REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CAMPAGNIE FINANCIERE SUCRES ET DENREES,
Petitioner,

- versus -

C.T.A. CASE NO. 5042

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
OCT 06 1995

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DECISION

This case is a claim for the refund of alleged excess payment of Documentary Stamp Tax (DST) and Capital Gains Tax (CGT) in the amounts of P107,869.00 and P951,830.00 respectively.

Petitioner is a non-resident foreign corporation not engaged in business in the Philippines.

On October 21, 1991, Petitioner by virtue of a Deed of Sale and Assignment of Subscription and Right of Subscription transferred its 8% equity interest in Makati Shangri-La Hotel and Resort, Inc., (Shangri-La) to Kerry Holdings, Ltd. (formerly Sligo Holdings, Ltd.) (Kerry). The interest transferred consisted of 107,929 issued shares and 152,031 newly subscribed shares. In addition, petitioner also assigned its deposits on stock subscriptions for 431,476 Shangri-La shares in favor of Kerry. The Documentary Stamp Tax (DST) and Capital Gains Tax (CGT) thereon were paid on November 29, 1991.

On October 21, 1993, Petitioner filed its claim for refund in the total amount of P1,059,699.00 stating in its letter that "we respectfully submit that CFSD's transfer of deposits on stock subscriptions is not a sale/assignment of shares of stock. As such, the transfer of CFSD's deposits on stock subscriptions should not have been subjected to DST and CGT." (Exh. E)

Said claim for refund has not been acted by the Respondent. Hence, this appeal.

The issues involved are the following:

a) Whether or not there was a sale of shares of stocks subject to Documentary Stamps Tax; and

b) Whether or not said sale was subject to Capital Gains Tax.

We answer both issues in the affirmative.

In the Deed of Sale and Assignment of Subscription and Right of Subscription (see Exh. A) executed by and between the Petitioner and Sligo Holdings Limited (now known as Kerry Holdings, Ltd.) it clearly appears that the "**Vendor - Assignor** (herein Petitioner) hereby <u>sells, transfers, cedes, assigns and conveys</u> his *Issued Shares, subscribed shares, <u>Deposits on Stock Subscription</u> and Right of Subscription* to the **Vendee - Assignee** free and clear of any liens and encumbrances whatsoever..." (Underlining Ours). And because of such sale, Petitioner bound itself to "pay the capital gains tax due on the sale of *Issued Shares and Subscribed Shares and assignment of Deposits on Stock Subscription*." (ibid)

From . the foregoing, it is undeniably clear that there was indeed a valid sale even as they are considered "future things" (such as Deposits on Stock Subscription) as contemplated under Article 1461 of the Civil Code which states that:

> **Article 1461.** - Things having a potential existence may be the object of the contract of sale.
>
> The efficacy of a sale of a mere hope or expectancy is deemed subject to the condition that the thing will come into existence.
>
> The sale of a vain hope or expectancy is void. (Emphasis supplied)

On this score, We believe and so hold that the Deposits on Stock Subscription is included as taxable "shares of stocks" under Section 24 (e)(2) of the Tax Code inasmuch as "the efficacy of (said) sale... is deemed subject to the condition that the thing will come into existence." Otherwise, said sale will be rendered void, which is not true in this particular case. Hence, there was a valid sale and for purposes of taxation falls under the term "shares of stocks" under Section 24 (e)(2) of the Tax Code liable for capital gains tax.

Moreover, herein Petitioner declared that it PROFITED from the sale by as much as P11.03 (selling price was P111.03 and the acquisition cost was only P100.00). Such profit should therefore be liable for Capital Gains Tax. A tax on the profit of sale on "net capital gain" is the very essence of the net capital gains tax law. To hold otherwise will ineluctably deprive the government of its due and unduly set free from tax liability persons who profited from said transactions.

We cannot allow that.

The intent to tax Deposits on Stock Subscription is even made clearer under the Documentary Stamp Tax Law which provides, thus:

> **SEC. 176.** Stamp tax on sales, agreements to sell, memoranda of sales, deliveries or transfer of bonds, due-bills, certificates of obligation or shares or certificates of stock. - **On all sales, or agreements to sell, or memoranda of sales, or deliveries, or transfer of bonds, due-bills, certificates of obligation, or shares or certificates of stock in any association, company or corporation, or transfer of such securities by assignment in blank, or by delivery, or by any paper or agreement, or memorandum or other evidences of transfer or sale whether entitling the holder in any manner to the benefit of such bonds, due-bills, certificates of obligation or stock, or to secure the future payment of money, or for the future transfer of any bond, due-bill, certificates of obligation or stock, there shall be collected a documentary stamp tax of fifty centavos on each two hundred pesos, or fractional part thereof, of the par value of**

> such bond, due-bill, certificates of obligation or stock: Provided, That only one tax shall be collected on each sale or transfer of stock or securities from one person to another regardless of whether or not a certificate of stock or obligation is issued, indorsed, or delivered in pursuance of such sale or transfer: and provided, further, That in the case of stock without par value the amount of the documentary stamp tax herein prescribed shall be equivalent to twenty-five per centum of the documentary stamp tax upon the original issue of said stock.[1]

Hence, sales "to secure the future payment of money, or for the future transfer of any bond, due-bill, certificates of obligation or stock" are liable for documentary stamp tax. The provision of law is categorically clear and needs no further disquisitions from this Court. In the light of the above provision of law, We find its logical link with the capital gains tax law for it would be absurd to subject documentary stamp tax on "future transfer of any bond, due-bill, certificates of obligation or stock" and yet free the same transfer from the capital gains tax. There simply is no logic behind that argument. Certainly, that could not be the intention of the law. Hence, the need to go beyond the confines of the literal and myopic interpretation of the term "shares of stocks" contemplated under Section 24 (e)(2) of the Tax Code. We are therefore even more convinced that it should include

[1]As amended by P.D. No. 1959.

Deposits on Stock Subscription and thus, liable for capital gains tax.

WHEREFORE, in all the foregoing, Petitioner's claim for refund is hereby **DENIED** for lack of merit.

SO ORDERED.

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