REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

COMPANIA GENERAL DE TABACOS DE FILIPINAS (Philippine Offices)
Petitioner,

- versus -

C.T.A. CASE No. 4141

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

11/17/93

D E C I S I O N

Before this Court is a Petition for Review filed by the petitioner, a foreign corporation duly licensed by Philippine laws to engage in business through its branch office, seeking a refund of the total amount of P1,768,931.05, representing the alleged overpaid branch profit remittance taxes during the years 1980 to 1985.

On February 4, 1986, petitioner filed a request before the respondent Commissioner of Internal Revenue for the refund of the sum of P1,447,295.62, as alleged overpaid branch profit remittance taxes for the years 1980 to 1983, computed as follows:

Year Earned	Branch Profits (Gross)	Remittance Tax Paid	Date Paid	Branch Profits (Actually Remitted)	Income Subjected to Final Tax	Correct Remittance Tax	Overpaid Remittance Tax
1980	P11,266,175.31	P1,689,926.29	2/07/84	P 9,576,249.02	P 782,042.92	P1,319,130.92	P 370,795.37
1981	11,839,681.41	1,775,952.21	4/10/85	10,063,729.20	287,257.74	1,466,470.72	309,481.49
1982	10,663,298.95	1,599,494.84	4/10/85	9,063,804.11	305,618.33	1,313,727.86	285,766.98
1983	17,860,260.11	2,679,039.01	4/22/85	15,181,221.10	529,306.23	2,197,787.23	481,251.78
TOTAL	P51,629,415.78	P7,744,412.35		P43,885,003.43	P1,904,225.22	P6,297,116.73	P1,447,295.62

Thereafter or on April 8, 1987, petitioner filed another request for the refund of P321,635.40, this time for the years 1984 and 1985, details of which are shown below:

Year Earned	Branch Profits (Gross)	Remittance Tax Paid	Date Paid	Branch Profits (Actually Remitted)	Correct Remittance Tax	Overpaid
1984	P 4,614,723.34	P 692,208.49	8/04/86	P 3,922,514.85	P 588,377.24	P103,831.25
1985	9,680,184.96	1,452,027.75	8/04/86	8,228,157.25	1,234,223.60	217,804.15
TOTAL	P14,294,908.30	P2,144,236.24		P12,150,672.10	P1,822,610.84	P321,635.40

Since respondent has not acted on petitioner's request, the latter filed the instant petition on April 9, 1987 to interrupt the running of the prescriptive period for claims for refund.

The issues raised before this Court are:

1. Whether or not the right to claim for refund of payments has already prescribed;

2. Whether or not the petitioner is legally entitled to the refund of the total amount of P1,768,931.05 on alleged excess branch profit remittance taxes paid during the years 1980 to 1985.

Respondent, in his answer, and by way of special and affirmative defenses, alleges among others, that "the right to claim for refund of payments made prior to April 9, 1985 has already prescribed." (Answer, p. 2; C.T.A. Records, p. 30).

Section 230 of the Tax Code provides:

> "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; 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 years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment xxx." (Underscoring supplied)

It is evident that payment made prior to April 9, 1985, had already prescribed. The profit remittance tax corresponding to branch profit for 1980 was paid on February 7, 1984. When this case was filed on April 9, 1987, more than two years have lapsed from the time the payment of the tax was made.

This Court is now left to decide on the correct branch profit remittance taxes paid during the period from 1981 to 1985.

Petitioner contends that the correct tax base for computing the branch profit remittance tax is the profit actually remitted abroad net of income already subjected to final tax. To support its contention, petitioner brought to the attention of this Court, B.I.R. ruling dated January 21, 1980 and the case of **Commissioner of Internal Revenue vs. Burroughs Limited** (142 SCRA 324) wherein the Supreme Court held that:

> "In a Bureau of Internal Revenue ruling dated January 21, 1980 by then Acting Commissioner of Internal Revenue Hon. Efren I. Plana the aforequoted provision had been interpreted to mean that the 'tax base upon which the 15% branch profit remittance tax xxx shall be imposed xxx (is) the profit *actually remited* abroad and not on the total branch profits out of which the remittance is to be made.' The said ruling is hereinbelow quoted as follows:
>
> 'In reply to your letter of November 3, 1978, relative to your query as to the tax base upon which the 15% branch profits remittance tax provided for under Section 24 (b)(2) of the 1977 Tax Code shall be imposed, please be advised that the 15% branch profit tax shall be imposed on the branch profits actually remitted abroad and not on the total branch profits out of which the remittance is to be made.
>
> Please be guided accordingly.'
>
> Applying, therefore, the aforequoted ruling, the claim of private respondent that it made an overpayment in the amount of P172,058.90 which is the difference between the remittance tax actually paid of P1,147,058.70 and remittance tax that should have been paid

of P974,999.89 computed as follows-

Profits *actually remitted*	P6,499,999.30
Remittance tax rate	15%
Remittance tax due	P 974,999.89

is well taken."

Respondent, on the other hand, contends that the case of **Burroughs** (supra) is not applicable to the instant case because of Revenue Memorandum Circular No. 8-82, dated March 17,1982, which states that since the "tax is imposed and collected at source, necessarily the tax base should be the amount actually applied for by the branch with the Central Bank of the Philippines as profit to be remitted abroad."

The applicable provision of the Tax Code is Section 24 (b)(2)(ii) (now Section 25(a)(5)) which provides:

> "**Tax on branch profits remittances** - Any profit remitted by a branch to its head office shall be subject to a tax of 15% (except those registered with the Export Processing Zone Authority): **Provided,** That any profit remitted by a branch to its head office authorized to engage in petroleum operations in the Philippines shall be subjected to tax at 7-1/2%. In both cases, the tax shall be collected and paid in the same manner as provided in Sections 51 and 52 of this Code xxx."

The question now lies on what particular B.I.R Ruling or Circular is applicable to the instant case. Whereas petitioner relies on B.I.R. Ruling dated January 21, 1980, respondent is of the opinion that Revenue

Memorandum Circular No. 8-82 dated March 17, 1982 should apply.

Revenue Memorandum Circular No. 8-82 is quoted hereunder in full:

"SUBJECT: Classification as to the proper tax base in the computation of the 15% branch profit remittance tax.

To: All Internal Revenue Officers and Others Concerned.

In BIR Ruling No. 016-79 dated April 18, 1979 anent the 15% branch profit remittance tax as an income tax imposed under Section 24(b)(2), National Internal Revenue Code of 1977, as amended, this Office ruled that 'xxx the 15% branch profit remittance tax should be based on the amount of P1,504,330.43 representing profit derived from the disposition of the shares, 15% of which is P225,649.57.'

It will be noted that the basis of computation in accordance with the ruling is profit without deduction for the 15% tax.

On January 21, 1980, this Office, in another ruling issued in answer to a query as to the tax base upon which the 15% branch profit remittance tax should be imposed held that 'the 15% branch profit remittance tax shall be imposed on the profit actually remitted abroad and not on the total branch profit out of which the remittance is to be made.'

As the latter ruling seems to have given rise to some misconception that it modified BIR Ruling No. 016-79 with respect to the manner of computation of the 15% branch profit remittance tax, this Office issued a clarificatory ruling on October 23, 1981 explaining -

The above ruling (of January 21,

1980) merely emphasized the distinction between the total branch profit which is remittable and that portion of the branch profit actually remitted without deduction on account of the tax to be paid.

The phrase 'any profit remitted abroad' should be construed to mean the profit to be remitted. Hence, there must be an actual remittance, as distinguished from profit which is remittable.

To give an example: If the total branch profit is P115,000.00 but the amount to be remitted is P100,000.00, then tax base should be P100,000.00.

Moreover, the 15% profit remittance tax imposed by Section 24(b)(2) of the Tax Code is an income tax, it is therefore clear that the same is non-deductible from the gross (profit) income. Inasmuch as the tax is an exaction on profit realized for remittance abroad, the deduction thereof as an expense is not sustained by law nowhere in Section 30 of the Tax Code is it provided that the same is deductible. Besides deductions from gross income are masters of legislative grace, what is not expressly granted by the law is deemed withheld.'

Considering that the 15% branch profit remittance tax is imposed and collected at source, necessarily the tax base should be the amount <u>actually applied</u> for by the branch with the Central Bank of the Philippines as profit to be remitted abroad.

It is desired that this Circular be given as wide publicity as possible.

(Sgd) **RUBEN B. ANCHETA**
Acting Commissioner"

The Supreme Court, in the **Burroughs** case (supra) applied B.I.R. Ruling dated January 21, 1980 and not Revenue Memorandum Circular No. 8-82. It was ruled that:

> "Petitioner's aforesaid contention is without merit. What is applicable in the case at bar is still the Revenue Ruling of January 21, 1980 because private respondent Burroughs Limited paid the branch profit remittance tax in question on *March 14, 1979*. Memorandum Circular No. 8-82 dated March 17, 1982 cannot be given retroactive effect in the light of Section 327 of the National Internal Revenue Code which provides-
>
> 'Section 327. *Non-retroactivity of rulings.* Any revocation, modification, or reversal of any of the rules and regulations promulgated in accordance with the preceding section or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayer except in the following cases (a) where the taxpayer deliberately misstates or omits material facts from his return or in any document required of him by the Bureau of Internal Revenue; (b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based, or (c) where the tax payer acted in bad faith.' **(ABS-CBN Broadcasting Corporation** vs. **Court of Tax Appeals,** 108 SCRA 151-152).
>
> The prejudice that would result to private respondent Burroughs Limited by a retroactive application of Memorandum Circular No. 8-82 is beyond question for it would be deprived of the substantial amount of P172,058.90. And, insofar as the enumerated exceptions are concerned, admittedly, Burroughs Limited does not fall under any of them."

In the instant case, the branch profit remittance taxes were paid after the effectivity of Memorandum

Circular No. 8-82. What should therefore apply is Memorandum Circular No. 8-82 as correctly advanced by the respondent.

This Court, in deciding early cases (CTA Case No. 445 dated August 23, 1993; CTA Case No. 3827 dated October 14 1988) involving the same parties and issues, applied Revenue Memorandum Circular No. 8-82.

Furthermore, the Court of Appeals, in the recent case of **Commissioner of Internal Revenue vs. Bank of America** (CA-G.R. SP No. 22529 dated September 19, 1990) had the occasion to explain the rationale of Revenue Memorandum Circular No. 8-82, when it ruled:

> "The use of the word remitted may well be understood as referring to that part of the said total branch profits which would be sent to the head office as distinguished from the total profits of the branch (not all of which need be sent or would be ordered remitted abroad). If the legislature indeed had wanted to mitigate the harshness of successive taxation, it would have been simpler to just lower the rates without in effect requiring the relative novel and complicated way of computing the tax, as envisioned by the herein private respondent. The same result would have been achieved.
>
> The attempt to deduce legislative intent with regard to Section 24(b)(2)(ii) of the Tax Code would only serve to allow a captious and strained intendment of the law. **NIMIA SUBTILITAS IN JURE REPROBATUR, ET TALIS CERTITUDO CERTITUDIMEM CONFUNDIT** (The laws does not allow of a captious and strained intendment, for such nice pretence of certainty confounds true and legal certainty). As held

in the case of **United States vs. Wurzbach,** 280 U.S. 396, 398:

> There is no warrant for seeking refined arguments to show that the statute does not mean what it says.

> In view of the foregoing, this Court finds that the clear import of Section 24(b)(2)(ii) of the Tax Code mandates the imposition of the fifteen percent (51%) tax on the branch profits remittance, with in tax parlance is alluded to as the "tax handle", with the total amount remited (not the total amount of the branch profits) as base for the tax."

Having found that the questioned taxes were paid when the applicable ruling is Revenue Memorandum Circular No. 8-82, "then what should apply as taxable base in computing the 15% branch profit remittance tax is the amount applied for with the Central Bank as profit to be remitted abroad xxx." (**Compania General de Tabacos vs. The Commissioner of Internal Revenue,** C.T.A. case No. 4451).

With regard to the passive income already subjected to the final tax, the same Section 24 (b)(2)(ii) (now Section 25(a)(5)) of the Tax Code provides:

> "xxx That interests, dividends, rents, royalties, including remunerations for technical services, salaries, wages, premiums, annuities, emoluments or other fixed or determinable annual, periodical or casual gains, profits, income and capital gains received by a foreign corporation during each taxable year from all sources within the Philippines <u>shall not be considered as branch profits unless the same are effectively connected with the conduct of the trade or</u>

> business in the Philippines." (Underscoring supplied)

Petitioner claims that only profits remitted abroad which are effectively connected with the taxpayer's trade on business in the Philippines are subject to the 15% branch profit remittance tax. It cited B.I.R. Ruling No. 157-81 dated July 13, 1981, the pertinent provision of which reads as follows:

> "In reply thereto, please be informed that pursuant to Section 24(b)(2) of the Tax Code, as amended, only profits remitted abroad by a branch office to its head office which are effectively connected with its trade or business in the Philippines are subject to the 15% profit remittance tax. To be 'effectively connected' it is not necessary that the income be derived from the actual operation of taxpayer-corporation's trade of business; it is sufficient that the income arises from the business activity in which the corporation is engaged. For example, if a resident foreign corporation is engaged in the buying and selling of machineries in the Philippines and invests in some shares of stock on which dividends are subsequently received, the dividend thus earned are not considered 'effectively connected' with is trade or business in this country." (Revenue Memorandum Circular No. 55-80.)

Respondent for his part argues that cash dividends and interest income of petitioner are effectively connected with the conduct of its trade and business in the Philippines that should be subjected to branch profits remittance tax.

As found by this Court in a previous case:

"(T)he rule is interest and dividends received by a foreign corporation during each taxable year form all sources within the Philippines shall not be considered as branch profits unless the same are effectively connected with the conduct of its trade or business. The phrase "effectively connected" was interpreted to mean income derived from the business activity in which the corporation is engaged.

In all the corporate quarterly income tax returns filed by petitioner with respondent's office, it was indicated as it was shown that the petitioner is engaged in the business as leaf tobacco dealer, exporter, importer and general merchants. Petitioner claims that interests received from savings deposit with Philtrust, interests received from money market placements and interest on Land Bank Bonds and cash dividends received from Philippine Long Distance Company Telephone Company (PLDT) and Tabacalera Industrial Development Corporation of the Phils. are not effectively connected with its trade or business.

Furthermore, pursuant to Section 24(c) and (d) of NIRC, dividends and interest are subject to final tax. To include them again as subject to branch profit remittance tax under the same Section 24(b)(2)(ii) would be contrary to law. Rightfully so, petitioner has sufficiently established a right to be refunded the amount of branch profit remittance tax paid on these interests and dividends which were included as part of the branch profits xxx." **(Compania General de Tabacos de Filipinas vs. The Commissioner of Internal Revenue** C.T.A. Case No. 4451, supra)

After considering the facts and issues of the case, this Court holds the petitioner entitled to a refund or tax credit in the amount of P152,690.61 corresponding to overpaid branch profit remittance taxes during the years from 1981 to 1983, computed as follows:

Gross amount remittable (1981-1983)		P40,363,240.47
Less: Income subjected to final tax		
a) Dividends		
1981 (Exhibits AC-1 to AC-20)	P16,180.11	
1982 (Exhibits AB-1 to AB-33)	10,357.11	
1983 (Exhibits XX-1 to XX-33)	10,844.67	
b) Interest on PTC savings account		
1981 (Exhibits AD-1 to AD-6)	P142,249.04	
1982 (Exhibits ZZ-1 to ZZ-7)	211,689.59	
1983 (Exhibits YY-1 to YY-12)	513,480.21	
c) Interest on LBP bonds		
1981 (Exhibits AD-11 and 12)	2,730.00	
1982 (Exhibit ZZ-8)	2,730.00	
d) Interest on money market placements		
1981 (Exhibits AD-8 to AD-10)	88,182.11	
e) Capital gain		
1982 (Exhibits WW-1 and WW-2)	19,494.66	1,017,937.50
Amount subjected to 15% branch profits remittance tax		P39,345,302.97
15% branch profit remittance tax		P5,901,795.45
Less: Amount of branch profit tax paid (1981-1983)		6,054,486.06
Amount refundable		P 152,690.61

As to the 1984 and 1985 branch profit remittance taxes, no refund or tax credit is due the petitioner since the latter did not present any proof of passive income it received during the period. Hence, the correct branch profit remittance taxes are the exact amount of taxes paid by the petitioner as computed below:

Gross amount remittable (1984-1985)	P14,294,908.30
Less: Income subject to final tax	
a) Dividends	nil
b) Interests	nil
c) Other passive incomes	nil
Amount subjected to 15% branch profits remittance tax	P14,294,908.30
15% Branch profits remittance tax	P 2,144,236.24

WHEREFORE, IN VIEW OF THE FOREGOING, respondent Commissioner of Internal Revenue is hereby ordered to refund in favor of petitioner, the amount of P152,690.61 representing overpaid 15% branch profit remittance taxes on dividends, interests and capital gain received during the years 1981 to 1983. No pronouncement as to cost.

SO ORDERED.

Quezon City, Metro Manila, November 17, 1993.

ERNESTO A. ACOSTA
Presiding Judge

WE CONCUR:

MANUEL K. GRUBA
Associate Judge

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

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 VII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals