118

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PHILIPPINE GLOBAL COMMUNICATIONS, INC,
Petitioner,

- versus -

C.T.A. CASE NO. 5400

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
OCT 02 1997

x - x

DECISION

Before Us for consideration is a Petition for Review filed by petitioner on July 19, 1996 regarding a claim for refund of franchise taxes which allegedly have been erroneously paid by it for the period covering the second quarter of 1994 up to the fourth quarter of 1995 in the aggregate amount of ₱70,795,150.51.

Petitioner is a corporation duly organized and existing by virtue of Philippine laws with office address at 8755 Paseo de Roxas, Makati City. It is a telecommunication company operating under a legislative franchise granted by Republic Act No. 4617. Its main business activities are in the construction, maintenance and operation of communication systems by radio, wire, satellite and other means between any point in the Philippines to points exterior thereto. As a franchisee, it is subject to the payment of the 3% franchise tax prescribed under Section 117(b) of the National Internal Revenue Code, as amended ("Tax Code" for brevity).

The present controversy all started when Republic Act No. 7716, otherwise known as the "Expanded Value-Added Tax Law", took effect on May 28, 1994. Petitioner posits the view that Section 12 of the latter law expressly amended said Section 117(b) of the Tax Code by removing its liability for the 3% tax on franchise. It further asseverates the following ratiocination:

> 10. The restraining order in the implementation of Republic Act No. 7716 issued by the Supreme Court in the cases of "Tolentino, et al. vs. Secretary of Finance, et al." (G.R. Nos. 115455; 115525; 115543; 115544; 115754 and 115781) cannot have the effect of extending petitioner's liability for the 3% franchise tax for the following reasons: (a) the grant of such tax exemption, or removal of the liability for such tax, was not an issue in said cases; and (b) the Supreme Court restrained the implementation but not the effectivity of Republic Act No. 7716. Hence, with the effectivity of said law on May 24 (sic), 1994, petitioner was already benefited by such tax exemption, which is self-operative and requires no implementation to take effect. (Petition, p. 4)

Consequently, on May 20, 1996, petitioner filed the requisite administrative written claim for refund together with the aforesaid justifications with the Appellate Division of respondent's Bureau, on the herein-below listed amounts of franchise taxes it cumulatively paid even after the effectivity of Republic Act No. 7716, to wit:

Quarter Covered	Date Paid	Total per machine validation	Exh.
2nd, 1994	20 July, 1994	P 9,380,243.00	"D"
3rd, 1994	20 October, 1994	10,892,806.80	"E"
4th, 1994	20 January, 1995	14,645,196.78	"F"
1st, 1995	20 April, 1995	9,512,684.78	"G"
2nd, 1995	20 July, 1995	9,870,148.49	"H"
3rd, 1995	20 October, 1995	8,586,305.90	"I"
4th, 1995	22 January, 1996	7,907,764.76	"J"
		P 70,795,150.51	

Despite such written claim, however, respondent failed to act on the same. Petitioner was therefore constrained to institute the instant appeal due to the near expiry of the prescriptive period of two-years within which a judicial claim for refund may be filed in accordance with Section 230 of the Tax Code.

At bar, petitioner repleads it stance *a quo*. Respondent, on the other hand, contends, *inter alia*, the following special and affirmative defenses, namely:

> 10. Section 12 of R.A. No. 7716, which petitioner claims to have expressly repealed Section 117 of the Tax Code, is devoid of any pronouncement as to the non-taxability of franchises on telephone and/or telegraph systems and radio broadcasting stations.
>
> 11. Section 20, paragraph 1 of R.A. No. 7716 clearly provides that only the rate of franchise taxes provided by any special law is expressly repealed while only Sections 113, 114 and 116 of the National Internal Revenue Code (NIRC), are repealed in their entirety, *viz.*:

"SEC. 20. Repealing Clauses. - The provisions of any special law relative to the rate of franchise taxes are hereby repealed. Sections 113, 114 and 116 of the National Internal Revenue Code are hereby repealed.

xxx xxx xxx

12. Hence, in the absence of any express legal mandate exempting franchise on telephone and/or telegraph systems and radio broadcasting stations from tax, petitioner cannot, therefore, claim any exemption therefrom.

13. Moreover, exemption from tax is construed in *strictissimi juris* against the grantee. (Luzon Stevedoring Corporation v. Court of Tax Appeals, 163 SCRA 647 [1988]). Thus, it behooves the grantee to show that he clearly falls within the exemptions provided by law. Otherwise, he will still be subject to the payment of the tax.

14. It is a cardinal rule in taxation that exemptions therefrom are highly disfavored in law and he who claims tax exemptions must be able to justify his claim or right. The exemption cannot be established by mere implication but it must be clearly expressed. (Wonder Mechanical Engineering Corporation v. Court of Tax Appeals, et al., 64 SCRA 555 [1975]).

In its memorandum, petitioner elucidated more on Section 12 of Republic Act No. 7716 by arguing that it is in the nature of a repeal by amendment. On the whole, however, petitioner basically reiterated its prior assertions. Respondent, on her part, added a new dimension in her opposition to herein claim by contending that even assuming *argumenti in gracia* that petitioner is exempt from the 3% franchise tax, the temporary restraining order ("TRO" for brevity), dated June 30, 1994, issued by the Supreme Court on the enforcement and implementation of Republic Act No. 7716 correspondingly suspended the exemption of petitioner from the 3% franchise tax.

The issues to be resolved in the case at bar are thus limited to the following:

1. Whether or not Section 12 of Republic Act No. 7716 expressly amended or repealed by amendment Section 117(b) of the Tax Code;

2. Whether or not it is incumbent upon petitioner to justify its claim or right to exemption from the 3% franchise tax, in conformity with the rule that exemption from tax is construed in *strictissimi juris* against the grantee;

3. Whether or not the TRO, dated June 30, 1994, issued by the Supreme Court had the effect of suspending the exemption of petitioner from the 3% franchise tax, granting that it is entitled thereto;

4. Whether or not petitioner has established the factual requirements of its claim for refund.

For a comprehensive understanding of the issues the following pertinent provisions of laws involved are hereby reproduced. Thus:

A. Sec. 117 of the Tax Code

> "Sec. 117. *Tax on Franchises.* - Any provision of general or special law to the contrary notwithstanding, there shall be levied, assessed and collected in respect to all franchises, upon the gross receipts from the business covered by the law granting the franchise, a tax in accordance with the schedule prescribed hereunder:

(a) On electric utilities, city gas and water supplies .... Two (2%) per cent

(b) On telephone and/or telegraph systems, and radio broadcasting stations .... Three (3%) per cent

(c) On other franchise .... Five (5%) per cent

The grantee shall file the return with, and pay the tax due thereon to, the Commissioner of Internal Revenue or his duly authorized representative in accordance with the provisions of Section 125 of this Code, and the return shall be subject to audit by the Bureau of Internal Revenue, any provision of any existing law to the contrary notwithstanding." (As amended by EO 72; Underscoring supplied)

B. Section 12 of Republic Act 7716

"Sec. 12. Section 117 of the National Internal Revenue Code, as amended, is hereby further ***amended to read as follows***:

> 'Sec. 117. ***Tax on franchise.*** - Any provision of general or special law to the contrary notwithstanding, there shall be levied, assessed and collected in respect to all franchise on electric, gas and water utilities a tax of two percent (2%) on the gross receipts derived from the business covered by the law granting the franchise.
>
> 'The grantee shall file the return with, and pay the tax due thereon to, the Commissioner of Internal Revenue or his duly authorized representative in accordance with the provisions of Section 125 of this Code and the return shall be subject to audit by the Bureau of Internal Revenue, any provision of any existing law to the contrary notwithstanding." (Emphasis supplied)

After an exhaustive study of the attending facts, the various provisions of law and jurisprudence in point, and the respective argumentation of the parties, this Court hereby rules in favor of the petitioner.

Anent the first issue, there is no doubt that an express amendment by deletion happened when Section 12 of Republic Act No. 7716 omitted to reproduce the former Section 117(b) and (c) of the Tax Code. Atty. Ruben E. Agpalo in his book entitled, Statutory Construction, **1990, 2nd ed., pp. 278-279**, succinctly elaborated on the matter, to quote:

> "Amendment means the change or modification, by addition, *deletion*, or alteration, of a statute which survives in its amended form. The amendment of statute is effected by the enactment of an amendatory act modifying or altering some provisions of the statute either expressly or impliedly. *Express amendment is done by providing in the amendatory act that specific sections or provisions of a statute are amended as recited therein or, as commonly indicated, "to read as follows". The section or sections affected are then reproduced as amended.*" (Citing the cases of David V. Dancel, 17 SCRA 696; Estrada vs. Caeda, 84 Phil. 791; and People vs. Garcia, 85 Phil. 651; underscoring supplied))

Section 12 of Republic Act No. 7716 categorically placed the phrase "amended to read as follows" in reproducing Section 117 of the Tax Code, hence it can be reasonably concluded that the true intendment of the legislature in enacting said law was really to make an express amendment by deletion of said subsection (b) and (c) of Section 117 of the Tax Code.

Respondent's thesis that there is no express repeal of Section 117(b) of the Tax Code by Republic Act No. 7716, as can be gleaned from the abovequoted Section 20 on the Repealing Clauses of the latter law, is to our opinion misplaced. Obviously, Section 117 of the Tax Code being the subject of an *express amendment* only could not possibly be included or grouped in the enumeration of sections of the Tax Code which had been *expressly repealed*. Undeniably, an amendment is essentially different from a repeal.

With regard to the second issue, respondent has asseverated assiduously in her answer, *supra*, and likewise, in her memorandum that it is incumbent upon petitioner to show that it clearly falls within the exemptions provided by Republic Act No. 7716 in the light of the cardinal rule that claims for refund are to be construed strictly against the taxpayer and that the claimant must prove by clear and convincing evidence his entitlement thereto. Contending that there is no clear grant in favor of petitioner of any exemption from payment of the 3% franchise tax and that nothing over it is provided in Republic Act No. 7716, respondent insists that petitioner's claim of exemption from franchise tax has no basis.

We are not impressed with respondent's disquisition. Notwithstanding the well-entrenched rule that tax exemptions are strictly construed against the grantee and liberally in favor of the taxing authority, it is equally true, however, that if there is an express mention or if the taxpayer falls within the purview of the exemption by clear legislative intent, then the rule on strict construction will not apply. (**Commissioner of Internal Revenue vs. Arnoldus Carpentry Shop, Inc. and Court of Tax Appeals, 159 SCRA 199**) The express amendment by deletion of the former Section 117 of the Tax Code, as above discussed, is a vivid and crystal clear example of such legislative intent to exempt petitioner from the 3% franchise tax, hence, strict construction does not apply.

Furthermore, We believe the pronouncement of the Supreme Court in the case of **Commissioner of Internal Revenue vs. The Court of Appeals, The Court of Tax Appeals and Ateneo de Manila, G.R. No. 115349, April 18, 1997**, answers the contention of the respondent squarely, when it stated, thus:

> "We disagree. Petitioner Commissioner of Internal Revenue erred in applying the principles of tax exemption without first applying the well-settled doctrine of strict interpretation in the imposition of taxes. It is obviously both illogical and impractical to determine who are exempted without first determining who are covered by the aforesaid provision. The Commissioner should have determined first if private respondent was

> covered by Section 205, applying the rule of strict interpretation of laws imposing taxes and other burdens on the populace, before asking Ateneo to prove its exemption therefrom. The Court takes this occasion to reiterate the hornbook doctrine in the interpretation of tax laws that "(a) statute will not be construed as imposing a tax unless it does so *clearly, expressly, and unambiguously. x x x (A) tax cannot be imposed without clear and express words* for that purpose. Accordingly, the general rule of requiring *adherence to the letter in construing statutes applies with peculiar strictness to tax laws* and the provisions of a taxing act are not to be extended by implication." Parenthetically, in answering the question of who is subject to tax statutes, it is basic that "in case of doubt, such statutes are to be construed most strongly against the government and in favor of the subjects or citizens because burdens are not to be imposed nor presumed to be imposed beyond what statutes expressly and clearly import."

Consequently, the respondent Commissioner before asking petitioner to prove its exemption for tax should have asked herself first of the law, if Section 117, as amended by R.A. 7716, in this case imposes franchise tax on the petitioner.

Concerning the third issue, this Court believes that the abovementioned TRO issued by the Supreme Court did not have the effect of suspending the exclusion of petitioner from the 3% franchise tax.

It is a time-honored doctrine that all laws (Republic Act No. 7716 included) are presumed valid and constitutional until or unless otherwise ruled by the Supreme Court. In addition, Article XVIII, Section 3 of the 1987 Constitution states that "[a]ll existing laws, decrees, executive orders, proclamations, letters of instructions and other executive issuances not inconsistent with this Constitution shall *remain operative until amended, repealed or revoked.*" (Lim vs. **Pacquing, 240 SCRA 649**; italics supplied)

Based on the above, the said TRO cannot be interpreted as having suspended the exclusion of the petitioner from franchise tax in view of the subsisting operation, validity and effectivity of Republic Act No. 7716.

A TRO is an order requiring a *person* to perform or to refrain from a particular act (Section 1, Rule 58 of the old Rules of Court). Thus, it was expected that the TRO in question was directed to "...all the respondents to CEASE and DESIST from enforcing and/or implementing R.A. No. 7716." (TRO; Exhibit "K"). As a result, the Secretary of Finance and the Commissioner of Internal Revenue were stopped from complying with the provision of Section 19 of Republic Act No. 7716 concerning the implementation of such act by way of promulgation of necessary rules and regulations within 90 days from effectivity thereof.

Herein parties, however, should take note that a TRO has the effect of merely suspending the implementation but not the effectivity of a law which is primarily a legislative function. It is an ancillary measure availed of by a party litigant who believes that an irreparable injury would result to the applicant if the respondent is not temporarily restraint from doing a certain act pending hearing of the case. It never has the effect of amending any provision of the law including its effectivity which is defined in the law itself. Once the TRO is lifted, the law should be implemented as it is written and shall take effect on the date the law requires it to take effect. As defined under Section 21, Republic Act 7716 shall take effect fifteen (15) days after its complete publication in the Official Gazette or in at least two (2) national newspaper of general circulation whichever comes earlier. Neither the BIR nor this Court can change said provision of law, more so especially taking into consideration that its validity and constitutionality was upheld in the case of **Arturo M. Tolentino et., al vs. The Secretary of Finance and the Commissioner of Internal Revenue, G.R. Nos. 115455, 115525, 115543, 1158544, 115754, 115781, 115852, 115873, and 11593, Resolution, promulgated on October 30, 1995.**

Moreover, the TRO restrained only the respondents named therein from *acting* through the enforcement and/or implementation of Republic Act No. 7716 but not to the extent of suspending the particular provisions of the latter law not needing enforcement and/or implementation through rules and regulations.

It is the considered opinion of this Court that the exclusion of petitioner by way of an express amendment by deletion started immediately upon the effectivity of Republic Act No. 7716 on May 28, 1994 and with the continuing validity and operation of said Act notwithstanding the issuance of the TRO, such exclusion remained uninterrupted. As this Court sees it, the exclusion or deletion requires no enforcement and/or implementation to be applicable, which would thereby cover it within the ambit of the TRO. The words "enforcement" and "implementation" as applied to the Act would necessitate the promulgation of rules and regulations which, in turn, demand some positive acts to be done by concerned taxpayers who will become liable to the tax, i.e., declaration and payment of taxes and compliance with reporting procedures. Exclusion or exemption, however, falls in a different class as the taxpayer so deleted or exempted is not duty bound to do any positive or negative act. As long as the taxpayer has ascertained itself to be exempted or not liable, it simply does not have to mind at all the particular law. In this sense, the exemption or deletion benefiting petitioner can thus be stated beyond cavil to be one that is self-operative.

In the light of the foregoing reasons, this Court joins the petitioner in its submission that "only those provisions in R.A. 7716 which need to be implemented by the BIR were restrained but those provisions which are *self-operative* such as the grant of tax exemption or removal of a tax liability, which does not need implementation by the BIR to be effective, were already enjoyed by those entitled thereto upon the effectivity of the law." (Memorandum for the Petitioner, pp. 7-8; italics supplied)

Going to the last issue, this Court finds petitioner to have sufficiently submitted documentary proofs in establishing its entitlement to herein claim for refund. These are:

a) Written Claim for Refund (Exhibit "L");

b) Quarterly Percentage Tax Returns (BIR Form No. 2531) for the 2nd quarter of 1994 up to the 4th quarter of 1995 (Exhibits "D" to "J", inclusive);

c) Tax Returns/ATAPs Batch Control Sheets and various certifications and letters of Urban Bank of the Philippines regarding franchise tax payments made by petitioner (Exhibits "M" to "U", inclusive); and,

d) Audited Financial Statements of petitioner for 1994 and 1995 showing the provision and payment of franchise taxes in the amount of P49,521,104.00 and P42,868,737.00 for the years 1994 and 1995, respectively.

WHEREFORE, in view of the foregoing, the instant Petition for Review is hereby **GRANTED**. **ACCORDINGLY**, respondent is **ORDERED** to **REFUND** the amount of P70,795,150.51 to the petitioner.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

AMANCIO Q. SAGA
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
Court of Tax Appeals