REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

PHILIPPINE AIRLINES, INC. (PAL),
Petitioner,

C.T.A. CASE NO. 6962

Members:

- versus -

CASTAÑEDA, JR., *Chairperson*
UY, *and*
PALANCA-ENRIQUEZ, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

NOV 1 3 2006

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DECISION

CASTAÑEDA, JR., J.:

Before Us is a Petition for Review seeking a refund of the amount of One Hundred Thirty Four Thousand Four Hundred Thirty One Pesos and 95/100 (P134,431.95) allegedly representing ten percent (10%) Overseas Communications Tax for the period January to December 2002.

Philippine Airlines Incorporated ("petitioner"), a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, is engaged in the air transportation business with principal address at the 9th Floor, PAL Center, Legaspi Village, Makati City.

The Commissioner of Internal Revenue ("respondent") is the duly authorized government official empowered, among others, to refund erroneously collected taxes under the 1997 National Internal Revenue Code ("NIRC"), as amended, with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.

To meet the exigencies of its daily business operations, petitioner availed the communication services of Philippine Long Distance Company ("PLDT"). For the period January 1, 2002 to December 31, 2002, petitioner allegedly paid PLDT the 10% Overseas Communications Tax ("OCT") in the amount of P134,431.95 on its overseas telephone calls.

On February 24, 2004, petitioner, through its AVP-Financial Planning and Analysis Ma. Stella L. Diaz, filed with the respondent a claim for refund in the amount of P134,431.95 representing the total amount of 10% OCT paid to PLDT from January to December 2002 citing as legal bases Section 13 of Presidential Decree (P.D.) No. 1590 and BIR Ruling No. 97-94 dated April 13, 1994.[1]

Due to respondent's inaction on its claim for refund, petitioner appealed before this Court on April 22, 2004.

In Answer to the Petition, respondent alleged, *inter-alia,* that: (a) petitioner's claim for refund is subject to administrative routinary investigation or examination by the BIR; (b) the amount of P134,431.95 being claimed by petitioner representing 10% OCT for the period January to December 2002 is not properly documented; (c) petitioner must show that it has complied with

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[1] Exhibit "A"

the prescriptive period in claiming for a refund or tax credit under Sections 204(C) and 229 of the 1997 NIRC, as amended; and (d) in an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund or credit because claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation.[2]

The parties jointly stipulated on the following issues for this Court's resolution:

> ***"1. Whether or not petitioner is exempt from the 10% overseas communications tax under its franchise, PD 1590, and therefore, entitled to the refund of the 10% overseas communications tax prayed for;***
>
> ***2. Whether or not the amount of P134,431.95 being claimed by petitioner as allegedly representing 10% overseas communications tax erroneously collected from PAL by PLDT and remitted to the BIR for the period of January to December 2002, is properly documented; and***
>
> ***3. Whether or not petitioner complied with the provisions of Sections 204(C) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit."***[3]

With regard to the first issue, petitioner submits that it is exempt from payment of 10% OCT as the same is deemed included in the term "in lieu of all other taxes" clause under its franchise.

According to the petitioner, the 10% OCT that was collected by PLDT from PAL for the period January to December 2002 is covered by two (2) annual corporate income tax returns, namely: (i) the tax return for the fiscal year ending March 31, 2002 [which covers the first three (3) months of 2002] and (ii) the income tax return for the fiscal year ending March 31, 2003 [which covers the last nine (9) months of 2002). For both fiscal years, petitioner

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[2] Rollo, pp. 43-44
[3] Rollo, p. 63

opted to pay its basic corporate income. However, as reflected in its income tax returns for fiscal years 2002 and 2003, petitioner incurred negative taxable income of P844,734,355.00[4] and P911,552,157.00,[5] respectively. Consequently, it did not pay any income tax for the same fiscal years. Petitioner did not pay either the two percent (2%) franchise tax on its gross revenues as the latter tax would result in a higher tax liability.

Petitioner argues that in opting for zero basic corporate income tax which is lower than the 2% franchise tax, petitioner complied with the "in lieu of all other taxes" clause of P.D No. 1590. Thus, it is no longer liable for all other taxes of any kind nature, or description including the 10% OCT and the erroneous payments thereof entitles it to a refund pursuant to its franchise.

But respondent disagrees. He maintains that Section 120 of the 1997 NIRC, as amended, imposes 10% OCT on overseas dispatch, message or conversion originating from the Philippines which include PLDT communication services, to wit:

> ***"SEC. 120 Tax on Overseas Dispatch, Message or Conversion originating from the Philippines.-***
>
> ***(A) Persons Liable. – There shall be collected upon every overseas dispatch, message or conversion transmitted from the Philippines by telephone, telegraph, telewriter exchange, wireless and other communication equipment service, a tax of ten percent (10%) on the amount paid for such services. The tax imposed in this Section shall be payable by the person paying for the services rendered and shall be paid to the person rendering the services who is required to collect and pay the tax within twenty (20) days after the end of each quarter."***

To resolve the first issue of whether or not petitioner must actually pay either the 32% basic corporate income tax based on its annual net taxable

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4 Exhibit "E-2"
5 Exhibit "F-2"

income or the 2% franchise tax based on its gross revenues derived from all sources despite having incurred zero net annual taxable income before it may claim a refund in the amount of P134,431.95 representing 10% OCT for the period January to December 2002, the proper interpretation of Section 13 of P.D. No. 1590 is essential. Said Section 13 reads:

> ***"SECTION 13. In consideration of the franchise and rights hereby granted, the grantee shall pay to the Philippine Government during the life of this franchise whichever of subsections (a) and (b) hereunder will result in a lower tax:***
>
> ***(a) The basic corporate income tax based on the grantee's annual net taxable income computed in accordance with the provisions of the National Internal Revenue Code; or***
>
> ***(b) A franchise tax of two percent (2%) of the gross revenues derived by the grantee from all sources, without distinction as to transport or non-transport corporations; provided that with respect to international air-transport services, only the gross passengers, mail and freight revenues from its outgoing lights shall be subject to this tax.***
>
> ***The tax paid by the grantee under either of the above alternatives shall be in lieu of all other taxes,[6] duties, royalties, registrations, license and other fees and charges of any kind, nature, or description imposed established, assessed, or collected by any municipal, city, provincial, or national authority or government agency, now or in the future, including but not limited to the following:***
>
> ***x x x x x x x x x***
>
> ***For purposes of computing basic corporate income tax as provided herein, the grantee is authorized:***
>
> ***a) To depreciate its assets to the extent of not more than twice as fast the normal rate of depreciation; and***
>
> ***b) To carry-over as a deduction from taxable income any net loss incurred in any year up to five years of the following year of such loss."[7]***

From the foregoing, nowhere is it stated that the tax due should be coupled with actual payment of either the basic 32% corporate income tax or

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[6] The "in lieu of all other taxes" clause excludes real property tax. By express provision of P.D. 1590, petitioner is liable to pay real property tax. (*Philippine Airlines, Inc. vs. Honorable Court of Tax Appeals, and the Commissioner of Internal Revenue, CA G.R. SP No. 69388, Nov. 25, 2003)*

[7] Exhibit "B"

2% franchise tax as a condition for the refund of other taxes such as OCT. A grantee must simply elect between the two alternatives mentioned in the franchise, and the option availed of must result in a lower tax liability as ruled by the Court *En Banc* in ***Philippine Airlines, Inc. (PAL) vs. Commissioner of Internal Revenue,*** *C.T.A. E.B. No. 55, July 5, 2006.* Quoting the case of ***Philippine Airlines, Inc. (PAL) vs. Honorable Court of Tax Appeals and The Commissioner of Internal Revenue,***[8] the Court *En Banc* emphasized:

> "xxx **Since no tax payment was made, is petitioner required, as contended by the respondent, to pay the 2% franchise tax in order to be exempted from the payment of other taxes such as the 20% final withholding tax on interest income being claimed herein by the petitioner? We believe the law does not say so**. The provision of section 13 is explicit and unequivocal. The petitioner-grantee must choose between the two aforementioned alternatives in the payment of its tax liability to the government and its choice must be that which result in a lower tax liability. **Obviously, zero tax liability is lower than 2% franchise tax; hence, the petitioner chose a better alternative in availing of the basic corporate income tax as basis for its tax liability to the government**.
>
> **Moreover, the law does not say that to avail of the exemption from payment of all other taxes, there must be, after the computation, a tax due coupled with an 'actual' payment thereof. The law simply states that the petitioner-grantee must choose between the two alternatives and such choice must be that whichever will result in a lower tax liability. Any tax paid under either of the two alternatives shall exempt the petitioner-grantee from the payment of the other taxes as the said tax payment is considered by law 'in lieu of all other taxes'**. In this case, as earlier stated, the petitioner availed of the right and privilege granted to it by law by opting to choose the basic corporate income tax as basis for its tax liability, which however, after considering the factors allowed by law, resulted in a zero tax liability. Such zero tax liability as a result of the exercise of its lawful privilege should not be taken against the petitioner nor deprive it of availment of the exemption granted by the law."

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[8] CA-G.R. SP No. 67970, September 30, 2003

Further, in holding that PAL is entitled to the claim for refund of 10% Overseas Communication Tax it paid to PLDT despite the fact that it did not pay the basic corporate income tax, having chosen such as that tax which resulted in a lesser liability, or no liability at all, the Court of Appeals had this to say:

> ***"It is likewise erroneous to conclude that it is mandatory that (the petitioner) must pay its franchise tax of two (2%) or to pay its corporate income tax to avail of the incentives provided under the last paragraph that the 'tax paid by the grantee under either of the above alternative shall be in lieu of all other taxes, duties, royalties, registration, license and other fees and charges x x x', regardless of whether or not it suffered a net loss during a particular taxable year." To repeat, the only qualification provided for in the law is the option given to PAL to choose between the tax which will yield the lesser liability. Noting is said about exemption from other taxes if PAL, choosing the payment of corporate income tax, does not pay income tax at all if the lawmakers intended to provide for such a condition, then they would have included such a provision. More importantly, if We were to uphold this interpretation, this would effectively negate the rationale of the law, by stripping PAL of the right given to it by virtue of its franchise to avail of tax incentives, such as the 'in lieu of all other taxes' clause.***
>
> ***The possibility that PAL will incur losses was not unforeseen by the lawmakers. In fact, the last paragraph of section 13 treats of "net loss incurred in any year" and allows PAL to "carry over the same as a deduction from taxable income x x x up to five years following the year of such loss". This is inconsistent with the interpretation of the respondent Court that PAL is obliged to pay franchise tax if its corporate income tax yields zero tax liability for the taxable year. As correctly contended by the petitioner, if the intention of the law was to compel the petitioner to pay the 2% franchise tax in case of a net loss position, it would not have authorized petitioner to carry over the net loss as a deduction for the next five (5) taxable years."***[9]

In the instant case, petitioner chose to pay the basic corporate income tax for January to December 2002. However, for this period, it incurred a zero tax liability. Applying the above law and jurisprudence, petitioner is not required to pay the 2% franchise tax before it can avail of the "in lieu of" provision under Section 13 of P.D. 1590.

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[9] Philippine Airlines, Inc. vs. Honorable Court of Tax Appeals, and the Commissioner of Internal Revenue (CA G.R. SP No. 69388. November 25, 2003

Anent the second issue, petitioner asserts that the report of the duly commissioned independent external auditor, Atty. Fabian F. K. de los Santos of SGV & Co., affidavits of PLDT's financial analyst Aleth Grace Ison and PAL's manager Tax Division Evelyn Taghap, duly substantiate its OCT payments for the period of January to December 2002 in the amount of P134,431.95 and the same is integrated in the aggregate amount of percentage taxes of P322,882,058.00[10] remitted by PLDT to the BIR.

To establish its payment to PLDT of the 10% OCT on the telephone calls abroad for the period January 1, 2002 to December 31, 2002, petitioner proffered various documents such as billing statements, provisional and official receipts issued by PLDT including its check vouchers,[11] all verified by the commissioned auditing firm, SGV & Co. These documents proved the fact of petitioner's payment to PLDT of the 10% OCT on its overseas telephone calls for the subject period. However, out of petitioner's total claimed OCT payments for the said period amounting to P134,431.95, the amount of P2,424.16 should be disallowed for being merely supported by PLDT official receipts but not verified against the PLDT billing statements and provisional receipts, and the Company's check vouchers.[12] Hence, petitioner was only able to prove actual payments amounting to P132,007.79.

As to whether or not the OCT was consequently remitted by PLDT to the BIR, the commissioned CPA was not able to verify the same. But petitioner presented the Quarterly Percentage Returns for the 1st, 2nd, 3rd and

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[10] Exhibits "O" to "R"
[11] Pre-marked as Exhibits I-1 to I-2359; J-1 to J-35; K-1 to K-41; L-1 to L-6; M-1 to M-2; N-1 to N-9; Exhibit "H"
[12] Findings & Observations, Item no. 5, Exhibit H-1-A

4th quarters of 2002[13] which were filed and the corresponding taxes thereon paid by PLDT through the BIR's Electronic Filing and Payment System (EFPS). Notably, these quarterly percentage tax returns did not contain a breakdown of the OCT payments indicating if said payments to PLDT were included therein. Petitioner requested a certification from PLDT concerning its OCT payments for the period of January 1 to December 31, 2002 on overseas telephone calls and the fact that the amount of the said taxes collected was actually remitted and paid by PLDT to the BIR. In reply thereto, the PLDT wrote:

> ***"In reply we regret to inform you that as we have previously advised, owing to the complexity of our computer system on collection and payment of subscriber accounts, we cannot certify, at this time, the information you require by merely making reference to our collection reports and percentage quarterly tax returns filed for the period specified. The collection reports used by our Accounting Division were not designed to generate data of collection on a per subscriber basis, only on an aggregate basis. However, any such amount collected from PAL pertaining to payment of the OCT would, based on our internal standard procedure, be actually remitted and paid by PLDT to the BIR."***[14]

Nonetheless, petitioner presented other evidence such as the affidavits of Ms. Ma. Evelyn Taghap,[15] and Ms. Aleth Grace Ison[16] attesting OCT remittances to the BIR.

With respect to the third issue, petitioner maintains the timeliness of the filing of the claim for refund in accordance with the provisions of Sections 204 and 229 of the 1997 NIRC, as amended, which partly provide:

> ***"SEC. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes. – The Commissioner may –***
>
> ***x x x x x x x x x***

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[13] Exhibits O, P, Q & R, inclusive of submarkings
[14] Exhibit "T"
[15] Exhibit "V"
[16] Exhibit "U"

> *(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund."*
>
> *"SEC. 229. Recovery of Tax Erroneously or Illegally Collected. – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.*
>
> *In any case, no such or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid."*

Pursuant to the above provisions, the reckoning of the two (2)-year prescriptive period for the filing of a claim for refund of erroneously paid tax should be from *the date of payment of tax*, which in this case, should be twenty (20) days after the end of each quarter in accordance with Section 120(A) of the 1997 NIRC, as amended, *viz:*

> *"SEC. 120 Tax on Overseas Dispatch, Message or Conversion Originating from the Philippines.-*
>
> *(A) Persons Liable. – There shall be collected upon every overseas dispatch, message or conversion transmitted from the Philippines by telephone, telegraph, telewriter exchange, wireless and other communication equipment service, a tax of ten percent (10%) on the amount paid for such services. The tax imposed in this Section shall be payable by the person paying for the services rendered and shall be paid to the person rendering the services who is required to collect and pay the tax within twenty (20) days after the end of each quarter."*

Records disclose that PLDT remitted to the BIR the subject 10% OCT on the following dates:

Exhibit	Payment Date	Quarter Involved
O-1	April 22, 2002	1st quarter 2002
P-1	July 22, 2002	2nd quarter 2002
Q-1	October 21, 2002	3rd quarter 2002[17]
R-1	January 20, 2003	4th quarter 2002

A perusal of the above schedule reveals that the earliest remittance was made on April 22, 2002 covering the first quarter of 2002. Counting from April 22, 2002, petitioner had until April 21, 2004[18] within which to file its claim for the 1st quarter of 2002 both in the administrative and judicial levels. Although petitioner's administrative claim was seasonably filed with the BIR on February 24, 2004, the instant Petition for Review filed on April 22, 2004 fell beyond the two (2)-year prescriptive period.

As to the remaining quarters of 2002, petitioner seasonably filed the administrative and judicial actions for refund reckoned from the respective dates when the subject taxes were remitted to the BIR.

WHEREFORE, premises considered, the Petition for Review is ***PARTIALLY GRANTED***. Petitioner's claim for refund is hereby granted in the reduced amount of P93,424.67, computed as follows:

Claimed Amount	P134,431.95
Less: Disallowances	
(a) OCT payments not verified against PLDT billing statements, provisional receipts, and Co.'s check vouchers	2,424.16
(b) OCT payments barred by prescription[19]	38,583.12
Refundable Amount	**P 93,424.67**

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[17] April 20, 2002, July 20, 2002 and October 20, 2002 all fell on a weekend
[18] 2004 was a leap year
[19] See Annex A

Accordingly, respondent is **ORDERED** to **REFUND** to petitioner the amount of P93,424.67 representing Overseas Communication Tax paid for the period January to December 2002.

SO ORDERED.

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

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ATTESTATION

I attest 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's Division.

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

CERTIFICATION

I hereby certify that the decision was reached after due consultation with the members of the Division of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Justice