REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

JOSE C. IBAZETA,
Petitioner,

- versus -

C.T.A. CASE NO. 4797

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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8/8/94

DECISION

This is a claim for refund or in the alternative, issuance of a tax credit certificate in the amount of P827,522.50 representing alleged excess capital gains tax paid by petitioner on stock transactions for the calendar year 1990.

The facts of the case are not in dispute.

Petitioner is a Filipino citizen, of legal age and resident of #316 Mango Drive, New Alabang, Muntinlupa, Metro Manila.

On March 29, 1990, thru a Deed of Assignment (Exhibits "A" to "A-4"), the petitioner entered into a stock swap transaction with Benguet Corporation whereby he transferred a total of 46,250 shares of stock of Anscor Capital and Investment Corporation (ACIC) (now AB Capital and Investment Corporation) to Benguet

Corporation in exchange for 214,972 newly issued Class "A" shares of stock therein. The agreed transfer price for the 46,250 ACIC shares was P8,280,738.75 (Exhibit "A-5").

The Deed of Assignment states that the transfer price of P8,280,738.75 is "equivalent to the total market value of the Benguet shares, less five percent(5%) thereof, computed based on the average market value of the issued and traded shares of the capital stock of Benguet Corporation" for the period from March 8 to 14, 1990. For this period, the average closing price of the Benguet shares in the stock market was P38.52 per share. In effect, the ACIC shares were exchanged for Benguet Shares at P179.043 per share (i.e., the "transfer price" of P8,282,738.75 divided by 46,250 ACIC shares). As of March 31, 1990, ACIC shares had a book value of P112.85/share (see Exhibits "B", "B-1" and "B-2").

The exchange of shares was done outside of the stock market.

The Petitioner filed a capital gains tax return covering the stock swap transaction involving the ACIC shares (Exhibit "C"). The acquisition cost of the ACIC shares was stated in the return as P4,093,125.00 or P88.50 per share. Since the ACIC shares were effectively exchanged for Benguet Shares at P179.043 per share, the

Petitioner realized capital gains on the stock swap transaction in the aggregate amount of P4,187,613.75 (i.e., the transfer price of P8,280,738.75 less "cost" of P4,093,125.00) for which the Petitioner paid capital gains tax at the schedular rate of 10% and 20% under Section 21(d)(1) of the NIRC in the amount of P827,522.75 and was issued the corresponding Confirmation Receipt and Order of Payment (Exhibits "D" and "D-1").

Subsequent to the aforementioned stock swap transaction, Benguet Corporation declared a 25% stock dividend to all stockholders of record as of June 15, 1990 (Exhibits "E" and "E-1").

As a result of the stock dividend declaration, the shareholdings of the Petitioner in Benguet Corporation increased from 214,972 shares to 268,715 shares. The end-effect of this stock dividend declaration is to reduce the cost per share of the total shareholdings of the Petitioner in Benguet Corporation. Thus, the adjusted cost basis per share of the Petitioner's shareholdings in Benguet Corporation after June 15, 1990 is P30.816 per share (as compared to the original acquisition cost of P38.52 per share prior to the stock dividend declaration).

On December 21, 1990, thru a Deed of Absolute Sale of Shares (Exhibits "F" "F-1" and "F-2") the Petitioner sold an aggregate number of 251,797 Benguet shares at P11.00 per share or for a total consideration of P2,769,767.00. Although the Benguet Shares are listed in the stock exchange, the 251,797 Benguet shares were sold outside of the stock exchange.

Considering that the 251,797 Benguet shares subject of the Deed of Absolute Sale of Shares were acquired at the adjusted cost basis of P30.816 but were sold at P11.00 per share, said Benguet shares were therefore sold at a loss. Closing price of Benguet Class "A" shares of stock on December 21, 1990 was P10/share at the Makati Stock Exchange and P9.50/share at the Manila Stock Exchange (Exhibit "G" and "G-1"). Accordingly, the Petitioner did not pay any capital gains tax on this transaction. In the capital gains tax return which the Petitioner filed covering this transaction (Exhibit "H"), he declared a capital loss of P4,989,609.35 taking into account that the aggregate adjusted cost basis of the 251,797 Benguet shares is P7,759,376.35 (i.e., 251,797 multiplied by P30.816 per share).

