

**REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY**

EN BANC

**COMMISSIONER OF INTERNAL
REVENUE,**

Petitioner,

CTA EB NO. 2525
(CTA Case No. 9874)

Present:

-versus-

**DEL ROSARIO, P.J.,
CASTAÑEDA, JR.,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO, and
CUI-DAVID, JJ.**

**KUWAIT AIRWAYS
CORPORATION,**

Respondent.

Promulgated:

JUN 16 2022

X - - - - -X

DECISION

CUI-DAVID, J.:

This is a Petition for Review¹ filed by the Commissioner of Internal Revenue (CIR), seeking to reverse and set aside the Decision dated May 28, 2021 (assailed Decision) and the Resolution dated September 30, 2021 (assailed Resolution), both rendered by the Court of Tax Appeals Second Division (Court in Division), granting the issuance of a Tax Credit Certificate (TCC) in favor of respondent Kuwait Airways Corporation, in the reduced amount of ₱11,973,834.71, representing its overpaid income tax for the Fiscal Year (FY) ended March 31, 2016.

¹ *En Banc* (EB) Docket, pp. 1-13.

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THE PARTIES

Petitioner CIR is vested under the appropriate laws with authority to carry out all the BIR functions, duties, and responsibilities, including, among others, the power to decide, approve, and grant claims for refund or tax credit of internal revenue taxes. He holds office on the 5th floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

Respondent Kuwait Airways Corporation is a foreign corporation formed and organized under the laws of Kuwait and a resident thereof. It was authorized by the Securities and Exchange Commission (SEC) to establish a branch office in the Philippines to engage in air transport services. Its branch office in the Philippines is located at G/F GC Corporate Plaza 150 Legaspi Street, Legaspi Village, Makati City. It is registered with the Bureau of Internal Revenue (BIR) Revenue District Office No. 125-Regular LT Division II, with Tax Identification Number (TIN) 001-482-624-000.

THE FACTS

On June 5, 2015, respondent, through its District Sales Manager/OIC, Mr. Jaime F. Zambrano, filed an Application for Relief from Double Taxation on Shipping and Air Transport (BIR Form No. 0901-T) with the BIR's International Tax Affairs Division (ITAD) in relation to its availment of the preferential tax rate of 1½%.²

On the following dates, respondent filed its Quarterly Income Tax Returns (Quarterly ITRs or BIR Form No. 1702Q) for the first three (3) quarters of the FY ending March 31, 2016, and its Annual Income Tax Return (Annual ITR or BIR Form No. 1702-MX) for the same FY.³ It paid the corresponding income tax due⁴ in the aggregate amount of ₱29,241,800.39 at 2½ % tax rate as follows:



² Exhibit "P-8", Docket, Vol. I, p. 501.

³ Exhibits "P-24" to "P-27", BIR Records, pp. 35 to 46.

⁴ Exhibits "P-9" to "P-12", Division Docket, Vol. II, pp. 830 to 834; Exhibits "P-14" to "P-17", Division Docket, Vol. II, pp. 835 to 839; Exhibits "P-19" to "P-22", Division Docket, Vol. I, pp. 548 to 552; and Exhibits "P-24" to "P-27", BIR Records, pp. 35 to 46.

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Period (FY ended March 31, 2016)	Date Filed and Paid	Tax Payable
1 st quarter ⁵	August 27, 2015	₱10,525,951.69
2 nd quarter ⁶	November 27, 2015	₱6,949,077.32
3 rd quarter ⁷	February 26, 2016	₱5,521,898.38
4 th quarter (Final)	July 14, 2016	₱6,244,873.00
TOTAL		₱29,241,800.39

In response to respondent's application for tax treaty relief, petitioner issued BIR Ruling No. ITAD 034-17 dated November 6, 2017,⁸ ruling that since the Philippines, as of the said date, has not granted a most-favored-treatment to any international air carrier of a third country, respondent is subject to income tax of 1½% on its Gross Philippine Billings (GPBs) earned beginning January 1, 2014, under par. 2(b), Article 8 of the Philippines-Kuwait Tax Treaty.

On March 21, 2018, respondent filed with the BIR its Amended Annual ITR for the FY ending March 31, 2016, applying the 1½% preferential income tax rate and showing an overpayment of ₱12,158,469.00.⁹

Sales/Revenues/Receipts/Fees	₱1,215,846,969.00
Income Tax Rate	1.50%
Income Tax Due	₱18,237,705.00
Less: Tax Credits/Payments	
Income Tax Payment(s) from Previous Quarter/s	₱22,996,927.00
Creditable Tax Withheld from Previous Quarter/s	845,979.00
Creditable Tax Withheld per BIR Form No. 2307 for the 4th Quarter	308,395.00
Tax Paid in Return Previously Filed, if this is an Amended Return	6,244,873.00
Total	₱30,396,174.00 ¹⁰
Tax Payable (Overpayment)	₱(12,158,469.00)

⁵ Exhibits "P-9" to "P-12", Division Docket, Vol. II, pp. 830 to 834.⁶ Exhibits "P-14" to "P-17", Division Docket, Vol. II, pp. 835 to 839.⁷ Exhibits "P-19" to "P-22", Division Docket, Vol. I, pp. 548 to 552⁸ Exhibit "P-29", Division Docket, Vol. I, pp. 574 to 577.⁹ Exhibits "P-30" and "P-31", Division Docket, Vol. II, pp. 840 to 849; BIR Records, pp. 47 to 56.¹⁰ Consisted of the quarterly income tax payments in the aggregate amount of ₱29,241,800.00 (₱22,996,927.00+₱6,244,873.00) and creditable taxes withheld in the amount of ₱1,154,374.00 (₱845,979.00+ ₱308,395.00).

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On May 16, 2018, respondent filed with the BIR Regular Large Taxpayer Audit Division II its administrative claim for the issuance of TCC in its favor, given its alleged overpaid income tax for the FY ending March 31, 2016.¹¹

On July 11, 2018, due to petitioner's inaction, respondent filed a Petition for Review,¹² initially raffled to this Court's First Division. In the Order dated September 27, 2018,¹³ the case was transferred to the Court's Second Division.

On October 23, 2018, petitioner filed his Answer,¹⁴ raising the following special and affirmative defenses:

- (1) In a claim for tax refund or tax credit, the applicant must prove not only entitlement to the claim but also compliance with all the documentary and evidentiary requirements therefore;
- (2) Revenue Memorandum Order No. (RMO) 1-2000¹⁵ provides guidelines for proper implementation of Tax Treaties to which the Philippines is a signatory;
- (3) Petitioner must prove that the preferential tax rate applies to its Gross Philippine Billings under the Philippine-Kuwait Tax Treaty;
- (4) Partaking of the nature of exemptions, claims for refund are strictly construed against the claimant and cannot be allowed unless granted in the most explicit and categorical language; and,
- (5) Being in the nature of tax exemptions, these claims are regarded as derogating sovereign authority and construed *strictissimi juris* against the claimant and liberally in favor of the taxing authority.

On October 24, 2018, petitioner submitted the BIR Records through registered mail.¹⁶ 

¹¹ Exhibits "P-53" and "P-54", BIR Records, pp. 62 to 64.

¹² Division Docket, Vol. I, pp. 10 to 31; Par. 3, Stipulations of Facts, JSFI, Division Docket, Vol. II, p. 689.

¹³ Division Docket, Vol. I, p. 310

¹⁴ Division Docket, Vol. I, pp. 317 to 324.

¹⁵ Procedures for Processing Tax Treaty Relief Application, November 25, 1999.

¹⁶ *Compliance* dated October 24, 2018, Division Docket, Vol. I, pp. 326 to 328.

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The pre-trial conference initially set for November 22, 2018,¹⁷ was reset to and held on January 17, 2019,¹⁸ upon respondent's Motion to Reset Hearing (Set on November 22, 2018).¹⁹ Respondent filed his Pre-Trial Brief on November 15, 2018,²⁰ while the petitioner's Pre-Trial Brief was submitted on January 8, 2019.²¹

On January 31, 2019, the parties filed their Joint Stipulation of Facts and Issues (JSFI).²² On February 12, 2019, the Court in Division issued the Pre-Trial Order,²³ approving and adopting the said JSFI and terminating the pre-trial.

The trial of the case then ensued.

During the trial, respondent presented testimonial and documentary evidence. The witnesses are (1) Ms. Maria Carmen S. Tiansay,²⁴ its District Sales Manager; (2) Ms. Ana Marie M. Molina,²⁵ its Accounts Manager-Finance; and (3) Ms. Maria Cristina Josefina Berces-Ocampo,²⁶ the Court-commissioned Independent Certified Public Accountant (ICPA).²⁷ On May 17, 2019, respondent submitted the ICPA Report.²⁸

On July 10, 2019, respondent filed its Formal Offer of Documentary Evidence.²⁹ Petitioner submitted his Comment (Re: Formal Offer of Evidence) on July 12, 2019.³⁰

In its Resolution dated October 1, 2019,³¹ the Court in Division admitted respondent's exhibits, except for Exhibits "P-26", for not being found in the records. Thus, on October 21, 2019, respondent filed a Motion for Reconsideration Re: Resolution Dated October 1, 2019,³² praying that the newly

¹⁷ Notice of Pre-Trial Conference dated October 26, 2018, Division Docket, Vol. I, pp. 330 to 331.

¹⁸ Minutes of the hearing held on, and Order dated, November 22, 2018, Division Docket, Vol. I, pp. 655 to 656; Minutes of the hearing held on, and Order dated, January 17, 2019, Division Docket, Vol. II, pp. 662 to 663.

¹⁹ Division Docket, Vol. I, pp. 334 to 336.

²⁰ Division Docket, Vol. I, pp. 642 to 652.

²¹ Division Docket, Vol. I, pp. 657 to 660.

²² Division Docket, Vol. II, pp. 688 to 696.

²³ Division Docket, Vol. II, pp. 718 to 725.

²⁴ Judicial Affidavit of Maria Carmen S. Tiansay, Division Docket, Vol. I, pp. 344 to 359; Minutes of the hearing held on, and Order dated, March 4, 2019, Division Docket, Vol. II, pp. 727 to 728.

²⁵ Judicial Affidavit of Ana Marie M. Molina, Division Docket, Vol. I, pp. 473 to 498; Minutes of the hearing held on, and Order dated March 4, 2019, Division Docket, Vol. II, pp. 727 to 728.

²⁶ Judicial Affidavit of Ms. Maria Cristina Josefina Berces-Ocampo, Division Docket, Vol. II, pp. 748 to 766; Minutes of the hearing held on, and Order dated, June 10, 2019, Division Docket, Vol. II, pp. 767 to 768.

²⁷ Oath of Commission dated March 4, 2019, Division Docket, Vol. I, p. 726; Minutes of the hearing held on, and Order dated, March 4, 2019, Division Docket, Vol. II, pp. 727 to 728.

²⁸ Manifestation dated May 16, 2019, Division Docket, Vol. II, pp. 744 to 745.

²⁹ Division Docket, Vol. II, pp. 776 to 795.

³⁰ Division Docket, Vol. II, pp. 853 to 854.

³¹ Division Docket, Vol. II, pp. 861 to 862.

³² Division Docket, Vol. II, pp. 865 to 867.

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scanned exhibits (in USB form) be admitted as replacement for the unclear and unreadable documents.

Meanwhile, during the hearing on October 23, 2019,³³ petitioner's counsel manifested that he had no witness to present in this case.

On February 19, 2020, respondent filed its Supplemental Formal Offer of Documentary Evidence.³⁴ In the Resolution dated June 10, 2020,³⁵ the Court in Division admitted respondent's exhibits offered in its Supplemental Formal Offer of Documentary Evidence. It granted respondent's Motion for Reconsideration Re: Resolution Dated October 1, 2019.

On July 29, 2020, petitioner posted his Memorandum,³⁶ while respondent filed its Memorandum on September 1, 2020.³⁷

On May 28, 2021, the Court in Division rendered the assailed Decision³⁸ in favor of the respondent, the dispositive portion of which reads:

WHEREFORE, in light of the foregoing considerations, the present *Petition for Review* is **PARTIALLY GRANTED**. Accordingly, respondent is **ORDERED** to **ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner, in the reduced amount of **P11,973,834.71**, representing the latter's overpaid income taxes for FY ended March 31, 2016.

SO ORDERED.

Petitioner filed a Motion for Partial Reconsideration³⁹ on the assailed Decision but was denied per Resolution dated September 30, 2021.⁴⁰ The *fallo* of the assailed Resolution reads:

WHEREFORE, premises considered, respondent's Motion for Partial Reconsideration Re: Decision dated 28 May 2021 is **DENIED** for lack of merit.

SO ORDERED.

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³³ Minutes of the hearing held on, and Order dated, October 23, 2019, Division Docket, Vol. II, pp. 868 and 873, respectively.

³⁴ Division Docket, Vol. II, pp. 883 to 886.

³⁵ Division Docket, Vol. II, pp. 938 to 939.

³⁶ Division Docket, Vol. II, pp. 945 to 950.

³⁷ Division Docket, Vol. II, pp. 953 to 966.

³⁸ EB Docket, pp. 14-34; Division Docket, Vol. II, pp. 971-991.

³⁹ Division Docket, Vol. II., pp. 992-998.

⁴⁰ EB Docket, pp. 35-41; Division Docket, Vol. II, pp. 1007-1013.

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Undaunted, petitioner filed the instant Petition for Review on October 27, 2021.⁴¹

On December 9, 2021, respondent was directed by this Court to file its comment on the petition.⁴²

On January 4, 2022, respondent filed its Comment (Re: Petition for Review dated October 26, 2021).⁴³

Hence, the instant petition was submitted for decision on March 8, 2022.⁴⁴

THE ISSUE

The Court *En Banc* notes that the instant Petition for Review does not contain a statement of the issues involved in the case. However, based on the discussion therein, the lone ground presented before this Court is:

WHETHER THE COURT'S SECOND DIVISION ERRED IN RULING THAT THE RESPONDENT IS ENTITLED TO THE ISSUANCE OF A TAX CREDIT CERTIFICATE IN THE REDUCED AMOUNT OF ₱11,973,834.71.

Petitioner's arguments:

Petitioner CIR insists that respondent Kuwait Airways Corporation is not entitled to the issuance of a tax credit certificate. He claims that in action for refund, the burden of proof is on the taxpayer to establish its right to it, and failure to sustain the burden is fatal to its claim for tax refund/credit; and that the applicant must prove not only entitlement to the claim but also compliance with all the documentary and evidentiary requirements.

Petitioner further claims that the availment of a tax treaty provision is not *ipso facto* granted to anyone who wishes to avail of the benefits thereof since there are specific procedures that must first be complied with; in relation to this, RMO 1-2000 was issued by the CIR to streamline the processing of tax treaty applications to improve efficiency in the service of taxpayers; and that RMO 1-2000 was not issued to supersede

⁴¹ Petition for Review, including attachments, CTA EB No. 2525 (CTA Case No. 9874), *En Banc* Docket, pp. 1-41.

⁴² *En Banc* Docket, pp. 42-44.

⁴³ *Id.* pp. 47-53.

⁴⁴ *Id.* pp. 56-59.

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a tax law or treaty, but was issued for proper and orderly implementation thereof.

Petitioner further stresses that respondent must prove that the preferential tax rate applies to its GPB under the Philippines-Kuwait Tax Treaty; that while respondent was able to secure a BIR Ruling No. ITAD 034-17, the same is accompanied by a strong caveat that if the facts alleged by the applicant turn out to be false, the said ruling shall be without force and effect; that it has the burden to discharge that its claimed transactions are in all fours with the provisions of the tax treaty and as that represented in the said BIR ruling; that respondent cannot simply claim a blanket application of the relief provided under the tax treaty since its refund claim is still subject to administrative and judicial scrutiny; that the claimant has the burden of proof to establish the factual basis of his claim for tax credit or refund; and that being in the nature of tax exemptions, these claims are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the claimant and liberally in favor of the taxing authority.

Lastly, petitioner cites the rulings of this Court in *Mirant (Philippines) Operations Corporation (formerly: Southern Energy-Asia Pacific Operations [Phils.], Inc. vs. Commissioner of Internal Revenue*⁴⁵ and in *CDL Hotels (Phils.) Corporation vs. Commissioner of Internal Revenue*.⁴⁶

Respondent's arguments:

On the other hand, respondent Kuwait Airways Corporation counters that a careful scrutiny of the Petition for Review reveals that the grounds relied upon by petitioner CIR are entirely the same issues and arguments raised in his Answer to the initial Petition for Review filed before the Court in Division; that the very same issues and arguments were likewise raised verbatim in his Motion for Partial Reconsideration dated June 15, 2021, in relation to the Decision of the Second Division in CTA Case No. 9874; that the presentation of these solved issues and arguments should neither be given credence nor warrant a reversal or modification of the Decision of the Second Division.

⁴⁵ CTA EB No. 40 (CTA Case No. 6382), June 7, 2005.

⁴⁶ CTA EB No. 339, August 10, 2009.



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Respondent likewise claims that petitioner anchored his allegation of respondent's non-entitlement to the issuance of a TCC by citing general provisions of law and existing jurisprudence but without specifying the factual basis to support said allegations; that like the Motion for Reconsideration, the Petition for Review also contains self-serving statements and declarations that do not deserve any weight, credence or value since they are unsubstantiated by any scintilla of proof; and that jurisprudence dictates that unless allegations are substantiated by clear and convincing proof, such defense is negative and undeserving of any weight.

Respondent further argues that it has proven with substantial and concrete documentary and testimonial evidence its entitlement to the issuance of Tax Credit Certificate; that to reiterate, no less than the CIR Caesar R. Dulay, confirmed in BIR Ruling No. ITAD 034-17 that respondent is entitled to avail of the preferential income tax rate of 1½% on its GPBs earned beginning January 1, 2014 under Article 8 of the Philippines-Kuwait tax treaty; that from the time the BIR Ruling was issued in 2017, there has been no investigation conducted by petitioner or any of its officers that would dispute the favorable ruling; that in addition, during the cross-examination of respondent's witnesses, petitioner did not challenge the validity of the BIR Ruling; and that petitioner's counsel likewise waived his right to present documentary evidence and witnesses; that he could have utilized this opportunity to refute the testimonies of respondent's witnesses and documentary evidence; and that instead of doing so, he slept on his rights and did nothing to disprove respondent's position.

Lastly, respondent cites the case of *Machica vs. Roosevelt Service Center, Inc.*⁴⁷

THE COURT EN BANC'S RULING**Timeliness of the instant Petition
for Review**

On October 11, 2021, petitioner received the assailed Resolution denying his motion for reconsideration. Prior thereto, on September 15, 2021, the Supreme Court issued

⁴⁷ G.R. No. 168664 dated May 4, 2006.



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Administrative Circular No. 72-2021,⁴⁸ declaring that all courts in the National Capital Region (NCR) continue to remain physically closed; hence, the time for filing and service of pleadings and motions remains suspended and shall resume after seven (7) calendar days counted from the first day of the physical reopening of the relevant court.

On October 18, 2021, the Supreme Court issued Administrative Circular No. 83-2021,⁴⁹ stating that under Administrative Circular No. 72-2021, the period for filing and service shall resume seven (7) calendar days from October 20, 2021.

On October 27, 2021, petitioner timely filed the present Petition for Review. Hence, the Court *En Banc* validly acquired jurisdiction.

We now proceed to the merits of the case.

At the outset, petitioner failed to proffer new or substantial arguments to persuade us that he has a meritorious case. The arguments he presented in this Petition for Review, lifted *verbatim* from the Answer, the Memorandum, and the Motion for Reconsideration he filed in CTA Case No. 9874, were duly considered and exhaustively discussed in the assailed Decision and Resolution. Nonetheless, we shall again discuss the parties' arguments to underscore specific points and settle the issue in this case.

The administrative and judicial claims were timely filed.

Sections 204⁵⁰ and 229⁵¹ provide the refund of erroneously or illegally collected taxes. Section 204 applies to administrative

⁴⁸ RE: COURT OPERATIONS BEGINNING 16 SEPTEMBER 2021, September 15, 2021.

⁴⁹ RE: COURT OPERATIONS BEGINNING OCTOBER 20, 2021 UNTIL OCTOBER 29, 2021, October 18, 2021.

⁵⁰ SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* — The Commissioner may —

...
(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty:** Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund. (*Emphasis supplied*)

⁵¹ 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**

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claims for refund, while Section 229 to judicial claims for refund.⁵²

Reading the two provisions together, administrative and judicial claims must be filed within the two (2)-year period. Furthermore, the administrative claim must be filed before the judicial claim.⁵³ While the law provides that the two years is counted from the date of payment of the tax, jurisprudence, however, clarified that the 2-year prescriptive period to claim a refund commences to run, at the earliest, on the date of the filing of the adjusted final tax return⁵⁴ because this is where the figures of the gross receipts and deductions have been audited and adjusted, reflective of the results of the operations of a business enterprise.⁵⁵ Thus, it is only when the return covering the whole year is filed that the taxpayer would know whether a tax is still due or a refund can be claimed based on the adjusted and audited figures.⁵⁶

As found by the Court in Division, the respondent filed its Annual ITR for the FY ended March 31, 2016, and paid the corresponding income tax on July 14, 2016, based on the special tax rate of 2½%. On March 21, 2018, it filed with the BIR an Amended Annual ITR for the FY ending March 31, 2016, applying the 1½% preferential income tax rate and showing an overpayment of ₱12,158,469.00 based on the BIR Ruling No. ITAD 034-17 dated November 6, 2017, confirming its entitlement to the said 1½% preferential rate.

Considering the foregoing, the 2-year period shall be reckoned from the date of payment of the tax regardless of any supervening cause that may arise after payment,⁵⁷ such as the issuance of the said BIR Ruling and the filing of Amended

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. (*Emphasis supplied*)

⁵² *Commissioner of Internal Revenue vs. Univation Motor Philippines, Inc. (Formerly Nissan Motor Philippines, Inc.)*, G.R. No. 231581, April 10, 2019.

⁵³ *Commissioner of Internal Revenue vs. Carrier Air Conditioning Philippines, Inc.*, G.R. No. 226592, July 27, 2021.

⁵⁴ *Supra* Note 52, citing *ACCRA Investments Corp. vs. Court of Appeals*, G.R. No. 96322, December 20, 1991, 281 Phil. 1060, 1068-1069.

⁵⁵ *Id.*, citing *Commissioner of Internal Revenue vs. TMX Sales, Inc.*, G.R. No. 83736, January 15, 1992, 282 Phil. 199, 207.

⁵⁶ *Id.*

⁵⁷ Section 229, NIRC of 1997, as amended.

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Annual ITR.⁵⁸ Thus, respondent had two years from July 14, 2016, or until **July 14, 2018**, to file its administrative and judicial claims.

Hence, the administrative claim filed on May 16, 2018,⁵⁹ and the judicial claim filed on July 11, 2018,⁶⁰ were within the two-year prescriptive period under Section 229 of the NIRC of 1997, as amended.

There was an erroneous overpayment of income tax for the FY ended March 31, 2016.

As a general rule, an international carrier doing business in the Philippines shall pay a tax of 2½% on its GPBs as provided under Section 28 (A)(3) of the NIRC of 1997, as amended. However, with the enactment of Republic Act No. (RA) 10378,⁶¹ an international carrier doing business in the Philippines may now avail of a *preferential rate* or exemption on the basis of an applicable tax treaty or international agreement to which the Philippines is a signatory or on the basis of 'reciprocity,'⁶² viz.:

Section 28. Rates of Income Tax on Foreign Corporations. –

(A) Tax on Resident Foreign Corporations. –

...

(3) International Carrier. — An international carrier **doing business in the Philippines** shall pay a tax of two and one-half percent (2 ½%) on its 'Gross Philippine Billings' as defined hereunder:

(a) International Air Carrier. — 'Gross Philippine Billings' refers to the amount of gross revenue derived from carriage of persons, excess baggage, cargo, and mail originating from the Philippines in a continuous and uninterrupted flight, irrespective of the place of sale or issue and the place of payment of the ticket or passage document: *Provided*, That tickets revalidated,

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⁵⁸ Concurring and Dissenting Opinion of Associate Justice Jean Marie A. Bacorro-Villena dated May 28, 2021 in CTA Case No. 9874.

⁵⁹ Exhibits "P-53" and "P-54", BIR Records, pp. 62 to 64.

⁶⁰ Division Docket, Vol. I, pp. 10 to 31; Par. 3, Stipulations of Facts, JSFI, Division Docket, Vol. II, p. 689.

⁶¹ AN ACT RECOGNIZING THE PRINCIPLE OF RECIPROCITY AS BASIS FOR THE GRANT OF INCOME TAX EXEMPTIONS TO INTERNATIONAL CARRIERS AND RATIONALIZING OTHER TAXES IMPOSED THEREON BY AMENDING SECTIONS 28(A)(3)(a), 109, 118 AND 236 OF THE NATIONAL INTERNAL REVENUE CODE (NIRC), AS AMENDED, AND FOR OTHER PURPOSES, March 7, 2013.

⁶² As implemented by Section 4.1, RR No. 15-2013, Revenue Regulations Implementing Republic Act No. 10378 Entitled "An Act Recognizing the Principle of Reciprocity as Basis for the Grant of Income Tax Exemptions to International Carriers and Rationalizing Other Taxes Imposed Thereon by Amending Sections 28 (A) (3) (A), 109, 118 and 236 of the National Internal Revenue Code (NIRC), as Amended, and for Other Purposes", September 20, 2013.

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exchanged and/or indorsed to another international airline form part of the Gross Philippine Billings if the passenger boards a plane in a port or point in the Philippines: *Provided, further*, That for a flight which originates from the Philippines, but transshipment of passenger takes place at any part outside the Philippines on another airline, only the aliquot portion of the cost of the ticket corresponding to the leg flown from the Philippines to the point of transshipment shall form part of Gross Philippine Billings.

...
Provided, That **international carriers doing business in the Philippines may avail of a preferential rate** or exemption **from the tax herein imposed on their gross revenue derived from the carriage of persons and their excess baggage on the basis of an applicable tax treaty** or international agreement to which the Philippines is a signatory or on the basis of reciprocity such that an international carrier, whose home country grants income tax exemption to Philippine carriers, shall likewise be exempt from the tax imposed under this provision. (*Emphasis supplied*)

Corollary thereto, petitioner issued Revenue Regulation No. (RR) 15-2013⁶³ to implement RA 10378. Section 4.1 states:

SECTION 4. INCOME TAX. —

4.1) Income Tax Imposed on International Carriers with Flights or Voyages Originating from Philippine Ports. — An international carrier having flights or voyages originating from any port or point in the Philippines, irrespective of the place where passage documents are sold or issued, is subject to the Gross Philippine Billings Tax of **two and one-half percent (2½ %)** imposed under Section 28(A)(3)(a) and (b) of the NIRC, as amended, unless it is subject to a **preferential rate** or exemption on the basis of an **applicable tax treaty or international agreement** to which the Philippines is a signatory or on the basis of 'reciprocity.' (*Emphasis supplied*)

Accordingly, an international carrier doing business in the Philippines is generally subject to the income tax rate of 2½ % on its GPBs, but it may avail of a **preferential rate** on the basis of an applicable tax treaty or international agreement to which the Philippines is a signatory.



⁶³ RR 15-2013, Implementing Republic Act No. 10378 Entitled "An Act Recognizing the Principle of Reciprocity as Basis for the Grant of Income Tax Exemptions to International Carriers and Rationalizing Other Taxes Imposed Thereon by Amending Sections 28 (A) (3) (A), 109, 118 and 236 of the National Internal Revenue Code (NIRC), as Amended, and for Other Purposes", September 20, 2013.

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In this case, petitioner issued Revenue Memorandum Circular No. (RMC) 37-2014 entitled "Entry Into Force, Effectivity, and Applicability of the Philippines-Kuwait Double Taxation Agreement" on May 8, 2014. The RMC provides:

The agreement between the **Government of the Republic of the Philippines and the Government of the State of Kuwait** for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income has entered into force on 22 April 2013. Pursuant to paragraph 2, Article 28 thereof, the provisions on taxes on income of the Agreement shall apply to income derived or which accrued beginning **01 January 2014**.

Tax Treaty Relief Applications (TTRA) invoking the Philippines-Kuwait Double Taxation Agreement should be filed with and addressed to the International Tax Affairs Division (ITAD)...For this purpose, the concerned Kuwaiti resident income earner or an authorized representative of the latter should file a duly accomplished BIR Form 0901 (Application for Relief from Double Taxation) together with the required documents (*Emphasis supplied*)

On June 5, 2015, respondent filed with the ITAD office the Tax Treaty Relief Applications (TTRA), invoking the Philippines-Kuwait Double Taxation Agreement.

Subsequently, on November 6, 2017, petitioner issued BIR Ruling No. ITAD 034-17 confirming that respondent is entitled to avail of the preferential income tax rate of 1½% on its GPBs earned beginning January 1, 2014, under paragraph 2(b), Article 8 of the Philippine-Kuwait Tax Treaty. The relevant portion of the ruling is hereunder quoted:

Kuwait Airways is a foreign corporation organized and existing under the laws of Kuwait and a resident thereof based on its Articles of Association and Certificate of Residency issued by the Ministry of Finance of Kuwait. ...

Kuwait Airways is allowed by the Securities and Exchange Commission ("**SEC**") to establish a branch office in the Philippines to engage in air transport services based on a resolution issued by the SEC on July 31, 1980. It started operations in the Philippines on November 1, 1980. ...Based on the current Validation of Air Operator Certificate issued by the Civil Aviation Authority of the Philippines, **Kuwait Airways** is allowed to conduct commercial air transport operations into, within, or from Philippine territory, specifically, Kuwait to Manila, and, Manila to Kuwait.

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RULING

In reply, please be informed that under Section 28 (A) (3) of the National Internal Revenue Code of 1997, as amended ("Tax Code"), international carriers (air transport and shipping) doing business in the Philippines are subject to income tax on their GPB at the rate of 2½%. Likewise, international carriers may avail of a preferential rate or exemption on their GPB on the basis of an applicable tax treaty or international agreement to which the Philippines is a signatory, or on the basis of reciprocity where the home country of these carriers exempt Philippine carriers from income tax doing business in the former's territories. **Section 28 (A) (3) provides: ...**

In the case of Kuwait Airways, it invokes solely the Philippines-Kuwait tax treaty, effective January 1, 2014. Article 8 thereof provides:

"Article 8

SHIPPING AND AIR TRANSPORT

1. *Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.*
2. *Notwithstanding the provisions of paragraph 1, profits from sources within a Contracting State derived by an enterprise of the other Contracting State from the operation of ships or aircraft in international traffic may be taxed in the first mentioned State but the tax so charged shall not exceed the lesser of:*
 - a) **one and one-half per cent of the gross revenues** derived from sources in that State; and
 - b) **the lowest rate that may be imposed** on profits of the same kind derived under similar circumstances by a resident of a third State."

Under Article 8, international carriers of Kuwait doing business in the Philippines are subject to income tax on their GPB at the rate of **1½%, or the lowest rate** imposed on the GPB of international carriers of a third country (the so called "**most-favored-nation treatment**").

Accordingly, since the Philippines, to date, has not granted a most-favored-nation treatment to any international air carrier of a third country, **Kuwait Airways is subject to income tax of 1½% on its GPB earned beginning January 1, 2014**, pursuant to paragraph 2 (b), Article 8 of the Philippines-Kuwait tax treaty. (*Emphasis supplied*)

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As stated in the above ruling, Kuwait Airways invokes solely the Philippine-Kuwait Tax Treaty⁶⁴ to avail the preferential tax rate of 1½%.

A tax treaty is an agreement entered into between sovereign states “for purposes of eliminating double taxation on income and capital, preventing fiscal evasion, promoting mutual trade and investment, and according fair and equitable tax treatment to foreign residents or nationals.”⁶⁵

In *Air Canada vs. Commissioner of Internal Revenue*, citing the case of *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc.*,⁶⁶ the purpose of a tax treaty was explained:

The purpose of these international agreements is to reconcile the national fiscal legislations of the contracting parties in order to help the taxpayer avoid simultaneous taxation in two different jurisdictions.⁶⁷

More precisely, the tax conventions are drafted with a view towards the elimination of *international juridical double taxation*, which is defined as the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for identical periods.⁶⁸

Observance of any treaty obligation binding upon the government of the Philippines is anchored on the constitutional provision that the Philippines “adopts the generally accepted principles of international law as part of the law of the land.” *Pacta sunt servanda* is a fundamental international law principle that requires agreeing parties to comply with their treaty obligations in good faith.⁶⁹

Moreover, as correctly pointed out by the Court in Division, the obligation to comply with a tax treaty must take precedence over the objective of RMO 1-2000.⁷⁰

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⁶⁴ Known as the “Convention between the Government of the Republic of the Philippines and the Government of the State of Kuwait for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.”

⁶⁵ *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc.*, 368 Phil. 388 (1999).

⁶⁶ G.R. No. 169507, January 11, 2016.

⁶⁷ *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc.*, G.R. No. 127105, June 25, 1999, cited in *Air Canada vs. Commissioner of Internal Revenue*, G.R. No. 169507, January 11, 2016, 776 Phil. 119-166.

⁶⁸ *Id.*

⁶⁹ *Supra* Note 66.

⁷⁰ G.R. No. 188550, August 19, 2013, cited in the assailed Resolution dated September 30, 2021, CTA Case No. 9874.

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In *Deutsche Bank AG Manila Branch vs. CIR (Deutsche Bank)*,⁷¹ the Supreme Court explained that taxpayers could not be deprived of their entitlement to the benefit of a treaty for failure to comply with an administrative issuance requiring the prior application for tax treaty relief since the obligation to comply with a tax treaty must take precedence over RMO 1-2000.

In upholding the tax treaty over the administrative issuance, the Supreme Court clarified:

[I]t must be stressed that there is nothing in RMO No. 1-2000 which would indicate a deprivation of entitlement to a tax treaty relief for failure to comply with the 15-day period. We recognize the clear intention of the BIR in implementing RMO No. 1-2000, but the CTA's outright denial of a tax treaty relief for failure to strictly comply with the prescribed period is not in harmony with the objectives of the contracting state to ensure that the benefits granted under tax treaties are enjoyed by duly entitled persons or corporations.

Bearing in mind the rationale of tax treaties, the period of application for the availment of tax treaty relief as required by RMO No. 1-2000 should not operate to divest entitlement to the relief as it would constitute a violation of the duty required by good faith in complying with a tax treaty. The denial of the availment of tax relief for the failure of a taxpayer to apply within the prescribed period under the administrative issuance would impair the value of the tax treaty. At most, **the application for a tax treaty relief from the BIR should merely operate to confirm the entitlement of the taxpayer to the relief.**

The **obligation to comply with a tax treaty must take precedence over the objective of RMO No. 1-2000.** Logically, noncompliance with tax treaties has negative implications on international relations, and unduly discourages foreign investors. While the consequences sought to be prevented by RMO No. 1-2000 involve an administrative procedure, these may be remedied through other system management processes, *e.g.*, the imposition of a fine or penalty. But we cannot totally deprive those who are entitled to the benefit of a treaty for failure to strictly comply with an administrative issuance requiring prior application for tax treaty relief. (*Emphasis supplied*)⁷²

Hence, the application of the provisions of the National Internal Revenue Code must be subject to the provisions of tax treaties entered into by the Philippines with foreign countries.⁷³

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*



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Clearly, respondent is entitled to avail of the use of the preferential tax rate of 1½% on its GBPs **beginning January 1, 2014**, under the Philippine-Kuwait Tax Treaty, and as confirmed by the petitioner himself when he signed and issued the BIR Ruling No. ITAD 034-17, *viz.*:

Accordingly, since the Philippines, to date, has not granted a most-favored-nation treatment to any international air carrier of a third country, **Kuwait Airways** is subject to income tax of 1½% on its GPB earned **beginning January 1, 2014**, pursuant to paragraph 2 (b), Article 8 of the Philippines-Kuwait tax treaty. (*Emphasis supplied*)

Thus, We concur with the Court in Division's finding that the respondent had made an erroneous overpayment of its income tax for the FY ended March 31, 2016 when it applied the 2½% tax rate instead of the 1½% preferential tax rate under Article 8 of the Philippine-Kuwait Tax Treaty.

We shall now proceed to determine whether respondent is entitled to the issuance of a tax credit certificate in the reduced amount of **₱11,973,834.71**.

Respondent is entitled to the issuance of a Tax Credit Certificate

Petitioner claims that in an action 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 for tax refund/credit; that the applicant must prove not only entitlement to the claim but also compliance with all the documentary and evidentiary requirements; and that the respondent has the burden to discharge that its transactions are on all fours with the provisions of the treaty and the facts represented in BIR Ruling No. ITAD 034-17 dated November 6, 2017.

Respondent counters that it has proven with substantial and concrete documentary and testimonial evidence its entitlement to the issuance of Tax Credit Certificate; no less than the CIR Caesar R. Dulay confirmed, in BIR Ruling No. ITAD 034-17, that respondent is entitled to avail of the preferential income tax rate of 1½% on its GBPs earned beginning January 1, 2014 under Article 8 of the Philippines-Kuwait tax treaty; that from the time the BIR Ruling was issued



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in 2017, there has been no investigation conducted by petitioner or any of his officers that would dispute the favorable ruling granted to respondent; that in addition, during the cross-examination of respondent's witnesses, petitioner did not challenge the validity of the BIR Ruling when it was presented as part of respondent's evidence; and that petitioner's counsel likewise waived his right to present documentary evidence and witnesses; that he could have utilized this opportunity to refute the testimonies of respondent's witnesses and documentary evidence; and that instead of doing so, he slept on his rights and did nothing to disprove respondent's position.

In this case, the records reveal that respondent has offered the testimonies of its witnesses, as well as the following exhibits, to prove that it is entitled to the issuance of a tax credit certificate in CTA Case No. 9874, to wit:

1. Tax Treaty Relief Application (TTRA) filed on June 5, 2015 with the BIR-ITAD Office;
2. BIR Revenue Memorandum Circular No. 37-2014;
3. BIR Ruling No. ITAD 034-17 dated November 6, 2017;
4. Tax Residency Certificate issued by the Ministry of Finance, Kuwait;
5. Memorandum of Association of Kuwait Airways Corporation;
6. Article of Association of Kuwait Airways Corporation;
7. Application of Foreign Corporation to Do Business in the Philippines;
8. Securities and Exchange Commission (SEC) No. 919;
9. BIR Certificate of Registration;
10. Civil Aeronautics Board Certification issued;
11. CAAP Validation of Air Operator Certificate No. F10-032-12;
12. Quarterly and Annual ITRs;
13. eFPS BIR payment confirmations;
14. Land Bank of the Philippines Confirmation Receipts;
15. Audited Statement of Gross Philippine Billings
16. Administrative Claim for the issuance of a tax credit certificates in the amount of P12,156,469;
17. Application for Tax Credits/Refunds ((BIR Form No. 1914);
18. ICPA Report; and other documents.

However, the Court notes that petitioner failed to act on respondent's administrative claim for the issuance of a TCC. He also failed to present any evidence during the trial before the Court in Division to support his assertion that respondent is not entitled to its claim for a TCC.



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Indeed, cases filed before the CTA are litigated *de novo*. As such, party litigants should prove every minute aspect of their cases.⁷⁴

Based on the evidence on record and the oft-repeated arguments of the parties, We find that respondent was able to establish its entitlement to the claimed TCC. Thus, the issuance of a TCC in its favor is proper.

At this juncture, We quote with approval the disquisition of the Court in Division that out of the ₱12,158,469.00 claimed overpayment, respondent is entitled to the issuance of a TCC in the reduced amount of ₱11,973,834.71, representing its overpaid income tax for FY ended March 31, 2016,⁷⁵ viz.:

Having resolved the foregoing matter, this Court shall now determine whether petitioner is entitled to the issuance of a tax credit certificate in the aggregate amount of ₱12,158,469.00, as prayed for in the present *Petition for Review*.

Petitioner filed its Quarterly ITRs for the first three (3) quarters of FY ending March 31, 2016, and its Annual ITR for the same FY, on the following dates:

Period	Date Filed
For the 1st Quarter	August 27, 2015
For the 2nd Quarter	November 27, 2015
For the 3rd Quarter	February 26, 2016
For the FY ending March 31, 2016	July 14, 2016

In the said *Returns*, petitioner subjected its gross revenues derived from passenger and cargo sales, excess baggage, and other income for the above-stated period to the income tax rate of **2½%**,

The above *Tax Payable* in the respective amounts of ₱10,525,951.69, ₱6,949,077.32, ₱5,521,898.38 and ₱6,244,873.00, or the total amount of ₱29,241,800.39, were accordingly paid by petitioner *via* the BIR's Electronic Payment System on August 27, 2015, November 27, 2015, February 26, 2016, and July 14, 2016, respectively, as evidenced by the corresponding Land Bank of the Philippines Confirmation Receipts and/or eFPS BIR payment confirmations, with stamped received by the BIR.



⁷⁴ *Commissioner of Internal Revenue vs. Co*, G.R. No. 241424, February 26, 2020, citing the case of *Commissioner of Internal Revenue vs. United Salvage and Towage (Phils.), Inc.*, G.R. No. 197515, July 2, 2014, 729 SCRA 113.
⁷⁵ Assailed Decision dated May 28, 2021, CTA Case No. 9874.

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After receipt of the said BIR Ruling No. ITAD 034-17, confirming its entitlement to the preferential tax rate of $1\frac{1}{2}\%$ on its GPBs, petitioner filed an Amended Annual ITR for FY 2016 on March 21, 2018, to reflect the application of the said rate. As shown therein, this resulted to an *overpayment* of income tax in the amount of ₱12,158,469.00, computed as follows:

Sales/Revenues/Receipts/Fees	₱1,215,846,969.00
Income Tax Rate	1.50%
Income Tax Due	₱18,237,705.00
Less: Tax Credits/Payments	
Income Tax Payment(s) from Previous Quarter/s	₱22,996,927.00
Creditable Tax Withheld from Previous Quarter/s	845,979.00
Creditable Tax Withheld per BIR Form No. 2307 for the 4th Quarter	308,395.00
Tax Paid in Return Previously Filed, if this is an Amended Return	6,244,873.00
Total	₱ 30,396,174.00
Tax Payable (Overpayment)	₱(12,158,469.00)

Notably, petitioner's tax credits/payments in the total amount of ₱30,396,174.00 for FY ended March 31, 2016, consisted of the quarterly payments in the aggregate amount of ₱29,241,800.00, and creditable taxes withheld in the amount of ₱1,154,374.00.

In proving the creditable taxes withheld (CWTs) in the aggregate amount of ₱1,154,374.00, petitioner presented its *Certificates of Creditable Tax Withheld at Source* (BIR Forms No. 2307) and *Summary Alphalist of Withholding Taxes* for FY 2016. However, the Court notes that some of the said *Certificates* were either dated prior to the year of the claim, or not under the registered name of petitioner as payee. Thus, the following withheld taxes totalling ₱184,634.29, shall be disallowed and deducted from petitioner's refundable amount, to wit:

In sum, out of the claimed amount of ₱12,158,469.00, representing the 1% difference between the income tax rates of $2\frac{1}{2}\%$ and $1\frac{1}{2}\%$ income tax on petitioner's GPBs amounting to ₱1,215,846,969.00 for FY 2016, the amount of **₱11,973,834.71** constitutes erroneously paid taxes, computed as follows:



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Income Tax Due @ 1.5% of Gross Philippine Billings			₱18,237,705.00
Less: Tax Credits/Payments			
Income tax payments for the FY 2016		₱29,241,800.00	
Creditable Tax Withheld	₱1,154,374.00		
Less: Disallowed by the Court	184,634.29	969,739.71	30,211,539.71
Total Amount Refundable per Court			₱(11,973,834.71)

Indeed, tax refunds are in the nature of tax exemptions; as such, they are to be construed *strictissimi juris* against the claimant.⁷⁶ The burden of proof is upon the claimants, and they must be able to justify their claim by the clearest grant of organic or statute law.⁷⁷ Fortunately for the respondent, it was able to discharge the burden of proof required by law.

While every citizen must honestly pay the right taxes, the government has a corollary duty to implement tax laws in good faith; to discharge its duty to collect what is due to it, and to justly return what has been erroneously and excessively given to it;⁷⁸ and should not resort to technicalities and legalisms, much less frivolous appeals, to keep the money it is not entitled to at the expense of the taxpayers.⁷⁹

Substantial justice, equity and fair play are on the side of [respondents]. Technicalities and legalisms, however exalted, should not be misused by the government to keep money not belonging to it and thereby enrich itself at the expense of its law-abiding citizens. If the State expects its taxpayers to observe fairness and honesty in paying their taxes, so must it apply the same standard against itself in refunding excess payments of such taxes. Indeed, the State must lead by its own example of honor, dignity and uprightness.⁸⁰

Considering all the foregoing, We see no compelling reason to depart from the ruling of the Court in Division.



⁷⁶ *Commissioner of Internal Revenue vs. Filminera Resources Corporation*, G.R. No. 236325, September 16, 2020.

⁷⁷ *Id.*

⁷⁸ *Republic of the Philippines represented by the Commissioner of Internal Revenue vs. GST Philippines, Inc.*, G.R. No. 190872, October 17, 2013.

⁷⁹ *Commissioner of Internal Revenue vs. Ironcon Builders and Development Corp.*, 625 Phil. 644, 651 (2010).

⁸⁰ *Filminera Resources Corp. vs. Commissioner of Internal Revenue*, G.R. 233581, March 11, 2019 (Unsigned Resolution).

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WHEREFORE, premises considered, the instant Petition for Review is **DENIED** for lack of merit. The Decision dated May 28, 2021 and the Resolution dated September 30, 2021 of the Second Division in the case docketed as CTA Case No. 9874 are **AFFIRMED**.

SO ORDERED.



LANEE S. CUI-DAVID
Associate Justice

WE CONCUR:



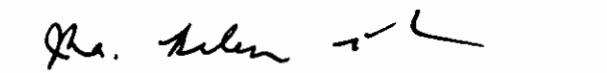
ROMAN G. DEL ROSARIO
Presiding Justice



JUANITO C. CASTANEDA, JR.
Associate Justice



ERLINDA P. UY
Associate Justice



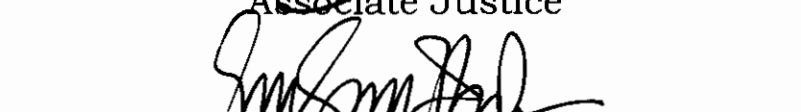
MA. BELEN M. RINGPIS-LIBAN
Associate Justice



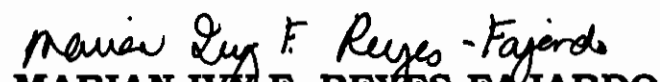
CATHERINE T. MANAHAN
Associate Justice



JEAN MARIE A. BACORRO-VILLENA
Associate Justice



MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice



MARIAN IVY F. REYES-FAJARDO
Associate Justice

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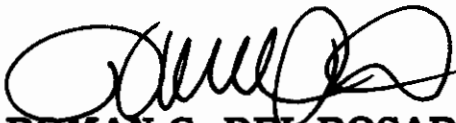
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CERTIFICATION

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