REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

ING BANK N.V. – MANILA BRANCH,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. E.B. NO. 450
(C.T.A. CASE NO. 7412)

Present:

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

Promulgated:

MAR 25 2009 2:45 p.m.

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DECISION

UY, J.:

This is a Petition for Review before the Court of Tax Appeals *En Banc* filed on February 4, 2009 under Section 18 of Republic Act No. 1125, as amended by Republic Act No. 9282, and Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals, seeking a review of the Decision and Resolution dated October 2, 2008 and December 16, 2008, respectively, by the First Division of this Court (Court in Division) which denied the Petition for Review in CTA Case No. 7412, entitled "ING Bank N.V. Manila Branch, petitioner, vs. Commissioner of Internal Revenue, respondent",[1] for lack of merit.

THE FACTS

The factual antecedents of the case, as found by the Court in Division, are as follows:

Petitioner, ING Bank N.V. - Manila Branch, is the Philippine branch office of ING Bank N.V., a company organized and existing under the laws of the Kingdom of The Netherlands; with office address at 21/F, Tower One, Ayala Triangle, Ayala Avenue, Makati City. Petitioner is duly licensed by the Securities and Exchange Commission (SEC) and authorized by the *Bangko Sentral ng Pilipinas* (BSP) to engage in universal banking and to operate a foreign currency deposit unit (FCDU) in the Philippines.

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of his office including, among others, the power to decide, approve, and grant refunds or tax credits of erroneously paid taxes.

Petitioner filed its Monthly Remittance Returns of Final Income Taxes Withheld on February 18, 2004 and April 12, 2004, in the aggregate amount of P251,097,379.40. On March 10, 2004, however, it filed an Amended Monthly Remittance Return of Final Income Tax Withheld as its Final Return for the month of February 2004.

On February 7, 2006, petitioner filed with the Bureau of Internal Revenue (BIR) an administrative claim for refund or issuance of tax credit

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[1] Ponencia of Associate Justice Lovell R. Bautista, First Division, concurred by Presiding Justice Ernesto D. Acosta and Associate Justice Caesar A. Casanova.

certificate in the amount of P251,097,379.40, arising from its alleged erroneous payment of branch profit remittance tax (BPRT) for 2004, with breakdown as follows:

Date of Filing of Returns and Payment of Taxes	Amount of Branch Profit Remittance Tax Paid
February 18, 2004	P 120,092,162.76
April 12, 2004	P 131,005,216.65
TOTAL	**P 251,097,379.40**

On February 17, 2006, in order to toll the running of the two-year period, petitioner filed the Petition for Review before the Court in Division due to respondent's inaction on its claim docketed as CTA Case No. 7412.

On October 2, 2008, the Court in Division rendered a Decision[2] denying petitioner's claim for the refund or issuance of a tax credit certificate representing allegedly erroneously paid BPRT on petitioner's remitted branch profits to ING Netherlands on February 18, 2004 and April 12, 2004 on the legal ground that petitioner's foreign currency deposit unit is in fact subject to the branch profit remittance tax provided under Section 28(A)(5) of the National Internal Revenue Code (NIRC) of 1997. The Court in Division explained that the NIRC of 1997 mandates payment of tax on branch profit remittance; thus, petitioner must prove that it is exempt from the payment thereof and not the other way around.

Finding no valid or cogent reason to either alter or modify the assailed Decision, the Court in Division denied petitioner's Motion for Reconsideration of the aforesaid Decision in the Resolution dated December 16, 2008.[3]

[2] Docket, pp. 54-64.
[3] Docket, pp. 65-67.

Hence, this recourse before the Court *En Banc* praying that the assailed Decision and Resolution dated October 2, 2008 and December 16, 2008, respectively, of the Court in Division be reconsidered and set aside; and another decision be issued granting petitioner's claim for refund or issuance of tax credit certificate in the amount of P251,097,379.40 representing its alleged erroneously paid BPRT.

On February 12, 2009, this Court issued a Resolution[4] requiring respondent to file a Comment to the instant Petition for Review. Upon submission of respondent's Comment on February 26, 2009,[5] this case was deemed submitted for decision in a Resolution dated March 5, 2009.[6]

Hence, this Decision.

THE ISSUE

The sole issue raised before the Court *en banc* is a legal one, to wit: whether or not FCDUs continued to be exempt from non-income taxes, including BPRT, under Section 28(A)(7)(b) of the NIRC of 1997.[7]

Petitioner's Arguments:

In support of the instant petition, petitioner raises that: (a) the historical background of the taxation of FCDUs supports the position that the final tax on income derived under the FCDU system is in lieu of all other taxes, including the BPRT; (b) the removal of the tax exemption of FCDUs from non-income taxes, including BPRT was never discussed during the legislative

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[4] Docket, p. 69.
[5] Docket, pp. 70-81.
[6] Docket, p. 82.
[7] Par. 14, Petition for Review, Docket, p. 14.

deliberations, nor even mentioned in the public hearings on the Comprehensive Tax Reform Program (CTRP); (c) the legislative deliberations on the bills from which R.A. No. 9294 originated confirm that the removal of the clause "exempt from all taxes" was a mere "inadvertent omission"; and (d) until the Supreme Court has ruled with finality on the legal issue of whether the exemption of FCDUs from non-income taxes, including BPRT was removed under the NIRC of 1997, there is no binding judicial precedent to deny petitioner's claim for refund.

Respondent's Counter-arguments:

Respondent filed his Comment[8] thereto on February 26, 2009 praying for the denial of the present petition for being devoid of any factual or legal basis. He posits that: (a) petitioner's foreign currency deposit unit is now subject to branch profit remittance tax in view of the deletion of the phrase "exempt from all taxes" from Section 27(D)(3) of the NIRC of 1997; (b) as a general rule, the literal construction of a statute shall apply, and legislative construction can only be availed if there is an ambiguity in the provisions of a statute; and (c) the rule of judicial precedent and stare decisis covers even decisions made by lower collegiate courts.

THE COURT EN BANC'S RULING

We find no merit in the petition.

A careful and closer look at the arguments set forth by the petitioner in the instant petition for review readily reveals that the grounds relied upon and the matters raised herein are mere restatements of petitioner's previous

[8] Docket, pp. 70-81.

arguments raised before the Court in Division which had already been exhaustively discussed and passed upon by it in its assailed Decision and Resolution. We thus adhere to the legal findings of the Court in Division that with the deletion of the phrase "exempt from all taxes" from Section 28(A)(7)(b) of the NIRC of 1997, petitioner's FCDUs are subject to BPRT.

We quote with approval the discussion of the Court in Division on the matter, to wit:

> "Prior to the amendment introduced by the NIRC of 1997, Section 25(a)(6)(B) of the 1977 Tax Code provides that:
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>> '(B) *Income derived under the Expanded Foreign Currency Deposit System.* — Income derived by a depository bank under the expanded foreign currency deposit system from foreign currency transactions with non-residents, offshore banking units in the Philippines, local commercial banks including branches of foreign banks that may be authorized by the Central Bank of the Philippines to transact business with foreign currency depository system units and other depository banks under the expanded foreign currency deposit system **shall be exempt from all taxes**, except taxable income from such transactions as may be specified by the Secretary of Finance, upon recommendation of the Monetary Board to be subject to the usual income tax payable by banks: Provided, That interest income from foreign currency loans granted by such depository banks under said expanded system to residents (other than offshore banking units in the Philippines or other depository banks under the expanded system) shall be subject to a 10% tax.' (*Emphasis supplied*)
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> The exemptions mentioned in the above law include branch profit remittance tax[9], documentary and science stamp tax, gross receipts tax, and privilege tax.

[9] Bank of Tokyo-Mitsubishi, Ltd. (Manila Branch) vs. Commissioner of Internal Revenue, CTA Case No. 5697, July 26, 2000.

However, it is very clear from Section 28(A)(7)(b) of the NIRC of 1997, which amended Section 25(a)(6)(B) of the 1977 Tax Code, that the phrase 'exempt from all taxes' was deleted. In other words, with the deletion of the phrase, the payment now of the ten percent (10%) final tax on FCDU income does not exempt a bank from the payment of branch profit remittance tax or other taxes.[10] For easy reference, said Section 28(A)(7)(b) is hereunder quoted:

> '**SEC. 28. Rate of Income Tax on Foreign Corporations. –**
>
> **(A) Tax on Resident Corporations**
>
> xxx xxx xxx
>
> **(7) Tax on Certain Incomes Received by a Resident Foreign Corporation. –**
>
> **(b) Income Derived under the Expanded Foreign Currency Deposit System.** — Income derived by a depository bank under the expanded foreign currency deposit system from foreign currency transactions with local commercial banks, including branches of foreign banks that may be authorized by the Bangko Sentral ng Pilipinas (BSP) to transact business with foreign currency depository system units and other depository banks under the expanded foreign currency deposit system, including interest income from foreign currency loans granted by such depository banks under said expanded foreign currency deposit system to residents, shall be subject to a final income tax at the rate of ten percent (10%) of such income.
>
> Any income of nonresidents, whether individuals or corporations, from transactions with depository banks under the expanded system shall be exempt from income tax.'
>
> xxx xxx xxx

The amendment by deletion of certain words or phrases in a statute indicates that the legislature intended to change the meaning of the statute. It cannot be overemphasized that the

[10] ING Bank (Manila Branch) vs. Commissioner of Internal Revenue, CTA Case No. 6017, March 11, 2002.

> present provision of the NIRC of 1997, as amended, deleted the phrase 'exemption from all taxes' relative to FCDUs; thus, the tax on branch profit remittance has not been imposed by mere implication. The law cannot be made any clearer.
>
> By virtue of said deletion, the payment of the ten percent (10%) final tax on FCDU income no longer exempts petitioner from the payment of the assailed branch profit remittance tax or other taxes for that matter. xxx"[11] *(Emphasis Ours)*

To reiterate, as a rule, the amendment by deletion of certain words or phrases in a statute indicates that the legislators intended to change the meaning of a statute, for the presumption is that the legislature would not have made the deletion had the intention been not to effect a change in its meaning. The amendment should accordingly be given a construction different from that previous to its amendment.[12]

The deliberate selection of language other than that used in an earlier act is indicative that a change in the law was intended and it calls for an application. An amended act is ordinarily to be construed as if the original statute has been repealed and a new and independent act in the amended form had been adopted in its stead. In other words, the amended act is regarded as if the statute has been originally enacted in its amended form and the amendment becomes a part of the original statute as if it had always been contained therein.[13] Any other view would be to betray lack of fidelity to the purpose so manifest in the controlling legal provision.[14]

Basic is the rule in statutory construction, that where the law speaks in clear and categorical language, there is no room for interpretation. There is

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[11] Assailed Decision dated October 2, 2008, pp. 7-8, 9; Docket, pp. 60-61, 62.
[12] Gloria vs. Court of Appeals, G.R. No. 131012; April 21, 1999, 306 SCRA 287.
[13] Estrada vs. Caseda, No. L-1560, October 25, 1949, 84 Phil. 791.
[14] Sarcos vs. Castillo, G.R. No. L-29755, January 31, 1969, 26 SCRA 853.

only room for application. Thus, the first and fundamental duty of courts is to apply the law as they find it, not as they like it to be. Fidelity to such a task precludes construction or interpretation, unless application is impossible or inadequate without it. No process of interpretation or construction need be resorted to where a provision of law peremptorily calls for application. This Court has no choice but to see to it that its mandate is obeyed.[15]

By the clear import of Section 28(A)(7)(b) of the NIRC of 1997, income derived by a depository bank under the foreign currency deposit system units from foreign currency transactions with local commercial banks shall be subject to a final tax of 10%. The phrase "exempt from all taxes" has definitely been deleted by the legislators. Clearly therefore, such deletion only entails a simple construction. It is the obvious aim of the Legislature to introduce a different meaning to the law, that is, the taking away of the tax exemption previously enjoyed by FCDUs. Consequently, Revenue Regulations No. 10-76, which implemented the old law is no longer applicable and the subject payment by petitioner of the 10% final tax on FCDUs income does not exempt it from BPRT or other taxes for that matter.

If the lawmakers intended to subject FCDUs to income tax only but maintains their exemptions from other taxes like BPRT, then, they could have easily demonstrated such intention. However, our lawmakers did not. They simply removed the said phrase, an indication of their intent to remove the tax exemption privilege of FCDUs. The deletion should not be considered as mere inadvertent omission.

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[15] Commissioner of Internal Revenue vs. American Express Int'l., Inc. (Phil. Branch), G.R. No. 152609, June 29, 2005.

An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however later wisdom may recommend the inclusion.[16] For as explained by the Supreme Court, in the interpretation of a legal document, especially a statute, it is not enough to obtain information or meaning of the author or authors, but also to see whether the intention or meaning has been expressed in such a way as to give it legal effect and validity. In short, the purpose of the inquiry, is not only to know what the author meant by the language used, but also to see that the language used sufficiently expresses their meaning. The legal act so to speak is made up of two elements — an internal and external one; it originates in intention and is perfected by expression. Failure of the latter may defeat the former.[17]

There being no effective exemption to speak of in this case, then all applicable taxes became due. It must be noted that the ten percent (10%) final tax levied on onshore income under Section 28(A)(7)(b) of the NIRC of 1997 pertains to income derived by a depository bank under the expanded foreign currency deposit system, and clearly does not include branch profit remittance tax under Section 28(A)(5) of the same Code. Hence, there was no erroneous payment of BPRT on petitioner's remitted branch profits to ING Netherlands on February 18, 2004 and April 12, 2004.

To reiterate, the rule in this jurisdiction is that "[t]ax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person

[16] Ruben Agpalo, Statutory Construction Fifth Edition, 2003, p. 74.
[17] Manila Jockey Club, Inc. vs. Games and Amusements Board; 107 Phil. 151 (1960).

claiming the exemption".[18] For taxes, being the lifeblood of the government, are meant to be paid without delay and often oblivious to contingencies or conditions.[19] The tax exemption cannot arise by mere implication and any doubt about whether the tax exemption exists is strictly construed against the taxpayer and in favor of the taxing authority.[20]

In the light of the foregoing discussions, the Court En Banc finds no reversible error committed by the Court in Division that would merit a reversal of its assailed Decision and Resolution dated October 2, 2008 and December 16, 2008, respectively.

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

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

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[18] Commissioner of Internal Revenue vs. Procter and Gamble Philippines Manufacturing Corporation and The Court of Tax Appeals, 204 SCRA 377 (1991); Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc. and Court of Appeals, 309 SCRA 87 (1999).

[19] Dr. Felisa L. Vda. De San Agustin vs. Commissioner of Internal Revenue, G.R. No. 138485, September 10, 2001.

[20] China Banking Corporation vs. Court of Appeals and Commissioner of Internal Revenue, G. R. Nos. 146749 and 147938, 403 SCRA 634, June 10, 2003.

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court *En Banc*.

ERNESTO D. ACOSTA
Presiding Justice