REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

May 28/70

O. T. KANG SCHOLARSHIP FOUNDATION,
Petitioner,

versus

CTA CASE NO. 1988

MISAEL VERA, in his capacity as Commissioner of Internal Revenue,
Respondent.

x - - - - - - - - - - x

D E C I S I O N

This is a claim for refund of the total sum of ₱5,706.90 paid by petitioner as income tax covering the years 1964 to 1967, inclusive.

The facts of this case appear in the following stipulation of facts:

> 1. That petitioner O.T. Kang Scholarship Foundation is a legal entity created by virtue of the Last Will and Testament of the late O.T. Kang, a Chinese citizen and a resident of Manila, and is administered by a Board of Trustees, composed of four (4) members appointed by the Court of First Instance of Manila in Special Proceedings No. 48369. Copies of the Last Will and Testament of the late O.T. Kang and the Order of the Court of First Instance of Manila dated January 8, 1962, in Special Proceedings No. 48369, appointing the members of the Board of Trustees, are hereto attached as Annexes "A" and "B" and made integral parts hereof;
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> 2. That in accordance with aforesaid Last Will and Testament of the

late O. T. Kang, 50% of the residue of his Estate was bequeathed to O. T. Kang Scholarship Foundation, the said properties being held in trust by the petitioner to be invested in such business or projects to be determined by the Board of Trustees, and that only the earnings of the said properties after deducting the expenses of administering the Foundation are to be used for scholarship of whatever kind as may be determined by the said Board of Trustees;

3. That in compliance with these purposes, petitioner invested its funds in various companies and corporations from which it derived income and paid the corresponding income tax for the years 1964, 1965, 1966 and 1967 as shown by the income tax returns attached as Annexes "C", "D", "E" and "F" and BIR Official Receipts as Annexes "G", "H", "I" and "J" and made integral parts of this joint stipulation of facts, in the following amounts:

1964 -	₱ 531.00	O.R. No. 3797890, April 19, 1965
1965 -	999.00	O.R. No. 5100630, April 14, 1966
1966 -	1,561.90	O.R. No. 0872604, April 14, 1967
1967 -	2,615.00	O.R. No. 2574006, April 13, 1968
	₱5,706.90	

4. That during the period from 1964 to 1967, various grants were given to different universities, colleges and schools throughout the Philippines which provided scholarships to certain deserving students as shown in the attached Statements of Cash Receipts, Disbursements and Other Assets marked as Annexes "K", "L", "M" and "N" and made integral parts of this joint stipulation of facts;

> 5. That in a letter of the petitioner dated August 20, 1968 and received by the respondent on September 3, 1968, petitioner claimed for a refund of a total amount of ₱5,706.90 as its income tax payment for the years 1964 to 1967. A copy of the letter dated August 20, 1968 is hereto attached as Annex "C" and made an integral part hereof. (Pp. 30-31, CTA rec.)

The issues presented to us by the parties are the following:

> 1. Whether or not petitioner's claim for refund of income taxes paid for the years 1964 and 1965 in the amounts of ₱531.00 and ₱999.00 respectively, had prescribed; and
>
> 2. Whether or not petitioner is an organization exempt from income tax under Section 27(k) of the Tax Code or is a trust under Section 56 of the same Code.

On the first issue of prescription, respondent's contention that petitioner's claim for refund of income taxes paid for the years 1964 and 1965 had already prescribed in accordance with Section 306 of the Tax Code is well taken. Petitioner paid its income taxes for the years 1964 and 1965 on April 19, 1965 and April 14, 1966 respectively. The instant action for refund was filed with this Court only on February 26, 1969.

It is obvious that from the date of payment of the 1964 income tax to the time of the filing of the petition for review with this Court, three (3) years, ten (10) months and seven (7) days had elapsed, and with regard to the year 1965, two (2) years, ten (10) months and twelve (12) days had elapsed. The rule on this point is stated by the Supreme Court in this language:

> . . . We have repeatedly held that the claim for refund with the Bureau of Internal Revenue and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period. "If, however, the Collector takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector." . . . (Comm. of Int. Rev. v. Victorias Milling Co., Inc. et al., G.R. No. L-24108, January 3, 1968.)

Consequently, petitioner's claim for refund of the taxes paid for the years 1964 and 1965 had already prescribed. However, with regard to the years 1966 and 1967, petitioner's claim for refund of the taxes paid for said years is still within the reglementary period.

Anent the second issue, petitioner's claim for refund hinges on its interpretation that it is an exempt organization under Section 27(k) of the Tax Code which provides:

> SECTION 27. Exemptions from tax on corporations.—The following organizations shall not be taxed under this Title in respect to in-

come received by them as such -

x x x x x

> (k) Corporation or association organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this Title. (As amended by sec. 5, Republic Act No. 82.)

Respondent, on the other hand, disputes petitioner's pretension, stating that petitioner is not a "corporation or association" within the contemplation of Section 27, but a trust falling under Section 56 of the Tax Code. Respondent further urges that even if petitioner were to be considered as an organization falling under Section 27 of the Tax Code, still it fails to meet the essential requisites for tax exemption under said Section 27(k).

In Bok et al v. McCaughan, 42 F 2d 618, involving a similar factual background as the case at bar, the Court said:

> . . . The statute defines the scope and meaning of corporation, viz.: "The term 'corporation' includes associations," and, taking the dictionary definition of an association as a "union of persons in a company * * * for some particular purpose," we are of the opinion that Congress by this comprehensive and inclusive word meant to include unincorporated bodies constituted by the association of men

> to carry on some common, charitable or educational purpose. In the present case, the trustees of the foundation created by the indenture were so associated in order to carry out the common purpose therein expressed; . . . And not only do the trustees constitute an association within the meaning of the statute, but this trust is a "foundation" in the accepted sense of that term. . . . (Underscoring supplied.)

In James Sprunt Benevolent Trust, et al v. Comm. of Internal Revenue, 20 BTA 19, we find the following excerpt:

> The respondent, relying upon certain dicta in James D. Williamson et al., 7 B. T. A. 1033, contends that the petitioner is neither a corporation, community chest, fund or foundation, but that it is a "trust" and is therefore not entitled to exemption under the abovequoted section of the statute. We are of the opinion that there is no merit in this contention. Manifestly, a fund or foundation may be a trust. If the trust is organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, and no part of the net earnings of such trust inures to the benefit of any private stockholder or individual, the trust is exempt. . . . The mere fact that the fund or foundation takes the form of a trust does not bar it from exemption. (Underlining ours.)

And Mertens' Law of Federal Income Taxation also says the following:

> Although "trusts" are not specifically referred to, a trust which can qualify as a community fund or foundation is exempt from taxation. . . (Mertens, Law of Federal Income Taxation, Vol. 6, Sec. 34.16, p. 27.)

We gather from the foregoing authorities that the comprehensive and all inclusive term "association" includes trusts when the latter takes the form of an association of men to carry on some common charitable or educational purpose. We further gather that a trust may be exempt from taxes if its purpose and activities are of the exempt category. The petitioner is so organized that, although it is in the form of a trust, it is nevertheless an association of men to carry on some common charitable purpose. If its purpose and activities qualify it for exemption under the terms of Section 27(k) of the Revenue Code it should be entitled to enjoy the exemption. Its purpose and activities will shield petitioner from the operation of Section 56 of the Revenue Code governing trust and place it within the protective confines of Section 27(k). It remains then to inquire whether petitioner's purpose and activities are within the orbit of Section 27(k).

The purpose and activities of petitioner is stated in the Will in this wise:

> "I direct that the amount pertaining to the Foundation abovementioned shall be invested in such projects and/or in such businesses as my Board of Trustees shall determine and only the earnings of the said properties; after deducting expenses of administering the foundation; shall be used for scholarships of whatever kind as may be determined by my Board of Trustees. The purpose of this proviso is to insure the continuance of the Foundation in perpetuity, if possible." (Page two.)

The same activities are explained in petitioner's memorandum as follows:

> . . . Under this provision of the Will, the petitioner was required to invest the funds in such projects and in such business as they may determine and that only the earnings of the said properties after deducting the expenses of administering the Foundation shall be used for scholarships. This is actually being done by the Board of Trustees in this case. In the course of the administration of the properties of the estate as directed by the testator they invest said estate in several business concerns as a consequence of which the estate earned income, the particular of which for the years in question are indicated in the income tax return (Annexes "C", "D", "E" and "F"). The Board of Trustees as shown in Annexes "K", "L", "M" and "N" which is a record of statement of cash receipts and disbursements of the funds of the Foundation. <u>All that the Board does,</u>

> therefore, with respect to the earnings of the Foundation is to collect the said income, invest part of it to other profitable business concerns. The rest of the said income were turned over to various schools and colleges like the University of the Philippines and catholic educational institutions, all of which were mentioned in Annexes "K", "L", "M" and "N" in the form of scholarships to poor but deserving students. The Court considering the nature of these institutions of learning, may take judicial notice of the fact that they themselves are exempt from income tax. (Pp. 3-4; underscoring supplied.)

Petitioner was obviously created not for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by law. The authority of the Trustees in the Will is to invest in such business or projects as may be determined by the trustees, broad and varied activities, and to spend for scholarships only the profits thereof. Note that the authority does not prohibit the subsequent sale of acquired assets and their re-investment, and neither does it prohibit the investment of profits and income. What it prohibits is the use of the original assets for scholarship, limiting the amounts that can be used for this purpose to the profits only. Thus, pursuant to this authority, the

Board of Trustees did in fact invest the money of the estate in stocks in several business concerns, to wit, Lepanto Consolidated Mining Company, Meralco Securities, Philex Mining Corporation, Philippine Tobacco Flue Curing and Redrying Corporation, San Miguel Corporation, Bookmark, Inc. and others. And it did not use all the income or profits from these investments for scholarships but used only a part thereof, reinvesting the rest to increase the assets of the Foundation, as stated in petitioner's Memorandum. Under these facts, it cannot be said that petitioner was created exclusively to hold title to property, collecting income thereon, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from taxes as provided in Section 27(k) of the Revenue Code.

In the case of Roche's. Beach, Inc. v. Comm. of Int., Rev., 96 F.(2d) 776, the Court said:

> In our opinion the petitioner cannot bring itself within section 103(14), 26 U.S. C.A. § 103(14) and note, as a corporation "organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses," to an exempt organization. Assuming that the charitable purpose for which it was organized may be found from evidence outside the corporate charter, the purpose of creating the

the petitioner was broader than merely to have it hold title to property and collect income therefrom. It was to operate the testator's bathing beach business, as well as to collect rentals from the houses and garage. Even if the latter was within subdivision 14, we do not think the operation of the bathing beach can be so held. This business was quite extensive. There were 3,000 bath houses to be let to transient bathers; 34 employees were engaged during the summer; as many as 6,000 persons might patronize the beach on pleasant days; suits and towels were rented; caps, belts and shoes were sold; and restaurant, soda and candy concessions were given out. In 1931 income from the beach property, exclusive of rentals from the other real estate, was more than $85,000, and expenses, omitting taxes, ran to nearly $40,000. <u>To call the operation of a business of these proportions merely "holding the title" and "collecting income therefrom" would be a forced construction of the language of the statute</u>. Gagne v. Hanover Water Works Co., 1 Cir., 92 F.2d 659, is directly in point as to the non-availability of the exemption of section 103(14). That case involved a water company, whose capital stock was owned by a college and a village, both of which were exempt from income tax. In denying exemption to the water company, the court said (92 F. 2d 659), at page 661): "The powers granted by its charter and the acts done under them disclose that it was authorized to engage and engaged in business activities like any domestic business corporation operating a water works plant for profit. <u>It surely was not organized for the exclusive purpose of holding title to property and in fact it did not limit its activities to such purpose</u>. (Underlining supplied.)

In the case of Gagne v. Hanover Water Works, 92 F.2d 659, the Court said:

> Furthermore the taxpayer corporation does not fall within the provisions of the exemption statute (section 103/14/) for it was not organized for the purpose of collecting and paying over its entire income, less expenses, to an organization exempt from paying an income tax, and in fact did not pay over its entire income, less expenses; but from year to year retained a part of its income and built up a substantial reserve fund. (Underscoring supplied.)

Again, in the case of Davenport Foundation, TC Memo. Op. Dkt. 10427 (Dec. 24, 1947), it was held that:

> . . . a non-profit corporation organized to act as trustee under charitable trusts, was held not to qualify as exempt under Sec. 101 (14) of the Code where out of its total income of $38,484, only $20,000 was actually distributed to corporations or individuals properly classified as exempt from tax. (Mertens, Law of Federal Income Taxation, Vol. 6, Sec. 34.16, p. 27.)

WHEREFORE, petitioner's claim for refund is hereby denied for lack of merit. With costs against petitioner.

SO ORDERED.

Quezon City, May 30, 1970.

RAMON L. AVANCEÑA
Associate Judge

WE CONCUR:

ROMAN M. UMALI
Presiding Judge

ESTANISLAO R. ALVAREZ
Associate Judge