REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PIZZAVEST TRANSNATIONAL CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5464

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAR 27 2000

x - x

DECISION

This is a claim for refund in the amount of ₱734,728.00 allegedly representing creditable withholding taxes on royalties for the year 1994 and 1995.

Petitioner is a corporation duly organized and existing under Philippine laws, with office address at the 2nd Floor of Unit No. 3 of the Rizal Memorial Stadium located at M. Adriatico St., Malate, Manila. It holds the exclusive right to grant franchise for "Domino's" Pizza Stores, including the right to sub-license the use of the mark "Domino's" Pizza and such valuable trade marks, service marks and commercial symbols in connection with the operation of said stores in the Philippines. For the use of or the right or privilege to operate Domino's Stores in the Philippines, it is paid royalties net of withholding taxes by the grantees or franchisees thereof. Aside from its franchise and royalty business, it is likewise engaged in the business of operating coffee houses, restaurants, inns, eating houses, taverns or places of entertainment and refreshment.

The facts are simple.

During calendar year 1994, Petitioner's Annual Corporate Income Tax Return ("ITR" for brevity) showed an income of ₱1,665,912.00 with deductions of ₱3,799,699.00 resulting in a net loss of ₱2,133,787.00 (Exhibit "A"). Likewise, for calendar year 1995, its ITR showed an income of ₱11,298,416.00 with deductions of ₱11,901,225.00, similarly resulting in a net loss in the amount of ₱602,809.00 (Exhibit "E").

Being in a net loss position for two consecutive years, Petitioner claimed for tax refund in its 1995 ITR under box number 6 of Section B thereof[1], the aggregate amount of ₱734,728.00 (₱121,564.00 for 1994 + ₱613,164.00 for 1995) which represents royalties withheld and remitted to Respondent's Bureau by its various franchisees/grantees (Section E of ITR).

On February 7, 1997, Petitioner filed a written claim for refund with the Appellate Division of Respondent's Bureau (Exhibit F). It anchored the legal bases of its claim under the provisions of Section 51 (f) of the Tax Code, as amended; Section 10 of Revenue Regulations No. 13-78, as amended by Revenue Regulations No. 6-85 and the decision of this Court in **Graphics International, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 4220, promulgated on February 10, 1993** wherein it is required that a refund of excess creditable tax withheld at source is proper as long as it is shown that the same has been included in the return of the recipient.

Due to alleged inaction of the Respondent, however, Petitioner was constrained to institute the present Petition for Review on February 17, 1997 because of the near expiry of the two-year prescriptive period for claiming such refund, as provided in Section 230 of the old Tax Code.

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[1] 1995 Annual Corporate Income Tax Return filed on April 15, 1996.

At bar, Petitioner reasserts its arguments *a quo*. On the other hand, Respondent contends in his Answer the following special affirmative defenses, to wit:

> 4. The petition does not state a cause of action. There is no allegation that the tax sought to be refunded was actually paid and remitted to the Bureau of Internal Revenue in accordance with the Tax Code.
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> 5. Petitioner, whose burden is to show entitlement to the refund, has failed to establish that the tax subject of its claim was erroneously or illegally collected.
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> 6. Granting, without admitting, that the tax sought to be refunded was withheld, paid and remitted by petitioner's franchise[e]/grantee, its collection is presumed to have been made in accordance with law.
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> 7. The petition is premature. Petitioner's application for the refund of income tax withheld on royalties is still pending investigation by the Bureau of Internal Revenue.
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> 8. Claim for refund is construed strictly against the claimant and cannot be allowed unless proven explicitly and categorically.
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> 9. The allegations regarding tax refundability do not ipso facto merit the refund claimed.

During trial, Petitioner offered in evidence copies of its various Monthly Remittance Return of Income Tax Withheld (BIR Form No. 1743-W) and ITRs concerned as proof of withholding of said royalty taxes and their corresponding inclusion in its ITRs for 1994 and 1995.

Respondent, on his part, presented as contrary evidence the findings contained in his Revenue Officer's Audit Report on Income Tax (BIR Form No. 1717A) on the Petitioner for the year 1994, dated October 15, 1997, which shows Petitioner's tax liability in the amount of ₱13,696,241.90, instead of a net loss (Exhibit 3).

Likewise, the consequent Assessment Notice on deficiency income tax issued by his office against the Petitioner, dated January 19, 1998, bearing assessment number 33-34-000176-94 in the amount of ₱12,290537.50 was also introduced as evidence for the Respondent.

Records show that Petitioner attempted to make a protest on the said assessment notice during trial but such attempt was flatly rejected by this Court, in this wise:

> 2. The Court adopts the view of respondent's counsel that the Court is not the proper forum to protest on the Deficiency Income Tax Assessment for the year 1994, amounting to ₱12,290,537.50 inclusive of surcharge, interest and compromise penalty. ***The protest should be done in the administrative level and not with this Court*** considering that this case involves a claim for refund on taxes on royalties paid for the years 1994 and 1995 by petitioner. (Resolution, dated March 16, 1999; p. 291, CTA records; italics and emphasis supplied)

Further in his memorandum, Respondent contends, *inter alia*, that Petitioner did not seek his prior approval when it applied automatically its 1994 excess tax credits to year 1995, hence, it erroneously carried over such credits to the taxable year 1995 following the *ratio decidendi* established in the case of **San Carlos Milling Co., Inc. vs. Commissioner of Internal Revenue, G.R. No. 103379, November 23, 1993**, wherein the Supreme Court pronounced that prior approval of the Commissioner of Internal Revenue is required before any automatic tax credit can be availed by the taxpayer in its return.

In addition, Respondent asserts the fact that Petitioner failed to prove during trial the actual remittance of its 1994 and 1995 withholding taxes to the Respondent's Bureau by its payors/franchisees, namely: European Bakeries, Inc., Transnational Food Services Corporation, Transam Food Services Corporation and DKG Corporation. While mindful of the ruling in **Commissioner of Internal Revenue vs. Court of Appeals and Paseo**

Realty and Development Corporation, CA-G.R. SP No. 32927, February 28, 1994, wherein a petitioner of this nature need not present proof of actual remittance of withholding tax on the ground that the payors/franchisees are not within the control of the petitioner-payee, Respondent nonetheless demurs fom the application of said appellate case to the petition at bar. He points out that based on separate sub-franchise agreements, Petitioner has access and thus implicitly some sort of control, to the Book of Accounts and other accounting records of its payors/franchisees by way of its right to audit them.

Based on the preceding facts and circumstances, this Court is confronted with the following issues, namely:

1. Whether or not the Petition at bar suffers from lack of cause of action, as pleaded by the Respondent in his Answer, on account of the fact that the Petition fails to allege that the taxes sought to be refunded have been actually paid and remitted to Respondent's Bureau;

2. Whether or not the case at bar was filed prematurely in view of the pending investigation being conducted by the Respondent on Petitioner's herein claim for refund of income tax withheld on royalties;

3. Whether or not there is a need for the Petitioner to prove actual remittance in the instant case, aside from the usual Certificate of Creditable Tax Withheld At Source (BIR Form No. 1743-750) issued by its payors/franchisees for the years 1994 and 1995;

4. Whether or not there is a necessity of securing first the prior approval of the Commissioner of Internal Revenue before automatic credit of excess creditable taxes can be enjoyed by the Petitioner for the years 1994 and 1995 following the Supreme Court case of **San Carlos Milling Co., Inc. vs. Commissioner of Internal Revenue**, supra; and,

5. Whether or not Petitioner has proven the legal and factual components of its claim for refund for the years 1994 and 1995;

As regards the first issue, this Court finds no merit in Respondent's contention that the Petition at bar lacks a cause of action. The allegations contained in the Petition unmistakably establish quite literally the fact that the royalty taxes being claimed for refund in the amount of ₱121,564.00 and ₱613,164.00 for the years 1994 and 1995, respectively, have been withheld, paid and remitted by Petitioner's franchisees/grantees to Respondent's Bureau (Petition, p.2, pars. 3-5). Respondent is thus wrong in raising lack of cause of action as a defense in this instance.

Anent the second issue, this Court is of the firm opinion that the case at bar has not been filed prematurely. On the contrary, it has been instituted seasonably by the Petitioner.

In the case of **Commissioner of Internal Revenue vs. Victorias Milling, Inc., 22 SCRA 12**, the Honorable Supreme Court held that the claim for refund with the BIR and the subsequent appeal to this Court must be filed within the two-year period as provided in Sections 204 and 230 of the Tax Code, as amended. If, however, the Commissioner takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in this Court before the end of such period without awaiting the decision of the Commissioner.

It appears that herein Petition was filed on February 17, 1997. When reckoned from April 15, 1995 which was the last date for the filing of ITR and payment of corresponding taxes covering the year 1994, as provided in the Tax Code, as amended (Petitioner filed its 1994 ITR on April 17, 1995), Petitioner's claim for refund for the year 1994 has barely two months left before the lapse of the two-year prescriptive period for the filing of the same from date of payment In conformity with the *Victorias Milling, Inc.* case, thus, Petitioner need not await the action of the Respondent on its administrative claim for refund as it is about to be barred from being elevated before this Court.

Essentially also, a reading of the provisions of Sections 204 and 230 of the Tax Code, as amended, would show that the taxpayer has a period of two years within which to *file* its administrative or judicial claim for refund *from date of payment of the tax*. No words can actually be found preventing the taxpayer from filing a judicial claim for refund until a certain length of time has elapsed within the two-year prescriptive period. What is being mandated to be observed is merely the filing of the claim for refund within such two-year period. Hence, even the 1995 claim of the Petitioner can be considered to have been filed in accordance with law.

On the third issue, this Court would like to point out that proof of actual remittance by the Petitioner is not needed in order to prove withholding and remittance of taxes to the Respondent's Bureau. It should be borne in mind by the Respondent that payors of withholding taxes are by themselves constituted as withholding agents of the BIR. The taxes they withhold are held in trust for the Government. In the event that the withholding agents commit fraud against the Government by not remitting the taxes so withheld, such act should not prejudice herein Petitioner-payee who has been duly withheld taxes by the withholding agents acting under Government authority. If ever, the same should instead be seen as an inimical act of the withholding agents directed against government coffers.

Under the above scenario, the taxpayer-payee is a complete stranger in so far as the disposition of the withheld taxes is concerned. Proof of actual remittance is not within the sphere of obligation of the Petitioner-payee but rather, an obligation entirely confined between Respondent and the withholding agents. The Certificates of Creditable Tax Withheld At Source issued by the withholding agents of the Government are *prima facie* proof of actual payment by the Petitioner-payee to the Government itself through said agents. This Court therefore reiterates the ruling of the Honorable Court of Appeals in the above cited case of *Paseo Realty and Development Corporation*.

Going into the fourth issue, this Court is in all accord with the pronouncement of the Honorable Supreme Court in the above mentioned case of *San Carlos Milling Co., Inc.* Indeed, an opportunity must be given the Respondent to investigate and confirm the veracity of the claims of the taxpayer even though the latter elected to automatically credit its excess tax payments to the succeeding year, as provided under Section 69 of the Tax Code and Section 7 of Revenue Regulations No. 10-77. This interpretation is consistent with the mandate of the Respondent to examine any book, paper, record or other data which may be relevant or material to ascertaining the correctness of any return or determining the liability of any person for any internal revenue tax (Section 7, Tax Code, as amended).

This Court begs to disagree with Respondent's seemingly literal understanding that his prior approval is required before automatic credit can be allowed. He dismisses the fact that the regulations itself provides for "automatic tax credit". What the *San Carlos Milling Co., Inc.* case merely clarified is the undiminished authority of the Respondent to investigate and confirm the veracity of the claims of the taxpayer. In fine, the gist of the case is this: the taxpayer may credit automatically its excess taxes to the succeeding year, subject however, to Respondents ascertainment of the correctness of the taxpayer's computations.

Bearing on the present case, however, the rationale of the *San Carlos Milling Co., Inc.* case is inapplicable as it cannot possibly be invoked to defeat the instant claim. Respondent should bear in mind that herein Court has acquired jurisdiction over the instant claim for refund. Hence, the duty of investigating and verifying Petitioner's claim through evidence properly adduced is now lodged before it. Respondent is left with no other recourse but to controvert and disprove vigorously before this Court the Petitioner's claim for refund.

Delving into the last issue, this Court finds the 1994 claim of the Petitioner to be barred by technicality. As stated in the aforequoted Resolution, dated March 16, 1999, this Court sided with the view of the Respondent that the proper forum to protest the Deficiency Income Tax Assessment for the year 1994, amounting to ₱12,290,537.50 inclusive of surcharge, interest and compromise penalty is not before this Court but at the administrative level. This revelation leads to no other conclusion than the simple fact that Petitioner has failed to make a protest on the said assessment at the administrative level within 30 days of receipt of the assessment notice as provided in Section 229 of the Tax Code.

Records show that Petitioner demurred and seemed to allege that it did not receive the subject assessment notice (Comment of Petitioner to Respondent's Formal Offer of Evidence; docket, p. 276).

Even without determining, however, the exact date at which Petitioner received the assessment notice sent by the Respondent allegedly through registered mail on January 19, 1998 at the Central Post Office in Manila under Registry Receipt No. 43117 (Exhibits 9 and 9-a), this Court easily notes that despite of the fact that it has acquired knowledge and receipt of the said notice when Respondent offered the same as part of his evidence on August 27, 1998 and a copy thereof was furnished to it, Petitioner still failed to make the necessary protest over the said notice within the required 30-day period as provided in Section 229 of the Tax Code, as amended.

Without any qualm or quibble thus, and in so far as the evidence on record reveals, Assessment Notice No. 33-34-000176-94, dated January 19, 1998, has apparently become final and demandable, pursuant to Section 229 of the Tax Code, as amended. This finding, in effect, bars the Petitioner from claiming any refund for the year 1994.

With respect to Petitioner's 1995 claim for refund, however, this Court finds the same to be meritorious. It is observed that Respondent did not present any countervailing evidence for the 1995 claim of the Petitioner. What is left to be done thus, is to see whether it has complied with the factual requirements of a refund for excess creditable withholding tax on royalties.

The legality of the claim is well established under Section 69 of the Tax Code, as amended, to wit:

> **Sec. 69.** ***Final Adjustment Return.*** - Every corporation liable to pay tax under Section 24 shall file a final adjustment return covering the total net income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable net income of that year the corporation shall either:
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> (a) Pay the excess tax still due; or
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> (b) Be refunded the excess amount paid, as the case may be.
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> In case the corporation is entitled to a refund of the excess estimated quarterly income tax paid the refundable amount shown on its final adjustment return may be credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable year.

Inasmuch as Petitioner's ITRs' (Exhibits A and E) show a net loss for the years 1994 and 1995 with corresponding excess creditable withholding taxes on royalties, it is clearly entitled to its claim for refund pursuant to paragraph (b) of said section.

Except for the year 1994 which has been excluded for reasons abovestated, what remains is the determination of Petitioner's satisfaction of the factual requisites of its 1995 claim for refund in the amount of ₱613,164.00.

In a litany of cases promulgated by this Court[2], such requisites required of the Petitioner comprise of the following, to wit:

> 1. that it filed a claim for refund within the two (2) year period as prescribed under Section 230 of the Tax Code;
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> 2. that the income upon which the taxes were withheld were included in the return of the recipients; and,
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> 3. the fact of withholding is established by a copy of statement (BIR Form No. 1743.1) duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom.

This Court has already ruled in the above discussion of the second issue that Petitioner's claim for refund for the year 1994 has not yet elapsed under the two-year prescriptive period provided under Section 230 of the Tax Code, as amended. To reiterate, herein Petition for Review was filed on February 17, 1997 while the 1994 ITR of the Petitioner was filed on April 17, 1995. This means that when reckoned with the statutory deadline for filing of ITR on April 15 of the following year, Petitioner's 1994 ITR has nearly two months to go before the two-year prescriptive period would expire at the time it filed the Petition at bar on February 17, 1997. Such a finding of seasonable filing of claim for refund is even more applicable to Petitioner's 1995 ITR which was filed on April 15, 1996, a much later date.

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2 *Citytrust Finance Corporation vs. The Commissioner of Internal Revenue, CTA Case No. 4134, November 11, 1991; Citytrust Finance Corporation [formerly Investor's Finance Corporation/FNCB Finance] vs. Commssioner of Internal Revenue, CTA Case No. 4046, February 24, 1993; FEB Investments, Inc. vs. The Commissioner of Internal Revenue, CTA Case No. 5353, August 22, 1997; Benguet Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5323, August 25, 1997; AP Industrial Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5360, January 20, 1999, etc.)*

A painstaking scrutiny of the 1995 ITR of the Petitioner shows that the income upon which the taxes were withheld had been properly declared in its 1995 ITR under Schedule 3 of Section C thereof (Exhibit E).

Unfortunately, however, Petitioner failed to present as evidence its various Certificates of Creditable Tax Withheld At Source (BIR Form No. 1743-750). What it submitted instead is an affidavit of loss of said certificates (Exhibit BB and BB-1). This Court finds the affidavit to be insufficient proof of withholding of creditable taxes on royalties. Respondent is right in saying in his Comment to the formal offer of the same by the Petitioner that it is self-serving. At the very least, Petitioner should have sought the sworn affidavits of the concerned payors/withholding agents in order to establish the fact of withholding of creditable taxes and the fact of issuance of said certificates.

Better still, Petitioner could have also sought the duplicate originals of the certificates which are in possession of the withholding agents. This is very well within Petitioner's capacity to do so, the withholding agents being its franchisees/grantees.

Moreover, said affidavit of loss does not show the amount of the 1995 claim for refund being broken into particular amounts with corresponding withholding agents. It is a mere general statement of loss without attending details. As such, this Court cannot possibly speculate as to the fact of withholding on any or all of the payments made by the franchisees/grantees to the Petitioner.

Much worse, Petitioner admits of possession of photocopies of said certificates, as shown in its letter to the BIR, dated September 2, 1997, (Exhibit AA), yet for unknown reason, it failed to formally offer the same before this Court to support the loss of the originals. While this Court is cognizant of the fact that Petitioner included photocopies of said certificates for the year 1995 in its Petition as annexes F to J, this Court notes that not any one of them has been referred to or mentioned in the Petition itself. In other words, such annexes appeared to have no integral relation to the body of the Petition and thus are extraneous and may be considered, for all intents and purposes, as having been inadvertently annexed therewith. Besides lack of formal offer, said annexes can not, likewise, be considered by this Court as evidence for the Petitioner inasmuch as they have not been properly identified by competent witnesses.

All of these circumstances, to the mind of this Court, proves fatal to the bid of the Petitioner to a claim for refund.

WHEREFORE, in view of the foregoing, the instant Petition for Review is hereby **DENIED** due to insufficiency of evidence and because of the fact that Petitioner's claim at bar in the amount of ₱734,728.00 is simply overwhelmed by its 1994 tax liability in the assessed amount of ₱12,290,537.50, which, based on the evidence on record, has apparently become final, executory and demandable following Petitioner's failure to protest the same pursuant to the provisions of Section 230 of the Tax Code, as amended.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

(Dissenting)
RAMON O. DE VEYRA
Associate 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