L/B

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EASTERN TELECOMMUNICATIONS PHILIPPINES, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 5230

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
AUG 05 1997 [signature]

x - x

DECISION

This is a petition for review filed by the petitioner, EASTERN TELECOMMUNICATIONS PHILIPPINES, INC., against the respondent, COMMISSIONER OF INTERNAL REVENUE, for the latter's inaction on petitioner's claim for refund amounting to P1,753,075.44, allegedly representing the excess or overpaid final taxes withheld and remitted to the Bureau of Internal Revenue by the petitioner on its royalty payments to SPRINT INTERNATIONAL COMMUNICATIONS CORP. AND AFAX, INC., covering the period from August, 1992 to August, 1994.

The antecedent facts of the case are as follows:

Petitioner, a corporation duly organized and existing under the laws of the Philippines On February 1, 1989, petitioner entered into a Software License and

Support Agreement with SPRINT INTERNATIONAL COMMUNICATIONS INC. (formerly Telenet Communications Corporation), a corporation organized and existing under the laws of the State of Delaware, USA. This agreement shall be effective for a period of two (2) years starting June 30, 1989. Pursuant to the said agreement, petitioner was required to pay on a quarterly basis the amount of $9,660.00 to SPRINT, starting on July 1, 1989 and on the first day of each following calendar quarter.

Said agreement was renewed, for the period October 1, 1991 to December 31, 1993, with the quarterly fee being reduced to $5,160.00, payable on October 1, 1991 and on the first day of each following calendar quarter. Both agreements were duly registered with the Bureau of Patents, Trademark and Technology Transfer of the Department of Trade and Industry.

Likewise, on August 24, 1990, petitioner entered into a Switching System Purchase and License Agreement for a period of five (5) years effective that same date with AFAX, Inc., a corporation duly organized and registered under the laws of the State of Oregon, USA. Under the said agreement, petitioner was required to pay monthly the amount of $20,723.00 to AFAX, Inc.. The agreement was amended by the parties on July 26, 1993 to effectuate the reduction of the monthly fee to only

$12,292.00. However, on September 20, 1994, the parties further amended the agreement by increasing the monthly fee to $12,527.00. The aforecited agreement and its amendments were duly registered with the Bureau of Patents, Trademark and Technology Transfer.

On July 1, 1992, respondent issued Revenue Memorandum Circular (RMC) No. 39-92, stating that the applicable withholding tax rate on royalty payments under the RP-US Tax Convention "With Respect to Taxes on Income" should be 25% and not 10% as previously ruled.

In compliance with said Revenue Memorandum Circular, petitioner subjected its quarterly royalty payments to SPRINT to the twenty-five percent (25%) withholding tax beginning January 1, 1993 until December 31, 1993, and its monthly royalty payments to AFAX, Inc. also to twenty-five percent (25%) withholding tax beginning August, 1992 to August, 1994.

After taking into account the decision of this Court, dated July 21, 1993, in the case of **IBM Corporation v. Commissioner of Internal Revenue, CTA Case No. 4308,** which ruled that the correct tax rate on royalties paid to US residents should be 10% and not 25%, applying the "most favored nation clause" of the RP-US Tax Treaty, petitioner filed with the respondent a letter, dated April 7, 1995, requesting for the refund of the total amount of P1,753,075.44, representing the alleged overwithheld and overpaid withholding tax on royalty payments to SPRINT in the amount of P111,128.91, covering the period January 1, 1993 to December 31, 1993, and to AFAX, Inc., in the amount of P1,641,946.53 covering the period August, 1992 to August, 1994.

From the time the said claim for refund was filed, respondent has not acted upon on said claim. Hence, the petitioner, on April 10, 1995, filed with this Court the instant petition for review.

Required to file its Answer, respondent prayed for the dismissal of this case on the following grounds:

> I. That the correct final withholding tax imposable on royalties under the RP-US Convention "With Respect to Taxes on Income" is twenty five percent (25%) in accordance with Revenue Memorandum Circular (RMC) No. 39-92, and not ten percent (10%) as claimed herein by the petitioner.
>
> II. That petitioner, who has the burden of proving that it is entitled to tax refund, has failed to establish that the tax subject of its claim for refund was erroneous or illegally collected.

The decisive issue that comes to fore for Our decision is: Whether or not petitioner is entitled to the refund of P1,753,075.44 as excess payments of final withholding taxes on royalties remitted abroad.

This is not the first time that this Court has been confronted with such an issue at hand. As correctly pointed by the petitioner, this Court has resolved the same issue in **IBM v. Commissioner of Internal Revenue, CTA Case No. 4308, March 31, 1993**, which is anchored on similar factual circumstances and on all fours with the instant petition. We find no cogent justification to deviate from our decision in said case, which states in part, to wit:

> "This Court is of the persuasion that petitioner's stand is correct and concurs with the opinion rendered by then Commissioner of Internal Revenue, Bienvenido Tan, Jr. (BIR Ruling No. 456-88, supra.), that under the most favored nation provision of the R.P.-U.S. Tax Treaty (Article 13, paragraph 2(b)(iii), the tax imposable on royalties derived by a resident of the United States from sources within the Philippines shall be the lowest rate of Philippines tax that may be imposed on royalties of the same kind paid under similar circumstances to a resident of a third state. Article 12, paragraph 2(b) of the R.P.-West Germany Tax Treaty, provides that royalties arising in the Philippines and paid to a resident of West Germany may also be taxed in the Philippines, but that tax so charged shall not exceed 10% of the gross amount of royalties. Said treaty also provides that for as long as the transfer of technology under Philippine law, is subject to approval, the limitation of the tax rate in case of royalties arising in the Philippines, apply if the contract giving rise to such royalties has been approved by Philippine competent authorities.
>
> Thus, inasmuch as the Agreement between World Trade and IBM Phils. as well as the Agreement between IBM and IBM Phils. had been approved by the Central Bank of the

> Philippines, royalties arising in the Philippines and payable to World Trade as well as to IBM by IBM Phils. should be taxed at the rate of 10% because said rate is indicated in the R.P.-West Germany Tax Treaty and pursuant to Article 13, paragraph 2(b)(iii), of the R.P. -U.S. Tax Treaty."

In the case at bar, respondent failed to comment on petitioner's formal offer of evidence and to file her memorandum, thus, this Court primarily based its decision on the evidence presented by the petitioner.

After a careful scrutiny of the evidence presented, this Court was led to the inevitable conclusion that indeed petitioner has withheld and over-remitted to the respondent the total amount of P1,753,075.44, representing the excess 15% final withholding tax on royalties, covering the period August, 1992 to August, 1994.

WHEREFORE, premises considered, judgment is hereby rendered **GRANTING** the herein petitioner's claim for refund. Respondent is hereby **ORDERED** to **REFUND** to the petitioner the total amount of P1,753,075.44 as excess final withholding taxes on royalties. No pronouncement as to costs.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that this 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
Court of Tax Appeals