REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPS. ALFREDO & IMELDA DIAZ
rep. by their Atty.-in-fact,
REINA D. COMANDANTE,
Petitioner,

- versus -

C.T.A. CASE NO. 6244

BUREAU OF INTERNAL REVENUE
rep. by Hon. RENE BANEZ,
in his capacity as Commissioner,
Respondent.

Promulgated:
MAR 0 5 2003

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DECISION

This case involves a claim for refund of the amount of Three Hundred Sixty Thousand Seven Hundred Sixty & 28/100 Pesos (P 360,760.28) representing the capital gains tax and documentary stamp tax allegedly paid twice by petitioner.

The facts of the case are as follows:

Spouses-petitioners are taxpayers with postal address at No. 163 Boyd Ave. Jersey City, New Jersey, 07304 USA. They are represented by their daughter, Reina D. Comandante, as their attorney-in-fact, as evidenced by the Special Power of Attorney, duly executed by the spouses before a notary public of New Jersey *(Annex A, Petition for Review).*

Sometime in October 1996, herein petitioners entered into a Contract of Loan with Land Bank of the Philippines *(Land Bank, for brevity)*, fully secured by a real estate mortgage over a parcel of land located at Tandang Sora, Quezon City, and covered by

Transfer Certificate of Title No. RT 6604 (82020) PR 18887, in favor of the said bank. Petitioners, however, were not able to pay their loan with Land Bank on its due date for which reason the latter instituted an extra-judicial foreclosure over the said mortgaged property in January, 1999.

On February 5, 1999, said property was sold by public auction to the highest bidder. There being no other bidders, the foreclosed property was awarded to the mortgagee Land Bank. The corresponding certificate of sale was allegedly issued in its favor which fact of issuance was annotated at the back of the title (*Annex C, Petition for Review*).

The following month, or on March 9, 1999, Land Bank, after being assessed by the respondent BIR in the amount of P 360,760.28 as Capital Gains and Documentary Stamp Tax, caused the payment of said taxes, as evidenced by the Certificate Authorizing Registration *(Annex D-1, Petition for Review).*

On November 11, 1999 and prior to the expiration of the one-year redemption period counted from the date of registration of sale under Act No. 3135, as amended, the petitioners redeemed said property by paying the redemption price of P5,772,015.71 to Land Bank. Thus, a Certificate of Redemption *(Annex E, Petition for Review)* was executed by the bank in favor of the petitioner. Simultaneous with the redemption of the property from Land bank, petitioner, as owner, executed a Deed of Sale in favor of Spouses Bienvenido and Elizabeth Pangan.

In December 1999, the new buyers, Spouses Pangan, paid the capital gains and documentary stamp taxes, as evidenced by the Certificate Authorizing Registration *(Annex G, Petition for Review).*

On August 17, 2000, petitioner filed with Revenue Region No. 7 of the respondent's Bureau, a claim for refund *(Annex H, Petition for Review)* of its capital gains and documentary stamps taxes paid on March 5, 1999, claiming that there was double payment of said taxes: the first, on March 5, 1999 by Land Bank and the other, on December 8, 1999 by the petitioner through Spouses Pangan.

It is petitioner's view that the long pendency of their letter-claim for refund before respondent's office points to the conclusion that the said request is as good as denied. Thus, in order to toll the running of the prescriptive period for refund, petitioner elevated the matter before this court by way of Petition for Review on March 2, 2001.

On April 20, 2001, respondent filed his Answer denying therein some material allegations in the petition and interposing the following Special and Affirmative Defenses:

> 1. That the herein petitioner is not entitled to the refund of the amounts prayed for in the instant petition for review;
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> 2. That the instant petition for review was prematurely filed as petitioner has not exhausted the administrative remedies required by law and jurisprudence on the actions of this nature as no decision has as yet been rendered by the respondent;
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> 3. In an action for refund, the taxpayer has the burden to show that the taxes paid were erroneously or illegally collected and failure to do so is fatal to the action;
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> 4. Claims for tax refund are strictly construed against the taxpayer. Petitioner has no cause of action.

This court, in a resolution promulgated on November 21, 2002, granted petitioner's "Motion for Judgment on the Pleadings" for the reason that the answer of the respondent no longer tendered a real issue since all the factual aspects in the case were already stipulated and agreed upon by the parties. More significantly is the fact that the applicable laws and jurisprudence cited by petitioners as well as the documents annexed to the petition were never denied existence by the respondent.

As stipulated by the parties, the sole issue involved in the case at bar is: "Whether or not petitioner is entitled to the refund of P 360,760.28 corresponding to the double payment made by petitioner for capital gains and documentary stamp taxes in March 1999 and the other in December 1999."

We first tackle the issue of whether there is double payment of capital gains tax. The law in point is Section 24(D)(1) of the 1997 Tax Code, which, for easy reference, is hereunder quoted as follows:

"Section 24. (D) Capital Gains from Sale of Real Property.-

(1) In General. - The provisions of Section 39(B) nothwithstanding , a final tax of six percent (6%) based on the gross selling price or current fair market value as determined in accordance with Section 6(E) of this Code, whichever is higher, is hereby imposed upon capital gains presumed to have been realized from the sale, exchange or other disposition of real property located in the Philippines, classified as capital assets, including **pacto de retro** sales and other forms of conditional sales by individuals, including estates and trusts x x x.

From the foregoing provision, it is clear that capital gains tax is imposed not only on absolute sale transactions, but likewise extends to conditional sales such as *pacto de retro* and foreclosure sales. This is even buttressed by Revenue Memorandum Order No. 6-92, issued on January 15, 1992, which provides that mortgage foreclosure sales, whether judicial or extra-judicial, are considered conditional sales subject to capital gains tax, thus:

"2.2. - The tax applies not only to ordinary sale transaction but also to *pacto de retro* sales and other forms of conditional sales, which necessarily includes mortgage foreclosure sales (judicial and extra-judicial foreclosure sales.)"

However, the controversy besetting the case at bar actually involves the question of whether the capital gains tax imposed on property under a foreclosure sale but subsequently redeemed within the one-year period of redemption can still be refunded. It appears that based on the prior decisions of this court, BIR rulings, revenue regulations and pertinent laws, the answer is in the affirmative. The subsequent redemption of the property subject to a mortgage foreclosure sale is not covered by the 6% capital gains tax imposed by Section 24(d)(1) of the Tax Code. It is to be noted that while the Tax Code imposes a 6% capital gains tax on conditional sales of property, including mortgage foreclosure sales, it must be stressed that the said conditional transactions presuppose transfer of interest or ownership over the subject properties. This is the reason why in cases "where the right of redemption of the mortgagor exists, the certificate of title of the mortgagor shall not be cancelled yet even if the property had already been subjected to foreclosure sale, but instead only a brief memorandum shall be annotated at the back of the certificate of title, and the cancellation of the title and the subsequent issuance of a new title in favor of the purchaser/highest bidder depends on whether the mortgagor shall redeem or not the mortgaged property within one (1) year from the issuance of the certificate of sale. Thus, no transfer of title of the highest bidder can be effected yet until and after the lapse of the one-year from the issuance of the said certificate of sale." (*page 106, The National Internal Revenue Code Annotated, De Leon, 2000 Edition*). The one-year period to redeem is provided for under Section 6 of Act No. 3135, as amended, which states:

> "***Section 6.*** – In all cases in which an extra-judicial sale is made under the special power hereinbefore referred to, the debtor, his successors-in-interest or any judicial creditor or judgment creditor, or any person having a lien on the property subsequent to the mortgage or deed of trust under which the property is sold, may redeem the same at any time **within the term of one year from and after the date of the sale**." (*Emphasis supplied*)

The period of one year referred to above is counted from the date of the registration of the Certificate of Sale as provided under Section 33 of Rule 39 of the 1997 Rules of Civil Procedure, thus:

Rule 39

> ***Section 33.*** – If no redemption be made within one (1) year from the date of registration of the certificate of sale, the purchaser is entitled to a conveyance or possession of property x x x.

It must be pointed out that it is not the transfer of ownership per se that subjects the sale to the capital gains tax. As elucidated by this court in the case of ***Spouses Arturo Soriano and Virginia T. Soriano vs Hon. Liwayway Vinzons-Chato, CTA Case No. 5563, June 22, 1999,*** thus:

> "It bears stressing that it is not the transfer of ownership per se that subjects the sale to the 5% capital gains tax but the profit or gain that was presumed to have been realized by the seller/mortgagor by means of said transfer as can be clearly seen from the provisions of Section 21 (e) of the Tax Code *(supra)*. Let us not forget that the capital gains tax is an income tax defined as a tax on a person's income, wages, salary, commissions, emoluments, profits and the like *(Black's Law Dictionary, 6^{th} edition.)* The concept of income implies gain, profit or flow of wealth *(Madrigal vs. Rafferty 38 Phil 414)*. The question that should be asked at this point is: Did the petitioners profit or gain anything from the foreclosure sale where the properties were redeemed within the specified redemption period? The answer is obvious. Petitioner did not earn any income from the sale of these foreclosed properties, hence they should not be made liable to pay the capital gains tax *x x x*."

Even the Bureau of Internal Revenue itself ruled in BIR Ruling 158-94 that subsequent redemption of real property under the *pacto de retro* sale is not subject to the capital gains tax *(BIR Ruling No. 158-94, November 21, 1994).* In another instance, the BIR recognized the harshness of imposing a capital gains tax before the expiration of the redemption period and made a ruling in this wise, thus:

> "In foreclosure sales of mortgaged real properties, the creditor-bank is the statutory seller, representing the owner-mortgagor of the real property, so that said bank becomes liable to pay the capital gains tax due on such foreclosure sale based on the bid price in the auction sale. **The bank, however, could get reimbursement or recovery of the capital gains tax payment, if the right of redemption is exercised by the debtor-mortgagor or when the property is sold to any party whatsoever** (underscoring ours). *(BIR Ruling No. 006-92, January 9, 1992).*

Thus, in order to curb the inequity of imposing a capital gains tax even before the expiration of the period of redemption, the Secretary of Finance issued Revenue Regulations No. 4-99, dated March 9, 1999, where he categorically declared, thus:

> "**SEC. 3 CAPITAL GAINS TAX. –**
>
> (1) In case the mortgagor exercises his right of redemption within one year from the issuance of the certificate of sale, no capital gains tax shall be imposed because no capital gains has been derived by the mortgagor and no sale or transfer of property was realized. A certification to that effect or the deed or redemption shall be filed with the Revenue District Office having jurisdiction over the place where the property is located which certification or deed shall likewise be filed with the Register of Deeds and a brief memorandum thereof shall be made by the Register of Deeds on the Certificate of Title of the mortgagor.
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> (2) In case of non-redemption, **the capital gains tax on the foreclosure sale imposed under Secs. 24(D)(1) and 27(D)(5) of the Tax Code of 1997 shall become due based on the bid price of the highest bidder but only upon the expiration of the one-year period of redemption** provided for under Sec. 6 of Act No. 3135, as amended by Act No. 4118, and shall be paid within thirty (30) days from the expiration of the said one-year redemption period." (*Emphasis ours*)

From the provisions of the above regulations, it may be inferred that in cases of foreclosure sales, the capital gains tax becomes due only in cases of non-redemption and only upon the expiration of the one-year period of redemption.

The records having shown that the capital gains tax in the amount of P 22,595.28 was indeed paid by the petitioners *(Annex D-1, Petition for Review)* plus the fact that respondent did not dispute and even admitted the fact of payment thereof, then the claim for refund of the erroneously paid capital gains tax should accordingly be granted.

We now proceed to resolve the issue on erroneously paid documentary stamp tax.

Section 196 of the Tax Code provides:

> ***"Section 196. - Stamp Tax on Deeds of Sale and Conveyances of Real Property.*** – On all conveyances, deeds, instruments or writings, other than grants, patents or original certificates of adjudication issued by the Government, whereby any land, tenement or other realty sold shall be granted, assigned, transferred or otherwise conveyed to the purchaser, or purchasers, or to any other person or persons designated by such purchaser or purchasers, there shall be collected a documentary stamp tax, at the rates herein below prescribed, based on the consideration contracted to be paid for such realty or on its fair market value determined in accordance with Section 6(E) of this code, whichever is higher: x x x
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> x x x x x x x x x."

Contrary to the findings of the BIR, the foregoing provision does not apply to petitioner whose mortgaged property was eventually redeemed. What is taxed by the afore-quoted provision are conveyances, deed, instruments and the like where there is transfer of the property from one party to another. It is quite evident that in the case at bar, the timely redemption of the petitioners of the mortgaged property had restored them of their rights over the property as the same was actually reverted to them. The act of redemption did not make the petitioners purchasers of the subject property but it is merely a restoration of the property to the mortgagors-debtors from the purchaser.

No less than the BIR itself, in its various rulings, stated that the deed of redemption is not subject to DST under Section 196 of the Tax Code, thus:

> "However, the Deed of Redemption is not subject to the Documentary Stamp Tax imposed under Section 196. It is noted that under said provision, the transaction which is subject to the DST is the conveyance of real property to the purchaser. This is not so in redemption of real property which involves restoration of the property to the mortgagor-debtor from the purchaser. Said deed of redemption is however, subject to the three-pesos DST imposed by Section 188 of the Tax Code ***(BIR Ruling No. 530-88, November 7, 1988, BIR Ruling No. 100-89, May 11,1989, BIR Ruling No. 158-90, August 16, 1990).***

While rulings issued by the BIR merely embody administrative opinions on queries and do not have the force and effect of law (*Alexander Howden and Co., Ltd. vs. Collector of Internal Revenue, L-19392, April 14, 1965*), they, however, have a persuasive effect on the courts and can be adopted especially if there is no showing that they are contrary to the basic law which they seek to interpret (*Afisco Insurance Corp., et al. vs. Court of Appeals, et al., G.R. No. 112675, January 25, 1999*).

Such being the case, petitioners in the case at bar are entitled to the refund of the documentary stamp tax erroneously paid to the BIR. However, they shall be subject to the tax imposed by Section 4 of Revenue Regulations No. 4-99, which provides:

"SEC. 4. DOCUMENTARY STAMP TAX. -

> (1) In case the mortgagor exercises his right of redemption, the transaction shall only be subject to the P 15.00 documentary stamp tax imposed under Section 188 of the Tax Code of 1997 because no land or realty was sold or transferred for a consideration.

xxx"

WHEREFORE, in view of the foregoing, the instant Petition for Review is **GRANTED**. Accordingly, respondent is hereby **ORDERED to REFUND** in favor of the petitioner the amount of P288,595.28 representing erroneously paid Capital Gains Tax and P72,150.00 representing overpaid Documentary Stamp Tax. However, the certification fee of P15.00 paid by petitioner pursuant to Section 188 of the 1997 Tax Code remains.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

LOVELL R. BAUTISTA
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