REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

I-REMIT, INC. (for itself and on behalf of JPSA Global Services, Co., JTKC Equities, Inc. and Surewell Equities, Inc.),
Petitioner,

- versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 822
(CTA Case No. 7993)

Present:

Del Rosario, *PJ,*
Castañeda,Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla, and
Cotangco-Manalastas, *JJ.*

Promulgated:

APR 16 2013 Apolinario 9:00 a.m.

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D E C I S I O N

COTANGCO-MANALASTAS, J.:

The instant case is a petition for review filed by petitioner praying for the reversal of the Decision dated May 23, 2011 and Resolution dated August 18, 2011, both issued by the CTA Second Division.

The assailed Decision and Resolution denied petitioner's claim for refund of the alleged excess percentage tax paid for shares listed and traded in the Philippine Stock Exchange, as follows:

> "WHEREFORE, premises considered, the Petition for Review is hereby DENIED for insufficiency of evidence."[1]

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[1] *Rollo*, C.T.A. EB Case No. 822, p. 106.

* * * * *

"WHEREFORE, premises considered, the Motion for Reconsideration is hereby DENIED for lack of merit."[2]

The Facts

The facts, as culled from the records[3], are:

Petitioner is a domestic corporation duly organized and existing under and by virtue of the laws of the Philippines and listed with the Philippine Stock Exchange (PSE) with principal office located at the 26th Floor, Discovery Centre, ADB Avenue, Ortigas Center, Pasig City.

JPSA Global Services Co., JTKC Equities, Inc. and Surewell Equities, Inc. are domestic corporations organized and existing under the laws of the Republic of the Philippines, all of them being shareholders of petitioner I-Remit.

Respondent is the Commissioner of Internal Revenue vested with authority to decide, approve, grant tax credit and/or refund of national internal revenue taxes with office address at the BIR National Office Building, BIR Road, Diliman, Quezon City.

On October 17, 2007, petitioner's shares of stock were listed on the PSE, out of which One Hundred Forty Million Six Hundred Four Thousand (140,604,000) shares were offered to the public by way of an initial public offering (IPO) at the offer price of Four and 68/100 Pesos (P4.68) each share. Of these shares offered during the IPO, One Hundred Seven Million Four Hundred Seventeen Thousand (107,417,000) unissued common shares were offered to the public as primary shares by I-Remit as issuing corporation while a total of Thirty-Three Million One Hundred Eighty-Seven Thousand (33,187,000) pre-existing common shares were offered to the public as secondary shares by JPSA Global Services Co., JTKC Equities, Inc., and Surewell Equities, Inc. as selling shareholders of I-Remit.

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[2] *Rollo*, p. 164.
[3] *Rollo*, pp. 20-24.

On November 19, 2007, in compliance with Section 127 of the National Internal Revenue Code (NIRC), petitioner paid the percentage tax on the IPO in the amount of Twenty-Six Million Three Hundred Twenty-One Thousand Sixty-Nine Pesos (P26,321,069.00). The amount of IPO tax paid was obtained by multiplying the gross proceeds from the IPO with the tax rate of 4%.

Petitioner alleges that the IPO tax rate of 4% should not have been applied. The computation as to the tax base of the shares offered to the public should have used 562,367,000, instead of 562,417,000, as divisor, thus resulting in a figure of 25.0022%, which means that the IPO tax rate should only have been 2%.

Due to this alleged erroneous tax rate used, and wrong figure stated as petitioner's total outstanding shares of stock after listing at the PSE, petitioner filed a claim for refund for the resulting overpayment amounting to Thirteen Million One Hundred Sixty Thousand Five Hundred Thirty-Four and 6/100 Pesos (P13,160,534.06) on April 18, 2008. The claim not having been acted upon and to toll the running of the prescriptive period, petitioner filed its judicial claim for refund on November 13, 2009.

The CTA Second Division denied the petition due to the failure of petitioner to prove that it is a closely held corporation. Petitioner's motion for reconsideration was likewise denied. The Court reversed its earlier position on the need to prove that petitioner is a closely held corporation, but upheld the denial on the ground that the computation of the percentage of shares offered for the initial public offering supported the use of the 4% as IPO tax rate, as provided under Revenue Regulations No. 006-08.

Hence, this petition for review before the CTA *En Banc*.

Issues

Petitioner raises the following issues:

I. Section 127(B) of the NIRC is unambiguous in applying the aggregate number of shares issued during the IPO as the basis in computing the IPO tax.

II. Assuming valid, Section 6(c) of Revenue Regulations No. 06-08 (RR 06-08) may not be retroactively applied to the instant case.

Ruling of the Court

Petitioner's claim for refund hinges on the sole issue that the use of the 4% tax rate is erroneous.

The petition for review has no merit.

For reference, Section 127(B) of the NIRC is quoted below:

> "Sec. 127. Tax on Sale, Barter or Exchange of Shares of Stock Listed and Traded through the Local Stock Exchange or through Initial Public Offering. –
>
> xxx
>
> (B) Tax on Shares of Stock Sold or Exchanged Through Initial Public Offering. – There shall be levied, assessed and collected on every sale, barter, exchange or other disposition through initial public offering of shares of stock in closely held corporations, as defined herein, a tax at the rates provided hereunder based on the gross selling price or gross value in money of the shares of stock sold, bartered, exchanged or otherwise disposed in accordance with the proportion of shares of stock sold, bartered, exchanged or otherwise disposed to the total outstanding shares of stock after listing in the local stock exchange:
>
> Up to twenty-five percent (25%) 4%
>
> Over twenty-five percent (25%)
> But not over thirty-three and
> One third percent (33 1/3%) 2%
>
> Over thirty-three and one third

Percent (33 1/3%) 1%

> The tax herein imposed shall be paid by the issuing corporation in primary offering or by the seller in secondary offering."

Based on the provision above, the applicable tax rate is based on the proportion of the number of shares sold to the total outstanding shares of stock after the listing. The computation of this proportion consists of two parts: (1) the number to be used as divisor; and (2) the number to be used as numerator or dividend.

It has been settled by the CTA Second Division that the divisor should be the total outstanding shares of stock after the listing excluding the treasury shares.[4]

With respect to the numerator, petitioner alleges that the total number of shares sold, regardless of whether it is a primary or secondary offering, should be used.[5] On the other hand, respondent argues that the number of shares issued or sold should be computed separately by the issuing corporation and the selling shareholders.[6]

The CTA Second Division agreed with respondent and, applying RR No. 006-08, ruled that the proportion of shares sold to the total outstanding shares of stock after the listing should be based separately on the number of shares of stock sold through primary or secondary offering.

We partially agree.

The distinction between the primary offering and secondary offering is not merely for the purpose of determining who will pay the tax, but also has bearing on the computation of the tax.

Section 127(B) provides that the tax shall be "*levied, assessed and collected on <u>every</u> sale, barter, exchange or other disposition <u>through initial public offering</u>*" of shares of stock in closely held corporations. The initial public offering is merely

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[4] *Rollo*, p. 104.
[5] *Rollo*, pp. 25-30.
[6] *Rollo*, pp. 219-223.

the venue for the sale of shares of stock; and it is a condition that must exist for Section 127(B) to apply. However, it is not the IPO that is taxed, but the sale, barter, exchange or other disposition of shares of stock, which occurs during the IPO.

Each sale is referenced to the seller – thus, there is a distinction between the sale made by the issuing corporation, petitioner I-Remit in this case, and the separate sales, through secondary offering, made by JPSA Global Services, Co., JTKC Equities, Inc., and Surewell Equities, Inc; even if all the foregoing sales occurred during the occasion of the IPO.

In short, the proportion of the shares of stock sold to the total outstanding shares of stock after the listing is computed separately for each seller. This distinction is clearly seen in Section 127(B) which imposed the tax on <u>every</u> sale, barter, exchange or other disposition, and differentiated the obligations to pay by the issuing corporation in primary offering, and the seller in secondary offering.

Section 127(C) further cements the difference by giving the corporate issuer, in a primary offering, 30 days from the date of listing to file its return and pay the corresponding tax. On the other hand, the seller in secondary offering is merely given 5 days to file its return and pay the tax.

Furthermore, the treatment of the primary offering as a different transaction from that of the secondary offering is reflected in RR No. 03-95, issued on February 7, 1995, *to wit*:

> "Section 5. Imposition of the Tax. –
>
> (a) On sales of shares of stock listed and traded through the local stock exchange. – xxx
>
> xxx
>
> (b) <u>On sales of shares of stock in a closely-held corporation by the issuing corporation, through initial public offering (IPO) or by the seller in secondary offering</u>. – xxx
>
> xxx

Section 7. Transactions Covered.

(a) xxx

(b) Sale, barter or exchange or other disposition of shares of stock in closely-held corporations through initial/primary public offering (IPO); and

(c) Sale, barter or exchange or other disposition of shares of stock in closely-held corporations through secondary offering."

Finally, the distinction is clearly illustrated in Section 6(c) of RR No. 006-08, which provided a sample computation of the proportion of the shares of stock sold to the total outstanding shares after the listing, and the imposition of tax on a primary offering and a secondary offering.

No other conclusion is available except that the tax under Section 127(B) is thus computed separately for the corporate issuer in a primary offering and the sellers in a secondary offering.

In this regard, the Court *En Banc* does not agree with the CTA Second Division's computation of the proportion of shares sold to the total outstanding shares after the listing for the sales made in secondary offering, by merely computing as lump sum the number of shares sold in secondary offering. The computation should be made individually per selling shareholder. However, the net effect would be the same as clearly, the proportion would not exceed 25%, and thus, the applicable tax rate would still be 4%.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice