REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

RAMON R. DEL ROSARIO, JR.,
Petitioner,

- versus -

C.T.A. CASE NO. 4796

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
DEC 01 1994

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D E C I S I O N

Petitioner herein seeks for the refund of erroneously paid capital gains tax in the amount of P2,502,568.25 for the year 1990 as a result of an exchange of shares from AB Capital & Investment Corporation (ABCIC for brevity), formerly Anscor Capital & Investment Corporation with Benguet shares.

On March 28, 1990, petitioner (Assignor) executed a Deed of Assignment in favor of Benguet Corporation (Assignee) whereby the Assignor transferred in favor of the Assignee a total of 138,750 outstanding shares in ABCIC in exchange for 644,917 newly issued Class "A" Benguet shares at P38.52 per share (average closing price in the stock market from March 8 to 14, 1990) or a transfer value of P24,842,216.25.

The acquisition cost of 138,750 ABCIC shares was P88.50 per share or P12,279,375.00. By reason of the transfer, the ABCIC shares was valued at P179.043 per share (P24,842,216.25/138,750 ABCIC shares) or a total of P24,842,216.25. As a result of the stock swap agreement, petitioner realized a capital gain in the amount of P12,562,841.25 (i.e. P24,842,216.25 less P12,279,375.00). Thus, on April 27, 1990, petitioner paid the Bureau of Internal Revenue the corresponding capital gains tax in the amount of P2,502,568.25, pursuant to Section 21(d)(1) of the National Internal Revenue Code (NIRC).

Subsequently, Benguet Corporation declared a 25% stock dividend to all stockholders of record as of June 15, 1990. Accordingly, petitioner's share in Benguet was increased by 161,229 shares (25% of 644,917). Thus, after the stock dividend declaration, petitioner has a total of 806,146 Benguet shares with an adjusted cost of P30.816 per share (i.e. P24,842,216.25 divided by 806,146 shares).

On December 21, 1990, petitioner sold <u>outside</u> the stock exchange a total of 755,731 Class "A" Benguet shares to Mr. Leonardo T. Siguion Reyna for P11.00 per share, or a total consideration of P8,313,041.00. Since the adjusted cost of the shares sold amounted to P23,288,606.50 (755,731 shares @ P30.816 per share), petitioner allegedly incurred a loss in the amount of P14,975,565.50 [755,731 shares @ (P30.816-P11.00/share)]. A Final Consolidated Tax Return on Stock Transactions (Shares Of Stocks Not Traded Thru The Stock

Exchange) was filed by petitioner on January 22, 1991, covering all his stock transactions outside of the stock exchange for the year 1990. In said return, petitioner reported a net capital loss of P3,956,200.85 and a refundable capital gains tax of P2,502,568.25, corresponding to the payment made on the stock swap transaction with Benguet Corporation on March 28, 1990. Subsequently, petitioner filed on February 6, 1991 a claim for refund/application for tax credit certificates with the respondent in the amount of P2,502,568.85.

To date, respondent has not acted on such claim for refund or tax credit. In order to toll the prescriptive period for filing a judicial claim for refund, petition instituted the instant petition on April 24, 1992.

Respondent, in answer to the petition, alleged that the sales of shares listed in the stock exchange whether traded in the stock exchange or not is covered under the provision of Section 21(d)(2) of the NIRC. The fact that the shares were listed in the stock exchange is sufficient to put it in the ambit of Section 21(d)(2). The tax rate applicable is 1/4 of 1% of the gross selling price or the presumed capital gain. She added that the phrase "and traded through a local exchange" under Section 21(d)(2) refers to the "listed shares" and not a qualification on the applicability of the tax rate of 1/4 of 1% on the gross selling price. Moreover, the capital gains realized on the stock swap transaction cannot be deducted from the alleged capital loss incurred on the sale of Benguet shares outside of the stock exchange. Respondent even opined that petitioner should pay the 1/4 of 1% capital gains on the sale of Benguet shares in December 21, 1990 by reason of the fact that the shares were listed in the stock exchange even if sold outside thereof.

Petitioner, on the other hand, contends that the tax rate applicable to shares sold outside the stock exchange even though listed therein is covered by Section 21(d)(1) where the tax rate applicable is 10% on the first P100,000.00 capital gain and 20% in excess of P100,000.00. The provision of Section 21(d)(2) cited by respondent applies only to the sale or exchange of shares listed and traded in the stock exchange. Section 21(d)(1) is clear on this point since it exclusively refers to "shares of stock not traded through a local stock exchange". Otherwise, if the lawmakers intended a 1/4 of 1% tax on all sale or exchange of listed shares then Section 21(d)(1) should be read as "shares not listed in the stock exchanges" instead of "shares not traded through the stock exchanges".

Section 21(d) is clear and does not leave any doubt on its interpretation. Thus, it must be given its literal meaning. The conjunction "and" in the phrase "shares of stock listed and traded through the local stock exchange" means that the shares listed must also be traded in the stock exchange. While it is true that only shares listed can be traded in the stock exchange, it does not however mean that listed shares cannot be sold over-the-counter, in a privately negotiated sale or exchange, or outside the stock exchange.

The main issue presented therefore for resolution is whether or not petitioner is entitled to the refund or tax credit of

P2,502,568.25 representing alleged overpaid capital gains tax on stock transactions for 1990. An ancilliary issue is whether or not Section 21(d)(1) or Section 21(d)(2) of the NIRC is applicable in the sale or exchange of shares listed but not sold or transferred through the facilities of the stock exchange.

We hold that petitioner is entitled to the claim for refund or in the alternative the issuance of a tax credit certificate as prayed for pursuant to Section 21(d)(1) of the NIRC.

The pertinent provision of Section 21(d)(1) and (2) of the National Internal Revenue Code provides:

> "**Sec. 21. Tax on citizens or residents. -**
>
> ***(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 shares 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 not traded through a local stock exchange:
>
> 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 listed and traded through a local stock exchange - 1/4 of 1% based on the gross selling price of the share or shares of stock."

In the case of **Jose C. Ibazeta v. Commissioner of Internal Revenue, CTA Case No. 4797, August 8, 1994**, We stated thus:

> "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 denominator in both provisions of law."

The nature of the shares (whether listed or not) is not material for the purpose of applying Section 21(d)(1) or the schedular rate of tax. What is material is the manner by which these shares are traded. **(Francisco A. Dizon v. Commissioner of Internal Revenue, CTA Case No. 4798, November 17, 1993.)**

The first transaction entered into by petitioner, on March 28, 1990, involves the exchange of ABCIC shares for Benguet shares, which resulted to a capital gain. Subsequently, petitioner sold its Benguet shares outside the stock exchange incurring a loss from said transaction. In both transactions Section 21(d)(1) govern. Since these shares were traded outside the stock exchange, the capital loss incurred from the sale of Benguet shares can be deducted from the capital gain derived from the exchange of ABCIC shares for Benguet shares. This is so because a final consolidated return or an adjustment return concerning all stock transaction during the taxable year shall be filed on or before the 15th day of the fourth month following the close of the taxable year. (Sec. 7, Rev. Reg. #2-82). [supra.] The excess therefore of capital losses from sales or exchanges of shares traded outside the stock exchange over the gains from such sales or exchanges is the net capital loss (Section 33(a)(3) NIRC). In compliance with Rev. Reg. #2-82, a consolidated report on stock transactions entered into by petitioner outside the stock exchange was filed by petitioner with the BIR on January 22, 1991. The final consolidated return indicated a net capital loss of P3,956,200.85. There being a loss, petitioner is not liable to pay the capital gains tax under Section 21(d)(1) and the amount of capital gains tax paid in the amount of P2,502,568.25 should be refunded in favor of petitioner the same having been duly supported by evidence.

WHEREFORE, in view of the foregoing the petition for review is **GRANTED**. Respondent is hereby ordered to refund or issue a tax credit certificate in favor of petitioner, Ramon Del Rosario, Jr., the amount of P2,502,568.25, representing overpaid capital gains tax involving stock transactions sold outside of the stock exchange for the year 1990.

No pronouncement as to costs.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

MANUEL K. GRUBA
Associate Judge

CERTIFICATION

This is to certify that the above 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