REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ALLIED BROADCASTING CENTER, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 5713

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
FEB 21 2002

x - x

DECISION

Case before Us stemmed from Respondent's issuance of Assessment Notice Nos. FAN-4-83-007554, FAN-1-83-87-007555, FAN-1-83-87-007556 and FAN-8-83-87-007557, against the Petitioner involving Deficiency Franchise Tax, Deficiency Income Tax, Expanded Withholding Tax and failure to withhold tax at source covering the year 1983.

The case at bar arose from the following antecedents:

Petitioner is a corporation organized and existing under and by virtue of the laws of the Philippines. It is primarily engaged in the broadcasting business.

It was a grantee of a legislative franchise under Republic Act No. 3001, an Act Granting the Allied Broadcasting Center permit to construct, maintain and operate Radio Broadcasting Stations in the Philippines, which took effect on June 19, 1960.

As of December 31, 1981, all existing franchises including that of the Petitioner were terminated by Presidential Decree No. 576-A.

From the said termination until such time that it was granted a new legislative franchise by virtue of Republic Act No. 8096, Petitioner continuously operated its broadcasting business through administrative permits and licenses.

In November 1997, Respondent issued the assailed assessment notices covering the following deficiency taxes for taxable year 1997:

Deficiency Franchise Tax	P294,196.31
Deficiency Income Tax	39,849.00
EWT	313.89
Failure to withhold tax at source	8,585.88

The aforesaid assessments were levied under Section 267 of the National Internal Revenue Code of 1997 which provides, thus:

> "**Section 267**. *Tax on franchises*. – (a) In general. – There shall be collected in respect to all franchises upon the gross receipts from the business covered by the law granting the franchise, a tax of five per centum or such taxes, charges and percentages as are specified in the special charters of the grantees upon whom such franchises are conferred, whichever is higher, unless the provisions thereof preclude the imposition of a higher tax. x x x"

To question the assessment, Petitioner's counsel wrote a letter to the Respondent on January 29, 1988, requesting termination of the Assessment Notices on the ground that Petitioner's availed itself of the Tax Amnesty granted under Executive Order No. 41 as implemented by Revenue Regulations No. 14-86.

However, Respondent informed the Petitioner in a letter dated August 11, 1988, that the tax amnesty did not cover the subject Franchise Tax, Expanded Withholding Tax and Withholding Tax Assessments.

To lay the fact that the BIR issued warrants but were never served.

Consequently, Petitioner in a letter dated September 18, 1990 requested for a consideration and cancellation of the assessment on the ground that the operations of its broadcasting stations were exempt from the payment of franchise tax by virtue of Republic Act No. 2889 which was effective from June 18, 1960 until it was modified or repealed by Executive Order No. 72, which took effect on November 26, 1986.

Petitioner's request for reconsideration was, however, denied in a letter dated July 13, 1998.

On January 8, 1999, Petitioner comes to this Court via Petition for Review.

In an Answer filed on March 5, 1999, the Respondent advanced the following Special and Affirmative Defenses:

> "6. He reiterates and repleads the preceding paragraphs of this Answer as part of his Special and Affirmative Defenses.
>
> 7. Section 1 of Republic Act No. 2889 granting exemption from the payment of franchise and privilege taxes was revoked/amended by Section 5(b) of R.A. No. 3001 (an Act Granting the Allied Broadcasting Center Permit to Construct, Maintain and Operate Radio Broadcasting Stations in the Philippines).
>
> Section 5(b) of R.A. 3001 was in turn amended by Section 267 of the NIRC of 1997 which imposed a tax of 5% of the gross receipts from the business covered by the law granting all franchises.
>
> > "**Sec. 267**. *Tax on franchises*. – (a) <u>In general. – There shall be collected in respect to all franchises upon the gross receipts from the business covered by the law granting the franchise, a tax of five per centum or such taxes, charges and percentages as are specified in the special charters of the grantees upon whom such franchises are conferred, whichever is higher</u>, unless the provisions thereof preclude the imposition of a higher tax. For the purpose of facilitating the assessment of this tax, reports shall be made by the respective holders of the franchises in such form and at such times, as shall be required by

> the regulations of the Ministry of Finance. The taxes, charges, and percentages on franchises, shall be assessed, collected by and paid to the Commissioner or any of his collection agents, any provision in the franchise to the contrary notwithstanding, and shall be due and payable as specified in the particular franchise, or, in case no time limit is specified therein, the provisions of section 193 shall apply; and if such taxes, charges, and percentages remain unpaid on the date on which they must be paid, twenty-five per centum shall be added to the amount of such taxes, charges, and percentages, which increase shall form part of the tax." (Underscoring supplied.)

It is crystal clear from the aforequoted provisions that Petitioner is liable for the 5% franchise tax.

8. Petitioner's contention that if at all it is liable for franchise tax, it is only liable for 1 and 1/2% instead of 5% since it has the right to benefit from any terms of the franchises of other radio stations more favorable than the terms of its franchise pursuant to Section 3 of R.A. 3001, such as the franchises of other radio stations like Filipinas Broadcasting Network, Inc. under R.A. No. 2990 and Nation Broadcasting Corporation of the Philippines under R.A. No. 3851, is untenable considering that even the franchises of these radio stations were amended by Section 267 of the Tax Code of 1977 which fixed a uniform franchise tax rate of 5% of gross receipts.

9. As regards Petitioner's availment of the tax amnesty under Executive Order No. 41, as implemented by Revenue Regulations No. 14-86, verification with Respondent's Tax Amnesty Implementation Office disclosed that its availment of the tax amnesty does not cover the following assessments:

ASSESSMENT NO.	KIND OF TAX	AMOUNT
FAN-4-83-87-007554	Franchise Tax	P643,854.41
FAN-1-83-87-007556	EWT	617.99
FAN-1-83-87-007557	Withholding Tax	8,585.88
TOTAL		P653,058.28

Hence, assessment of the above-enumerated deficiency taxes is appropriate and proper.

10. All presumptions are in favor of the correctness of tax assessments **(CIR vs. Construction Resources of Asia, Inc., 145 SCRA 671)** and the burden of proof to prove otherwise is upon Petitioner.

11. The right to assess has not prescribed since the assessments were issued on November 20, 1987 within five (5) years from the filing of Petitioner's income tax return for 1983 on April 16, 1984.

12. The right to collect has not prescribed since the prescriptive period for collection of the tax was suspended when Petitioner protested the assessments on January 29, 1988 and again on September 19, 1990. **(Commissioner of Internal Revenue vs. Wyeth Suaco Laboratories, Inc., 202 SCRA 125)**

The issues in this case as agreed upon by the parties in their Amended Joint Stipulation of Facts and Issues are the following:

"1. Whether or not Petitioner's 1983 gross sales of P5,883,926.18 are subject to the franchise tax imposed under Section 267 of the NIRC of 1997.

2. Whether or not the right to assess had prescribed.

3. Whether or not the Respondent had lost his right to collect the taxes assessed due to prescription.

4. Whether or not Petitioner's availment of tax amnesty covers the assessments of deficiency franchise tax, EWT and withholding tax.

We find merit in the petition, although we can categorically state that this is not due to prescription of the right to assess and collect the taxes in question. So before we go into the merits of the petition, a brief discussion on the Nos. 2 and 3 issues jointly stipulated by the parties is in order.

Petitioner contends that the right of Respondent to assess the taxes had already prescribed as they were all issued beyond the five (5) (now three) year period.

We find Petitioner's contention untenable. The allegation of prescription of the right to assess was not even amply supported by Petitioner with a sound argument. Strangely, even Petitioner's discussion of this theory lacked factual basis as can be gleaned from its Memorandum dated March 26, 2001 (see pages 161 to 162 of the CTA Records). What is clear to this Court however is the admitted fact that the assessments were issued on November 20, 1987 covering the taxable year 1983, the ITR of which was filed on April 15, 1984 (Nos. 5 and 7 of the Amended Joint Stipulation of Facts and Issues). From these admissions, it can be concluded that the assessments having been issued on November 20, 1987, the same were within the 5-year (now three years) period counted from the filing of Petitioner's ITR on April 16, 1984, hence the right of the Respondent to assess had not yet prescribed.

However, with respect to the right to collect the assessed taxes, this Court believes that it has already prescribed. The records show that Petitioner filed two (2) protests, one dated January 29, 1988 and the other September 18, 1990 raising its availment of the tax amnesty and other legal issues. Neither the protest dated January 29, 1988 nor the one dated September 18, 1990 requested for reinvestigation. Section 224 of the Tax Code clearly provides that the running of the Statute of Limitations for the collection of assessed taxes shall be suspended if the taxpayer requests for a reinvestigation which is granted by the Commissioner and we quote:

> **SEC. 224**. *Suspension of running of statute*. – The running of the statute of limitation provided in Sections 203 and 223 on the making of assessment and the beginning of distraint or levy or a proceeding in court for collection, in respect of any deficiency, shall be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty days thereafter; when the taxpayer requests for a reinvestigation

> which is granted by the Commissioner; when the taxpayer cannot be located in the address given by him in the return filed upon which a tax is being assessed or collected: *Provided, That*, if the taxpayer informs the Commissioner of any change in address, the running of the statute of limitations will not be suspended; when the warrant of distraint and levy is duly served upon the taxpayer, his authorized representative, or a member of his household with sufficient discretion, and no property could be located; and when the taxpayer is out of the Philippines.

In the instant case, Petitioner did not request for a reinvestigation. In 1990, the Warrants of Garnishment, Distraint and/or Levy were prepared but were never served to the taxpayer. Within the 5-year period, the records only show that the case was referred to the Legal Department of the BIR on October 5, 1990. No other actions were taken thereon until Petitioner was finally informed of the denial of the protest in a letter dated July 13, 1998. At that time, the period to collect has already prescribed.

Stripped of non-essentials, we shall now proceed to the other issues which for purposes of clarity will be discussed individually.

FRANCHISE TAX

Petitioner takes issue with the deficiency franchise tax assessment on the ground that during the taxable year in question (1983), it was not operating under a legislative franchise by virtue of P.D. 576-A which terminated all existing franchises including its own. Petitioner claims that it was merely given a permit to operate hence, not being a holder of a legislative franchise, it should not be held liable for franchise tax.

We agree with the Petitioner. This Court is of the opinion that the issue boils down to the tenor of the provisions of Section 267 of the National Internal Revenue Code of 1983, the law applicable during the taxable year in question, thus:

> "**Section 267**. *Tax on franchises*. – (a) In general. – There shall be collected in respect to all franchises upon the gross receipts from the business covered by the law granting the franchise, a tax of five per centum or such taxes, charges and percentages as are specified in the special charters of the grantees upon whom such franchises are conferred, whichever is higher, unless the provisions thereof preclude the imposition of a higher tax. x x x"

The subject provision is so coached in simple and unambiguous language that it need not require any interpretation. The plain import of the clause "covered by the law granting the franchise" is that this would be determinative of the issue as to whether or not Petitioner may be properly subjected to the imposition of franchise tax.

There is no dispute that Petitioner was a holder of a legislative franchise under Republic Act No. 3001 which permitted it to construct, maintain and operate radio broadcasting stations in the Philippines. However, as contained in the parties Amended Joint Stipulation of Facts and Issues, the said franchise was subsequently terminated by Presidential Decree No. 576-A as of December 31, 1981 (No. 14 of the Joint Stipulation of Facts and Issues). It is worthy to state that after the said termination, as testified to by Petitioner's witness, it continuously operated by virtue of a permit issued by the National Telecommunications Commission. The Court finds this fact relevant since the taxable year in question is 1983 during which the Petitioner was operating by virtue of a permit.

Respondent's protestation hinges mainly on the provisions of Section 267 of the National Internal Revenue Code of 1977 which imposed a tax of 5% upon the gross receipts from the business covered by the law granting the franchise.

This Court, however, wonders with puzzlement why the Respondent disregards the admitted fact that Petitioner's legislative franchise was terminated by Presidential Decree

No. 576-A and that the latter was operating through a permit in the year 1983. Section 6 of P.D. 576-A provides, thus:

> "**SECTION 6**. All franchises, grants, licenses, permits, certificates or other forms of authority to operate radio or television broadcasting systems shall terminate on December 31, 1981. Thereafter, irrespective of any franchise, grant, license, permit, certificate or other forms of authority to operate granted by any office, agency or person, no radio or television station shall be authorized to operate without the authority of the Board of Communications and the Secretary of Public Works and Communications or their successors who have the right and authority to assign to qualified parties, frequencies, channels or other means of identifying broadcasting systems; *Provided, however*, that any conflict over, or disagreement with, a decision of the aforementioned authorities may be appealed finally to the Office of the President within fifteen (15) days from the date the decision is received by the party in interest."

Touching on the distinction between a franchise and a license, this Court, in the case of **Republic Broadcasting System vs. CIR, CTA Case No. 4630, July 27, 1993**, ruled thus:

> "A "franchise" is a right or privilege granted by the sovereignty to one or more parties to do some act or acts, which they could not do without this grant from the sovereign power; a privilege which emanates from the sovereign power of the state or government; a branch of the sovereign power of the state, subsisting in a person or corporation by grant from the state (Words and Phrases, Vol. 17, pp. 471,482, 469).
>
> A "license" on the other hand, confers no right or estate nor vested interest, nor does it constitute a binding contract between the parties, but it is a mere leave to be enjoyed as matter of indulgence at the will of the party granting it. It is in no sense a contract between the state and the licensee, but is a mere personal permit, neither transferable nor vendible (Words and Phrases, Vol. 25, pp. 150, 174)."

We cannot blatantly disregard the aforesaid distinction since the very law itself speaks of a legislative franchise, and certainly a franchise is different from a permit and/or license. Prescinding from this premise, it indubitably follows that Petitioner cannot be properly assessed for deficiency franchise taxes because during the taxable year in question, it was a mere holder of a license/permit issued by the National Telecommunications Commission.

Thus, in **Commissioner of Internal Revenue vs. Republic Broadcasting Systems, Inc., and Court of Tax Appeals, CA-G.R. SP No. 32831 promulgated on September 19, 1994**, the Court of Appeals, confronting similar issues as in the case at bar, had the occasion to rule in this wise:

> "Section 117 of the National Internal Revenue Code imposes a franchise tax on the "gross receipts from the business covered by the law granting the franchise." It is, therefore, beyond cavil that said provision may be enforced only upon grantees of legislative franchises. If it were the intent of the framers of the aforementioned revenue measure to include television and radio stations operating by virtue of administrative permits and licenses, they could have easily so provided the same therein. We cannot thus sustain Petitioner's position that the finding of Respondent CTA cancelling the assessments against Respondent RBS is discriminatory and unfair to other franchise holders. The questioned assessments were precisely set aside by Respondent CTA for the reason that during the third and fourth quarters of 1987, Respondent RBS was not a holder of a legislative franchise and therefore should not and cannot be placed in the same category as that of other franchise holders." (underlining Ours)

Being in all fours with the case at bar, We see no cogent reason to deviate from, much less, disregard the foregoing pronouncements. It also bears stressing that the aforequoted Republic Broadcasting case has already become final by means of a Supreme Court Entry of Judgment dated October 4, 1995.

INCOME TAX

As admitted by then Commissioner of Internal Revenue, Beethoven L. Rualo, the deficiency income tax assessment under FAN 1-83-87-007555 is covered by the tax amnesty availed of by Petitioner hence said assessment should be withdrawn and cancelled. (Read Letter dated July 13, 1998, p. 8, CTA records). We therefore see no reason to depart from the pronouncement of Respondent.

WITHHOLDING TAXES

Petitioner presents the argument that it is no longer liable to pay the assessed withholding taxes because it availed of the tax amnesty granted by Executive Order No. 41 as implemented by Revenue Regulations No. 14-86.

Respondent, on the other hand, contends that the withholding taxes in question are not covered by the tax amnesty hence it must pay the amounts of P617.99 and P8,585.88 pertaining to expanded withholding taxes on security and other fees and surcharge on failure to withhold taxes on talent fees, respectively. The details of the aforesaid amounts are specified hereunder, thus:

Deficiency Expanded Withholding Tax

Security & Other Fees	P69,753.86
Multiply by the rate of tax	.45%
Deficiency Expanded Withholding Tax	P 313.89
Add: 25% Surcharge	78.47
20% Interest from 4/16/84 to 11/20/87	225.63
Total	P 617.99

Surcharge for Failure to Withhold Tax

Talent Fees	P343,435.29
Multiply by withholding tax rate	10%
Withholding tax	P 34,343.53
Multiply by surcharge rate	25%
Surcharge	P 8,585.88

We partially agree with the Respondent.

Section 4(d) of Executive Order (EO) 41 expressly excepts taxpayers with respect to withholding tax liabilities from the coverage of the tax amnesty. Said Section 4(d) of EO 41 provides:

> **SECTION 4**. *EXCEPTIONS*. – The following taxpayers may not avail themselves of the amnesty herein granted:
>
> x x x
>
> (d) Those that have withholding tax liabilities under the National Internal Revenue Code, as amended, insofar as said liabilities are concerned;
>
> x x x

Implementing EO 41, Section 3(d) of Revenue Regulations No. 14-86 provides:

> **SEC. 3**. *Who may not avail*. –
>
> x x x
>
> e) (d) Those with withholding tax liabilities under the Internal Revenue Code, as amended, insofar as said liabilities are concerned;
>
> x x x

We believe that withholding taxes are not income tax liabilities on untaxed income of the taxpayer, who is merely a withholding agent in this case.

With respect to the 25% surcharge for failure to withhold tax on talent fees in the amount of P8,585.88, We find Petitioner not to be liable to pay the same.

Based on the records of this case, the talent fees of P343,435.99 were included as part of the salaries and that the corresponding taxes have been withheld and remitted to the BIR (see pages 42 to 48 and 66 to 89, BIR Records), hence the surcharge imposed for failure to withhold tax should be cancelled.

WHEREFORE, in view of all the foregoing, the assessment issued against Petitioner for franchise tax and income tax as well as the 25% surcharge for failure to withhold taxes on talent fees pertaining to taxable year 1983 is hereby **CANCELLED**

while the assessment for withholding tax on security and other fees in the amount of P617.99 is deemed **VALID** and **DEMANDABLE**.

Accordingly, Petitioner is **ORDERED** to **PAY** Respondent the amount of P617.99 immediately.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

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