REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FRANCISCO A. DIZON,
Petitioner,

- versus - C.T.A. CASE NO. 4798

COMMISSIONER OF INTERNAL REVENUE.
Respondent.
x - - - - - - - - - - - - x

11/17/93

D E C I S I O N

This is a claim for refund/credit of the alleged overpaid capital gains tax of petitioner for the sale of shares of stock in 1990 in the sum of P1,885,253.07.

Petitioner, is a Filipino citizen of legal age with address at # 19 Don Vicente Rufino Avenue, Corinthian Garden, Quezon City, Metro Manila.

On March 29, 1990, petitioner by virtue of a Deed of Assignment (Exhibits A to A-4) entered into a stock swap transaction with Benguet Corporation whereby petitioner transferred 122,500 shares of stock of AB Capital and Investment Corporation (or ABCIC for short) (formerly Anscor Capital and Investment Corporation) to Benguet's 569,387 newly issued class "A" shares with an agreed transfer price of ABCIC share in the amount of P21,932,767.50.

On April 27, 1990, petitioner paid a capital gains tax covering said stock swap transaction in the amount of P1,885,253. (Exhibit C) at the rate of 10% and 20% under Section 21(d)(1) of the tax code, as evidenced by CBP Confirmation Receipt No. B19952234 and BIR Payment Order No. C8047812 both bearing the date April 27, 1990 (Exhibits D and D-1)

On December 21, 1990 thru a Deed of Absolute Sale of shares (Exhibits F to F-2) petitioner sold 666,542 Benguet shares at P11.00 per share for a total consideration of P7,331,962.00.

Petitioner did not pay any capital gains tax on this transaction when he filed his capital gains tax return (Exhibit H), Instead petitioner declared a capital loss of P13,208,196.27 stating that the aggregate adjusted cost basis of the 666,542 Benguet shares is P20,540,158.27 (i.e., 666,542 multiplied by P30.816 per share, the acquisition cost of the Benguet shares).

On January 23, 1991, petitioner filed his final consolidated tax returns covering his stock transactions alleging that both transactions were effected outside the stock exchanges, and that during the year 1990, said stock transactions showed a net capital loss of P3,731,950.90 which completely negated his net capital gains for the same year.

On February 6, 1991, petitioner filed with respondent a claim for refund in the sum of P1,885,253.07 allegedly representing excess capital gains tax for 1990 (Annex "G"). Without waiting for respondent action on his claim for refund, and to interrupt the two (2) year prescriptive period, petitioner filed the instant petition for review on April 21, 1992.

Respondent, filed her answer on July 8, 1993 alleging among others that the sale of Petitioner's Benguet Corporation shares of stocks on December 21, 1990 falls within the purview of Section 21(d)(2) of the tax code, and is governed by transactional capital gains tax of 1/4 of 1% gross selling price; that petitioner is not entitled to refund considering that the transactions are separate and distinct from each other; that the filing of the returns cannot be consolidated in accordance with Section 7 of Revenue Regulations No. 2-82, which provides a separate manner of payment and filing of returns is covered by Section 21(d)(2) of the tax code. (Answer, p. 411, CTA records)

Respondent opted not to submit evidence in support of her case manifesting that the issue in this case is purely legal and instead submitted the case for decision based on the pleadings after the filing of her memorandum.

The principal question raised in this appeal is whether or not petitioner is entitled to a refund/tax credit of the amount of P1,885,253.07 representing alleged overpaid capital gains tax for the taxable year ended December 31, 1990.

The parties have different contentions regarding the following provisions of the tax code:

> "Section 21(d)(1) and Section 21(d)(2) - The provisions of Section 33(b) notwithstanding, capital gains realized from the sale, exchange or disposition of shares of stock in any domestic corporation shall be taxed as follows:
>
> (1) Net capital gain as defined in Section 33(a) realized during each taxable year from the sale, exchange on other disposition of shares of stock <u>not traded through a local stock exchange</u>.
>
> | | |
> |---|---|
> | Not over P100,000 | 10% |
> | Over P100,000 | 20% |
>
> (2) Capital gains presumed to have been realized from the sale, exchange or disposition of shares of stock <u>listed and traded through a local stock exchange</u> - 1/4 of 1% based on the gross selling price of the share or shares of stock."

Petitioner maintains that the final tax of 1/4 of 1% mentioned in Section 21(d)(2) of the tax code applies exclusively to the sale of listed shares which are traded in the stock exchanges and not to sale of listed shares outside of the exchanges which is subject to the schedular rate of 10% and 20% under Section 21(d)(1) of the tax code. Petitioner argues that the use of the words "listed and traded" in Section 21(d)(2) of the tax code will not apply to the sale by petitioner of listed shares because they were sold outside of the stock exchanges and the transaction is now covered by Section 21(d)(1) with the schedular rate of 10% and 20% based on the net capital gains therefrom.

To support his stand, petitioner cites the case of Fagel Taben, Agricultural Corporation v. Jacinto, 203 SCRA 189; Marina Port Services Inc. v. Inigo, 181 SCRA 304, wherein the court ruled that it is a basic rule in statutory construction that when the statute in question uses plain and clear words and phrases, said statute must be taken to mean exactly what it says and must be applied without attempted interpretation And, even if petitioner has admitted that only listed shares can be traded through the stock exchanges, it does not prohibit the trading of listed shares outside of the stock exchanges. The fact that neither the Makati and Manila stock exchanges by-laws prohibits the sale of listed shares out of the exchanges, then listed shares may be traded through privately negotiated sales.

The nature of the shares (whether listed or not is not material for the purpose of applying Section 21(d)(1) of the tax code or the schedular rate of taxation. What is material is the manner by which these shares are traded. Revenue Regulations No. 2-82 further distinguishes shares which are traded in the exchanges and shares which are not traded through the stock exchanges, thus:

> **Section 5.** ***Imposition of the tax***
>
> (a) Sales of shares of stock listed and traded through a local stock exchange - a tax of 1/4 of 1% shall be imposed on the gross selling price of the shares of stock sold, exchanged or transferred through the facilities of stock exchanges registered with the Securities and Exchange Commission.
>
> (b) Shares of stock not traded through a local stock exchange - net capital gain derived the taxable year from sales, exchanges, transfers or similar transactions shall be taxed as follows:

not over P100,000	10%
over P100,000	20%

The distinction clearly indicates that the Bureau of Internal Revenue recognizes the fact that listed shares need not be traded in the stock exchanges. It also solidifies the fact that listed shares maybe sold outside of the stock exchanges and the gain therefrom if any, shall be taxed at the schedular rate of 10% and 20%.

Petitioner's sale of stock effected outside the facilities of the stock exchanges falls squarely within the mandate of Section 21(d)(1) of the tax code. By promulgating Revenue Regulation No. 2-82 the Bureau of Internal Revenue recognizes the fact that listed shares may be traded, sold outside of the facilities of the stock exchanges in which case the same shall not be subject to 1/4 of 1% tax on the gross selling price of the shares but by the schedular systems of capital gain tax at the rate of 10% and 20% under Section 21(d)(1).

In the recent case of Jardine Davies, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 4324, June 22, 1993, this Court ruled, thus:

xxx xxx xxx

> "this involves the sale of shares of stocks not traded through a local stock exchange. Respondent's counsel was not

> heard to object when petitioner presented as evidence stock transactions capital gains tax return (Exhibits B, C and E) clearly showing that the transactions were treated in accordance with Section 24(2)(a) formerly Section 21(d)(1) of the tax code. The contrary view of respondent that Section 24(2)(b) formerly Section 21(d)(2) of the tax code applies is without any factual or legal basis."

Also, in the earlier case of Jardine Davies, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 4032, August 6, 1992, this Court has ordered the refund of the overpaid capital gains tax on stock transaction for the entire year.

Respondent did not controvert petitioner's evidence. In fact, respondent has merely submitted this case for decision on the basis of the records and pleadings of the case, without presenting counter evidence.

Lastly, a taxpayer can, indeed offset the capital losses which he incurred from this stock transactions during the taxable year, against capital gains derived therefrom during the same year, and claim, at the end of said taxable year, a refund in case of an overpayment of capital gains tax. This is so because a final consolidated return or an adjustment return concerning all stock transaction during the taxable year shall be filed on or before the 15th day of the fourth month following the close of the taxable year. (Sec.7, Rev. Reg. #2-82).

Taking the two-transactions together, petitioner's capital, losses in the sale of the Benguet shares in December 1990 wiped out whatever gains he realized from the exchange transaction involving the ABCIC shares in March 1990. Considering that petitioner incurred a net capital loss for his stock transactions in 1990, we simply cannot deny but instead give due course to its petition.

WHEREFORE, respondent Commissioner of Internal Revenue is hereby ordered to refund/issue tax credit to petitioner Francisco A. Dizon in the amount of P1,885,253.07 representing overpaid capital gains tax in taxable year ended December 31, 1990.

SO ORDERED.

Quezon City, Metro Manila, November 17, 1993.

MANUEL K. GRUBA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals