REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

HONGKONG AND SHANGHAI BANKING CORPORATION, LIMITED – PHILIPPINE BRANCHES,
Petitioner,

- versus -

C.T.A. CASE NO. 6009

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAY 0 2 2002

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DECISION

This case involves a claim for refund or issuance of a tax credit certificate in the amount of THIRTY TWO MILLION NINE HUNDRED FOUR THOUSAND FOUR HUNDRED THIRTY SEVEN PESOS and 30/100 (P32,904,437.30) representing erroneous payment of documentary stamp tax for the period January to December 1998.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of Hongkong and authorized by the Securities and Exchange Commission to engage in business in the Philippines with principal office address at the Enterprise Center, Tower I, 6766 Ayala Avenue corner Paseo de Roxas, Makati City. It is registered with the Bureau of Internal Revenue with Taxpayer's Identification No. 047-000-504-44.

Petitioner performs, among others, custodial services on behalf of its investor-clients, corporate or individual, resident or non-resident of the Philippines, with respect to the latter's passive investments in the Philippines, majority of which are investments in shares of stocks in domestic companies. As a custodian bank, Petitioner acts as the safe-keeper of the investor-client's investments as well as the collection/payment agent with respect to dividends and other income derived from the latter's passive investments.

The investor-clients maintain Philippine peso and/or foreign currency accounts. The funds maintained in these accounts are managed by Petitioner by instructions from said investor-clients given through electronic messages. These instructions are standard forms known in the banking industry as SWIFT instruction. SWIFT means "Society for Worldwide Interbank Financials Telecommunication" which is owned and operated by the International Banking Community and is basically, responsible for the transmission of electronic messages among financial institutions, banks, and specifically for custodial services. The standard forms of which are, identified as, SWIFT MT 100, MT 202, MT 521, MT 199, MT 299, MT 999, TELEX HEXAGON and/or MT 200.

In the purchase of shares of stock and other investment in securities, the investor-clients send electronic messages from abroad to Petitioner in the form of SWIFT MT 100, MT 202, MT 521, MT 199, MT 299, MT 999, TELEX, HEXAGON and/or MT 200, instructing petitioner to debit their local or foreign currency accounts and to pay the purchase price upon receipt of the securities.

Petitioner's witness, Gerardo Emmanuel Lim, Manager for Operations, Custody and Clearing Department, testified on the contents of the electronic messages, particularly MT 100 and MT 521, during the hearing held on August 28, 2000, to wit:

Q. Mr. Witness, could you briefly explain to us the nature and details printed on these documents?

A. For the MT 100, this is an instruction to pay out an account with another bank, and it is shown here the Transaction Reference Number, the Value Date, the Ordering Bank which is HSBC, the Account Number and the name of the customer.

For MT 521, this is an instruction for us to pay out certain amount of cash. This is the result of the buying of shares of stocks in the market. So, we have the Settlement Date, the Transaction Reference Number, the Date and Place, the Code for whatever Shares that our client bought, the Number of Shares bought, the Safekeeping Account Number, the Delivery of the Securities which is indicated on the Securities Brokerage, the Account for Payment which indicates the account for which the settlement amount will be paid.

The contents of MT 199, MT 299, MT 599 and MT 999 were explained by Mr. Lim during the hearing held on September 26, 2000, as follows:

A. For MT 199, MT 299, MT 599 and MT 999. MT 199 is a Pre-format Type of the swift instruction basically it instructs the bank to debit an amount from the clients account and to a designated third party which is also included in this instruction. The Swift MT 202, is the corresponding bill showing the dates, the account of the clients who will pay the amount to the beneficial banks and all the other pertinent information that is needed to reflect the payments. Swift MT 299, is a Pre-format type of swift instruction. It instructs the bank to debit an amount from the clients account and to a designated third party which is also included in this instruction. Swift MT 599, Pre-format type of swift instruction. It instructs the bank to debit an amount from the clients account and to a designated third party which is also included in this instruction. Swift MT 999, Pre-format type of swift instruction. It instructs the bank to debit an amount from the clients account and to a designated third party which is also included in this instruction. Telex is a Pre-format swift instruction to debit an amount from the clients' account with us and pay to a third party. Hexagon is an internal service provided by the bank wherein the client is allowed to receive an access or authorized to issue an instruction to us to pay out a certain party based on a certain format similar to a swift instruction. Swift MT 200, instruction of a client to pay a certain amount at a certain value date to the beneficiary in other banks.

On August 23, 1999, the Bureau of Internal Revenue (BIR) issued a ruling to the effect that instructions/advises from abroad on the management of funds located in the Philippines which do not involve transfer of funds from abroad are not subject to the documentary stamp tax, the pertinent portion of which reads as follows:

BIR Ruling No. 132-99

"x x x this office hereby holds that the instruction made through an electronic message by non-resident payor-client to debit his local or foreign currency account maintained in the Philippines and to pay a certain named recipient also residing in the Philippines, is not the transaction contemplated under Section 181 of the Tax Code. Such being the case, such electronic instruction purporting to draw funds from a local account intended to be paid to a named recipient in the Philippines is not subject to documentary stamp tax imposed under the foregoing Section."

On the basis of the foregoing BIR Ruling, Petitioner filed an administrative claim for refund on January 31, 2000 in the amount of P32,904,437.30 covering the period January to December 1998.

Thereafter, on February 10, 2000, the instant Petition for Review was filed with this Court.

In support of its claim for refund, petitioner presented the following documents in evidence, to wit:

1. Documentary Stamp Tax (DST) Declarations filed on March 24, 1998 and November 23, 1998 (Exhibits A, B);

2. Various Monthly Information Returns for DST paid for the taxable year 1998 (Exhibits C, D, E, F, G, H, I, J, K, L, M, N);
3. Various HSBC's Custody and Clearing Department's Internal Return (Exhibits O, P, Q, R, S, T, W, X, Y, Z);
4. Administrative claim for refund dated January 29, 2000 (Exhibit AA);
5. License issued to HSBC on July 20, 1948 (Exhibit BB);
6. Various Inward Message Text Reports (Exhibits CC, DD, FF, GG, HH, II, JJ, MM);
7. DST Process Flowchart (EE)
8. Auditor's Report (Exhibit NN);
9. TELEX (Exhibit KK);
10. HEXAGON (Exhibit LL);
11. Various Message Instructions and Securities Order Forms (Exhibits NN-11-1-1 to NN-12-12-66, inclusive of sub-markings; NN-13-1-1 to N-13-1-480);
12. Various Customer Receipts of the Operations Department (Exhibits NN-12-13A-1 to NN-12-13K-76, inclusive of sub-markings);
13. Statements of Accounts of various clients (Exhibits NN-12-14-1 to NN-12-15-2, inclusive of sub-markings; NN-13-2-1 to NN-13-2-9);
14. Schedule of DST paid for each month of January to December 1998 (Exhibits NN-14-1 to NN-14-2);
15. Statement History of DST Usage (Exhibits NN-15-1 to NN-15-7);
16. Previous Transaction History Reports (Exhibits OO, OO-1, OO-2, OO-3).

Respondent filed his Answer on April 4, 2000 and raised the following Special and Affirmative Defenses, to wit:

> "4. The alleged claim for refund by the petitioner herein is subject to investigation by the Bureau of Internal Revenue.
>
> 5. Assuming without admitting that Petitioner paid the tax liability, petitioner, however, failed to demonstrate by clear and convincing evidence that the tax subject of the case at bar was erroneously or illegally collected.
>
> 6. Taxes paid and collected are presumed to have been paid in accordance with law and regulations, hence, not refundable.
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> 7. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to adduce sufficient proof is fatal to the action for tax refund/credit.
>
> 8. It is incumbent upon the petitioner to show that it has complied with the provision of Section 229 of the Tax Code, as amended.
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> 9. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation *(Commissioner of Internal Revenue vs. Ledesma, G.R. No. L-13509, January 30, 1970, 31 SCRA 95)* and as such, they are looked upon with disfavor *(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121).*

The issues jointly stipulated by the parties are as follows:

1. Whether or not for the period January 1, 1998 to December 31, 1998, petitioner in fact paid DST in the total amount of P32,904,437.30 on electronic instructions/advises (SWIFT MT 100, MT 202, and/or MT 521);
2. Whether or not BIR Ruling No. 132-99 dated August 23, 1999 is applicable to the instant petition;
3. Whether or not Petitioner is entitled to a refund of the DST paid under Section 181 of the Tax Code on electronic instructions/advises; and

4. Whether or not there were actual purchases of shares of stock and other investment in securities through electronic messages.

We rule in favor of Petitioner.

We shall first discuss the second and third issues as they are correlated with each other.

Petitioner anchored the subject claim for refund upon BIR Ruling No. 132-99 dated August 23, 1999 issued in favor of Citibank and Standard Chartered Bank. On the basis of said ruling, the previous documentary stamp tax payments under Section 181 of the 1997 NIRC are deemed erroneous.

Section 181 provides, viz:

> **Section 181.** ***Stamp Tax Upon Acceptance of Bills of Exchange and Others.*** - Upon any acceptance or payment of any bill of exchange or order for the payment of money purporting to be drawn in a foreign country but payable in the Philippines, there shall be collected a documentary stamp tax of Thirty centavos (P.30) on each Two hundred pesos (P200), or fractional part thereof, of the face value of any such bill of exchange, or order, or the Philippine equivalent of such value, if expressed in foreign currency.

Under the aforequoted provision of law, the documentary stamp tax shall be levied on the instrument which is a bill of exchange purporting to be drawn in a foreign country but payable in the Philippines. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or a fixed or determinable future time, a sum certain in money to order or to bearer [Section 126, the Negotiable Instruments Law (Act No. 2031)].

On the other hand, Respondent advanced the view that Petitioner's transactions covering the "electronic message instructions" are considered as loans extended by Petitioner to its investor-clients abroad, and the "electronic message instructions" fall within the purview of the term bill of exchange, thus, subject to the documentary stamp tax under Section 180 and not Section 181, both of the 1997 NIRC.

We do not agree with Respondent's view.

The instruction made through an electronic message by a non-resident investor-client, which is to debit his local or foreign currency account in the Philippines and pay a certain named recipient also residing in the Philippines is not the transaction contemplated in Section 181 of the Code. In this case, the withdrawal and payment shall be made in cash. It is parallel to an automatic bank transfer of local funds from a savings account to a checking account maintained by a depositor in one bank. The act of debiting the account is not subject to the documentary stamp tax under Section 181. Neither is the transaction subject to the documentary stamp tax under Section 180 of the same Code. These electronic message instructions cannot be considered negotiable instruments as they lack the essential feature of negotiability, which is, the ability to be transferred (Words and Phrases).

These instructions are considered as mere memoranda and entered as such in the books of accounts of the local bank, and the actual debiting of the payor's local or foreign currency account in the Philippines is the actual transaction that should be properly entered as such.

The Court likewise finds that the "electronic message instructions" other than those mentioned in BIR Ruling No, 132-99 are not subject to Sections 180 and 181, of the NIRC of 1997.

Respondent further averred that BIR Ruling No. 132-99 is not applicable to the instant case pursuant to Section 246 of the NIRC. BIR Ruling No. 132-99 was issued on August 23, 1999 in favor of Citibank and Standard Chartered Bank. On the other hand, the transactions subject of this petition for review took place during January to December 1999 or prior to the issuance of BIR Ruling No.132-99. Thus, respondent opined that pursuant to the rule on non-retroactivity of rulings, BIR Ruling No. 132-99 should not be made applicable to petitioner's case.

We do not agree.

Section 246 of the NIRC provides, viz:

> **Section 246.** ***Non-Retroactivity of Rulings.*** - Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding sections or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers except in the following cases:
>
> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
>
> (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
>
> (c) Where the taxpayer acted in bad faith.

The aforequoted provision of law presents the general rule that regulations, rulings and circulars promulgated by the Commissioner of Internal Revenue shall not be given retroactive effect if the same are not prejudicial to the taxpayer. In this case, the "electronic message instructions" which have been subjected to the documentary stamp tax are similar to the "electronic message instructions" mentioned in the said BIR ruling. Thus, since the BIR ruling did not subject the "electronic message instructions" to documentary stamp tax under Section 181 of the NIRC, the application of said ruling to the instant case is not prejudicial to herein petitioner hence said retroactive effect may validly apply.

With respect to the first jointly stipulated issue, we answer in the affirmative. The fact of payment of the documentary stamp taxes was established upon presentation of the various Documentary Stamp Tax Declarations and Monthly Information Returns for Documentary Stamp Taxes paid (Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, and Z).

For the period January to December 1998, Petitioner purchased and paid documentary stamp taxes in the aggregate amount of P33,000,000.00 broken down as follows:

Date of Purchase	Amount
March 1998	P25,000,000.00
November 1998	8,000,000.00
	33,000,000.00
	(Exhibits A and B)

For the period January to December 1998, Petitioner paid documentary stamp tax amounting to P109,398,729.62 broken down as follows:

Month	Amount of DST Paid
January	P 14,024,749.57
February	13,268,590.70
March	12,599,206.35
April	11,522,120.50
May	7,207,242.30
June	7,424,452.40
July	7,847,941.40
August	6,681,494.00
September	6,458,664.80
October	5,396,867.90
November	8,986,747.40
December	7,980,652.30
TOTAL	**P109,398,729.62**
	(Exhibit C to Z, inclusive)

Petitioner likewise paid documentary stamp tax on electronic instructions/advices (SWIFT MT 100, MT 202, MT 521, MT 199, MT 299, MT 999, TELEX, HEXAGON and/or MT 200) for the same period January to December 1998. The documentary stamp tax was paid pursuant to Section 181 of the 1997 Tax Code at the rate of P0.30 on each P200 based on the settlement price on the face of the advice, having a total documentary stamp tax payment of P32,904,437.30 which forms part of the documentary stamp tax payments aforementioned amounting to P109,398,729.62, broken down as follows:

Month	Amount of DST Paid
January	P 3,328,305.60
February	4,566,924.90
March	5,371,797.30
April	4,197,235.50
May	2,519,587.20

June	2,301,333.00
July	1,586,404.50
August	1,787,359.50
September	1,231,828.20
October	1,303,184.40
November	2,026,379.70
December	2,684,097.50
TOTAL	**P32,904,437.30**

Based on the report of the independent CPA, there were documentary stamp tax payments on transactions supported by the SWIFT/Messages and statements of accounts with differences from the bank-provided schedules due to system errors amounting to P814,875.00. Upon inquiry, these system errors were found to be due to some internal problems in the bank's data processing system.

The Statement of Account Print Outs which were marked as exhibits NN-12-15-1 and NN-12-15-2 reflected the amounts of P33,865,000.00, P33,250,000.00 and P76,135,000.00. These amounts should have been actually reflected as P133,865,000.00, P133,250,000.00 and P276,135,000.00, respectively.

The procedure adopted in the verification of the correct amounts was explained by petitioner's witness, Mr. Danilo Zayco, Manager, Information Technology Development Department of Hongkong and Shanghai Bank during the hearing held on February 14, 2001, to wit:

ATTY. AGBAYANI:

R. Mr. Zayco, what was the procedure in your verification?

MR. ZAYCO:

A. Well, initially, it was reported to us by Gerry Lim and when we found out, we restored some files of April 1998 and looked at the actual data, and our investigation showed that the program that generated the Statements has certain limitations. It can only reflect up to 30 digits. In short, it cannot reflect anything above a 100 Million. So, it would drop the first number.

ATTY. AGBAYANI:

Q. Do you have any document showing that indeed from these amounts the certain digits were dropped?

MR. ZAYCO:

A. Yes, I actually made a transaction history report. We actually got the data from the data base and it shows that the amounts P133,865,000.00, P133,250,000.00, and P276,135,000.00 were indeed in the data base.

ATTY. AGBAYANI:

Q. Do you have a copy of this document?

MR. ZAYCO:

A. Yes, I have generated a Report.

x x x x x x x x x

ATTY. AGBAYANI:

Q. Can you explain the difference between the amount in the Statement of Accounts and in that transaction, Mr. Zayco?

MR. ZAYCO:

A. Yes. In the first amount, the actual data base shows the amount P133,865,000.00 while on the Statement, it reflects P33,865,000.00. As I have mentioned previously, because of the excess of the limitation of the Statement Program, it drops the first digit. So, that is the one. Same thing with the next amount – P133,250,000.00 in the data base, but it reflects P33,250,000.00 in the Statement, and so goes with the last one which is P276,135,000.00. It reflects the amount of only P276,135,000.00 in the statement.

Moreover, as stated in the Independent auditor's report, the aggregate amount of P2,543,866.55 was not verified due to the following reasons:

Particulars	Amount
1. Copies of the order instruction (SWIFT messages and other supporting documents [e.g., securities order form, statement of accounts) are not available	P1,302,619.85
2. The supporting documents are photocopies of the order instructions and other supporting documents (e.g., securities order form, statement of accounts)	31,478.90
3. The only available support is the statement of account or securities order form or confirmation letter. SWIFT/Message instructions are not available	599,231.80
4. The supporting statement of account is not available although transaction is supported by SWIFT/message instructions.	242,190.55
5. DST Usage without supporting documents	368,345.45
GRAND TOTAL	**P2,543,866.55**

With regard to the second exception amounting to P31,478.90, petitioner advanced the view that since the original copies cannot be produced in court without bad faith on the part of the offeror, evidence other than the original document is admissible pursuant to Sections 3 and 5 of Rule 130 of the Rules of Court. Therefore, photocopies of the order instructions and other supporting documents should be admissible.

Under the Rules of Court, before the contents of an original may be proved by secondary evidence, satisfactory proof must be made of the following: (a) the execution and existence of the original; (b) the loss and destruction of the original or its nonproduction in court; and (c) unavailability of the original is not due to bad faith on the part of the offeror.

In the instant case, petitioner's witness testified on the second and third requisite. It however, failed to prove the execution and existence of the original.

The term "execution" means the accomplishment of a thing; the completion of an act or instrument. Thus, a contract is executed when it is signed by the parties. Satisfactory proof must also be made as to the existence of the instrument, and this necessarily involves proof of its proper execution or genuineness. They may be established by the person or persons who executed it, by the person before whom its execution was acknowledged, or by any person who was present and saw it executed or who after execution, saw it and recognized the signatures; or by a person to whom the parties to the instrument had previously confessed the execution thereof, or in the manner provided by the Rules (p. 283, Basic Evidence, Francisco, Second Edition, 1999).

Moreover, in the verification of a claim for refund, the source document and the other documents supporting the transaction must be produced in order that a determination may be made as to the veracity of the claim. These documents are vital in the determination as to whether or not the claim for refund is proper. Failure on the part of petitioner to produce the message instructions and the supporting documents such as the statements of account, is fatal to its claim.

Hence, failure by petitioner to present the original copies of the electronic message instructions and the other supporting documents left the Court with no means to determine the veracity of its claim.

In fine, petitioner has proven its claim for refund of erroneous payment of the documentary stamp tax for the taxable year 1998 but only to the extent of P30,360,570.75, computed as follows:

Amount of DST validated (as per Auditor's Report)		P27,094,077.25
Add:		
(1) DST paid on message instructions not supported by SWIFT message types enumerated in BIR Ruling 132-99	P2,451,618.50	
(2) DST on amounts erroneously reflected In the Statements of Accounts	814,875.00	3,266,493.50
DST Refundable		P30,360,570.75

It is no longer necessary to delve on the fourth issue since petitioner has proven its entitlement to the refund sought for.

WHEREFORE, in the light of all the foregoing, the instant Petition for Review is **PARTIALLY GRANTED.** Respondent is hereby **ORDERED** to **REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** in favor of Petitioner the amount of P30,360,570.75 representing erroneous payment of documentary stamp tax for the taxable year 1998.

SO ORDERED.

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

I CONCUR:

ERNESTO D. ACOSTA
Presiding 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