REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FILIPINAS SYNTHETIC FIBER CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 3951

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

5/14/93

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

D E C I S I O N

This is an assessment case on the alleged deficiency withholding tax at source on the interest, royalties and guarantee fees payable to non-resident foreign corporations.

Petitioner, a domestic corporation, received on December 27, 1979 a letter of demand from the respondent assessing it for deficiency withholding tax at source in the total amount of P829,748.77, inclusive of interest and compromise penalties, for the period from the fourth quarter of 1974 to the fourth quarter of 1975. (Annex A, pp. 6-10, CTA records.) The bulk of the deficiency withholding tax assessment, however, consisted of interest and compromise penalties for alleged late payment of withholding taxes due on interest on loans, royalties and guarantee fees paid by the petitioner to non-resident corporations.

The assessment was seasonably protested by the petitioner through its auditor, SGV and Co., which was denied by the respondent on the ground that "For Philippine internal revenue tax purposes, the liability to withhold and pay income tax withheld at source from certain payments due to a foreign corporation is at the time of accrual and not at the time of actual payment or remittance thereof." (See respondent's letter denying petitioner's protest, pp. 295-296, BIR records.) In support of his decision, the respondent relied upon BIR Ruling No. 71-003 and BIR Ruling No. 24-71-003-154-84 dated September 12, 1984 as well as the Court's decision in **Construction Resources of Asia, Inc.** v. **Comm. of Int. Rev.** (CTA Case No. 3307) holding "that the liability of the taxpayer to withhold and pay the income tax withheld at source from certain payments due to a non-resident foreign corporation attaches at the time of accrual of the aforesaid payments and not at the time of actual payment or remittance thereof" and "the withholding agent/corporation is obliged to remit the tax to the government since it already and properly belongs to the government. Since the taxpayer in this case failed to pay the withholding tax on interest, royalties and guarantee fee at the time of their accrual in the books of the corporation the aforesaid assessment is therefore legal and proper." (See respondent's letter of denial to petitioner's protest, ibid.)

Hence, this petition for review.

The issue at bar is whether the liability to withhold tax at source on income payments to non-resident foreign corporations arises upon remittance of the amounts due to the foreign creditors or upon accrual thereof. Petitioner likewise raised the issue on whether or not the assessments for the fourth quarter of 1975 should be included in this case or in C.T.A. Case No.3421, also entitled "FILSYN v. CIR."

In protesting the assessments, the petitioner maintains that "the withholding tax on the said interest income and royalties were paid to the government when the said interest and royalties were actually remitted abroad ....In other words, whatever amount has been accrued in the books, the withholding tax due thereon is ultimately paid to the government upon actual remittance abroad of the said amount accrued." (pp. 244-245, BIR records; Underscoring supplied.) In support of its position, the petitioner averred that "this procedure .... is in accordance with the decision of the Court of Tax Appeals in the case of **Bayer Pharmaceuticals, Inc. v. Commissioner of Internal Revenue** (CTA Case No. 2846, March 16, 1979.)" (ibid.)

In this petition for review, the petitioner is consistent in its line of argument emphasizing that "the petitioner's duty to withhold the tax due is on interest, royalties and guarantee fees prescribed under Section 53 of the Tax Code which provides that the duty to withhold arises only upon actual remittance or payment of the amounts due to said recipients, while its liability to pay to the government the tax so withheld is on or before the 25th of the month following the end of the quarter when such tax had been withheld on any actual remittance or payment of the aforesaid items of income during the quarter" (Petition for Review, p. 4; Underscoring supplied.) Hence, "there being no legal and factual basis for the deficiency withholding tax, the imposition of interest and compromise penalties in connection therewith are", according to the petitioner, "likewise devoid of legal and factual basis". (ibid. p. 5)

We disagree.

On the contrary, it appears that the line of defense adopted by the petitioner is that which is wanting in legal and factual basis.

The provisions of law pertinent to this case are Sections 53 and 54 of the National Internal Revenue Code in force in 1974-1975. The relevant portions of said sections provide, thus:

> "SEC. 53. Withholding tax at source.- x x x
>
> "(b) Non-resident aliens and foreign corporations.- (1) Nonresident aliens.- Every individual, corporation, partnership, or association, in whatever capacity acting, including a lessee or mortgagor of real or personal property, trustee acting in any trust capacity, executor, administrator, receiver, conservator, fiduciary, employer, and every officer or employee of the Government of the Republic of the Philippines having the control, receipt, custody, disposal, or payment of interest, dividends, rents, royalties, salaries, wages, premiums, annuities, compensation, remunerations, emoluments, or other fixed or determinable annual, periodical, or casual gains, profits, and income, and capital gains, of any nonresident alien not engaged in trade or business within the Philippines, shall (except in the case provided in sub-section (a) (1) of this Section) deduct and withhold from the annual, periodical, or casual gains, profits, and income, and capital gains, a tax equal to 30 per cent thereof.

x x x

(2) Nonresident foreign corporations.- In the case of foreign corporations subject to tax under this title, not engaged in trade or business within the Philippines, there shall be deducted and withheld at the source in the same manner and upon the same items as is provided in subsection (b) (1) of this section, as well as on remunerations for technical services or otherwise, a tax equal to thirty-five (35) per cent thereof. This tax shall be returned and paid in and subject to the same conditions as provided in Section 54. x x x"

x x x

"SEC. 54. Returns and payment of taxes withheld at source.- (a) Quarterly return and payment of taxes withheld. - Taxes deducted and withheld under Section 53 shall be covered by a return and paid to the Commissioner of Internal Revenue or to his collection agent in the province, city, or municipality where the withholding agent has his legal residence or withholding agent is a corporation, where the principal office is located. The taxes deducted and withheld by the withholding agent shall be held as a special fund in trust for the Government until paid to the collecting officers. The Commissioner of Internal Revenue may, with the approval of the Secretary of Finance, require these withholding agents to pay or deposit the taxes deducted and withheld at more frequent intervals when necessary to protect the interest of the Government. The return shall be filed and the payment made within 25 days from the close of each calendar quarter. x x x"

It should be noted that nothing in the above-quoted provisions of law can one find that the tax would be "withheld on any actual remittance or payment of the aforesaid items of income during the quarter" as alleged by the petitioner in its Petition for Review. The law is clear as to "who" are required to deduct and withhold taxes due on "what" items of income, but it is admitted that the law is not conclusive as to "when" the duty to withhold the taxes arises. The issue however as to "when" the duty to withhold the taxes arises has clearly been defined already by this Court. In other words, the issue is not of first impression. In at least three analogous cases this Court had unmistakably defined that the duty "to withhold and pay the income tax withheld at source from interest due to a non-resident foreign corporation attaches at the time of the accrual of said interest and not at the time of actual payment or remittance thereof. Because of its controlling effects on the present case, we will quote the pertinent portion of the decision:

> "Payment of the withholding tax at source due from a foreign lender attaches upon accrual of the interest to be remitted abroad. The interest accrues at the time it is earned. At such time, the tax on the interest attaches and the contractor is obliged to remit the tax to the government since it already and properly belongs to the government. Indeed, there is no reason why the overseas contractor, petitioner in this

> case, who is based in the Philippines, should wait until it remits the interest due the foreign lender before paying the withholding tax-at-source. Otherwise, the government will be at the mercy of the taxpayer who may take time in remitting the interest to the foreign lender." (**Western Palawan Timber Corporation** v. **Commissioner of Internal Revenue**, CTA Case No. 3544, June 5, 1987, quoting **Construction Resources of Asia, Inc.** v. **Commissioner of Internal Revenue**, CTA Case No. 3307, Nov. 25, 1983.)

We do not intend to depart from the rulings these precedent cases. In fact, We have to preserve the sagacity of the judgment.

Petitioner, has taken refuge in the much earlier case of **Bayer Pharmaceuticals, Inc.** v. **Commissioner of Internal Revenue**, CTA Case No. 2846, March 16, 1979, which ruled, thus:

> "We, accordingly, rule that since the royalties in question could not be paid or remitted in 1972 by petitioner Bayer Pharmaceuticals, Inc. to non-resident foreign corporation Bayer Aktiengesellschalft, lerverkusen Bayermerk due to Central Bank restrictions, petitioner was under no obligation to withhold and pay income tax-at-source on said royalties..." (Underscoring supplied)

In that case, the royalties could not be remitted to the non-resident foreign corporation due to Central Bank restrictions, and so the Court ruled that the time of payment of the royalties is the maturation point of the withholding duty. It bears emphasis, therefore, that if the income payable to a non-resident corporation can be paid or remitted because there are no restrictions against its payment or remittance thereof, the liability to withhold and pay the tax thereon attaches at the time of accrual, not at the time of actual remittance. In this case, there are no such restrictions, hence, the liability of petitioner to withhold and pay the income tax withheld at source from interest due its foreign creditor attaches at the time of the accrual of said interest and not at the time of actual payment or remittance thereof.

It is interesting to note, whether by coincidence or by design that the petitioner, in the administrative level or even in its pleadings in this Court, never mentioned about the liability "to withhold arose only when the payments become due, payable and demandable, and Filsyn complied with this duty as well as the mandate of Section 54 that the withholding tax be paid within 25 days from the end of the calendar quarter when the withholding was made. It is not really an "accrual" versus "remittance" scenario but rather an "accrual" versus "due, demandable and payable" situation." (p. 18, petitioner's memorandum; Underscoring supplied) The introduction of the phrase "due, demandable and payable" is rather misplaced because it creates a new version from the originally categorical position taken by the petitioner in the administrative level and even in the pleadings filed in this Court that "the withholding tax on the said interest income and royalties were paid to the government when the said interest and royalties were <u>actually remitted</u> abroad...whatever amount has been accrued in the books, the withholding tax due thereon is ultimately paid to the government upon <u>actual remittance</u> abroad of the said amount accrued." (Underscoring supplied; Protest letter, pp. 244-245, BIR records.) We could only surmise that the Western Palawan decision probably influenced such re-alignment of arguments. But just the same, the insertion of the phrase "due, payable and demandable" is of no moment and will not in any way alter the stand this Court has consistently taken. It should be remembered that the petitioner is using the accrual system of accounting. Under that system, an item that is definitely ascertained as to amount and acknowledged to be due has "accrued", receipt of income is not essential to constitute "income". (Revenue Act 1918, 212, 40 Sta. 1064, **Lichtenberger Ferguson Co.** v. **Welch** C.C.A., Cal. 54, F. 2nd 570, 572.) Thus a "corporation which made its income tax return on accrual basis, by deducting from gross income all losses and expenses accruing during that year, whether payable or not, was required to deduct all reserves on its books, including reserve for income taxes...; tax having "accrued" in economic and bookkeeping sense" (U.S. v. Anderson, 465 Ct. 131, 134, 269 U.S. 422 70 L. Ed. 347). In the same vein, the withholding tax should be paid to the government upon accrual thereof.

The second issue raised by the petitioner hardly involves a gripping question as the assessment made for the fourth (4th) quarter (1975) should have been included in the CTA Case No. 3421. In fact, it has already been resolved in that case and that herein petitioner was ordered to pay such deficiency withholding tax. To assess again herein Petitioner would be tantamount to double assessment on the same taxable year which is grossly unfair to the petitioner.

The Court recognizes that the burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the respondent is wrong but that he (taxpayer) is right. All presumptions are in favor of the correctness of the tax assessment. (Interprovincial Autobus Co., Inc. v. Collector of Internal Revenue, 98 Phil. 290, Jan. 31, 1956.) And if the taxpayer fails to present evidence or proof in support of his allegations, this Court will sustain the assessment against the taxpayer (Caresosa v. Bureau of Internal Revenue, CTA Case No. 3713, January 25, 1985.)

IN VIEW OF THE FOREGOING, judgment is hereby rendered ordering petitioner to pay respondent the amount of P306,163.35 as deficiency withholding tax at source for the fourth quarter of 1974 to the third quarter of 1975 plus 10% surcharge and 14% annual interest from November 29, 1979 to July 31, 1980, plus 20% interest from August 1, 1980 until fully paid but not to exceed that which corresponds to a period of three (3) years pursuant to P.D. No. 1705.

SO ORDERED.

Quezon City, Metro Manila, May 14, 1993.

MANUEL K. GRUBA
Associate Judge

WE CONCUR :

ERNESTO D. ACOSTA
Presiding 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 VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals