REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION
****

ING BANK N.V. MANILA BRANCH,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7412

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:

OCT 02 2008 9:00 a.m.

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DECISION

BAUTISTA, *J.*:

This case involves a claim for refund or issuance of tax credit certificate in the amount of **TWO HUNDRED FIFTY ONE MILLION NINETY SEVEN THOUSAND THREE HUNDRED SEVENTY NINE AND 40/100 PESOS (P251,097,379.40)**, representing alleged erroneously paid branch profits remittance tax on petitioner's remitted 2002 branch profits to ING Netherlands on February 18 and April 12, 2004.

ING Bank N.V. Manila Branch (petitioner) is the Philippine branch office of ING Bank N.V.[1], 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

[1] Exhibit "A"

by the *Bangko Sentral ng Pilipinas* (BSP) to engage in universal banking and to operate a foreign currency deposit unit (FCDU) in the Philippines.[2]

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of said 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.[3]

On February 7, 2006, petitioner filed with the Bureau of Internal Revenue (BIR) an administrative claim for refund or issuance of tax credit certificate in the amount of P251,097,379.40[4], arising from its alleged erroneous payment of branch profit remittance tax 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	**P251,097,379.40**

On February 17, 2006, petitioner filed this instant *Petition for Review* before it could be barred by prescription.

Respondent, in his *Answer* filed on March 27, 2006, raised the following arguments:

"4. Petitioner's Foreign Currency Deposit Unit (FCDU) is now subject to branch profits remittance tax (BPRT) in view of the deletion of the phrase 'exempt from all taxes' from Section 27 (D)(3) of the National Internal Revenue Code of 1997 (1997 NIRC) [Section 25 (a)(6)(B) of the 1977 NIRC].

> *'Sec. 27. Rates of Income Tax on Domestic Corporations. –*

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[2] Par. 1, Joint Stipulation of Facts and Issues (JSFI), *Rollo*, pp. 99-100
[3] Par. 2, JSFI, *Rollo*, p. 100
[4] Par. 3, JSFI, *Rollo*, p. 100

xxx *xxx* *xxx*

(D) Rates of Tax on Certain Passive Income

xxx *xxx* *xxx*

(3) Tax on Income Derived under the Foreign Currency Deposit System. - Income derived by a depositary 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 deposit system units and other depositary banks under the foreign currency deposit system, including interest income from foreign currency loans granted by such depositary banks under the said expanded foreign currency deposit system to residents, shall be subject to final tax at the rate of ten percent (10%) of such income.'

5. In **ING Bank [Manila Branch] vs. Commissioner of Internal Revenue**, CTA Case No. 6017, March 11, 2002, the First Division of this Honorable Court held:

'xxx *xxx* *xxx*

Prior to the amendment introduced by the Tax Reform Act of 1997, Section 25 (a)(6)(B) of the 1977 Tax Code provides:

(B) ***Income derived under the Expanded Foreign Currency System.*** *– Income derived by a depositary 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 deposit system units and other depositary banks under the expanded foreign currency deposit system* <u>*shall be exempt from all taxes*</u> *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 depositary banks under the said expanded system to residents (other than*

> *offshore expanded banking units in the Philippines or other depository banks under the expanded system shall be subject to a 10% tax.*
>
> xxx xxx xxx
>
> (Underscoring supplied)

The above exemption, as implemented by Revenue Regulations No. 10-76, includes exemption from documentary and science stamp tax, gross receipts tax and branch profit remittance tax.

With the advent of the Tax Reform Act of 1997, the phrase 'exempt from taxes' has been deleted in Section 28(A)(7)(b), to wit:

> *(b)* ***Income Derived under the Expanded Foreign Currency System.*** *– Income derived by a depositary bank under the expanded foreign currency deposit system from foreign currency transactions with local commercial banks that may be authorized by the Bangko Sentral ng Pilipinas (BSP) to transact business with foreign currency deposit system units and other depositary banks under the foreign currency deposit system, including interest income from foreign currency loans granted by such depositary banks under said expanded foreign currency deposit system to residents, shall be subject to final income tax at the rate of ten percent (10%) of such income.*
>
> *Any income of non-residents whether individuals or corporations, from transactions with depository banks under the expanded system shall be exempt from income tax.*
>
> xxx xxx xxx

