REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BANK OF TOKYO - MITSUBISHI, LTD.
MANILA BRANCH,
Petitioner,

- versus -

C.T.A. CASE NO. 5697

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JUL 26 2000

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DECISION

This case involves a claim for refund of overpaid branch profit remittance tax in the amount of P1,855,093.97 for the fiscal year ended March 31, 1996.

Petitioner is a banking institution duly organized and registered under the laws of Japan and with a branch in the Philippines authorized to engage in the banking business.

By virtue of a merger between Bank of Tokyo, Ltd. and The Mitsubishi Bank, Ltd. on April 1, 1996, a Certificate of Change of Name was issued to the Petitioner on November 15, 1996 by the Securities and Exchange Commission (Exh. G).

For the fiscal year ended March 31, 1996, Petitioner's combined net income amounted to P51,522,083.55, broken down as follows:

Unit	Net Income	Exhibit
Regular Banking Unit (RBU)	P31,393,898.03	D
Foreign Currency Deposit Unit (FCDU)	20,128,185.52	E
Total	P51,522,083.55	

Consequently, Petitioner secured a clearance from the *Bangko Sentral ng Pilipinas* (BSP) to remit to its head office in Japan the US dollar equivalent of the above-mentioned sum (Exh. F).

On December 17, 1996, Petitioner filed with the Bureau of Internal Revenue (BIR) its Monthly Remittance Return of Income Taxes Withheld and paid branch profit remittance tax in the amount of P4,709,084.70 corresponding to 15% of the total net income of its RBU of P31,393,898.03 that was applied with the BSP for remittance to its head office (Exh. A).

It is the proposition of herein Petitioner that an overpayment was made of the branch profit remittance tax to the government inasmuch as the RP-Japan Tax Treaty allows a preferential rate of 10% between the two participating countries. Thus, an administrative claim for refund was filed with the BIR on August 5, 1998 (Exh. B) for the refund of overpaid branch profit remittance tax of P1,569,694.90, detailed hereunder:

	BPRT
Should be: (P31,393,898.03 x 10%)	P3,139,389.80
Actual payment (P31,393,898.03 x 15%)	P4,709,084.70
Under/(Over) payment	P1,569,694.90

On September 16, 1998, Petitioner filed an amended claim for refund with the BIR (Exh. C) to revise the computation of overpaid branch profit remittance tax in order to reflect the correct tax base which is the amount of profit actually remitted pursuant to the case of Bank of America NT & SA decided by the Supreme Court on July 31, 1994. The amount sought to be refunded was accordingly computed, *viz*:

Actual BPRT Paid (P31,393,898.03 x 15%)	P4,709,084.70
Should be (P31,393,898.03/110% x 10%)	2,853,990.73
Amount of Overpaid BPRT	**P1,855,093.97**

The administrative claim having been unacted upon by the Respondent, this judicial claim was timely filed on December 16, 1998.

Respondent alleges the following Special and Affirmative Defenses:

a) Petitioner's claim for refund is under verification/investigation by respondent Commissioner of Internal Revenue;

b) In an action for tax refund, petitioner must show that taxes were paid erroneously or collected illegally. Failure to sustain this burden is fatal to the action for refund;

c) Claims for refund are construed strictly against the claimants since they are in the nature of exemptions from taxation; and

d) Taxes are presumed to have been paid and collected in accordance with law.

However, Respondent did not submit his memorandum nor present any evidence to refute Petitioner's claim but submitted the case for decision (CTA rec., p. 85).

We are confronted with several issues in the case at bar:

(1) Whether or not Petitioner is entitled to the preferential tax rate of 10% in the payment of branch profit remittance tax in accordance with the RP-Japan Tax Treaty;

(2) Whether or not Petitioner's tax base for the branch profit remittance tax should be the actual profit remitted abroad; and

(3) Whether or not Petitioner is entitled to the refund sought for.

Section 25(a)(5) of the then Tax Code mandates that "any profit remitted by a branch to its head office shall be subject to a tax of 15%". Nevertheless, under paragraph 5 of the Protocol to the RP-Japan Tax Treaty, it is provided that:

"Protocol"

> 5. Nothing in the convention shall be construed as preventing the Republic of the Philippines from imposing on the earnings (other than those derived from the operation of ships or aircraft in international traffic) of a company being a resident of Japan attributable to a permanent establishment which it has in the Republic of the Philippines, a tax in addition to the tax which would be chargeable on the income of a company being a resident of the Republic of the Philippines, <u>provided that any additional tax so imposed shall not exceed 10 per cent of the amount of the part of such earnings which is remitted abroad</u>. For the purposes of this paragraph, the term "earnings" means the amount remaining after deducting from the profits by the Republic of the Philippines. (Underscoring supplied).

Under Article 5 of the said treaty, the term "permanent establishment" includes a branch, to wit:

"Article 5

> (1) For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
>
> (2) The term "permanent establishment" includes especially"
>
> (a) a store or other sales outlet;
> (b) **a branch**;
> (c) an office;
> (d) a factory;
> (e) a workshop;
> (f) a warehouse;
> (g) a mine, an oil or gas well, a quarry or other place of extraction of natural resources.

Prescinding from the above provision, Petitioner, being a branch of the Bank of Tokyo-Mitsubishi, Ltd., qualifies to avail of the 10% preferential tax rate. Verily, the net income remitted by Petitioner to its head office clearly falls under the term "earnings" defined in the above-quoted protocol. In other words, the branch profit remittance tax, which is an additional tax imposed upon Petitioner, should not exceed 10% of such net income or earnings remitted to its head office. Therefore, 15% tax rate prescribed under Section 25(a)(5) of the then Tax Code does not apply to the Petitioner. Furthermore, Respondent issued a ruling on January 30, 1995 which interpreted the above provisions of the RP-Japan Tax Treaty to the effect that the additional tax to be imposed on branch profits to be remitted to the head office in Japan by its Philippine branch should not exceed 10% of the amount of the part of such earnings remitted abroad (see BIR Ruling No. 013-95).

This goes without saying that the first issue is resolved in favor of the Petitioner.

As regards the second issue, We would like to stress at the outset that the Tax Reform Act of 1997 (Republic Act No. 8424), now categorically provides:

> SEC. 28. *Rates of Income Tax on Foreign Corporations.* -
>
> (A) *Tax on Resident Foreign Corporations.* -
>
> (1) *In General.* - xxx
>
> xxx xxx xxx
>
> (5) *Tax on Branch Profits Remittances.* - Any profit remitted by a branch to its head office shall be subject to a tax of fifteen percent (15%) which shall be based on the total profits applied or earmarked for remittance without any deduction for the tax component thereof (except

those activities which are registered with the Philippine Economic Zone Authority). (Emphasis Supplied).

The above law leaves no room for argument that the tax base for branch profit remittance tax effective January 1, 1998 is the profit applied or earmarked for remittance abroad without deduction for the tax component thereof. (See **Tax Law and Jurisprudence, Vitug & Acosta**, 2nd Ed., p. 83). But the same cannot apply to the Petitioner, as the subject claim involves the fiscal year ended March 31, 1996. As per the applicable law and jurisprudence at that time, the 15% branch profit remittance tax shall be imposed on any profit remitted by a branch to its head office. And the Supreme Court then interpreted said provision of the law as to mean "profit actually remitted or net of branch profit remittance tax itself". In the case of **Bank of America NT & SA versus Honorable Court of Appeals, and the Commissioner of Internal Revenue**, G.R. No. 103092, July 21, 1994, it was elucidated in this wise:

> In the 15% remittance tax, the law specifies its own tax base to be on the "profit remitted abroad". There is absolutely nothing equivocal or uncertain about the language of the provision. The tax is imposed on the amount sent abroad, and the law (then in force) calls for nothing further. xxx
>
> As well expounded by the Tax Court-
>
> > "x x x In all the situations x x x where the mechanism of withholding of taxes at source operates to ensure collection of the tax, and which respondent claims the base on which the tax is computed is the amount to be paid or remitted, the law applicable expressly, specifically and unequivocally mandates that the *tax is on the total amount thereof which shall be collected and paid as provided in Sections 53 and 54 of the Tax Code.* xxx

> "On the other hand, there is absolutely nothing in Section 24(b)(2)(ii), which indicates that the 15% tax on branch profit remittance is on the total amount of profit to be remitted abroad which shall be collected and paid in accordance with the tax withholding device provided in Section 53 and 54 of the Tax Code. The statute employs `Any profit remitted abroad by a branch to its head office shall be subject to a tax of fifteen per cent (15%)'- without more. Nowhere is there said of `*base on the total amount actually applied for by the branch with the Central Bank of the Philippines as profit to be remitted abroad, which shall be collected and paid as provided in Sections* 53 and 54 of this Code.' Where the law does not qualify that the tax is imposed and collected at source based on profit to be remitted abroad, that qualification should not be read into the law. It is a basic rule of statutory construction that there is no safer nor better canon of interpretation than that when the language of the law is clear and unambiguous, it should be applied as written. And to our mind, the term `any profit remitted abroad' can only mean such profit as commonly and popularly accepted and understood. To say therefore that the tax on branch profit remittance is imposed and collected *at source* and necessarily the tax should be the amount actually applied for the branch with the Central Bank as profit to be remitted abroad is to ignore the unmistakable meaning of plain words."

Finally, We delve on the issue of entitlement to the claim sought for.

Petitioner avers that the net income or profit on foreign currency deposit unit remitted to its head office is exempt from branch profit remittance tax relying upon the provision of Section 25(a)(6)(B) of the applicable Tax Code, reading:

> (B) *Income derived under the Expanded Foreign Currency Deposit System.*- Income derived by a depository bank under the expanded foreign currency deposit system from foreign currency transactions with **non-residents, offshore banking units in the Philippines,** local commercial banks including branches of foreign banks that may be authorized by the Central Bank of the Philippines to transact business with foreign currency depositary system units and other depository banks under the expanded foreign currency deposit system shall be exempt from all taxes, except

taxable income from such transactions as may be specified by the Secretary of Finance, upon recommendation of the Monetary Board to be subject to the usual income tax payable by banks. xxx

Indeed, the aforecited law is clear. Income derived by a depository bank under the expanded foreign currency deposit system from foreign currency transactions with a branch of a foreign bank shall be exempt from all taxes except taxable income from such transactions. And records will indubitably show that Petitioner did not pay any tax on its net offshore income while it paid regular bank taxes on all other income not classified as offshore or onshore income (Exh. E).

Petitioner maintains that the net income from the bank's Foreign Currency Deposit Unit is exempt from branch profit remittance tax (BPRT) under Section 25(a)(6)(B) of the Old Tax Code and as declared by the Respondent in Revenue Regulations No. 10-76. Thus, Petitioner did not pay BPRT corresponding to said net income from its Foreign Currency Deposit Unit.

We agree with Petitioner on this point. Section 3 of Revenue Regulations No. 10-76 provides as follows:

"Section 3. Rates of income tax to be imposed. —

The rates of income to be imposed, which shall be in lieu of all other taxes such as but not limited to privilege tax, gross receipts tax, documentary and science stamp tax and profit remittance tax are as follows: xxx (underscoring ours)."

Furthermore, BIR Ruling No. 553-88 dated November 22, 1988 affirmed Petitioner's stance when the then Commissioner of Internal Revenue, Beinvenido A. Tan, Jr. ruled in this manner:

"Accordingly, the remittance of profits by branches of foreign commercial banks operating a foreign currency deposit unit to their head office consisting of the FCDU's offshore and onshore income is not subject to the 15% branch profit remittance tax under Section 25(a)(5) of the Tax Code as amended."

In sum, We find that Petitioner is entitled to the preferential rate of 10% in the payment of branch profit remittance tax. And the basis for the 10% branch profit remittance tax should be the amount of the profit actually remitted to its head office or net of the branch profit remittance tax itself, computed as follows:

A) Regular Banking Unit Operations (P31,393,898.03)

Actual BPRT Paid (P31,393,898.03 x 15%)	P4,709,084.70
Should be (P31,393,898.03/110% x 10%)	2,853,990.73
Refundable	P1,855,093.97

WHEREFORE, in view of all the foregoing, the instant Petition for Review is hereby **GRANTED**. Respondent Commissioner of Internal Revenue is **ORDERED** to **REFUND** or in the alternative to issue a **TAX CREDIT CERTIFICATE** to the Petitioner the amount of P1,855,093.97 representing overpaid branch profit remittance tax for the fiscal year ended March 31, 1996.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

AMANCIO Q. SAGA
Associate Judge

RAMON O. DE VEYRA
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