REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

Third Division

NES GLOBAL TALENT LIMITED,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 9065

Members:

BAUTISTA, *Chairperson*
FABON-VICTORINO, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

FEB 09 2018
2:50 p.m.

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AMENDED DECISION

RINGPIS-LIBAN, ***J.*:**

For the Court's resolution are the following:

1. petitioner's **Motion for Partial Reconsideration (of the Decision dated 6 September 2017)**, filed on September 28, 2017, without respondent's comment as per Records Verification dated January 22, 2018; and

2. respondent's **Motion for Partial Reconsideration**, filed on September 26, 2017, with petitioner's **Comment/Opposition (On Petitioner's[1] Motion for Reconsideration dated 25 September 2017)**, filed on November 2, 2017.

Petitioner moves for the reconsideration of the Court's Decision dated September 6, 2017, the dispositive portion of which reads:

> "**WHEREFORE,** premises considered, the Petition for Review is **PARTIALLY GRANTED**. Accordingly, respondent is

[1] Should be "Respondent".

ORDERED TO REFUND the amount of **₱10,369,060.73,** representing petitioner's erroneously paid FWT for the months of November to December 2012 and April to July 2013.

SO ORDERED."

Petitioner's Motion for Partial Reconsideration

Petitioner raised the following grounds in its motion:

1. this Court cannot make a deficiency tax assessment; and
2. it fully paid the Withholding Tax on Compensation (WTC) for November to December 2012 and April to July 2013. For foreign employees, the WTC was based on the grossed-up value of the guaranteed net pay. Hence, there was no deficiency WTC.

Petitioner asserts that the Court did not make a mere determination of the proper tax applicable, rather, it made a deficiency assessment by making its own computation, which is a function of the Bureau of Internal Revenue (BIR). It argues that by disallowing ₱4,238,957.72 of the refund claim, the Court in effect made a deficiency assessment, a function of the BIR.

Petitioner alleges that there was no need for the Court to rule that WTC is the proper applicable tax as the same was not contested by it. Also, the payment of WTC is not indispensable to the determination that final withholding taxes (FWT) were erroneously paid. It claims that the payment of WTC and FWT are independent issues.

The Court does not agree.

It must be noted that this Court's jurisdiction to review respondent's denial or inaction on disputed assessments includes the authority to determine the proper taxes to be paid. In fact, it is incidental in determining whether there should be refund in this case.

In the case of *SMI-ED Philippines Technology, Inc. vs. Commissioner of Internal Revenue*[2], the Supreme Court held that:

> "Petitioner argued that the Court of Tax Appeals had no jurisdiction to subject it to 6% capital gains tax or other taxes at

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[2] G.R. No. 175410, November 12, 2014.

the first instance. The Court of Tax Appeals has no power to make an assessment.

As earlier established, the Court of Tax Appeals has no assessment powers. In stating that petitioner's transactions are subject to capital gains tax, however, the Court of Tax Appeals was not making an assessment. It was merely determining the proper category of tax that petitioner should have paid, in view of its claim that it erroneously imposed upon itself and paid the 5% final tax imposed upon PEZA-registered enterprises.

The determination of the proper category of tax that petitioner should have paid is an incidental matter necessary for the resolution of the principal issue, which is whether petitioner was entitled to a refund.

The issue of petitioner's claim for tax refund is intertwined with the issue of the proper taxes that are due from petitioner. A claim for tax refund carries the assumption that the tax returns filed were correct. If the tax return filed was not proper, the correctness of the amount paid and, therefore, the claim for refund become questionable. In that case, the court must determine if a taxpayer claiming refund of erroneously paid taxes is more properly liable for taxes other than that paid.

In *South African Airways v. Commissioner of Internal Revenue*, South African Airways claimed for refund of its erroneously paid 2½% taxes on its gross Philippine billings. This court did not immediately grant South African's claim for refund. This is because although this court found that South African Airways was not subject to the 2½% tax on its gross Philippine billings, this court also found that it was subject to 32% tax on its taxable income.

In this case, petitioner's claim that it erroneously paid the 5% final tax is an admission that the quarterly tax return it filed in 2000 was improper. Hence, to determine if petitioner was entitled to the refund being claimed, the Court of Tax Appeals has the duty to determine if petitioner was indeed not liable for the 5% final tax and, instead, liable for taxes other than the 5% final tax. As in *South African Airways*, petitioner's request for refund can neither be granted nor denied outright without such determination.

> If the taxpayer is found liable for taxes other than the erroneously paid 5% final tax, the amount of the taxpayer's liability should be computed and deducted from the refundable amount."

Moreover, in the case of *Air Canada vs. Commissioner of Internal Revenue*[3], the Supreme Court affirmed the ruling in *SMI-ED Philippines Technology, Inc. vs. Commissioner of Internal Revenue* and held that:

> "Finally, we reject petitioner's contention that the Court of Tax Appeals erred in denying its claim for refund of erroneously paid Gross Philippine Billings tax on the ground that it is subject to income tax under Section 28(A)(1) of the National Internal Revenue Code because (a) it has not been assessed at all by the Bureau of Internal Revenue for any income tax liability; and (b) internal revenue taxes cannot be the subject of set-off or compensation, citing *Republic v. Mambulao Lumber Co., et al.* and *Francia v. Intermediate Appellate Court.*
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> In *SMI-ED Philippines Technology, Inc. v. Commissioner of Internal Revenue*, we have ruled that '[i]n an action for the refund of taxes allegedly erroneously paid, the Court of Tax Appeals may determine whether there are taxes that should have been paid in lieu of the taxes paid.' The determination of the proper category of tax that should have been paid is incidental and necessary to resolve the issue of whether a refund should be granted. Thus:
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> Hence, the Court of Tax Appeals properly denied petitioner's claim for refund of allegedly erroneously paid tax on its Gross Philippine Billings, on the ground that it was liable instead for the regular 32% tax on its taxable income received from sources within the Philippines. Its determination of petitioner's liability for the 32% regular income tax was made merely for the purpose of ascertaining petitioner's entitlement to a tax refund and not for imposing any deficiency tax."

The issue of petitioner's claim for tax refund of Final Withholding Tax (FWT) is closely related with the issue of the proper taxes that are due from petitioner. Hence, in stating that petitioner is liable to WTC, however, this Court was not making an assessment. It was merely determining the proper category of tax that petitioner should have paid, in view of its claim that it erroneously paid FWT.

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[3] G.R. No. 169507, January 11, 2016.

To reiterate, the determination of the proper category of tax (WTC) that petitioner should have paid is an incidental matter necessary for the resolution of the principal issue, which is whether petitioner is entitled to a refund of FWT.

As to petitioner's contention that it fully paid the WTC for November to December 2012 and April to July 2013, petitioner claims that for foreign employees, the WTC was based on the grossed-up value of the guaranteed net pay. Thus, there is no deficiency WTC.

The Court agrees.

It can be recalled that in the assailed Decision, the Court found that petitioner's assigned foreign employees were paid on a net rate basis (*i.e.*, petitioner agreed to shoulder the tax due on the assigned foreign employees' compensation); while the Filipino employees were paid on a gross rate basis (*i.e.*, Filipino employees will shoulder the tax due on their compensation). The compensation paid to the assigned foreign employees were grossed-up by 85% for the months of October, November and December 2012, and April and May 2013, and 68% for July 2013, before determining the FWT to be withheld thereon. For the month of June 2013, some of the payments were grossed up by 85%, while others were grossed up by 68%, before determining the FWT to be withheld thereon.

Thus, the Court held that the petitioner's shouldering of the tax expenses of its assigned foreign employees is considered compensation that benefitted the employees, which is taxable. Consequently, the Court disallowed from petitioner's claim the amount of ₱3,335,349.07 representing the WTC due on the WTC shouldered by petitioner on compensation paid to assigned foreign employees. The amount of ₱3,335,349.07 formed part of the ₱4,238,957.62 total disallowances made by the Court.[4]

In its motion, petitioner argues that the Court failed to consider that the WTC on payments made to foreign employees were computed based on the grossed-up value of the guaranteed net take home pay. This means that the WTC was already computed by grossing up the net take home pay.

Petitioner pointed out that the same was discussed by the Court-commissioned Independent Certified Public Accountant (ICPA) in pages 10-13 of his Report (Exhibit P-32), Annexes 5-series and 10-series thereof, and Exhibits P-40 and P-41. For better appreciation of the Court, petitioner attached to its motion the supporting computations (Annexes A to F) in reference to the amended December 2013 BIR Form No. 1601-C (Exhibits P-

[4] Decision, Docket, Vol. 2, pp. 710-712.

45 and P-47), to capture the WTC on the WTC initially shouldered by petitioner for 2012 and 2013.

Petitioner explained that the grossing-up happens at year-end, upon annualization of the employees' compensation and WTC. Thus, petitioner asserted that it paid the WTC on the WTC it shouldered.

Guided by the foregoing explanations made by petitioner, the Court was able to determine that indeed petitioner subjected to WTC the WTC it initially shouldered for the compensation of its foreign employees for the subject period of claim. As can be seen in the supporting computations attached to petitioner's motion as Annexes A to F and Annualized Computation of WTC (Exhibit P-42), the WTC initially shouldered by petitioner in 2012 and 2013 was added to the foreign employees' taxable compensation for the year 2013 in determining the total WTC due from the said employees for 2013. Thus, the WTC remitted by petitioner in December 2013 (Exhibits P-47 and P-48) included the WTC due on the WTC shouldered by petitioner for 2012 and 2013.

Accordingly, petitioner is entitled to a refund in the modified amount of ₱13,704,409.80, representing erroneously paid FWT for the months of October to December 2012 and April to July 2013.

Respondent's Motion for Partial Reconsideration

Respondent alleges that petitioner's certain documentary exhibits are inadmissible in evidence for being hearsay and that petitioner's instant claim for refund should be construed *strictissimi juris* against it. On the other hand, petitioner alleges the following grounds: (1) respondent's failure to issue a deficiency assessment for WTC and plead in its Answer that there is a deficiency WTC constitute a waiver to question the sufficiency of its WTC payment; (2) there is no evidence to support respondent's allegation that the WTC payment was insufficient; (3) Exhibits "P-1", "P-30", "P-34", "P-35", "P-36-A", "P-36-B", "P-37-A" and "P-37-B" should be given probative value; and (4) a claim for refund clearly based on erroneous payment, and not on a claim of tax exemption, should be liberally construed for the taxpayer.

Respondent asserts that petitioner failed to present the signatory of the records or the person who had a hand in the preparation of certifications, letter claim and contracts of services in order to establish and validate the facts stated therein. Respondent argues that the said certifications, letter claim and contracts of services marked as Exhibits "P-1", "P-30", "P-34", "P-35", "P-36-A", "P-36-B", "P-37-A" and "P-37-B" were identified and testified to by petitioner's witnesses – Lee Coleman and Glenn Ian D. Villanueva, and not by the one who issued them. Hence, the aforesaid exhibits should not have been given probative value for being hearsay evidence pursuant to Section 36, Rule 130 of the Rules of Court.

Respondent's contention has no merit.

Exhibits "P-1", "P-30", "P-36-A", "P-37-A" and "P-37-B" pertain to the Bureau of Internal Revenue Form (BIR) No. 1601-F stamped received by the BIR on June 27, 2013, Letter dated September 25, 2014 addressed to BIR, Revenue District Office (RDO) No. 53-B, Agreement for Provision of Contractor Agency and Recruitment Services with INPEX Australia Pty. Ltd., Contracts of Services of Foreign Employees assigned to INPEX and/or FDIP and Contracts of Service of Filipino Employees assigned to INPEX.

It must be noted that Mr. Lee Coleman has been the Regional Finance Director of petitioner since 2008. As a Regional Finance Director, his duties and responsibilities include supervising the preparation of the books of accounts, financial statements and tax returns of petitioner.[5] Hence, he has acquired personal knowledge regarding the preparation and filing of the said documents and is competent to testify regarding the same.

Similarly, Mr. Glenn Ian D. Villanueva, a court-commissioned Independent Certified Public Accountant (ICPA), has a duty to examine and identify the relevant documents of petitioner in relation to its claim for refund or issuance of Tax Credit Certificate (TCC). For this reason and by virtue of his expertise, he can very well testify on the contents of the documents subject of his examination.

Furthermore, Exhibits "P-34", "P-35" and "P-36-B" pertain to petitioner's License to Transact Business in the Philippines, Certificate of Registration with the BIR and Amended Articles of Incorporation of Fluor Daniel Inc. – Philippines, are public documents since they are either notarized or records in the custody of government agencies such as Securities and Exchange Commission (SEC) and BIR, which require no further authentication.

In the case of *Republic of the Philippines vs. Fe Roa Gimenez and Ignacio B. Gimenez*[6], the Court held that:

> Emphasizing the importance of the correct classification of documents, this court pronounced:

[5] Docket, Vol. 1, p. 111.
[6] G.R. No. 174673, January 11, 2016.

> The nature of documents as either public or private determines how the documents may be presented as evidence in court. A public document, by virtue of its official or sovereign character, or because it has been acknowledged before a notary public (except a notarial will) or a competent public official with the formalities required by law, or because it is a public record of a private writing authorized by law, *is self-authenticating and requires no further authentication in order to be presented as evidence in court.* In contrast, a private document is any other writing, deed, or instrument executed by a private person without the intervention of a notary or other person legally authorized by which some disposition or agreement is proved or set forth. **Lacking the official or sovereign character of a public document, or the solemnities prescribed by law, a private document requires authentication in the manner allowed by law or the Rules of Court before its acceptance as evidence in court.**
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In *Salas v. Sta. Mesa Market Corporation*, this court discussed the difference between mere copies of audited financial statements submitted to the Bureau of Internal Revenue (BIR) and Securities and Exchange Commission (SEC), and certified true copies of audited financial statements obtained or secured from the BIR or the SEC which are public documents under Rule 132, Section 19(c) of the Revised Rules of Evidence:

> The documents in question were supposedly copies of the audited financial statements of SMMC. Financial statements (which include the balance sheet, income statement and statement of cash flow) show the fiscal condition of a particular entity within a specified period. The financial statements prepared by external auditors who are certified public accountants (like those presented by petitioner) are audited financial statements. *Financial statements, whether audited or not, are, as [a] general rule, private documents. However, once financial statements are filed with a government office pursuant to a provision of law, they become public documents.*
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> Whether a document is public or private is relevant in determining its admissibility as evidence. Public documents are admissible in evidence even

> without further proof of their due execution and genuineness. On the other hand, private documents are inadmissible in evidence unless they are properly authenticated. Section 20, Rule 132 of the Rules of Court provides:
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> *Petitioner and respondents agree that the documents presented as evidence were mere copies of the audited financial statements submitted to the BIR and SEC. Neither party claimed that copies presented were certified true copies of audited financial statements obtained or secured from the BIR or the SEC which under Section 19(c), Rule 132 would have been public documents. Thus, the statements presented were private documents. Consequently, authentication was a precondition to their admissibility in evidence. (Emphasis supplied)*

Considering that Exhibits "P-34", "P-35" and "P-36-B" pertain to documents submitted and obtained or secured from the BIR or the SEC, the same are considered public documents. "As a public document, the rule on authentication does not apply. It is admissible in evidence without further proof of its due execution and genuineness".[7] Therefore, the persons who prepared the documents need not be presented in court to identify, describe and testify on these exhibits.

WHEREFORE, premises considered, petitioner's **Motion for Partial Reconsideration (of the Decision dated 6 September 2017)**, is **PARTIALLY GRANTED**; while respondent's **Motion for Partial Reconsideration**, is **DENIED** for lack of merit. Accordingly, the dispositive portion of the assailed Decision dated September 6, 2017 is hereby amended to read, as follows:

> "**WHEREFORE,** premises considered, the Petition for Review is **PARTIALLY GRANTED.** Accordingly, respondent is **ORDERED TO REFUND** the amount of **₱13,704,409.80,** representing petitioner's erroneously paid FWT for the months of November to December 2012 and April to July 2013, representing erroneously paid FWT for the months of November to December 2012 and April to July 2013, computed as follows:

Amount of FWT Claim			₱ 14,608,018.35
Less:	Disallowances per the Court's Decision dated September 6, 2017[8]	₱ 4,238,957.62	
	Less: Reconsidered disallowance representing WTC due	(3,335,349.07)	

[7] *Kummer vs. People of the Philippines*, G.R. No. 174461, September 11, 2013.
[8] Decision, Docket, Vol. 2, p. 712.

on the WTC shouldered by petitioner for compensation paid to assigned foreign employees		
Net Disallowances		903,608.55
Refundable Erroneously Paid FWT, as adjusted		**₱13,704,409.80**

SO ORDERED."

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

ATTESTATION

I attest that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice