REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PHILIPPINE NATIONAL BANK,
Petitioner,

- versus - C.T.A. CASE NO. 6511

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

APR 28 2004

x --- x

DECISION

This case involves a review of the decision of herein respondent dated May 1, 2002 denying petitioner's protest and ordering it to pay the deficiency documentary stamp tax and its increments for the calendar years 1982-1986 in the total amount of **SIX MILLION ONE HUNDRED EIGHTY ONE THOUSAND ONE HUNDRED NINETY FIVE AND 21/100 PESOS (P 6,181,195.21).**

The facts of the case are undisputed:

Petitioner Philippine National Bank (PNB) is a private commercial bank organized and existing under and by virtue of Philippine laws with principal office at PNB Financial Center, Pres. Diosdado Macapagal Boulevard, Pasay City.

For the calendar years 1982 to 1986, PNB entered into SWAP Arrangements and/or Forward Exchange Agreements with the Central Bank of the Philippines, wherein a SWAP Arrangement involves the following:

a. A local bank (PNB, in this case) offers to sell to the Central Bank dollars at the guiding rate/cross rate with the stipulation that the local bank would buy back the dollar sold upon the maturity date of the SWAP arrangement at a specified rate;

b. The dollar, which is the subject matter of the SWAP arrangement, originates from a foreign bank wherein the local bank maintains a deposit or is a grantee of a credit line for loan availments. The local bank advises the foreign bank to remit the dollar amount subject of the SWAP transaction to the Federal Reserve Bank for credit to the account of the Central Bank of the Philippines (now Bangko Sentral ng Pilipinas);

c. Upon transmitting the above advice by cable, the local bank now prepares the "Offer to Sell Spot Exchange Under SWAP Arrangement" addressed to the Central Bank confirming therein that it has already instructed its correspondent foreign bank to remit the dollar to the Federal Reserve Bank by telegraphic transfer.

d. On the basis of the representation of the local bank and after having been satisfied that its account with the Federal Reserve Bank has in fact been credited, the Central Bank now prepares its acceptance subject to the conditions it may impose on the same document on which the offer was made. This marks the perfection of the forward exchange contract between the local bank (PNB) and the Central Bank after which the latter credits the account of the former in Philippine currency in compliance with its undertaking.

On November 17, 1986, petitioner was issued a Pre-Assessment Notice (PAN) by the Bureau of Internal Revenue (BIR) for deficiency withholding and documentary stamp taxes in the amounts of P33,087,617.90 and P5,696,514.75, respectively, arising from the above-mentioned SWAP transactions between petitioner and the Central Bank for the period covering the calendar years 1982-1986.

On December 17, 1986, petitioner filed its objection to the PAN.

On January 9, 1987, an amended Pre-Assessment Notice increasing the amount of deficiency documentary stamp taxes was issued by herein respondent, which PAN was protested to by petitioner on February 3, 1987, reiterating its stand that SWAP transactions are not subject to DST.

On April 7, 1989, Assessment Notice Nos. FAS-IB-82 to 86/89-000542 and FAS-5-82 to 86/89-000543, together with a Letter of Demand, were issued by respondent for the following deficiency taxes:

DEFICIENCY WITHHOLDING TAX-AT-SOURCE (SWAP Transactions)

Taxable Year	Withholding Tax Due	25% Surcharge	14% & 20% Interest from various due dates to 1-30-89	Total
1982	P 98,611.70	P 24,652.93	P 104,530.62	P 227,795.25
1983	1,820,309.59	455,077.40	1,674,726.38	3,950,113.37
1984	6,372,460.96	1,593,115.24	4,970,665.03	12,936,241.23
1985	5,695,541.94	1,423,885.49	3,625,901.63	10,745,329.06
1986	3,988,339.61	997,084.90	1,940,809.82	6,926,234.33
	P 17,975,263.80	**P 4,493,815.96**	**P 12,316,633.48**	
Total Amount Due and Collectible				**P 34,785,713.24**

DEFICIENCY DOCUMENTARY STAMPS STAX

DOCUMENTARY STAMPS TAXES DUE FOR 1982 TO 1985		P 3,757,484.90
Documentary Stamps Taxes Due for 1986	P 1,938,728.25	
Add: 25% Surcharge	484,682.06	2,423,410.31
Compromise Penalty		300.00
Total Amount Due and Collectible		**P 6,181,195.21**

(Exhibit "E-1")

On April 24, 1989, petitioner PNB wrote herein respondent and requested for a sixty (60) day extension within which to file its protest to the assessment notices *(Exhibit "F")*. Through a letter dated May 19, 1989, petitioner argued that the SWAP transactions subject of the assessment notice are not subject the deficiency withholding tax at source and deficiency DST based on the grounds stated in the memorandum of the Bankers Association of the Philippines (BAP) Tax Committee dated September 29, 1987 submitted to the Commissioner of Internal Revenue *(Exhibit "G")*.

A decision, dated May 1, 2002, was rendered by respondent canceling petitioner's assessment for deficiency withholding tax at source but upholding the assessment on deficiency documentary stamp taxes in the amount of P 6,181,195.21. Quoted below is the dispositive portion of the said decision:

"IN VIEW WHEREOF, this Office hereby resolved to CANCEL AND WITHDRAW Assessment Notice No. FAS-IB-82 to 86/89-000542 demanding payment of deficiency withholding taxes for the years 1982 to 1986. Assessment Notice No. FAS-5-82 to 86/89-000543 demanding payment of the aggregate amount of P 6,181,195.21 as deficiency documentary stamp taxes for the same years 1982 to 1986 is hereby AFFIRMED in all respects. Consequently, the protestant-bank is hereby ordered to pay the above-stated amount plus interest that may have accrued thereon, to the Collection Service, BIR National Office, Diliman, Quezon City, within thirty (30) days from receipt hereof, otherwise, the collection thereof shall be effected through the summary remedies provided by law.

This constitutes the final decision of this Office on the matter."

Thus, this Petition for Review filed on July 19, 2002.

In his Answer dated September 4, 2002, respondent claimed the following as his Special and Affirmative Defenses, to wit:

5. The deficiency documentary stamp tax (DST) assessment is based on the order or cable/instruction of petitioner to its foreign correspondent bank to remit a specific sum in dollars to the Federal Reserve Bank (which, in turn advises the Central Bank (CB) that a specific sum in dollars/foreign currency is available to petitioner). It is the position of Respondent that when petitioner sells a foreign exchange (spot sale) in a SWAP transaction and orders its correspondent bank abroad to remit the dollars so sold to the correspondent bank of the Central Bank of the Philippines (now Bangko Sentral ng Pilipinas), e.g., Federal Reserve Bank, said order is considered a telegraphic transfer subject to the DST under the then Section 195 (now Section 182) of the Tax Code, as amplified by Sections 51 and 50 of the Regulations No. 26, otherwise known as the Documentary Stamp Tax Regulations, pertinent provisions of which read as follows:

> "Sec. 195. Stamp tax on Foreign Bills of Exchange and Letters of Credit. - On all foreign bills of exchange and letters of credit (including orders, by telegraph or otherwise, for the payment of money issued by express or steamship companies or by any person or persons) <u>drawn in but payable out of the Philippines in a set of three or more according to the custom</u> of merchants and bankers, there shall be collected a documentary stamp tax of thirty centavos on each two hundred pesos, or fractional part thereof of the face value of any such bill of exchange or letter of credit, or the Philippine equivalent of such face value, if expressed in foreign currency (as amended by P.D. 1457 and P.D. 1959)." (Underscoring supplied)
>
> "Sec. 51. <u>What may be considered as telegraphic transfer</u>. - If a local bank cables to a certain bank in a foreign country with which bank said local bank has a credit, and direct that foreign bank to pay another bank or person in the same locality a certain sum of money, the document for and in respect of such transaction will be regarded as a telegraphic transfer, taxable under the provisions of

Section 1449 (i) of the Administrative Code."

"Sec. 50. Basis of tax in case of telegraphic transfers or orders for the payment of money drawn in but payable out of the Philippines Islands (now Philippines) should be the face value of such telegraphic transfers or orders computed, if expressed in a foreign currency with the rate of exchange taken into consideration." (Underscoring supplied)

6. The flow of funds abroad from the Philippines to the United States is irrelevant to the accrual of the DST. The liability of an instrument to the documentary stamp tax and the amount of tax are determined by the form and face thereof and cannot be affected by proofs of facts outside of the instrument itself (U.S. vs Isham, 17 Wall. 496, 84 U.S. 496).

7. The then Section 195 (now Section 182) of the Tax Code subjects to the DST foreign bills of exchange and letters of credit (including orders by telegraph or otherwise) for the payment of money drawn in but payable out of the Philippines. Accordingly, the DST prescribed by Section 195 of the Tax Code, as amended, is due and payable on the order covering the forward transaction as well as the order covering or leading to the spot sale of foreign exchange and not on the sale or purchase of foreign exchange which is not subject to the DST. In the case at bar, the real parties to the transaction are petitioner as drawer which, as heretofore discussed, has a SWAP arrangement with the CB and the former's foreign correspondent bank as drawee/acceptor. Pursuant to the then Section 222 (now Section 173) of the Tax Code, the DST is payable indifferently by either party making, signing, issuing, accepting or transferring the taxable document. Hence, since the drawee (petitioner's foreign correspondent bank) is not within the Philippine Government's taxing jurisdiction, petitioner, as the drawer, is liable to pay the DST on the aforementioned orders, any market convention to the contrary notwithstanding. With the amendment of Section 222 of the Tax Code by Presidential Decree No. 1994 effective January 1, 1986, the liability of petitioner, as drawer, to the DST on the order/cable instruction effected under the SWAP agreement becomes more explicit.

8. The assessment was issued in accordance with law and regulations.

9. All presumptions are in favor of the correctness of tax assessments.

For this court's resolution are the following stipulated issues:

(1) Whether or not petitioner's SWAP transactions by way of order or cable/instructions are considered telegraphic transfers subject to Documentary Stamp Tax (DST) under Section 195 (now Section 182) of the Tax Code of the Philippines, amplified by Sections 50 & 51 of Regulations No. 26.

(2) Whether or not petitioner PNB is liable for Documentary Stamp tax under Section 182 of the Tax Code of the Philippines as amended.

Petitioner's anchors its claim on then Section 195 (now Section 182) of the Tax Code which provides that:

> **Section 195. Stamp Tax for Foreign Bills of Exchange and Letters of Credit.** – On all foreign bills of exchange and letters of credit (including orders, by telegraph or otherwise, for the payment of money issued by express or steamship companies or by any person or persons) drawn in but payable out of the Philippines in a set of three or more according to the custom of merchants and bankers, there shall be collected a documentary stamp tax of thirty centavos on each two hundred pesos, or fractional part thereof of the face value of any such bill of exchange or letter of credit, or the Philippine equivalent of such face value, if expressed in a foreign currency." (Emphasis supplied)

According to petitioner, the emphasized portion in the above-quoted provision bears utmost significance in the resolution of the issue presented because the impact this particular portion creates is that it provides for a different criterion from the general class of persons enumerated under then Section 222 of the Tax Code (now Section 173) who are liable for the DST. Said portion of the provision allegedly unequivocally recognizes and acknowledges that there are market practices and conventions that have been consistently and continuously observed by merchants and bankers in the pursuit of their commercial transactions. Petitioner further maintains that the Tax Committee of the Banker's Association of the Philippines (BAP) had already emphasized that the market convention or practice recognized by private and government instrumentalities is that it is the buyer who pays for the documentary stamp tax (DST). Under the said market convention, when the local bank sells the foreign exchange to the Central Bank through telegraphic transfer via the former's foreign corresponding bank, the Central Bank, being the buyer, is supposed to be the one liable for the DST. In the same vein, when the local bank buys back the previously sold dollar upon the maturity of the swap arrangement, the local bank pays for the DST being the buyer this time.

Furthermore, petitioner, in its memorandum, argued that under Section 195 of the Tax Code, in order that the foreign bills of exchange and letters of credit be subject to DST, the same must be drawn in but payable out of the Philippine Islands. It contemplates a situation where money has been drawn on an existing account here in the Philippines and made payable abroad.

Respondent, however, argues that the flow of funds abroad from the Philippines to the United States is irrelevant to the accrual of the DST since the liability of an instrument to the documentary stamp tax and the amount of tax are determined by the form and face thereof and cannot be affected by proofs of facts outside of the instrument itself. (U.S. vs Isham, 17 Wall. 496, 84 U.S. 496). It is respondent's contention that the then Section 195 (now Section 182) of the Tax Code subjects to the DST foreign bills of exchange or letters of credit (including orders by telegraph or otherwise) for the payment of money drawn in but payable out of the Philippines. Accordingly, the DST prescribed by Section 195 of the Tax Code, as amended, is due and payable on the order covering the forward transaction as well as the order covering or leading to the spot sale of foreign exchange and not on the sale or purchase of foreign exchange which is not subject to the DST. In the case at bar, the real parties to the transaction are petitioner as drawee which has a SWAP Arrangement with the Central Bank and the former's foreign correspondent bank as drawee/acceptor. Pursuant to the then Section 222 (now Section 173) of the Tax Code, the DST is payable indifferently by either party making, signing, issuing, accepting or transferring the taxable instrument. Hence, since the drawee (petitioner's foreign correspondent bank) is not within the Philippine Government's taxing jurisdiction, petitioner, as the drawer, is liable to pay the DST on the aforementioned orders, any market convention to the contrary notwithstanding. With the amendment of Section 222 of the Tax Code by Presidential Decree No. 1994 effective January 1, 1986, the liability of petitioner, as drawer, to the DST on the order/cable instruction effected under the SWAP Agreement becomes more explicit.

We find against the petitioner.

As has been held in a line of cases promulgated by this court and affirmed by the Court of Appeals (***China Banking Corporation vs. The Commissioner of Internal Revenue, CTA Case No. 4361, December 22, 1993; China Banking Corporation vs. Commissioner of Internal Revenue, CA-G.R. SP No. 33651, September 23, 1994; Consolidated Bank & Trust Company vs. The Commissioner of Internal Revenue, CTA Case No. 4647,***

November 21, 1994; Consolidated Bank & Trust Company vs. The Commissioner of Internal Revenue and the Court of Tax Appeals, CA-G.R. SP No. 35950, March 31, 1995; and Bank of the Philippine Islands vs. The Commissioner of Internal Revenue, CTA Case No. 4481, May 31, 1994), the liability of petitioner for the payment of documentary stamp taxes for the transfer or sale of foreign bills of exchange finds support under Section 51 of Revenue Regulations No. 26.

Moreover, "(a) documentary stamp tax is in the nature of an excise tax. It is not imposed upon the business transacted but upon the privilege, opportunity or facility offered at exchanges for the transaction of the business" (Commissioner of Internal Revenue vs. Heald Lumber Co., L-16340, February 29, 1964). Section 51 of Revenue Regulations No. 26 is quoted below:

> **Section 51. What may be considered as telegraphic transfer**. – If a local bank cables to a certain bank in a foreign country with which bank said local bank has a credit, and directs that foreign bank to pay to another bank or person in the same locality a certain sum of money, the document for and in respect of such transaction will be regarded as a telegraphic transfer, taxable under the provisions of Section 1449(i) of the Administrative Code.

Petitioner's cabled instructions to its foreign correspondent bank to remit a specific sum in dollars to the Federal Reserve Bank to be credited to the account of the Central Bank is in the nature of a telegraphic transfer subject to DST under Section 195 (now Section 182) of the Tax Code. In the case of ***Bank of Philippine Islands vs. The Commissioner of Internal Revenue, CTA Case No. 4481, May 31, 1994***, this court had the occasion to rule that:

> "It has been shown above that by virtue of Section 51 of Revenue Regulations No. 26, mere cabled instructions to a foreign correspondent to pay money would fall within the ambit of Section 182.
>
> Even if such instructions were not covered, Petitioner's argument would still not stand. Section 182 mentions "foreign bills of exchange and letters of credit" that are "drawn in but payable out of the Philippines." Obviously, it is not money that is being drawn in the Philippines, as the Petitioner would have it, but bills of exchange and letters of credit. It is hard to imagine how the law could contemplate bills of exchange and letters of credit being drawn "from a place of deposit in the Philippines" in relation to DST under Section 182.

It is more logical to consider that what the law means with "drawn in" is "executed in". In fact, the Centennial 6th Edition of Black's Law Dictionary defines "draw" as:

The act of a drawer in creating a draft. To draw a bill of exchange, check, or draft, is to write (or cause it to be written) and sign it; to make, as a note

Thus, to draw bills of exchange and letters of credit in the Philippines is to write, sign, or otherwise execute such bills of exchange and letters of credit in the Philippines."

Likewise, Section 211 of the Tax Code of 1986 (now Section 198) provides that:

Section 211. Stamp tax on assignments and renewals of certain instruments. - Upon each and every assignment or transfer of any mortgage, lease or policy of insurance, or the renewal or continuance of any agreement, contract, charter or any evidence of obligation or indebtedness by altering or otherwise, there shall be levied, collected and paid a documentary stamp tax, at the same rate as that imposed on the original instrument."

Having resolved that SWAP transactions by way of order or cable/instructions are considered telegraphic transfers subject to documentary stamp taxes, we now resolve the second issue as to whether the petitioner is liable to pay such taxes covering the taxable years 1982 to 1986, including interest and surcharges.

It is petitioner's stand that it cannot be held liable for deficiency assessment of Documentary Stamp Tax covering the calendar years 1982-1986 for the reason that Central Bank, the buyer of foreign exchange and the party liable for the Documentary Stamp Tax, is tax-exempt under P.D. 1827. The amendment introduced by PD 1994 amending Section 222 (now Section 173) of the Tax Code which now imposes the DST on the other party who is not exempt became effective only on July 3, 1986, which is fifteen (15) days from June 18, 1986, the date the Official Gazette was released for general circulation. Accordingly, petitioner may be held to pay DST only starting from June 18, 1986 to December 31, 1986, but not those prior to such date. Petitioner maintains that P.D. 1994 which took effect only on July 3, 1986 cannot be made applicable to the SWAP transactions entered into by them considering that said presidential decree does not provide for a retroactive application, thus, to do so would be prejudicial to them.

We do not agree with petitioner.

In the case of ***Philippine Commercial International Bank (as successor-in-interest of Insular Bank of Asia and America) vs. The Commissioner of Internal Revenue, CTA Case. No. 4883, April 11, 1996,*** citing the case of ***Bank of Philippine Islands vs. The Commissioner of Internal Revenue, CTA Case No. 4481, May 31, 1994,*** this court held that:

> "Even assuming, for the sake of argument, that there was a valid DST assessment issued by respondent, the second question to be argued upon is this: Is petitioner liable for DST even if the buyer is the Central Bank, a tax-exempt entity, **but who has assumed responsibility for the payment of such tax?**
>
> Respondent asserts that petitioner is liable, invoking the amendatory provision of P.D. 1994 to Section 222 (now Section 186), which states:
>
> > *"Provided: That whenever one party to the taxable document enjoys exemption from the tax herein imposed, the other party thereto who is not exempt shall be the one directly liable for the tax."* (Underscoring supplied)
>
> Petitioner and even this court beg to disagree. P.D. 1994 expressly provides in its Section 49 that it shall take effect on January 1, 1986. In the case of Bank of Philippine Islands vs. The Commissioner of Internal Revenue, CTA Case No. 4481, May 31, 1994, this court even ruled that the date of publication of P.D. 1994 for purposes of its effectivity was June 18, 1986, the day the Official Gazette on which it was published was released for publication. It was only after June 18, 1986 that BPI was made to pay the deficiency DST. Applying this decision to the case at bar where the taxable year involved is 1985, it is undeniably clear that P.D. 1994 is inapplicable."
>
> *(Emphasis supplied)*

Considering that the issue on the date of effectivity of P.D. 1994 has already been resolved in the case of Bank of Philippine Islands vs. The Commissioner of Internal Revenue, CTA Case No. 4481, the same shall no longer be the tackled. Nonetheless, it is not enough that the party liable to pay the documentary stamp tax is tax-exempt. It is indispensable that such party "assume" the responsibility to pay the subject tax. In the case at bar, there is no showing that the Central Bank assumed the responsibility to pay the documentary stamp taxes. Then Section 222 of the Tax Code of 1977 clearly provided that:

> "**Section 222. Stamp taxes upon documents, instruments, and papers.** – Upon documents, instruments, and papers, and upon acceptances, assignments, sales, and transfers of the obligation, right, or property incident thereto, there shall be levied, collected and paid, for and in respect of the transaction so had or accomplished, the corresponding documentary stamp taxes prescribed in the following section of this Title, by the person making, signing, issuing, accepting, or transferring the same, and at the time such act is done or transaction had."

With the above-mentioned provision, there is no question that the documentary stamp tax is payable by either the person making, signing, issuing, accepting, or transferring the document, instrument or paper. Said provision leaves the tax to be paid indifferently by either party (***Sta. Clara Lumber Company, Inc. vs. Jose Aranas, C.T.A. Case No. 502, June 12, 1959***). Consequently, since in this case, through accepted market practice, the Central Bank, as the buyer, is made the party liable to pay the documentary stamp taxes, it should assume the responsibility of paying for the DST, or else nobody would be paying for such taxes, considering that the Central Bank is tax-exempt. Unfortunately, petitioner failed to show that the Central Bank assumed the responsibility to pay the documentary stamp tax. The records are bereft of evidence to show Central Bank's assumption of responsibility to pay the DST.

The intention of the lawmakers to make either party, whether tax-exempt or not, liable for the payment of the DST is now made explicit by the amendment of Section 222 (now Section 173) of the Tax Code. Significantly, before this court can sustain petitioner's claim for exemption from liability, petitioner must show proof and convince this court that the Central Bank has assumed responsibility for the payment of the documentary stamp taxes. In this petitioner failed to provide evidence.

"Because taxes are the lifeblood of the nation, the Court has always applied the doctrine of strict interpretation in construing tax exemptions" (***Commissioner of Internal Revenue vs. Court of Appeals, 298 SCRA 83***). In other words, the claimant has the burden of proof to establish the factual basis of his claim. Failure to do so is fatal to its claim.

Finally, even assuming that petitioner is exempt from the payment of the documentary stamp taxes for the period prior to the effectivity of the amendment, still, petitioner failed to substantiate its claim that the **1986** SWAP transactions were entered into between the periods covering January 1, 1986 to June 18, 1986. In other words, there was no concrete evidence to convince this court that the transactions entered into by petitioner bank with the Central Bank (now Bangko Sentral ng Pilipinas) were during the period from January 1, 1986 to June 18, 1986.

WHEREFORE, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, Assessment Notice No. FAS-5-82 to 86/89-000543 for Deficiency Documentary Stamp Taxes is **AFFIRMED** and petitioner is **ORDERED** to **PAY** the respondent the amount of P6,181,195.21 representing deficiency documentary stamp taxes for the taxable years 1982-1986, plus 20% delinquency interest from July 19, 2002 until fully paid pursuant to Section 249(c) of the Tax Code, as amended.

SO ORDERED.

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

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

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 Justice