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Jan. 27, 1968

JAPAN AIR LINES,
Petitioner,

versus

CTA CASE NO. 1634

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

D E C I S I O N

This is in connection with petitioner's claim for the refund of the sum of ₱39,877.99, allegedly representing erroneously paid common carrier's tax for the period covering from May, 1963 to September, 1964.

Petitioner, Japan Air Lines (or JAL for short), is a foreign corporation engaged in the business of international air carriage. JAL did not have planes that lifted or landed passengers and cargo in the Philippines during the period under review. It has not been granted by the Civil Aeronautics Board (CAB) a certificate of public convenience and necessity to operate here (Exh. A, p. 19, CTA rec.). However, on two occasions, JAL's planes landed here on chartered flights - one on September 23-26, 1963 carrying the Prime Minister of Japan on a state visit and the other a small plane, Beechcraft, that came here on January 14-17, 1964 (see pp. 24-25, t.s.n.; Exhs. B, B-1 & B-2, pp. 20-22, CTA rec.). In November, 1967 its application to operate in the Philippines was finally approved by the CAB (see Petitioner's Reply Memo.).

Since mid-July, 1957, JAL has maintained an office at the Filipinas Hotel, Roxas Boulevard, Manila. Said office did not sell tickets but is maintained merely for the promotion of the company's public relations and to hand out brochures, literature and other information playing up the attractions of Japan as a tourist spot and the services enjoyed in JAL planes (Exh. I, p. 54, BIR rec.).

On July 17, 1957, JAL constituted the Philippine Air Lines (PAL for short) its general sales agent in the Philippines (Exh. E, pp. 51-57, CTA rec.; pp. 12 & 21, t.s.n). As an agent, PAL, among other things, sells for and in behalf of JAL, plane tickets and reservations for cargo spaces which are used by the passengers or customers on the facilities of JAL. Although PAL is the exclusive general sales agent in the Philippines, sale of JAL tickets is done also by travel agencies but all such sales are under the direct supervision of PAL which is responsible to JAL for the settlement, accounting and liquidation of said sales. As described in petitioner's memorandum, this is how the said agency operates:

When a JAL ticket is sold in the Philippines to a passenger whose trip originates from the Manila International Airport to points abroad, as for example, Manila to Seoul, via Taipeh and Tokyo, and Seoul to Manila, via Tokyo, that passenger is invariably lifted from Manila to the first city out by a non-JAL plane because JAL has no planes departing or arriving here. He is lifted by JAL planes only in those legs or routes where JAL maintains flights. In the example given, these are the legs - Taipeh to Tokyo, Tokyo to Seoul and back to Tokyo. (Exh. "F"; t.s.n. hearing of July 11, 1967, testimony of Mrs. I. Ricafort).

When a JAL ticket is sold in the Philippines, the customer pays the total fare in Philippine pesos, although the ticket also bears fare quotation in U.S. dollars, converted at the rate of ₱3.90: $1.00, per International Air Transport Agreement (IATA) schedule. The travel agency that sold the JAL ticket remits the peso fare to the PAL, which, in turn, accounts the same to JAL. It is to be noted that PAL does not settle these sales on a per ticket basis but on the basis of a monthly period. This means that at the end of the month, PAL adds all the fares paid on JAL tickets sold, deducts all the commissions due the selling travel agency and the 3% overriding commission due to it. PAL, as general sales agent under Exh. "E". PAL also deducts all other disbursements made on behalf of JAL. The net balance is remitted to JAL. With respect to those JAL tickets lifted by PAL, that is, those legs where a passenger bearing JAL tickets are carried on PAL planes, PAL bills JAL through the IATA clearing house. In the example given, PAL billed JAL through IATA for that portion of the fare corresponding to the Manila-Taipeh leg. Under Exh. "F", such portion amounted to about $70.00. This amount belonged exclusively to PAL and was reported as part of PAL's gross revenue for purposes of the franchise tax payments of PAL. Similarly, in the example given, Scandinavian Airways which carried the passenger bearing JAL ticket from Tokyo back to Manila, billed JAL through IATA for the corresponding fare. That also formed part of

> the revenues of Scandinavian Airways. (t.s.n., p. 14; hearing of July 11, 1967, testimony of Mrs. I. Ricafort).
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> Summarizing the accounting of the fare paid on a JAL ticket sold in the Philippines, PAL receives as compensation (1) that portion corresponding to the fare on the leg carried on a PAL plane, computed per IATA tariff schedule, (2) an overriding commission of 3% based on those legs actually lifted by JAL planes. Nos. (1) and (2) form part of the gross revenue of PAL for purposes of computing its franchise tax. The travel agency that sold the JAL ticket here receives the agency commission of 7% on the fare paid by the passenger. This forms part of the revenues of such travel agency. (pp. 63-64, CTA rec.)

For the period from January, 1959 to September, 1964, PAL paid, for and in behalf of JAL, 2% common carrier's tax based on the "on line" portion of the fares on the tickets sold by PAL on behalf of JAL. The "on line" portion refers to the fares corresponding to the leg carried on a JAL plane (Exh. 1, pp. 1-3, BIR rec.; pp. 17-19, t.s.n.).

On May 13, 1965, petitioner, through counsel, filed a claim for refund of the total amount of ₱84,197.83, representing the 2% common carrier's tax paid on various dates between February 20, 1959 and September 21, 1964 (Exh. 1, _supra_.). On May 17, 1965, or four (4) days later and before respondent could act on its claim for refund, petitioner filed the present petition for review seeking the refund of only ₱39,877.99 paid as common carrier's tax on various dates between May 20, 1963 and September,

1964. On March 14, 1967, petitioner filed a motion to amend its petition for review by increasing its claim for refund to ₱42,168.97 (p. 44, CTA rec.). In a resolution dated June 14, 1967, this Court denied petitioner's motion to amend on the ground that the amount to be added was not included in the claim for refund before the Bureau of Internal Revenue and such amendment would amount to an action for refund filed beyond the two-year prescriptive period (p. 46, CTA rec.). The present petition for review, therefore, involves only the amount of ₱39,877.99.

The sole issue involved in this case is whether or not petitioner is a common carrier in the Philippines subject to the 2% common carrier's tax imposed by Section 192 of the Revenue Code.

There is no dispute as to the fact that petitioner is engaged in the business of international air transportation or as a common carrier. The only point of disagreement is whether or not it is engaged as such in the Philippines.

Petitioner contends that its activity or business as a common carrier is confined outside the Philippines and as such it is not liable for common carrier's tax. Respondent, however, counters that petitioner is engaged in the business of common carrier in the Philippines through its agent, the Philippine Air Lines.

The percentage tax on common carriers is in the nature of a privilege or excise tax (Title V, Chapter I, Comm. Act No. 466, as amended). It is a charge imposed upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation (51 Am. Jur. 61). The Supreme Court, interpreting the percentage tax on common carriers under Section 192 of the Revenue Code, held that what the legal provision purports to tax is the business of transportation, so much so that the tax is based on the gross receipts (Comm. v. U.S. Lines Co., L-16850, May 30, 1962).

We are of the considered opinion that JAL is engaged in the business of transportation in the Philippines. We are not unaware of the fact that the actual act of transporting passengers and cargo from the Philippines is undertaken by PAL since JAL has no flights in this country. This activity, as we will point out below, is, however, done by PAL for and in behalf of JAL.

When a passenger from the Philippines wants to go to New York via Hongkong, Tokyo and San Francisco, he buys from a PAL office a JAL ticket for the entire trip from the Philippines to New York and pays the full cost of the fare. He boards a PAL plane in Manila. In Hongkong, a JAL plane takes over and carries him through Tokyo and San Francisco to New York. Note that the JAL ticket is from the Philippines to final destination, not merely from the point where JAL planes take over. The moment he buys a JAL ticket in the Philippines, the contract of transportation, evidenced by JAL ticket (Exh. F, p. 58, CTA rec.), is deemed perfected, and the perfected contract is a contract of carriage from the Philippines to point of destination. From then on, JAL is duty bound to transport him safely from the Philippines to his place of destination - New York. The fact that he takes a PAL plane from the Philippines to Hongkong is of no significance. His contract of transportation is with JAL not PAL. What PAL did was only to transport him for and in behalf of JAL. As far as the passenger is concerned, JAL is his carrier and PAL the carrier's agent.

Common carriers subject to tax under Section 192 of the Revenue Code are required to use freight stub receipts and passage tickets stating therein the names and addresses of the carriers. The regulations on this point state:

> SEC. 16. Freight stub receipts and passage tickets required of common carriers. - Common carriers, transportation contractors, and other persons subject to tax under Section 192 of the National Internal Revenue Code shall use freight stub receipts and passage tickets . . . In issuing the freight stub receipt, the carrier or his agent shall enter in both the original and the duplicate the name and address of the carrier, the date of issue, the

> names and addresses of the shipper and the consignee, a description of the goods shipped with a statement of their weight or quantity, the place of delivery to the carrier and the destination of the goods, the route to be followed, the date of shipment, and the amount of freightage. . . . Passage tickets shall also be in duplicate and must show the points of embarkation and destination and the amount of charges. The original must be delivered to the passenger or the shipper, and the duplicate retained by the carrier for record purposes and preserved for a period of five years from the date of issue. . . (Rev. Regs. No. V-1; 43 O.G. 4563; underlining supplied.)

JAL complied with this requirement in the issuance of its tickets to passengers in the Philippines. In fact, JAL traffic documents are required to be used by PAL (see Exh. E, Art. 6, supra). These are in effect indications that JAL is engaged in business as common carrier in the Philippines.

Aside from selling tickets and transporting passengers for JAL, PAL files the common carrier's percentage tax returns and pays the 2% tax thereon. It also handles insurance for JAL. As its compensation, PAL receives that portion corresponding to the fare on the leg carried on PAL plane, and an overriding commission of 3% based on those legs actually lifted by JAL planes. Noteworthy is the fact that JAL itself maintains an office in Manila which coordinates the sales of its tickets and cargo spaces in this country; attends to administrative functions having to do with JAL future operations;

cultivates the company's public relations here; and hands out brochures, literature and other information playing up the attractions of Japan and the efficient services enjoyed in JAL planes. JAL under the agency contract can perform any of the functions of PAL or take part in them (Exh. E, Art. 7, supra). These activities of JAL in the Philippines are common transactions undertaken by one engaged in the business of air transportation.

It is JAL's pretension that PAL is not its agent in carrying passengers and cargo in the latter's planes but merely an agent in the sale of transportation service for JAL. To prove its point, JAL claims that: "Under Art. 11 of Exh. 'E', PAL is solely liable, without any recourse against JAL, for any claims and damages caused by PAL or any of its sales agents, imposing upon the PAL the burden of defending at its own expense all such suits made against it as well as the settlement of the claims." (See Petitioner's Memo., p. 68, CTA rec.). This claim is, to say the least, occassioned by a misinterpretation of the agency agreement dealing on indemnity which we quote as follows:

ARTICLE 11

INDEMNITY AGREEMENT 1. JAL shall hold the general sales agency and its sales agents free and harmless and the general sales agent shall not be liable JAL in case of liabilities or

> claims of liability arising from the transportation of passengers, baggage, cargo or mail sold by the general sales agent or by its sales agents.
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> 2. The general sales agent shall hold JAL free and harmless and JAL shall not be liable to the general sales agent in case of claims and damages arising from the negligence of the general sales agent or of its sales agents in the performance of these functions.
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> 3. In the event of claims being made against the party entitled to be indemnified in accordance with para. 1 or 2 of this Article, such parties shall promptly notify the other party by written notice, whereupon the latter party shall at its own cost and expenses undertake the defense of such suit or the settlement of such claim and pay the amount of any final judgment or decree or of any settlement negotiated by the indemnifying party and all expenses incident thereto. The party to be indemnified shall cooperate by promptly furnishing to the other party at its request all data, papers, records and information which it has at its disposal. (Exh. E, pp. 54-55, CTA rec.; underscoring supplied.)

Undoubtedly, the indemnity agreement under paragraphs 1 and 2, supra, explicitly exempts PAL and its sales agents from any liability whatsoever arising from the transportation of passengers and cargo except when the liability results from its own negligence. These provisions of the indemnity agreement are clearly indicative of the intention of the parties to constitute an agency for the transportation of passengers and cargo. JAL holds itself liable for the acts of PAL. It is the cardinal rule in agency that an agent who acts as such is not personally liable to the party with whom he contracts unless he expressly binds himself or exceeds the limits of his authority, and it is the principal that must comply with obligations contracted by the agent within the scope of his authority (Arts. 1897 & 1910, new Civil Code; see Zialcita-Yuseco v. Simmons, G.R. No. L-7912, Aug. 30, 1955). True enough, PAL obligates itself to cover damages occassioned by its negligence. This however is but a reiteration of a fundamental principle of the law of agency that an agent is responsible to the principal for negligence, a responsibility that cannot be waived by the principal beforehand because such a waiver is, by and large, contrary to public policy.

The contract of general sales agency (Exh. E, supra.) may not have categorically mentioned that PAL is the agent of JAL in the transportation of passengers and cargo from the Philippines. However, the contract of agency must be considered not as the parties stipulated but as they performed it (Quiroga v. Parsons Hardware Co., 38 Phil. 501). In this case, the activities of PAL unmistakably point to that of one acting as the agent of JAL.

But, petitioner contends that it cannot possibly have engaged here in the business of carrying passengers and cargo because none of its planes lifted passengers and cargo from or to the Philippines. It is true that a passenger or cargo booked for abroad in accordance with the arrangement between petitioner and PAL is invariably lifted from Manila to the first city out by a non-JAL plane, usually a PAL plane. This fact does not detract from petitioner's status as a common carrier in the Philippines, and thereby avoid the incidence of the excise tax imposed by Sec. 192 of the Revenue Code. As adverted to further above, the transportation contract is between JAL and the passenger. The common carrier that flies the passenger to the point where JAL takes over, carries the passenger as an agent of JAL and its planes are in effect the planes of JAL. (To constitute a common carrier with all the juridical liabilities thereof it is not essential that the person or corporation undertaking the service of carriage owns the means of transportation. If the contract is that the goods will be carried and delivered, it makes the one so contracting a common carrier, regardless of the name or the ownership of the line or lines over which the service extends) (see J. H. Cownie Glove Co. v. Merchants' Dispatch Transportation Co., 106 N.W. 749; Cristenson v. American Exp. Co., 15 Minn. 270, Gil. 208, 2 Am. Rep. 122).

JAL makes capital of the fact that it has no authority to operate in the Philippines and so it can not be a common carrier here. This is beside the point. The tax in question is based on section 192 of the Revenue Code which is a privilege tax on business and not on section 259 of the same Code governing franchise taxes.

Lastly, JAL asserts that the promulgation of Revenue Regulations No. 6-66 (effective June 26, 1967, 63 O.G. No. 26, pp. 5572-5575) which considers an off-line international airline having a branch office or a sales agent in the Philippines selling ticket for compensation or commission to cover off-line flights of its foreign airline, as not engaged in the business of a common carrier in the Philippines, and, therefore, not subject to common carrier's tax, bolsters the validity of its position. It further argues that although said regulations are inapplicable, since they took effect long after the years involved in this case, they nonetheless serve as an aid in ascertaining what is the meaning of the law before and after their promulgation, considering that the law has not been amended. We do not subscribe to this view. (As JAL correctly pointed out, the said regulations have no retroactive effect and, therefore, cannot apply to transactions taking place before its promulgation, as in the case at bar. Moreover, we are not bound by the interpretation given by administrative body in charge in the implementation of the law if we believe that such an interpretation is unwarranted. It lies within the exclusive province of the courts to determine what is the true meaning and intent of the law. To this end, administrative regulations may help but not control the courts in the construction of a given statute.)

WHEREFORE, the petitioner's claim for refund is here DENIED, with costs against petitioner.

SO ORDERED.

Quezon City, January 27, 1968.

RAMON L. AVANCEÑA
Associate Judge

I CONCUR:

ESTANISLAO R. ALVAREZ
Associate Judge

Presiding Judge Roman M. Umali did not take part.