REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

HONGKONG AND SHANGHAI BANKING CORPORATION - LIMITED PHILIPPINE BRANCHES,
Petitioner,

vs. **C.T.A. CASE NO. 5951**

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
DEC 18 2002

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DECISION

This case involves a claim for refund or issuance of tax credit certificate for the amount of P19,572,992.10, representing the erroneous payment of Documentary Stamp Tax ("DST") for the period September 1, 1997 to December 31, 1997.

The facts as culled from the records are as follows:

Petitioner is a corporation duly organized and existing under and by virtue of the laws of Hongkong, and authorized by the Securities and Exchange Commission (SEC) to engage in business in the Philippines. It is registered with the Bureau of Internal Revenue (BIR) with taxpayer's identification number 047-000-504-44 and principal office address at 6780 Ayala Avenue, Makati City (*par. 1, Petition for Review; Exhibits "V" & "V-1"*).

Petitioner performs custodial services on behalf of its investor-clients, corporate or individual, resident or non-resident, with respect to the latter's passive investments in

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the Philippines, particularly investments in shares of stock in domestic corporations and, as such, acts as collection/payment agent with respect to dividends and other income derived from these passive investments (*par. 1, Stipulation of Facts*).

The investor-clients maintain Philippine peso and/or foreign currency accounts. In the management of their funds maintained in the said peso and/or foreign currency accounts, e.g. transfer and disbursement of funds payment or for reinvestment, said investor-clients give instructions to petitioner from outside of the Philippines via electronic messages. These electronic message instructions are standard forms known in the banking industry as SWIFT MT 100, MT 202 and/or MT 521. In case of purchase of shares of stock and other investment in securities, the investor-clients send electronic messages from abroad to petitioner in the form of SWIFT MT 100, MT 202, and/or MT 521, instructing the latter to debit its local or foreign currency account and to pay the purchase price upon receipt of the securities (*pars. 4 and 5, Petition for Review)*.

From August to October 1997, petitioner allegedly purchased and paid DST in the total amount of P35,000,000.00, broken down as follows:

Date of Purchase	**Amount**
August 28, 1997	P 5,000,000.00
September 22, 1997	5,000,000.00
October 29,1997	25,000,000.00
TOTAL	**P 35,000,000.00**

(*Annexes "A", "B" and "C", Petition for Review*)

According to petitioner, for the period September 1997 to December 1997, it paid DST on the electronic instructions/advises (SWIFT MT 100, MT 202 and/or MT 521) received from abroad at the rate of P0.30 on each P200.00 based on the settlement price on the face of the advise under Section 181 of the National Internal Revenue Code (NIRC), totalling P19,572,992.10, detailed as follows:

September 1997	P 6,981,447.90
October 1997	6,209,316.60
November 1997	3,978,510.30
December 1997	2,403,717.30
	P19,572,992.10

(*Annexes "D", "E", "F" and "G", Petition for Review*).

On August 23, 1999, the BIR issued BIR Ruling No. 132-99, stating that instructions/advises from abroad on the management of funds located in the Philippines which do not involve transfer of from funds abroad are not subject to DST. On the basis of this ruling, petitioner filed with the BIR on October 8, 1999 an administrative claim for refund of the DST it erroneously paid on the electronic instructions it received from its investor-clients abroad during the period September to December 1997 in the amount of P19,572,992.10 (*par. 2, Stipulation of Facts*).

On even date, the present case was filed in order to suspend the running of the two-year prescriptive period under the law.

In his Answer filed on November 11, 1999, the respondent raised the following Special and Affirmative Defenses:

"4. He reiterates and repleads the preceeding (sic) paragraphs of this answer as part of his Special and Affirmative Defenses;

5. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the respondent's Bureau;

6. Taxes paid and collected are presumed to have been made in accordance with law; hence, not refundable;

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7. Assuming but without admitting the fact that petitioner is entitled to tax refund, it is incumbent upon the latter to show that it has complied with the provisions under Section 204 (c) in relation to Section 229 of the Tax Code. Otherwise, its failure to prove the same is fatal to the claim for refund; and

8. Claims for refund are construed strictly against the claimant for the same partake the nature of tax exemption from taxation (**Commissioner of Internal Revenue vs. Ledesma**, 31 SCRA 95) and as such, they are looked upon with disfavor (**Western Minolco Corp. vs. Commissioner of Internal Revenue**, 124 SCRA 1211)."

The parties stipulated the issues to be resolved by this court, namely:

1. Whether or not for the period September 1, 1997 to December 31, 1997, petitioner in fact paid DST in the total amount of P19,572,992.10 on electronic instructions/advises SWIFT MT 100, MT 202 and/or MT 521; and

2. Whether or not BIR Ruling No. 132-99 dated August 23, 1999 is applicable to the instant Petition.

(p. 52, CTA Records, Stipulation of Issues)

After considering the attending facts, evidence, and the applicable laws and jurisprudence, the court partially grants the Petition for Review.

We shall discuss first the second issue inasmuch as the finding here would dictate whether or not the first issue would still need to be tackled.

Respondent argues that BIR Ruling No. 132-99 is not applicable to the instant case pursuant to the principle of non-retroactivity of rulings as provided in Section 246 of the NIRC. He maintains that BIR Ruling No. 132-99 was issued on August 23, 1999. On the other hand, the transactions subject of this petition for review took place from

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September 1, 1997 to December 31, 1997 or prior to the issuance of BIR Ruling No. 132-99. Accordingly, the said BIR Ruling should not be made applicable to petitioner's case.

The court does not agree.

Section 246 of the NIRC provides, thus:

> "**Section 246.** *Non-Retroactivity of Rulings.* – Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or any of the rulings or circulars promulgated by the Commissioner **shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers** except in the following cases:
>
> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
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> (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
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> (c) Where the taxpayer acted in bad faith." (*Emphasis supplied*)

The aforequoted provision lays down the rule that regulations, rulings and circulars promulgated by the Commissioner of Internal Revenue (CIR) shall not be given retroactive effect if the same are prejudicial to the taxpayer. Considering the fact that the BIR ruling even exempts from the payment of the DST the "electronic message instructions" under Section 181 of the NIRC, the application of the said BIR ruling to the present case would not be prejudicial to herein petitioner. Hence, it may be given a retroactive application.

Moreover, the issue had already been passed upon by this court in the case of ***Hongkong Shanghai Banking Corporation, Limited-Philippine Branches vs. Commissioner of Internal Revenue***, *CTA Case No. 6009, promulgated on May 2, 2002,*

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involving the same parties and issues, where we held that the "electronic message instructions" which have been subjected to DST are similar to the "electronic message instructions" mentioned in BIR Ruling 132-99. For easy reference, pertinent portion of the said ruling is hereby reproduced:

BIR Ruling No. 132-99

> "x x x this office hereby holds that the instruction made through an electronic message by a non-resident payor-client to debit his local or foreign currency account maintained in the Philippines and to pay a certain named recipient also residing in the Philippines is not the transaction contemplated under Section 181 of the 1997 Tax Code. Such being the case, such electronic instruction purporting to draw funds from a local account intended to be paid to a named recipient in the Philippines is not subject to documentary stamp tax imposed under the foregoing Section."

Section 181 of the 1997 Tax Code, on the other hand, provides:

> "**Section 181. Stamp Tax Upon Acceptance of Bills of Exchange and Others.** – Upon any acceptance or payment of any bill of exchange or order for the payment of money purporting to be drawn in a foreign country but payable in the Philippines, there shall be collected a documentary stamp tax of Thirty centavos (P.30) on each Two hundred pesos (P200), or fractional part thereof, of the face value of any such bill of exchange, or order, or the Philippine equivalent of such value, if expressed in foreign currency."

In the aforesaid case, this court upheld the arguments of herein petitioner that these electronic messages are not the transactions contemplated in Section 181 of NIRC, thus:

> "**The instruction made through an electronic message by a non-resident investor-client, which is to debit his local or foreign currency account in the Philippines and pay a certain named recipient also residing in the Philippines is not the transaction contemplated in Section 181 of the Code.** In this case, the withdrawal and payment shall be made in cash. It is parallel to an automatic bank

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> transfer of local funds from a savings account to a checking account maintained by a depositor in one bank. **The act of debiting the account is not subject to the documentary stamp tax under Section 181. Neither is the transaction subject to the documentary stamp tax under Section 180 of the same Code. These electronic message instructions cannot be considered negotiable instruments as they lack the essential feature of negotiability, which is, the ability to be transferred (*Words and Phrases*)**.
>
> These instructions are considered as mere memoranda and entered as such in the books of accounts of the local bank, and the actual debiting of the payor's local or foreign currency account in the Philippines is the actual transaction that should be properly entered as such." (*Emphasis supplied*)

We now proceed to the first stipulated issue.

Records show that petitioner made payments for DST as supported by its DST Declarations and Monthly Information Returns of DST for the months of September 1997 to December 1997 (*Exhibits A, B, C, D, G, J and M*). It was ascertained that the total DST payment included the DST payment pursuant to Section 181 of the Tax Code on electronic instructions/advices that were paid at the rate of P0.30 on each P200.00 based on the settlement price on the face of the advice.

Based on the report submitted before this court by the commissioned independent CPA, the amount of claim for refund that was determined to be substantiated by either the originals or certified true copies of the SWIFT messages and other documentation is P11,186,240.23. Additionally, as in the previous case of ***Hongkong Shanghai Banking Corporation, Limited-Philippine Branches vs. Commissioner of Internal Revenue**, supra,* the court also grants the refund of the DST paid on similar transactions covered by SWIFT messages/instructions (i.e., message type 203, 559, telex, receipt order enquiry)

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other than those types (i.e., SWIFT MT 100 or MT202 and/or MT 521) mentioned in BIR Ruling No. 132-99. The message types covered in the ruling represent payment instructions which follow SWIFT format specifications and authorizations whereas the other message types not included in the ruling are likewise payment instructions but makes use of a free format message. These DST amount to:

Amount			
Settlements	**Operations**	**Customer Service Dept. (CSD)**	**Total**
(Exhibit CC-7-8)	*(Exhibit CC-8-2)*		*(Exhibit CC-6)*
P 987,066.80	P 655,667.10	-	P 1,642,733.90

The commissioned CPA also reported that there are DST paid on transactions supported by SWIFT/Messages and statements of accounts with differences from the bank-provided schedules due to system errors, amounting to P3,607,421.70. The system generated statements of accounts which reflected errors relative to the amounts debited against a particular account. For instance, a debit of P202,499,000 will be reflected in the statement as P02,499,000. Since the differences were adequately explained by petitioner's Assistant Manager for IT Dev., Ms. Ma. Clara Q. De Veyra (*TSN, March 1, 2001*) to be due to some internal problems in the bank's data processing system, the court likewise allows the refund of the said amount.

However, this court agrees with the findings arrived at by the commissioned independent CPA that out of the total amount claimed, an aggregate amount of P3,136,596.27 should be disallowed due to the following reasons (*Exhibit CC-3*):

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	Particulars	**Amount**
1.	Copies of the order instruction (SWIFT messages and Other supporting documents (e.g., securities order form, Statement of accounts) are not available	P 882,875.23
2.	The message type of the order instruction is not the SWIFT messages mentioned in the BIR Ruling 132-99 And not supported by Statement of Accounts (SOA)	287,317.20
3.	The only available support is the statement of account Or securities order form or confirmation letter. SWIFT/ Message instructions are not available	183,147.00
4.	The supporting statement of account is not available Although transaction is supported by SWIFT/message Instruction	1,595,853.90
5.	Claim not part of Bank's schedule	187,402.94
	Grand Total	**P3,136,596.27**

In sum, petitioner is entitled to the claim for refund of erroneously paid documentary stamp tax for the months of September 1997 to December 1997 but only to the extent of P16,436,395.83 computed as follows:

Amount Claimed	P19,572,992.10
Less: Disallowance per commissioned independent CPA's findings	3,136,596.27
DST Refundable	P16,436,395.83

WHEREFORE, in the light of the foregoing, the instant petition is hereby partially granted. Accordingly, respondent is hereby **ORDERED** to **REFUND**, or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner in the reduced amount of P16,436,395.83 representing erroneously paid documentary stamp tax for the months of September 1997 to December 1997.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

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I CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge

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