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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

RHONE-POULENC RORER
PHILIPPINES, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 4869

COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

Promulgated:
APR 03 1996

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D E C I S I O N

This case involves a claim for refund or tax credit filed by petitioner, Rhone-Poulenc Rorer Philippines, Inc., against respondent, Commissioner of Internal Revenue, for alleged overpaid income tax for the year 1990 in the amount of P3,220,063.00.

As borne out by the pleadings, petitioner is a corporation duly organized and existing under the laws of the Philippines. It is primarily engaged in the business of "importing, manufacturing, processing, compounding, repacking, preparing for market, buying, selling at whole, distributing, transporting and promoting general merchandise, goods and wares of all kinds and descriptions, such as but not limited to pharmaceutical preparations, drugs, medicines, chemicals, compounds, druggist sundries and supplies, perfumeries, toilet articles, scientific apparatus and physicians' and hospitals' supplies". Sometime during the third quarter of 1990 or exactly on the 27th of September 1990, petitioner bought all the assets of Rhone Poulenc Nattermann Pharma, Inc. in exchange for all the unissued no par value shares of petitioner. By virtue of this merger, petitioner also assumed all the obligations and liabilities of Rhone Poulenc Nattermann Pharma, Inc..

Prior to the merger, Rhone Poulenc Nattermann Pharma, Inc. has filed with the Bureau of Internal Revenue its first and second quarters Quarterly Income Tax Returns for the year 1990. It paid the amounts of P1,400,530.00 on May 30, 1990 and P1,819,533.00 on August 29, 1990, representing its quarterly income tax payments for the first and second quarters ending March 1990 and June 1990, respectively.

As a result of the merger, Rhone Poulenc Nattermann Pharma, Inc. was dissolved on October 30, 1990. Thus, on November 29, 1990, Rhone Poulenc Nattermann Pharma, Inc. filed its final Income Tax Return for the period starting January 1, 1990 to October 30, 1990, showing a net loss of P14,065,749.00, a NIL income tax liability and a refundable amount of P3,220,063.00, representing the total payments made for the first and second quarters of 1990.

The refund of the excess tax paid by Rhone Poulenc Nattermann Pharma, Inc. forms part of the assets (rights receivable) acquired by petitioner, as the surviving corporation by virtue of the merger. Thus, on September 1, 1992, petitioner filed with the Bureau of Internal Revenue a letter claim for refund or tax credit, dated August 27, 1992, seeking the refund of the sum of P3,220,063.00, equivalent to the overpaid income tax for 1990 by Rhone Poulenc Nattermann Pharma, Inc.. A little about two months thereafter or on October 29, 1992, petitioner instituted this petition for review, seeking the refund of P3,220,063.00, without necessarily waiting for the decision of respondent on its claim for refund or tax credit for the purpose of tolling the running of the two-year prescriptive period for filing a judicial claim for refund or tax credit.

In response to the petition filed, respondent alleged that the petitioner is not the real party in interest to claim for the refund or tax credit of P3,220,063.00 because there was no valid merger or consolidation between petitioner and Rhone Poulenc Nattermann Pharma, Inc. as envisioned in Section 76 of the Corporation Code. Secondly, the petition is still premature because the claim for refund or tax credit is still pending investigation by the Bureau of Internal Revenue. Lastly, respondent averred that the quarterly income tax payments were made in accordance with law. Since claim for refund or tax credit partakes the nature of a tax exemption, therefore the same should be construed strictly against the claimants.

The issues presented are as follow:

1. Whether or not petitioner is the real party in interest to judicially claim for the refund or tax credit of overpaid income tax for 1990 paid by Rhone Poulenc Nattermann Pharma, Inc.. To answer this, we must first determine whether or not there was a valid merger or consolidation between petitioner and Rhone Poulenc Nattermann Pharma, Inc. in order to constitute petitioner to be the real party in interest who can institute and file the instant petition for refund; and

2. Whether or not petitioner is entitled to claim for the refund of overpaid income tax for the year 1990 by Rhone Poulenc Nattermann Pharma, Inc..

Tackling on the first issue, that is, whether or not petitioner is the real party in interest to file the suit for the judicial refund of P3,220,063.00, the Court believes that the document presented by petitioner more particularly described as a "Deed Of Assignment With Assumption Of Liabilities", dated September 27, 1990, constitutes a valid merger between petitioner and Rhone Poulenc Nattermann Pharma, Inc. as contemplated in Section 34(c)(2) and (4) in relation to Section 34(c)(6)(b) of the National Internal Revenue Code.

For taxation purposes the term "<u>merger</u>" or "<u>consolidation</u>" has been defined in Section 34(c)(6)(b) of the Tax Code as follows:

> "(b) The term 'merger' or 'consolidation', when used in this section shall be understood to mean: (1) the ordinary merger or consolidation or (2) <u>the acquisition by one corporation of all or</u>

> substantially all the properties of another corporation solely for stock: *Provided,* That for a transaction to be regarded as merger or consolidation within the purview of this section, it must be undertaken for a *bona fide* business purpose and not solely for the purpose of escaping the burden of taxation: *Provided, further,* That in determining whether a *bona fide* business purpose exists each and every step of the transaction shall be considered and the whole transaction or series of transactions shall be treated as a single unit: *Provided, finally,* That in determining whether the property transferred constitutes a substantial portion of the property of the transferor the term 'property' shall be taken to include the cash assets of the transferor." (Emphasis Ours.)

The first kind of merger or consolidation above-cited refers to the "ordinary merger or consolidation" as contemplated and referred to by respondent in her answer which is covered under Section 76 of the Corporation Code, which provides as follows:

> "**SEC. 76. Plan of merger or consolidation.** - Two or more corporations may merge into a single corporation which shall be one of the constituent corporations or may consolidate into a new single corporation which shall be the consolidated corporation.
>
> The board of directors or trustees of each corporation, party to the merger or consolidation, shall approve a plan of merger or consolidation setting forth the following:
>
> 1. The names of the corporations proposing to merge or consolidate, hereinafter referred to as the constituent corporations;

> 2. The terms of the merger or consolidation and the mode of carrying the same into effect;
>
> 3. A statement of the changes, if any, in the articles of incorporation of the surviving corporation in case of merger; and, with respect to the consolidated corporation in case of consolidation, all the statements required to be set forth in the articles of incorporation for corporations organized under this Code; and
>
> 4. Such other provisions with respect to the proposed merger or consolidation as are deemed necessary or desirable."

However, this is not the one referred to by petitioner in this case. It is the second kind of merger, that is, <u>the acquisition by one corporation of all or substantially all the properties of another corporation solely for stock</u>.

We agree with petitioner.

As a general rule, there shall be recognized a gain or loss for every sale or exchange of property <u>except</u> in pursuance of a plan of merger or consolidation where in the following instances:

(a) a <u>corporation</u> which is a party to a merger or consolidation exchanges property solely for stock in a corporation which is a party to the said merger or consolidation,

(b) a <u>shareholder</u> exchanges stock in a corporation which is a party to the merger or consolidation solely for the stock of another corporation also a party to the merger or consolidation, or

(c) a <u>security holder</u> of a corporation which is a party to the merger or consolidation exchanges his securities in such corporation solely for stock or securities in another corporation, a party to the merger or consolidation. [Section 34(c)(1) and (2) NIRC (Underling ours.)].

The Deed of Assignment with Assumption of Liabilities clearly embodies the agreement between Rhone Poulenc Nattermann Pharma, Inc., as the Assignor, and Rhone Poulenc Rorer Philippines, Inc., as the Assignee, whereby the former shall transfer and deliver all its existing assets, rights and business including the goodwill, the right to use its name, all its rights and interests in all patents, trademarks and licenses for and in consideration of the issuance of 15,264 no par value shares equivalent to a total issue value of P21,824,908.00. In addition, the Assignee shall assume all debts, obligations and liabilities of the Assignor whether accrued, absolute, contingent or otherwise, as of September 27, 1990 (Exh. J). It is therefore evident, that by virtue of this Agreement or the assignment of all of the assets, rights and obligations of Rhone Poulenc Nattermann Pharma, Inc. to petitioner, the second kind of merger exists that which is equivalent to the "merger" by virtue of the "acquisition by one corporation of all or substantially all the properties of another corporation solely for stock".

The execution of the Deed of Assignment with Assumption of Liabilities in effect constituted a valid merger. As a result thereof, there was dissolution and liquidation of the absorbed corporation (Rhone Poulenc Nattermann Pharma, Inc.) which was effected on October 30, 1990. Necessarily, the net assets of the dissolved corporation which included among others its receivables were transferred in favor of petitioner. This includes the right to claim for the refund or tax credit of overpaid taxes. Afortiori, petitioner after having acquired the right to collect the receivables of Rhone Poulenc Nattermann Pharma, Inc. has also acquired a valid right to institute this claim for refund or tax credit in its favor. This finds support in Section 80(4) of the Corporation Code, which states that "(t)he surviving or the consolidated corporation shall thereupon and thereafter possess all the rights, privileges, immunities and franchises of each of the constituent corporations; and all property, real or personal, and all receivables due on whatever account, including subscriptions to shares and other choses in action, and all and every other interest of, or belonging to, or due to each constituent corporation, shall be deemed transferred to and vested in such surviving or consolidated corporation without further act or deed". (Emphasis ours.)

It is also noteworthy to point that the purpose of the merger was to effect a reorganization as embodied in the Whereas Clause of the Deed of Assignment - "WHEREAS, ASSIGNOR desires that all of its assets be conveyed and exchanged solely for shares of ASSIGNEE'S unissued no par shares, with the assumption by ASSIGNEE of such liabilities and obligations of ASSIGNOR as hereinafter set forth, for the purpose of carrying out in the Philippines, the worldwide reorganization of Rhone Poulenc and Rorer Companies" (Exh. J). It cannot be denied therefore that the merger was effected for a *bona fide* business purpose and not for the purpose of escaping the burden of taxation. As elucidated by the Supreme Court in the case of **Commissioner of Internal Revenue v. Rufina, et. al.,** G.R. Nos. L-33665-68, February 27, 1987, 148 SCRA 42, 49, to wit:

> "The basic consideration, of course, is the purpose of the merger, as this would determine whether the exchange of properties involved therein shall be subject or not to the capital gains tax. The criterion laid down by the law is that the merger 'must be undertaken for a *bona fide* business purpose and not solely for the purpose of escaping the burden of taxation.' We must therefore seek and ascertain the intention of the parties in the light of their conduct contemporaneously with, and especially after, the questioned merger pursuant to the Deed of Assignment of January 9, 1959."

In the case at bar, the transfer of assets by Rhone Poulenc Nattermann Pharma, Inc. to Rorer Philippines, Inc. was made in pursuance to a plan of reorganization. It cannot be said that there is a device to avoid the tax by means of this merger since both corporations are engaged in similar business. Rhone Poulenc Nattermann Pharma, Inc. is primarily engaged in the business of importing, buying, repacking, manufacturing, selling at wholesale, distributing, transporting, and promoting pharmaceutical preparations, drugs, and medicines of all kinds and description, similar to the business petitioner is engaged in.

Thus, in view of the foregoing we have arrived at the conclusion that there is a valid merger. Hence, the question of whether or not petitioner is the real party in interest entitled to institute this action should be answered in the affirmative.

The second issue to be resolved is whether or not petitioner is entitled to the refund or tax credit of P3,220,063.00. After examining the evidence presented by petitioner, the Court found petitioner to be entitled to the amount claimed for. Petitioner has presented as evidence the following documents to prove entitlement to the amount sought for refund or tax credit, to wit:

> 1. First Quarter Income Tax Return, ending March, 1990, of Rhone Poulenc Nattermann Pharma, Inc., showing the tax due of P1,400,530.00 (Exh. A);
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> 2. Central Bank Confirmation Receipt No. B19638241 (Exh. F) and BIR Payment Order No. C7874934 (Exh. G) evidencing payment of the first quarter income tax due of P1,400,530.00;
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> 3. Second Quarter Income Tax Return, ending June 1990, of Rhone Poulenc Nattermann Pharma, Inc., showing the tax due of P1,819,533.00 (Exh. B);
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> 4. Central Bank Confirmation Receipt No. B19638261 (Exh. I) and BIR Payment Order No. C8487488 (Exh. H) evidencing payment of the second quarter income tax due of P1,819,533.00;
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> 5. Final Income Tax Return, as of October 30, 1990, of Rhone Poulenc Nattermann Pharma, Inc., showing a refundable amount of P3,220,063.00, equivalent to the total quarterly income tax

payments for the first and second quarters of 1990 (Exh. D);

6. Letter claim for refund/tax credit filed by petitioner on September 1, 1992 (Exh. E);

7. The Income Tax Returns and CB Confirmation Receipts and BIR Payment Orders of petitioner for:

a. the Third Quarter, ending September 30, 1990 (Exh. L) showing a tax due of P3,583,127.00;

b. CB Confirmation Receipt No. B21286327 (Exh. L-3) and BIR Payment Order No. C9040915 (Exh. L-4) evidencing payment of the tax for the third quarter in the amount of P3,583,127.00;

c. the 1990 Annual Income Tax Return, ending December 31, 1990 (Exh. K), showing a tax due of P18,490,590.00, with no indication of any tax credit being claimed in the return filed with the BIR (Exh. K-2) and with the attached audited financial statements for said year;

d. CB Confirmation Receipt No. B20211838 (Exh. K-3) and BIR Payment Order No. C10574883 (Exh. K-4) evidencing payment of the tax due of P18,490,590.00;

e. First Quarter Income Tax Return, ending March 31, 1991 (Exh. M), showing that petitioner did not avail of any tax credit in the amount of P3,220,063.00 (refund for 1990) as a carry-over to the succeeding taxable quarter.

Pursuant to Section 69 of the National Internal Revenue Code, any excess of the quarterly income taxes paid from the total tax due on the entire taxable net income of that year the same shall be refunded or credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable year. Since petitioner did not apply the same as a tax credit for the succeeding taxable quarter necessarily it opted to file for a refund of the excess income tax paid.

All the documents submitted in evidence by petitioner showed that petitioner is indeed entitled to the refund or tax credit being claimed for. Respondent was considered by this Court, upon the motion of petitioner, to have waived her right to present any evidence. She instead manifested to submit this case based on the pleadings and the evidence presented by petitioner. She also waived the presentation of memorandum for the guidance of this Court in the resolution of this case. There being no serious ground raised by respondent to discourage this Court from granting the claim for refund or tax credit the same should be allowed. Petitioner has overcome the burden of proof required under the law. Petitioner has satisfactorily proven its case.

WHEREFORE, finding the petition to be meritorious the same is hereby **GRANTED.** Respondent is hereby ordered to refund or issue a tax credit in favor of petitioner in the amount of

P3,220,063.00, representing overpaid income tax for the year 1990. No pronouncement as to cost.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

MANUEL K. GRUBA
Associate Judge

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that this 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