REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CHINA BANKING CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 3486

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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5/30/88

D E C I S I O N

The question involved in this suit brought by petitioner China Banking Corporation for recovery of the amount of P5,555.00 representing alleged erroneously paid capital gains tax is:

> Where by the terms of a revenue memorandum order of the Bureau of Internal Revenue a debtor-mortgagor is made liable for the capital gains tax but such tax was advanced by the creditor-mortgagee who is interested in having title of the property consolidated in its name, is the tax paid erroneously or illegally assessed or

collected recoverable by the creditor-mortgagee pursuant to the provisions of Section 292 (now Section 243) of the National Internal Revenue Code?

The facts as gathered by petitioner from the pleadings and on the basis of the evidence presented are:

1. On September 15, 1976, Tan Cheng Leng, of legal age, Filipino, married to Ang Ling and a resident of 207 M.H. del Pilar Street, Malate, Manila, executed a real estate mortgage (Exhibit "A") in favor of petitioner over a parcel of land, together with all the improvements thereon situated in Antipolo,' Rizal covered by Transfer Certificate of Title No. N 11015 (Exhibit "D") of the Register of Deeds for the Province of Rizal to secure the payment of the indebtedness of the said mortgagor (pp. 5-7, TSN of 10-16-85);

2. The said mortgagor defaulted in the payment of his obligations to the petitioner. Consequently, the said mortgagor's property was extrajudicially foreclosed by the Provincial Sheriff of Rizal, upon petition (Exhibit "B") of

China Banking Corporation, the petitioner herein, and sold to the highest bidder for P625,550.00 at the auction sale conducted on April 27, 1979 for which the appropriate Certificate of Sale (Exhibit "C") was issued by the Provincial Sheriff of Rizal on April 27, 1979, and the same was annotated/registered on T.C.T. No. N-11015 (Exhibit "D") on June 6, 1979 as Entry No. 40198/T-No. N-11015 (pp. 7-11, TSN of October 16, 1985);

3. For failure of the said Mortgagor to redeem the property within the one (1) year reglementary period from June 6, 1979, the said property was consolidated in the name of the herein petitioner (Exhibits "E" and "F") on July 17, 1980 only after payment of the capital gains tax in the amount of P5,555.00 sometime late July or early August, 1980 as evidenced by petitioner's Manager's Check No. 160005 for P5,555.00 payable to the Bureau of Internal Revenue dated July 9, 1970 (Exhibit "H") duly endorsed by 'BIR Q.C." Office and subsequently T.C.T. No. N-40856 (Exhibit "G") was issued in the name of the petitioner (pp. 11-14, TSN of October 16, 1985);

4. Petitioner's manager's check (Exhibit "H") which was used as payment for the capital gains tax and which was issued by petitioner on the basis or strength of a disbursement voucher or debit ticket dated July 9, 1980 (Exhibit "I") was paid to and received by the Bureau of Internal Revenue of Quezon City as shown by its endorsement (Exhibit "H-1") when it deposited the said manager's check with the Philippine National Bank (Exhibit "H-3") (pp. 15-19, TSN of October 16, 1985);

5. Unfortunately, petitioner lost the official receipt evidencing payment of the capital gains tax issued by the Bureau of Internal Revenue of Quezon City and despite diligent efforts, the same could not be found. (pp. 19-20, 27, TSN of October 16, 1985; pp. 7, 8, 10, TSN of Jan. 28, 1986;

6. About the middle of June, 1982, petitioner was able to get hold of a copy of Revenue Memorandum Order No. 33-81 dated November 19, 1981 (Exhibit "J") expressly providing that the payment of capital gains tax on consolidation of property arising from extrajudicial foreclosure exclusively

rests on the debtor-mortgagor and not on the creditor-mortgagee (pp. 14-15, 20-21, TSN of October 16, 1985);

7. Subsequently, petitioner on June 22, 1982 filed with the office of the respondent a formal demand or claim for refund of the payment of the capital gains tax dated June 15, 1982 (Exhibit "K") (pp. 21, 22-23, TSN of October 16, 1985);

8. When the respondent failed to take any action on petitioner's claim for refund of the payment of the capital gains tax (Exhibit "K"), petitioner on July 6, 1982 filed the instant petition with this Honorable Court (pp. 23-24, TSN of October 16, 1985);

9. During the trial on the merits, petitioner presented two witnesses in the persons of Atty. Omar D. Vigilia, Assistant Chief Legal Counsel of petitioner, and Mr. Hilario Garcia, Junior Clerk in the Legal Department of petitioner, who both testified, inter alia, on the various documentary evidence presented during the trial.

As special and affirmative defenses, respondent alleges:

Well-settled is the doctrine that provisions on tax refunds are construed strictly against the taxpayer as they are in the nature of tax exemption;

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 said action for refund;

It is incumbent upon petitioner to show that it has complied with the provisions of Sections 292 and 295 of the National Internal Revenue Code of 1977, as amended;

In an action for refund, the date of payment must be alleged with exactitude and failure to do so is fatal to said claim for refund;

Granting without admitting, that in the consolidation of title arising from extrajudicial foreclosure, the liability for the payment of the capital gains tax rests on the debtor-mortgagor, however, said liability may validly be shifted to and assumed by the creditor-mortgagee, as it is the latter who is interested in having the property consolidated in its name;

Granting arguendo that the capital gains tax in question was paid by petitioner (creditor-mortgagee), the same was paid in accordance with law and suc payment is a waiver of his right to claim the refund from respondent.

Petitioner anchors its claim for refund on Revenue Memorandum Order No. 33-81 dated November 19, 1981, the third paragraph thereof states:

> "It will be noted that under the foregoing transaction, the capital gains tax is payable by the debtor-mortgagor because it is the party normally realizing the income on account of the sale or disposition of the capital asset. Such income is realized if the proceeds of the loan exceed the cost of the property mortgaged. And it is presumably for this gain derived that the mortgagor-debtor did not pay the loan anymore and allowed the foreclosure of his property; and he did not also bother to file the return and pay the tax for such gain."

We find no merit in petitioner's case.

The controlling statute is Section 292 (now Section 243) of the National Internal Revenue Code, the pertinent portion of which reads:

> Sec. 292. 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; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

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Adverting to the terms of the law, it is very clear that a taxpayer's right to the refund of any national internal revenue tax is planted on the condition that the tax must have been erroneously or illegally assessed or collected. The statute employs the phrase "tax hereafter alleged to have been erroneously or illegally assessed or collected" - nothing more. The accent is on the words - "erroneously or illegally assessed or collected". Accordingly, a taxpayer who pays or advances a tax which is legally and lawfully due and payable to the government is not entitled to recovery of such tax because it is not erroneously or illegally collected. The Commissioner of Internal Revenue simply refunds taxes which the law says he must not assess or collect. He is not authorized to refund' taxes which lawfully and rightly belong to the government.

Here, in the case at bar, petitioner simply elected to pay the capital gains tax which is lawfully and legally due respondent Commissioner of Internal Revenue for consolidation of its title arising from extrajudicial foreclosure. If a certain revenue memorandum order hints that such tax is payable by the debtor-mortgagor, petitioner's rights should be gauged by the provision in the law germane to its choice. But surely not the recovery of the tax from respondent because it was not erroneously or illegally collected. The law is clear. If at all, as suggested by respondent, petitioner should seek reimbursement from the mortgagor-debtor.

And more so when it is considered that a refund of taxes undoubtedly partakes of the nature of an exemption, and the same cannot be allowed unless granted in the most explicit and categorical language. (Resin, Inc. vs. Auditor General, L-17888, Oct. 29, 1968, 25 SCRA 754.) Claims for refund are construed strictly against claimants since a claim for refund is in the nature of an exemption from taxation. (Commissioner of Internal Revenue vs. Ledesma, L-17509, Jan. 30, 1970, 31 SCRA 95.)

WHEREFORE, finding the petition for review without merit, the same is dismissed and the refund sought is hereby denied, at petitioner's costs.

SO ORDERED.

Quezon City, Metro Manila, May 30, 1988.

AMANTE FILLER
Presiding Judge

I CONCUR:

(dissents in separate opinion)
CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge

C E R T I F I C A T I O N

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.

AMANTE FILLER
Presiding Judge
Court of Tax Appeals

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DISSENTING OPINION

Petitioner China Banking Corporation is a commercial banking corporation duly organized and existing under our laws.

It appears that on September 15, 1976, Tan Cheng Leng have executed a real estate mortgage in favor of petitioner China Banking Corporation over a parcel of land, covered by TCT No. N-11015 of the Registry of Deeds of Rizal to secure the payment of its indebtedness (Exh. D).

Said mortgagor Tan Cheng Leng defaulted in the payment of his indebtedness to the bank and so his property was extrajudicially foreclosed, upon petition of the China Banking Corporation (Exh. B), and sold to the said China Banking Corporation for P625,550.00 at auction on April 27, 1979 (Exh. C), and the same was registered on TCT No. N-11015 on June 6, 1979 in Entry No. 40198. (Exh. D)

For the failure of said mortgagor to redeem the property within a year, said property was consolidated in the name of herein petitioner on July 17, 1980 (Exhs. E and F), after payment of the capital gains tax in the amount of P5,555.00 sometime in late July, 1980 (Exh. H), as evidenced by petitioner's Manager's Check No. 160005 duly endorsed by the BIR office (Exh. H-1). Petitioner's manager's check (Exh. X) was used as payment for the capital gains tax and which was issued on the strength of disbursement voucher ticket dated July 9, 1980 (Exh. I).

Petitioner's claim that the payment of the P5,555.00 capital gains tax as creditor-mortgagee was erroneous considering that, in the case of consolidation of title arising from extrajudicial foreclosure, the burden of payment of the capital gains tax rests exclusively on the debtor-mortgagor, for which petitioner as a matter of right has the right to claim for refund under Section 295 of the National Internal Revenue Code. Revenue Memorandum Order No. 33-81, dated November 19, 1981 (Exh. J), provides as follows:

> "It will be noted that under the foregoing transaction, the capital gains tax is payable by the debtor-mortgagor because it is the party normally realizing the income on account of the sale or disposition of the capital asset. Such income is realized if the proceeds of the loan exceed the cost of the property mortgaged. And it is presumably for this gain derived that the mortgagor-debtor did not pay the loan anymore and allowed the foreclosure of his property; and he did not also bother to file the return and pay the tax for such gain." (Underscoring supplied)

On June 22, 1982, petitioner filed with the Commissioner of Internal Revenue the claim for refund dated June 15, 1982.

On July 6, 1982, petitioner filed the instant petition for review.

In answer to the petition for review, respondent Commissioner of Internal Revenue interposed the defenses that tax refunds are construed strictly against the taxpayer; that the taxes paid were erroneously or illegally collected; that it is incumbent upon petitioner to show that it has complied with the provisions of Sections 292 and 225 of the National Internal Revenue Code, as amended; that in an action for refund, the date of payment must be alleged with exactitude and failure to do so is fatal to said claim for refund; granting without admitting, that in the consolidation of title arising from extrajudicial foreclosure, the liability for the payment of the capital gains tax rests on the debtor-mortgagor, however, said liability may validly be shifted and assumed by the creditor-mortgagee (petitioner), as it is the latter who is interested in having the property consolidated in its name; and granting that the capital gains tax in question was paid by petitioner, the same was paid in accordance with law and such payment is a waiver of his right to claim the refund.

The sole issue in this case is whether or not petitioner is entitled to the refund of the sum of P5,555.00 as capital gains tax.

Petitioner contends that under Revenue Memorandum Order No. 33-81 dated November 19, 1981, it is manifestly clear that the burden of payment of the capital gains tax in the consolidation of the title of property arising from extrajudicial foreclosure xclusively rests on the debtor-mortgagor and not on creditor-mortgagee. On the other hand, respondent invokes certain requirements to be complied with by the mortgagee-bank before the mortgagor-debtor be liable for the payment of the capital gains tax.

It is my opinion that petitioner is entitled under Revenue Memorandum No. 33-81 to the refund of the sum of P5,555.00, it having been erroneously paid capital gains tax. Failure of the bank to furnish the Revenue District Officer the names of the debtor-mortgagor or his legal or principal place of business; the amount of loan; and the fair market value of the property mortgaged is of no moment. It is enough that these matters were judicially brought to the attention of the Court for the purpose of adjudication.

I hereby dissent to the majority opinion.

Quezon City, Metro Manila, June 3, 1988.

CONSTANTE C. ROAQUIN
Associate Judge