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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PHILIPPINE AIRLINES, INC. (PAL),
Petitioner,

- versus -

C.T.A. CASE NO. 5825

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 05 2001

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DECISION

Before Us for consideration is a Petition for Review filed by the Petitioner on April 23, 1999, seeking for a refund of the amount of P1,769,860.18, representing alleged erroneously collected overseas communications tax.

Culled from the records are the following antecedent facts:

Petitioner is a domestic corporation organized and existing under and by virtue of Philippine laws.

Case at bar stemmed from the alleged erroneous collection of 10% overseas communications tax from the Petitioner by the Philippine Long Distance Telephone Company (PLDT for brevity) arising from the former's overseas telephone calls amounting to P1,769,860.18. The said amount was allegedly remitted by PLDT to the Bureau of Internal Revenue.

Believing as it does that it is entitled to the refund of the paid overseas communication tax by virtue of its franchise, more particularly Section 13 of PD 1590, Petitioner, through its Assistant Vice-President, Revenue Operations and Tax Services

Atty. Edgardo P. Curbita, filed an administrative claim for refund with the Bureau of Internal Revenue on November 20, 1998 (Exhibit "B"). Out of the amount claimed under this request for refund, P953,911.81 was alleged in the Petition to be erroneously collected covering the billing periods starting from January 1997 to March 1998.

On March 26, 1999, on the basis of the same Presidential Decree, Petitioner filed a supplemental written request for refund involving the amount of P815,948.37 representing additional 10% overseas communications tax for billing periods starting January 1997 through November 1998.

Unable to obtain an immediate relief from the Respondent Bureau, Petitioner elevated its case to this Court on April 23, 1999 citing as ground therefor its stance a quo.

On June 18, 1999, Respondent filed his Answer to the Petition for Review and by way of Special and Affirmative Defenses interposed the following:

> "5. The "in lieu of all taxes" provision in the petitioner's franchise applies only if petitioner paid the taxes under subsections (a) and (b) of Presidential Decree No. 1590 and since petitioner is not paying any of the said taxes, then no such tax can be applied in lieu of the 10% overseas communications tax, hence, petitioner is subject thereto and therefore not entitled to the refund claimed;
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> 6. Petitioner's claim has partially, if not totally, prescribed;
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> 7. The petition states no cause of action as it does not allege the date/s when the taxes sought to be refunded were actually paid;
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> 8. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to the refund and failure to sustain the burden is fatal to the action for tax refund;
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> 9. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable; and
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> 10. Well-settled is the rule that claims for refund are construed strictly against the claimants since it partakes of the nature of an

exemption from taxation. (**Resins, Inc. vs. Auditor General, 75 SCRA 754, 1968**)"

On June 28, 2001, this case was considered submitted for decision sans the memorandum of the Respondent.

As stipulated by the contending parties, the issues to be resolved are:

a. Whether or not Petitioner PAL is entitled to the refund of the 10% overseas communications tax prayed for;

b. Whether or not the "in lieu of all taxes" provision in the Petitioner's franchise applies only if Petitioner paid the taxes under subsections (a) and (b) of Presidential Decree No. 1590;

c. Whether or not Petitioner's claim has partially, if not totally prescribed;

d. Whether or not petition states no cause of action as it does not allege the dates when the taxes sought to be refunded were actually paid.

In the main, Petitioner relies heavily on the provisions of its franchise which exempts it from the payment of other kinds of taxes other than basic corporate income tax or franchise tax which it is required to pay at the end of the taxable year whichever of the two will result in a lower tax, thus:

> "**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 to 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
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> (b) A franchise tax of two per cent (2%) of the gross revenues derived by the grantee from all sources, without distinction as to transport or non-transport operations; provided that with respect to international air-transport

> service, only the gross passengers, mail, and freight revenues from its outgoing flights shall be subject to this tax.
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> The tax paid by the grantee under either of the above alternatives shall be in lieu of all other taxes, duties, royalties, registration, license, and other fees and charges of any kind, nature, or description imposed, levied, established, assessed, or collected by any municipal, city, or provincial, or national authority or government agency, now or in the future x x x."

Respondent, on the other hand, asserts that Petitioner is not entitled to the refund sought since the phrase "in lieu of all taxes" provision in the Petitioner's franchise may apply only if Petitioner paid the taxes under either of sections (a) and (b) of P.D. No. 1590 and inasmuch as Petitioner did not pay any of the said taxes, then no such tax can be applied in lieu of the 10% overseas communications tax.

After considering carefully the contending parties' respective arguments and the applicable jurisprudence on the matter, We find for the Respondent.

In the case of **Philippine Airlines, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 5824, promulgated on June 13, 2001,** this Court has had the occasion to rule on the issue of whether or not the claimant is entitled to refund despite the fact that it did not pay either the corporate income tax or the 2% franchise tax, thus:

> xxx xxx, the Petitioner's franchise clearly provides that "in consideration of the franchise and rights hereby granted, the grantee shall pay to the Philippine Government during the life of this franchise" either 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 a franchise tax of two percent (2%) of the gross revenues derived by the grantee from all sources.
>
> From the foregoing, it is quite unequivocal that Petitioner is required under its franchise to pay a franchise tax of two percent of its gross revenues without any further qualification that it is exempt from such when it is at a

net loss position at the end of the taxable year. Under the franchise, it is mandatory that the Petitioner must pay its franchise tax of two percent (2%) or to pay its corporate tax so that it may avail of the incentives provided under the last paragraph that "the tax paid by the grantee under either of the above alternatives shall be in lieu of all other taxes, duties, royalties, registration, license and other fees and charges of any kind x x x.", regardless of whether or not it suffered a net loss during a particular taxable year.

The phrase "in lieu of" means instead of, in place of; or in substitution for (Black vs. Barnes, 46 P. 2d 625, 626, 142 kan. 361; Rutherland vs. Oroville-Wyandotte Irr. Dist., 22 P. 2d 505, 218 Cal. 242; Words and Pharses, Vol. 21, p. 472). The "in lieu of" implies the existence of something for which a substitution is being made. Analyzing, therefore, the wordings of the franchise more particularly the last paragraph of Section 13 of PD 1590, it is clear that Petitioner has the option to pay either a corporate income tax or 2% franchise tax to avail of the incentive. Had Petitioner paid the 2% franchise tax, then the final withholding taxes withheld may be considered as "other taxes" as it falls under income tax. However, should it choose to avail of the first alternative, then final withholding tax on income may not be considered as "other taxes." In other words, should PAL opt to avail of the first alternative, that is, to pay corporate income tax, payment of final withholding tax is deemed part of its corporate income tax liability, therefore not refundable."

Clearly from the foregoing, the very franchise itself requires payment of either of the two taxes by the Petitioner so that it can avail of exemptions from other kinds of taxes. Since Petitioner did not pay either of the two taxes, accordingly, the Petition must fail.

WHEREFORE, in view of all the foregoing, the Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

I CONCUR:

ERNESTO D. ACOSTA
Presiding 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