REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ABS-CBN BROADCASTING CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5060

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
APR 08 1997

x - x

DECISION

This is a judicial claim for the refund of alleged erroneously collected franchise tax in the original amount of P121,277,319.18 for the period covering January 1991 to the third quarter of 1993. This amount was later increased to P139,891,753.63 in an amended petition filed on September 29, 1995, which also extended the coverage of the claim to the fourth quarter of 1993.

Petitioner is a domestic corporation (formerly known as Bolinao Electronics Corporation) which existed under a franchise granted by virtue of Republic Act Nos. 511 and 512, as amended by Republic Act Nos. 5730 and 5733, respectively. It is engaged in the business of radio and television broadcasting.

Petitioner filed a claim for refund in a letter received by the office of respondent on November 25, 1993, alleging that for the period January 1991 to the second quarter of 1993 it paid a total amount of P114,451,449.63 as franchise tax, detailed as follows:

Television - P108,224,722.18
Radio - P 6,226,727.45

The said claim also included the payment of the franchise tax in the amount of P10,256,031.00 corresponding to the third quarter of 1993.

Petitioner based its claim for refund on this Court's decision entitled, Republic Broadcasting System Inc. vs. Commissioner of Internal Revenue, CTA Case No. 4830, July 27, 1993, which ruled that by virtue of Presidential Decree No. 576-A, all existing radio and television franchise were repealed and terminated, hence during the period covered by the present claim, petitioner herein was not existing under a franchise, thus, not liable for franchise tax. This is the reason why the payments made during the said period are now being refunded by the petitioner. Hence, the Court, in the aforementioned Republic Broadcasting case, which was decided in favor of the petitioner, cancelled the deficiency franchise tax assessments on the ground that petitioner therein did not exist under a franchise during the period covered by the assessment. Petitioner, herein, now claims to be in a similar situation as Republic Broadcasting System, Inc., because it is also engaged in radio and television broadcasting, thus, it must be given the same treatment in the light of the aforecited case decided by this Court.

As as alternative cause of action, petitioner asserted that if this Court decides that it is still liable for the franchise tax then its tax rate should only be 3% of its gross receipts and not 5% as originally paid in the light of Section 4 of Republic Act 511, as amended by Republic Act 5730, the law granting to them their franchise, in relation to Section 8 of Republic Act 7252, which granted Republic Broadcasting a new franchise, the two sections are quoted hereunder thus:

R.A. No. 511, as amended by R.A. No. 5730

"Section 4. In the event of any competing individual, partnership or corporation receiving from the Congress a similar temporary permit or franchise in which there shall be any term or terms more favorable than those herein granted or tending to place the herein grantee at any disadvantage, then such term or terms shall, *ipso facto*, become a part of the terms hereof and shall operate equally in favor of the grantee as in the case of said competing individual, partnership or corporation."

R.A. No. 7252

"Section 8. *Tax Provisions.* - The grantee, its *successors* or assigns shall be liable to pay the same taxes on their real estate, buildings and personal property exclusive of this franchise, as other persons or corporations are now or hereafter may be required by law to pay. In addition thereto, the grantee, its *successors* or assigns shall pay a franchise tax equivalent to three percent (3%) of all gross receipts of the radio/television business transacted under this franchise by the grantee, its successors or assigns and the said percentage shall be in lieu of all taxes on this franchise or earnings thereof: x x x."

It is petitioner's analysis that the aforequoted sections taken together will lead to a conclusion that it shall only be liable for the 3% franchise tax on its gross receipts from radio and television broadcasting activities, that is, in the event this Court decides that it is still liable for the franchise tax.

Respondent remained silent on this claim for refund so petitioner filed a petition for review with this court on January 18, 1994 and an amended petition on September 29, 1995, reiterating all of the arguments presented in the administrative level.

The defense interposed by the respondent centers on the argument that while the aforementioned Section 6 of Presidential Decree No. 576-A revoked all existing franchises; nonetheless, the same was restored by the license later issued by the National Telecommunications Commission and the Secretary of Transportation and Communication in lieu of the franchise, which had the effect of reinstating their respective franchises (p. 59, Answer, CTA rec.). As a matter of fact, they went on to operate in 1986 after their franchise has been revoked in 1981. Thus, these broadcasting firms, including herein petitioner, are still liable for the franchise tax.

The issue presented before Us is whether or not petitioner is liable for franchise tax under Section 117 of the Tax Code, for the periods covering the January 1991 to the fourth quarter of 1993.

It is imperative at this point to quote the different provisions of law that centers on the present controversy.

National Internal Revenue Code:

"Section 117. Tax on franchises. — Any provision of general or special law to the contrary notwithstanding, there shall be levied, assessed and collected in respect to all franchises, upon the gross receipts from the business covered by the law granting the franchise, a tax in accordance with the schedule prescribed hereunder.

(a)	On electric utilities, city gas and water supplies	Two (2%) per cent
(b)	On telephone and/or telegraph systems, and radio broad-casting stations	Three (3%) per cent
(c)	On other franchises	Five (5%) per cent

The grantee shall file the return with, and pay the tax due thereon to, the Commissioner of Internal Revenue or his duly authorized representative in accordance with the provisions of Section 125 of this Code, and the return shall be subject to audit by the Bureau of Internal Revenue, any provision of any existing law to the contrary notwithstanding." (As amended by E.O. 72)

P.D. 576-A

"Section 6. All franchises, grants, licenses, permits, certificates or other forms of authority to operate radio or

> television broadcasting systems <u>shall terminate on December 31, 1981.</u> Thereafter, irrespective of any franchise, grant, license, permit, certificate or other forms of authority to operate granted by any office, agency or person, no radio or television station shall be authorized to operate without the authority of the Board of Communications and the Secretary of Public Works and Communications or their successors who have the right and authority to assign to qualified parties frequencies, channels or other means of identifying broadcasting systems; Provided, however, that any conflict over, or disagreement with, a decision of the aforementioned authorities may be appealed finally to the Office of the President within fifteen days from the date the decision is received by the party in interest."

This Court had the occasion to pass upon an analogous controversy in the case entitled **Republic Broadcasting System, Inc. vs. Commissioner of Internal Revenue**, CTA Case No. 4630, July 27, 1993, where it was ruled that the aforequoted P.D. 576-A terminated all existing franchise for radio and television broadcasting and that the license issued thereafter by the National Telecommunications Commission did not have the effect of restoring the previous franchise, and we quote, thus:

> "Respondent's argument that the authority or license issued by the Board of Communications and the Secretary of Public Works and Communications should be considered as franchise does not hold water. A license is a license and a franchise, a franchise, this Court cannot see two sides of a coin at a time. There has to be a demarcation line to this effect. A franchise is a vested right

is a mere personal privilege and is revocable. In a franchise, the rights, privileges and obligations of both the contracting parties (the franchise holder and the state) are well defined and serves as the contract between them. Such matters like extent of operation, area of responsibilities, franchise tax to be paid to the state, and tax exemption privileges are recited."

The above-quoted ruling was later affirmed by the Court of Appeals in the case entitled, Commissioner of Internal Revenue vs. Republic Broadcasting System, Inc., and Court of Tax Appeals, CA-G.R. SP No. 32831, September 19, 1994, when it declared, thus:

"We agree with the findings of the respondent CTA that P.D. 576-A terminated all existing franchises including that of the petitioner as of December 31, 1981 and that the franchise of respondent RBS was not revived until it accepted the new Congressional franchise granted to it (R.A. No. 7252) on March 20, 1992. Petitioner's contention that respondent RBS should still be liable for franchise taxes for the third and fourth quarters of 1987 for the reason that at that time respondent RBS continued to operate by virtue of administrative licenses and permits is erroneous because it blatantly disregards the significant distinction between a legislative franchise and licenses/permits issued by an administrative agency, such as the National Telecommunications Commission (NTC). Thus, as correctly pointed out by the respondent CTA, 'A franchise is a right or privilege granted by the sovereignty to one or more parties to do some act or acts, which they could not do without this grant from the sovereign power, a privilege which emanates from the sovereign power of the state or government a branch of the sovereign power of the state, subsisting in a person or corporation by grant from the state.' (17 Words and Phrases 471, 482, 469)

A "licensee" on the other hand, confers no right on estate nor vested interest, nor does it constitute a binding contract between the parties, but it is a mere leave to be enjoyed as matter of indulgence at the will of the party granting it. It is in no sense a contract between the state and the licensee, but is a mere personal permit, neither transferable nor vendible (25 Words and Phrases 150, 174).

Consequently, the following finding of the respondent CTA clearly becomes ineluctable:

Respondent's argument that the authority or license issued by the Board of Communications and the Secretary of Public Works and Communications should be considered as franchise does not hold water. A license is a license and a franchise, a franchise, this court cannot see two sides of a coin at a time. There has to be a demarcation line to this effect. A franchise is a vested right protected by the Constitution while a license is a mere personal privilege and is revocable. (Decision, pp. 8-9)"

In the light of the aforesaid appellate ruling of the Court of Appeals, this court rules in favor of the petitioner.

Presidential Decree No. 576-A terminated all existing television and radio franchises as of December 31, 1981. Therefore the original franchise of petitioner under Republic Act Nos. 511 and 512 was included among those whose existence ended by virtue of said law. It was only on March 3, 1995 that petitioner was again granted a new franchise under Republic Act Nos. 7966. So during the periods covered by the claim for refund, from the January 1991 to the fourth quarter of 1993, petitioner was allowed to operate by virtue of a license issued on a yearly basis by the National Telecommunications Commission. Not having existed under a franchise during said period, petitioner could not be made liable to pay the franchise tax under Section 117 of the Tax Code.

After a careful study of the evidence presented by the petitioner to prove the amount claimed, this court excluded several of the amounts mentioned by the petitioner for two reasons; namely, prescription and petitioner's failure to include certain amounts in its original claim for refund with the Bureau of Internal Revenue.

This petition for review was filed on January 18, 1994. The date of filing is crucial as it will have the effect of excluding the first, second and third quarters of 1991 in the final computation of the amount to be refunded because the dates of payment of the taxes due for these quarters certainly fall outside the two-year prescriptive period provided under Section 230 of the Tax Code, which clearly provides:

"SEC. 230. 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 excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue; 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 suit or proceeding shall be begun 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 therefore, 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." (should read "tax".)

The Supreme Court has made this principle clear in the case of Commissioner of Internal Revenue vs. Victorias Milling Company, Inc., and The Court of Tax Appeals, 22 SCRA 12, when it ruled:

> "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'."

We have also excluded the amount corresponding to the fourth quarter of 1993 because such an amount was not included in its original claim for refund filed with the

Bureau of Internal Revenue. It was only in its amended petition filed with this Court, that petitioner decided to include this particular quarter in the hope that it will merit consideration in our final decision. Unfortunately, the provision found in Section 230 of the Tax Code (supra) works against the ploy of the petitioner. Section 230 of the Tax Code expressly declares that a written claim for refund is a pre-requisite before any Court action can be resorted to by the petitioner. The rationale for such a requirement was best expressed by the Supreme Court in the case of Santiago M. Bermejo vs. The Collector of Internal Revenue, 87 Phil. 96, when it declared, thus:

> "The law clearly stipulates that after paying the tax, the citizen must submit a claim for refund before resorting to the courts. The idea probably is, first, to afford the collector an opportunity to correct the action of subordinate officers; and second, to notify the government that such taxes have been questioned, and the notice should then be borne in mind in estimating the revenue available for expenditure."

The letter claim for refund filed by the petitioner in the office of the respondent, dated November 25, 1993 (Exhibit "M"), made mention only of the periods from January 1991 to the third quarter of 1993. It did not include the fourth quarter of 1993, so there is no reason why we should also include the same in our final computation. No evidence was presented to show that another claim for refund was filed by the petitioner to cover the last quarter of 1993.

In conclusion, the petitioner is still entitled to the amount of P101,696,631.11 representing payments of franchise taxes made during the fourth quarter of 1991 to the third quarter of 1993, computed as follows:

PERIOD	EXHIBITS	TELEVISION	RADIO	TOTAL
4TH QUARTER 1991	D, D-1, D-2, D-3	P10,535,695.30	P 746,518.62	P 11,282,213.92
1ST QUARTER 1992	E, E-1, E-2, E-3	11,287,316.03	525,092.89	11,812,408.92
2ND QUARTER 1992	F, F-1, F-2, F-3	10,166,994.68	762,090.79	10,929,085.47
3RD QUARTER 1992	G, G-1, G-2, G-3	11,105,521.68	447,610.93	11,553,136.81
4TH QUARTER 1992	H, H-1, H-2, H-3, H-4	10,944,519.54	565,119.17	11,509,638.71
1ST QUARTER 1993	I, I-1, I-2, I-3	11,423,672.16	431,396.04	11,855,068.20
2ND QUARTER 1993	J, J-1, J-2, J-3	10,231,407.74	966,978.30	11,198,386.04
3RD QUARTER 1993	K, K-1, K-2, K-3	9,239,209.00	1,016,822.00	10,256,031.00
		P95,614,396.09	P6,082,235.04	P101,696,631.60

WHEREFORE, in view of the foregoing, respondent Commissioner of Internal Revenue is hereby ordered to refund in favor of the petitioner, the amount of P101,696,631.60, representing erroneously paid franchise tax covering the periods from the fourth quarter of 1991 to the third quarter of 1993.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

I CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

C E R T I F I C A T I O N

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

ERNESTO D. ACOSTA
Presiding Judge