REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SMITH KLINE and FRENCH OVERSEAS CO. (Philippine Branch),
Petitioner,

- versus -

C.T.A. CASE NO. 4385

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated :
AUG 11 1995

x - x

DECISION

The instant case involves disputed deficiency withholding tax and sales tax assessments issued by respondent against petitioner, Smith Kline and French Overseas Co. (Philippine Branch) with office address at Victoria Valley Blvd., Cainta, Rizal, for the year 1981 in the amounts of P133,180.59 and P549,062.69, respectively.

The following are the undisputed facts of the case.

Demand letter and notices for the above assessments were issued and mailed by respondent on June 30, 1987. The same were received by SGV, petitioner's auditor, on July 2, 1987. Protest was filed by the petitioner on August 3, 1987. In a letter, dated July 28, 1989, respondent denied petitioner's request. This letterdenial was received by petitioner on August 22, 1989. Consequently, on September 21, 1989, petitioner filed with this Court the instant appeal.

Among others, petitioner states in its petition for review that the assessments issued against it were for late payment of withholding tax on royalties and deficiency sales tax on pharmaceutical products (see par. 3, Petition). It maintains that it withheld and paid taxes upon actual remittance and therefore, there is no late payment from which surcharges and interest could be based (par. 7, pp. 2-3, Ibid).

As regards its deficiency sales tax assessment, petitioner alleges that it was arrived at after the BIR examiner reduced petitioner's allowable tax credit by using presumptive ratios and formulas which should not have been applied as actual figures and amounts exist (sub-par. B, par. 7, pp. 8-9, supra).

On February 13, 1990, respondent filed his answer with this Court wherein he avers the following:

> "1. He admits the material allegations in paragraphs 1, 2, 3 and 6 of the petition;
>
> 2. He admits the allegations in paragraphs 4 and 5 of the petition that petitioner filed letters-protests dated July 27, 1987 and September 1, 1987, but specifically denies the grounds relied upon in said letters-protests for being mere opinions and erroneous conclusions of fact and/or law,

the truth being those stated in the special and affirmative defenses;

3. He specifically denies the allegations in paragraphs 7(A) and (B) of the petition for being without basis in fact and in law; and as

SPECIAL AND AFFIRMATIVE DEFENSES

4. The petition does not state a cause of action.

5. Liability to withhold tax-at source on royalties and interests due to a non resident foreign corporation attaches upon accrual and not at the time of actual remittance or payment thereof (**Wyeth Suaco Laboratories, Inc. vs. CIR**, CTA Case No. 3981, **Western Palawan Timber Corp. vs. Commissioner** of Internal Revenue, CTA Case No. 3544, **Construction Resources of Asia, Inc. vs. The Commissioner of Internal Revenue**, G.R. No. 68413, December 10, 1984);

6. There is nothing in Sec. 54 (Tax Code) from which it can be deduced that the liability to withhold and pay tax attaches at the time of actual remittance;

7. The ruling in **Bayer Pharmaceutical, Inc. vs. Commissioner of Internal Revenue**, C.T.A. Case No. 2846, is not applicable to the case at bar;

8. Respondent's assessment for deficiency sales tax for the year 1981 in the amount of P549,062.69 was issued in accordance with law and revenue regulations;

9. All presumptions are in favor of the correctness of the deficiency tax assessments. Petitioner, who has the burden of proving that respondent's assessment is incorrect, has failed to overcome the presumption in favor of the correctness of said deficiency tax assessments. "(pp. 40-42, CTA records)

As can be gleaned from the pleadings just mentioned, petition and answer, there are only two (2) issues to be resolved in this case. One is whether the duty of taxpayer to withhold attaches upon accrual as maintained by respondent, or upon payment or actual remittance as averred by petitioner. The other issue is whether or not it is a correct procedure for respondent to adopt a formula or ratio in finding the allowable tax credit for petitioner so as to determine the latter's deficiency sales tax liability.

However, as the case progressed in court, there appeared a third issue and this is on jurisdiction. Respondent, in his <u>Comment on Petitioner's Offer of Evidence</u> raised for the first time this issue when he said:

> "He interposes no objection as to the existence of these exhibits (referring to Exhibits "D" which is photocopy of letter protest dated July 27, 1987 and "D-1", BIR stamp of receipt showing the date August 3, 1987 - see p. 92, CTA records)
>
> BUT OBJECTS as to the purpose for which these documents are being offered for reason that these exhibits were filed beyond the reglementary period of thirty (30) days from receipt of the assessment.
>
> He interposes no objection as to the existence of these exhibits (referring to Exhibits "E" which is photocopy of a letter dated September 1, 1987 filed by Petitioner thru its representative, SGV and Co. as a

supplement to the protest dated July 27, 1987 and "E-1", BIR stamp of receipt showing date September 3, 1987 - p. 92, CTA records) BUT OBJECTS as to the purpose for which these documents are being offered for reason that the assessment is already final and executory the letter protest having been filed out of time. (p. 161 CTA records)

This issue on jurisdiction was settled by this Court in its Resolution dated July 6, 1993, the pertinent provision of which is quoted hereunder.

