REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PROFESSIONAL SERVICES, INC. (PSI)
Petitioner,

- versus - **C.T.A. CASE NO. 6218**

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
DEC 04 2002

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DECISION

This case involves a claim for refund or issuance of tax credit certificate in the amount of Five Million Eight Hundred Nineteen Thousand Seven Hundred Thirty-Seven Pesos and Fifty Centavos (P5,819,737.50) representing documentary stamp tax alleged to have been erroneously paid by the petitioner in connection with the transfer of its land in exchange for shares of stocks of another corporation.

Petitioner Professional Services, Inc. *(PSI, for brevity)* is a domestic corporation incorporated primarily to establish, operate, manage and own hospital or hospitals, medical and clinics and/or laboratories and such other enterprises which may have similar undertakings.

On December 14, 1998, PSI and PSI Land Inc. entered into a Memorandum of Agreement whereby petitioner PSI will transfer its land (where the hospital is located) to

PSI Land Inc. in exchange for the latter's shares of stock. (*Exhibit A; par. 1, Joint Stipulation of Facts*). The purpose of the transfer was to effect the proposed increase in authorized capital stock of PSI Land Inc. from One Million Six Hundred Thousand Pesos (P1,600,000.00) to Four Hundred Million Pesos (P400,000,000.00), subject to SEC approval.

To effect the transfer of the land of petitioner to PSI Land Inc. in exchange for the latter's shares of stock, petitioner and PSI Land Inc. executed a Deed of Assignment on December 21, 1998 (*Exhibit B; par. 2, Joint Stipulation of Facts*). Petitioner then paid on January 8, 1999 the documentary stamp tax on the said Deed of Assignment in the amount of P5,819,737.50 (*Exhibit C; par. 3, Stipulation of Facts*).

Petitioner alleges that thereafter, the subject land was mortgaged to a consortium of banks to guarantee a loan. Under said circumstances, the land became unacceptable as a consideration for the subscription by PSI of PSI Land Inc.'s intended increase in authorized capital stock. As a consequence thereof, the application for increase in authorized capital stock of PSI Land Inc. with the Securities and Exchange Commission (SEC) was not approved (*page 10, TSN, November 19, 2001; page 11, TSN, September 6, 2001*).

Considering that no SEC approval on the increase in authorized capital stock was issued or will be issued in the future, petitioner believes that the documentary stamp tax payment was erroneous since the transfer of land was not consummated and thus, no conveyance or transfer of real property was made by the parties. Moreover, petitioner maintains that the parties no longer intend to undertake the transaction.

Thus, on January 5, 2001, petitioner filed a request for refund or issuance of tax credit certificate in the amount of P5,819,737.50, representing erroneously paid documentary stamp tax (*Exhibit D; par. 4, Stipulation of Facts*). As there was no immediate action on the part of the respondent, petitioner elevated its case before us on January 8, 2001. Considering that the date of payment of the documentary stamp tax was made on January 8, 1999, petitioner had until January 7, 2001 to institute the instant petition, the year 2000 being a leap year. However, since January 7, 2001 fell on a Sunday, the petition was still timely filed on January 8, 2001.

Petitioner and respondent jointly stipulated the issues to be resolved in this case, to wit:

1) Whether or not there was a transfer or conveyance of real property that would be subject to documentary stamp tax (DST); and

2) Whether or not petitioner is entitled to DST refund.

Petitioner argues that it erroneously paid the documentary stamp of P5,819,737.50 tax inasmuch as the transfer of the land was not consummated and thus, the amount so paid is refundable.

Respondent, for his part, specifically denied all material allegations of the petitioner in its Petition for Review and asserts that the payment of the documentary stamp tax was correct and proper. However, when it was his chance to present evidence, counsel for the respondent merely submitted the case for decision without presenting any evidence (*page 179, CTA records*).

Anent the first issue of whether or not there was a transfer or conveyance of real property that would be subject to documentary stamp tax, petitioner posits that there was no absolute conveyance or transfer of real property, the reason being that when the subject land was mortgaged to a consortium of banks, the land became unacceptable as a consideration for the shares of PSI Land Inc. As a result, the application for increase in authorized capital stock of PSI Land Inc. with the SEC did not proceed. Therefore, payment of documentary stamp tax on the Deed of Assignment was erroneous.

Respondent, on the other hand, counters that documentary stamp tax is a tax on the transaction. A conditional transfer of land is the transaction that is the subject of the documentary stamp tax. A documentary stamp tax is in the nature of an excise tax. It is not imposed upon the business transacted but is an excise upon the privilege, opportunity or facility offered at exchanges for the transaction of the business. According to the respondent, it is immaterial whether the sale was consummated or not. The transaction that is liable to documentary stamp tax is the issuance of the deed of assignment.

We find for the petitioner.

In the Memorandum of Agreement executed between petitioner and PSI Land Inc. (*Exhibit A*), it was provided, among others, that:

> WHEREAS, PSI and PSI Land, Inc. mutually agree to execute a Deed of Assignment whereby PSI shall assign and transfer its 100% undivided interest in the said property to PSI Land Inc. as payment for the shares of stock of the latter corporation, provided that such Deed of Assignment shall be considered

> annulled, rescinded, abandoned and without effect from the beginning in the event that a clear indication is shown that PSI cannot and is unable to transfer the aforesaid property to PSI Land, Inc..
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> NOW THEREFORE, for and consideration of the foregoing premises and mutual covenants, PSI hereby agrees to transfer and assign its 100% undivided interests and participation over that certain parcel of land described free from any and all liens and encumbrances, to PSI Land, Inc. as well as to execute a Deed of Assignment in favor of PSI Land, Inc. regarding the same, and PSI Land, Inc. hereby accepts such offer of PSI, **subject to the approval of the SEC for the increase in authorized capital stock.** (Underscoring supplied).

Pursuant to said Memorandum of Agreement, a Deed of Assignment was executed by PSI and PSI Land Inc. (*Exhibit B*) partly stipulating, thus:

> WHEREAS, the ASSIGNOR and the ASSIGNEE mutually agree to consolidate the ownership of the above-described property by which the ASSIGNOR shall assign and transfer its 100% undivided interest in the said property to the ASSIGNEE as payment in kind for the ASSIGNOR'S subscription to the ASSIGNEE'S increase in capital stock.

The intent of the parties cannot be disputed. Petitioner will assign and transfer the subject land to PSI Land Inc. as payment for the subscription to the latter's increase in capital stock. But then PSI Land Inc. cannot by itself increase its capital stock without the consent or approval of the SEC. However, the subject land could not be transferred or conveyed to PSI Land Inc. (*Exhibit E*) since it was mortgaged to a consortium of banks with the Development Bank of the Philippines as trustee (*Exhibit E-4*) and petitioner failed to get a written consent from the mortgagee-banks (*TSN, November 19, 2001, page 8*) for the intended swapping. Therefore, PSI Land Inc. was not able to comply with the requirements set forth by the SEC relative to its application for increase in authorized capital stock (*Exhibits F, G and H*).

Clearly from the facts availing in this case, no documentary stamp tax is due and demandable. This court agrees with the respondent that documentary stamp taxes are levied on the exercise by persons of certain privileges conferred by law for the creation, revision, or termination of specific legal relationships through the execution of specific instruments. Nevertheless, we do not concur with the sweeping statement of respondent that documentary stamp taxes must be paid upon the issuance of the said instruments, without regard to whether the contracts which gave rise to them are rescissible, void, voidable or unenforceable. It must be borne in mind that when the Supreme Court made such ruling[1], the issue pertained to the payment of documentary stamp tax upon the issuance of insurance policy. Besides, the Tax Code is quite clear on the matter that there shall be collected a documentary stamp tax on insurance policies issued whereby any insurance shall be made or renewed upon any life or lives. The same principle had been enunciated by the Supreme Court in the earlier insurance cases of *Commissioner of Internal Revenue vs. Heald Lumber Co.*[2] and *Lincoln Philippine Life Insurance Company, Inc. vs. Court of Appeals.*[3] But the cases of *Consolidated Coconut Industries, Inc. vs. Collector of Internal Revenue*[4] and *Commissioner of Internal Revenue vs.*

[1] Phil. Home Insurance Corp., et al. vs. CA, 301 SCRA 443.
[2] 10 SCRA 372.
[3] 293 SCRA 92.
[4] 70 SCRA 22.

Construction Resources of Asia, Inc.,[5] also relied upon by the respondent, delved on the taxability on the issuance of certificates of stocks. In said cases, the Supreme Court had this to say:

> "Ordinarily, when a corporation issues a certificate of stock (representing the ownership of stocks in the corporation to fully paid subscription) the certificate of stock can be utilized for the exercise of the attributes of ownership over the stocks mentioned on its fact. The stocks can be alienated; the dividends or fruits derived therefrom can be enjoyed, and they can be conveyed, pledged or encumbered. The certificate as issued by the corporation, irrespective of whether or not it is in the actual or constructive possession of the stockholder, is considered issued because it is with value and hence the documentary stamp tax must be paid as imposed by Section 212 of the National Internal Revenue Code, as amended.
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> xxx xxx xxx
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> "Predicated on the above reasons, We are firmly convinced that the Government stands to lose nothing in imposing the documentary stamp tax only on those stock certificates duly issued, or wherein the stockholders can freely exercise the attributes of ownership and with value at the time they are originally issued. As regards those certificates of stocks temporarily subject to suspensive conditions they shall be liable for said tax only when released from said conditions, for then and only then shall they truly acquire any practical value for their owners."

Based on the above pronouncement, the documentary stamp tax was imposed on every original issue of certificates of shares of stock, whether or not said certificates are delivered actually or constructively to the stockholder. What is taxed is the privilege of issuing shares of stock and, therefore, the tax accrued at the time the shares are issued.

In the case at bar, the privilege of issuing shares of stock (increase in capital stock) was not exercised because PSI Land Inc.'s application to increase its authorized capital

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[5] 145 SCRA 671.

stock with the SEC did not proceed. It follows that no certificate of shares of stock was issued. Accordingly, no documentary stamp tax was imposable. And even if we view it from Section 196 of the Tax Code, as amended, still, the privilege of transferring or conveying the ownership or title of the subject land in consideration to subscribing PSI Land Inc.'s increase in capital stock was not availed of, notwithstanding the existence of the Deed of Assignment. Section 196 of the Tax Code, as amended, is partly quoted hereunder:

> SEC. 196. *Stamp Tax on Deeds of Sale and Conveyance of Real Property.* – On all conveyances, deed, instruments, or writings, other than grants, patents or original certificates of adjudication issued by the Government, whereby any land, tenement or other realty sold shall be granted, assigned, transferred or otherwise conveyed to the purchaser or purchasers, or to any other person or persons designated by such purchaser or purchasers, there shall be collected a documentary stamp tax, at the rates herein below prescribed, based on the consideration contracted to be paid for such realty or its fair market value determined in accordance with Section 6(E) of this Code, whichever is higher: Provided, That when one of the contracting parties is the Government, the tax herein imposed shall be based on the actual consideration:
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> (a) When the consideration, or value received or contracted to be paid for such realty after making proper allowance of any encumbrance, does not exceed One thousand pesos (P1,000), fifteen pesos (P15.00).
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> (b) For each additional One thousand pesos (P1,000), or fractional part thereof in excess of One thousand pesos (P1,000) of such consideration or value, Fifteen pesos (P15.00).

Petitioner paid the documentary stamp tax of P5,819,737.50 based on the above provision (*Exhibits C and C-1*). But respondent stands firm that the payment of said tax was proper because a conditional transfer of land is the transaction that is the subject of the documentary stamp tax in this case.

This court begs to disagree. We do not believe that the mere execution of the Deed of Assignment makes petitioner liable to pay the documentary stamp tax. Under the aforequoted Section 196, documentary stamp tax is levied on all conveyances, deeds, instruments, or writings, other than grants, patents or original certificates of adjudication issued by the Government, whereby any land, tenement or other realty sold shall be granted, assigned, transferred or otherwise conveyed to the purchaser or purchasers or any person or persons designated by such purchaser or purchasers. While it is generally true that a documentary stamp tax is levied on the document and not on the property involved, the documentary stamp tax is not intended to be a tax on the document alone. The law taxes the document because of the transaction so that the tax becomes due and payable at the time the transaction is had or accomplished and in the case at bar, the assignment and transfer of the subject property in exchange for PSI Land Inc.'s increase in capital stock. Despite the execution of the Deed of Assignment, the subject land was not effectively assigned to PSI Land Inc. or the transaction was not accomplished. This can be evidenced by the Transfer Certificate of Title whereby the land remains in the name of petitioner (*Exhibit E*).

Further, as elucidated by the Supreme Court in the earlier cited cases, certificates of shares of stock subject to suspensive conditions shall be liable to documentary stamp tax only when they are released from said conditions. In the same vein, the Deed of

Assignment executed between petitioner and PSI Land Inc. was subject to the suspensive condition that the SEC should approve the application for increase in authorized capital stock of the latter. Since the application with the SEC did not push through, it cannot be gainsaid that the suspensive condition was not fulfilled. To put it differently, there was no transfer or conveyance of real property that would be subject to documentary stamp tax.

In the case of *Spouses Francis Go and Edna San Gabriel Go vs. Commissioner of Internal Revenue, CTA Case No. 5875, December 1, 1999* and affirmed *in toto* by the Court of Appeals on September 19, 2001, an extra-judicially foreclosed property was redeemed by the owners-petitioners before the expiration of the statutory period of one year. The redemption price included the capital gains tax and documentary stamp tax paid by the mortgagor. This court ruled that since the mortgagor did not earn any income from the sale of the foreclosed property, it should not be made liable to pay the capital gains tax and the documentary stamp tax, especially taking into consideration that in foreclosure sale, transfer of ownership ensues only upon expiration of the redemption period of one year. Inasmuch as the property was redeemed within the statutory period, there was no sale or transfer of ownership or title of the property involved.

In contrast is the case of *Far East Bank and Trust Company versus Commissioner of Internal Revenue*[6]. Parcels of land were mortgaged to petitioner bank as security for a loan obligation. The mortgagor failed to pay its loan and the mortgaged properties were then extra judicially foreclosed with petitioner as the highest bidder. Transfer

[6] CTA Case No. 5074, January 2, 1997.

Certificates of Title covering the subject properties were issued in the name of the petitioner. However, the Court of Appeals, affirmed by the Supreme Court, reversed the decision of the lower court and nullified the sale of the subject properties. Petitioner bank then filed a claim for the refund of capital gains tax and documentary stamp tax paid thereon. In view of the grant of the claim for refund by respondent of the capital gains tax, the issue raised before this court was whether or not the documentary stamp tax was refundable as well. It was declared therein that "the subsequent cancellation of the auction sale by court decree is of no consequence because there was an actual transfer of property in the name of the petitioner" as shown by the Transfer Certificates of Title issued in the name of the petitioner. The transaction involved a transfer of property and the transfer of title was consummated. Therefore, the documentary stamp tax paid thereon was correct and proper.

In sum, if the transaction involves a transfer of real property, the transaction must be consummated before documentary stamp tax liability attaches. In other words, there must be a transfer of title or ownership shown by the Transfer Certificate of Title. And if the real property is to be assigned as in this case, the transaction after having been accomplished or consummated should have been annotated in the Transfer Certificate of Title. As long as there is actual transfer or assignment, documentary stamp tax becomes payable regardless of whether the transfer or assignment is later on declared as null and void. On the other hand, if documentary stamp tax is levied on the issuance of a certificate of shares of stock, said certificate must be duly issued or wherein the stockholder can freely exercise the attributes of ownership. If a certificate of stock is under suspensive conditions, it shall be liable to documentary stamp tax only when the suspensive conditions are fulfilled.

Thus, whether the transaction liable to documentary stamp tax in the instant case is the issuance of the certificate of stock or transfer of real property, the end result will be the same. The payment made by the petitioner of the documentary stamp tax in the amount of P5,819,737.50 was erroneous since no certificate of stock was ever issued relative to the intended increase in capital stock (as the application thereof did not proceed) nor was there transfer of subject land as payment for the subscription of the intended increase in capital stock..

WHEREFORE, in view of all the foregoing, the court finds the instant petition meritorious and in accordance with law. Accordingly, respondent is hereby **ORDERED** to **REFUND** or, in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner in the amount of P5,819,737.50, representing erroneous payment of documentary stamp tax.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

I CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
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