 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.

In *Commissioner of Internal Revenue v. Smart Communications, Inc.,*[40] the Supreme Court declared:

> Pursuant to [the above-quoted Sections 204(C) and 220], the person entitled to claim a tax refund is the taxpayer. However, **in case the taxpayer does not file a claim for refund, the withholding agent may file the claim.**
>
> In *Commissioner of Internal Revenue v. Procter & Gamble Philippine Manufacturing Corporation,*[41] a withholding agent was considered a proper party to file a claim for refund of the withheld taxes of its foreign parent company. Pertinent portions of the Decision read:
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> > The term 'taxpayer' is defined in our NIRC as referring to 'any person subject to tax

[40] G.R. Nos. 179045-46, August 25, 2010.
[41] G.R. No. 66838, December 2, 1991.

imposed by the Title [on Tax on Income].' It thus becomes important to note that under Section 53(c)[42] of the NIRC, the withholding agent who is 'required to deduct and withholding any tax' is made 'personally liable for such tax' and indeed is indemnified against any claim and demands which the stockholder might wish to make in questioning the amount of payments effected by the withholding agent in accordance with the provisions of the NIRC. The withholding agent, P&G-Phil., is directly and independently liable for the correct amount of the tax that should be withheld from the dividend remittances. The withholding agent is, moreover, subject to and liable for deficiency assessments, surcharges and penalties should the amount of the tax withheld be finally found to be less than the amount that should have been withheld under law.

A 'person liable for tax' has been held to be a 'person subject to tax' and properly considered a 'taxpayer.' The terms 'liable for tax' and 'subject to tax' both connote legal obligation or duty to pay a tax. **It is very difficult, indeed conceptually impossible, to consider a person who is statutorily made 'liable for tax' as not 'subject to tax.' By any reasonable standard, such a person should be regarded as a party in interest, or as a person having sufficient legal interest, to bring a suit for refund of taxes he believes were illegally collected from him.**

In *Philippine Guaranty Company, Inc. v. Commissioner of Internal Revenue*, this Court pointed out that a withholding agent is in fact the agent both of the government and of the taxpayer, and that the withholding agent is not an ordinary government agent:

[42] Now Section 57 of the NIRC of 1997.

> 'The law sets no condition for the personal liability of the withholding agent to attach. The reason is to compel the withholding agent to withhold the tax under all circumstances. In effect, the responsibility for the collection of the tax as well as the payment thereof is concentrated upon, the person over whom the Government has jurisdiction. Thus, the withholding agent is constituted the agent of both the Government and the taxpayer. With respect to the collection and/or withholding of the tax, he is the Government's agent. In regard to the filing of the necessary income tax return and the payment of the tax to the Government, he is the agent of the taxpayer. The withholding agent, therefore, is no ordinary government agent especially because under Section 53 (c) he is held personally liable for the tax he is duty bound to withhold; whereas the Commissioner and his deputies are not made liable by law.'

If, as pointed out in *Philippine Guaranty*, **the withholding agent is also an agent of the beneficial owner of the dividends with respect to the filing of the necessary income tax return and with respect to actual payment of the tax to the government, such authority may reasonably be held to include the authority to file a claim for refund and to bring an action for recovery of such claim.** This implied authority is especially warranted where, as in the instant case, the withholding agent is the wholly owned subsidiary of the parent-stockholder and therefore, at all times, under the effective control of such parent-stockholder. In the

> circumstances of this case, it seems particularly unreal to deny the implied authority of P&G-Phil. to claim a refund and to commence an action for such refund.
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> x x x x
>
> We believe and so hold that, under the circumstances of this case, P&G-Phil. is properly regarded as a 'taxpayer' within the meaning of Section 309,[43] NIRC, and as impliedly authorized to file the claim for refund and the suit to recover such claim.

Petitioner, however, submits that this ruling applies only when the withholding agent and the taxpayer are related parties, *i.e.*, where the withholding agent is a wholly owned subsidiary of the taxpayer.

We do not agree.

Although such relation between the taxpayer and the withholding agent is a factor that increases the latter's legal interest to file a claim for refund, there is nothing in the decision to suggest that such relationship is required or that the lack of such relations deprives the withholding agent of the right to file a claim for refund. Rather, what is clear in the decision is that a withholding agent has a legal right to file a claim for refund for two reasons. *First*, he is considered a 'taxpayer' under the NIRC as he is personally liable for the withholding tax as well as for deficiency assessments, surcharges, and penalties, should the amount of the tax withheld be finally found to be less than the amount that should have been withheld under law. *Second*, as an agent of the taxpayer, his authority to file the necessary income tax return and to remit the tax withheld to the government impliedly includes the authority to file the necessary income tax return and to remit the tax withheld to the government impliedly includes the authority to file a claim for refund and to bring an action for recovery of such claim.

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[43] Now Section 204(C), NIRC of 1997.

> In this connection, it is however significant to add that while the withholding agent has the right to recover the taxes erroneously or illegally collected, he nevertheless has the obligation to remit the same to the principal taxpayer. As an agent of the taxpayer, it is his duty to return what he has recovered; otherwise, he would be unjustly enriching himself at the expense of the principal taxpayer from whom the taxes were withheld, and from whom he derives his legal right to file a claim for refund.
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> As to *Silkair (Singapore) Pte, Ltd. v. Commissioner of Internal Revenue*[44] cited by the petitioner, we find the same inapplicable as it involves excise taxes, not withholding taxes. In that case, it was ruled that the proper party to question, or seek a refund of, an indirect tax 'is the statutory taxpayer, the person on whom the tax is imposed by law and who paid the same even if he shifts the burden thereof to another.'
>
> In view of the foregoing, we find no error on the part of the CTA in upholding respondent's right as a withholding agent to file a claim for refund.

Per the foregoing jurisprudential pronouncements, a withholding agent may file a claim for refund, even if the said withholding agent is not a wholly owned subsidiary of the principal taxpayer. Nevertheless, the withholding agent is obligated to remit to the said taxpayer the amount recovered as taxes erroneously or illegally collected.

Such being the case, since petitioner is the withholding agent in this case, it has the required personality to file the instant claim for refund on behalf of Yashima.

Requirements under Section 229 of the NIRC of 1997.

As can be gleaned from the above-quoted Section 229 of the NIRC of 1997, as amended, recovery of taxes

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[44] G.R. No. 173594, February 6, 2008.

erroneously or illegally collected is legally allowed. An *"erroneous or illegal tax"* is defined as one levied without statutory authority, or upon property not subject to taxation or by some officer having no authority to levy the tax, or one which is some other similar respect is illegal.[45]

Additionally, in *Commissioner of Internal Revenue v. Acosta*,[46] the Supreme Court enumerated the conditions for Section 229 to apply, to wit:

> Noteworthy, the requirements under Section 230[47] for refund claims are as follows:
>
> 1. A **written claim** for refund or tax credit must be filed by the taxpayer with the Commissioner;
> 2. The claim for refund must be a **categorical demand** for reimbursement;
> 3. The claim for refund or tax credit must be filed, or the suit or proceeding therefor must be commenced in court **within two (2) years from date of payment of the tax or penalty regardless of any supervening cause.**
>
> In our view, the law is clear. A claimant must first file a written claim for refund, categorically demanding recovery of overpaid taxes with the CIR, before resorting to an action in court. This obviously is intended, first, to afford the CIR an opportunity to correct the action of subordinate officers; and second, to notify the government that such taxes have been questioned, and the notice should then be borne in mind in estimating the revenue available for expenditure.

Thus, the refund claimant must show that: (1) a written claim for refund or tax credit has been filed with respondent; (2) such claim must be a categorical demand for reimbursement; and (3) the claim, or the suit or proceeding must be filed in court, within two (2) years from

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[45] *Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation*, G.R. No. 188497, April 25, 2012, citing BLACK'S LAW DICTIONARY, Fifth Edition, p. 486.
[46] G.R. No. 154068, August 3, 2007.
[47] Now Section 229 of the NIRC of 1997.

date of payment of the tax or penalty, regardless of any supervening cause.

As regards the *first* and *second* requirements under Section 229 of the NIRC of 1997, as amended, evidence shows that petitioner was able to comply with the said *first* requirement through its letter dated September 2, 2016 filed before the BIR on September 5, 2016.[48] The letter categorically demanded for the reimbursement of the amount of ₱18,391,219.94, in this wise:

> ...we respectfully request for [the] refund of final withholding taxes amounting to Php18,391,219.94 representing payments for the months of August 2014, December 2014, July 2015, August 2015 and September 2015. xxx[49]

Petitioner likewise fulfilled the third requirement. Sections 204 (C) and 229 of the NIRC of 1997, as amended, provides that both the administrative claim for refund/TCC filed with the BIR and the subsequent appeal to the CTA must be filed within two years from the date of payment of tax.[50]

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[48] Exhibit "P-24".
[49] *Ibid.*
[50] Section 204 of the NIRC of 1997, as amended reads:

SEC. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes. — The Commissioner may —

xxx xxx xxx

(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.

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.

Evidence show that petitioner paid or remitted final withholding taxes from income payments to Yashima for the following periods, *viz.*:

Period Covered	Amount	Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F) (Exhibit)	BIR ePayment Confirmation (Exhibit)	Payment Transaction Date per BIR ePayment Confirmation	Last Day to File Administrative and Judicial Claims
August 2014	₱ 15,331,115.29	"P-4"	"P-5"	September 10, 2014	September 10, 2016
December 2014	638,922.20	"P-6"	"P-7"	January 9, 2015	January 9, 2017
July 2015	132,772.27	"P-8"	"P-9"	August 11, 2015	August 11, 2017
August 2015	950,595.67	"P-10"	"P-11"	September 11, 2015	September 11, 2017
September 2015	1,337,814.34	"P-12"	"P-13"	October 13, 2015	October 13, 2017
Total	**₱18,391,219.77**				

Thus, petitioner had two years from September 10, 2014, at the earliest, and until September 10, 2016, at the earliest, within which to file both its administrative and judicial claims for refund or tax credit certificate.

Evidently, petitioner's administrative claim and judicial claim for refund via the instant Petition for Review were seasonably filed on September 5, 2016[51] and September 8, 2016, respectively, in compliance with the first and second requirements under Section 229 of the NIRC of 1997, as amended.

The Supreme Court has consistently ruled that a claim for refund or credit with the BIR and the subsequent appeal to this Court must be filed within two (2) years from the date of payment of the tax.[52] The law only requires that an administrative claim be priorly filed. That is, to give the BIR at the administrative level an opportunity to act on said

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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 payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without 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.

[51] Exhibits "P-24" to "P-26".

[52] *Commissioner of Internal Revenue v. Victorias Milling Co., Inc. and The Court of Tax Appeals*, G.R. No. L-24108, January 3, 1968; *J. N. Sweeney, A. O. Baigrie, and Ramon Burgas v. Collector*, G.R. No. L-12178, August 21, 1959; *P.J. Kiener Company, Ltd. v. Saturnino David*, G.R. No. L-5163, April 23, 1953.

claim. In other words, for as long as the administrative claim and judicial claim were filed within the two-year prescriptive period, then there was exhaustion of administrative remedies.[53] The taxpayer need not wait for respondent to act on the administrative claim for refund.[54]

Petitioner's refund claim consists of erroneous or illegal taxes.

Section 28(B)(1) of the NIRC of 1997, as amended by Republic Act No. 9337,[55] provides as follows:

> SEC. 28. *Rates of Income Tax on Foreign Corporations.* –
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> xxx xxx xxx
>
> (B) *Tax on Non-resident Foreign Corporations.* –
>
> (1) *In General.* – Except as otherwise provided in this Code, a foreign corporation not engaged in trade or business in the Philippines shall pay a tax equal to thirty-five percent (35%) of the **gross income received during each taxable year from all sources within the Philippines**, such as interests, dividends, rents, royalties, salaries, premiums (except reinsurance premiums), annuities, emoluments or other fixed or determinable annual, periodic or casual gains, profits and income, and capital gains, except capital gains subject to tax under subparagraphs 5(c): *Provided*, That **effective January 1, 2009, the rate of income tax shall be thirty percent (30%).**

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[53] *Commissioner of Internal Revenue v. Univation Motor Philippines, Inc. (formerly Nissan Motor Philippines, Inc.)*, G.R. No. 231581, April 10, 2019.
[54] *Ibid.*
[55] AN ACT AMENDING SECTIONS 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES.

✓

Relative thereto, Section 2.57-1(I)(1) of Revenue Regulations No. 2-98 reads:

> Sec. 2.57-1. *Income Payments Subject to Final Withholding Tax.* – The following forms of income shall be subject to final withholding tax at the rates herein specified:
>
> xxx xxx xxx
>
> (I) *Income Derived From all Sources Within the Philippines by Non-Resident Foreign Corporation.* – **The following shall be subject to final withholding tax based on the gross amount of income and at the rate of tax prescribed therefor:**
>
> (1) *In general.* – **On gross income derived from all sources within the Philippines** such as interests, dividends, rents, royalties, salaries, premiums (except reinsurance premiums), annuities, emoluments, or other fixed or determinable annual, periodic or casual gains, profits and income and capital gains (except capital gains realized from sale, exchange, disposition of shares of stock in any domestic corporation which is subject to capital gains tax under Sec. 28(B)(5)(c) xxx.

Thus, the law requires that any payment within the Philippines to a non-resident foreign corporation is subject to tax, and must be subject to the final withholding tax, at the rate of 30%, beginning January 1, 2009.

Significantly, Section 32(B)(5) of the NIRC of 1997, as amended, provides as follows:

> SEC. 32. *Gross Income.* —
>
> xxx xxx xxx
>
> (B) *Exclusions from Gross Income.* – **The following items shall <u>not</u> be included in gross income and shall be exempt from taxation under this Title:**

xxx xxx xxx

(5) *Income Exempt under Treaty.* – **Income of any kind, <u>to the extent required by any treaty obligation binding upon the Government of the Philippines</u>."**

On the basis of the foregoing, income of any kind, to the extent required by any treaty obligation binding upon the Philippines, are exempt from income tax. Thus, the above-stated thirty percent (30%) withholding tax rate for income payments to a non-resident foreign corporation may not be applied, or may be reduced, to the extent required by a tax treaty entered into by the Government of the Philippines.

In claiming that its alleged payments to Yashima are exempt from final withholding tax, petitioner invokes the RP-Japan Tax Treaty. Article 7 of the RP-Japan Tax Treaty, as amended, provides as follows:

Article 7

1. The profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in that other Contracting State but only so much of them as is attributable to that permanent establishment.

Thus, the profits of an enterprise of a Contracting State shall be taxable only in that Contracting State, *unless* the said enterprise carries on business in the other Contracting State through a permanent establishment. Such being the case, for the profits of Yashima to be taxable only in Japan, it must be shown that Yashima is an enterprise thereof and does not carry on business in the Philippines through a permanent establishment.

The term "permanent establishment" is defined as a fixed place of business through which the business of an enterprise is wholly or partly carried on.[56] Such term includes especially: (1) a store or other sales outlet; (2) a branch; (3) an office; (4) a factory; (5) a workshop; (6) warehouse; and (7) a mine, an oil or gas well, a quarry or other place of extraction of natural resources.[57] However, even if there is no fixed place of business, an enterprise of a Contracting State is deemed to have a permanent establishment in the other Contracting State if it furnishes in the other Contracting State consultancy services, or supervisory services in connection with a contract for a building, construction or installation project through employees or other personnel, provided that such activities continue (for the same project or two or more connected projects) for a period or periods aggregating more than six months within any twelve-month period.[58]

To prove that Yashima is an enterprise of Japan or a non-resident foreign corporation, and does not carry on business in the Philippines through a permanent establishment, petitioner presented the following documents:

Recipient	**Country of Origin/Residence**	**Corporate Filing / Registration Documents**	**Exhibit reference**
Yashima	Japan	Certificate of Non-Registration of Company issued by the Philippine Securities and Exchange Commission (SEC)	Exhibit "P-17"[59]
		Translated Certificate of Company Registration of Yashima with Consularized authentication from the Philippine Embassy on August 8, 2016	Exhibit "P-16"[60]
		Translated Articles of Incorporation of Yashima with Consularized authentication from the Philippine Embassy on August 8, 2016	Exhibit "P-15"[61]

[56] Article 5(1), RP-Japan Tax Treaty.
[57] Article 5(2), RP-Japan Tax Treaty.
[58] Article 5(6), RP-Japan Tax Treaty.
[59] Vol. 2 Docket, Vol. 2, p. 695.
[60] *Ibid.*, pp. 681 to 694.
[61] *Ibid.*, pp. 665 to 680.

Clearly, Yashima is an enterprise of Japan, incorporated in the said country and that it does not have a permanent establishment (or a fixed place of business) in the Philippines.

Moreover, to prove that the provision of services by Yashima did not constitute a permanent establishment, petitioner presented the following:

1) Contract for Supply of Labor, Equipment and Materials;[62] and
2) Certificate issued by Yashima stating the time spent by Japanese personnel in the Philippines.[63]

Taken together, the documents submitted disclosed that the employees of Yashima performed the repair services in the Philippines for periods aggregating not more than six months within any twelve-month period (covering the years 2014 and 2015). Such being the case, Yashima, during that relevant period, did not have a permanent establishment in the Philippines in connection with the services it provided to and for petitioner. Hence, the profits or gross income of Yashima is taxable only in Japan; and the amounts withheld by petitioner as income tax therefrom must be deemed as one levied without authority, thus, refundable.

As consideration for the full and faithful performance of its obligations under the said Contract and the completion of the services, petitioner paid Yashima service fees, which should be considered the latter's profits or gross income, to wit:

Acknowledgement/ Cash Receipt		Proof of Billing Which Shows the Nature of the Payment				
Exhibit Ref.	**Amount per OR (in Japanese Yen)**	**Exhibit Ref.**	**Portion of Debit Note/Invoice Amount Net of FWT (in Japanese Yen)**	**Grossed-Up Amount (in Japanese Yen)**	**Exchange Rate**	**Grossed-Up Amount in Pesos subjected to Final Withholding Tax**
"P-86-C"	¥82,295,023.00	"P-86-D"	¥83,250,180.00	¥118,928,828.57	0.4297	₱51,103,717.64
"P-88-C"	5,700,000.00	"P-88-D"	3,971,280.00	5,673,257.14	0.3754	2,129,740.73
"P-89-C"	1,026,800.00	"P-89-D"	826,800.00	1,181,142.86	0.3747	442,574.23

[62] Exhibit "P-14".
[63] Exhibit "P-19".

P-90-C1; P-90-C2"	7,496,200.00	"P-90-D1"	2,016,700.00	2,881,000.00	0.3648	1,050,988.80
"P-90-C3"	4,263,500.00	"P-90-D2"	4,063,500.00	5,805,000.00	0.3648	2,117,664.00
"P-87-C"	10,134,560.00	"P-87-D1"; "P-87-D2"	8,519,560.00	12,170,800.00	0.3664	4,459,381.12
TOTAL	**¥110,916,083.00**		**¥102,648,020.00**	**¥146,640,028.57**		**₱61,304,066.52**

In sum, petitioner was able to prove that it had remitted erroneous withholding taxes in the total amount of ₱18,391,219.77, as shown below:

Income Payments to Yashima	**30% FWT**	**Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F)**		**BIR ePayment Confirmation**	
		FWT	**Exhibit**	**Date**	**Exhibit**
₱51,103,717.64	₱15,331,115.29	₱15,331,115.29	"P-4"	10 September 2014	"P-5"
2,129,740.73	638,922.22	638,922.20	"P-6"	9 January 2015	"P-7"
442,574.23	132,772.27	132,772.27	"P-8"	11 August 2015	"P-9"
1,050,988.80	315,296.64	950,595.67	"P-10"	11 September 2015	"P-11"
2,117,664.00	635,299.20				
4,459,381.12	1,337,814.34	1,337,814.34	"P-12"	13 October 2015	"P-13"
₱61,304,066.52	**₱18,391,219.96**	**₱18,391,219.77**			

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is **GRANTED**. Accordingly, respondent is ordered to issue a tax credit certificate to petitioner Toledo Power Company in the amount of **₱18,391,219.77**, representing its erroneously paid final withholding taxes during the taxable years 2014 and 2015 arising from income payments made to Yashima & Co. Ltd., a non-resident foreign corporation exempt from tax under RP-Japan Tax Treaty, as amended.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

ROMAN G. DEL ROSARIO
Presiding Justice

CATHERINE T. MANAHAN
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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice