REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

FLUOR DANIEL, INC. - PHILIPPINES, *Petitioner,*

-*versus*-

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

CTA CASE NO. 8444

Members:
Bautista, *Chairperson*
Fabon-Victorino, *and*
Ringpis-Liban, ***JJ.***

Promulgated:
NOV 02 2016
3:46 p.m.

x---x

RESOLUTION

BAUTISTA, J:

For resolution is respondent's Motion for Reconsideration (Re: Decision dated 11 July 2016) filed by registered mail on July 29, 2016; with petitioner's Opposition (To: Respondent's Motion for Reconsideration) filed on September 26, 2016.

On July 11, 2016, the Court rendered a Decision, the dispositive portion of which reads as follows:

> **WHEREFORE,** the instant Petition for Review is hereby **GRANTED.**
>
> The Final Decision on Disputed Assessment dated February 13, 2012 and the relating assessment for Final Withholding Tax against petitioner Fluor Daniel Inc. - Philippines in the total amount of **SIXTY-NINE MILLION FIVE HUNDRED NINETY-TWO THOUSAND ONE HUNDRED SIXTY-FOUR AND 18/100 PESOS (Php69,592,164.18)** is hereby **CANCELLED** and **SET ASIDE.**
>
> Accordingly, respondent is hereby **ORDERED TO REFUND OR TO ISSUE A TAX CREDIT CERTIFICATE** in

favor of petitioner in the amount of **TWENTY-NINE MILLION EIGHT HUNDRED TWENTY-FIVE THOUSAND TWO HUNDRED THIRTEEN AND 22/100 PESOS (Php29,825,213.22)** representing Final Withholding Tax on Royalties paid under protest.

SO ORDERED.[1]

The Court found that petitioner and Fluor Intercontinental, Inc. ("FII") entered into a Licensing Contract whereby the latter granted the former a non-exclusive and non-transferrable authority to access and use the suite of software for free. However, petitioner is required to pay for the maintenance of the software.

Finding the definition of "royalties" in the *RP-US Tax Treaty ("Tax Treaty")* too broad, the Court referred to the *Commentaries on the 2010 Economic Co-operation and Development ("OECD") Model Tax Convention on Income and on Capital ("OECD Commentary")*. Based thereon, it concluded that the Licensing Contract deals with both "know-how" contract (for the use of the suite of software) and service contract (for the maintenance of the software). However, the Court did not dwell on the "know-how" contract since FII did not receive any income therefor since it was for free. As to the service contract, the *OECD Commentary* referred to *Article 8 (Business Profits) of the RP-US Tax Treaty*, which leads to the conclusion that the business profits of FII from the service contract shall be taxable only in the US unless it has a Permanent Establishment ("PE") in the Philippines. Upon establishing that FII has no PE in the Philippines and that the services were indeed rendered in the US, the Court declared that FII's income from the maintenance service fees is exempt from income tax.

As to respondent's claim that non-compliance with *Revenue Memorandum Order ("RMO") No. 1-2000*, which requires any availment of a tax treaty provision to be preceded by an application for tax treaty relief with the International Tax Affairs Division ("ITAD") of the Bureau of Internal Revenue ("BIR"), the Court referred to the case of *Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue, G.R. No. 188550, August 19, 2013, 704 SCRA 216 ("Deutsche Bank")* in ruling that there is no need therefor since laws and issuances must ensure that the reliefs granted under tax treaties are accorded to the parties entitled thereto. Hence, if no such prior application is required

---

[1] Emphases retained.

by the Tax Treaty, there is no basis to demand the same by administrative issuance.

Likewise, the Court ruled that petitioner was able to prove that the payment of the taxes sought to be refunded were collected by respondent and paid by petitioner under protest, and that the administrative and judicial claims were filed within the two (2)-year prescriptive period.

In respondent's Motion for Reconsideration, he avers that the software maintenance service fees paid by petitioner to FII are considered royalties within the definition of *Revenue Memorandum Circular ("RMC") No. 77-2003*, as amended by *RMC No. 44-2005*; that the *Deutsche Bank* case should not be applied in the instant case following the principle of prospectivity of statutes; that, instead, the applicable case law is *Mirant (Philippines) Operations Corp. v. Commissioner of Internal Revenue, G.R. No. 168531 ("Mirant");* that petitioner's act of payment is tantamount to waiving its right to question the assessment issued against it; and that in a case for refund, the burden of proof is on the taxpayer to establish its right thereto and failure to sustain the burden is fatal to its claim.

In petitioner's Opposition, it counters that the Court correctly ruled that the software maintenance fees paid to FII do not constitute royalties, but are actually fees constituting petitioner's share in maintenance costs of the suite of software provided by FII to petitioner; that the doctrine in *Deutsche Bank* is applicable to the case at bar; that the Supreme Court in *Deutsche Bank* already ruled that the principle laid down in *Mirant* is not binding in other cases involving different parties since it is merely in the form of a minute resolution; and that petitioner did not waive its right to question the assessment.

The Court finds no merit in respondent's Motion for Reconsideration.

RMC No. 77-2003, as amended by *RMC No. 44-2005*, deals with the use and right to use the software. As already explained the Court, while the Licensing Contract deals with both "know-how" contract and service contract. FII did not receive any payment for the former, which can be the subject of any tax. The fact that the "know-how" contract is free cannot be denied despite the various restrictions imposed.

Respondent claims that the source of income arising from the services is irrelevant since *Section 28(B)(1) of the 1997 National Internal Revenue Code ("NIRC")* explicitly includes royalties in the gross income of nonresident foreign corporations subject to 35% tax. However, it must be noted that the same provision clearly provides that the said tax is imposed on income from "all sources within the Philippines" only, for easy reference:

CHAPTER IV
Tax on Corporations

SECTION 28. *Rates of Income Tax on Foreign Corporations.* –

xxx xxx xxx

(B) *Tax on Nonresident Foreign Corporation.* –

(1) *In General.* – Except as otherwise provided in this Code, a foreign corporation not engaged in trade or business in the Philippines shall pay a tax equal to thirty-five percent (35%) of the gross income received during each taxable year from all sources within the Philippines, such as interests, dividends, rents, royalties, salaries, premiums (except reinsurance premiums), annuities, emoluments or other fixed or determinable annual, periodic or casual gains, profits and income, and capital gains, except capital gains subject to tax under subparagraph 5(c): *Provided,* That effective January 1, 2009, the rate of income tax shall be thirty percent (30%).[2]

Respondent claims that since at the time when the present case was filed, the prevailing doctrine is *Mirant*, petitioner is bound thereto. Hence, the *Deutsche Bank* doctrine cannot apply since it was only promulgated on August 13, 2013.

At the outset, it must be emphasized that the pronouncement in *Mirant* was embodied in a minute resolution. While it may amount to a final action on that particular case, it is not a precedent, and cannot bind non-parties to the said action.[3] The doctrines or principles of law which constitute binding precedents are embodied only in decisions by the Supreme Court, not in its minute resolutions. Therefore, no

[2] Underscoring ours.
[3] *Alonso v. Cebu Country Club. Inc.*, G.R. No. 130876, January 31, 2002.

Therefore, no doctrine, principle of law or binding precedent was ever enunciated in the *Mirant* decision. Thus, respondent's claim that *Mirant* is the prevailing doctrine has no leg to stand on.

Considering that the instant case and the *Deutsche Bank* case involve the same issue, *i.e.*, whether a prior application for tax treaty relief filed with the BIR is necessary before a taxpayer can avail of the preferential tax treatment under a tax treaty, this Court is duty bound to adhere to the said precedent laid down by the Supreme Court pursuant to the principle of *stare decisis*.

As to respondent's other arguments, the Court finds that these have been sufficiently passed upon and discussed in the Decision of the Court dated July 11, 2016.

WHEREFORE, respondent's Motion for Reconsideration (Re: Decision dated 11 July 2016) is hereby **DENIED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ESPERANZA R. FABON-VICTORINO
Associate Justice

(On Leave)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice