REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

TAKENAKA CORPORATION PHILIPPINE BRANCH,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7385

Members:

CASTAÑEDA, JR., *Chairperson*
UY, *and*
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:
NOV 18 2008
4:30 p.m.

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DECISION

CASTAÑEDA, JR., *J.*:

Takenaka Corporation-Philippine Branch filed the instant *Petition for Review* seeking cancellation and termination of the deficiency tax assessments issued by the Commissioner of Internal Revenue against the former for taxable year 2001, in the total amount of P432,842,121.18, inclusive of twenty percent (20%) interest computed as of April 22, 2005.

Takenaka Corporation-Philippine Branch (Petitioner) is a corporation organized and existing under the laws of Japan, duly licensed to transact business in the Philippines. Its principal business address is at 18/F Tower II Enterprise Center, Ayala Avenue, Makati City.[1]

The Commissioner of Internal Revenue (Respondent) is the duly appointed official of the Bureau of Internal Revenue (BIR) empowered to perform the duties of her office, including, among others, the power to decide, cancel, and abate tax liabilities pursuant to Section 204(B) of the National Internal Revenue Code (NIRC) of 1997.[2]

On September 29, 2004, petitioner received from respondent a Preliminary Assessment Notice (PAN) dated September 22, 2004, with attached Details of Discrepancies covering taxable year 2001. The PAN alleged that petitioner had deficiency income tax of P239,247,654.79 and deficiency expanded withholding tax of P2,904,216.00.[3] On October 8, 2004, petitioner opposed the PAN by filing a Letter of Protest/Position Paper with respondent.[4]

In a Letter dated November 16, 2004, Anselmo G. Adriano, Acting Regional Director of the BIR Revenue Region No. 8, informed petitioner that the docket of the subject deficiency taxes including petitioner's Letter of Protest was forwarded to BIR Revenue District Office, RDO No. 47-East Makati.[5]

On December 6, 2004, petitioner received a letter dated December 3, 2004 from BIR Revenue District Office No. 47–East Makati, through Revenue District Officer Simplicio A. Madulara, requiring petitioner to submit

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[1] Par. 1, Petition for Review, *Rollo,* p. 1.
[2] Par. 2, Petition for Review, *Rollo*, p. 1.
[3] Exhibits "B" and "B-1", *Rollo,* pp. 222 to 225.
[4] Exhibit "C", *Rollo,* pp. 226 to 231.
[5] Exhibit "D", *Rollo,* p. 232.

documentary evidence in support of its October 8, 2004 Protest within sixty (60) days from receipt of the letter or until February 6, 2005.[6] In compliance with the letter, petitioner submitted additional supporting documents pertinent to the Letter of Protest on February 1, 2005.[7]

In the letter dated March 2, 2005, respondent informed petitioner that after the BIR's re-evaluation and validation of the supporting documents submitted by petitioner, there is no factual or legal basis to justify the withdrawal or cancellation of the subject deficiency taxes.[8] On March 9, 2005, petitioner, through its tax counsel, filed its *Reply* to the letter.[9]

On March 23, 2005, petitioner received from respondent a Formal Assessment Notice (FAN) with Details of Discrepancies dated March 22, 2005 and covering taxable year 2001. The FAN alleged that petitioner owed deficiency taxes due to the Government in the total amount of P432,842,121.18, broken down as follows:[10]

Assessment Notice No.	Kind of Tax	Basic Tax	Interest/Compromise	Total
IT-33664-01-05-0107	Income	265,679,371.68	160,281,089.44	425,960,461.12
WE-33664-01-05-0107	EWT	4,157,242.51	2,724,417.55	6,881,660.06
TOTAL				**432,842,121.18**

On March 29, 2005, petitioner, through its tax counsel, filed with respondent its Protest Letter dated March 28, 2005 on the FAN.[11]

On May 3, 2005, petitioner received a letter dated April 27, 2005 from Anselmo G. Adriano, Acting Regional Director of the BIR Revenue Region No. Je

[6] Exhibit "E", *Rollo,* pp. 233 to 235.
[7] Exhibit "F", *Rollo,* p. 236.
[8] Exhibit "G", *Rollo,* pp. 237 to 241.
[9] Exhibit "H", *Rollo,* pp. 242 to 250.
[10] Exhibits"I", "I-1", "I-2", and "I-3", *Rollo,* pp. 251 to 257.
[11] Exhibit "J", *Rollo,* pp. 258 to 268.

8, informing petitioner that the entire docket of the subject deficiency taxes was forwarded to its Legal Division for the resolution of the issues raised in the Protest Letter dated March 28, 2005.[12] Acting on that information, petitioner sent to Atty. Wilmer B. Dekit, Assistant Chief of the Legal Division of BIR Revenue Region No. 8, Makati City, documents consisting of petitioner's Annual Income Tax Return (ITR) and Audited Financial Statements, both for taxable year 2001.[13]

As of November 16, 2005, respondent had not acted on petitioner's Protest.[14] Hence, the instant *Petition for Review* filed on December 16, 2005.

After respondent filed her *Answer* on March 9, 2006, pre-trial conference began on April 27, 2006. On May 12, 2006, the parties filed their *Joint Stipulation of Facts and Issues*, which was approved by the Court in a *Resolution* dated May 22, 2006.

During trial, petitioner and respondent presented their respective testimonial and documentary evidence in support of their position. However, respondent failed to formally offer her evidence; thus, waiving her right to file her formal offer of evidence and resting her case.[15]

On March 17, 2008, the case was submitted for decision, taking into consideration the *Memorandum* filed by petitioner, without any filed by respondent.[16]

On March 13, 2008, petitioner filed a *Motion for Partial Withdrawal of the Petition* with respect to the deficiency income tax for taxable year 2001 *Je*

[12] Exhibit "K", *Rollo,* p. 269.
[13] Exhibit "L", *Rollo*, p. 270.
[14] Par. 16, Joint Stipulation of Facts and Issues, *Rollo,* p. 107.
[15] *Rollo*, p. 346.
[16] *Rollo,* p. 427.

due to its availment of the remedy provided in Republic Act (R.A.) No. 9480, otherwise known as the "Tax Amnesty Law".[17] On June 26, 2008, the Court granted the motion.[18]

The jointly stipulated issues submitted for this Court's resolution are the following:

1. Whether or not petitioner's adherence to the "percentage of completion method" in reporting income is valid?

2. Whether or not petitioner has an undeclared income for taxable year 2001?

3. Whether or not petitioner has declared expenses for taxable year 2000 that were paid and recorded only in taxable year 2001?

4. Whether or not the expenses reported and claimed by petitioner for taxable year 2001 are properly supported with documents?

5. Whether or not respondent's disallowance of income payments made by petitioner to the Siemens, Inc.–Fuji-Haya Consortium allegedly due to non-withholding has legal basis?

6. Whether or not the NOLCO claimed by petitioner for taxable year 2001 are valid?

7. Whether or not the subject deficiency expanded withholding tax against petitioner is proper and valid?

Considering that the *Petition* with respect to the deficiency income tax had already been withdrawn, the remaining issue to be resolved is the last one, *viz.*, *Whether or not the subject deficiency expanded (creditable) withholding tax against the petitioner is proper and valid?*

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[17] *Rollo,* pp. 415 to 417.
[18] *Rollo,* pp. 469 to 470.

Petitioner contends that the payments it made to Siemens, Inc.-Fuji-Haya Consortium is not subject to creditable withholding tax of two percent (2%) under Revenue Regulations No. 2-98, as amended, because the latter is not a corporation subject to regular corporate income tax under Section 27(A) of the NIRC of 1997. Since a consortium is an entity enjoying exemption from corporate income tax, petitioner argues that payments made to Siemens, Inc.-Fuji-Haya Consortium are likewise exempt from withholding as provided in Section 2.57.5 of Revenue Regulations No. 2-98.

Respondent, on the other hand, argues that Siemens, Inc.-Fuji-Haya Consortium is a corporation because the construction project was not undertaken pursuant to an operating consortium agreement under a service contract with the Government as defined in Section 22(B) of the NIRC of 1997, and that it is registered as a domestic corporate taxpayer.

The Court rules for petitioner.

For income tax purposes, the term "corporation" does not include joint venture or consortium formed for the purpose of undertaking construction projects or engaging in petroleum, coal, geothermal and other energy operations pursuant to an operating or consortium agreement under a service contract with the Government. Section 22(B) of the NIRC of 1997 provides the definition of a "corporation" in this wise:

> "**SEC. 22**. **Definitions.** - When used in this Title:
>
> xxx xxx xxx
>
> (B) The term **'corporation'** shall include partnerships, no matter how created or organized, joint-stock companies, joint accounts *(cuentas en participacion)*, association, or insurance companies, but **does not include** general professional

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> partnerships and a joint venture or **consortium formed for the purpose of undertaking construction projects or engaging in petroleum, coal, geothermal and other energy operations pursuant to an operating or consortium agreement under a service contract with the Government. 'General professional partnerships'** are partnerships formed by persons for the sole purpose of exercising their common profession, no part of the income of which is derived from engaging in any trade or business." (*Emphasis supplied*)

Based on the definition, consortium formed for the purpose of undertaking construction projects **are not** considered taxable corporations. For this reason, such consortiums cannot be taxed under Section 27(A) of the NIRC of 1997 which provides that:

> **SEC. 27. Rates of Income Tax on Domestic Corporations.** –
>
> (A) *In General.* - Except as otherwise provided in this Code, **an income tax** of thirty-five percent (35%) **is hereby imposed upon the taxable income** derived during each taxable year from all sources within and without the Philippines **by every corporation, as defined in Section 22(B) of this Code and taxable under this Title as a corporation,** organized in, or existing under the laws of the Philippines: **Provided,** That effective January 1, 1998, the rate of income tax shall be thirty-four percent (34%); effective January 1, 1999, the rate shall be thirty-three percent (33%); and effective January 1, 2000 and thereafter, the rate shall be thirty-two percent (32%). (*Emphasis supplied*)

Consortiums if formed for purposes mentioned in Section 22 (B) of NIRC of 1997 are not subject to the corporate income tax and only the entities composing such consortiums are subject to thereto.

Meanwhile, respondent's argument that the Siemens, Inc-Fuji-Haya Consortium for construction project must be undertaken pursuant to an operating consortium agreement under a service contract with the Government is misplaced. It is to be noted that the exclusion of a joint venture formed for the purpose of undertaking construction projects from the definition of "corporation" for tax purposes originated from Presidential Decree (PD) No. 929 which was signed into law on May 4, 1976 by the then President Ferdinand E. Marcos. The pertinent portion of the law provides:

> SECTION 1. Subsection (b), Section 84 of the National Internal Revenue Code as amended is hereby further amended to read as follows:
> (b) The term "corporation" includes partnership no matter how created or organized, joint stock companies, joint accounts (cuentas en participacion), associations or insurance companies, but does not include general professional partnership and **a joint venture formed for the purpose of undertaking construction projects.**
> xxx" (*Emphasis supplied*)

It is clear from above-quoted provision that **there is no qualification requiring the joint venture to have a service contract with the Government before it can be excluded from the definition of a taxable corporation.**

Moreover, under the doctrine of last antecedent, a statutory construction principle, a qualifying word or phrase should be understood as referring to the nearest antecedent.[19] In the present case, the phrase *"pursuant to an operating consortium agreement under a service contract with the Government"* qualifies the immediately preceding antecedent of those consortiums *"engaging in petroleum, coal, geothermal and other energy operations"* and not those consortiums undertaking construction projects. Accordingly, Siemens, Inc.-Fuji-Haya Consortium, which is undertaking construction projects, does not need to have a service contract with the Jr

[19] *Roldan, et al. vs. Villaroman, et al.*, 69 Phil. 12 (1939).

Government in order to retain its status as a consortium exempted from corporate income tax.

Furthermore, the BIR has long accepted this view and even issued several rulings[20] that a joint venture or consortium formed for the purpose of undertaking construction projects is exempt from income tax and is likewise not subject to the expanded withholding tax regardless of whether the project involves a service contract with the Government.

Also by analogy, the ruling of the Supreme Court *En Banc* in *Commissioner of Internal Revenue vs. Court of Appeals, et al.*[21] applies to the present case, thus:

> "There can be no denying either that the final withholding tax is collected from income in respect of which employees' trusts are declared exempt (Sec. 56[b], now 53[b], Tax Code). The application of the withholdings system to interest on bank deposits or yield from deposit substitute is essentially to maximize and expedite the collection of income taxes by requiring its payment at the source. **If an employees' trust like the GCL enjoys a tax-exempt status from income, we see no logic in withholding a certain percentage of that income which it is not supposed to pay in the first place**." (*Emphasis supplied*)

As an entity exempt from corporate income tax, income payments made to Siemens, Inc.-Fuji-Haya Consortium are likewise exempted from creditable withholding tax pursuant to foregoing jurisprudence and Section 2.57.5 of RR No. 2-98, which states:

> **SECTION 2.57.5.** *Exemption from Withholding.* – **The withholding of creditable withholding tax prescribed in**

[20] *BIR Ruling No. 020-82* dated January 26, 1982, *BIR Ruling No. 010-96* dated January 23, 1996, *BIR Ruling No. 018-99* dated February 11, 1999, *BIR Ruling UN-025-95* dated January 11, 1995, *BIR Ruling UN-125-95* dated March 30, 1995 and *BIR Ruling DA-702-07* dated December 28, 2007.
[21] G.R. No. 95022, March 23, 1992, 207 SCRA 487.

> **these Regulations shall not apply to income payments made to the following**:
>
> xxx xxx xxx
>
> (B) **Persons enjoying exemption from payment of income taxes pursuant to the provisions of any law, general or special** such as but not limited to the following: (*Emphasis supplied*)

As for the contention that Siemens, Inc.-Fuji-Haya Consortium is registered as a domestic corporate taxpayer, the Court rules otherwise. Pursuant to her delegated authority, respondent had already ruled and admitted in *BIR Ruling (DA-174-01)*[22] that Siemens, Inc.-Fuji-Haya Consortium is indeed a consortium formed for the purpose of the construction project. She even went further as to rule that as a consortium, Siemens, Inc.-Fuji-Haya Consortium is exempt from the payment of corporate income tax and gross payments made to it shall not be subject to the creditable withholding tax. While Siemens, Inc.-Fuji-Haya Consortium registered itself as a VAT taxpayer,[23] the registration did not convert the consortium to a corporation given that respondent ruled the consortium as "non-taxable".[24] By such admission, respondent is estopped from claiming that Siemens, Inc.-Fuji-Haya Consortium is a registered domestic taxpayer liable for regular corporate income tax.

In sum, petitioner is not liable for the expanded withholding tax on the payments it made to Siemens, Inc.-Fuji-Haya Consortium.

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[22] Exhibit "DD"
[23] Exhibit "CC" and submarkings
[24] Exhibit "DD"

WHEREFORE, the instant *Petition for Review* is hereby **GRANTED**. Accordingly, the deficiency expanded withholding tax in the amount of P6,881,660.06, inclusive of interest, for taxable year 2001, assessed against petitioner is hereby **CANCELLED** and **SET ASIDE**.

SO ORDERED.

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

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

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
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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.

ERNESTO D. ACOSTA
Presiding Justice