

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FORMER EN BANC

COMMISSIONER OF INTERNAL
REVENUE,

Petitioner,

C.T.A. E.B. No. 469
(C.T.A. CASE Nos. 6699,
6884 and 7166)

- versus -

CBK POWER COMPANY LIMITED,
Respondent.

X-----x

CBK POWER COMPANY LIMITED,
Petitioner,

C.T.A. E.B. No. 494
(C.T.A. CASE Nos. 6699,
6884 and 7166)

- versus -

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

Present:
ACOSTA, P.J.
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, JJ.

Promulgated:

MAR 29 2010

X-----x

DECISION

UY, J.:

Before Us are consolidated Petitions for Review filed by the Commissioner of Internal Revenue against CBK Power Company Limited in C.T.A. E.B. No. 469 on May 27, 2009, and by CBK Power Company Limited against the Commissioner of Internal Revenue in C.T.A. E.B. No. 494 on June 11, 2009 seeking the following legal remedies:

C.T.A. E.B. No. 469

In C.T.A. E.B. No. 469, the Commissioner of Internal Revenue ("Commissioner", for brevity) prays that the Decision dated August 28, 2008¹, and the Amended Decision dated February 12, 2009², both rendered by the former First Division of this Court (Court in Division) in CTA Case Nos. 6699, 6884 and 7166, entitled "*CBK Power Company Limited, petitioner, vs. Commissioner of Internal Revenue, respondent*", be revised and set aside. The dispositive portions thereof read as follows:

Decision promulgated on August 28, 2008:

"WHEREFORE, the Petitions for Review are hereby **GRANTED**. Accordingly, respondent is hereby **ORDERED to REFUND** in favor of petitioner the amount of **FIFTEEN MILLION SIX HUNDRED SEVENTY TWO THOUSAND NINE HUNDRED FIFTY EIGHT AND FORTY TWO CENTAVOS (P15,672,958.42)** representing its excess final withholding tax for the years 2001 to 2003.

SO ORDERED."

Amended Decision promulgated on February 12, 2009:

"WHEREFORE, respondent is **ORDERED to REFUND** to petitioner the reduced amount of **FOURTEEN MILLION EIGHT HUNDRED THIRTY FIVE THOUSAND SEVEN HUNDRED TWENTY PESOS AND 39/100 (P14,835,720.39)**.

SO ORDERED."

C.T.A. E.B. No. 494:

In C.T.A. E.B. No. 494, CBK Power Company Limited ("CBK Power", for brevity) prays that the same Amended Decision, and the Resolution dated

¹ Penned by Associate Justice Caesar A. Casanova, and concurred by Presiding Justice Ernesto D. Acosta and Associate Justice Lovell R. Bautista. Docket (CTA EB Case No. 469), pp. 45 to 64.

² Docket (CTA EB Case No. 469), pp. 65 to 70. Docket (CTA EB Case No. 494), pp. 59 to 64.

May 7, 2009³, be reversed and set aside. The dispositive portion of the said Resolution read as follows:

"WHEREFORE, petitioner's Motion for Reconsideration [of the Amended Decision dated February 12, 2009] is hereby DENIED for LACK OF MERIT. SO ORDERED."

THE FACTS

The factual antecedents of the case are not in dispute.

CBK Power is a limited partnership duly organized and existing under the laws of the Republic of the Philippines, engaged in the development and operation of the Caliraya, Botocan and Kalayaan hydroelectric power generating plants in Laguna (herein referred to as the "CBK Project"). Its principal office address is located at the NPC Compound, San Juan, Kalayaan, Laguna, 4015. It is likewise a duly registered taxpayer and is registered with the Board of Investments as engaged in a preferred pioneer area of investment under the Omnibus Investment Code of 1987.

The Commissioner, on the other hand, is a public officer duly appointed by the President of the Philippines and is the head of the Bureau of Internal Revenue (BIR) —the government agency officially responsible for the assessment and collection of all national internal revenue taxes. He is vested with the power and authority to refund any internal revenue tax erroneously or illegally assessed or collected, or any penalty collected without authority, or of any sum excessively or in any manner wrongfully collected, including excess final withholding taxes.

³ *Ibid*, pp. 71 to 75. *Ibid*, pp. 65 to 70.



Sometime in August 2000, CBK Power obtained a syndicated loan from, *inter alia*, BNP Paribas, The Dai-ichi Kangyo Bank, Limited, the Industrial Bank of Japan, Limited, and Societe General (collectively referred to as the "Lenders") to finance the CBK Project.

Under the procedures of the Agreement, the interest payments are to be remitted to an Inter-Creditor Agent (or PRI Facility Agent) acting for the Lenders. The Inter-Creditor Agent will inform CBK Power of the total interest payments already due for a certain period under the Agreement and will instruct CBK Power to make payments to a designated account identifying, through an attachment in tabulated form, the interest amount payable to each of the Lenders. Pursuant to Section 2.1.5 of the Agreement, CBK Power will then instruct its bank to remit the total interest payment due during a specified period to the Inter-Creditor Agent in accordance with its payment instructions. Upon receipt of CBK Power's interest payment, the Inter-Creditor Agent will distribute the amounts due to each Lender, and of the Lenders will receive the interest payment appertaining to it.

Following the completion of CBK Power's primary loan syndication and prior to drawdown or the actual borrowing of funds, certain portions of the loan were assigned by the Lenders to various other banks, including Fortis Bank (Nederland) N.V. and Raiffeisen Zentral Bank Osterreich AG.

In February 2001, pursuant to the Agreement, CBK Power drew on the Credit Facility, or actually borrowed or was lent money by the Banks.

The Inter-Creditor Agent is Daichi Kangyo Bank, a Japanese bank, which subsequently merged with the Industrial Bank of Japan, Limited, and

the Fuji Bank, Limited, with the merged entity being named as Mizuho Corporate Bank. One of the merged banks, Fuji Bank, Limited, had a Philippine branch, and with the merger, this branch became a branch of Mizuho Corporate Bank.

Prior to the merger, CBK Power remitted a portion of interest payments to the Inter-Creditor Agent for the account of the Industrial Bank of Japan, Limited.

Subsequently, Fortis Bank (Nederland) N.V. assigned its portion of the loan to Fortis Bank S.A./N.V., as a Lender under the Agreement. Thus, Fortis Bank (Nederland) N.V. was the payee of the interest income in May and August 2001, while Fortis Bank S.A./N.V. assumed the former's rights and interest effective October 1, 2001.

Fortis Bank S.A./N.V., Fortis Bank (Nederland) N.V., and Raiffeisen Zentral Bank AG are residents of Belgium, Netherlands and Austria, respectively, for purposes of their respective income taxes, and of the relevant provisions of the income tax treaties between the Philippines and Belgium, Netherlands and Austria, respectively. While, the Industrial Bank of Japan, Limited, and Mizuho Corporate Bank, Limited, are residents of Japan for purposes of their respective income taxes, and of the relevant provisions of the income tax treaties between the Philippines and Japan. Except for Mizuho Corporate Bank, Limited, the Banks do not have offices in, and are not engaged in trade or business in the Philippines.

For the period from May 2001 to May 2003, pursuant to the Agreement, CBK Power remitted interest payments to the Banks. It then

allegedly withheld, paid and remitted to Revenue District Office No. 55 of the BIR the final withholding taxes on interest to the said Banks based on the following rates:

- a) Fifteen percent (15%) for Fortis Bank S.A./N.V., Fortis Bank (Nederland) N.V., and Raiffesen Zentral Bank Osterreich AG; and
- b) Twenty percent (20%) for Industrial Bank of Japan, Limited, and Mizuho Corporate Bank, Limited.

According to CBK Power, under the relevant tax treaties between the Philippines and the country in which each of the Banks is a resident, the interest income derived by the Banks are subject to a preferential tax rates as follows:

Bank	Country of Residence	Preferential Rate under the relevant tax treaty
Fortis Bank S. A./ N. V.	Belgium	10% (Article 11[1], RP-Belgium Tax Treaty)
Industrial Bank of Japan	Japan	10% (Article 11[3], RP-Japan Tax Treaty)
Raiffesen Zentral Bank Osterreich AG	Austria	10% (Article 11[3], RP-Austria Tax Treaty)
Mizuho Corporate Bank	Japan	10% (Article 11[3], RP-Japan Tax Treaty)

Thus, on April 14, 2003, CBK Power filed a claim for refund of its excess final withholding taxes allegedly erroneously withheld and collected for the years 2001 and 2002 with the BIR Revenue Region No. 9. The claim for refund of excess final withholding taxes in 2003 was filed on March 4, 2005.

Due to the Commissioner's inaction, CBK Power filed three (3) Petitions for Review before the Court in Division relating to the interest payments made in 2001 to 2003, to wit:



1) **CTA Case No. 6699** was filed by CBK Power on June 6, 2003 seeking the refund of excess final withholding tax in the total amount of ₱ 6,393,267.20 covering year 2001 with respect to interest income derived by Fortis Bank S.A./N.V., Industrial Bank of Japan, and Raiffesen Zentral Bank Osterreich AG. An Answer was filed by the Commissioner on July 25, 2003.

2) **CTA Case No. 6884** was filed by CBK Power on March 5, 2004 seeking for the refund of the amount of ₱ 8,136,174.31 covering year 2002 with respect to interest income derived by Fortis Bank S.A./N.V., Industrial Bank of Japan, Mizuho Corporate Bank, Limited, and Raiffesen Zentral Bank Osterreich AG. The Commissioner filed his Answer on May 7, 2004.

Meanwhile on May 19, 2004, CBK Power filed a Motion to Consolidate CTA Case Nos. 6699 and 6884, which the Court in Division granted on June 18, 2004.

3) **CTA Case No. 7166** was filed by CBK on March 9, 2005 seeking for the refund of ₱ 1,143,517.21 covering year 2003 with respect to interest income derived by Fortis Bank S.A./N.V., and Raiffesen Zentral Bank Osterreich AG. The Commissioner then filed his Answer on May 9, 2005.

The Court in Division ordered the consolidation of CTA Case Nos. 6699, 6884 and 7166 in its Resolution dated August 3, 2005.

In the assailed Decision promulgated on August 28, 2008, the Court in Division granted the said three Petitions for Review and ordered the Commissioner to refund in favor of CBK Power the total amount of ₱ 15,672,958.42.



The Commissioner filed a Motion for Reconsideration of the said Decision On September 16, 2008. CBK Power filed an Opposition thereto on October 20, 2008. On February 12, 2009, the Court in Division promulgated the assailed Amended Decision and reduced the amount to be refunded from ₱ 15,672,958.42 to ₱ 14,835,720.39 due to the failure of CBK Power to obtain an ITAD-ruling with respect to its transactions with Fortis Bank (Nederland) N.V., pursuant to the Supreme Court's Resolution dated February 18, 2008 in *Mirant (Philippines) Operations Corporation (formerly: Southern Energy Asia Pacific Operations [Phils.], Inc.) vs. Commissioner of Internal Revenue*⁴.

CBK Power filed a Motion for Reconsideration of the said Amended Decision on March 9, 2009, arguing as follows:

1. The Supreme Court ruling in the *Mirant* case does not constitute *stare decisis* or set precedent that an ITAD ruling is required before availing of a preferential tax rate under the appropriate tax treaty;
2. The imposition of a prior requirement of an ITAD ruling is effectively a derogation of the Honorable Court's exclusive power to consider and rule on judicial claims for refund; and
3. Revenue Memorandum Order No. (RMO) 1-2000 cannot, and actually does not, require a prior application for treaty relief before a judicial claim for refund may prosper

However, on May 7, 2009, the Court in Division issued the assailed Resolution, denying CBK Power's Motion for Reconsideration. Consequently,

⁴ G.R. No. 168531.

the Commissioner and CBK Power filed their respective Petition for Review with the Court *En Banc* docketed as CTA EB No. 469 and 494, respectively.

CBK Power filed its Comment⁵ to the Commissioner's Petition For Review in CTA EB No. 469 on July 8, 2009 as directed by the Court *En Banc* in the Resolution dated June 24, 2009.⁶ On the other hand, the Commissioner failed to file the required Comment⁷ to the Petition for Review filed by CBK Power in CTA EB 494, within the given period of ten (10) days from notice.⁸

In the Resolution dated July 30, 2009⁹, the two (2) cases were consolidated by the Court En Banc, and the parties were ordered to file their respective Consolidated Memorandum within thirty (30) days from receipt of the said Resolution. On September 2, 2009, CBK Power filed its consolidated Memorandum,¹⁰ while the Commissioner filed his Consolidated Memorandum on September 4, 2009.¹¹ In the Resolution dated September 16, 2009¹² these consolidated cases were deemed submitted for decision.

Hence, this Decision.

THE ISSUES

The arguments/issues raised by the parties are as follows:

In **CTA EB No. 469**, the Commissioner presents one argument to wit:

“ The Honorable First Division of the Court of Tax Appeals erred in resolving that respondent is entitled to a partial refund of

⁵ Docket (CTA EB Case No. 469), pp. 85 to 90.

⁶ Docket (CTA EB Case No. 469), pp. 80 to 84.

⁷ Resolution dated June 29, 2009. Docket (CTA EB Case No. 494), pp. 268 to 269.

⁸ Docket (CTA EB Case No. 494), p. 270.

⁹ Docket (CTA EB Case No. 469), pp. 93 to 94.

¹⁰ Docket (CTA EB Case No. 469), pp. 95 to 128.

¹¹ Docket (CTA EB Case No. 469), pp. 129 to 142.

¹² Docket (CTA EB Case No. 469), pp. 144 to 145.

Php14,835,720.39 of its excess final withholding taxes erroneously withheld and collected for the years 2001, 2002 and 2003.”

In the discussion of the foregoing argument, the Commissioner submits that CBK Power failed to exhaust administrative remedies when it filed the First Division Petitions; and that CBK Power's Petitions for Review filed before the former First Division of this Court were not filed within the two-year prescriptive period for initiating judicial claims for refund.

In **CTA EB No. 494**, CBK Power submits one issue, to wit:

“Whether or not a prior application for treaty relief – by obtaining an ITAD ruling – is required before CBK (*Power*) can avail of the preferential tax rate under the RP-Netherlands Tax Treaty.”

CBK Power's Arguments

CBK Power submits that it did not fail to exhaust its administrative remedies when it filed the former First Division Petitions to claim the refund of the excess final withholding taxes paid to BIR; that it filed the same Petitions within the 2-year prescriptive period under the NIRC for filing judicial claims for refund. Lastly, CBK Power points out that there is no legal basis for requiring a prior application for treaty relief before CBK Power can avail of the preferential tax rate under the RP-Netherlands Tax Treaty.

Thus, according to CBK Power:

1. The Supreme Court's minute resolutions denying Mirant's petition for review of this Court *En Banc*'s decision do not constitute *stare decisis* or set precedent that an ITAD ruling is required before availing of a preferential tax rate under the appropriate tax treaty;

2. Tax treaties form part of Philippine law, and rights granted under such law may not be defeated by imposing extraneous requirements imposed by RMO No. 1-2000, such as the requirement of obtaining a prior ITAD ruling;

3. In any event, RMO No. 1-2000 itself does not make it mandatory upon a taxpayer to obtain an ITAD ruling before availing of the preferential tax rate under the applicable tax treaty; indeed, RMO No. 1-2000 itself states that the only consequences of such a failure is that the taxpayer may have to file a claim for tax refund/credit or be liable for a deficiency tax liability; and

4. The requirement of an ITAD ruling before a taxpayer can make a judicial claim for refund is in derogation of the Honorable Court's exclusive power to consider and rule on judicial claims for refund.

The Commissioner's Arguments

On the other hand, the Commissioner argues that the Court in Division erred in resolving that CBK Power is entitled to a partial refund of ₱ 14,835,720.39 as excess final withholding taxes erroneously withheld and collected for the years 2001, 2002 and 2003.

The Commissioner stresses that a taxpayer who feels aggrieved by the actions taken by tax authorities may not seek redress in the courts of justice without first exhausting administrative remedies, under the doctrine of primary jurisdiction, except for certain well-recognized exceptions; and that minute resolutions of the Supreme Court carry great weight.

Finally, according to the Commissioner, the availment of tax treaty provisions must be preceded by an application for tax treaty relief with the Commissioner's International Tax Affairs Division.

THE COURT EN BANC'S RULING

CBK Power filed the Petition for Review covering the claim for the year 2001 within the two-year prescriptive period under Section 229 of the NIRC of 1997.

Section 229 of the National Internal Revenue Code (NIRC) of 1997 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.

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."

Based on the foregoing, the Supreme Court has repeatedly held that the claim for refund or credit with the Bureau of Internal Revenue and the subsequent appeal to this Court must be filed within the two-year period.¹³

For his part, the Commissioner contends as follows:

"CBK's Exhibits T, V and X (Remittance Return of the Final Income Tax Withheld), shows the return of May 2001, August 2001 and November 2001 were filed on June 11, 2001, September 10, 2001 and December 10, 2001 respectively. However, the Petition for Review for taxable year 2001 was filed on February 18, 2004 which is more than two years required by law to file such an action. Thus, CBK's claim for refund for its

¹³ *Commissioner of Internal Revenue vs. Victorias Milling Co., Inc., et al.*, G.R. No. L-24108, January 3, 1968.

taxes involving the taxable year 2001 amounting P6,393,267.19 had already prescribed and the Honorable Court did not have jurisdiction over the same.”¹⁴

The Commissioner is mistaken.

As correctly pointed out by CBK Power, the latter’s Petition for Review covering taxable year 2001¹⁵ was filed **on June 6, 2003** and not on February 18, 2004. Accordingly, the Court in Division correctly ruled, in its original Decision, that CBK Power’s petitions for review were filed within the two-year prescriptive period under Section 229 of the NIRC of 1997, to wit:

“With the administrative claim filed on April 14, 2003, petitioner filed (1) Petition for Review on June 6, 2003 which was docketed as CTA Case No. 6699, a Supplemental Petition filed on September 10, 2003, then subsequently an Amended Petition for Review on February 18, 2004; and (2) Petition for Review filed on March 5, 2004 which was docketed as CTA Case No. 6884. While the administrative claim filed on March 4, 2005, petitioner filed its Petition for Review on March 9, 2005 which was docketed as CTA Case No. 7166.

Thus, based on the above illustrations, **the claims both under the administrative and judicial levels were made within the two-year prescriptive period.**”¹⁶ (*Emphasis supplied*)

The doctrine of exhaustion of administrative remedies is not an absolute rule.

The Commissioner argues that the administrative claim for refund of 2003 of excess final withholding taxes was filed by CBK Power on March 4, 2005, a Friday, while the Petition for Review (CTA Case No. 7166) was filed on March 8, 2005. The CIR was allegedly not furnished the necessary documents evidencing the claim nor was he given sufficient time by CBK to

¹⁴ Docket (CTA EB Case No. 469), p. 138.

¹⁵ CTA Case No. 6699.

¹⁶ Docket (CTA EB Case No. 469), p. 58.

investigate and evaluate the administrative claim as there was only one (1) working day between the filing of the administrative claim and the judicial claim. The Commissioner claims that the filing of the administrative claim was treated by CBK Power as a mere formality to the filing of the judicial claim.

Citing the ruling in *Bagatsing V. Ramirez* (74 SCRA 306),¹⁷ the Commissioner points out that it is a well-settled rule in tax laws, that the taxpayer who feels aggrieved by the actions taken by tax authorities may not seek redress in the courts of justice without first exhausting available administrative remedies, except for certain well-recognized exceptions.

While as a rule, the doctrine of exhaustion of administrative remedies should not be disregarded, there are indeed a number of instances when such doctrine may be dispensed with and judicial action may be validly resorted to immediately.¹⁸ Two of these exceptional cases are (1) when there is urgent need for judicial intervention,¹⁹ and (2) when irreparable damage will be suffered.²⁰

In the cases at bench, the filing an administrative claim for refund of CBK Power's excess final withholding taxes with respect to interest income for taxable years 2001, 2002 and 2003 before the BIR is not disputed. It is however the Commissioner's submission that it is necessary for CBK Power to submit all relevant evidence before the Bureau of Internal Revenue in support of its various claims, and the basis for seeking judicial redress, which

¹⁷ Docket (CTA EB Case No. 469), pp. 134 to 135.

¹⁸ *Sunville Timber Products, Inc. vs. Abad, et al.*, G.R. No. 85502, February 24, 1992.

¹⁹ *Aquino, et al. vs. Luntok, et al.*, G.R. No. 84324, April 5, 1990.

²⁰ *De Lara, et al. vs. Cloribel, et al.*, G.R. No. L-21653, May 31, 1965.

should allegedly be either the denial of its claim or inaction of the Commissioner thereon. Absent these circumstances, the judicial claims allegedly merely become an attempt by taxpayer to circumvent the role and duties of the Commissioner in evaluating the taxpayer's claim for refund.

It cannot be overemphasized that the second paragraph of the above-quoted Section 229 of the NIRC of 1997, specifically provides the period within which a judicial claim for refund or tax credit certificate should be filed. It is stated therein that 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.

Based on the foregoing legal provision, upon expiration of the two year prescriptive period from date of payment of the tax sought to be refunded, the taxpayer loses its right to seek judicial redress on the claim. Therefore, before such expiration, judicial intervention is urgently needed.

In the instant cases, should CBK Power have awaited the final action of the Commissioner on its claim for refund or tax credit certificate, prior to taking court action, knowing fully well that the prescriptive period is about to end, CBK Power, not only loses its right to seek judicial recourse, but it will likewise suffer irreparable damage as it will lose the right to recover the refund being claimed. Evidently, the two (2) above-cited exceptions to the rule on exhaustion of administrative remedies apply in the instant cases.

In *College of Oral & Dental Surgery vs. Court of Tax Appeals, et al.*,²¹ the Supreme Court ruled:

²¹ G.R. No. L-10446, January 28, 1958.

"This Court, construing the aforequoted provision of law (*referring to then Section 306 of the old NIRC, now Section 229 of the NIRC of 1997*) in an identical case, made the pronouncement that although the filing of the claim with the Collector of Internal Revenue is intended as a notice to said official that unless the tax or penalty alleged to have been erroneously or illegally collected is refunded court action will follow, this does not imply that the taxpayer must await for the action of the Collector before bringing the matter to court (P.J. Kiener Co., Ltd. vs. David, 92 Phil., 945, penned by Mr. Justice Pedro Tuason). Indeed, it must be observed that under said provisions, the taxpayer's failure to comply with the requirement regarding the institution of the action or proceeding in court within 2 years after the payment of the taxes bars him from the recovery of the same, irrespective of whether a claim for the refund of such taxes filed with the Collector of Internal Revenue is still pending action of the latter." (*Underscoring and emphasis supplied*)

Clearly from the foregoing, it was proper for CBK Power to have filed the petitions for review with the Court in Division before the expiration of the two-year prescriptive period mandated under Section 229 of the NIRC of 1997 without awaiting the final resolution of its administrative claims for refund before the Commissioner.

A prior application for tax treaty relief is required before a taxpayer can avail of the preferential tax treatments under Philippine tax treaties.

In the assailed Amended Decision, the Court in Division ruled:

"Going now to the second assigned error, this Court agrees with respondent.

In the Supreme Court Resolution dated February 18, 2008 for *Mirant (Philippines) Operations Corporation (formerly: Southern Energy Asia-Pacific Operations [Phils.], Inc. vs. CIR*²², the High Court requires that an ITAD ruling must be obtained prior to availing a preferential tax rate. Considering this, the refund claim must be reduced.

²² G.R. No. 168531.

The record shows that petitioner (CBK Power) only failed to obtain an ITAD-ruling with respect to its transactions with Fortis Bank (Nederland) N.V. Thus, the initial refund granted in the amount of P15,672,958.42 shall be reduced to P14,835,720.39 xxx."²³ (*Emphasis supplied*)

A review of what transpired in the said *Mirant* case would reveal that:

(i) the Court of Tax Appeals *En Banc* decreed, *inter alia*, that the filing of an application for tax treaty relief is required prior to the availment of the provisions of certain Philippine tax treaties; and (ii) on appeal, the Supreme Court issued two (2) minute resolutions in disposing said case: *first*, one that denied the petition, and *second*, one that denied with finality the motion for reconsideration of the denial of said petition. The Clerk of Court of the Supreme Court informed the parties in the *Mirant* case of the said minute resolutions as follows:

The denial of Mirant's Petition for Review:

"Sirs/Mesdames:

*Quoted hereunder, for your information, is a resolution of this Court dated **12 November 2007**:*

G.R. No. 168531 (*Mirant [Philippines] Operations Corporation [Formerly Southern Energy Asia-Pacific Operations (Phils.) Inc.] vs. Commissioner of Internal Revenue*).— Considering the allegations, issues and arguments adduced in the petition for review on certiorari, the Court resolves to **DENY** the petition for failure to sufficiently show any reversible error in the assailed judgment to warrant the exercise by the Court of its discretionary appellate jurisdiction in this case, and for raising substantially factual issues.

Very truly yours,

LUDICHI YASAY-NUNAG

²³ Docket (CTA EB Case No. 469), p. 69. Docket (CTA EB Case No. 494), p. 63.



Clerk of Court
By: (signed)
MA. LUISA L. LAUREA
Asst. Clerk of Court"

The denial of Mirant's Motion for Reconsideration:

"Sirs/Mesdames:

*Quoted hereunder, for your information, is a resolution of this Court dated **18 February 2008**:*

G.R. No. 168531 (Mirant [Philippines] Operations Corporation [Formerly Southern Energy Asia-Pacific Operations (Phils.) Inc.] vs. Commissioner of Internal Revenue).— Acting on petitioner's motion for reconsideration dated 9 January 2008 of the Resolution dated 12 November 2007 which denied the petition for review on certiorari, the Court resolves to **DENY** the motion for reconsideration with **FINALITY**, no substantial argument having been adduced to warrant the reconsideration sought.

No further pleadings or motions shall be entertained in this case. Let entry of final judgment be made in due course. *Quisumbing, J., on official leave; Azcuna, J., designated additional member pursuant to Adm. Circular No. 84-2007.*

Very truly yours,

LUDICHI YASAY-NUNAG
Clerk of Court
By: (signed)
MA. LUISA L. LAUREA
Asst. Clerk of Court"

The question that confronts this Court now is whether or not minute resolutions of the Supreme Court can be considered as binding precedents in disposing the present case?

We look at jurisprudential guidelines on the matter.



In the case of *Philippine Health Care Providers, Inc. vs. Commissioner of Internal Revenue*,²⁴ the Supreme Court said:

“Petitioner raises another interesting issue in its motion for reconsideration: whether this Court is bound by the ruling of the C[ourt of]A[ppeals] in *CIR v. Philippine National Bank*²⁵ that a health care agreement of Philamcare Health Systems is not an insurance contract for purposes of the DST.

In support of its argument, petitioner cites the August 29, 2001 minute resolution of this Court dismissing the appeal in *Philippine National Bank* (G.R. No. 148680). Petitioner argues that the dismissal of G.R. No. 148680 by minute resolution was a judgment on the merits; hence, the Court should apply the C[ourt of]A[ppeals] ruling there that a health care agreement is not an insurance contract.

It is true that, although contained in a minute resolution, our dismissal of the petition was a disposition of the merits of the case. When we dismissed the petition, we effectively affirmed the C[ourt of]A[ppeals] ruling being questioned. As a result, our ruling in that case has already become final. **When a minute resolution denies or dismisses a petition for failure to comply with formal and substantive requirements, the challenged decision, together with its findings of fact and legal conclusions, are deemed sustained. But what is its effect on other cases?**

With respect to the same subject matter and the same issues concerning the same parties, it constitutes *res judicata*. However, if other parties or another subject matter (even with the same parties and issues) is involved, the minute resolution is not binding precedent. Thus, in *CIR v. Baier-Nickel*,²⁶ the Court noted that a previous case, *CIR v. Baier-Nickel*²⁷ involving the same parties and the same issues, was previously disposed of by the Court thru a minute resolution dated February 17, 2003 sustaining the ruling of the C[ourt of]A[ppeals]. Nonetheless, the Court ruled that the previous case ‘ha(d) no bearing’ on the latter case because the two cases involved different subject matters as they were concerned with the taxable income of different taxable years.

²⁴ G.R. No. 167330, September 18, 2009.

²⁵ G.R. No. 148680.

²⁶ G.R. No. 153793, August 29, 2006.

²⁷ Extended Resolution, G.R. No. 156305, February 17, 2003.

Besides, there are substantial, not simply formal, distinctions between a minute resolution and a decision. The constitutional requirement under the first paragraph of Section 14, Article VIII of the Constitution that the facts and the law on which the judgment is based must be expressed clearly and distinctly applies to decisions, not to minute resolutions. A minute resolution is signed only by the clerk of court by authority of the justices, unlike a decision. It does not require the certification of the Chief Justice. Moreover, unlike decisions, minute resolutions are not published in the Philippine Reports. Finally, the proviso of Section 4(3) of Article VIII speaks of a decision. Indeed, as a rule, this Court lays down doctrines or principles of law which constitute binding precedent in a decision duly signed by the members of the Court and certified by the Chief Justice." (*Emphasis and underscoring supplied*)

Simply put, a minute resolution may amount to a final action on the case but it is not a precedent,²⁸ and can not bind non-parties to the action.²⁹

Accordingly, since CBK Power was not a party in G.R. No 168531 (the *Mirant* case) and since CBK Power's claim for refund was not the subject matter of G.R. No 168531, the Court in Division cannot cite and rely, as binding precedents, on the minute resolutions issued by the High Court thereon, in disposing CBK Power's claim for refund.

However, CBK Power is still far from being relieved, since this Court may still exercise its, as it is endowed with, judicial power in deciding the present case, notwithstanding the absence of a binding precedent.

It is well-settled that administrative issuances, such as RMO 1-2000 issued by the BIR, have the force and effect of law. They benefit from the same presumption of validity and constitutionality enjoyed by statutes.³⁰ Thus, while it may be true that treaties become part of the law of the land

²⁸ *Komatsu Industries (Phils.), Inc. vs. Court of Appeals, et al.*, G.R. No. 127682, April 24, 1998.

²⁹ *Alonso vs. Cebu Country Club, Inc.*, G.R. No. 130876, January 31, 2002.

³⁰ *Mirasol, et al. vs. Department of Public Works and Highways, et al.*, G.R. No. 158793, June 8, 2006.

through transformation pursuant to Article VII, Section 21 of the 1987 Constitution,³¹ RMO 1-2000 is just as equally binding.

Furthermore, as can be gleaned from the objectives of RMO 1-00, the issuance thereof is not without reason or foundation. Said objectives are as follows:

"This Order is issued to streamline the processing of the tax treaty relief application in order to improve efficiency and service to taxpayers.

Furthermore, it is to the best interest of both the taxpayer and the Bureau of Internal Revenue that any availment of the tax treaty provisions be preceded by an application for treaty relief with the International Tax Affairs Division (ITAD). **In this way, the consequences of any erroneous interpretation and/or application of the treaty provisions** (i.e., claim for tax refund/credit for overpayment of taxes, or deficiency tax liabilities for underpayment) **can be averted before proceeding with the transaction and or paying the tax liability covered by the tax treaty."**
(Emphases supplied)

It can be readily gathered from the foregoing that RMO 1-00 requires that an application for treaty relief must be filed with the ITAD prior to any availment of tax treaty provisions to avoid the consequences of any erroneous interpretation and/or application of treaty provisions prior to the transaction and/or payment of tax liability covered by a tax treaty. This requirement is reasonably in accord with the strict construction of tax exemptions.

Contrary thereto however, it is CBK Power's view that under the plain language of RMO 1-2000, it is not mandatory that there be an application for

³¹ *Pharaceutical and Health Care Association of the Phils. vs. Health Secretary, et al.*, G.R. No. 173034, October 9, 2007.

treaty relief with the ITAD. To support its stance, CBK Power points to the above-quoted objectives of RMO 1-2000.

We disagree considering that CBK Power failed to read the other parts of the said issuance, particularly, part III thereof, to wit:

"III. Policies

In order to achieve the above-mentioned objectives, the following policies shall be observed:

xxx xxx xxx

2. Any availment of the tax treaty relief **shall be preceded by an application** by filing BIR Form No. 0901 (Application for Relief from Double Taxation) with ITAD at least 15 days before the transaction i.e. payment of dividends, royalties, etc., accompanied by supporting documents justifying the relief. xxx

xxx xxx xxx." (*Emphases and underscoring supplied*)

Notably, in formulating the above policy, the word "**shall**" was used in paragraph 2. Needless to state, in common or ordinary parlance and in its ordinary significance, the term "**shall**" is a word of command, and one which has always and which must be given a compulsory meaning, and it is generally imperative or mandatory. It has the invariable significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning or when public interest is involved or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears.³²

Anent CBK Power's contention that the requirement of an ITAD ruling before a taxpayer can make a judicial claim for refund is in derogation of this Court's exclusive power to consider and rule on judicial claims for refund, We

³² *Gonzales vs. Chavez, et al.*, G.R. No. 97351, February 4, 1992.

find the same unmeritorious, because Section 6 of the NIRC of 1997 duly grants the Commissioner the power to make assessments and prescribe additional requirements for tax administration and enforcement. Additionally, as already stated, RMO 1-2000 has the force and effect of law and thus must be applied accordingly by this Court.

In fine, while the Court in Division cannot validly rely on the *Mirant* case, it did not err in ruling that a prior application filed with the BIR's ITAD is still required to avail of the provisions of tax treaties.

WHEREFORE, all the foregoing considered, the parties' Petitions for Review are hereby **DENIED** for lack of merit. Accordingly, the assailed Decision promulgated on August 28, 2008, the assailed Amended Decision promulgated February 12, 2009, and Resolution dated May 7, 2009, of the Court in Division are hereby **AFFIRMED** *in toto*.

SO ORDERED.

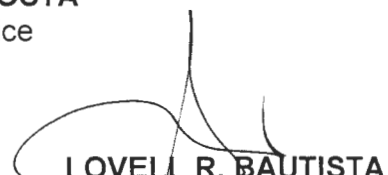

ERLINDA P. JOY
Associate Justice

WE CONCUR:

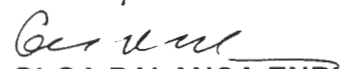
(On Leave)

ERNESTO D. ACOSTA
Presiding Justice


JUANITO C. CASTAÑEDA, JR.
Associate Justice

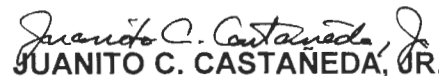

LOVELL R. BAUTISTA
Associate Justice


CAESAR A. CASANOVA
Associate Justice


OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII 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 *En Banc*.


JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice