L1B

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FAR EAST BANK AND TRUST COMPANY,
Petitioner,

- versus -

CTA CASE NO. 5074

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JAN 02 1997

x - x

DECISION

This is a claim for refund in the original amount of P12,900,003.00 representing capital gains tax and documentary stamp tax (DST) alleged to have been paid by the petitioner on March 11,1992. This amount was reduced to only P2,150,000.00 for DST as the respondent subsequently granted the refund of the capital gains tax in the amount of P10,750,000.00 by the issuance of a Tax Credit Certificate in the said amount in favor of petitioner (Exhibit "T").

The pertinent facts are not in dispute.

On June 28,1990, Ma'ao Sugar Central Co., Inc. (MSCI) mortgaged to petitioner bank, 30 parcels of land as security for a loan obligation obtained by the former from the latter in the amount of P135,178,050.00. This real estate mortgage was later amended to include an additional seven (7) parcels of land all of which are located in Negros Occidental.

The mortgagor, MSCI, failed to pay its loan obligation on the agreed date which prompted the petitioner to file for the extrajudicial foreclosure of the subject properties. Shortly thereafter, an auction sale was held and petitioner, being the highest and sole bidder, was awarded said properties. The petitioner then alleges that it consequently paid the capital gains tax and the DST in the total amount of P 12,900,003.00, the details of which are as follows :

Certification Fee	P 3.00
Documentary Stamp Tax	2,150,000.00
Withholding Tax	10,750,000.00
TOTAL	P12,900,003.00

Transfer Certificates of Title covering the subject properties were soon issued in the name of petitioner (Exhibits "H" and "I"), but the Court of Appeals reversed the decision of the lower court and nullified the sale of the subject properties. The decision of the Court of Appeals was finally affirmed by the Supreme Court even after several motions for reconsideration filed by the petitioner, in a resolution dated September 27, 1993.

The nullification of the auction sale and the consequent cancellation of titles now a stark reality, petitioner then filed a claim for refund in a letter dated December 2, 1993 and received by the respondent on December 10, 1993. Apparently, this letter did not elicit any response from the respondent, so petitioner filed a petition for review with this Court on March 10, 1994.

Respondent in answer to the petition averred the following Special and Affirmative Defenses, thus:

> 5. The petition does not state a cause of action, Documentary stamp tax and capital gains tax are taxes on the document or instrument evidencing the transaction agreed upon and the same are due and payable at the time the transaction is accomplished. The subsequent cancellation or nullification of the transaction, therefore, does not invalidate the taxes already collected, hence, no refund/credit can be allowed for the tax paid;
>
> 6. Petitioner has not shown that the tax sought to be refunded/credited was actually paid by it. In fact, Annex "G" of the petition indicates that no capital gains tax was paid because the vendor-mortgagor, Ma-oa Sugar Central Co., Inc. is a corporation exempt from the payment of capital gains tax;
>
> 7. Assuming, arguendo, that petitioner (mortgagee and buyer at the auction sale) paid the capital gains tax, it is not entitled to a refund or tax credit;
>
> > "When a mortgagee at foreclosure pay the capital gains tax, he cannot ask for a refund from the government but he (the mortgagee) can ask for reimbursement from the mortgagor. (Nolledo, the National Internal Revenue Code, 1993 ed., page 964)."

8. Again, assuming that capital gains tax was paid, it is doubtful whether petitioner was the one who paid the same, considering that capital gains tax is normally paid by the debtor-mortgagor and not the buyer-mortgagee;

9. A documentary stamp tax is in the nature of an excise tax. It is not imposed upon the business but a tax upon the privilege, opportunity or facilities offered at exchanges for the transaction of the business. It is an excise upon the facilities used in the transaction of the business separate and apart from the business itself. (Commissioner of Internal Revenue v. Heald Lumber Co., 10 SCRA 372 [1964]);

10. The liability of an instrument to a documentary stamp tax and the amount thereof is determined on the face thereof and cannot be affected by proof of facts outside of the instrument itself (Jose Arenas, updated National Internal Revenue Code, 1988 ed., p. 773). Thus, the state in collecting the tax is not bound to go beyond the face of the transaction and determine whether the transaction is valid or not. Consequently, when the transaction is cancelled or nullified there can no longer be refund/credit of the taxes paid. In effect, a person or entity entering into an invalid transaction runs the risk of forfeiting whatever documentary stamp tax he may have paid;

11. Petitioner has failed to show that it has complied with the provisions of Section 230 of the Tax Code which is a mandatory requirement before an action for tax refund may be filed;

12. Filing of a claim for refund is mandatory and a prerequisite or a condition precedent to the prosecution of a suit for the recovery of taxes said to have erroneously or illegally collected, and non-compliance therewith bars and is fatal to the action. (Johnston Limber Co., Inc. vs. CTA and Collector of Internal Revenue, 101 Phil. 151 [1957]);

> 13. Tax refunds are in the nature of tax exemption, thus, it must be construed strictly against the claimant.

In view of the grant of the refund of the capital gains tax, the issue that confronts this Court is now confined to the determination of the question of whether or not petitioner is entitled to the refund of P2,150,000.00 representing the DST paid in 1992.

Petitioner argues that Section 196 of the Tax Code which imposes DST on sale of property contemplates of a consummated sale where the ownership in real property is transferred in favor of the purchaser and since the sale in question was declared a nullity, then the sale is deemed not to have taken place and therefore no real property was transferred in its favor. Furthermore, petitioner adds that DST is an excise tax and as such is imposed upon the privilege or facilities used in the transaction, it follows then that if the privilege was taken away by the taxing power, then no transaction can be had and no tax should have been collected.

Respondent, in her initial arguments, questioned the evidence presented by the petitioner because she contends that no sufficient evidence was offered to prove payment, however in her memorandum, she limited her arguments to the legal aspect of the refund of the DST. She contends that even if the sale was cancelled, no refund can be granted because basically DST is a tax upon documents, instruments and papers and upon acceptances, assignments, sales and transfers of the obligation, right or property incident thereto, citing Section 173 of the Tax Code. Therefore, the DST was due and payable at the time the transaction was made and completed, thus the consequent nullification of such transaction does not entitle the taxpayer the automatic return of such payment. Respondent agrees with the petitioner that DST is an excise tax imposed upon the privilege or facilities used in the transaction. She however contends that once this privilege is utilized, the consequent nullification of such transaction would result in the forfeiture of the DST that may have been paid.

We agree with respondent's contentions.

Section 173 of the NIRC provides:

> "SEC. 173. ***Stamp taxes upon documents, instruments, and papers.*** - Upon documents, instruments, and papers, and upon acceptances, assignments, sales, and transfers of the obligation, right, or property incident thereto, there shall be levied, collected and paid for, and in respect of the transaction so had or accomplished, the corresponding documentary stamp taxes prescribed in the following sections of this Title, by the person making, signing, issuing, accepting, or transferring the same, and at the same time such act is done or transaction had: *Provided*, That whenever one party to the taxable document enjoys exemption from the tax herein imposed, the other party thereto who is not exempt shall

be the one directly liable for the tax (*as amended by Pres. Decree No. 1994).*"

In the instant case, the transfer of title was consummated as shown by the Transfer Certificates of Title presented as exhibits "H" and "I" issued in the name of herein petitioner. The transaction involves transfer of property. And since the transaction was effected by the actual transfer of the property in the name of petitioner as evidenced by exhibits "H" and "I", the DST was rightfully and legally paid at the time "such act is done or transaction had". Normally, the DST and the Capital Gains Tax are paid before the property can be transferred in the name of the buyer. With the actual transfer or with the "transaction (auction sale) had", the payment of the DST in advance actually effected the transfer. Otherwise, the property cannot be processed to effect the transfer without the payment of the DST and the Capital Gains Tax.

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 petitioner.

In the case of **Commissioner** of Internal Revenue v. **Heald Lumber Co., 10 SCRA 372 [1964]**, the Supreme Court held that:

"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. It is an excise upon the facilities used in the transaction of the business separate and apart from the business itself. (Du Pont v. U.S., 300 U.S. 150; Thomas v. U.S., 192 U.S. 363; Nicol v. Ames, 173 U.S. 509). With respect to stock certificates, it is levied upon the privilege of issuing them; not on the money or property received by the issuing company for such certificates. Neither is it imposed upon the share of stock. As Justice Learned had pointed out in one case, documentary stamp tax is levied on the document and not on the property which it described. (Empire Trust Co. v. Hoey, 103 F 2d. 430). If, therefore, as is apparent from the foregoing discussion, that the tax in question is imposed on the privilege of issuing certificates, then the tax may be collected only once: when the certificates are first or originally issued. The reason is because a certificate is issued only once. Whatever documentary tax is due, is due at that time. (Empire Trust Co. v. Hoey, *supra*).

A Documentary Stamp Tax is an excise tax. It is a tax on the privilege to enter into a transaction. The tax is designed to raise revenues and not to render the document void. (NOLLEDO, Bar Reviewer in Taxation, 1990 Tenth and Rev. Ed., p. 597; see also the recent case of Commissioner of Internal Revenue v. Firemen's Fund Insurance Co., et. al., L-30644, March 9, 1987). Similarly, the DST on the sale or transfer of real property is imposed on the privilege of transferring real property (by auction sale). Thus, the "transaction had" is the sale of real property - effected by the transfer of property in the name of petitioner. Whatever documentary stamp tax is due, is due at the time. The annulment of the sale happened after the transfer of title. A subsequent event, that is, the declaration of nullity of the sale, will not affect the payment of the DST because the privilege was actually used and effected at the time that the title to the property was transferred in petitioner's name.

In the consolidated cases entitled **American International Underwriters (Phils.), Inc. v. Commissioner of Internal Revenue, CTA Case No. 4208; Philippine American General Insurance Company v. Commissioner of Internal Revenue, CTA Case No. 4209; Philippine American Accident Insurance Company v. Commissioner of Internal Revenue, CTA Case No. 4210; Philippine Home Assurance Corporation v. Commissioner of Internal Revenue, CTA Case No. 4211**, all dated April 26, 1993, this Court ruled that the subsequent cancellation of the transaction from where the DST liability attaches, does not have the effect of cancelling such liability. We quote pertinent portions of the aforecited consolidated cases, thus:

> 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. It is an excise upon the facilities used in the transaction of the business separate and apart from the business itself." (Aranas, Updated National Internal Revenue Code, 1988 Edition, p. 772; Underscoring supplied). While it is true that a documentary stamp tax is levied on

> the document and not on the property which it described, (Comm. v. Heald Lumber Co., 10 SCRA 372) the documentary stamp tax is not intended to be a tax on the document alone, rather, the law taxes the document because of the transaction. It is due and payable (Sec. 173, NIRC) at the time the transaction is had or accomplished (i.e., at the time of the issuance of the document).
>
> x x x. The payment or non-payment of the premiums by the insurants is immaterial since documentary stamp taxes are in the nature of an "excise upon the facilities used in the transaction of the business separate and distinct from the business itself" (Underscoring supplied; Aranas, ibid.) Such being the case, there is wisdom in the BIR Ruling No. 433 by which this Court agree fully that the "subsequent cancellation of insurance policies issued will not exempt the issuer from the corresponding documentary stamp tax." And thus, "no refund can be allowed of the documentary stamp tax paid on insurance policies which for some reason or another have been cancelled" (ibid) or for that matter, the premiums were unpaid."

WHEREFORE, in view of the foregoing, the instant petition for review is **DISMISSED** and the claim for refund in the amount of P2,150,000.00 representing payment of documentary stamp tax is hereby **DENIED.**

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

I CONCUR:

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that this 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
Court of Tax Appeals