REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

DOLE FOOD COMPANY, INC.,
Petitioner,

CTA Case No. 9011

Members:

- versus -

BAUTISTA, *Chairperson*
FABON-VICTORINO, and
RINGPIS-LIBAN, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

APR 13 2018 11:30 a.m.

x- x

DECISION

Fabon-Victorino, J.:

This *Petition for Review*[1] filed by Dole Food Company, Inc. (DFCI) on March 19, 2015, seeks to refund the amount of One Hundred Sixty-Six Million Seven Hundred Thirty-Three Thousand Two Hundred Thirty Pesos (₱166,733,230.00), allegedly representing erroneously paid capital gains tax (CGT) arising from the sale of its shares in Dole Philippines, Inc. (DPI) to Dole Asia Holdings Pte. Ltd (DAHL).

First, the facts.

Petitioner DFCI (formerly Castle and Cooke, Inc.) is a non-resident foreign corporation organized and existing under the laws of Delaware, United States of America. Its principal address is 2711 Centerville Road, Suite 400, Wilmington City, New Castle County, Delaware, USA.[2]

[1] Docket, vol. 1, pp. 6-13.
[2] Docket, vol. 1, p. 35.

1093

Respondent, on the other hand, is the Commissioner of the Bureau of Internal Revenue (BIR) vested with power to act upon and approve claims for refund or tax credit as provided by law. He holds office at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner DFCI owns 11.87% of the total shareholdings of DPI, equivalent to 28,170,000 Common B shares out of DPI's authorized capital stock of 252,812,000 common shares.[3]

DPI is a domestic corporation, with principal office address at Polomolok, South Cotabato and business address at 5th floor, 6750 Office Tower, Ayala Avenue, Makati City.[4] It is engaged in the business of production, processing, marketing, export and sale of pineapple products, bananas and other agricultural products.

On February 19, 2013, a *Share Transfer Agreement*[5] was entered into by and between petitioner and DAHL, a Singaporean private limited company, with principal office address at One Raffles Quay Level #37-01, North Tower, Singapore. In the said Agreement, petitioner sold and transferred to DAHL all its rights, title and interests in and to the 28,170,000 Common B Shares in DPI, for a purchase price of ₱1,949,082,300.00.

Thereafter, or on March 4, 2013, petitioner filed an *Application for Tax Treaty Relief*[6] with the BIR International Tax Affairs Division (ITAD) requesting confirmation of the exemption of the sale of its DPI shares to DAHL from CGT pursuant to the Republic of the Philippines - United States Tax Treaty (RP-US Tax Treaty).

On March 21, 2013, petitioner filed its CGT return and correspondingly paid the amount of ₱166,733,230.00.[7]

[3] Exhibits "P-6" and "P-7", docket, vol. 2, pp. 792 and 793-801.
[4] Exhibit "P-16", docket, vol. 2, p. 885.
[5] Exhibit "P-5", docket, vol. 2, pp. 777-791.
[6] Exhibit "P-15", docket, vol. 2, pp. 879-884.
[7] Exhibits "P-8" and "P-9", docket, vol. 2, p. 802.

On April 5, 2013, petitioner secured the Certificate Authorizing Registration (CAR) and Tax Clearance[8] on the subject sale of shares.

On October 1, 2014, on the belief that the sale and transfer of its DPI shares to DAHL was exempt from CGT under the RP-US Tax Treaty, petitioner filed with the BIR an *Application for Tax Credits/Refunds* to recover its alleged erroneously paid CGT.[9]

On March 19, 2015, petitioner filed the instant *Petition for Review* claiming inaction on the part of respondent on its claim for refund or issuance of tax credit certificate (TCC).

In his *Answer*[10], respondent argues that under Philippine tax treaties, capital gains derived by residents of the other contracting States from the disposition of a share or of an interest in a Philippine Corporation are taxable in the Philippines only if the assets of such corporation consist principally of real property interest located in the Philippines. He added that the same rule applies with respect to the taxability of capital gains realized from the disposition of an interest in partnership, trust or estate to the extent that such gains are attributable to a real property located in the Philippines.

According to respondent, the basis in determining the composition of the assets is the value of all the assets of the subject corporation, both real and personal, as appearing in its financial statement on the date of sale of the share or interest in such corporation. In case the financial statement as of the date of sale is not available, the most recent financial statement may be used after the necessary adjustment are made to reflect transactions made during the period from the date of such financial statement to the date of sale.

[8] Exhibit "P-12", docket, vol. 2, pp. 805-809.
[9] Exhibit "P-13", docket, vol. 2, pp. 810-815.
[10] Docket, vol. 1, pp. 193-199.

Respondent further avers that the sale was made on February 19, 2013, however, petitioner presented a table representing assets of DPI ending December 2010 and 2011. Since petitioner used an irrelevant financial statement, the prevailing market value of such assets must be used as basis in the computation of assets pursuant to Revenue Regulations (RR) No. 4-86.

On July 23, 2015, petitioner filed a *Motion to Take Deposition upon Written Interrogatories*[11] of its acting Vice President Ronald Bouchard, a resident of the United States of America, which the Court granted in the Resolution[12] dated September 9, 2015.

After the pre-trial conference, a Pre-Trial Order[13] was issued on January 19, 2016.

In support of its claim for refund, petitioner presented the Finance Director of DPI Teodoro Santos Jr. and the *Deposition upon Written Interrogatories of Ronald Bouchard.*

Witness **Teodoro C. Santos Jr.** testified[14] that he is the current Finance Director of DPI and as such, he oversees, among others, the preparation of DPI's financial statements for accurate and timely presentation.

He further testified that DPI is a domestic corporation with principal office address at Polomolok, South Cotabato and principal business address at 5th Floor, 6750 Office Tower, Ayala Avenue, Makati City. It is engaged in the business of production, processing, marketing, export and sale of pineapple products, bananas and other agricultural products.

He is familiar with the present case for refund of erroneously paid CGT on the transfer of DPI shares from petitioner to DAHL because petitioner requested DPI for

[11] Docket, vol. 1, pp. 205-208.
[12] Docket, vol. 2, p. 433.
[13] Docket, vol. 2, pp. 634-639.
[14] Exhibit, "P-19", docket, vol. 1, pp. 211-217.

assistance in preparing the supporting documents to petitioner's Tax Treaty Relief Application and Application for Tax Credit/Refund filed with the BIR.

Allegedly, to be exempt under the tax treaty, it must be established that the assets of DPI do not principally consists of real property interest located in the Philippines. Per his understanding, the sale of shares in a corporation by a US resident is subject to CGT in the Philippines only if the assets of the corporation consist principally of real properties located in the Philippines. Under Revenue Regulations No. 4-86, the term principally means more than 50% of the entire assets in terms of value consisting of real properties. The same requirement is necessary to process petitioner's Application for Tax Credit/Refund filed with the BIR. In relation thereto, and as DPI's Finance Director, he certified that DPI's real property interest in the Philippines does not comprise more than 50% of its total assets per DPI's audited Financial Statements dated May 18, 2012 and May 17, 2013.

In his *Deposition*,[15] **Ronald Bouchard** declared that as Acting Vice President of petitioner, he is authorized and empowered to enter into contracts, bind the company, and file the petition for refund of CGT before this Court.

Petitioner is a US corporation incorporated in the State of Delaware. It is a holding company whose main function is to provide stewardship to the other entities within the affiliated group and exercise all authority pertinent to managing the company.

In February of 2013, petitioner sold and transferred its 28,170,000 Common B shares in DPI to DAHL for a purchase price of ₱1,949,082,300.00 as indicated in the Share Transfer Agreement dated February 19, 2013. Petitioner paid the CGT on the said transaction and applied for the CAR and Tax Clearance Certificate.

---

[15] Exhibit "P-20".

After securing the CAR, specifically on October 1, 2014, petitioner filed with BIR's Revenue District Office No. 39 an administrative claim for refund to recover its erroneously paid CGT amounting to ₱166,733,230.00. Petitioner believes that under the RP-US Tax Treaty, gains from the sale of personal property derived by a US resident that does not have a permanent establishment or a fixed base in the Philippines shall be taxable only in the US. According to witness Bouchard, the Certificate of Non-Registration issued by the Philippine Securities and Exchange Commission (SEC) dated February 26, 2013, proves that petitioner is not registered or licensed to do business in the Philippines.

He added that under the Reservation Clause of the RP-US Tax Treaty and relevant BIR Rulings, the sales of shares in a corporation is subject to CGT in the Philippines if the real property assets of the said corporation comprise more than 50% of the entire assets of the corporation in terms of value. As shown in the DPI's audited Financial Statements dated May 18, 2012, its real property assets constitutes less than 50% of its entire assets.

Petitioner rested after formal offer of its exhibits as indicated in the Resolution[16] dated December 5, 2016.

On February 23, 2017, petitioner filed a *Manifestation*[17] stating that respondent issued a Certification[18] No. CGT 16-016 on December 8, 2016, to the effect that the *Share Transfer Agreement* between petitioner and DAHL is not subject to CGT. Petitioner moved that the Certification be given judicial notice as an official act of the Executive Department.

On March 14, 2017, respondent admitted in open court the existence of Certification No. 16-016 dated December 8, 2016, issued by the BIR. Upon formal offer, the Court admitted the said Certification. During the same proceeding,

[16] Docket, vol. 2, pp. 997-998.
[17] Docket, vol. 2, pp. 999-1001.
[18] Exhibit "P-21", docket, vol. 2, p. 1002.

respondent manifested that he would no longer present any evidence.

On May 3, 2017, the instant case was deemed submitted for decision considering petitioner's *Memorandum*[19] filed on April 21, 2017 and the Report[20] of the Judicial Records Division dated April 21, 2017, that respondent failed to file his memorandum.[21]

THE ISSUES

Per the parties' stipulation, the issues[22] for the Court's determination are as follows:

I. Whether petitioner DFCI, under the RP-US Tax Treaty, is exempt from payment of capital gains tax for the sale of its DPI shares to DAHL; and

II. Whether petitioner DFCI is entitled to a refund of the Capital Gains Taxes paid to and collected by respondent.

THE COURT'S RULING

Foremost among the issues in claims for refund is the timeliness of the filing of the administrative and judicial actions by the taxpayer-claimant which determines the jurisdiction of the Court to take cognizance thereof.

Sections 204(C) and 229 of the National Internal Revenue Code (NIRC) of 1997, as amended, laid down the procedure governing the refund of erroneously paid taxes, to wit:

---

[19] Docket, vol. 2, pp. 1029-1048.
[20] Docket, vol. 2, p. 1049.
[21] Resolution, docket, vol. 2, p. 1056.
[22] Joint Stipulation of Facts and Issues, docket vol. 2, p. 453.

1099

SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –

xxx xxx xxx

(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty:** *Provided, however*, that a return filed showing an overpayment shall be considered as a written claim for credit or refund." *(Emphasis supplied)*

"SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however*, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." *(Emphasis supplied)*

1100

The cited provisions govern all kinds of refund or credit of internal revenue taxes collected erroneously or illegally, pursuant to the NIRC.[23] Section 204(C) applies to administrative claims filed with the BIR, while Section 229 refers to judicial actions for the recovery of the tax.

In the case of *Commissioner of Internal Revenue vs. Goodyear Philippines, Inc.*,[24] the Supreme Court held that Section 229 of the NIRC of 1997, as amended, mandates that judicial claims for refund must be lodged within two (2) years from the date of payment of the tax or penalty, the same however may not be maintained until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue.

Settled is the rule that both the administrative claim for refund with the BIR and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period from the date of payment of the tax.[25]

The dates of filing of petitioner's administrative and judicial claims for refund *vis-a-vis* the 2-year prescriptive period for filing such, are summarized as follows:

Date of Payment of CGT	Date of Filing of the Administrative Claim	Date of Filing of the Judicial Claim	End of the two-year period
March 21, 2013	October 1, 2014	March 19, 2015	March 21, 2015

Plain from the above table that petitioner's administrative and judicial claims for refund were both seasonably filed. Hence, the Court has jurisdiction to take cognizance of the instant case.

Going on the merits of the claim for refund, evidence show that petitioner is a corporation organized and existing

---

[23] *Commissioner of Internal Revenue vs. Central Azucarera Don Pedro*, G.R. No. L-28467, February 28, 1973; *Commissioner of Internal Revenue vs. Insular Lumber Co., et al.*, G.R. No. L-24221, December 11, 1967.
[24] G.R. No. 216130, August 3, 2016.
[25] *Commissioner of Internal Revenue vs. Victorias Milling Co., Inc. and The Court of Tax Appeals*, G.R. No. L-24108, January 3, 1968.

1107

under the laws of the State of Delaware in the United States. Also, per Certification of Non-Registration issued by the SEC, petitioner is not registered either as a corporation or as a partnership licensed to do business in the Philippines.

Petitioner submits that the sale/transfer of its shares of stock in DPI to DAHL is exempt from CGT pursuant to the RP-US Tax Treaty, justifying the refund of ₱166,733,230.00, representing erroneously paid CGT on the said sale.

Petitioner is entitled to the refund of the erroneously or illegally collected CGT pursuant to the RP-US Tax Treaty

Section 28(B)(5)(c), in relation to Section 32(A)(3) and (B)(5), of the NIRC of 1997, as amended, provides that non-resident foreign corporations are subject to CGT on their net capital gains realized during the taxable year from the sale or other disposition of shares of stock in a domestic corporation made outside the stock exchange; and any gain derived from such dealings in property shall form part of gross income, except that income exempt under any treaty obligation binding on the Government of the Philippines shall be excluded from gross income and exempt from income tax. The provisions is quoted for ready reference as follows:

> SEC. 28. *Rates of Income Tax on Foreign Corporations.* –
>
> xxx xxx xxx
>
> (B) *Tax on Nonresident Foreign Corporation.* –
>
> xxx xxx xxx
>
> (5) *Tax on Certain Incomes Received by a Nonresident Foreign Corporation.* –
>
> xxx xxx xxx

1102

> (c) *Capital Gains from Sale of Shares of Stock not Traded in the Stock Exchange.* – A final tax at the rates prescribed below is hereby imposed upon the net capital gains realized during the taxable year from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation, except shares sold, or disposed of through the stock exchange:
>
> Not over P100,000 .... 5%
> On any amount in excess of P100,000 .... 10%
>
> xxx xxx xxx
>
> SEC. 32. *Gross Income.* –
>
> (A) *General Definition.* – Except when otherwise provided in this Title, gross income means all income derived from whatever source, including (but not limited to) the following items:
>
> xxx xxx xxx
>
> (3) Gains derived from dealings in property;
>
> xxx xxx xxx
>
> (B) *Exclusions from Gross Income.* – The following items shall not be included in gross income and shall be exempt from taxation under this Title:
>
> xxx xxx xxx
>
> (5) *Income Exempt under Treaty.* – Income of any kind to the extent required by a treaty obligation binding upon the Government of the Philippines.

Generally, any gain by petitioner from the sale of shares in DPI should be subject to CGT. However, considering that the Philippines has a tax treaty with US, the said income from the sale of shares may be exempted from income tax if the conditions set forth under the RP-US Tax Treaty are satisfied.

Petitioner based its claim for tax exemption on Article 14 of the RP-US Tax Treaty, which states:

ARTICLE 14
Capital Gains

(1) Gains from the alienation of tangible personal (movable) property forming part of the business property of a permanent establishment which a resident of a Contracting State has in the other Contracting State or of tangible personal (movable) property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in the other State. However, gains derived by a resident of a Contracting State from the alienation of ships, aircraft or containers operated by such resident in international traffic shall be taxable only in that State, and gains described in Article 13 (Royalties) shall be taxable only in accordance with the provisions of Article 13 (Royalties).

(2) Gains from the alienation of any property other than those mentioned in paragraph 1 or in Article 7 (Income from Real Property) shall be taxable only in the Contracting State of which the alienator is a resident."

Corollary to the foregoing, Article 1 of the Reservation Clause of the RP-US Tax Treaty provides:[26]

ARTICLE 1

Notwithstanding the provisions of Article 14 of the Convention relating to capital gains, both the Philippines and the United States may tax gains from the disposition of an interest in a corporation **if its assets consist principally of**

[26] *Supplementing the Convention between the Republic of the Philippines and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.*

1104

> **a real property interest located in that country**. Likewise, both countries may tax gain from the disposition of an interest in a partnership, trust or estate to the extent the gain is attributable to a real property interest in one of the countries. The term 'real property interest' is to have the meaning it has under the law of the country in which the underlying real property is located. *(Emphasis supplied)*

By virtue of the above provisions of the RP-US Tax Treaty, any gain that may be derived by a resident of the US from the alienation of its properties, other than those mentioned in paragraph (1) of Article 14 of the RP-US Tax Treaty, shall be taxable only in the US. However, under the Reservation Clause of the RP-US Tax Treaty, the Philippines may tax the gains derived from the disposition of shares owned by a resident of the US in a domestic corporation, if the latter's assets consist principally of real property interests located in the Philippines.

For purposes of determining whether under the applicable tax treaty, the assets of a corporation consist principally of real property interests, RR No. 4-86 dated April 2, 1986 was issued. It provided the guidelines for determining the composition of the company's assets. Under the said Revenue Regulation, the term "Real Property Interest" shall be understood to include real properties as understood under Philippine laws. "Real Property Interest" means any properties enumerated in Section 3[27] of the RR No. 4-86 which, are not, however, exclusive of others that are similarly situated. Moreover, the term "Principally" means more than fifty percent (50%) of the entire assets in terms of value.

Furthermore, Section 4 of RR No. 4-86 provides that the basis for determining the composition of a company's assets shall be the value of all the assets of the subject corporation, both real and personal, as appearing in its financial statement

✓

[27] Section 3. *Properties.* - The following are real property interest and/or real properties: xxx

1105

on the date of the sale of the share or interest and as verified by the BIR.

In *Goodyear Philippines, Inc. vs. Commissioner of Internal Revenue*[28], this Court made the following pronouncements as to the exemption of shares from CGT under the RP-US Tax Treaty:

> In the case of petitioner, its Audited Financial Statements (AFS) for the years 2007 and 2008 reveal that the real property components of its property, plant and equipment (PPE) comprise less than 50% of its assets, detailed as follows:
>
> xxx xxx xxx
>
> Furthermore, as correctly pointed out by petitioner, the entire values of the PPE of petitioner for the years 2007 and 2008, respectively, comprise less than 50% of its total assets for said years, respectively, to wit:
>
> xxx xxx xxx
>
> Since petitioner's assets do not consist principally of real property interest, the Reservation Clause of the RP-US Tax Treaty does not apply in this case. Accordingly, the net capital gain derived by GTRC in the redemption of its 3,729,216 preferred shares by petitioner is exempt from the 5% or 10% capital gains tax imposed under Section 28(B)(5)(c) of the NIRC of 1997, as amended.

In the instant case, respondent complains that the sale of petitioner's shares was made on February 19, 2013, but petitioner allegedly presented a table representing assets of DPI ending December 2010 and 2011. Since petitioner, according to respondent, used an irrelevant financial statement, the prevailing market value of such assets must be used as basis in accordance with RR No. 4-86.

[28] CTA Case No. 8188, March 25, 2013, affirmed by the CTA *En Banc* in *Commissioner of Internal Revenue vs. Goodyear Philippines, Inc.*, CTA EB No. 1041, August 14, 2014

1102

Contrary to respondent's contention, petitioner submitted DPI's audited Financial Statements for the period December 31, 2012 dated May 17, 2013.[29] Evident from the said audited Financial Statements that the percentage of DPI's real property interest over its total assets was only **17.80%**, to wit:

ASSETS	AS OF DECEMBER 31, 2012
Non-Current Assets	-
Property, plant and equipment	4,725,601,019.00
Total Assets	26,549,527,599.00
Percentage	17.80%

Petitioner likewise submitted the Comparative Schedule of Property, Plant and Equipment[30] to show that the valuation of DPI's real property on February 19, 2013 amounts to ₱4,568,099,916.00 which is way less than 50% of DPI's total assets.

Indubitably, the gains realized by petitioner from the sale of its shares in DPI to DAHL shall only be taxable in the US pursuant to Article 14 in relation to the reservation clause in the RP-US Tax Treaty. Hence, said gain is not subject to Philippine CGT.

As stressed by the High Tribunal in *Commissioner of Internal Revenue vs. Fortune Tobacco Corporation*[31], if the State expects taxpayers to observe fairness and honesty in paying their taxes, it must hold itself against the same standard in refunding erroneous exactions and payment of such taxes. It thus behooves the government to refund what it erroneously collected.[32]

WHEREFORE, the Petition for Review filed by Dole Food Company, Inc. on March 19, 2015, is hereby **GRANTED**.

---

[29] Exhibit "P-18", docket, vol. 2, p. 912.
[30] Exhibit "P-17", docket, vol. 2, p. 905.
[31] G.R. Nos. 167274-75, July 21, 2008.
[32] *Commissioner of Internal Revenue and Commissioner of Customs vs. Philippine Airlines, Inc.*, G.R. No. 212536-37, August 27, 2014.

110

Accordingly, respondent is hereby **ORDERED TO REFUND** in favor of petitioner the amount of **₱166,733,230.00**, representing erroneously paid capital gains tax from the sale of petitioner's shares of stock in Dole Philippines, Inc. to Dole Asia Holdings Pte. Ltd.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

LOVELL R. BAUTISTA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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
Associate Justice
Chairperson

1108

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, and the Division Chairperson's Attestation, 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.

ROMAN G. DEL ROSARIO
Presiding Justice

1109