REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CARDPAC-CAP INFORMATION SYSTEMS PTE LTD. and BANK OF THE PHILIPPINE ISLANDS,
Petitioners,

- versus -

C.T.A. CASE NO. 4664

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
FEB 21 1995

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D E C I S I O N

Petitioners instituted this case in order to claim for the refund or tax credit of overpaid withholding tax on license fees paid in 1989 amounting to ₱256,680.00.

CARDPAC-CAP Information Systems PTE Ltd. (CAP), is a non-resident foreign corporation duly organized and existing under Singapore laws with business address at 138 Cecil Street, *16-00 Cecil Court Singapore, represented herein by The Bank of the

Philippine Islands (BPI), a domestic corporation duly organized and existing under Philippine laws.

On June 20, 1989, CAP Information Systems PTE., Ltd., and BPI Express Credit Corporation, a wholly-owned subsidiary of BPI, entered into a "CARDPAC License Agreement" (Exh. C) whereby the former, who has acquired marketing rights to a software product known as CARDPAC, has agreed to distribute said product to the latter with the right to use and avail of the technical knowledge of CARDPAC. As borne by the records, BPI is required to pay license fees in the amount of US$230,000.00, payable in two (2) equal installments. The first installment is payable upon the signing of the agreement and the second on delivery.

On December 18, 1989, the CARDPAC License Agreement, dated June 20, 1989, and its Amendment Nos. 1 and 2, dated August 4, 1989 and November 23, 1989, respectively, was registered with the Department of Trade and Industry - Technology Transfer Registry Bureau of Patents, Trademarks and Technology Transfer under Certificate of Registration No. 966-A (Exh. C-1).

On September 19, 1989, BPI paid CARDPAC-CAP the first 50% down payment of the total License Fee. On November 10, 1989, BPI filed its Monthly Remittance Return of Income Taxes Withheld, showing the amount of ₱3,881,334.59 as final tax withheld and paid to the BIR. The amount of ₱3,881,334.59 covers the amount of

₱898,380.00, representing 35% withholding tax on the license fee of ₱2,566,800.00 paid by BPI to CARDPAC-CAP.

Petitioners alleged that the preferential rate of 25% instead of 35% withholding tax should be applied, pursuant to the "most-favored nations" clause in Article 12(2)(c) of the RP-Singapore Tax Treaty, which provides: (Exh. D)

"Article 12
Royalties

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may also be taxed in the Contracting State in which they arise, and according to the law of that State, but, if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed:

(a) in the case of the Philippines, 15 per cent of the gross amount of the royalties, where the royalties are paid by an enterprise registered with the Philippine Board of Investments and engaged in preferred areas of activities and also royalties in respect of cinematographic films or tapes for television or broadcasting;

(b) in the case of Singapore, where the royalties are approved under the Economic Expansion Incentives (Relief from Income tax) Act of Singapore, the Royalties shall be exempt;

(c) in all other cases, 25 per cent of the gross amount of the royalties." (Emphasis supplied.)

On October 31, 1991, petitioner filed a letter, dated October 29, 1991, with the respondent claiming for the refund or tax credit of the alleged overpaid withholding tax on license fees paid to CARDPAC-CAP for 1989 amounting to ₱256,680.00, computed as follows: (Exh. E)

License fees paid to CARDPAC	$ 115,000.00
Conversion Rate	x ₱22.32
License fees paid in Pesos	₱2,566,800.00
Regular tax rate	x 35%
Total tax remitted to BIR	₱ 898,380.00
Actual tax liability at 25%	- 641,700.00
Overremitted Withholding Tax	₱ 256,680.00

On November 5, 1991 or merely five (5) days following the filing of an administrative claim for refund/tax credit, petitioners instituted the instant petition for review with the Court.

Respondent alleged that in an action for refund/tax credit the burden of proof lies with petitioner to show that it is entitled to the refund/tax credit sought. In this case, petitioners must show that they are covered by the RP-Singapore Tax Treaty. The presumption is that the withholding tax was collected and paid in accordance with law.

Furthermore, petitioners must have complied with the requirements for claiming a refund/tax credit with the BIR and with this Court, pursuant to the provisions of Section 204 and 230 of the National Internal Revenue Code. When petitioners filed a claim for refund/tax credit with the respondent on October 30, 1991, barely five (5) days have passed when they instituted the petition with the Court giving respondent no time to act on the claim. Petitioners have failed to exhaust all possible administrative remedies and in effect made the petition lacks a cause of action.

The issues presented for resolution are:

(1) Whether or not the petition lacks a cause of action for failure on the part of petitioners to comply with the doctrine of exhaustion of administrative remedies; and

(2) Whether or not petitioners are legally entitled to the claim for refund/tax credit of alleged overpaid withholding tax for 1989 in the amount of ₱256,680.00.

With regard to the first issue, the Court of Appeals has affirmed Our decision regarding the two-year prescriptive period for filing an adminstrative claim for refund and instituting a judicial claim for refund with Our Court, where it was ruled:

> "Accordingly, We do not agree with appellant that it is necessary for the Commissioner of Internal Revenue to act unfavorably on the claim for refund before the Court of Tax Appeals may acquire jurisdiction. This is so because of the positive

requirement of Section 230 and the doctrine that delay of the Commissioner in rendering decision does not extend the peremptory period fixed by the statute.

Neither are We convinced that the law requires that the claim for refund should have been filed at the earliest instance in order to give the Commissioner an opportunity to rule on it and the court to review the ruling of the Commissioner of Internal Revenue on appeal. The law fixed the same period - two years - for filing a claim for refund with the Commissioner (Sec. 204, par. 3), and for filing suit in court (Sec. 230), unlike in protests of assessment under Sec. 229 which fixed the period (thirty days from receipt of decision) for appealing to the court, thus clearly implying that the prior decision of the Commissioner is necessary for the court to take cognizance of the case. While it may be true that the Court of Tax Appeals is essentially an appellate court, and should act only upon claims for refund that are unfavorably decided by the Commissioner, the remedy is addressed to the legislature.

The taxpayer cannot be faulted for taking advantage of the full two-year period prescribed by law in filing his claim for refund. The Court of Tax Appeals itself acknowledges that the claim for refund with the Commissioner can be pending simultaneously with a suit for refund filed with said court:

> "xxx. In fact the records will show that from the time Petitioner filed its claim for refund either from April 2, 1986 or April 14, 1988 up to promulgation of this decision on December 20, 1993, respondent has failed to act favorably or unfavorably

> on the said claim for refund. The institution of a petition for review covering claim for refund filed with the Bureau of Internal Revenue has never been a bar to the continuous administrative processing of claim for refund. In fact in number of cases filed before this court, petition for review were withdrawn afterwards by the petitioner from this court by reason of the grant of the refund by the respondent." (See Order denying Motion for Reconsideration dated April 27, 1994)" **[Commissioner of Internal Revenue vs. Bank of the Philippine Islands, as Liquidator of Paramount Acceptance Corporation and The Court of Tax Appeals, CA-G.R. SP No. 34102, September 19, 1994.]**

Anent the second issue, respondent alleged that petitioner is still liable to pay the amount of ₱570,609.08 as deficiency tax on the adjusted tax base inclusive of penalty for late remittance of tax due per the examiner's report of investigation, computed as follows: (Exh. 1-C, p. 60, BIR records)

Computation of Tax Base by the BIR:

Net Amount Remitted	US$115,000.00
Conversion Rate	x P22.32
Net Amount Remitted in Pesos	₱ 2,566,800.00
Divided by (100%-35%)	65%
Gross Amount of License Fees-Royalties	₱ 3,948,923.08

Computation of Penalties for Late Remittance:

Gross Royalties	P 3,948,923.08
Rate of tax - preferential	x 25%
Basic Tax Due	P 987,230.77
Add: Surcharge	246,807.69
Interest (10-10-89 - 11-10-89)	20,567.31
Compromise	20,000.00
Total due and payable	P1,274,605.77
Less: Tax Paid	898,380.00
Balance	P 376,225.77
Add: Interest (11-11-89 - 6-10-92)	194,383.31
Total Still Due	P 570,609.08

The examiner has no disagreement with petitioner when she stated that the withholding tax rate applicable is 25%, the preferential rate, pursuant to Section 12(2)(c) of the RP-Singapore Tax Treaty. In fact, the Memorandum Report of Investigation revealed her recommendation as follows:

"RECOMMENDATION:

The examination confirmed the facts presented by the taxpayer. There is no doubt that the License Fees paid directly to CAP in Singapore is subject to the treaty rate of 25%. But, should registration with the Technology Transfer Registry of the BPTTT were made a prerequisite to the availment of the treaty rate, then, the transaction becomes subject to the regular rate of 35%. This issue though is still to be resolved by responsible authorities.

> However, even without the benefit of the above issue, no amount of refund would still be due to BPI. Instead, the taxpayer was found to be liable in the amount of ₱570,609.08 representing deficiency tax on the adjusted tax base and penalties for late remittance of the tax due. Please refer to the attached worksheet for the computation."

This was even bostered by her testimony during the hearing of this case when on cross examination by petitioner's counsel, respondent's witness answered:

"Q. How much was withheld?

A. The amount withheld was 35% of US$115,000.00 which is the amount of the license fee.

Q. Now, how much in your opinion should have been withheld, in your report?

A. Actually, we have found out that this license fee is actually subject to 25% which is being provided for by the RP-Singapore Tax Treaty."

Thus, it appears from the testimony of respondent's examiner as well as from the BIR records that the tax rate applicable is 25% and not 35%, the rate used by petitioner. It is evident that the rate that should be used was 25%. However, the parties seems to be opposing with respect to the tax base instead of the tax rate. According to respondent, the tax base should be ₱3,948,923.08, which is the gross amount of license fees computed by dividing

US$115,000.00 by 65% (100%-35%) multiplied by ₱22.32, the Peso conversion rate at the time of remittance. To elaborate, the examiner explained that:

> "x x x. So if the license fee is US$115,000.00 it follows that if we will use the tax rate of 25%, it follows that 25% of 115,000.00 should be the amount of tax and the remaining 75% should only be the amount remitted to Singapore.
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> In this case they used a 35% tax rate and instead of remitting only 65% to Singapore, they have remitted 115,000.00. So what we did was, the amount should be remitted to Singapore should be 65% of the gross amount of royalties because RP-Singapore Tax Treaty provides that, only the amount of the tax of gross royalties is 25% therefore, this being the case that they have remitted a 35% tax, it follows US$115,000.00 is 65% of gross royalties. Therefore, we have computed gross royalties by dividing 115,000.00 by 65% which is 1 minus the tax rate, 1 minus the tax rate multiply by the tax rate of 25% which they are claiming for to use right now is the amount of the tax due. On this tax due we have imposed penalties because the late payment, the surcharge, the interest, compromise and then we deducted the amount of the tax paid to get the deficiency tax." (T.S.N., October 5, 1993, pp. 21-22)

If we adopt the opinion of respondent, it would appear that the tax base would be increased from ₱2,566,800.00 to ₱3,948,923.08 when in truth and in fact the 50% gross amount of license fee amounted only to US$115,000.00 or ₱2,566,800.00

converted into Pesos pursuant to the License Agreement. Of the license fee paid to petitioner by BPI in 1989 in the amount of US$115,000.00 - 35% tax was actually paid by petitioner by way of withholding tax in the amount of P898,380.00. Since the tax due thereon is only 25% in accordance with the RP-Singapore Tax Treaty, there resulted an overpayment in the amount of ₱256,680.00. Petitioner presented the Monthly Remittance Return of Income Taxes Withheld for October 1989, the BIR Payment Order, CB Confirmation Receipt and the Schedule of Withholding Taxes on Softwares for the purpose of proving that the amount of ₱898,380.00 was actually withheld and remitted to the BIR as payment of 35% royalty tax by petitioner. The evidence presented by petitioner clearly established its right to claim for a refund or tax credit of the excess amount paid as withholding tax in the amount of ₱256,680.00.

WHEREFORE, finding the petition meritorious and in accordance with law, the same is hereby **GRANTED**. Respondent is ordered to refund or issue a Tax Credit Certificate in favor of petitioner in the amount of ₱256,680.00 representing overpaid withholding tax on license fees paid in 1989 pursuant to the most-favored nations clause of the RP-Singapore Tax Treaty.

No pronouncement as to cost.

SO ORDERED.

MANUEL K. GRUBA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

(dissenting)
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