REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

AB CAPITAL AND INVESTMENT CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5233

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 30 1996

x - x

DECISION

This is a petition for review filed by the petitioner, AB CAPITAL AND INVESTMENT CORPORATION, against the respondent, Commissioner of Internal Revenue, for the latter's inaction of the petitioner's claim for refund in the amount of P274,662.57, representing the alleged over-remittance of withholding taxes for the taxable year 1993.

The antecedent facts of the case are as follows:

Petitioner is the investment manager of the AsianBank Corporation Multi-Employer Plan (herein referred to as the "Plan"), a retirement plan for qualified employees of the AsianBank Group of Companies. The "Plan" provided for the instances when an employee may retire as well as the benefits he is entitled to receive, to wit: (p. 74, CTA rec.)

"WHEN YOU MAY RETIRE

Normal retirement is age 60.

If you want to avail of Early Retirement, you may do so upon reaching age 55, provided you have rendered 15 years of service. Your early retirement is subject to Management's consent.

You may still remain in active service even after age 60 and continue to earn retirement credits, if you and the Company mutually agrees to extend your service period beyond the normal retirement date.

YOUR BENEFITS

UPON RETIREMENT

When you retire, you will receive an amount equal to 1 month's final salary for every year of service.

UPON DEATH OR DISABILITY

In cases such as death or disability, you or your beneficiaries will receive an amount equal to 1 month's final salary for every year of service.

If you have been with the Company for at least 3 years, you are entitled to a minimum benefit equivalent to 12 month's salary.

UPON SEPARATION FROM SERVICE

If you opt to leave the Company and voluntarily resign from work, the amount which you are entitled to receive is in accordance with the following schedule:

Years of Service	Applicable Percentage
Less than 5 years	0%
5 less than 10	25%
10 less than 15	50%
15 less than 20	75%
20 or more	100%"

This was duly approved by the BIR as a reasonable retirement benefit plan within the contemplation of Section 28(b)(7)(A) of the Tax Code (Exh. D). However, certain conditions were imposed, *viz.*:

> "It is observed, however, that the Plan provides for normal retirement on 'the first day of the month next following his attainment of age sixty (60) (Sec. 1, Art. IV, Plan). This provision of the Plan allows the retirement of an employee who may have served the company for even less than ten (10) years as long as he retires at age 60. In such case, the benefit payable to the retiring member shall not be exempt from income tax because Section 28(b)(7)(A) of the Tax Code requires the presence of these two (2) conditions in order that the employee benefit may be granted tax exemption: (1) the employee had been in the service of the same private firm for at least ten (10) years; and (2) he is at least 50 years old at the time of retirement.
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> x x x x x x x x x
>
> Any and all amounts that may be received under the Plan by an employee-member voluntarily resigning or separated from the service of the company shall be subject to income tax (Sec. 1, Art. VII, Plan)."

On June 30, 1992, Mr. Ramon R. del Rosario, Jr., who was then President of AsianBank Corporation, was

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appointed by President Fidel V. Ramos, as Secretary of Finance *ad interim*. The appointee took his oath of office on the same date. As a result of his appointment as Secretary of Finance, Mr. del Rosario, Jr. has to leave his post as President of AsianBank Corporation. Consequently, he is entitled to receive the benefits under The AB Group of Companies Multi-Employer Retirement Plan.

Petitioner, as manager and withholding agent of the AsianBank Corporation Multi-Employer Plan, released and paid Mr. del Rosario, Jr., the full amount of P784,750.21, under the so-called "retirement benefits". Petitioner relying on BIR Ruling Nos. 76-88 (March 4, 1988), 191-89 (September 4, 1989) and 4-89 (January 19, 1989) did not withhold any tax on the amount of P784,750.21. In said rulings, the Bureau of Internal Revenue (BIR) have stated that any amount received by an official or employee from his employer as a consequence of the former's acceptance of a government position is exempt from all taxes and consequently from the withholding tax under Sec. 28(b)(7)(B) of the Tax Code, as amended, because one cannot refuse the invitation to serve the government. And for this reason, his separation is therefore considered beyond his control.

However, despite the non-withholding of tax on the "retirement benefits" paid to Mr. del Rosario, Jr., petitioner erroneously remitted to the BIR on January 20, 1993 the amount of P274,662.57, representing 35% withholding tax on the "retirement benefits" of Mr. del Rosario, Jr.

On August 23, 1994, petitioner, thru counsel, filed with the respondent a claim for refund in the amount of P274,662.57 representing the over-remittance of withholding tax for the taxable year 1993 on account of the erroneous remittance of the tax corresponding to the "retirement benefits" received by Mr. del Rosario, Jr.. Petitioner's claim for refund was not acted upon by the respondent. Hence, petitioner filed with this Court the instant petition for review on April 11, 1995.

The petitioner by way of this petition is claiming for the refund or in the alternative the issuance of a tax credit of P274,662.57. Petitioner anchors its claim on the following grounds:

1. That the separation of Mr. Ramon del Rosario, Jr. from AsianBank Corporation was due to a cause beyond his control, hence, his "retirement benefit" is exempted from the income (withholding) tax; and

2. That in three (3) separate and unequivocal rulings of the respondent (BIR Ruling Nos. 76-88, 004-89 and 191-89), it was ruled that "leaving the private sector to join the government service is beyond the control of the employee, accordingly any and all amounts received by said employee as a result thereof are exempt from all taxes and consequently from the withholding tax."

Respondent did not dispute the existence of the three (3) BIR Rulings cited by petitioner, but she denied its applicability to the case at bar. She also argued that the petitioner's claim for refund or tax credit has already prescribed on the ground that the alleged erroneous payment was made on January 20, 1993, while the instant petition for review was filed before this Court only on April 11, 1995. The claim for refund or tax credit having been filed beyond the two-year period from the date of payment of the tax pursuant to Section 230 of the Tax Code, as amended, the same is deemed to have prescribed. Furthermore, the retirement of Mr. Ramon del Rosario was NOT due to a cause beyond his control since the latter was not coerced to accept the position of Secretary of Finance instead there was freedom of choice on the part of the appointee.

The following issues have to be resolved by this Court, to wit:

I. WHETHER OR NOT THE PETITIONER'S CLAIM FOR REFUND OR TAX CREDIT HAS PRESCRIBED; and

II. WHETHER OR NOT THE RETIREMENT OF MR. RAMON DEL ROSARIO, JR. FROM ASIANBANK CORP. TO BECOME SECRETARY OF FINANCE OF THE PHILIPPINES WAS DUE TO CAUSE BEYOND HIS CONTROL AS CONTEMPLATED UNDER SEC. 28(b)(7)(B) OF THE TAX CODE.

Respondent alleged in her memorandum that the tax alleged to be erroneously paid was remitted to the BIR on January 20, 1993. The claim for refund with the BIR was filed on August 24, 1994 but the petition with the Court was filed only on April 11, 1995 way beyond the two-year prescriptive period for filing a claim for refund under Section 230 of the Tax Code.

We disagree with the respondent.

Section 230 of the Tax Code, as amended, provides:

> "**Sec. 230. 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 excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue; 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 begun after the expiration of two 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 therefore, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears to have been erroneously paid." (Underscoring ours.)

In interpreting the phrase "from the date of payment of the tax", the Supreme Court in the case of **ACCRA Investments Corporation v. Court of Appeals** [204 SCRA 957 (1991)], has ruled that "from the date of payment of the tax" should be construed from the date of petitioner-corporation's filing of its final adjustment tax return. The Highest Court of the land stressed in the above-mentioned case, following its Resolution, dated April 10, 1989, in the case of **Commissioner of Internal Revenue v. Asia Australia Express, Ltd., (G.R. No.** 85956), that "the two-year prescriptive period within which to claim a refund commences to run, at the earliest, on the date of the filing of the adjusted final tax return".

Section 70 subparagraph (b) of the Tax Code explicitly provides the period within which to file a final adjustment return for corporations. It states:

> "**Sec. 70. Quarterly declaration. (a) Place of filing. -** x x x.
>
> **(b) Time of filing the income tax return.** - The corporate quarterly declaration shall be

filed within sixty (60) days following the close of each of the first three quarters of the taxable year. The final adjustment return shall be filed on or before the 15th day of April or on or before the 4th month following the close of the fiscal year, as the case may be. (as amended by Pres. Decree No. 1705)"

Since the tax erroneously withheld was remitted and paid on January 20, 1993, the same is deemed paid as of the end of the taxable year when the same actually falls due or on the 15th day of April of the following year. Thus, taxes withheld for the year 1993 actually falls due on April 15, 1994. Since the petition for review was filed on April 11, 1995, the claim for refund or tax credit has not yet prescribed for it is within the two-year prescriptive period.

With regard to the second issue, both parties posed a question on the proper interpretation of the phrase "for any cause beyond the control of said official or employee" under Sec. 28(b)(7)(B) of the Tax Code, as amended, which provides:

"SEC. 28. Gross Income - (a) *General definitions.* - x x x.

(b) ***Exclusion from gross income.*** - The following items shall not be included in gross income and shall be exempt from taxation under this Title:

x x x x x x x x x

(7) ***Retirement benefits, pensions, gratuities, etc.***

> x x x x x x x x x
>
> (B) Any amount received by an official or employee or by his heirs from the employer as a consequence of separation of such official or employee from the service of the employer due to death, sickness or other physical disability or for any cause beyond the control of the said official or employee. (Underscoring ours.)

Sec. 2(b)(2) of Revenue Regulations No. 6-82, as amended by Revenue Regulations No. 12-86, is pertinent to the issue posed upon this Court. It provides that:

> "(2) Any amount received by an official or employee or by his heirs from the employer as a consequence of separation of such official or employee from the service of the employer due to death, sickness, or other physical disability or for any other cause beyond the control of the said official or employee, such as retrenchment, redundancy and cessation of business.
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> The phrase "for any cause beyond the control of the said official or employee" connotes involuntariness on the part of the official or employee. The separation from the service of the official or employee must not be asked for or initiated by him.
>
> Whether or not the separation is beyond the control of the said official or employee, being essentially a question of fact, shall be determined on the basis of prevailing facts and circumstances. This shall be duly established through competent evidence to be submitted by the employer which should be attached in his monthly report for the period in which the amount was paid due to involuntary separation.

> Any payment made by an employer to an employee on account of dismissal, that is, for causes other than those mentioned in paragraph (b)(2) hereof, constitutes compensation regardless of whether the employer is legally bound by contract, statute, or otherwise to make such payment." (Underscoring supplied.)

The phrase "for any other cause beyond the control of the said official or employee," therefore, contemplates a situation wherein the said official or employee is forced to resign/retire or be separated from the service due to reasons beyond his control or against his will, such as death, illness, physical disability, retrenchment, redundancy, cessation or stoppage of business.

In the case at bar, Mr. del Rosario's appointment as Secretary of Finance is not involuntary, rather the position offered to him by the President was duly accepted by him when he took his oath of office. As a consequence, therefore, he has to vacate the position as President of AsianBank Corporation. Accordingly, as stated in the BIR's approval of the company's retirement plan, the amount received under the Plan by an employee-member who voluntarily resigns or is separated from the service of the company shall be subject to income tax.

The so-called "retirement benefit" received by Mr. del Rosario, Jr. cannot qualify as a legitimate retirement benefit under the "Plan" because he did not retire due to reaching the compulsory age of 60 nor did he avail of the early retirement scheme. More so, the late retirement package. His separation from the company was by reason of his acceptance of a position as Secretary of Finance. This cannot be considered as something beyond his control. Because one can refuse a position offered to him especially if he feels he is not qualified to perform the task assigned to him. It is not true that a person cannot refuse an invitation to serve the government. As a matter of fact, he can refuse the offer as in the case of Rep. Edcel Lagman when he refused a Cabinet position (see Annex A of Resp's. Memorandum, p. 183, CTA rec.).

In this case, Mr. del Rosario, Jr. decided to accept the position offered to him by the President. And in so doing, he opted to be separated from the company by his own volition. Hence, this Court is of the opinion that the case at bar is not one of those situations contemplated by the phrase "for other cause beyond the control of said official or employee" under Sec. 28(b)(7)(B) of the Tax Code, as amended. The amount of P784,750.21 received by Mr. del Rosario from the AsianBank should be subjected to the withholding tax. Since the amount of P274,662.57, although not withheld from Mr. del Rosario, was actually remitted to the BIR there appears to be no overpayment of withholding taxes for the year 1993.

WHEREFORE, premises considered, judgment is hereby rendered **dismissing** the herein petition for lack of merit. No pronouncement as to costs.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

I CONCUR:

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation with the member 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