While petitioner had no other stock transaction for 1990 that resulted in a capital gain, he had another transaction which resulted in a capital loss. This involved the sale of Asian Bank shares of stock to A. Soriano Corp. for P15,901,648.44 with a reported loss of

P1,628,211.70. No other details were provided since this will not affect at all the subject claim.

On January 23, 1991, the Petitioner filed a Final Consolidated Tax Return covering his stock transactions outside the stock exchanges for the year 1990 (Exhibit "I"). He reported in the Final Return that for the year 1990, his stock transactions outside the stock exchanges resulted in a net capital loss of P2,430,207.30 which wiped out all the net capital gains he derived from his stock transactions for the same year.

The stock transactions entered into by petitioner for calendar year 1990 is summarized below:

Date of Transaction	Particulars	Total Selling Price	Cost	Net Gain (Loss)	Capital Gains Tax Paid
03-28-90	Petitioner sold Asian Bank Shares to A. Soriano Corp.	P15,901,684.44	P17,529,896.14	(P1,628,211.70)	P ----
03-29-90	Petitioner swapped with Benguet Corp. (BC) 46,250 shares of Anscor Capital & Investment Corp. (ACIC) for 214,972 Class "A" shares of BC	8,280,738.75	4,093,125.00	4,187,613.75	827,522.50
12-21-90	Petitioner sold 251,797 Class "A" shares of BC to Leonardo T. Sequion Reyna	2,769,767.00	7,759,376.35	(4,989,609.35)	----
	TOTALS	P26,952,190.19	P29,382,379.49	(P2,430,207.30)	P827,522.50

An administrative claim for refund in the amount of P827,522.50 was filed by petitioner with the Bureau of Internal Revenue (BIR) on February 6, 1991 (Exhibit "J").

Respondent Commissioner did not act upon the petitioner's claim for refund. To interrupt the two-year prescriptive period, the Petitioner filed the herein petition for review with this Court on April 24, 1992.

The only issue is whether or not petitioner is entitled to the refund of P827,522.50 representing alleged overpaid capital gains tax on stock transactions for 1990.

Underlying the said issue is whether Section 21(d)(1) or Section 21(d)(2) of the National Internal Revenue Code (NIRC) is applicable in determining the capital gains tax due on the gain realized from the sale of listed shares but not traded through the stock exchanges.

Quoted hereunder are the pertinent provisions of law, viz:

SECTION 21. *Tax on citizens or resident.-*

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(d) Capital gains from sales of shares of stock. - The provisions of Section 33(b) notwithstanding, capital gains realized from the sale, exchange or disposition of share of stocks in any domestic corporation shall be taxed as follows:

> (1) Net capital gain as defined in Section 33(a)(2) realized during each taxable year from the sale, exchange or other disposition of shares of stock <u>not traded through a local stock exchange</u>:
>
> Not over P100,000.00 .... 10%
> Over P100,000.00 .... 20%
>
> (2) Capital gains presumed to have been realized from the sale, exchange or disposition of shares of stock <u>listed and traded</u> through a local stock exchange - 1/4 of 1% based on the gross selling price of the share or shares of stock. (Underscoring supplied).
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> xxx xxx xxx

Petitioner submits that the sale of listed shares outside of the stock exchange is governed by the provisions of Section 21(d)(1) of the NIRC, i.e., the schedular rate of 10% and 20% based on the net capital gains realized thereon, and not by Section 21(d)(2) of the NIRC, i.e., the final tax of 1/4 of 1% based on the gross selling price of the share sold. It is argued that Section 21(d)(2) of the NIRC applies exclusively to the sale or disposition of shares of stock which are listed and traded in the stock exchanges and not to shares listed but not traded through the stock exchanges. There should be a concurrence of "listing" of shares in the stock exchanges and actual "trading" of the same through the facilities of the exchange in order that the tax of 1/4 of 1% under Section 21(d)(2) of the NIRC shall be applicable. Otherwise stated, the phrase "and traded through a local stock exchange" is not a mere description of "listed shares" but a qualification for the application of the tax of 1/4 of 1%. The provisions of the NIRC on stock transactions [Section 21(d)(1) and (2)] are allegedly clear and free from ambiguity and need no further interpretation. The foregoing was claimed to find support in Revenue Regulations No. 2-82 which makes a distinction between "shares which are traded through the stock exchanges" and "share which are not traded through the stock exchanges but listed in one or more stock exchanges".

On the other hand, respondent contends that petitioner's sale of Benguet Corporation share of stock on December 21, 1990 fall within the purview of Section 21(d)(2) of the Tax Code hence, subject to the capital gains tax of 1/4 of 1% of the gross selling price. It is respondent's view that what is indispensable as required by law, is the fact that the shares of stock are listed in the stock exchange. The actual trade of shares of stocks need not occur through local stock exchange. Consequently, petitioner is allegedly not entitled to the claim for tax refund considering that the stock transactions are separate and distinct from each other and the filing of returns cannot be consolidated, for Section 7 of Revenue Regulations No. 2-82 provides a separate manner of payment and filing of returns covered by Section 21(d)(1) and Section 21(d)(2) of the Tax code. Respondent therefore prays that petitioner be ordered to pay the capital gains tax of 1/4 of 1% of the gross selling price of the Benguet Corp. shares of stocks, plus surcharge and interest in accordance with Section 248 and 249 of the Tax Code, as amended.

The first and fundamental duty of the court is the application of the law according to its express terms, interpretation being called for only when such literal application is impossible (**Pacific Oxygen, etc. vs. Central Bank**, 37 SCRA 685; **Republic Flour Mills, Inc. vs. Commissioner of Customs**, 39 SCRA 269; **Allied Brokerage Corp. vs. Commissioner of Customs**, 40 SCRA 555; **Gonzaga vs. Court of Appeals**, 51 SCRA 381). When the words and phrases of the statute are clear and unequivocal, their meaning must be determined from the language employed and the statute must be taken to mean exactly what it says (**Pascual vs. Pascual-Bautista**, 207 SCRA 561).

The Court cannot hardly find anything ambiguous in Section 21(d)(1) and (2) of the Tax Code that pose a problem of interpretation. The words are plain and readily understandable. The schedular rate of 10% and 20% based on the net capital gains realized from sale of shares of stocks [Section 21(d)(1)] applies to those not traded through the local stock exchange. Whereas, the 1/4 of 1% based on the gross selling price of the shares of stock [Section 21(d)(2)] applies to those listed and traded through a local stock exchange. While it is true that only those shares which are listed may be traded in the local stock exchange, it does not necessarily follow that listed shares may only be traded in the local stock exchange. They may be sold outside the local stock exchange. We agree with petitioner that the "listing" and actual "trading" must concur in order for Section 21(d)(2) to apply. Please note that the said provision of law both mentions "listed" and "traded", joined together by the injuncture word "and", meaning concurrence. If the shares of stock are listed but sold outside the local stock exchange, Section 21(d)(1) should apply. What is controlling is whether or not the shares of stock are traded in the local stock exchange. This is the common denomination in both provisions of law.

In the instant case, petitioner's stock transactions were outside the local stock exchange. A fortiori, Section 21(d)(1) of the NIRC is applicable. The schedular rate of 10% and 20% based on the net capital gain realized during the taxable year meaning, the excess of the gains from sales or exchanges of capital assets over the losses from such sales or exchanges (Section 33(a)(2), NIRC) should be imposed.

Pursuant to Section 45(d) of the Tax Code, petitioner filed a return and paid the corresponding capital gains tax thereon, if any, within thirty days after each transaction and a final consolidated return of all transactions during the taxable year on or before the fifteenth day of the fourth month following the close of the taxable year. Consequently, petitioner has paid a capital gains tax of P827,522.50 for taxable year 1990 even if it incurred a net capital loss of P2,430,207.30 from all his 1990 stock transactions taken together. (See summary of stock transactions.). Verily, petitioner is entitled to a refund.

WHEREFORE, respondent Commissioner of Internal Revenue is hereby ordered to refund or issue tax credit certificate to petitioner Jose C. Ibazeta the amount of P827,522.50 representing overpaid capital gains tax on stock transactions for calendar year 1990.

SO ORDERED.

Quezon City, Metro Manila, August 8, 1994.

Ernesto D. Acosta

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