REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1786** (CTA Case No. 8934)
	Present:
- versus -	Del Rosario, *PJ*, Castañeda, Jr., Uy, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, Manahan, Bacorro-Villena, and Modesto-San Pedro, *JJ.*
MAERSK GLOBAL SERVICE CENTRES (PHILIPPINES) LTD., Respondent.	Promulgated: OCT 11 2019 3:50 p.m.

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RESOLUTION

CASTAÑEDA, JR., *J.*:

For resolution of the Court *En Banc* is petitioner's Motion for Reconsideration (on the Decision of the Honorable Court dated 13 June 2019) filed on July 5, 2019, with respondent's Comment (To the Motion for Reconsideration dated 4 July 2019) filed on August 13, 2019.

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

"**WHEREFORE**, the instant Petition is **DENIED**. Accordingly, the Decision dated October 11, 2017 and the

Resolution dated January 26, 2018, respectively, are **AFFIRMED.**

SO ORDERED."[1]

In his motion, petitioner asserts that there was a valid ground to disallow respondent's bad debt expense as an item of deduction. Further, he asserts that the assessment for Final Withholding Tax (FWT) on Branch Profit Remittance was proper. On the other hand, respondent counters that the instant motion should be denied for being *pro forma* or for lack of merit, among others.

After careful consideration of the present issues involved, the Court En Banc resolves to deny the instant motion.

Respondent's denied VAT refund claim is a valid loss which was properly deducted from its gross income for CY 2010

The Court *En Banc* notes that aside from echoing the dissenting opinion of the Honorable Presiding Justice Roman G. Del Rosario and Honorable Justice Esperanza R. Fabon-Victorino, petitioner raised no new argument that was not addressed in the assailed Decision.

To reiterate, law does not prohibit the recovery of excess input tax other than by refund or issuance of a tax credit certificate. Thus:

> **"Treatment of denied VAT refund claims**
>
> xxx xxx xxx
>
> It is noteworthy that there is no explicit rule as to the treatment of **disallowed/denied** application for refund or issuance of tax credit certificate on input VAT attributable to zero-rated sales under the NIRC of 1997, as amended. However, Revenue Regulations (RR) No. 09-89 provided for Journal Entries *vis-à-vis* the recording of transactions if there are **disallowed/denied** input taxes upon verification of the claim, *to wit:*

[1] Court *En Banc* Docket, p. 115.

'Example 4:

Under the same set of facts as in Examples 1, 2, 3, the net refundable or creditable input tax shall be computed as follows:

Input tax per VAT return			P32,500
Less: Input tax not attributable to export sales:			
Input tax attributable to taxable domestic sales		P16,250	
Input tax attributable to exempt sales	8,125		
Input tax on ending inventory	1,120		
Excess of output tax over input tax attributable to taxable domestic sales		3,750	29,245
Net amount refundable or creditable			P3,255

The following entries shall be made to reflect the foregoing transactions:

xxx xxx xxx

B. Upon filing of application for refund or tax credit:

Receivable (TCC/Refund) P3,255

Input tax P3,255

To record the amount of input taxes claimed for refund or tax credit.

Input tax attributable to zero-rated sales			P8,125
Less:			
	Excess of output tax over input tax attributable to taxable domestic sales	P3,750	
	Input tax on ending inventory	1,120	4,870
Claim for refund/tax credit			P3,255

Case 1

Upon receipt of the tax credit or refund where there are no disallowances:

Cash or TCC P3,255

Receivables (TCC/Refund) P3,255

To record the amount of refund or tax credit received.

Case 2

Upon receipt of tax credit or refund where there are disallowed input taxes of P2,500 upon verification of claim:

Purchases or Cost of Sales P2,500

Receivables (TCC/Refund) P2,500

To close unallowable input tax upon verification of claim.

Cash or TCC P755

Receivables (TCC/Refund) P755

To record the amount of refund or tax credit received.'

Based on the foregoing, the disallowed/denied claim for input tax was recorded as Purchases or Cost of Sales, which is classified as an expense account and a deduction from the taxpayer's sales/revenue.

It should be noted that respondent's treatment of recording the input taxes in the Other Receivables account is in order. When the DOF denied respondent's claim, it cannot record the disallowed/denied input taxes as part of the cost because the books of account for the year 2006 have been closed. Alternatively, the same was written of its books through the contra account Other Provision-Allowance, which is an account used to reduce the value of a related account (in this case, the Other Receivables account). This contra account was eventually closed to the Bad Debts Expense account, which formed part of respondent's deductions from its gross income.

xxx xxx xxx

Upon verification by the Court in Division, respondent's denied VAT refund claim was a valid loss, to wit:

1. Respondent actually sustained a loss in the amount of ₱11,133,280.00 when the DOF denied its claim for refund, considering that such denial equated to respondent no longer having any reasonable expectation to classify the same as a receivable;

2. The loss was sustained in CY 2010, when respondent received the DOF's denial letter, and as evidenced by the date stamped on the envelope[2] of said letter (i.e., March 11, 2010);

3. Respondent was not compensated for the loss; ge

[2] Exhibit P-10, Docket, Vol. I, p. 472.

4. Respondent incurred the loss in the conduct of its trade or business (*i.e.*, the denied input VAT arose from petitioner's zero-rated sales of services); and

5. The DOF categorically stated in its denial letter that respondent's claim for the issuance of TCC "cannot be given due course."

Thus, it is proper to treat the denied VAT refund claim as a deductible loss.

Finally, petitioner subscribes to the dissenting opinion of the Honorable Associate Justice Esperanza R. Fabon-Victorino, that the unutilized input taxes attributable to zero-rated sales can only be recovered through an application for refund or tax credit. There is no specific provision under the law which allows another modality to recover unapplied input taxes arising from zero-rated or effectively zero-rated sales.

While *We* recognize that the NIRC of 1997, as amended, specifically mentions refund or tax credit as modes to recover unutilized input taxes attributable to zero-rated sales, it does not categorically prohibit the use of any other mode for its recovery. In fact, a reading of Section 112 (A) of the NIRC of 1997, as amended, suggests that an alternative mode may be resorted to by a taxpayer for the recovery of excess input taxes other than by tax refund or tax credit. Thus:

> "SEC. 112. **Refunds or Tax Credits of Input Tax.** –
>
> (A) *Zero-rated or Effectively Zero-rated Sales.* – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated **may**, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: xxx" *(Emphasis supplied)*

The use of the permissive word "may" by the statute signifies that a taxpayer has the discretion whether to apply for a tax refund or tax credit of the excess input VAT, to the extent that such input tax has not been applied against output tax. In other words, the above-quoted law allows a taxpayer to **fully recover** the excess input tax, to the extent that such input tax has not been applied against output tax, either by tax refund or tax credit.

However, while the law merely speaks of tax refund or tax credit, there is no law which prohibits a taxpayer from resorting to any other mode for the recovery of excess input tax, as in this case. Here, there is no transgression of any law or rule by respondent when it treated its denied VAT refund claim as an expense or a loss, because when it treated the same as such and deducted it from its gross income for CY 2010, respondent therefore opted not to fully recover its excess input tax to the extent that such input tax has not been applied against its output tax. Thus, respondent merely chose to claim it as a deductible expense or loss leading to a partial recovery of its excess input VAT, instead of fully recovering it by pursuing its refund claim.

Thus, if the taxpayer desires to fully recover its excess input VAT, *i.e.*, to the extent that such input tax has not been applied against output tax, the law provides only for two (2) modes: either by filing a claim for tax refund or tax credit. However, if the taxpayer decides not to fully recover the same, it may resort to other modes which are not categorically prohibited by any law or rule, and which are based on sound accounting principles and procedure."[3]

In addition, the pertinent separate concurring opinion of Honorable Justice Catherine T. Manahan is worth mentioning, thus:

"In BIR Ruling No. DA591-2004 issued on November 24, 2004, the BIR affirmed that a denied claim for refund of unutilized input VAT relating to its VAT zero-rated sales may be treated as a deductible expense for income tax purposes if the denial is based on failure to comply with certain sales invoicing requirements thus echoing the provisions of RMC No. 42-2003 issued on July 13, 2003 where the BIR confirmed that in cases where a taxpayer fails to submit sufficient invoicing documents to prove zero-rated sales, the amount of input VAT claimed may be charged to the appropriate expense account or asset account whichever is applicable. xxx"[4]

In the instant case, it is clear that when respondent applied for the issuance of tax credit certificate in 2006, the Department of Finance denied[5] *gr*

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[3] Court *En Banc* Docket, pp. 115-119.
[4] Court *En Banc* Docket, p. 133.
[5] Exhibit "P-9".

the same for respondent's alleged failure to strictly comply with the invoicing requirements. Hence, as guided by RR No. 09-89, in relation to RMC No. 42-2003 which was applied in BIR Ruling No. DA591-2004, respondent's denied VAT refund claim is a valid deductible loss.

The assessment for FWT on branch profit remittance was improper

Finally, petitioner insists that the imposition of FWT on respondent's branch profit remittance was proper. However, as discussed in the assailed Decision, the subject is based merely on an assumption and as such, should be considered as an invalid assessment. Thus:

> "Petitioner asserts that:
>
> > '16. The Petitioner assessed the Respondent Branch Profit Remittance Tax on its entire earnings as of P166,043,000.00 for calendar year 2010 not only because the amount was entered under the Head Office Account but also because the said amount was in reality already directly paid and remitted to the Head Office. The Respondent is merely booking the transactions here in the Philippines and no amount is being remitted to the Respondent.
> >
> > xxx xxx xxx
> >
> > 18. It is thus moot and academic for the Respondent to apply or earmark its remittances to the Head Office in view of the current set up of the manner of payment by Respondent's customers.'
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> After careful review, the Court *En Banc* finds the above assertion untenable. In this regard, the Court in Division aptly held that:
>
> > 'A review of petitioner's Head Office Account for CYs 2009 and 2010 reveals that it is comprised of two different items, i.e., Assigned Capital and Accumulated Earnings.
> >
> > As regards the Assigned Capital account, the assigned capital of Php11,129,800.00 in CY 2010 remained the same in CY 2009. On the other hand, as regards the Accumulated Earnings account, all of petitioner's net income in CY 2010 (*i.e.,*

Php40,013,880.00) was added to its Accumulated Earnings account, which resulted in the total balance of Php166,043,000.00 as of December 31, 2010.

Meanwhile, in the assessment, respondent assumed that petitioner's entire earnings as of CY 2010 was remitted (*i.e.*, not just the net income for CY 2010 in the amount of Php40,013,880.00, but also those of previous years), and thus imposed BPRT on the same resulting in the deficiency FWT assessment.

The Court holds that it was erroneous for respondent to conclude that the entire earnings of petitioner as of CY 2010 (*i.e.*, Php166,043,000.00) partakes the nature of an indirect remittance to the head office which should be subjected to BPRT. Under the branch accounting principles in the Philippines, the net income is a standard component or entry in the Head Office Account, which entry is added to the Accumulated Earnings of the previous year (*i.e.*, CY 2009) in order to arrive at the Accumulated Earnings as of the end of the current year (*i.e.*, CY 2010). The mere fact that Accumulated Earnings was booked under the Head Office Account does not automatically mean that said accumulated earnings were already applied or earmarked for remittance to the head office. Respondent's allegation of a constructive remittance of profits cannot be countenanced.

In addition, Section 28 (A) (5) of the 1997 NIRC requires that profits be applied or earmarked for remittance to the head office. In the present case, however, there is no evidence that petitioner actually did either — apply for remittance or earmark for remittance its net income as of CY 2010 to its head office.

Therefore, respondent's conclusion that the income, booked as Accumulated Earnings under the Head Office Account, should have been subject to FWT on BPRT, does not in any way justify the imposition of the BPRT absent any showing that actual remittance or earmarking for remittance was made by petitioner.

From the foregoing, it is evident that the assessments made against petitioner for CY 2010 were issued without basis in law and in fact. Necessarily, having ruled that the assessments for deficiency income tax and FWT are improper, the interest and compromise penalty imposed by respondent thereon likewise have no basis.'

Clearly, the BIR made an assessment based merely on a presumption *vis-à-vis* respondent's payment setup by its customers. Basic is the rule that 'in order to stand judicial scrutiny, the assessment must be based on facts. The presumption of the correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption.' As such, the Court *En Banc* sees no reason to disturb the findings of the Court in Division."[6]

To end, petitioner failed to raise meritorious arguments to warrant the reconsideration of the assailed Decision. Hence, the denial of the instant motion is in order.

WHEREFORE, the instant Motion for Reconsideration (on the Decision of the Honorable Court dated 13 June 2019) is **DENIED.**

SO ORDERED.

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

WE CONCUR:

(I reiterate my Concurring and Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

(I reiterate my CDO)
ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
(With due respect, I join PJ's CDO)
CIELITO N. MINDARO-GRULLA
Associate Justice

Ma. Belen
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

[6] Court *En Banc* Docket, pp. 119-121.

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice