REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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PHILIPPINE AIRLINES, INC. (PAL),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6735

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:
JUN 14 2006

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DECISION

CASANOVA, C., J.:

This case involves a claim for refund in the amount of ONE HUNDRED TWENTY SEVEN THOUSAND ONE HUNDRED THIRTY EIGHT and 92/100 (P127,138.92) PESOS allegedly representing erroneously collected 10% Overseas Communications Tax from petitioner by Philippine Long Distance Telephone Company for the taxable period April to December 2001.

The antecedent facts of the case are as follows:

Petitioner Philippine Airlines, Inc. ("PAL") is a domestic corporation organized in accordance with the laws of the Republic of the Philippines with principal office address at the 9th Floor, PAL Center, Legazpi St., Legazpi Village, Makati City.[1]

Respondent, on the other hand, is the Commissioner of the Bureau of Internal Revenue, charged, among others, with the duty to assess and collect all national internal revenue taxes, fees, and charges, including the 10% tax on overseas dispatch, message, or conversation originating from the Philippines, imposed by Section 120 of the National Internal Revenue Code of 1997 ("1997 NIRC"), with principal office at the Bureau of Internal Revenue ("BIR") National Office Building, Agham Road, Diliman, Quezon City.[2]

For the period January to December 2001, the Philippine Long Distance Telephone Company ("PLDT") collected from petitioner 10% Overseas Communications Tax ("OCT") on the latter's overseas telephone calls in the total amount of P202,471.18, summarized as follows:[3]

PERIOD	**AMOUNT**
January to March 2001	P 75,332.26
April to June 2001	50,271.43
July to September 2001	43,313.96
October to December 2001	33,553.53
Total	P202,471.18

Alleging exemption from 10% OCT under Section 13 of its franchise, Presidential Decree No. 1590 ("P.D. No. 1590") and BIR Ruling No. 97-94 dated April 13, 1994, petitioner, on April 8, 2003, filed an administrative claim for refund with the respondent of the erroneously paid OCT in the amount of P202,471.18.[4]

Unable to find any response from the respondent and in order to stop the running of the two-year prescriptive period, petitioner elevated this case through a Petition for Review

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[1] Par.1, Joint Stipulation of Facts and Issues, Records, page 64
[2] Par. 2, Joint Stipulation of Facts and Issues, Records, page 64
[3] Exhibits "B" and "C"
[4] Exhibit "A"

with this Court on July 24, 2003, this time claiming only for the refund of the amount of P127,138.92 allegedly representing erroneously collected 10% OCT by PLDT for the second, third and fourth quarters of the taxable year 2001 or covering the months of April to December 2001.[5]

By way of an Answer filed on August 25, 2003, respondent asserted the following Special and Affirmative Defenses:

> "4. He reiterates and repleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses;
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> 5. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau;
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> 6. The amount of P127,138.92 being claimed by petitioner as allegedly representing 10% overseas communications tax erroneously collected from PAL by PLDT and remitted to the BIR for the period April to December 2001 was not properly documented;
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> 7. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;
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> 8. Petitioner must show that it has complied with the provisions of Sections 204 (C) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit;
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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, 31 SCRA 95*) and as such, they are looked upon with disfavor (*Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211*)."

To support its claim, petitioner submitted numerous documents and likewise presented witnesses to identify the same while respondent submitted the case for decision based on the pleadings. On October 3, 2005, this Court issued a resolution considering the case submitted for decision after both parties have filed their respective memoranda.

The parties mutually submitted the following issues to be tried or resolved in this case:

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[5] Records, page 3

> "1. Whether or not petitioner is entitled to the refund of the 10% overseas communications tax prayed for;
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> 2. Whether or not the amount of PHP127,138.92 being claimed by petitioner as allegedly representing 10% overseas communications tax erroneously collected from PAL by PLDT and remitted to the BIR for the period April to December 2001 is properly documented; and
>
> 3. Whether or not petitioner complied with the provisions of Sections 204 (C) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit."

Petitioner maintains that Section 13 of P.D. No. 1590 clearly provides that it has the option to pay either (a) the basic corporate income tax based on its annual net taxable income in accordance with the 1997 NIRC; or (b) a franchise tax of 2% on its gross revenues derived from all sources, whichever will result in a lower tax. The same provision states that the tax it paid under either of the said alternatives, *"shall be in lieu of all other taxes, duties, royalties, registration, license, and other fees and charges of any kind, nature, or description, imposed levied, established, assessed, or collected by any municipal, city, provincial, or national authority or government agency, now or in the future".* Hence, according to the petitioner, it is the clear intention of the legislature that all other taxes not falling under any of subsections (a) or (b) thereof shall be within the scope of the "*in lieu of*" clause of Section 13 which is very broad and all-encompassing as it covers almost all, if not all, types of taxes, duties, impositions, fees and charges. Therefore, the 10% OCT falls within the "*in lieu of*" provision which petitioner is entitled to avail of after it pays whichever under subsections (a) or (b) of Section 13 of P.D. No. 1590 will result in a lower tax. Considering that petitioner chose option (a) and it being in a net loss position, it is exempt from 10% OCT despite the fact that it did not pay the basic income tax, having chosen said option.

To further strengthen its position, petitioner pointed out that no less than the respondent interpreted the subject provision of PAL's franchise in BIR Ruling No. 097-94 dated April 13, 1994 granting PAL's exemption from all taxes. Moreover, in the case of

Philippine Airlines, Inc. vs. Hon. Court of Tax Appeals and The Commissioner of Internal Revenue,[6] petitioner argues that the rulings earlier made by this Court in CTA Case Nos. 5824 and 5825 were already reversed by the Court of Appeals. Thus, in order to be exempt from all other taxes, it does not have to pay the 2% franchise tax in case it has no income tax liability due to a zero or nil taxable income. It asserts that Section 13 of PAL's franchise does not provide that only upon actual payment of either the income tax or the franchise tax would petitioner's exemption from "all other taxes" become effective.

In the case at bar, after petitioner computed its basic corporate income tax for taxable year 2001 in accordance with the provisions of the Tax Code and filed the corresponding annual income tax returns,[7] it opted not to pay the 2% franchise tax since it is definitely higher than the zero or negative income tax liabilities for the subject period. Petitioner contends that in availing of the option to pay its corporate income tax, whether or not there is an actual tax due and demandable, petitioner has sufficiently complied with the requirement under Section 13 of P.D. No. 1590 and is definitely exempt from all other taxes, including the 10% OCT, under the *"in lieu of"* provision of said section.

Respondent, however, counters that Section 13 of P.D. No. 1590 is clear. He insists that the interpretation earlier made by this Court in CTA Case Nos. 5824 and 5825, promulgated on June 13 and September 5, 2001, respectively, explaining that "the very franchise itself requires payment of either of the two taxes by the petitioner so that it can avail of exemptions from other kinds of taxes" is more logical and consistent with the legislative intent. Thus, he argues that since petitioner did not pay either of the two taxes, consequently, the petition must fail.

The first issue is really whether or not petitioner PAL is entitled to the refund of 10% Overseas Communications Tax despite the fact that no actual payment was made of either

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[6] C.A. G.R. SP No. 69388, November 25, 2003
[7] Exhibits "K" and "L"

the corporate income tax or the 2% franchise tax as provided under Section 13 of P.D. No. 1590, which We resolve in the affirmative. Section 13 of P.D. No. 1590 provides:

> "**SEC. 13.** In consideration of the franchise and rights hereby granted, **the grantee shall pay** to the Philippine Government during the life of this franchise **whichever of subsections (a) and (b) hereunder will result in a lower tax:**
>
> (a) The basic corporate income tax based on the grantee's annual net taxable income computed in accordance with the provisions of the National Internal Revenue Code; or
>
> (b) A franchise tax of two percent (2%) of the gross revenues derived by the grantee from all sources, without distinction as to transport or non-transport operations; provided, that with respect to international air-transport service, only the gross passenger, mail, and freight revenues from its outgoing flights shall be subject to this tax.
>
> **The tax paid by the grantee under either of the above alternatives shall be in lieu of all other taxes**, duties, royalties, registration, license, and other fees and charges of any kind, nature or description, **imposed, levied, established, assessed or collected by any municipal, city, provincial, or national authority or government agency, now or in the future**, including but not limited to the following: x x x" *(Emphasis supplied)*

Section 120 of the 1997 NIRC provides in part:

> "SEC. 120. *Tax on Overseas Dispatch, Message or Conversation Originating from the Philippines.* –
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> (A) *Persons Liable.* – There shall be collected upon every overseas dispatch, message or conversation transmitted from the Philippines by telephone, telegraph, telewriter exchange, wireless and other communication equipment service, a tax of ten percent (10%) on the amount paid of such services. The tax imposed in this Section shall be payable by the person paying for the services rendered and shall be paid to the person rendering the services who is required to collect and pay the tax within twenty (20) days after the end of each quarter."

The above language of Section 13 of P.D. No. 1590 is clear. Petitioner shall choose whichever of the two alternatives will result in a <u>lower tax</u> and any payment under either of the alternatives given shall be "in lieu of all other taxes, duties, royalties, registration, license, and other fees and charges of any kind, nature, or description, imposed, levied, established, assessed, or collected by any municipal, city, provincial, or national authority or government agency, now or in the future xxx."[8]

Petitioner opted to pay corporate income tax when it filed its Annual Income Tax Returns for the fiscal years ending in March 31, 2001 and March 31, 2002.[9] Thus, petitioner computed its basic corporate income tax in accordance with the provisions of the National Internal Revenue Code. The computations resulted in zero or nil tax liabilities. We concur with the petitioner that in order to be exempt from all other taxes under Section 13 of P.D. 1590, it does not have to pay the 2% franchise tax in case it has no income tax liability due to zero or nil taxable income. Section 13 does not provide that only upon actual payment of the income tax or the franchise tax would petitioner's exemption from "all other taxes" become effective. In accepting the franchise, petitioner is granted the privilege of paying either the basic corporate income tax or franchise tax whichever will result in a lower tax. In the event that no basic corporate income tax is due because of losses in its business operations as provided in Section 27(A) of the Tax Code, petitioner is not precluded from availing the option granted in Section 13(a) of P.D. No. 1590. What matters is that the option, as elected by petitioner, shall yield to a lesser tax liability. As correctly observed by the Court of Appeals in *Philippine Airlines, Inc. vs. Court of Tax Appeals and the Commissioner of Internal Revenue*:[10]

> "xxx [P]etitioner availed of the right and privilege granted to it by law by opting to choose the basic corporate income tax as basis for its tax libility, which however, after considering the factors allowed by law, resulted in a zero tax liability. Such zero tax liability as a result of the exercise of its lawful privilege should not be taken against the petitioner nor deprive it of availment of the exemption granted by the law."

Further, the possibility that petitioner will incur losses was foreseen by the lawmakers because the same Section 13 of P.D. No. 1590 allows the grantee, petitioner herein, for purposes of computing the basic corporate income tax, to "carry over as a

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[8] Please see *Philippine Airlines, Inc. v. Court of Tax Appeals And the Commissioner of Internal Revenue*, CA-G.R. SP No. 67970, September 30, 2003; *Philippine Airlines, Inc. v. Court of Tax Appeals And the Commissioner of Internal Revenue*, CA-G.R. SP No. 69388, November 25, 2003

[9] Exhibits K & L, respectively

deduction from taxable income any net loss incurred in any year up to five years following the year of such loss". If the intention of the law was to compel petitioner to pay the 2% franchise in case of a net loss position or that there must be actual payment despite the nil tax liability before the "in lieu of" provision may be availed of, it would not have authorized petitioner to carry-over the net loss as a deduction for the next five (5) taxable years.

In sum, having opted the preference under subsection (a) of Section 13 of P.D. 1590 by filing the necessary annual tax returns covering the subject period April to December 2001, petitioner had complied with its obligation under Section 13 of its franchise. Therefore, it is exempt from all other taxes, including the claimed Overseas Communications Tax, under the "in lieu of " provision of said section[11] and petitioner may accordingly claim for the refund of the OCT it paid to PLDT for the period April to December 2001 in the sum of P127,138.92. We now proceed to resolve the second issue of whether the claimed amount of P127,138.92 is properly documented.

To prove that the amount of P127,138.92 allegedly representing 10% Overseas Communications Tax for the period April 1, 2001 to December 31, 2001 was collected by PLDT from petitioner, petitioner presented in evidence the report of the commissioned independent CPA.[12] Out of the total claimed amount of P127,138.92, only the amount of P126,243.80 was verified to be supported either by original or photocopied PLDT billing statements, original official receipts and original copies of PAL's check vouchers.[13] But as to whether or not the overseas communications tax was consequently remitted by PLDT to the Bureau of Internal Revenue, the commissioned CPA was not able to verify the same. However, petitioner presented PLDT's Quarterly Percentage Tax Returns for the second, third and fourth quarters of taxable year 2001 stamped "Received" by a BIR's authorized

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[10] CA-G.R. No. 67970, September 30, 2003.

[11] See also Philippine Airlines, Inc. vs. Honorable Court of Tax Appeals and The Commissioner of Internal Revenue, CA-G.R. SP No. 69388, November 25, 2003

[12] Exhibit G, inclusive of sub-markings

[13] Pre-marked Exhibits H-1 to H-716, I-1 to I-741 & J-1 to J-433

agent bank, Land Bank of the Philippines,[14] together with the official receipts from the same bank,[15] to prove that indeed PLDT remitted the overseas communications tax to the BIR. It is noteworthy that these quarterly percentage tax returns did not contain a breakdown of the overseas communications tax that would indicate that the payments made by PAL to PLDT were included therein. Petitioner tried to request for a certification from PLDT as to the amount of OCT collected by PLDT from petitioner for the calendar years 2001 and 2002 on the latter's overseas telephone calls and the fact that the amount of OCT collected was actually remitted and paid by PLDT to the BIR. In reply thereto, the PLDT wrote:

> "[w]e regret to inform you that as we have previously advised, owing to the complexity of our computer system on collection and payment of subscriber accounts, we cannot certify, at this time, the information you require by merely making reference to our collection reports and percentage tax returns filed for the periods specified. The collection reports by our Accounting Division were not designated to generate data of collection on a per subscriber basis, only on an aggregate basis. However, any such amount collected from PAL pertaining to payment of the OCT would, based on our internal standard procedure, be actually remitted and paid by PLDT to the BIR."[16]

Thus, petitioner presented testimonial evidence to prove that the overseas communications tax paid by PAL to PLDT was indeed included in the quarterly percentage tax returns of PLDT for the second, third and fourth quarters of taxable year 2001 received by BIR's authorized agent bank and that the latter received the payments for the OCT from the former.[17] In this regard, petitioner presented Ms. Aleth Grace Ison, Financial Analyst of PLDT and Ms. Evelyn Taghap, its own Tax Manager.[18]

As to the final issue of whether or not petitioner complied with the provisions of Sections 204 (C) and 229 of the 1997 NIRC, We likewise rule in the affirmative. Pursuant to Section 120 of the same Code in relation to Revenue Regulations No. 1-98, as amended,

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[14] Exhibits O, P & Q
[15] Exhibits O-3, P-3 & Q-3
[16] Exhibit S
[17] pp. 6-7, 10-11 & 14-15, TSN, December 2, 2004
[18] pp. 6 – 13, TSN, February 15, 2005

PLDT is required to collect from petitioner 10% OCT on its overseas telephone calls and pay the same to the BIR within twenty (25) days after the end of each quarter.

PLDT filed its quarterly percentage tax returns for the second, third and fourth quarters of 2001 on July 25, 2001,[19] October 25, 2001[20] and January 21, 2002,[21] respectively. Counting from these dates, petitioner had until July 25, 2003, October 25, 2003 and January 21, 2004 within which to file its claim for the second, third and fourth quarters of 2001, respectively, both in the administrative and judicial levels. Thus, petitioner's administrative claim for refund filed on April 8, 2003[22] and the instant petition filed on July 24, 2003 were well within the period required by law.

WHEREFORE, the Petition for Review is hereby **GRANTED.** Respondent is **ORDERED** to refund to the petitioner the substantiated amount of P126,243.80 representing erroneously collected 10% Overseas Communications Tax for the period April to December 2001.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(On Leave)
ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

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[19] Exhibit O
[20] Exhibit P
[21] Exhibit Q
[22] Exhibit A

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LOVELL R. BAUTISTA
Acting Division Chairman

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice