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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CONSTRUCTION RESOURCES OF
ASIA, INC.,
Petitioner-Appellant,

- versus -

C.T.A. CASE NO. 3307

THE COMMISSIONER OF INTERNAL
REVENUE,
Respondent-Appellee.
x - - - - - - - - - - - - - - x

11/25/83

D E C I S I O N

Section 53(b)(2) of the National Internal Revenue Code requires that a tax of 15% on interest on foreign loans payable to non-resident foreign corporations be deducted and withheld by the borrower and paid to the Commissioner of Internal Revenue or his authorized collection agent. And as an incentive for Filipino overseas contractors, Section 4(a)(2) of Presidential Decree No. 1167 allows a tax credit for such taxes withheld on interest payments on foreign loans incurred directly and exclusively for overseas projects, provided no such credit is enjoyed by the lender-remittee in his country, and the overseas contractor has assumed the liability for payment of the tax due from the lender-remittee.

The pertinent facts are not disputed. As narrated by respondent Commissioner of Internal Revenue in his memorandum dated March 21, 1983: (pp. 67-69, CTA records.)

Petitioner is a domestic corporation, duly registered with the Overseas Construction Board as an overseas contractor (pars. I and II, Petition).

In July, 1977, it entered into a contract with the Malaysian government for the construction of a road at Sabah (par. II, Petition). In connection therewith, petitioner incurred foreign loans in the amount of $3,900,000.00 at 9-3/16% interest per annum (p. 73, B.I.R. rec.). For the period from December 7, 1977 to June 5, 1978, petitioner paid the sum of $179,156.25 to the foreign creditors as interest on its loans (Ibid).

In an investigation conducted by respondent's examiners, it was ascertained that petitioner failed to file withholding tax retrun and to withhold 15% tax on interest on foreign loans remitted abroad (pp. 72-73, BIR rec.). It was also ascertained that petitioner failed to purchase and affix the corresponding documentary and science stamps on the stock certificates issued by it covering ₱17,800,000.00 worth of shares pursuant to Sections 222 and 224 of the Tax Code (p. 59, BIR rec.).

Thus, in a demand letter dated January 25, 1980 (pp. 86-87, BIR rec.), respondent sought payment of withholding tax-at-source in the amount of ₱300,170.46, computed as follows:

4th quarter 1977 - - - - - -	₱ 42,742.91
1st quarter (Jan.-March 1978) -	149,976.82
2nd quarter (Apr.-June 1978) -	107,450.73
Total withholding tax with interest & penalties - - - -	₱300,170.46

In a letter dated March 5, 1980, respondent demanded payment of petitioner's documentary and science stamps tax liability in the sum of ₱89,400.00, computation of which follows:

$$\frac{₱17,880,000.00}{200} = ₱89,400.00 \times \begin{array}{l} .50 \text{ doc.} \\ .50 \text{ sci.} \end{array} = \begin{array}{r} ₱44,700.00 \\ \underline{44,700.00} \end{array}$$

Total - - - - - - - - ₱89,400.00

Petitioner, in letters dated November 7, 1979 and February 15, 1980, protested the assessment for withholding tax-at-source, stating that the actual payment of interest was made only on June 5, 1978 and, therefore, it had nothing yet to withhold in 1977. Petitioner further alleged that under the provisions of P.D. 1167, being an overseas contractor, it is exempt from the withholding tax-at-source provisions of the Tax Code (par. IV, Petition).

As regards its documentary and science stamps tax liability, petitioner contends that up to the date of the filing of its petition with this Honorable Court, no actual transfer of ownership of shares has been effected.

Per investigation of respondent's examiners, however, it was ascertained that the shares have been duly issued and, therefore, the corresponding amount of documentary and science stamps should have been properly affixed and paid. Consequently, in a letter dated April 30, 1981 (p. 109 BIR rec.) respondent denied petitioner's protest.

Hence, the filing of the instant Petition for Review with this Honorable Court on May 28, 1981.

Petitioner assails the Government's right to impose and collect the withholding tax at source in the amount of ₱300,170.46 due on interest payments remitted abroad, and documentary and science stamp taxes in the amount of ₱89,400.00.

Is petitioner exempt from payment of the withholding tax at source in the amount of ₱300,170.46

due on interest payments remitted abroad?

The position of petitioner Construction Resources of Asia, Inc., comes to this: (pp. 83-84, CTA records.)

> But, in a certification then requested by Atty. Nicomedes P. Agag, in behalf of petitioner CRA, in a letter dated May 26, 1982, Mr. Reynaldo A. Suarez, Assistant Regional Director for Revenue Region No. 4-B, Quezon City, ruled that petitioner CRA is exempted from payment of gross receipts tax on foreign loans it obtained from the Philippine Veterans Bank, as agent. This letter dated May 26, 1982, signed by Assistant Regional Director Suarez of Region 4-B, Quezon City, has been submitted in evidence for petitioner as Exhibits "H", "H-1" and "H-2". Now while this gross receipts tax on foreign loans was obtained by petitioner CRA from the Philippine Veterans Bank as agent, the same does not detract from the fact that petitioner's loan from the Philippine Veterans Bank, as agent, is the same and similar in all respect with its loan from Ayala Finance (Hongkong) Ltd. In other words, the ruling of Assistant Regional Director Suarez of Revenue Region 4-B, Exhibits "H", "H-1" and "H-2" for petitioner, may just as well equally apply with equal force and effect, to petitioner's foreign loan with Ayala Finance (Hongkong) Ltd..
>
> Stated otherwise, petitioner being exempt from the withholding tax on its gross receipts from its foreign loan obtained from the Philippine Veterans Bank as agent, it must perforce logically and legally follow that it be exempted from the withholding tax on its interest payments on foreign loans secured from Ayala Finance (Hongkong) Ltd., in accordance with the aforequoted provisions of law.

And the basis of petitioner's claim of exemption from the withholding tax on interest payments on foreign loan is the letter dated May 26, 1982 of Assistant

Regional Director Reynaldo A. Suarez of Revenue Region No. 4-B, Quezon City (Exh. "H", pp. 37-38, CTA records), to wit:

May 26, 1982

Atty. NICOMEDES P. AGAG
240 Ibuna, San Juan
Metro Manila

S i r :

This is in answer to your letter dated May 12, 1982 requesting clarification on whether or not your client, CONSTRUCTION RESOURCES OF ASIA, INC., is exempt from payment of the Gross Receipts Tax on foreign loan it obtained from the Philippine Veterans Bank as agent.

You represented:

1. That our client is an overseas contractor and registered as such with the Overseas Construction Board on August 14, 1978;

2. That our client was awarded an overseas contract in Sabah, Malaysia, and because of its immediate need of cash for the purchase of construction materials and working capital, it secured a foreign loan with the Philippine Veterans Bank as agent;

3. That in the contract executed between our client and the Philippine Veterans Bank as agent of the lender, our said client assumed, as stated in the contract, the payment of the Gross Receipts Tax of 10%;

4. That the Philippine Veterans Bank now included said Gross Receipts Tax of 10% in its statement of account sent to our client;

5. That in the conference had with the Philippine Veterans Bank's official, we maintained that our client is exempted from the payment of said Gross Receipts Tax of 10% under the aforecited provisions of PD 1167. This is so because the foreign loan secured by our client was used directly and exclusively in its overseas construction project, and that, it assured the liability for the payment of the tax due as part of the conditions of the contract it had with the Philippine Veterans Bank as agent of the lender-remittee.

On the basis of the facts you have represented we find that your client is exempt from the withhonding tax on interest payment on foreign loan, under P.D. No. 1167.

Very truly yours,

For the Regional Director:

REYNALDO A. SUAREZ
Asst. Regional Director
TAN S6268-A0925-A-1

The controlling statute is Section 4 of Presidential Decree No. 1167, which textually reads:

SEC. 4. Incentives for Filipino Overseas Contractors.- A duly registered Filipino contractor who is engaged or will be engaged in an overseas construction project, shall be granted the incentives provided in Subsections (a) and (b), or at his option, to the incentive provided in Subsection (c) of this Section:

a) Tax credit-(1) Taxes paid by the Filipino contractor to foreign governments on income derived from overseas projects subject, however, to the limitation of Section 30(c)(4)(a) and (b) of the National Internal Revenue Code;

(2) Tax credit for taxes withheld on interest payments on foreign loans incurred directly and exclusively for overseas projects: Provided, That (i) no such credit in enjoyed by the lender-remittee in his country; and (ii) the overseas contractor has assumed the liability for payment of the tax due from the lender-remittee; and

(3) Tax credit equivalent to the sales or compensating taxes paid on domestically manufactured or produced materials or products which are purchased by the overseas contractor and actually exported by him to be used in his overseas projects: Provided, That the sales taxes are indicated as a separate item on the sales invoice of the manufacturer or producer.

b) Deduction from gross overseas income.- (1) Accelerated depreciation - At the option of the Filipino construction contractor and in accordance with the procedures established by the Bureau of Internal Revenue fixed assets actually used in overseas operations may be: (i) depreciated to the extent of not more than twice as fast as the normal rate of depreciation if expected life thereof is ten (10) years or less; or (ii) depreciated over any number of years, between five (5) years and expected life if the latter is more than ten (10) years. Such depreciation cost as may be chosen by the said taxpayer shall be allowed as a deduction from taxable income: Provided, That he notifies the Bureau of Internal Revenue at the beginning of the depreciation period which depreciation rate allowed by this Section will be used by him;

(2) Additional deduction of labor training expenses- An additional deduction from taxable income of one-half of the value of labor training expenses incurred for improving the

performance and efficiency of unskilled labor: Provided, That such training program is duly approved by the Department of Labor: Provided, That such deduction shall not exceed ten percent (10%) of the direct labor wage; and

(3) Net operating loss carry-over- A net operating loss incurred on overseas projects in any year of operation may be carried over as a deduction from taxable income earned from overseas projects, within the three (3) years immediately following the year of such loss: Provided, That the loss carried over is computed net of incentives herein granted: Provided further, That no impairment of loans or guarantees extended by the Philippine Government or any of its instrumentalities has occurred or will occur as a result of overseas construction operations during the taxable year. The net operating loss shall be computed in accordance with the procedures established by the Bureau of Internal Revenue and shall be allowed only for purposes of income declaration in the Philippines.

c) In lieu of the income tax payable as a result of the application of the incentives provided for in the preceding subsections, the Filipino contractor may elect to pay a one and one-half percent ($1\frac{1}{2}\%$) tax on his overseas gross income.

We are at a loss to see how Assistant Regional Director Reynaldo A. Suarez deduced from Section 4 of Presidential Decree No. 1167 that petitioner Construction Resources of Asia, Inc. is exempt from the withholding tax on interest payments on its foreign loan. Adverting to the terms of the law, it is very plain and apparent that a duly registered

Filipino contractor who is engaged or will be engaged in an overseas construction project, as an incentive, is entitled only, insofar as taxes withheld on interest payments on foreign loans incurred directly and exclusively for overseas projects are concerned, to claim a tax credit for such taxes, if no such credit is enjoyed by the lender-remittee in his country and the overseas contractor has assumed the liability for payment of the tax due from the lender-remittee. The presidential decree employs the term - "Tax credit for taxes withheld on interest payments on foreign loans incurred directly and exclusively for overseas projects" - without more. Absolutely nothing there said speaks of exemption from the withholding tax on interest payments on foreign loans. The law is specific and mandatory. It merely calls for application, as thus worded. We are not to indulge in statutory construction because there is no room for interpretation. And applying the law as it is written, petitioner is clearly not exempt from payment of the withholding tax on interest payments on its foreign loan.

The rule is well-established that one who claims to be exempt from the payment of a particular tax must do so under clear and unmistakable terms found in the statute. Tax exemptions are strictly construed against the taxpayer, they being highly disfavored and may almost be said "to be odious to the law". He who claims an exemption must be able to point some positive provision of law creating the right; it cannot be allowed to exist upon a mere vague implication or inference. (Manila Eletric Company vs. Vera, L-29987 & L-23847, October 22, 1975, 67 SCRA 35.) The right of taxation will not be held to have been surrendered unless the intention to surrender is manifested by words too plain to be mistaken (Ohio Life Insurance & Trust Co. vs. Debolt, 60 Howard, 416) and too categorical to be misinterpreted (Reagan vs. Commissioner of Internal Revenue, L-26379, December 27, 1969, 30 SCRA 968), for the state cannot strip itself of the most essential power of taxation by doubtful words; it cannot by ambiguous language, be deprived of this highest attribute of sovereignty (Erie Railway Co. vs. Commonwelath of Pennsylvania, 21 Wallace, 492, 499). So, when exemption is claimed, it must be shown indubitably to exist, for every presumption is against it, and a well-founded doubt is fatal to the claim. (Asiatic Petroleum Co. vs. Llanes, 49 Phil. 466; Manila Electric Company vs. Vera, supra.)

Petitioner avers that it "is not claiming outright exemption, thus it applied for such exemption under BIR Form No. 04-B duly accomplished,'Exhibit D' for petitioner. But the same was denied by respondent Commissioner." (p. 84, CTA records.) On the other hand, respondent contends that since petitioner chose to avail of the incentive of tax credit and deduction from gross overseas income (last sentence of paragraph V, Petition for Review), this option does not mean outright exemption as claimed by petitioner. Implicit from the law is that the overseas contractor must first pay the withholding tax-at-source. Then, whatever amount has been paid by petitioner as withholding tax-at-source, may be claimed as deduction from its overseas gross income. Unfortunately, however, petitioner did not pay its withholding tax-at-source liability in the belief that it is outrightly exempt. (pp. 71-72, CTA records.)

We do not see in Section 4 of Presidential Decree No. 1167, the law involved, supra, what may be considered as "plain and unambiguous terms" or "words too plain to be mistaken and too categorical to be misinterpreted" declaring petitioner exempt from the withholding tax on its gross receipts from its foreign loan, or exempt from the withholding tax on its interest payments on foreign loans. (p. 84, CTA records.) In fact, we cannot even infer or imply, contrary to the principles enumerated above, that there is such an exemption from taxation.

Note that what Section 4 of the law grants to a duly registered Filipino contractor engaged in overseas construction project are "<u>incentive</u>" (not tax exemptions) provided in Subsections (a) and (b), or at his option, to the "<u>incentive</u>" provided in Subsection (c). Subsection (a) allows (1) tax credit for taxes paid by the Filipino contractor to foreign governments on income derived from overseas projects; (2) tax credit for taxes withheld on interest payments on foreign loans incurred directly and exclusively for overseas projects; and (3) tax credit equivalent to the sales or compensating taxes paid on domestically manufactured or produced materials or products which are purchased by the overseas contractor and actually exported by him to be used in his overseas projects. All of these however are subject to the limitations or restrictions mentioned in the law. Subsection (b), which is not pertinent hereto, allows the deduction from gross overseas income of (1) accelerated depreciation; (2) additional labor training expenses; and (3) net operating loss carry-over. Or at the option of the Filipino overseas contractor, in lieu of the income tax payable as a result of the application of the incentives granted above, he may elect, as provided in Subsection (c), to pay a one and one-half percent (1½%) tax on his overseas gross income. No legal justification, therefore, can be found for exempting petitioner Construction Resources of Asia, Inc. from payment of the withholding tax-at-source in the amount of ₱300,170.46 due on interest payments on foreign loans remitted abroad for the fourth quarter of 1977 and first and second quarters of 1978.

Assuming that petitioner is under obligation to withhold, it next argues that it is not covered by the withholding tax-at-source provision of the Tax Code on interest payments on its foreign loan because actual payment of interest was made allegedly only on June 5, 1978. Thus, it had nothing yet to withhold in 1977.

The liability of petitioner to withhold and pay the income tax withheld-at-source from interests due to a non-resident foreign corporation attaches at the time of the accrual of said interests and not at the time of actual payment or remittance thereof. (BIR Ruling No. 71-003.) As aptly stated by respondent Commissioner of Internal Revenue (p. 73, CTA records):

> Payment of the withholding tax-at-source due from a foreign lender attaches upon accrual of the interest to be remitted abroad. The interest accrues at the time it is earned. At such time, the tax on the interest attaches and the contractor is obligated to remit the tax to the government since it already and properly belongs to the government. Indeed, there is no reason why the overseas

> contractor, petitioner in this case, who is based in the Philippines, should wait until it remits the interest due the foreign lender before paying the withholding tax-at-source. Otherwise, the government will be at the mercy of the taxpayer who may take time in remitting the interest to the foreign lender.

Coming to the question of whether petitioner is liable for documentary and science stamp taxes in the amount of ₱89,700.00, Construction Resources of Asia, Inc. alleges that it "is still unable up to the present to issue the corresponding certificate of stocks to its stockholders due to the difficulty of the transfer of ownership over the capital equipment contributed by some stockholders as their capital contribution to petitioner corporation." (par. VII, Petition for Review, pp. 4-5, CTA records.) In support thereof, petitioner presented a certification dated October 23, 1982 of petitioner's acting secretary marked as Exhibit "G" (p. 36, CTA records), which reads:

> "This is to certify that due to the difficulty of the transfer of ownership over the capital equipment contributed by some stockholders on the capital position of petitioner corporation complicated by subsequent problems on the use of said equipment, the corresponding certificate of stock in favor of stockholders concerned has as of now remain pending so much so that the claims for documentary and science stamps tax in the amount of ₱89,700.00 by respondent commissioner, has yet no factual or legal basis."

A documentary stamp tax is in the nature of an excise. It is not imposed upon the business transacted but is an excise upon the privilege, opportunity or facility offered at exchanges for the transaction of the business. It is an excise upon the facilities used in the transaction of the business separate and apart from the business itself. With respect to stock certificates, it is levied upon the privilege of issuing them; not on the money or property received by the issuing company for such certificates. Neither is it imposed upon the shares of stock. As Justice Learned Hand pointed out in one case, a documentary stamp tax is levied on the document and not on the property which it described. (Commissioner of Internal Revenue vs. Heald Lumber, L-16340, Feb. 29, 1964, 10 SCRA 372, citing Du Pont vs. U.S., 300 U.S. 150; Nicol vs. Ames, 173 U.S. 509; Empire Trust Co. vs. Joey, 103 F. 2d. 430.)

The documentary stamp tax is due and payable at the time the transaction is had or accomplished, i.e., at the time of the issuance of the document. (Sec. 212, now Sec. 224, National Internal Revenue Code.) A document is not deemed issued unless and until it is delivered. Delivery is essential to constitute an issue of bonds or certificates. (Sec. 4, Regs. No. 26; Philippine Consolidated Coconut Industries vs. Commissioner of Internal Revenue, L-25424, March 8, 1976, 70 SCRA 22.)

While in a memorandum report dated May 3, 1979 for the Commissioner of Internal Revenue (pp. 60-61, BIR records), respondent's examiners stated that petitioner's "paid in capital of ₱17,880,000.00 which was originally issued was not subjected to documentary and science stamp (under Sec. 212 old Code)" and this "was fully taken up in the conference with the Vice-President, Accountant and Member of the Board of Directors and they are willing to pay the assessment on Doc. & Science stamp upon receipt of the assessment notice", there is absolutely nothing in the records which will show or indicate that the stock certificates on the paid-in capital of ₱17,880,000.00 were issued or delivered, actually or constructively, to the stockholders, granting that such paid-in capital was "originally issued". In fact, as required, no pertinent document or evidence establishing or indicating issuance or delivery of the stock certificates was submitted by the BIR examiners to support their claim. Considering that Exhibit "G" of petitioner was not disputed or controverted by respondent, the bare statement of respondent's examiners that the paid-in capital of ₱17,880,000.00 which was originally issued was not subjected to documentary and science stamp taxes, unaccompanied by adequate evidence, does not constitute sufficient basis to sustain the imposition of documentary and science stamp taxes in the amount of ₱89,700.00 on petitioner. It is true that an assessment is presumed correct, but the assessment must be based on actual facts. In the case under consideration, there are no substantial facts to support the assessment of ₱89,700.00 as documentary and science stamp taxes for the year 1977. (Collector of Internal Revenue vs. Benipayo, L-13656, January 31, 1962, 4 SCRA 182.)

Accordingly, petitioner Construction Resources of Asia, Inc. is hereby ordered to pay to respondent Commissioner of Internal Revenue the amount of ₱299,720.46 as deficiency withholding tax-at-source for the fourth quarter of 1977 and first and second quarters of 1978 plus 5% surcharge and 14% annual interest thereon from January 25, 1980 to July 31, 1980 and 20% annual interest from August 1, 1980 to the date of full payment pursuant to Section 51(e)(2)(3) of the National Internal Revenue Code of 1977, as amended, provided that the maximum amount that may be collected as interest on deficiency shall in no case exceed the amount corresponding to a period of three years. The compromise penalties suggested by respondent in his assessment cannot be imposed as it does not appear that petitioner agreed to their imposition. The rule has been established that compromise penalty cannot be imposed or collected without the agreement and conformity of the taxpayer. (Wonder Mechanical Engineering Corporation vs. Court of Tax Appeals, L-22805 & 27858, June 30, 1975, 64 SCRA 555.)

WHEREFORE, the decision appealed from is modified as indicated in the above opinion of the Court. With costs.

SO ORDERED.

Quezon City, Metro Manila, November 25, 1983.

AMANTE FILLER
Presiding Judge

WE CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge