

REPUBLIC OF THE PHILIPPINES  
Court of Tax Appeals  
QUEZON CITY

**EN BANC**

MIRANT SUAL CORPORATION  
(formerly: Southern Energy  
Pangasinan, Inc.),

Petitioner,

C.T.A. E.B. NO. 144  
(C.T.A. CASE NO. 6386)

Present:

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

- versus -

COMMISSIONER OF INTERNAL  
REVENUE,

Respondent.

Promulgated:

JAN 15 2007 *Apolinario*

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DECISION

UY, J:

This is a Petition for Review before the Court of Tax Appeals En Banc filed on December 23, 2006 under Republic Act No. 9282, seeking a review of the Decision and Resolution by the Second Division of this Court (Court in Division) in CTA Case No. 6386, entitled "Mirant Sual Corporation (formerly: Southern Energy Pangasinan, Inc.) vs. Commissioner of Internal Revenue", to wit:









2. Whether or not in a claim for refund of erroneously paid final withholding tax, it is required that the withholding agent should prove that the income recipient has filed its tax return and paid its income tax in the Philippines;

3. Whether or not petitioner is the proper party to file the claim for refund of erroneously paid withholding tax;

4. Whether or not petitioner has to file an application for a tax treaty relief with the International Tax Affairs Division of the Bureau of Internal Revenue; and

5. Whether or not the income payments to Engica are subject to the 5% expanded withholding tax.

Respondent filed his "Comment (Re. Petition for Review)" on February 9, 2006 and prayed for the dismissal of the present petition for lack of merit.

#### THE COURT EN BANC'S RULING

We find no merit in the petition.

A careful and closer look at the arguments set forth by the petitioner in the instant petition would readily reveal that the grounds relied upon and the matters raised herein are mere restatements of petitioner's previous arguments raised before the Court in Division which had already been exhaustively discussed and passed upon in its assailed Decision and Resolution promulgated on August 22, 2005 and November 14, 2005, respectively.

Be that as it may, with the end view of further clarifying the matter, there is no doubt that under Section 28 (B)(1) of the NIRC of 1997, a non-resident corporation is liable to pay a tax equal to thirty two (32%) percent of the gross income received during each taxable year from all sources within the Philippines beginning January 1, 2000. To quote:

"SFC. 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 subparagraphs 5(c) and (d). Provided, that effective January 1, 1998, the rate of income tax shall be thirty-three percent (33%), and effective January 1, 2000 and thereafter, the rate shall be thirty-two percent (32%)." (Underlining Ours)

Material to the resolution of the controversy in this case is the determination of what is a resident foreign corporation and a non-resident foreign corporation. Under Section 22 (B) and (C) of the NIRC of 1997, the aforesaid terms are distinguished from each other in the following manner:

"SEC. 22. Definitions. -- When used in this Title --

xxx xxx xxx

(4) The term "resident foreign corporation" applies to a foreign corporation engaged in trade or business within the Philippines.

(5) The term "nonresident foreign corporation" applies to a foreign corporation not engaged in trade or business within the Philippines."

Correspondingly, a definitive classification of Engica's tax personality, either as a resident or nonresident foreign corporation, will resolve petitioner's instant claim for refund.

As to whether or not Engica was "doing business" in the Philippines as to be considered a "resident foreign corporation", it is worthy to mention that the phrase "doing business" has been interpreted by the Supreme Court in this fashion:

"No general rule or governing principle can be laid down as to what constitutes 'doing or engaging in' or 'transacting' business. Indeed, each case must be judged in the light of its peculiar environmental circumstances. The true test, however, seems to be whether the foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another (Traction Cos. vs. Collectors of Internal Revenue [C.T.A., Ohio], 223 F. 864, 867). The term implies a continuity of commercial dealings and arrangements and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of, the purpose and object of its organization." (*Underscoring Ours*)

Applying the foregoing in the case at bench, in order that Engica, a foreign corporation, may be regarded as doing business in the Philippines, there must be continuity of conduct and intention to establish a continuous business, such as the appointment of a local agent, and not one of a temporary character. Failure to establish such conduct and intention are fatal to petitioner's claim/allegation that Engica is a resident foreign corporation.

As correctly determined by the Court in Division, notwithstanding the fact that Engica has created a permanent establishment by virtue of the RP-UK Tax Treaty, the aforesaid treaty does not automatically convert the foreign corporation into a resident corporation under our tax jurisdiction but merely speaks of how it should be taxed.

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<sup>1</sup>The Macpherson Co., Inc., et al. vs. Andres Margamot, et al., 72 Phil. 324 (1941).

To emphasize further, it was likewise declared that "Engica has no license and certificate to transact business in the Philippines and has no office or place of business in the Philippines to be classified as a resident foreign corporation."<sup>2</sup>

Moreover, the assailed Decision already elaborated the matter in this wise:

"First, if We go along with the position of herein petitioner that Engica is a resident foreign corporation, then it must follow that Engica should be subjected to income tax at the rate of 32% on its net taxable income, to wit:

"Sec. 28. Rates of Income Tax on Foreign Corporations. —

(A) Tax on Resident Foreign Corporations. —

(1) In General. — Except as otherwise provided in this Code, a corporation organized, authorized, or existing under the laws of any foreign country, engaged in trade or business within the Philippines, shall be subject to an income tax equivalent to thirty-five percent (35%) of the taxable income derived in the preceding taxable year from all sources within the Philippines. Provided, That effective January 1, 1998, the rate of income tax shall be thirty-four percent (34%); ~~xxx~~ and effective January 1, 2000 and thereafter, the rate shall be thirty-two percent (32%). (Emphasis supplied)

Further, Engica should also be required to file annual tax returns, as like any other domestic corporations, viz:

"Sec. 62. Corporation Returns. —

(A) Requirements. — Every corporation subject to the tax herein imposed, except foreign corporation not engaged in trade or business in the Philippines, shall render, in duplicate, a true and accurate quarterly income tax return and final or adjustment return in accordance with the provisions of Chapter XII of this

<sup>2</sup> Decision dated August 27, 2005, CTA Case No. 6388, p.16; Rollo, p. 24.



The burden of proof is upon him who claims the exemptions in his favor and he must be able to justify his claim by the clearest grant of the organic or statute law.<sup>4</sup> This is consistent with the well-established principle that tax refunds are in the nature of a tax exemption and should be construed strictissimi juris against the taxpayer.<sup>5</sup>

To reiterate, the fact that Engica created a permanent establishment under the RP-UK Tax Treaty, this circumstance did not convert Engica into a resident foreign corporation for the purpose of rendering the final withholding tax withheld by petitioner improper, neither did it result in subjecting Engica to a lower tax rate of 5% expanded/creditable withholding tax under Revenue Regulations No. 2-88.

In the light of the foregoing considerations, We find no reversible error committed by the Court in Division when it rendered the assailed Decision dated August 22, 2005, and Resolution dated November 14, 2005.

WHEREFORE, premises considered, the instant petition is hereby **DENIED DUE COURSE**, and, accordingly, **DISMISSED** for lack of merit.

**SO ORDERED**

  
**ERLINDA P. UY**  
Associate Justice

<sup>4</sup> *Coca-Beaking Corporation vs. Court of Appeals*, 403 SCRA 634 (2003).  
<sup>5</sup> *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc.*, and *Court of Appeals*, 303 SCRA 87 (1999); *Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd.*, 244 SCRA 332 (1995); *Commissioner of Internal Revenue vs. Procter and Gamble Philippine Manufacturing Corporation and the Court of Tax Appeals*, 204 SCRA 177 (1991).

WE CONCUR:

  
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*.

  
ERNESTO D. ACOSTA  
Presiding Justice