REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

ALCON LABORATORIES (PHILIPPINES), INC.
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7640

Members:

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

Promulgated:

MAR 3 1 2009
3:41 p.m.

x- -x

DECISION

CASTAÑEDA, JR., J.:

STATEMENT OF THE CASE

This is a Petition for Review filed under Section 229 of the National Internal Revenue Code (NIRC) of 1997 and Section 7 of Republic Act No. 1125, as amended, involving a claim for the issuance of tax credit certificate of final withholding tax on cash dividends in the amount of Ph₱ 1,497,971.20 allegedly collected erroneously by the Bureau of Internal Revenue (BIR) on June 15, 2005.

FACTS

In their *"JOINT STIPULATION OF FACTS AND ISSUES"*[1], the parties submitted a summary of stipulated facts as follows—

> "1. Petitioner is a domestic corporation organized and existing under Philippine laws and is registered with the Securities and Exchange Commission ('SEC') on 6 January 1970 with SEC Registration No. 40201.
>
> 2. Respondent is the duly appointed Commissioner of Internal Revenue with office address at BIR National Office Building, Diliman, Quezon City. He is sued in such capacity, having been duly appointed to exercise the powers and perform the duties of his office including, among others, the power to decide disputed assessments, refunds of internal revenue taxes, fees and other charges, penalties imposed in relation thereto, or other matters arising under the NIRC.
>
> 3. Petitioner is authorized to engage in the development, manufacture, purchase, importation, distribution, sale and lease of surgical, medical and optical equipment, instruments, accessories and supplies of every kind and nature, including computer software programs and applications to aid in the performance of surgical procedures, medical examinations and operations. Petitioner is also authorized to engage in the business of providing technical and advisory services for the installation, operation, use and maintenance of such computer software programs and applications.
>
> 4. Pursuant to Section 229 of the 1997 NIRC, petitioner has two (2) years from the date of payment of the final withholding tax within which to file a claim for refund or tax credit and file the Petition for Review.
>
> 5. Under Article 10, paragraph (2) (a) of the Philippines-Switzerland Tax Treaty, a 10% preferential tax rate applies to cash dividends received by a resident of Switzerland from a Philippine company, provided that the beneficial owner of the dividends is a company in Switzerland which holds directly at least 10% of the capital of the Philippine company.
>
> 6. On 24 August 2006, petitioner filed with respondent, through the International Tax Affairs Division, an application for relief from

gc

[1] *Rollo*, pp. 91-95.

> double taxation under the Philippines-Singapore[2]Tax Treaty to request confirmation that a 10% preferential tax treaty rate applies to cash dividends paid by petitioner to Alcon, Inc. in Switzerland, and to request respondent to issue a tax credit certificate in favor of petitioner in the amount of ₱ 1,497,971.20, representing the amount of overpaid final withholding tax resulting from the application of the above 10% preferential tax treaty rate."

Alcon, Inc., a company[3] which is not registered as a corporation or as a partnership in the Philippines.[4] Alcon, Inc. is a stockholder of record of One Hundred Sixty-Five Thousand Two Hundred Fifty-Five (165,255) shares of petitioner with a total par value of Sixteen Million Five Hundred Twenty-Five Thousand Five Hundred Philippine Pesos (₱ 16,525,500.00), representing 99.9% of petitioner's total outstanding capital stock.[5]The said shares were acquired through original subscription from petitioner's authorized capital stock.[6]

The subject transaction arose when, on May 9, 2005, petitioner, through its Board of Directors, declared cash dividends in the total amount of Twenty-Nine Million Nine Hundred Fifty-Nine Thousand Four Hundred Twenty-Four Pesos (₱ 29,959,424.00), to be distributed among stockholders of record as of December 31, 2004, pro rata to their respective shareholdings, based on the number of shares held by them as of December 31, 2004.[7] Said cash dividends shall be paid not later than June 30, 2005.[8]

---

[2] This should be Philippines-Switzerland.
[3] Exhibit "C".
[4] Exhibit "B".
[5] Exhibits "G", "H", "I", "J", and "O".
[6] Exhibit "G".
[7] Exhibits "E" and "F".
[8] *Id.*

On June 15, 2005, petitioner filed BIR Form No. 0605 via the Electronic Filing and Payment System of the BIR and remitted the sum of ₱ 4,493,913.60 to respondent, as 15% final withholding tax on cash dividends payable to its stockholders of record.[9]

On July 29, 2005, the sum of US$453,100.37 (or Ph₱ 25,464,240.91) was debited from the account of petitioner and remitted to Alcon, Inc., as beneficiary of the cash dividends declared and distributed by petitioner.[10] The said amount represents the amount of dividends less withholding tax at 15%.

On August 24, 2006, petitioner applied for tax treaty relief with the International Tax Affairs Division of the BIR. However, to date, said application has not been resolved.

Hence, petitioner filed this petition on June 14, 2007.

In his Answer[11] filed on August 13, 2007, respondent alleged by way of special and affirmative defenses the following—

> "4. Petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected.
>
> 5. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable.
>
> 6. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to adduce sufficient proof is fatal to the action for tax refund/credit.
>
> 7. It is incumbent upon petitioner to show that it has complied with the provisions of Section 204 in relation to Section 229 of the 1997 Tax Code.

---

[9] Exhibit "K".
[10] Exhibit "L".
[11] *Rollo*, pp. 55-56.

8. Claims for refund are construed strictly against the claimant for the same partakes the nature of exemption from taxation **(Commissioner of Internal Revenue vs. Ledesma, G.R. No. L-13509, January 30, 1970, 31 SCRA 95)** and as such, they are looked upon with disfavor (**Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121**)."

Petitioner presented its sole witness, Mr. Antonio H. Miguel, and filed its Formal Offer of Evidence, which was admitted by the Court.

At the hearing on June 4, 2008, counsel for respondent manifested that this case has no report of investigation, and that he is submitting respondent's case for decision based on the pleadings. Upon his motion, respondent was granted 30 days from the said date to file a Memorandum. Respondent, however, did not file a Memorandum.

Upon motion of the counsel of petitioner, the latter was also given 30 days to file its Memorandum. Petitioner's Memorandum was filed on July 4, 2008.

Per this Court Resolution dated July 18, 2008, this case was submitted for decision, without respondent's Memorandum.

ISSUES

The issues as stipulated by the parties[12] are as follows—

"(a) Whether or not petitioner's payment of cash dividends is subject to ten percent (10%) final withholding tax rate;

(b) Whether or not petitioner paid and remitted to Alcon, Inc. the sum of US$453,100.37 (or PhP25,464,240.91), representing the amount of cash dividends for the year 2005;

(c) Whether or not petitioner complied with all the requirements of the law in order to be subject to the ten percent (10%) final withholding tax rate on cash dividend; and

---

[12] See footnote no. 1.

(d) Whether or not the petitioner's claim for refund/tax credit for the year 2005 allegedly representing excess final withholding taxes in respect of cash dividend payments to Alcon, Inc. is substantiated by documentary evidence."

Central to the foregoing issues, however, is the determination of whether petitioner may properly invoke the provisions of the Philippines-Switzerland Tax Treaty granting the preferential tax rate of ten percent (10%) on the subject dividends. Otherwise stated, the pivotal issue is whether petitioner was able to substantiate its entitlement under the said treaty to warrant the issuance of the tax credit certificate being sought.

THE COURT'S RULING

After considering the arguments of the parties based on the pleadings as well as weighing all the pieces of evidence presented to the Court by the petitioner, this Court finds merit to the petition for review.

In this case, the treaty being invoked is the Philippines-Switzerland Tax Treaty[13], which in its Article 10 provides, in part, as follows—

"Article 10
DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the

[13] Formally known as CONVENTION BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME.

beneficial owner of the dividends, the tax so charged shall not exceed:

a) 10 per cent of the gross amount of the dividends if the beneficial owner is a company (excluding partnerships) which holds directly at least 10 per cent of the capital of the paying company;

b) 15 per cent of the gross amount of the dividends in all other cases."

Under the said treaty, the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes[14].

Parenthetically, in determining the residency of the payor of the dividends and the recipient thereof, Article 4 of the Philippines-Switzerland Tax Treaty must be taken into account, to wit—

"Article 4
RESIDENT

1. For the purposes of this Convention, the term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature."

Thus, to be considered as a *"resident of the Philippines"*, it must be shown that the person is liable to tax in the Philippines, under Philippine laws, by reason of the person's domicile, residence, etc. Corollarily, to be considered as *"resident of Switzerland"*, it must be established that the person is liable to tax in Switzerland, under Swiss laws, by reason of the person's domicile, residence, etc.

In this case, this Court finds that petitioner, the company paying the dividends, is a resident of the Philippines as stated by the parties in their Joint Stipulation of Facts and Issues that petitioner *"is a domestic corporation* Jc

[14] Article 3, paragraph 1(d), Philippines-Switzerland Tax Treaty.

organized and existing under Philippine laws and is registered with the Securities and Exchange Commission". Being a domestic corporation[15], petitioner is liable to tax in the Philippines under Section 27 of the NIRC of 1997, thereby qualifying petitioner as a *"resident of the Philippines"* in accordance with above-cited Article 4 of the Philippines-Switzerland Tax Treaty.

Petitioner duly established that Alcon, Inc., being the recipient of the subject dividends, is a *"resident of the Switzerland"* at the time the tax on the subject dividends became due. Petitioner was able to prove that Alcon, Inc. is a company[16] and a stockholder of record of petitioner of 165,255 shares of petitioner, representing 99.9% of petitioner's total outstanding capital stock.

The subject dividends became due on May 9, 2005—the date when the said dividends were declared and were made payable, since that is the time when the obligation of petitioner to deduct and withhold the tax on the dividends arose, in accordance with Section 2.57.4[17] of Revenue Regulations No. (RR) 2-98[18], as amended by RR 12-01.

---

[15] The term *"domestic"*, when applied to a corporation, means created or organized in the Philippines or under its laws. *[Section 22(C), NIRC of 1997].*
[16] Exhibit "D".
[17] *Sec. 2.57.4. Time of Withholding.* – The obligation of the payor to deduct and withhold the tax under Section 2.57 of these Regulations arises at the time an income payment is paid or payable, or the income payment is accrued or recorded as an expense or asset, whichever is applicable, in the payor's books, whichever comes first. The term "payable" refers to the date the obligation becomes due, demandable or legally enforceable.

Provided, however, that where income is not yet paid or payable but the same has been recorded as an expense or asset, whichever is applicable, in the payor's books, the obligation to withhold shall arise in the last month of the return period in which the same is claimed as an expense or amortized for tax purposes.
[18] SUBJECT: Implementing Republic Act No. 8424, *"An Act Amending The National Internal Revenue Code, as Amended"* Relative to the Withholding on Income Subject to the Expanded Withholding Tax and Final Withholding Tax, Withholding of Income Tax on Compensation, Withholding of Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes.

To establish that Alcon, Inc. is a resident of Switzerland, petitioner formally offered in evidence[19] two (2) documents to prove that Alcon, Inc. is a non-resident foreign corporation domiciled on Switzerland and registered under Trade Register No. CH-170.3.017.372-9, with Tax Register No. 1011-724-65, to wit— (1) an authenticated certification dated July 11, 2006 issued by the *Kantonale Steuerverwaltung Zug* in favor of Alcon, Inc.,[20] and (2) certification dated May 2, 2007 issued by *Kanton Zug* with a stamp of the Swiss Federal Tax Administration Berne.[21]

Considering that there is only a short span of time between the time the subject dividends became due on May 9, 2005 and dates of the July 11, 2006 and May 2, 2007 certificates proving Alcon, Inc.'s residency, logic dictates that Alcon, Inc. is a resident of Switzerland when the said dividends were declared and were made payable. Moreover, other pieces of evidence offered by petitioner corroborate the fact of Alcon, Inc.'s residency in Switzerland, as follows: (1) Exhibit "H"[22], SEC certified machine copy of the General Information Sheet of Alcon Laboratories (Philippines), Inc. as of 22 November 2005, consisting of six pages; Exhibit "I"[23], SEC certified machine copy of the General Information Sheet of Alcon Laboratories (Philippines), Inc. as of 27 February 2005, consisting of five pages; Exhibit "L"[24], Citigroup Debit Advice or Details of Payment Cover for Direct Payment Order No. 3055210107/1 by Order of Alcon Laboratories

---

[19] *Rollo*, p. 103.
[20] Exhibit "C".
[21] Exhibit "D".
[22] *Rollo*, pp.122-127.
[23] Id. pp.128-132.
[24] Id. pp. 139-140.

(Philippines), Inc. for the benefit of Alcon, Inc. for the sum of US$453,100.37(PhP25,464,240.91 per exchange rate of US$1.00:P56.20 as of 29 July 2005), consisting of two pages; Exhibit "M"[25], Certificate of Final Tax Withheld at Source (BIR Form No. 2306) issued by petitioner to Alcon, Inc., consisting of one page; and Exhibit "N"[26], Letter dated 18 August 2006 addressed to the BIR International Tax Affairs Division and sent on behalf of petitioner, with attached Application for Relief from Double Taxation (BIR Form No. 0901), consisting of a total of five pages. All these pieces of evidence prove that indeed Alcon, Inc. is a resident of Switzerland at the time the cash dividends were declared and paid.

The burden of proof is upon him who claims the exemption in his favor and he must be able to justify his claim by the clearest grant of organic or statute law.[27] In this case, petitioner has fully discharged that burden.

Having established its entitlement to the preferential tax rate of ten percent (10%) under the Philippines-Switzerland Tax Treaty, it is clear that petitioner erroneously applied the 15% final withholding tax rate on the P29,959,424.00 cash dividends. Thus, there is an overpaid final withholding tax to respondent on the cash dividends paid to Alcon, Inc. computed , as follows:

Amount of withholding tax actually remitted, based on 15% tax rate...	PhP4,493,913.60
Less: Amount of correct withholding tax due, based on 10% tax rate......	2,995,942.40
Excess or overpaid withholding tax..	PhP1,497,971.20

---

[25] Id. p. 141.
[26] Id. pp. 142-146.
[27] *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc., et al.*, G.R. No. 127105, June 25, 1999 (309 SCRA 87).

WHEREFORE, the instant Petition for Review is hereby **GRANTED.** Respondent is hereby ORDERED to issue a tax credit certificate in the amount of Php1,497,971.20.

SO ORDERED.

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

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

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.

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