REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1596** (CTA Case No. 8558)
	Present:
- versus -	Del Rosario, *P.J.*, Castañeda, Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, and Manahan, *JJ.*
SUTHERLAND GLOBAL SERVICES PHILIPPINES, INC., Respondent.	Promulgated: FEB 19 2018 4:23 p.m.

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DECISION

CASTAÑEDA, JR., *J.*:

This Petition for Review filed by petitioner Commissioner of Internal Revenue, seeks to reverse and set aside the assailed Decision[1] promulgated on July 21, 2016 and Resolution[2] promulgated on January 24, 2017, respectively, by the CTA First Division.

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

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[1] Penned by Associate Justice Cielito N. Mindaro-Grulla, with Presiding Justice Roman G. Del Rosario and Associate Justice Erlinda P. Uy concurring, Court in Division Docket, Vol. II, pp. 743-772.
[2] Court in Division Docket, Vol. II, pp. 821-827.

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** the amount of ₱11,493,196.61 to petitioner, representing its erroneously paid income tax for the fiscal year ending June 30, 2010.
>
> **SO ORDERED.**"[3]

On the other hand, the dispositive portion of the assailed Resolution reads:

> "**WHEREFORE**, premises considered, petitioner's **Motion for Partial Reconsideration** and respondent's **Motion for Reconsideration** are hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"[4]

THE FACTS

The facts[5] as found by the CTA First Division, are as follows:

> "Petitioner [now respondent] Sutherland Global Services Philippines, Inc. is a non-pioneer Information Technology (IT) locator enterprise registered by virtue of the Philippine Economic Zone Authority (PEZA) Certificates of Registration Nos. 05-10-IT and 06-90-IT. Its principal address is at the 12th Floor, Philplans Corporate Center, Kalayaan Avenue and Triangle Drive, Fort Bonifacio, Taguig City.
>
> On the other hand, respondent [now petitioner] is the Commissioner of the Bureau of Internal Revenue (BIR), empowered to perform the duties of her office, including, among others, the power to decide, approve and grant refunds or tax credits of erroneously paid taxes, as provided by law. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.
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> Prior to the proclamation of the Clark Economic Zone (CEZ) as a PEZA Special Economic Zone, petitioner was registered with the Clark Development Corporation (CDC). Petitioner started its commercial operations on August 9, 2006, under a Temporary Permit to Operate issued by CDC. It was also issued Certificates of

[3] See Note 1, p. 771.
[4] See Note 2, p. 827.
[5] See Note 1, pp. 744-755.

Registration and Tax Exemption as a Clark Special Economic Zone (CSEZ) Enterprise by CDC, authorizing it to continue its operations within the CSEZ.

On December 20, 2006, petitioner and PEZA executed a Registration Agreement dated November 22, 2006, entitling petitioner, as registrant, to conduct and operate its business inside the CSEZ. Among the provisions of the Registration Agreement was the grant to petitioner of tax incentives under Republic Act (RA) No. 7916, as amended, otherwise known as the Special Economic Zone Act of 1995 (PEZA Law), and the PEZA IT Guidelines, to wit:

xxx xxx xxx

> '13.1 The REGISTRANT shall pay 5% tax on gross income, in lieu of all national and local taxes, subject to PEZA and BIR rules and regulations.
>
> xxx xxx xxx'

On January 18, 2007, the PEZA Board of Directors passed Resolution No. 07-037, approving the grant of full PEZA incentives to CSEZ export-oriented and IT locator enterprises, including petitioner; which had been registered with CDC after the proclamation of CSEZ as a PEZA Special Economic Zone, and which had been determined by PEZA as compliant with the requirements for entitlement to PEZA incentives.

Accordingly, petitioner and PEZA executed a Supplemental Agreement on February 2, 2007, with the following terms:

> '1. The REGISTRANT shall be entitled to four (4) years Income Tax Holiday (ITH) under non-pioneer status and upon the expiration of the ITH incentive, the REGISTRANT (Sutherland) shall be entitled to 5% gross income tax (GIT) incentive and to other incentives under the PEZA law.
>
> 2. The REGISTRANT shall automatically revert to the enjoyment of incentives for CSEZ once the pertinent law is enacted by Congress.
>
> 3. Nothing herein contained shall be construed as amending or modifying any of the terms and conditions of the Original Contract except as herein expressly provided.

4. This Agreement shall form an integral part of the Original Contract.'

Petitioner alleged that since the start of its commercial operations on August 9, 2006, petitioner had paid the five percent (5%) gross income tax (GIT). Specifically, during the fiscal year from July 1, 2009 to June 30, 2010, petitioner paid the amount of ₱17,442,209.50 to the BIR, as reflected in its Annual Income Tax Return (ITR), which was filed on October 20, 2010.

On October 15, 2012, petitioner filed an administrative claim for refund, arguing that it erroneously paid the 5% GIT during the fiscal year ending June 30, 2010.

In order to exercise and preserve its right to seek judicial relief within the two-year prescriptive period to file a refund claim, petitioner filed the instant Petition for Review before this Court on October 17, 2012.

Instead of filing an Answer, respondent filed a Motion to Dismiss on January 18, 2013, praying that after due hearing, the Petition for Review should be dismissed for lack of jurisdiction and for being barred by prescription. Petitioner filed its Opposition on January 22, 2013. Thereafter, respondent filed a Reply to the Opposition on February 11, 2013; while petitioner filed a Rejoinder on February 18, 2013.

In a Resolution dated May 2, 2013, the Court denied respondent's Motion to Dismiss and ruled that the filing of the administrative and the judicial claims for refund on October 15, 2012 and October 17, 2012, respectively, were made within the two-year reglementary period. Respondent then filed a Motion for Reconsideration on May 15, 2013, which was also denied by the Court.

Accordingly, respondent filed her Answer on August 8, 2013, interposing the following Special and Affirmative Defenses:

xxx xxx xxx

The case was set for a pre-trial conference on January 14, 2014. Thus, respondent filed her Pre-Trial Brief on September 16, 2013; while petitioner filed its Pre-Trial Brief on January 10, 2014.

The parties filed their Joint Stipulation of Facts and Issues on March 3, 2014, and a Supplemental Joint Stipulation of Facts and Issues on April 8, 2014; which was approved by the Court in its Resolution dated April 25, 2014. Accordingly, the Pre-Trial Order was issued by the Court on April 29, 2014.

During trial, petitioner presented the following witnesses: (1) Glenn Ian D. Villanueva – Independent Certified Public Accountant (CPA); and (2) Ms. Liana F. Lorenzo – petitioner's Senior Tax Manager. It likewise formally offered its documentary evidence on November 12, 2014, as follows:

xxx xxx xxx

The Court issued a Resolution on April 15, 2015, admitting, as petitioner's evidence, Exhibits xxx.

On the other hand, during the hearing held on October 28, 2014, respondent, through counsel, manifested that she has no evidence to present.

As directed by the Court, petitioner filed its Memorandum on May 27, 2015. Respondent, on the other hand, failed to file her Memorandum, as per Records Verification Report issued by this Court's Judicial Records Division on August 6, 2015.

Hence, the case was declared submitted for decision on August 18, 2015."

On July 21, 2016, the Court in Division promulgated the assailed Decision. Consequently, respondent filed its Motion for Partial Reconsideration[6] on August 8, 2016, while petitioner filed his Motion for Reconsideration[7] through registered mail on August 5, 2016. Both petitioner's and respondent's respective motions were denied by the Court in Division in the assailed Resolution promulgated on January 24, 2017.

On February 21, 2017,[8] petitioner filed through registered mail his Petition for Review before the Court *En Banc*. On July 4, 2017,[9] the Court *En Banc* required the parties to submit their respective memoranda. On August 15, 2017, respondent filed its Memorandum.[10] On the other hand,

[6] Court in Division Docket, Vol. II, pp. 773-788.
[7] Court in Division Docket, Vol. II, pp. 793-803.
[8] Court *En Banc* Docket, pp. 5-20.
[9] Resolution, Court *En Banc* Docket, pp. 91-92.
[10] Court *En Banc* Docket, pp. 93-112.

petitioner failed to file his Memorandum as per Records Verification[11] dated September 4, 2017. Thus, on September 18, 2017,[12] the Court *En Banc* submitted the instant case for decision. Hence, this Decision.

THE ISSUES

The issues to be resolved by the Court *En Banc* are: (1) Whether the CTA has jurisdiction over this case; (2) Whether respondent is entitled to its claim for refund.

THE RULING

The Court *En Banc* denies the instant Petition.

The CTA has jurisdiction over the instant case

Petitioner argues that respondent's action for refund was filed out of time considering that the two (2)-year period to file administrative and judicial claims for refund under Section 229 of the National Internal Revenue Code (NIRC) of 1997, as amended, should be reckoned from the last day for the filing of the income tax return, and not from the actual payment of the tax due.

Petitioner's argument is incorrect.

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

> "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, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

[11] Court *En Banc* Docket, p. 113.
[12] Resolution, Court *En Banc* Docket, pp. 115-116.

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: *Provided, however,* That the Commissioner may, even without a written claim therefor, 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."

Meanwhile, the issue raised by petitioner has been succinctly resolved by the CTA First Division in its Resolution[13] dated May 2, 2013. Said Resolution was reiterated in the assailed Decision, as follows:

"The issues on prescription have already been resolved by this Court via Resolution dated May 2, 2013, wherein the Court ruled that the filing of the administrative claim and the judicial claim for refund on October 15, 2012 and on October 17, 2012, respectively, were made within the two-year reglementary period. The significant portion of this Court's Resolution reads as follows:

'xxx xxx xxx

Thus, it has been held by the Supreme Court that the two-year period of prescription counted 'from the date of payment of the tax' within the framework of Section 229 of the NIRC of 1997, actually pertains to the two-year period counted from the time of the actual filing of the corporate taxpayer's Annual Income Tax Return for it is at this point where it can already be determined whether there has been an overpayment by the taxpayer.

In the same vein, the actual date of filing of the Annual Income Tax Return and the payment of tax was made by petitioner on October 20, 2010 and it was only this time that the amount to be refunded was ascertained. Considering so, October 20, 2010 is the reckoning date of the two year prescriptive period prescribed in Section 229 of the NIRC of 1997. Thus, the filing of the administrative and judicial claims for refund on October 15, 2010 and October 17, 2010, respectively, were made within the two-year reglementary period.'"

On this score, Section 229 of the NIRC of 1997, as amended, categorically states that the two (2)-year period shall be counted from the

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[13] Court in Division Docket, Vol. I, pp. 130-136.

date of payment of the tax or penalty. Had it been the purpose of the law to count the two (2)-year period from the last day for filing of the tax return, *i.e.*, income tax return, then it could have plainly set forth the same.

Petitioner laments that if the assailed Decision is not reversed, it has the effect of rewarding a taxpayer by extending the said two (2)-year period despite the belated filing of the return and payment of the tax. However, petitioner's position is unfounded. It is noteworthy that petitioner is adequately armed with remedies provided by law in cases of belated filing of returns and payment of taxes, *i.e.*, imposition of penalties as provided under NIRC of 1997, as amended. Thus, a taxpayer who omits to do the foregoing obligations may be exposed to criminal and civil cases sanctioned by law.

However, in refund cases, Section 229 of the NIRC of 1997, as amended, plainly and clearly states that the two (2)-year period shall be counted from the date of payment of the tax or penalty. In other words, while penalties may be imposed against an erring taxpayer, Section 229 of the NIRC of 1997, as amended, does not deny or reduce a taxpayer's right to refund. What is essential under Section 229 is that the taxpayer complied with or observed the mandatory and prescriptive periods, aside from the taxpayer's duty to exhaust available administrative remedies.

Considering the foregoing, the Court *En Banc* rules that the CTA has jurisdiction over the instant case.

Revenue Memorandum Circular (RMC) No. 15-2007 was already revoked by RMC No. 14-2012 at the time the claim for refund was filed

Petitioner asserts that respondent did not comply with the requirements provided under RMC No. 15-2007. However, upon careful evaluation, it was found that on April 4, 2012, RMC No. 14-2012 effectively revoked the Memorandum of Agreement circularized in RMC No. 15-2007. Meanwhile, respondent respectively filed its administrative and judicial claims for refund on October 15 and 17, 2012. In other words, at the time of the filing of the claims, RMC No. 15-2007 was already revoked. As such, there is no need to comply with the same.

The CTA First Division determined the income derived from respondent's PEZA-registered business activities within CSEZ

Petitioner asserts that aside from its annual Income Tax Return for the fiscal year ending June 30, 2010, respondent did not present supporting documents to prove that its income was derived from its registered activity.

Yet, a perusal of the evidence shows that respondent presented various pieces of evidence to prove its claim. Likewise, a reading of the assailed Decision shows that the CTA First Division thoroughly discussed the income earned by petitioner from its PEZA-registered activities. In fact, such determination led to the conclusion that respondent's claim for refund should only be partially granted. The pertinent portion of the assailed Decision reads:

> "Out of the ₱1,445,377,138.00 total revenues subjected to the 5% gross income tax, only the amount of ₱1,436,103,220.64 (₱1,445,377,138.00 less ₱9,273,917.36) was proven to have been earned by petitioner from its PEZA-registered activities within the CSEZ for the FY ending June 30, 2010. Since petitioner is exempt from income tax for the FY ending June 30, 2010 on income earned from its PEZA-registered activities within the CSEZ, the 5% income tax on its FY 2010 CSEZ revenues constitutes erroneously paid tax, which is the proper subject for a tax refund pursuant to Sections 204(C) and 229 of the National Internal Revenue Code of 1997, as amended.
>
> However, considering the findings of this Court that petitioner has an income tax due from its facility located at Export Plaza Building, Makati City (PHL01) in the amount of ₱5,874,793.33, petitioner's entitlement to a refund of its erroneously paid income tax is adjusted to ₱11,493,196.61, computed as follows:"[14]

At any rate, upon careful review of the pieces of evidence, the Court *En Banc* finds that the conclusion of CTA First Division is in order.

The CTA has no power to make an assessment at the first instance

Petitioner asserts that in order for respondent to claim for refund, respondent must prove that it paid other national internal revenue taxes such as Value-Added Tax or Percentage Tax. Petitioner concedes that while he has the power to examine returns and to assess the correct amount of tax, his failure to exercise such powers does not create a presumption in favor of the

[14] See Note 1, pp. 770-771.

correctness of a return. The taxpayer must present evidence to prove his claim for refund.[15]

Petitioner's assertion is palpably erroneous.

Essentially, what petitioner asks of this Court is to determine: (1) whether respondent paid its other national internal revenue taxes; and (2) whether respondent correctly paid the taxes due, if any. Thus, petitioner wants this Court to perform the foregoing determinations before granting respondent's claim for refund.

In other words, petitioner wants this Court to make an assessment at the first instance.

In *SMI-ED Philippines Technology, Inc. v. Commissioner of Internal Revenue*,[16] the Supreme Court categorically stated that the CTA has no power to make an assessment at the first instance. Thus:

> "**The Court of Tax Appeals has no power to make an assessment at the first instance**. On matters such as tax collection, tax refund, and others related to the national internal revenue taxes, the Court of Tax Appeals' jurisdiction is **appellate in nature**.
>
> xxx xxx xxx
>
> Thus, the BIR first has to make an assessment of the taxpayer's liabilities. When the BIR makes the assessment, the taxpayer is allowed to dispute that assessment before the BIR. If the BIR issues a decision that is unfavorable to the taxpayer or if the BIR fails to act on a dispute brought by the taxpayer, the BIR's decision or inaction may be brought on appeal to the Court of Tax Appeals. The Court of Tax Appeals then acquires jurisdiction over the case.
>
> When the BIR's unfavorable decision is brought on appeal to the Court of Tax Appeals, the Court of Tax Appeals reviews the correctness of the BIR's assessment and decision. In reviewing the BIR's assessment and decision, the Court of Tax Appeals had to make its own determination of the taxpayer's tax liabilities. **The Court of Tax Appeals may not make such determination before the BIR makes its assessment and before a dispute involving such assessment**

[15] Petition for Review, Court *En Banc* Docket, par. 30, pp. 15-16.
[16] G.R. No. 175410, November 12, 2014.

> **is brought to the Court of Tax Appeals on appeal.**"*(Emphasis supplied)*

Thus, *SMI-ED* is instructive that the CTA does not have the power to make an assessment at the first instance. Such power is primarily vested on petitioner, and his failure to exercise said power does not clothe this Court the power to exercise the same.

Considering the foregoing, it is not incumbent upon the Court *En Banc* to first determine whether respondent paid its other national internal revenue taxes before granting respondent's claim for refund. Such determination would be tantamount to making an assessment at the first instance which is proscribed under *SMI-ED.*

The pieces of evidence presented by respondent are not hearsay evidence

Finally, petitioner argues that respondent's pieces of evidence are hearsay evidence and should not be accorded probative weight. On the other hand, respondent argues that it properly presented its evidence in accordance with the 2005 Revised Rules of the Court of Tax Appeals (RRCTA), as amended.

Petitioner's argument is untenable.

A perusal of the records shows that during trial, respondent presented witness Mr. Glenn Ian D. Villanueva as an Independent CPA. In the performance of his duties, Section 5(a)(2), Rule 12 of the 2005 RRCTA, as amended, provides:

> "SEC. 5. *Presentation of voluminous documents or long accounts.* - xxx
>
> (a) Summary and CPA certification –
>
> xxx xxx xxx
>
> (2) a certification of an independent CPA attesting to the correctness of the contents of the summary after making an examination, evaluation and audit of voluminous receipts, invoices or long accounts." ge

Thus, Mr. Villanueva was required to present a certification attesting to the correctness of the contents of the summary he prepared after making an examination, evaluation and audit of the voluminous documents involved in this case. Considering that Mr. Villanueva, who performed the said duties, testified as to the circumstances of the said pieces of evidence, the subject documents cannot be considered hearsay.

In sum, petitioner failed to raise meritorious arguments to justify the reversal of the assailed Decision and Resolution, respectively. Hence, the denial of the Petition is in order.

WHEREFORE, the instant Petition for Review is **DENIED**, for lack of merit. Accordingly, the assailed Decision promulgated on July 21, 2016 and Resolution promulgated on January 24, 2017, respectively, are **AFFIRMED**.

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
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.

ROMAN G. DEL ROSARIO
Presiding Justice