"The Court RESOLVED as follows:

1. x x x

2. ADMIT Exhibits "D", "D-1", "E" and "E-1" which were qualifiedly admitted by respondent.

Respondent did not object to Exh. "C-1", the SGV and Co. stamp of receipt bearing the date July 2, 1987. Therefore, petitioner has thirty days from July 2, 1987 to file its protest. Exh. "D-1" shows that the protest was filed on August 3, 1987. Petitioner has up to August 1, 1987, which is the thirtieth day following July 2, 1987, to file its protest. But August 1, 1987 falls on a Saturday, a non-working day for government agencies. It is but logical that petitioner filed the protest on August 3, 1987, a Monday.

Furthermore, respondent did not allege as an affirmative defense failure of petitioner to file the protest within the reglementary period. It was only in the comment to petitioner's formal offer of evidence did respondent invoke the late filing of the protest.

Moreover, in answer to the protest filed by petitioner, respondent rendered a decision (Exh. "F") stating that "after a careful evaluation of the issues raised therein, this Office finds no ground to cancel or even modify

> the same; hence reiterated". He added that "this is his final decision on this case and should you disagree, you may appeal to the Court of Tax Appeals within thirty (30) days from receipt hereof, otherwise, this Office will take the necessary action to enforce its immediate collection." It is therefore quite clear from the wordings of the decision of respondent that petitioner is entitled to appeal said decision within thirty (30) days from receipt thereof to this Court. Therefor, <u>the assessment has not yet become final</u> pending the resolution of petitioner's appeal with this Court." (pp. 164-165, CTA records) (Underscoring supplied)

In a motion for reconsideration (pp. 168-171, CTA records) filed on July 20, 1993, respondent reiterated his view that the assessment in question has already become final and executory. He alleged that petitioner had up to August 1, 1987 to file its protest, and the same could not be extended just because August 1, 1987 is a Saturday. According to him, as he cited Dr. Arturo M. Tolentino's commentaries on the Civil Code of the Philippines, in computing a period of time only Sunday and legal holidays are excluded. He argued further that once an assessment acquires a final and executory status for failure of the taxpayer to administratively protest the same within thirty (30) days from receipt of the assessment, the Court of Tax Appeals loses jurisdiction over the case, inspite of subsequent communications between the taxpayer and the Commissioner of Internal Revenue."

Petitioner filed its Opposition to Motion for Reconsideration, (pp. 177-180, CTA records) on August 9, 1993 declaring therein that when an official act cannot be performed on the last day because government offices are closed for business that last day shall extend to the following working day as the last day which is neither a Sunday or a holiday.

After considering respondent's motion for reconsideration of this Court's previous resolution, as well as petitioner's opposition to said motion, this Court resolved again the issue of jurisdiction when it pronounced in its Resolution dated February 9, 1994 (pp. 190 - 193, CTA records) that:

> "xxx xxx xxx
>
> After a careful reading of the assailed resolution as well as the records of the case, we find no sufficient and valid reason to set aside or modify our resolution of July 6, 1993.
>
> xxx xxx xxx
>
> IN VIEW OF ALL THE FOREGOING, the court hereby resolves to DENY respondent's Motion for reconsideration for lack of merit. x x x", (Underscoring supplied)

At this juncture, this Court wants to emphasize that it still adheres vehemently to its previous and consistent stance that it has jurisdiction over the instant case. Whatever declarations or argumentations advanced by this Court in its two (2) resolutions previously mentioned and quoted are hereby incorporated and/or adopted in this decision for the purpose of deciding the issue of jurisdiction. This issue has been passed upon earlier and accorded prime importance by the Court as discussions on the other two (2) issues involved will be considered moot and academic if this Court has not ruled that it has jurisdiction to try the instant case.

The Court now comes to the issue on withholding tax at source. It concurs with respondent's view that the liability to withhold attaches upon accrual and that there is nothing in Section 54 of the Tax Code from which it can be deduced that the liability to withhold and pay tax attaches at the time of actual remittance.

For a careful perusal of the applicable provision, Section 54 is quoted hereunder:

> "SEC. 54. <u>Returns and payment of taxes withheld at source</u>.
>
> (a) Quarterly returns and payment of taxes withheld - <u>Taxes deducted and withheld under Section fifty-three shall be covered by a return and paid</u> to the Revenue District Offices, Collection Agent, or duly authorized Treasurer of the city, or municipality where the withholding agent has his legal residence or principal place of business, or where the withholding agent is a corporation, where the principal office is located. x x x <u>The return for final withholding tax shall be filed and</u>

> the payment made within 25 days from the close of each calendar quarter, while the return for creditable withholding taxes shall be filed and the payment made not later than the last day of the month following the close of the quarter during which withholding was made. (As amended by Batas Pambansa Blg. 41)
>
> (b) x x x" (Underscoring supplied)

From the above - quoted provisions of Section 54 (a), more specifically the underlined sentences which state:

> "Taxes deducted and withheld under Section fifty-three shall be covered by a return and paid ... "
>
> The return for final withholding tax shall be filed and the payment made within 25 days from the close of each calendar quarter ... "

it is clearly seen that the words "return" and "paid" as provided in the first quoted sentence and the words "filed" and "payment" as contained in the second quoted sentence, were put closely together. Even the title itself of the subject provision made use of the words "returns" and "payment". These are clear manifestations of the intention of the law to require subject withholding agents to file their withholding tax returns and pay the corresponding withholding tax thereon within 25 days from the close of the calendar quarter. The acts of filing and paying are inseparable. A withholding agent can not just file his withholding tax return without paying the tax thereon. Similarly, any authorized agent by the BIR cannot simply receive payment of withholding tax without any withholding tax return covering such payment.

Section 53 of the 1981 Tax Code expressly provides:

> "SEC. 53. *Withholding of tax at source.*
>
> (a) x x x
>
> (2) Non-resident foreign corporations - In the case of foreign corporations subject to tax under this Title, not engaged in trade or business within the Philippines, there shall be deducted and withheld at source in the same manner and upon the same items as provided in subsection (b)(1) of this section, as well as on remunerations for technical services or otherwise, a tax equal to thirty-five per centum (35 %) thereof: Provided, that interest on foreign loans shall be subject to withholding tax of fifteen per centum(15 %). This tax shall be returned and paid in the same manner and subject to the same conditions as provided in Section 54 . x x x" (Underscoring supplied)

From the above, particularly from the last sentence which has been underlined, it will be noted again that the words "returned" and "paid" were placed together. Meaning, the law indeed requires withholding agents to do both the filing of return and payment of withholding tax "in the same manner and subject to the same conditions as provided in Section 54 ..."

The foregoing discussions clearly controvert petitioner's view "that taxpayer's duty to withhold the tax arises at the time of actual remittance, specifically within twenty-five (25) days from the close of each calendar quarter during which actual remittance was made." (see 2nd par., p. 3. Petition). This allegation of petitioner is erroneous as the phrase "during which actual remittance was made" is nowhere to be found in Section 54 (a). Well-settled is the rule on statutory Construction that:

> "The language of a Statute affords the best means of its exposition and legislative intent must be determined primarily therefrom. (**Van Pelt vs. Hilliard**, 78 So. 693, **Jones vs. Pebler**, 125 A.L.R., p. 451). It is the court's duty to give the statute the interpretation its language calls for. The courts may not speculate as to the probable intent of the legislature apart from the words. (**Honduras vs. Soto**, 8 Am. St. Rep. 744). Popular clamor as to the enforcement of a law adds nothing to, and detracts nothing from, the duty of the court to construe the law as it is. (**Allen vs. State**, 39 A.L.R., p. 782). The law may sometime be harsh, but if it is so written and intended by the legislature, the courts have no recourse but to apply it." (Underscoring supplied)
> (Handbook on Statutory Construction by Ruperto G. Martin, 1972 edition, p. 61)

A review of the computation of the deficiency withholding tax assessment (Exh. 4, Respondent, p. 261, BIR, records; Exh. "B", Petitioner, p. 106, CTA records) will show that petitioner was imposed penalties for late payment of withholding tax on its remittances of royalty to third party only for the 1st and 2nd quarters of 1981. Insofar as its remittances of royalty to Smith Kline and

French International are concerned it was found late in payment of withholding tax only for the 2nd quarter. Meaning to say, except for the quarters just mentioned, petitioner paid its withholding tax-at-source as it falls due or as it is accrued in its books, for the rest of the quarters of the year 1981 (see Exhibit "10", Respondent, p. 338, BIR records). As to what was the reason why there was vacillation in its accounting policy or practice of remitting royalties and paying the corresponding withholding taxes- at source due thereon, petitioner failed to mention in its communications and/or letter - protests to the respondent. Not even in its pleadings and evidence, both oral and documentary, did petitioner explain why for some quarters of 1981 it followed the accrual principle and for other quarters of the same year, it followed the actual remittance principle. Petitioner's indecisiveness weakens its assertion that its duty to withhold arises upon actual remittance.

In assailing the validity of subject deficiency withholding tax assessment, petitioner invokes the ruling laid down by this Court in the Bayer case, which ruling states:

> "x x x that since the royalties in question could not be paid or remitted in 1972

> by petitioner Bayer Pharmaceuticals, Inc. to non-resident foreign corporation Bayer Aktiengessellschalft, Leverkusen Bayermerk due to Central Bank restrictions, petitioner was under no obligation to withhold and pay income tax-at-source on said royalties and therefore, it is not liable for the deficiency withholding tax-at-source assessment of respondent Commissioner of Internal Revenue x x x" (Underscoring supplied) (Decision, CTA Case No. 2846, "**Bayer Pharmaceuticals, Inc. vs. CIR,**" March 16, 1979, p. 22)

On the other hand, respondent supports its assessment with this Court's decision in the case of Construction Resources of Asia, Inc. In this case, this Court ruled that:

> "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 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 foreign lender.'"
> (Decision, CTA Case No. 3307, "**Construction Resources of Asia, Inc. vs. CIR,**" November 25, 1983, pp. 13-14)

Applying these two decisions to the case at bar, this Court believes that its ruling in the case of Construction Resources should apply. There being no restrictions on the part of petitioner, Smith Kline and French Overseas Co. (Phil. Branch), to remit the royalties abroad, there is no reason why the government should wait for it to actually remit the royalties before it could pay the withholding taxes due thereon. In fact, under Section 54(a) of the tax Code, it is the intention of the government to get hold immediately of the taxes deducted and withheld. Thus, it is so provided that:

> "Section 54. Returns and payment of taxes withheld at source.
>
> (a) x x x The Commissioner of Internal Revenue may, with the approval of the Minister of Finance, require these withholding agents to pay or deposit the taxes deducted or withheld at more frequent intervals when necessary to protect the interest of the Government. x x x" (Underscoring supplied)

At this juncture, it is worth mentioning that the decisions of this Court in both cases of Bayer and Construction Resources were affirmed by the Supreme Court. This Court wants to clarify that in the Bayer case, it upheld the actual remittance principle as there were Central Bank restrictions which were then blocking Bayer's remittances of royalties abroad. In the absence, therefore, of these restrictions, like in the instant case, (see par. 5, Exhibit "7", Respondent, p. 272, BIR records) the accrual principle as promulgated in the case of Construction Resources will be followed.

As regards the issue of deficiency sales tax on pharmaceutical products, petitioner argues that respondent resorted to formulas or ratios which produced presumptive amounts. Respondent, on the other hand, maintains that the adoption of formulas or ratios as a procedure or investigation was not "the source of disagreement between the respondent's examiner and the taxpayer" (last par., p. 10, Respondent's Memorandum, p. 228, CTA records). Respondent further stated that:

> "The disagreement arose when the respondent's examiner noted that the petitioner claimed a tax credit on sales tax paid on raw materials purchases which were not used in the manufacture of finished products for the year 1981. x x x" (Underscoring supplied)
> (par. 2, p. 12 Ibid, p. 230, CTA records)

Respondent is correct. The issue of the legality or propriety of using formulas or ratios is no longer the source of disagreement between respondent and petitioner. The latter is already estopped from assailing the propriety of using formulas or ratios as it already paid its 1981 deficiency sales tax on animal health products amounting to P5,731.05. In determining the allowable tax credits for the sales tax on said animal health products respondent's examiners applied the same ratios and formulas (Exhibit "6", Respondent, pp. 269-270, BIR records). If the use of said ratios and formulas really produces presumptive amounts then petitioner should have immediately questioned its deficiency sales tax assessment on animal health products. The fact that it willingly paid this assessment is an indication that it is agreeable to the findings of respondent's examiner as well as to the latter's use of subject ratios and formulas.

Moreover, it is not true that respondent's assessment for deficiency sales tax on pharmaceutical products was based on mere presumptions (p. 9, Petition). As borne by the B.I.R. records of the case and the exhibits presented by respondent's counsel, respondent's examiner based her findings on actual figures taken from petitioner's books of accounts and financial statements. Precisely, it was in the process of examining petitioner's books that respondent's examiner discovered that the former made use as tax credit sales tax paid on raw materials purchases being claimed for the year 1981 but which were not used in the manufacture of finished goods for the same year (Exhibit "6", Respondent, p. 269, BIR records).

Petitioner failed to convince this Court that it has successfully impugned the validity of the assessments of respondent Commissioner of Internal Revenue.

WHEREFORE, in view of all the foregoing, the instant petition for review is hereby dismissed. Petitioner is ordered to pay the amount of P133,180.59 representing deficiency withholding tax at source and P549,062.69 representing deficiency sales tax for the year 1981 or a total of P682,243.28, plus interests and surcharges.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Associate Judge

MANUEL K. GRUBA
Associate Judge

CERRTIFICATION

I hereby certify that this decision was reached after due consultation among 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