**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

**PHILIPPINE COCOA CORPORATION,**
Petitioner,

- versus - **C.T.A. CASE NO. 4392**

**COMMISSIONER OF INTERNAL REVENUE AND THE SECRETARY OF TRADE AND INDUSTRY,**
Respondents.

11/9/93

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# D E C I S I O N

This case involves petitioner's claim for refund or tax credit of overpaid income tax for the fiscal year 1987 amounting to P289,030.00. Petitioner availed the net operating loss carry-over (or NOLCO for short) on the remaining unapplied balance of P825,801.00, as net operating loss incurred on its registered operations for the fiscal year 1981.

The material facts are as follows:

Petitioner is a corporation duly organized and existing under the laws of the Republic of the Philippines. It was incorporated on February 9, 1979. Petitioner is engaged in the business of manufacturing cocoa and chocolate products.

On April 11, 1980, petitioner was registered with the Board of Investment (BOI) as a non-pioneer enterprise enjoying certain incentives as a registered agricultural enterprise under Presidential Decree No. 1159. Petitioner's registration covers the processing of cocoa powder and cocoa butter. It enjoys certain incentives granted to a registered agricultural enterprise. One of these is the NOLCO.

Sec. 6(c) of P.D. 1159 (Prescribing Incentives For Investments In Agricultural Enterprise) provides:

> "SEC. 6. ***Incentives to a Registered Agricultural Enterprise.*** - A registered enterprise, to the extent engaged in a preferred of investment, shall be granted the following incentive benefits:
>
> x x x x x x x x x.
>
> (c) Net Operating Loss Carry-over. - A net operating loss incurred in any of the first ten years of operations may be carried over as a deduction from taxable income for the six years immediately following the year of such loss. The entire amount of the loss shall be carried over to the first of the six taxable years following the loss, and any portion of such loss which exceeds that taxable income of such first year shall be deducted in like manner from the taxable income of the next remaining five years. The net operating loss shall be computed in accordance with the provisions of the National Internal Revenue Code, any provisions of this Decree to the contrary notwithstanding, except that income not taxable either in whole or in part under this or other laws shall be included in gross income.
>
> x x x x x x x x x."

Under BOI letter dated 1985-07-22 (July 22, 1985), the BOI approved petitioner's request to transfer its registration as a non-pioneer enterprise under P.D. No. 1159 to an export producer under

P.D. No. 1789, as amended. Pursuant thereto, on January 21, 1986, the BOI issued to petitioner a Certificate of Registration as an Existing Export Producer effective May 18, 1984, in accordance with the provisions of P.D. No. 1789 (Omnibus Investment Code), as amended by Batas Pambansa Blg. 391 (An Act Declaring The 1983 Investment Incentives Policy By Modifying The System on the Grant of Investment Incentives). The NOLCO incentives were not among the incentives granted to existing producers under the amendment.

For the fiscal year ending June 30, 1981, petitioner incurred a net operating loss of P2,564,662.00. For taxable years 1982 and 1983, petitioner deducted from its taxable income the NOLCO in the amounts of P1,725,763.00 and P343,509.00, respectively. There remained a balance of net operating loss of P825,801.00 which was not applied for the years 1984, 1985 and 1986. However, the amount of P825,801.00 was later applied in 1987, the sixth year following the loss. This was reflected in the Amended Income Tax Return filed by petitioner with the Bureau of Internal Revenue on October 2, 1989.

The BOI-BIR Working Committee Memorandum, dated March 10, 1987, shows that petitioner deducted the net operating loss from its total taxable income as follows:

| | TAXABLE INCOME | | | NOLCO |
|---|---|---|---|---|
| Year | BOI-reg. op'n | Non-BOI reg. | Total | Availed |
| 1982 | P1,519,256.00 | P206,507.00 | P1,725,763.00 | P1,725,763.00 |
| 1983 | P 219,605.00 | P123,904.00 | P 343,509.00 | P 343,509.00 |

The Committee findings disclosed that the net operating loss was deductible only from the taxable income from its registered operations. There was an unauthorized deduction of NOLCO in the amounts of P206,507.00 and P123,904.00 for the years 1982 and 1983, respectively. It was therefore recommended that the corresponding income taxes due thereon be paid. Thus, on December 30, 1987, petitioner paid the amounts of P99,643.20 and P53,385.60, representing deficiency income taxes for the years 1982 and 1983, respectively.

For fiscal year ending June 30, 1987, petitioner's Income Tax Return reflected an income tax due of P5,723,172.00, computed as follows:

| | |
|---|---|
| Income | P 60,782,712.00 |
| Less: Deductions | 44,430,791.00 |
| Net Income | P 16,351,921.00 |
| Tax Due | P 5,723,172.00 |

Upon investigation, petitioner was assessed by the Bureau of Internal Revenue for Deficiency Income and Expanded Withholding Tax for the fiscal year 1987. On December 24, 1987, petitioner paid the Deficiency Income Tax of P21,793.32, inclusive of interest, and the Deficiency Expanded Withholding Tax of P7,169.93, inclusive of interest and compromise penalty.

Sometime in September 1988, petitioner received from the BIR a pre-assessment notice, dated July 2, 1988, for Additional Deficiency Income Tax for fiscal year 1987 in the amount of P8,698.00, computed as follows:

| | |
|---|---|
| Net Income Per Return | P16,351,921.00 |
| Add. Disallowances per investigation | 60,000.00 |
| Net Income Per Investigation | P16,411,921.00 |
| Add. Additional Unallowable Deduction Per Return | |
| A) Def. Income Tax (FY-6/30/86) | 21,000.00 |
| N.B. - See Schedule of Taxes | |

| | | |
|---|---|---|
| and Licenses paid as of 6/30/87 stamp received 10/15/87; Authority to Issue Rev. Tax Receipt Re: payment of Def. Income Tax for 6/30/86 | | |
| Net Income Per Review | | P16,432,921.00 |
| Income Tax Due | | P 5,751,522.00 |
| Less: Amounts Previously Paid. | | |
| Per Return | P5,723,172.00 | |
| Per Investigation | 21,000.00 | 5,744,172.00 |
| Def. Income Tax Per Review | | P 7,350.00 |
| Add: 20% int. p.a. fr. 10/16/87 to 9/15/88 (0.183334) | | 1,348.00 |
| Total Def. Income Tax & Interest | | P 8,698.00 |

On September 23, 1988, petitioner paid the BIR P8,731.00, comprising the basic tax of P7,350.00 and interest of P1,381.00 computed from October 16, 1987 to September 23, 1988.

In a letter dated December 23, 1988, respondent informed petitioner that upon investigation no deficiency business tax was found due from it. But the sum of P37,693.65, was found due and collected from petitioner, itemized as follows:

| Particulars | P.O. No. | C.R. No. | Date | Amount |
|---|---|---|---|---|
| Deficiency income tax | 1272074 | 4796735 | 12-24-87 | P21,793.32 |
| Additional Deficiency income tax | 3374248 | 15540344 | 9-23-88 | 8,731.00 |
| Deficiency expanded withholding tax | 1272069 | 4796734 | 12-24-87 | 7,169.33 |
| Total | | | | P37,693.65 |

On October 2, 1989, petitioner filed an Amended Income Tax Return for fiscal year ending June 30, 1987. Petitioner applied the remaining NOLCO of P825,801.00, as a deduction from net income. The Amended Income Tax Return of petitioner for FY 1987, showed a refundable amount of P289,030.00, computed as follows:

| | |
|---|---|
| Income | P60,782,712.00 |
| Less: Deductions | 44,430,791.00 |
| Net Income | P16,351,921.00 |
| Less: Deductions under Special Laws | |
| Net Loss Carry-over | 825,801.00 |
| Net Taxable Income | P15,526,120.00 |
| | |
| Tax Due | P 5,434,142.00 |
| Less: Tax Paid | 5,723,172.00 |
| Total Amount Refundable | P 289,030.00 |

A claim for refund in the amount of P289,030.00 was filed with the BIR on October 9, 1989. In order to toll the running of the prescriptive period for filing a judicial claim for refund/credit of taxes, petitioner instituted the present petition on October 13, 1989, without waiting for respondent, Commissioner of Internal Revenue, decision on the matter.

In this petition, petitioner also impleaded as a necessary party respondent the Secretary of Trade and Industry who is the Chairman of the Board of Governors of the BOI and vested with the authority to issue/grant the claim for tax credit applied for by petitioner as provided by the Secretary of Finance Memorandum dated January 26, 1989.

The issue presented before Us for resolution is whether or not petitioner is entitled to deduct from the 1987 taxable income the NOLCO balance of P825,801.00 under P.D. 1159 after it became a registered existing export producer under P.D. 1789, as amended by B.P. Blg. 391, in order to be entitled to the refund/credit of P289,030.00, representing alleged overpaid income tax for said year.

Petitioner alleged that the balance of P825,801.00 net operating loss incurred in 1981 can still be applied as a NOLCO for FY 1987. Petitioner maintains that its subsequent registration on January 21, 1986 as an Existing Export Producer (effective May 18, 1984) under P.D. 1789, as amended by B.P. 391, did not revoke the NOLCO incentive which had already accrued in its favor since 1981.

Respondent, on the other hand, contends that the BOI decided against the application of the balance of P825,801.00 NOLCO for FY 1987. The NOLCO is not among the incentives granted to petitioner as an Existing Export Producer under Article 48 of P.D. 1789, as amended by B.P. 391. In other words, although it was entitled to avail the NOLCO incentive under its original registration as an Agricultural Enterprise, it however "waived" the NOLCO incentive under P.D. 1159 when it opted to transfer its registration to an Existing Export Producer under P.D. 1789, as amended by B.P. 391. The waiver of the NOLCO incentive is a precondition for registration under the new incentives law.

P.D. 1789 (Omnibus Incentives Code), effective January 16, 1981, expressly repealed P.D. 1159 and other investment incentives laws, without prejudice to the rights of any registered enterprise which at the time of effectivity of the Code have been registered under R.A. 5186, R.A.6135, P.D. 1159 and R.A. 5455. Art. 45(c) of P.D. 1789 provides NOLCO incentives to registered enterprises. The NOLCO incentive was withdrawn under B.P. 391 (effective April 28, 1983) limiting the availment of such incentive to registered domestic producers.

The contention of petitioner is not meritorious. The deductibility of the NOLCO balance of P825,801.00 from the 1987 taxable fiscal year finds no legal basis. Petitioner's claim for refund of P289,030.00 should therefore be denied.

Petitioner was entitled to avail of NOLCO incentives under its original registration as an agricultural enterprise under P.D. 1159. The subsequent repeal of P.D. 1159 by P.D. 1789 did not prejudice any rights acquired prior to the effectivity of the latter. Like any other right, however, the NOLCO incentive may be waived and this petitioner did. When petitioner opted to transfer its registration as an agricultural enterprise (P.D. 1159) to an existing export producer <u>effective May 18, 1984</u> (P.D. 1789, as amended by B.P. 391), it waived all the incentives that may be availed under P.D. 1159.

The waiver finds its basis on Section 21 of B.P. 391 which provides:

> "**Sec. 21.** The provisions of the preceding section notwithstanding, existing enterprises which are enjoying the incentives under the laws shall continue to enjoy such incentives for the period therein stated. <u>Provided, however, that they may waive such incentives and opt to be governed by the provisions of this Act, in which event, their period of availment of the incentives herein provided shall be reckoned from the original date of their entitlement to the incentives under the said laws.</u>" (Underscoring supplied.)

This provision clearly shows that enterprises which opt to be governed by the provisions of P.D. 1789 and B.P. 391 waive their incentives that may be granted under previous incentive laws (P.D. 1159).

It is claimed by petitioner that B.P. 391 has only prospective and no retroactive application. Thus, what could be waived, according to petitioner, are those NOLCO incentives pertaining to any net operating loss incurred from 1984 (the date of registration under P.D. 1789, as amended). Petitioner added that NOLCO incentives "earned" by petitioner in 1981 can not be affected and are still available and allowable to be claimed as deductions in 1987.

This theory of petitioner has no leg to stand on. There is no basis for petitioner's argument that B.P. 391 is prospective. The law itself provides for its retroactive application in that the period of availment provided under B.P. 391, shall be reckoned from the original date of their entitlement to the incentives under the previous laws. When petitioner was registered as an export producer effective May 18, 1984 under P.D. 1789, as amended, it became entitled to the incentives provided in said decree. Since NOLCO is not included in the package of incentives granted to export producers under P.D. 1789, as amended by B.P. 391 which took effect (April 28, 1983) earlier that petitioner's registration as an export producer (May 18, 1984) then such NOLCO incentive is deemed not to have ever been granted to petitioner as an export producer. If petitioner s argument is valid, then it could have availed of two sets of incentives - surely, that is not the intent of the law.

From another perspective, the net operating loss to be deductible must belong to the same set of registered operations from which the taxable income against which the losses will be deducted arises. The net operating loss in fiscal year 1981 was incurred from operations as an agricultural producer. Necessarily, it can be deducted only from income derived from the same operations. However, petitioner admitted in its petition that effective May 18, 1984, it ceased to be an agricultural producer. Allowing petitioner then to deduct net operating loss incurred in 1981 from 1987 income on operations as registered export producer under P.D. 1789, as amended, is improper and therefore should not be allowed.

**WHEREFORE,** premises considered, judgment is hereby rendered **DENYING** the instant petition for lack of merit. Costs against petitioner.

**SO ORDERED.**

Quezon City, Metro Manila, November 9, 1993.

**ERNESTO D. ACOSTA**
Presiding Judge

**WE CONCUR:**

**MANUEL K. GRUBA**
Associate Judge

**RAMON O. DE VEYRA**
Associate Judge

**CERTIFICATION**

I hereby certify that the decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

**ERNESTO D. ACOSTA**
Presiding Judge
Court of Tax Appeals