REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

DOLE FRESH FRUIT COMPANY	**CTA CASE No. 9012**
Petitioner,	**Members:**
-versus-	CASTAÑEDA, JR., Chairperson, MINDARO-GRULLA, and BACORRO-VILLENA, *JJ.*
COMMISSIONER OF INTERNAL REVENUE,	
Respondent.	**Promulgated:** FEB 05 2020 8:05 a.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for Decision on March 18, 2019[1] is a Petition for Review[2] filed by petitioner Dole Fresh Fruit Company (DFFC) on March 19, 2015, pursuant to Section 7(a)(1)[3] of Republic Act (RA) No. 1125,[4] as amended, as well as Section 3(a)(1)[5] of Rule 4 and Section 4(a) of Rule 8 of the Revised

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[1] *Dockets,* Vol. II, p. 1098.
[2] *Dockets,* Vol. I, pp. 6-22.
[3] Sec. 7. Jurisdiction. - The CTA shall exercise:

(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:

(1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;

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[4] Act Creating the Court of Tax Appeals.
[5] Sec. 3. Cases within the jurisdiction of the Court in Division.- The Court in Division shall exercise:

(a) Exclusive original over or appellate jurisdiction to review by appeal the following:

Rules of the Court of Tax Appeals, as amended, claiming for refund of its erroneously paid capital gains taxes (CGT) to the Commissioner of Internal Revenue, arising from its sales of shares in Dole Philippines, Inc. (DPI) to Dole Asia Holdings Pte. Ltd. (DAHL) in the amount of ₱9,036,864.40.[6]

Petitioner DFFC is corporation organized and existing under the laws of the State of Nevada, United States of America (US) with principal place of business at One East First Street, Reno, Washoe Country, Nevada, US. It is principally engaged in any lawful activity for which corporations may be formed under the General Corporation Law of Nevada[7].[8]

Respondent Commissioner of Internal Revenue (CIR), is the duly appointed CIR with authority among others, to decide, approve, and grant tax credits and/or refunds of overpaid or erroneously paid internal revenue taxes.[9]

On March 4, 2013, petitioner filed an application with the Bureau of Internal Revenue's (BIR) Internal Tax Affairs Division (ITAD) to request confirmation that the transaction is exempt from capital gains tax under the Republic of the Philippines-United States (RP-US) Tax Treaty.[10]

Thereafter, on March 5, 2013[11], petitioner filed its documentary stamp tax return and paid Documentary Stamp Tax (DST) in the amount of ₱57,725.00.[12]

> (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue.

[6] Statement of the Case, Pre-Trial Order dated July 27, 2016, *Dockets*, Vol. II, p. 674.
[7] Exhibit "P-2" and "P-3", *Dockets*, Vol. II, pp. 782-790 and 791-794, respectively.
[8] The Parties, Petition for Review, *Dockets*, Vol. I, p. 6.
[9] Par. 1, Statement of Facts and Issues, Pre-Trial Order dated July 27, 2016, *Dockets*, Vol. I, p. 674.
[10] Par. 5, Statement of Material Facts, *Petition for Review* and Exhibit "P-15, *Dockets*, Vol. I, pp. 2 and Vol. II, 906-910, respectively.
[11] Exhibit "P-10" and "P-11", *Dockets*, Vol. II, pp. 826 and 827, respectively.
[12] Par. 6, Statement of Material Facts, *Petition for Review*, *Dockets*, Vol. I, p. 8.

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On March 21, 2013,[13] petitioner filed its capital gains tax return and paid capital gains taxes in the amount of ₱9,036,864.40.[14]

On April 5, 2013,[15] petitioner secured the Certificate Authorizing Registration (CAR) and tax clearance on the sale of shares.[16]

Thereafter, on October 1, 2014, petitioner filed with the BIR an Application for Tax Credits/Refund (Form No. 1914)[17] to recover the erroneously paid capital gains taxes amounting to ₱9,036,864.40.[18]

With the 2-year period to file cases for refund before the courts to prescribe pursuant to Section 229 of the National Internal Revenue Code (NIRC) of 1997, petitioner filed the instant Petition for Review with this Court on March 19, 2015.

On May 13, 2015, respondent filed her Answer,[19] interposing the following special and affirmative defenses, to wit:

> "15. The Petition for Review lacks proper verification and a valid certification against forum shopping in accordance with the applicable rules. It is not signed by an authorized representative.
>
> Ronald D. Bouchard is not authorized to sign the Verification and Certification Against Forum Shopping at the time he signed the documents. The VERIFICATION AND CERTIFICATION" was signed by Ronald D. Bouchard on February 25, 2015. The Secretary's Certificate authorizing him to sign the same was executed only on March 9, 2015.

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[13] Exhibit "P-8" and "P-9", *Dockets*, Vol. II, pp. 824 and 825, respectively.
[14] Par. 7, Statement of Material Facts, *Petition for Review*, *Dockets*, Vol. I, p. 8.
[15] Exhibit "P-12", *Dockets*, Vol. II, p. 828.
[16] Par. 8, Statement of Material Facts, *Petition for Review*, *Dockets*, Vol. I, p. 8.
[17] Exhibit "P-13", *Dockets*, Vol. II, pp. 835-841.
[18] Par. 9, Statement of Material Facts, *Petition for Review*, *Dockets*, Vol. I, p. 8.
[19] *Dockets*, Vol. I, pp. 189-193.

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Given the lack of a proper verification and a valid certification, the Petition is treated as an unsigned pleading which produces no legal effect.

Consequently, Section 2, RULE 6, Revised Rules of the Court of Tax Appeals provides that:

> '**SEC. 2.** *Petition for Review; contents.* – The petition for review shall contain allegations showing the jurisdiction of the Court, a concise statement of the complete facts and a summary statement of the issues involved in the case, as well as the reason relied upon for the review of the challenged decision. <u>The petition shall be verified and must contain a certification against forum shopping</u> as provided in Section 3, Rule 46 of the Rules of Court. A clearly legible duplicate original or certified true copy of the decision appealed from shall be attached to the petition.' (Emphasis supplied).

Corollary to this is Section 3, Rule 46 of the 1997 Rules of Civil Procedure which states that:

> '**SEC. 3.** *Contents and filing of Petition; effect of non-compliance with requirements.*
>
> xxx xxx
>
> The <u>failure to comply</u> with any of the foregoing requirements shall be <u>sufficient ground for the dismissal of the petition</u>.' (Emphasis supplied)

Considering the material defect in the Petition for Review, the Rules warrant the dismissal of the Petition."

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The pre-trial was initially set on July 16, 2015.[20]

Respondent submitted to the Court the BIR Records on May 25, 2014.[21]

Thereafter, petitioner filed a Motion to Take Deposition upon Written Interrogatories on June 25, 2015,[22] which was granted by the Court on September 16, 2015.[23]

On January 13, 2016, petitioner submitted its Notice to Take Deposition Upon Written Interrogatories.[24] On February 16, 2016, the Court issued a Resolution[25] giving respondent ten (10) days from notice within to serve her cross-interrogatories.

Thereafter, on April 1, 2016, the Court issued a Resolution[26] setting the pre-trial conference on May 26, 2016.

The Petitioner's Pre-Trial Brief and Respondent's Pre-Trial Brief were both submitted on May 20, 2016.[27]

The parties submitted their Joint Stipulations of Facts and Issues on June 10, 2016,[28] which were approved in the Resolution dated June 16, 2016,[29] thereby terminating the Pre-Trial.

On July 27, 2016, the Court issued the Pre-Trial Order.[30]

During trial, petitioner presented documentary and testimonial evidence. As for its testimonial evidence, petitioner offered the testimonies of (1) Mr. Teodoro C.

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[20] *Notice of Pre-Trial Conference* dated May 18, 2015, *Dockets*, Vol. I, pp. 194-195.
[21] Compliance dated May 25, 2015, *Dockets*, Vol. I, p. 196.
[22] *Dockets*, Vol. I, pp. 199-202.
[23] Resolution dated September 16, 2015, *Dockets*, Vol. I, pp. 228-232.
[24] *Dockets*, Vol. I, pp. 233-239.
[25] Resolution dated February 16, 2016, *Dockets*, Vol. I, p. 374.
[26] Resolution dated April 1, 2016, *Dockets*, Vol. I, p. 398-399.
[27] *Dockets*, Vol. I, pp. 404-412 and 400-403, respectively.
[28] *Dockets*, Vol. II, pp. 633-638.
[29] *Dockets*, Vol. II, p. 640.
[30] *Dockets*, Vol. II, pp. 674-680.

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Santos, Jr.,[31] petitioner's Finance Manager of DPI; and (2) Deposition upon Written Interrogatories of Mr. Ronald Bouchard,[32] President of DFCC.

On April 5, 2018, petitioner filed its Formal Offer of Evidence.[33] Respondent failed to file his comment thereon.[34]

In the Resolution dated July 25, 2018,[35] the Court admitted petitioner's Exhibits, *except* "P-20", for failure to identify the exhibit.

On December 5, 2018, the Court issued a Resolution granting petitioner Urgent Motion to Correct Description of Exhibits "P-4" and "P-4.1", in its Formal Offer of Evidence, to wit:

P-4	Philippine Securities and Exchange Commission Certificate of Non-Registration of Dole Fresh Fruit Company dated February 26, 2013
P-4.1	Philippine Securities and Exchange Commission Certificate of Non-Registration of Dole Fresh Fruit Company dated July 15, 2014

Petitioner's exhibits are as follows:

Exhibit	Description
P-1	Secretary Certificate dated March 9, 2015 and consularized on March 11, 2015
P-1.1	Written Consent of the Board of Directors dated July 14, 2015 and consularized on July 22, 2015
P-2	Affidavit Certifying Copy of Certificate of Incorporation with the attached Articles of Incorporation Dole Fresh Fruit Company dated September 12, 1985, and consularized on July 2,

[31] Exhibit "P-19", *Dockets*, Vol. II, pp. 415-422; Order dated February 22, 2017, *Dockets*, Vol. II, pp. 714-715.
[32] Exhibit "P-21", *Dockets*, Vol. I, pp. 236-239; Exhibit "P-508", *Dockets*, Vol. II, pp. 986 to 997; Order dated February 22, 2017, *Dockets*, Vol. II, pp. 714-715.
[33] *Dockets*, Vol. II, pp. 762-770.
[34] Records Verification dated March 14, 2018 issued by the Judicial Records Division of this Court, *Dockets*, Vol. II, p. 1045.
[35] *Dockets*, Vol. II, pp. 1050-1051.

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P-3	U.S. Tax Residency Certification dated May 04, 2015 and consularized on May 20, 2015
P-4	Philippine Securities and Exchange Commission Certificate of Non-Registration of Dole Fresh Fruit Company dated February 26, 2013
P-4.1	Philippine Securities and Exchange Commission Certificate of Non-Registration of Dole Fresh Fruit Company dated July 15, 2015
P-5	Share Transfer Agreement between DFFC and Dole Asia Holdings Pte Ltd. ('DAHL') consularized on 22 February 2013
P-6	Stock Certificate No. 154 in Dole Philippines, Inc. issued under the name of DFFC
P-7	General Information Sheet for April 30, 2012 filed on November 13, 2012
P-8	Capital Gains Tax return filed on March 21, 2013
P-9	Official Receipt issued by RCBC on March 21, 2013 for payment of Php9,036,864.40
P-10	Documentary Stamp Tax return filed on March 5, 2013
P-11	Official Receipt issued by DBP for payment of Php57,285.00 on March 05,2013
P-12	Certificate Authorizing Registration issued on April 05, 2013, and Tax Clearance Certificate issued on April 04, 2013
P-13	Application for Tax Credits/Refund and Form 1914 (administrative claim) filed on October 1, 2014
P-14	DPI's Audited Financial Statements dated May 18, 2012
P-15	Tax Treaty Relief Application dated March 1, 2013 and filed on March 04, 2013
P-16	Certificate of Filing of Amended Articles of Incorporation of DPI issued on January 09, 2015 with attached amended Articles of Incorporation of DPI
P-17	Comparative Schedule of the Property, Plant and Equipment as part of Form 0901-C
P-18	DPI's Audited Financial Statements dated May 17, 2013
P-19	Judicial Affidavit of Mr. Teodoro Santos
P-19-A	Signature of Mr. Teodoro Santos
P-20	Certification No. 16-017 issued on December 08, 2016 by the Commissioner of Internal Revenue Caesar R. Dulay
P-21	Deposition Upon Written Interrogatories of Mr. Ronald Daniel Bouchard before Rainer J. Casis, Vice Consul Philippine Consulate General Los Angeles,

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	California dated 16 March 2016

In the Resolution, the Court noted the respondent's Manifestation and Compliance filed on January 14, 2019, manifesting that the presentation of its evidence be waived. The Court also ordered the parties to file their respective memoranda within thirty the (30)-day period.[36]

Subsequently, petitioner filed its Memorandum on March 5, 2019.[37] Respondent, however, failed to file her memorandum.[38]

The instant case was considered submitted for decision on March 18, 2019.[39]

THE ISSUES

The parties submitted the following issues[40] for the Court's resolution, to wit:

a) WHETHER THE PETITIONER LACKS A VALID VERIFICATION AND CERTIFICATION AGAINST FORUM SHOPPING; and

b) WHETHER DFFC IS ENTITLED TO A REFUND OF THE CAPITAL GAINS TAXES ERRONEOUSLY PAID TO AND COLLECTED BY THE CIR.

Petitioner argues that it is legally entitled to claim its refund for ₱9,036,864.40 representing erroneously paid capital gains tax under the RP-US Tax Treaty, having complied with the substantive and procedural requisites for claiming a refund of erroneously paid tax under the tax law.

The instant Petition for Review is meritorious.

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[36] Resolution dated January 23, 2019, *Dockets*, Vol. II, pp.1070-1071.
[37] *Dockets*, Vol. II, pp. 1077-1096.
[38] Records Verification dated March 13, 2019 issued by the Judicial Records Division of this Court, *Dockets*, Vol. II, p. 1097.
[39] *Supra*, note 1.
[40] Issues, Pre-Trial Order dated July 27, 2016, *Dockets*, Vol. II, p. 675.

Respondent claims that Ronald D. Bouchard is not authorized to sign the Verification and Certification Against Forum Shopping at the time he signed the documents. She states that the Verification and Certification signed by Ronald D. Bouchard on February 25, 2015 while the Secretary's Certificate authorizing him to sign the same was executed only on March 9, 2015.

Section 4 and 5 of Rule 7 of the Rules of Civil Procedure provide:

> "SEC. 4. *Verification*. – Except when otherwise specifically required by law or rule, pleadings need not be under oath, verified or accompanied by affidavit.
>
> A pleading is verified by an affidavit that the affiant has read the pleading and that the allegations therein are true and correct of his personal knowledge or based on authentic records.
>
> A pleading required to be verified which contains a verification based on information and belief or upon knowledge, information and belief or lacks a proper verification, shall be treated as an unsigned pleading.
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> SEC. 5. Certification against forum shopping. - The plaintiff or principal party shall certify under oath in the complaint or other initiatory pleading asserting a claim for relief, or in a sworn certification annexed thereto and simultaneously filed therewith: (a) that he has not theretofore commenced any action or filed any claim involving the same issues in any court, tribunal or quasi-judicial agency and, to the best of his knowledge, no such other action or claim is pending therein; (b) if there is such other pending action or claim, a complete statement of the present status thereof; and (c) if he should thereafter learn that the same or similar action or claim has been filed or is pending, he shall report that fact within five (5) days therefrom to the court wherein his aforesaid complaint or initiatory pleading has been filed. Failure to comply with the foregoing requirements shall not be curable by mere amendment of the complaint or other initiatory pleading but shall be cause for the dismissal of the case without prejudice, unless otherwise

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provided, upon motion and after hearing. The submission of a false certification or noncompliance with any of the undertakings therein shall constitute indirect contempt of court, without prejudice to the corresponding administrative and criminal actions. If the acts of the party or his counsel clearly constitute willful and deliberate forum shopping, the same shall be ground for summary dismissal with prejudice and shall constitute direct contempt, as well as a cause for administrative sanctions."

Moreover, in the case of *Fuji Television Network, Inc. vs. Arlene S. Espiritu,*[41] the Supreme Court, citing *Altres, et al. vs. Empleo, et al.,*[42] summarized the rules on verification and certification against forum shopping in this manner:

"For the guidance of the bench and bar, the Court restates in capsule form the jurisprudential pronouncements ... respecting non-compliance with the requirement on, or submission of defective, verification and certification against forum shopping:

1) A distinction must be made between non-compliance with the requirement on or submission of defective verification, and non-compliance with the requirement on or submission of defective certification against forum shopping.

2) <u>As to verification, non-compliance therewith or a defect therein does not necessarily render the pleading fatally defective. The court may order its submission or correction or act on the pleading if the attending circumstances are such that strict compliance with the Rule may be dispensed with in order that the ends of justice may be served thereby.</u>

3) Verification is deemed substantially complied with when one who has ample knowledge to swear to the truth of the allegations in the complaint or petition signs the verification, and when matters alleged in the petition have been made in good faith or are true and correct.

[41] G.R. No. 204944-45, December 3, 2014.
[42] G.R. No. 180986, December 10, 2008.

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4) As to certification against forum shopping, non-compliance therewith or a defect therein, unlike in verification, is generally not curable by its subsequent submission or correction thereof, unless there is a need to relax the Rule on the ground of 'substantial compliance' or presence of 'special circumstances or compelling reasons.'" (Underlinings supplied.)

Petitioner submits as evidence the Authenticated Certificate of Assistant Secretary, which certifies that Mr. Ronald D. Bouchard is authorized and empowered to sign the Verification and Certification. It also offers as evidence the Authenticated Certificate of Assistant Secretary with attached Action Taken by Unanimous Written Consent of the Board of Directors of the petitioner, which provides:

> "RESOLVED, that the execution by Ronald D. Bouchard of that certain Verification and Certification on behalf of the Corporation xxx and of that certain petition entitled 'Dole Fresh Fruit Corporation v. Commissioner of Internal Revenue' docketed as CTA Case No. 9012 pending with the Philippines Court of Tax Appeals 1st Division be, and each hereby is, confirmed and affirmed pursuant to his inherent powers and functions as a Vice President of the Corporation, without need of prior explicit authority from the Board."[43]

In *Lopez Realty, Inc. et al. vs. Spouses Reynaldo Tanjangco and Maria Luisa Arguelles Tanjangco*,[44] the Supreme Court explains the nature of such ratification and ruled that it retroacts to the date of the subject of such act, to wit:

> "The general rule is that a corporation, through its board of directors, should act in the manner and within the formalities, if any, prescribed by its charter or by the general law. Thus, directors must act as a body in a meeting called pursuant to the law or the

[43] *Dockets*, Vol. II, p. 779.
[44] G.R. No. 154291, November 12, 2014.

> corporation's by-laws, otherwise, any action taken therein may be questioned by any objecting director or shareholder.
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> However, the actions taken in such a meeting by the directors or trustees may be ratified expressly or impliedly. Ratification means that the principal voluntarily adopts, confirms and gives sanction to some unauthorized act of its agent on its behalf. It is this voluntary choice, knowingly made, which amounts to a ratification of what was theretofore unauthorized and becomes the authorized act of the party so making the ratification. The substance of the doctrine is confirmation after conduct, amounting to a substitute for a prior authority. Ratification can be made either expressly or impliedly. Implied ratification may take various forms – like silence or acquiescence, acts showing approval or adoption of the act, or acceptance and retention of benefits flowing therefrom." (Underlining supplied.)

Thus, such act of petitioner's Unanimous Written Consent of the Board of Directors on July 14, 2014 is considered a ratification and retroacts to the date when Mr. Bouchard sign the Verification and Certification on February 25, 2015.

Moreover, the rule on verification and certification against forum shopping is not strictly applied in the interest of substantial justice. In *Great Southern Maritime Services Corporation et al. v. Jennifer Anne B. Acuna et al.,*[45] the liberal interpretation of such rule was sustained by the Supreme Court, which ruled that:

> "[I]t must be remembered that the rules on forum shopping, which were precisely designed to promote and facilitate the orderly administration of justice, should not be interpreted with such absolute literalness as to subvert its own ultimate and legitimate objective which is the goal of all rules of procedure - that is, to achieve substantial justice as expeditiously as possible.

[45] G.R. No. 140189, February 28, 2005.

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> Needless to stress, rules of procedure are merely tools designed to facilitate the attainment of justice. They were conceived and promulgated to effectively aid the court in the dispensation of justice. Courts are not slaves to or robots of technical rules, shorn of judicial discretion. In rendering justice, courts have always been, as they ought to be, conscientiously guided by the norm that on the balance, technicalities take a backseat against substantive rights, and not the other way around. Thus, if the application of the Rules would tend to frustrate rather than promote justice, it is always within our power to suspend the rules or except a particular case from its operation."

Now, this Court determines whether petitioner timely filed its administrative and judicial claims.

Section 229 of the NIRC of 1997, as amended, provides as follows:

> "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, <u>until a claim for refund or credit has been duly filed with the Commissioner</u>; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> <u>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</u>: *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." (Underlinings supplied.)

The foregoing provision allows the recovery of taxes erroneously or illegally collected within a period of two (2)

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years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment. 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 aspect is illegal.[46]

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.[47]

The dates of filing of petitioner's administrative and judicial claims for refund *vis-à-vis* the two (2)-year prescriptive period for filing such, are summarized as follows:

Date of Payment of CGT	**Date of Filing of the Administrative Claim**	**Date of Filing of the Judicial Claim**	**End of the two-year period**
March 21, 2013[48]	October 1, 2014[49]	March 19, 2015[50]	March 21, 2015

Clearly, petitioner's administrative claim filed on October 1, 2014 and the subsequent appeal before the Court *via* Petition for Review filed on March 19, 2015, are both within the two (2)-year prescriptive period provided under Section 229 of the NIRC of 1997, as amended.

This Court now proceeds to resolve whether the subject refund claim involves erroneous or illegal taxes and finds that petitioner complied with the requisites to prove its entitlement to the refund claimed.

Petitioner owns 0.64% of the total shareholdings of DPI, equivalent to 1,527,600 common shares out of DPI's

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[46] *Commissioner of Internal Revenue vs. Pilipinas Shell Petroleum Corporation, G.R. No. 188497, April 25, 2012.*
[47] *Commissioner of Internal Revenue vs. Victorias Milling Co., Inc. and The Court of Tax Appeals*, G.R. No. L-12178, August 21, 1959; *P.J. Kiener Company, Ltd. vs. Saturnino David*, G.R. No. L-5163, April 23, 1953.
[48] Exhibit "P-8" and "P-9", *Dockets*, Vol. II, pp. 824 and 825, respectively.
[49] Exhibit "P-13", *Dockets*, Vol. II, pp. 835-841.
[50] *Dockets*, Vol. I, pp. 6-13.

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authorized capital stock of 2,528,120,000 common shares.[51] DPI is a corporation organized and existing under Philippines laws.[52]

On February 19, 2013, petitioner sold and transferred to DAHL all its rights, title, and interests in and to the 1,527,600 Common B Shares in DPI, for a purchase price of ₱105,694,644. DAHL is a Singapore private limited company.[53]

Section 28(B)(5)(c) of the NIRC, in relation to Sections 32(A)(3) and 32(B)(5) of the same Code, provides that non-resident foreign corporations are subject to CGT on their net capital gains realized during the taxable year from the sale or other disposition of shares of stock in a domestic corporation made outside the stock exchange and any gain derived from such dealings in property shall form part of gross income except that income exempt under any treaty obligation binding on the Government of the Philippines shall be excluded from gross income and exempt from tax. The provisions read as follows:

> "Sec. 28. Rates of Income Tax on Foreign Corporations. –
>
> XXX XXX XXX
>
> (B) Tax on Nonresident Foreign Corporation. –
>
> XXX XXX XXX
>
> (c) Capital Gains from Sale of Shares of Stock not Traded in the Stock Exchange.-A final tax at the rates prescribed below is hereby imposed upon the net capital gains realized during the taxable year from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation, except shares sold, or disposed of through the stock exchange:

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[51] Exhibit "P-6" and "P-7", *Dockets*, Vol. II, pp. 812 and 814-823, respectively.
[52] Exhibit "P-16", *Dockets*, Vol. II, 911-931.
[53] Exhibit "P-5", *Dockets*, Vol. II, pp. 797-811.

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Not over ₱100,000.......................................5%
On any amount in excess of ₱100,000.........10%

XXX XXX XXX

Sec. 32. Gross Income. –

(A) General Definition. - Except when otherwise provided in this Title, gross income means all income derived from whatever source, including (but not limited to) the following items:

XXX XXX XXX

(3) Gains derived from dealings in property;

XXX XXX XXX

(B) Exclusions from Gross Income. - The following items shall not 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, to the extent required by any treaty obligation binding upon the Government of the Philippines."

Petitioner presented the Affidavit Certifying Copy of Certificate of Incorporation with the attached Articles of Incorporation of DFFC to show that it is a corporation duly organized and existing under the laws of the United States of America (USA) and the Philippine Securities and Exchange Commission Certificate of Non-Registration of DFFC[54] to show that it is not registered either as a corporation or as a partnership in the Philippines.

Generally, any gain by petitioner from the sale of shares in DPI should be subject to CGT. However, considering that the Philippines has a treaty with the US, the

[54] Exhibit "P-4" and "P-4.1", *Dockets*, Vol. II, pp. 795 and 796, respectively.

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said income from the sale of shares may be exempted from income tax if the conditions set forth under the RP-US Tax Treaty are satisfied, which states:

> "ARTICLE 14
> *Capital Gains*
>
> (1) Gains from the alienation of tangible personal (movable) property forming part of the business property of a permanent establishment which a resident of a Contracting State has in the other Contracting State or of tangible personal (movable) property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in the other State. However, gains derived by a resident of a Contracting State from the alienation of ships, aircraft or containers operated by such resident in international traffic shall be taxable only in that State, and gains described in Article 13 (Royalties) shall be taxable only in accordance with the provisions of Article 13 (Royalties).
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> (2) Gains from the alienation of any property other than those mentioned in paragraph 1 or in Article 7 (Income from Real Property) shall be taxable only in the Contracting State of which the alienator is a resident."

Corollary to the foregoing, Article 1 of the Reservation Clause of the RP-US Tax Treaty[55] provides:

> "ARTICLE 1
>
> Notwithstanding the provisions of Article 14 of the Convention relating to capital gains, both the Philippines and the United States may tax gains from the disposition of an interest in a corporation <u>if its</u>

[55] Supplementing the Convention between the Republic of the Philippines and the United States of America for the Avoidance of Double Taxation and the Preservation of Fiscal Evasion with Respect to Taxes on Income.

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> assets consist principally of a real property interest located in that country. Likewise, both countries may tax gain from the disposition of an interest in a partnership, trust or estate to the extent the gain is attributable to a real property interest in one of the countries. The term 'real property interest' is to have the meaning it has under the law of the country in which the underlying real property is located." (Underlining supplied)

Thus, under the RP-US Tax Treaty, capital gains from the sale of shares of stock shall be taxable in the state where the alienator is a resident. However, the Reservation Clause provides that such sale may be taxed by both the Philippines and the US if the interest being disposed is in a corporation whose assets consist principally of a real property interest located in that country. On the reverse side, under the RP-US Tax Treaty, the subject capital gains may be exempt from Philippine tax if the interest being disposed is in a corporation whose assets do not consist principally of real property interest located in the Philippines.

In the instant case, it was proven that petitioner DFFC is a non-resident foreign corporation, and the shares transferred are of DPI which is a domestic corporation. It is now necessary to determine whether the assets of DPI consist principally of real property interest in the Philippines.

For purposes of determining whether under the applicable tax treaty, the assets of a corporation consist principally of real property interests, RR No. 4-86[56] dated April 2, 1986 was issued. It provided the guidelines for determining the composition of the company's assets. Under the said Revenue Regulation, the term "Real Property Interest" shall be understood to include real properties as understood under Philippine laws. "Real Property Interest" means any properties enumerated in Section 327 of the RR No. 4-86 which, are not, however, exclusive of others that are similarly situated. Moreover, the term "Principally" means more than fifty percent (50%) of the entire assets in terms of value.

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[56] Determination of whether the assets of a corporation consist principally of real property interest under the Philippine tax treaties.

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Furthermore, Section 4 of RR No. 4-86 provides that the basis for determining the composition of a company's assets shall be the value of all the assets of the subject corporation, both real and personal, as appearing in its financial statement on the date of the sale of the share or interest and as verified by the BIR.[57]

In *Goodyear Philippines, Inc. vs. Commissioner of Internal Revenue,*[58] this Court made the following pronouncements as to the exemption of shares from CGT under the RP-US Tax Treaty:

> In the case of petitioner, its Audited Financial Statements (AFS) for the years 2007 and 2008 reveal that the real property components of its property, plant and equipment (PPE) comprise less than 50% of its assets, detailed as follows:
>
> XXX XXX XXX
>
> Furthermore, as correctly pointed out by petitioner, the entire values of the PPE of petitioner for the years 2007 and 2008, respectively, comprise less than 50% of its total assets for said years, respectively, to wit:
>
> XXX XXX XXX
>
> Since petitioner's assets do not consist principally of real property interest, the Reservation Clause of the RP-US Tax Treaty does not apply in this case. Accordingly, the net capital gain derived by GTRC in the redemption of its 3,729,216 preferred shares by petitioner is exempt from the 5% or 10% capital gains tax imposed under Section 28(B)(5)(c) of the NIRC of 1997, as amended.

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[57] *Dole Food Company, Inc. vs. Commissioner of Internal Revenue,* CTA Case No. 9011, April 13, 2018.

[58] CTA Case No. 8188, March 25, 2013, affirmed by the CTA *En Banc* in *Commissioner of Internal Revenue vs. Goodyear Philippines, Inc.,* CTA EB No. 1041, August 14, 2014.

Summarizing the provisions thus: (1) capital gains derived by residents of other Contracting States from the disposition of shares or interests in a Philippine corporation are taxable in the Philippines only if the assets of the corporation consist principally of real property interest located in the Philippines;[59] (2) real property interests are interests on properties enumerated in RR 4-86, including real properties as defined under Philippine law;[60] (3) principally means more than fifty percent (50%) of the entire assets in terms of value;[61] and, (4) the value of the assets shall be determined from the financial statements as of the date of the sale, as verified by the BIR.[62]

Applying the foregoing to the instant case, petitioner presented DPI's Audited Financial Statements[63] for the year ended December 31, 2012 dated May 17, 2013. Evident from the said audited Financial Statements that the percentage of DPI's real property interest over its total assets was only **17.80%,** to wit:

Assets	As of December 31, 2012
Property, plant and equipment	₱ 4,725,601,019.00
Total Assets	26,549,527,599.00
Percentage	17.80%

Petitioner likewise submitted the Comparative Schedule of Property, Plant and Equipment[64] to show that the valuation of DPI's real property during the transaction date amounts to ₱4,568,099,916.00 which way less than 50% of DPI's total assets.

As computed, the real property interest of DPI does not exceed 50%, thus it cannot be said to have assets consisting principally of a real property interest in the Philippines. Therefore, petitioner's capital gains derived from the transfer of its shares of stock in the DPI shall be exempt from CGT in the Philippines, pursuant to RP-US Tax Treaty.

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[59] RR 4-86, Section 1.
[60] RR 4-86, Section 2(a).
[61] RR 4-86, section 2(b).
[62] RR 4-86, section 4.
[63] Exhibit "P-18", *Dockets*, Vol. II. pp. 933-1005.
[64] Exhibit "P-17", *Dockets*, Vol. II, p. 932.

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As stressed by the High Tribunal in *Commissioner of Internal Revenue vs. Fortune Tobacco Corporation,*[65] if the State expects taxpayers to observe fairness and honesty in paying their taxes, it must hold itself against the same standard in refunding erroneous exactions and payment of such taxes. It thus behooves the government to refund what it erroneously collected.[66]

WHEREFORE, in light of the foregoing considerations, the instant Petition for Review is **GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is **ORDERED TO REFUND** in favor of petitioner Dole Fresh Fruit Company the amount of **₱9,036,864.40**, representing erroneously paid capital gains tax from sale of its shares of stock in Dole Philippines, Inc. to Dole Asia Holding Pte. Ltd.

SO ORDERED.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

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

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

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[65] G.R. Nos. 167274-75, July 21, 2008.
[66] *Commissioner of Internal Revenue and Commissioner of Customs vs. Philippine Airlines, Inc.,* G.R. No. 212536-37, August 27, 2014.

ATTESTATION

I attest 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.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
2nd Division Chairperson

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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice