REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SMART COMMUNICATIONS, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 6120

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

NOV 05 2001

x - x

DECISION

This is a petition seeking for the refund or issuance of a tax credit certificate in the amount of P4,664,474.88, allegedly representing overpaid final withholding tax on royalties for the months of May and June, 1998 and August, 1999.

The facts are not disputed.

Petitioner is a corporation duly organized and existing under Philippine laws and is engaged in the operation of integrated telecommunications services throughout the Philippines.

On March 8, 1994, it registered with the Board of Investments (BOI) as a new operator of nationwide enhanced cellular mobile telephone system (CMTS) on a preferred non-pioneer status in accordance with the provisions of the Omnibus Investments Code of 1987. Likewise, on August 26, 1997, Petitioner registered anew its CMTS operations with the BOI as expanding operator also on a preferred non-pioneer status (par.1.02, Joint Stipulation of Facts).

In line with its CMTS installation and operation, Petitioner entered into a Technical Assistance Agreement (Agreement, for brevity) with Asia Link B.V. (ALBV), a corporation duly organized and existing under the laws of the Netherlands. Under the said Agreement, ALBV will make available to Petitioner its patents, patent applications, know-how's (including engineering and manufacturing assistance), applications and designs for the build-out and maintenance of the CMTS and modifications, improvements and other new technologies relating to CMTS. In consideration therefor, Petitioner will pay royalty fees to ALBV.

On January 1998, Petitioner recorded in its books an accrual of royalty fees to ALBV for technical services rendered for the period September 1, 1997 to November 30, 1997 in the amount of P39,549,817.45. The corresponding 15% final withholding tax amounting to P5,932,472.62 was withheld and remitted to the Bureau of Internal Revenue (BIR) on February 10, 1998 (Exhibit L). However, on May 8, 1998, Petitioner adjusted its total accrued royalty fee from P39,549,817.45 to P40 902,211.00 and paid to the BIR on June 10, 1998 the additional amount of P202,859.03 as 15% final withholding tax on the royalty fee adjustment of P1,352,393.55 (Exhibit B).

On June 15, 1998, Petitioner remitted to ALBV the amount of US$826,425.21, with peso equivalent of P34,766,879.25, representing royalty fee for the period September 1, 1997 to November 30, 1997, net of the 15% final withholding tax previously paid to the BIR.

On June 29, 1998, Petitioner again remitted to ALBV the amount of US$854,855.91, with peso equivalent of P35,981,740.15, representing royalty fee for the period December 1, 1997 to February 28, 1998, net of the 15% final withholding tax amounting to P6,349,718.85 which was remitted and paid to the BIR on July 27, 1998 (Exhibit C).

On August 16, 1999, Petitioner further remitted to ALBV the amount of US$1,071,209.54, with peso equivalent of P42,164,798.42, representing royalty fee for the period September 1, 1998 to November 30, 1998, net of the 15% final withholding tax in the amount of P7,440,846.78. The 15% final withholding tax was remitted and paid to the BIR on September 27, 1998 (Exhibit D).

Claiming that the technical service fee payments it made to ALBV are subject only to 10% final withholding tax, instead of 15%, pursuant to Article 12 of the RP-Netherlands Tax Treaty, Petitioner filed a letter with the Appellate Division of the BIR on May 15, 2000, requesting for the refund of the amount of P4,664,474.88 as alleged overpayment of final taxes withheld for the months of May and June 1998 and August 1999, excepting the tax payment made on February 10, 1998 as the same has already prescribed (Annex D, Petition for Review, par. 1.07, Joint Stipulation of Facts). Petitioner's claim for refund was computed as follows:

Period Covered	Filing/ Remittance Date	Tax Base	Tax Withheld at 15% FWT Rate	Shd Be Tax Withheld at 10% FWT Rate	FWT Overpayment
May 1998	June 10, 1998	1,352,393.55	202,859.03	135,239.36	67,619.67
June 1998	July 27, 1998	42,331,459.00	6,349,718.85	4,233,145.90	2,116,572.95
August 1999	Sept. 27, 1999	49,605,645.20	7,440,846.78	4,960,564.52	2,480,282.26
	TOTAL	93,289,497.75	13,993,424.66	9,328,949.78	**4,664,474.88**

On May 15, 2000, Petitioner filed a request for tax refund with the Appellate Division of the Bureau of Internal Revenue. On June 2, 2000, Petitioner filed with the International Tax Affairs Division (ITAD) of the BIR, a tax treaty relief application in connection with its technical service fee payments to ALBV (Annex E, Petition for Review, par. 1.08, Joint Stipulation of Facts). Four days later, or on June 6, 2000 Petitioner re-filed its claim for refund, this time with the ITAD, as it was allegedly advised by its Legal Department that it should have filed its request for tax refund with ITAD, instead of the Appellate Division of the BIR.

There being no action on the part of herein Respondent and the two-year prescriptive period was about to expire, the present case was filed on June 8, 2000.

Respondent filed his Answer on August 16, 2000, and claimed by way of Special and Affirmative Defenses that:

> "5. The petitioner's claim for refund is still subject to routinary administrative investigation by the respondent's bureau.
>
> 6. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable.
>
> 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 provisions of Section 204 in relation to Section 229 of the Tax Code, as amended.
>
> 9. Claims for refund are construed strictly against the claimant for the same partakes 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**)."

That the instant Petition was timely filed is conceded (par. 1.11, Joint Stipulation of Facts). Likewise, the parties stipulated that it is already a settled issue that a withholding agent is the proper party to claim for the refund of overpayment of withholding tax (par.

1.12, Joint Stipulation of Facts). Thus, in their Joint Stipulation of Issues filed with this Court on October 5, 2000, the parties submitted only the following for resolution:

1. Whether or not SMART remitted, as royalty fees, to ALBV the amount of P93,289,497.75;

2. Whether or not SMART has overpaid final withholding tax on royalties in the amount of P4,664,474.88;

3. Whether or not SMART's claim for refund of alleged overpaid final withholding tax on royalties for the months of May and June 1998 and August 1999 is substantiated by documentary evidence; and

4. Whether or not SMART is entitled to a refund in the amount of P4,664,474.88 representing overpaid final withholding tax on royalties for the months of May and June 1998 and August 1999.

However, since the foregoing issues are interrelated, the same shall be discussed jointly.

After carefully examining the evidence adduced solely by Petitioner, We rule in its favor.

Article 12 of the RP-Netherlands Tax Treaty provides in part:

"ROYALTIES

1. Royalties arising in one of the States and paid to a resident of the other State may be taxed in that other State.

2. However, such royalties may also be taxed in the State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed:

(a) **10 per cent of the gross amount of the royalties where the royalties are paid by an enterprise registered, and engaged in preferred areas of activities in that State;** and

(b) 15 per cent of the gross amount of the royalties in all other cases.

x x x"

Clearly from the above, Petitioner should have been taxed at the lower rate of 10%, it being sufficiently shown and has in fact been admitted by herein Respondent, that it is an enterprise registered with the BOI on a preferred non-pioneer status (Exhibit E).

To substantiate its claim that there was an overpayment, Petitioner presented a certification from ALBV, the recipient of the royalty fees, to the effect that it had received technical service fees from the former totalling US$2,762,491.36, net of the 15% final withholding taxes (Exhibit M) which were remitted to the BIR on various dates as shown by the Monthly Remittance Returns of Income Taxes Withheld with the corresponding bank validation of payments made (Exhibits B, C and D).

Respondent, on the other hand, submitted no controverting evidence and submitted his case based on the pleadings (p.123, CTA Records).

Considering, therefore, that Petitioner was able to prove that it is a duly registered enterprise engaged in a preferred area of activity as required by the RP-Netherlands Tax Treaty so as to qualify to a 10% final withholding tax and considering further that Petitioner has shown to the satisfaction of the Court that it actually remitted and paid 15% final withholding tax totalling P13,993,424.66, instead of only 10 % or P9,328,949.78, We are left with no recourse but to grant the relief sought.

WHEREFORE, in view of all the foregoing, the Court finds the instant petition meritorious and in accordance with law. **ACCORDINGLY**, Respondent is hereby **ORDERED** to **REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** to Petitioner in the amount of P4,664,474.88 representing overpaid final withholding taxes on royalties for the months of May and June, 1998 and August, 1999.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

AMANCIO Q. SAGA
Associate Judge

Juanito C. Castañeda, Jr.
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