REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PHILIPPINE AIRLINES, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 6298

COMMISSIONER OF INTERNAL REVENUE MR. RENE BAÑEZ,
Respondent.

Promulgated:

APR 2 3 2004

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DECISION

This is a claim for refund of the amount of P727,193.91 allegedly representing erroneously collected Overseas Communication Tax (OCT) for the period covering January to December 1999.

The following are the relevant facts as revealed by the records of the case:

Petitioner is a domestic corporation organized in accordance with the laws of the Republic of the Philippines with principal office at the 9th Floor, PAL Center, Legazpi St., Legazpi Village, Makati City *(par. 1, Stipulation of Facts).* For its communications services necessary for its day-to-day operations, petitioner engaged the services of Philippine Long Distance Telephone

Company (PLDT). Aside from the basic fee which PLDT charges its customers for the use of the communication services it provides, it also includes in its monthly statements of account taxes, imposts and other governmental charges such as the 10% Tax on Overseas Dispatch, Message, or Conversation Originating from the Philippines in accordance with Section 120(A) of the National Internal Revenue Code (NIRC) of 1997 which provides:

> **SEC. 120. Tax on Overseas Dispatch, Message or Conversation Originating from the Philippines.** –
>
> (A) *Persons Liable.* – There shall be collected upon every overseas dispatch, message or conversation transmitted from the Philippines by telephone, telegraph, telewriter exchange, wireless and other communication equipment services, a tax of ten percent (10%) on the amount paid for such services. The tax imposed in this Section shall be payable by the person paying for the services rendered and shall be paid to the person rendering the services who is required to collect and pay the tax within twenty (20) days after the end of each quarter.

For the period January to December 1999, petitioner allegedly paid PLDT for the latter's services, including a total amount of P727, 193.91 *(Exhibit "A")* purportedly representing the 10% Overseas Communications Tax (*OCT, for brevity*).

On October 25, 2000, petitioner, through its AVP-Financial Planning & Analysis, filed a claim for refund *(Annex "A," Petitioner's Reply)* with the Office of the Commissioner of Internal Revenue of its supposedly erroneously paid

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Overseas Communication Tax, citing as its basis the provisions of Presidential Decree No. 1590, specifically Section 13 thereof.

As petitioner's claim for refund remained without any action, on April 27, 2001, the petitioner sought judicial recourse before this court.

On June 26, 2001, respondent filed his Answer to the Petition for Review and by way of Special and Affirmative Defenses interjected the following:

> "6. Petitioner's alleged claim for refund is subject to investigation by respondent's Bureau;
>
> 7. The petition states no cause of action. It failed to allege the date when the tax sought to be refunded was paid;
>
> 8. Neither has petitioner shown that the tax sought to be refunded was actually paid;
>
> 9. There is no proof in the petition to show that petitioner filed a written claim for refund with respondent in accordance with the mandatory provision of Section 230 of the Tax Code. The alleged claim for refund (Annex "C" of the Petition) was not received by the respondent;
>
> 10. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to sustain the burden is fatal to the action for refund or credit;
>
> 11. It is an elementary rule that claims for refund/credit are construed in strictissimi juris against the taxpayer as they partake the nature of exemption from tax."

The parties stipulated the following issues to be resolved:

1. Whether or not petitioner is exempted from the 10% Overseas Communications Tax by virtue of its charter, Presidential Decree No. 1590;

2. Whether or not petition states no cause of action as it failed to allege date when the tax sought to be refunded was paid;

3. Whether the tax sought to be refunded was actually paid.

Petitioner relied mainly on the provisions of its franchise, P.D. No. 1590, specifically Section 13 thereof, which states:

> **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 in 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
>
> 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 passenger, mail, and freight revenues from its outgoing flights shall be subject to this tax.
>
> 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, provincial, or national authority or government agency, now or in the future, including but not limited to the following:

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According to petitioner, Section 13 expressly provides that PAL is liable to pay only either (a) the 32% basic corporate income tax based on the grantee's annual net taxable income; or, (b) a franchise tax of two per cent (2%) of the gross revenues. Therefore, the legislative intent is clear, i.e., all other taxes not falling under any of these two types of taxes shall be within the scope of the **in lieu of clause** of Section 13 which, as pointed out, is very broad and all-encompassing as to cover almost all, if not all, types of taxes, duties, impositions, fees and charges. Accordingly, in view of the clear language of Section 13, there is no doubt that the 10% Overseas Communication Tax is covered by the **in lieu of** provision of PAL's franchise which exempts PAL from all other taxes of any kind, nature or description, in lieu of which PAL is obliged to pay only the basic corporate income tax or the 2% franchise tax, whichever is lower.

To prove that it paid the Overseas Communication Tax to PLDT, which, in turn, remitted the same to the Bureau of Internal Revenue, petitioner presented the Quarterly Percentage Tax Returns of PLDT for the four taxable quarters of 1999 *(Exhibits D to H, inclusive of submarkings)*. During the trial, petitioner presented Lucia G. Bautista, Section Supervisor of the Financial Accounting Division of PLDT, who testified that under PLDT's accounting

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procedure, all collections of tax payments for ten (10%) per cent Overseas Communication Tax for the four quarters of 1999 have been remitted to the BIR for each quarter.

On the other hand, respondent posited that while petitioner presented witnesses to prove that it paid Overseas Communication Tax to PLDT, it however, failed to present documents, like certification from PLDT, to prove that the latter withheld the 10% Overseas Communication Tax. Respondent asserted that the letter from PLDT stating that it cannot generate the necessary details for verification of PLDT's remittance of petitioner's OCT payments to the BIR did not supplement its claim for refund. Likewise, respondent argued that petitioner failed to present its income tax return during the hearing to controvert the statement of respondent's witness, Fatima Sarrosa, in her memorandum report *(Exhibit 2)*, that the OCT was already claimed as an expense since it was part of the communication expense deducted from the gross income as shown in the Income Tax Return submitted to the BIR.

After a judicious consideration of the contending parties' respective arguments, the testimonies of their witnesses and the applicable laws and jurisprudence on the matter, denial of the claim for refund of the Overseas Communication Tax of the petitioner is called for.

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In the similar case of ***Philippine Airlines, Inc. (PAL) vs. Commissioner of Internal Revenue, CTA Case No. 5825, September 5,2001***, this court ruled to deny the claim for refund of Overseas Communication Tax of the petitioner for lack of merit, citing the case of ***Philippine Airlines, Inc. (PAL) vs. Commissioner of Internal Revenue, CTA Case No. 5824, June 13, 2001***, thus:

"In the case of Philippine Airlines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 5824 promulgated on June 13, 2001, this Court 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 per cent (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 per cent 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 (2%) per cent 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 xxx," regardless of whether or not it suffered a net loss during a particular taxable year.
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> The phrase "in lieu of" means instead of, in place of; or in substitution for (Black v. Barnes, 46 P. 2d 625, 626, 142 Kan. 361;

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> Rutherland v. Oroville-Wyandotte Irr. Dist., 22 P. 2d 505, 218 Cal. 242; Words and Phrases, 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 exemption from other kinds of taxes. Since petitioner did not pay either of the two taxes, accordingly, the petition must fail."

However, in contradistinction with the CTA Case No. 5824, the subject matter of the present case is a percentage tax, Overseas Communication Tax. While the said tax may qualify as "other taxes", petitioner however, failed to support its position by presenting its annual income tax return for the taxable year involved in case it chose to pay the basic corporate income tax instead of the franchise tax. As in its previous claim for refund of Overseas Communication Tax, herein petitioner failed to prove that it has paid either of the two taxes provided for under Section 13 of P.D. No. 1590, which is an indispensable requirement before it may enjoy the privileges granted therein.

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Petitioner did not present its Income Tax Return covering the period of the subject refund; hence, it is not entitled to the other benefits of the decree.

Because taxes are the lifeblood of the nation, the court has always applied the doctrine of strict interpretation in construing tax exemptions (*Commissioner of Internal Revenue v. Court of Appeals, 298 SCRA 83, October 14, 1998*).

Accordingly, the court finds it unnecessary to delve into the rest of the issues raised.

WHEREFORE, in the light of the foregoing, the instant petition is hereby **DENIED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

(w/ Separate Concurring Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Judge

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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

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