By the clear import of the present law, income derived by a branch of a foreign bank that may be authorized by the Bangko Sentral ng Pilipinas to transact business with foreign currency deposit system units, like herein Petitioner, shall be subject to a final tax of 10%. The phrase 'exempt from all taxes' has been deleted by the legislators. The amendment by deletion of certain words or phrases in a statute indicated that the legislative intended to change the meaning of the statute (Gloria vs. Court of Appeals, 306 SCRA 287). By virtue of such deletion, Revenue Regulations No. 10-76, which implemented the old law

> *is no longer applicable. In other words, the payment of 10% final tax on FCDU income does not exempt Petitioner from the payment of branch profit remittance tax or other taxes for that matter.*
>
> *xxx xxx xxx*
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> *Taxes are the lifeblood of the nation; the Court has always applied the doctrine of strict interpretation in construing tax exemptions. Furthermore, a claim of statutory exemption from taxation should be manifest and unmistakable from the language of the law on which it is based. Thus, the claimed exemption must expressly be granted in a statute stated in a language too clear to be mistaken (Commissioner of Internal Revenue vs. Court of Appeals, 298 SCRA 83).*
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> *Petitioner would like Us to consider that despite the plain provision of the present tax law the phrase 'exempt from all taxes' still applies to its FCDU income.*
>
> *It cannot be overemphasized that under the 1997 Tax Code, 'tax exemptions from all taxes' relative to FCDUs can no longer be found. Hence, there is no construction to speak of in the first place. Besides, even if there is such a tax exemption, the same should be strictly construed against the taxpayer. Petitioner's existence (sic) that it is still covered by the tax-exempt provision of the old law as implemented by Revenue Regulations No. 10-76 is quite absurd and contrary to sound reasoning. xxx"*

7. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue;

8. The amount of P251,097,379.40 being claimed by petitioner as alleged erroneously paid BPRT is not properly documented;

9. In an action for refund/credit, 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/credit;

10. Petitioner must show that it has complied with the provisions of Sections 204 (C) and 229 of the 1997 NIRC on the prescriptive period for claiming tax refund/credit.

11. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation **(Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)** and as such, they are looked upon with disfavour **(Western Minolco Corp vs. Commissioner of Internal Revenue, 124 SCRA 1211)**."

After trial on the merits and upon receipt of petitioner's *Memorandum*, this case was submitted for decision on June 23, 2008.

As stipulated by the parties, the following are the issues for this Court's resolution:

1. Whether or not petitioner's foreign currency deposit unit is now subject to branch profits remittance tax; and

2. Whether or not petitioner is entitled to the claim for refund or issuance of tax credit certificate of erroneously paid 2004 BPRT in the amount of P251,097,379.40.

Petitioner submits that based on the historical background of the taxability of foreign currency depositary units, the final tax on income derived under the FCDU system is in lieu of all other taxes; including the branch profit remittance tax. Accordingly, its FCDUs are subject only to income tax on their onshore income.

Petitioner alleges that an examination of the entire provision of the National Internal Revenue Code (NIRC) of 1997 on and the legislative history of FCDU taxation proves that the elimination of the phrase "'in lieu of all taxes" was made only as part of a language that would reclassify local bank income from offshore income to onshore income. The NIRC of 1997 only reclassified local bank income as onshore tax and nothing more; it did not remove the FCDUs' exemption from BPRT. Moreover, this intention to retain the tax exemptions of FCDUs is made clearer through the enactment of Republic Act No. 9294[5] on April 28, 2004; which Act further amended Section 28(A)(7)(b) of the NIRC of 1997.

On the other hand, it is respondent's argument that petitioner's FCDUs are 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 (formerly Section 25(a)(6)(B) of the NIRC of 1977 [1977 Tax Code]).

[5] An Act Restoring the Tax Exemption of Offshore Banking Units (OBUs)and Foreign Currency Deposit Units (FCDUs), amending for the purpose Section 27 (D) and Section 28, Paragraphs (A) (4) and (A) (7) (b) of the National Internal Revenue Code , as amended.

After a thorough evaluation of the attending facts, pieces of evidence, jurisprudence, and laws applicable to this instant *Petition*, this Court resolves against petitioner.

Prior to the amendment introduced by the NIRC of 1997, Section 25(a)(6)(B) of the 1977 Tax Code provides that:

> "(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*)

The exemptions mentioned in the above law include branch profit remittance tax[6], documentary and science stamp tax, gross receipts tax, and privilege tax.[7]

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.[8] 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**
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> xxx xxx xxx
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> **(7) Tax on Certain Incomes Received by a Resident Foreign Corporation. -**

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[6] Bank of Tokyo-Mitsubishi, Ltd. (Manila Branch) vs. Commissioner of Internal Revenue, CTA Case No. 5697, July 26, 2000
[7] Revenue Regulations No. 10-76
[8] ING Bank (Manila Branch) vs. Commissioner of Internal Revenue, CTA Case No. 6017, March 11, 2002

(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."

Subsequently, Republic Act No. 9294 further amended Section 28(A)(7)(b) of the NIRC of 1997, to wit:

"**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. -

xxx xxx xxx

(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 Bangko Sentral ng Pilipinas (BSP) to transact business with foreign currency deposit system units and other depository banks under the expanded foreign currency deposit system **shall be exempt from all taxes**, except net income from such transactions as may be specified by the secretary of Finance, upon recommendation by the Monetary Board to be subject to the regular income tax payable by banks: *Provided, however*, That interest income from foreign currency loans granted by such depositors 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 final tax at the rate of ten percent (10%)." (*Emphasis supplied*)

From the foregoing, the phrase "exempt from all taxes" is once again visible. However, it must be pointed out that this exemption is applicable only to cases involving the period before the NIRC of 1997 took effect and after the enactment of Republic Act No. 9294 on April 28, 2004. In other words, during the effectivity of the NIRC of 1997, but prior to the enactment of R.A. 9294, no such tax exemption existed.

The amendment by deletion of certain words or phrases in a statute indicates that the legislature intended to change the meaning of the statute.[9] It cannot be overemphasized that the 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. In relation to this, the provision on the payment of the branch profit remittance tax is found under Section 28(A)(5) of the NIRC of 1997, which states:

> "**(5) Tax on Branch Profits Remittances.** — Any profit remitted by a branch to its head office shall be subject to a tax of fifteen percent (15%) which shall be based on the total profits applied or earmarked for remittance without any deduction for the tax component thereof (except those activities which are registered with the Philippine Economic Zone Authority). The tax shall be collected and paid in the same manner as provided in Sections 57 and 58 of this Code: Provided, That interests, dividends, rents, royalties, including remuneration for technical services, salaries, wages, premiums, annuities, emoluments or other fixed or determinable annual, periodic or casual gains, profits, income and capital gains received by a foreign corporation during each taxable year from all sources within the Philippines shall not be treated as branch profits unless the same are effectively connected with the conduct of its trade or business in the Philippines."

From the above-quoted provision, a branch profit remittance tax is a tax on any profit remitted by a branch to its head office; provided that it is effectively connected with the conduct of its trade or business in the Philippines. In other words, every time petitioner remits branch profits to its head office abroad, a 15% tax is due and demandable, based on

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[9] Gloria vs. Court of Appeals, 306 SCRA 287

the total profits applied or earmarked for remittance without any deduction for the tax component thereof.

This Court likewise cannot subscribe to petitioner's argument that Republic Act No. 9294 clarified the intentions of the legislators to exempt FCDUs from all taxes; that the exemption was never removed from the provisions of Section 28(A)(7)(b) of the NIRC of 1997.

Republic Act No. 9294 which was approved on April 28, 2004, amended further Sections 27(D) and 28(A)(7)(b) of the NIRC of 1997. A reading of the title of the Act would show that it was meant to "restore" the tax exemptions of offshore banking units (OBUs) and foreign currency deposit units. "To restore" would mean "to reinstate or bring back". In other words, "to restore the tax exemptions of OBUs and FCDUs" connotes that the tax exemptions were previously removed so as to have the possibility of "reinstating" or "bringing back" the same. Thus, if R.A. 9294 meant to **restore** the tax exemptions of these OBUs and FCDUs; logically, the NIRC of 1997 had **removed** such tax exemptions, for what could possibly be restored if nothing was removed.

Well-settled is the legal principle that taxes are the lifeblood of the nation; and as such a claim of statutory exemption from taxation must be manifest and unmistakable from the language of the law on which it is based before the benefits of such tax exemption can be enjoyed.[10]

In recapitulation, this Court holds that petitioner's foreign currency deposit unit is subject to the branch profit remittance tax provided under Section 28(A)(5) of the National Internal Revenue Code of 1997. As the NIRC of 1997 mandates payment of tax on branch profit remittance, petitioner must prove that it is exempt from the payment thereof and not the other way around. Therefore, petitioner's failure to do so justified the denial of the refund claim.

[10] Commissioner of Internal Revenue vs. Court of Appeals, 298 SCRA 83

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

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division