Supreme Court E-Library

SO ORDERED.

Fernan, C.J., Narvasa, Melencio-Herrera, Gutierrez, Jr., Cruz, Paras, Feliciano, Padilla, Bidin, Sarmiento, Griño-Aquino, Medialdea, Regalado, and *Davide, Jr., JJ.*, concur.

EN BANC

[G.R. No. 60714. October 4, 1991]

COMMISSIONER OF INTERNAL REVENUE, *petitioner, vs.* **JAPAN AIR LINES, INC., and THE COURT OF TAX APPEALS,** *respondents.*

SYLLABUS

1. TAXATION; INCOME TAX; PROCEEDS FROM SALES OF AIRLINE TICKET SOLD IN THE PHILIPPINES; TAXABLE AS INCOME FROM SOURCES WITHIN THE PHILIPPINES. — In *Commissioner of Internal Revenue vs. Air India* and the *Court of Tax Appeals,* the Court held that the revenue derived from the sales of airplane tickets through its agent Philippine Air Lines, Inc., here in the Philippines, must be considered taxable income, and more recently, in the case of *Commissioner of Internal Revenue vs. American Airlines, Inc. and Court of Tax Appeals*, it was likewise declared that for the source of income to be considered as coming from the Philippines, it is sufficient that the income is derived from activities within this country regardless of the absence of flight operations within Philippine territory.

2. ID.; ID.; FOREIGN AIRLINE COMPANIES SELLING TICKET IN THE PHILIPPINES THROUGH LOCAL AGENT; CONSIDERED RESIDENT FOREIGN CORPORATION DOING BUSINESS IN THE PHILIPPINES. — There being no dispute that JAL constituted PAL as local agent to sell its airline tickets, there can be no conclusion other than that JAL is a resident foreign corporation, doing business in the

Supreme Court E-Library

Philippines. Indeed, the sale of tickets is the very lifeblood of the airline business, the generation of sales being the paramount objective.

3. **ID.; ID.; ID.; ID.; TAXABLE INCOME; RULE.** — Under Section 24 of Commonwealth Act No. 466 otherwise known as the "National Internal Revenue Code of 1939," the applicable law in the case at bar, resident foreign corporations are taxed thirty percentum (30%) upon the amount by which their total net income exceed one hundred thousand pesos. JAL is liable to pay 30% of its total net income for the years 1959 through 1963 as contradistinguished from the computation arrived at by the Commissioner as shown in the assessment. Apparently, the Commissioner failed to specify the tax base on the total net income of JAL in figuring out the total income due, *i.e.*, whether 25% or 30% level.

4. **ID.; ID.; SURCHARGES; IMPOSITION THEREOF, NOT PROPER IN CASE AT BAR.** — Nowhere in the records of the case can be found that JAL deliberately failed to file its income tax returns for the years covered by the assessment. There was not even an attempt by petitioner to prove the same or justify the imposition of the 50% surcharge. All that petitioner did was to cite the provision of law upon which the surcharge was based without explaining why it was applicable to respondent's case. Such cannot be countenanced for mere allegations are definitely not acceptable. The willful neglect to file the required tax return or the fraudulent intent to evade the payment of taxes, considering that the same is accompanied by legal consequences, cannot be presumed. The fraud contemplated by law is actual and constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right. Negligence, whether slight or gross, is not equivalent to the fraud with intent to evade the tax contemplated by the law. It must amount to intentional wrongdoing with the sole object of evading the tax. This was not proven to be so in the case of JAL as it believed in good faith that it need not file the tax return for it had no taxable income then. The element of fraud is lacking. At most, only negligence may be imputed to JAL for not ascertaining the dispensability of filing the tax returns. As such, JAL may be subjected only to the 25% surcharge prescribed by the aforequoted law.

Supreme Court E-Library

5. ID.; EXCISE TAX; COMMON CARRIER'S TAX; NOT APPLICABLE IN CASE AT BAR. — The Tax Court ruled in that case that the mere sale of tickets, unaccompanied by the physical act of carriage of transportation, does not render the taxpayer therein subject to the *common carrier's tax*. The common carrier's tax is an excise tax, being a tax on the activity of transporting, conveying or removing passengers and cargo from one place to another. It purports to tax the business of transportation. Being an excise tax, the same can be levied by the State only when the acts, privileges or businesses are done or performed within the jurisdiction of the Philippines.

FELICIANO, *J.*, *dissenting*:

1. TAXATION; INCOME TAX; WHETHER A FOREIGN CORPORATION BE A RESIDENT, ONE DOING BUSINESS IN THE PHILIPPINES, OR A NON-RESIDENT, NOT DOING BUSINESS IN THE PHILIPPINES IS SUBJECT TO PHILIPINE INCOME TAX ONLY IN RESPECT OF ITS PHILIPPINE-SOURCE INCOME.— Whether or not Japan Air Lines (JAL) is a resident foreign corporation doing business in the Philippines, is *not* a relevant consideration under the statutory provisions here involved, as they existed during the taxable years from 1959 through to 1963. Whether a foreign corporation be a *resident* one doing business in the Philippines, or a *non-resident* not doing business in the Philippines, is subject to Philippine income tax *only in respect of its Philippine-source income*. The critical issue, in other words, is always whether or not JAL was, during the taxable years involved, deriving *income from sources within the Philippines*.

2. ID.; ID.; SOURCE OF INCOME RELATES NOT TO THE PHYSICAL SOURCING OF A FLOW OF MONEY OR THE PHYSICAL SITUS OF PAYMENT, BUT RATHER TO THE PROPERTY, ACTIVITY OR SERVICE WHICH PRODUCED THE INCOME.— The tax involved here is the *tax on income*: we are not concerned with a *sales tax* nor with an *excise or privilege tax*. For purposes of income taxation, I respectfully submit, the "source of income" relates *not* to the physical sourcing of a flow of money or the physical situs of payment, but rather to the "*property, activity or service which produced the income*"

Supreme Court E-Library

3. ID.; ID.; THE ACTIVITY OR SERVICE GIVING RISE TO INCOME IS THE ENTERING INTO AND PERFORMING A CONTRACT OF SERVICE OR CARRIAGE FROM ONE POINT OF THE GLOBE TO ANOTHER POINT IN THE GLOBE.— The activity or service giving rise to income, in the present case, is *not* the sale of personal property (so-called "sale of airline tickets"); the generative *activity is rather entering into and performing a contract of service or carriage* from one point of the globe (outside the Philippines) to another point in the globe (also outside the Philippines).

4. ID.; ID.; INCOME GENERATED IS SOURCED OR EARNED IN THE PLACE WHERE CONTRACT IS PERFORMED.— When the BOAC and JAL transactions are appropriately characterized as contracts of carriage or service, the ordinary "source rule" under our NIRC and Revenue Regulations No. 2 relating to contracts of service or carriage — that the income generated is sourced or earned in the place where the contract is performed — becomes applicable. Applying this "source rule," it will be seen that the income earned by BOAC or JAL by transporting persons and goods between two (2) points both outside the Philippines, must be regarded as non-Philippine source income, and hence not taxable to a foreign corporation.

APPEARANCES OF COUNSEL

Felicisimo R. Quiogue and *Felipe T. Dumpit* for private respondent.

D E C I S I O N

PARAS, *J.*:

This petition for review seeks the reversal of the decision* of the Court of Tax Appeals in CTA Case No. 2480 promulgated on January 15, 1982 which set aside petitioner's assessment of deficiency income tax inclusive of interest and surcharge as

* Penned by Presiding Judge Amante Filler and concurred in by Associate Judges Constante C. Roaquin and Alex Z. Reyes.

Supreme Court E-Library

well as compromise penalty for violation of bookkeeping regulations charged against respondent.

The antecedental facts of the case are as follows:

Respondent Japan Air Lines, Inc. (hereinafter referred to as JAL for brevity), is a foreign corporation engaged in the business of international air carriage. From 1959 to 1963, JAL did not have planes that lifted or landed passengers and cargo in the Philippines as it had not been granted then by the Civil Aeronautics Board (CAB) a certificate of public convenience and necessity to operate here. However, since mid-July, 1957, JAL had maintained an office at the Filipinas Hotel, Roxas Boulevard, Manila. Said office did not sell tickets but was maintained merely for the promotion of the company's public relations and to hand out brochures, literature and other information playing up the attractions of Japan as a tourist spot and the services enjoyed in JAL planes.

On July 17, 1957, JAL constituted the Philippine Air Lines (PAL), as its general sales agent in the Philippines. As an agent, PAL, among other things, sold for and in behalf of JAL, plane tickets and reservations for cargo spaces which were used by the passengers or customers on the facilities of JAL.

On June 2, 1972, JAL received deficiency income tax assessment notices and a demand letter from petitioner Commissioner of Internal Revenue (hereinafter referred to as Commissioner for brevity), all dated February 28, 1972, for a total amount of ₱2,099,687.52 inclusive of 50% surcharge and interest, for years 1959 through 1963, computed as follows:

	1959	1960	1961
Net income per investigation	₱472,025.16	₱476,671.48	₱734,812.77
Tax due thereon	133,608.00	135,001.00	212,444.00
Add: 50% surch.	66,804.00	67,500.50	106,222.00
½% mo. int.(3 yrs.)	24,049.44	24,300.18	38,239.92
Total due	₱224,461.44	₱226,801.68	₱356,905.92

Supreme Court E-Library

	1962	1963	SUMMARY
Net income per investigation	₱1,065,641.63	₱1,550,230.48	₱224,461.44
Tax due thereon	311,692.00	457,069.00	226,801.68
Add: 50% surch	155,846.00	228,534.50	356,905.92
½% mo. int.			523,642.56
(3 yrs.)	56,104.56	82,272.42	767,875.92
Total due	₱523,642.56	₱767,875.92	₱2,099,687.52
Compromise Penalty			₱1,500.00

On June 19, 1972, JAL protested said assessments alleging that as a non-resident foreign corporation, it was taxable only on income from Philippine sources as determined under Section 37 of the Tax Code, and there being no such income during the period in question, it was not liable for the deficiency income tax liabilities assessed (*Rollo*, pp. 53-55). The Commissioner resolved otherwise and in a letter-decision dated December 21, 1972, denied JAL's request for cancellation of the assessment (*Ibid.*, p. 29).

JAL therefore, elevated the case to the Court of Tax Appeals which, in turn, reversed the decision (*Ibid.*, pp. 51-76) and thereafter denied the motion for reconsideration filed by the Commissioner (*Ibid.*, p. 77). Hence, this petition.

Petitioner raises two issues in this wise:

1. WHETHER OR NOT PROCEEDS FROM SALES OF JAPAN AIR LINES TICKETS SOLD IN THE PHILIPPINES ARE TAXABLE AS INCOME FROM SOURCES WITHIN THE PHILIPPINES.

2. WHETHER OR NOT JAPAN AIR LINES IS A FOREIGN CORPORATION ENGAGED IN TRADE OR BUSINESS IN THE PHILIPPINES.

The petition is impressed with merit.

Supreme Court E-Library

The issues in the case at bar have already been laid to rest in less than three cases resolved by this Court. Anent the first issue, the landmark case of *Commissioner of Internal Revenue vs. British Overseas Airways Corporation* (G.R. Nos. 65773-74, April 30, 1987, 149 SCRA 395) has categorically ruled:

"The Tax Code defines 'gross income' thus:

"'Gross income' includes gains, profits, and income derived from salaries, wages or compensation for personal service of whatever kind and in whatever form paid, or from profession, vocations, trades, business, commerce, sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interests, rents, dividends, securities, or the transaction of any business carried on for gain or profit, or gains, profits and income derived from any source whatever" (Sec. 29(3); Italics supplied).

"The definition is broad and comprehensive to include proceeds from sales of transport documents. The words 'income from any source whatever' disclose a legislative policy to include all income not expressly exempted within the class of taxable income under our laws. Income means 'cash received or its equivalent'; it is the amount of money coming to a person within a specific time x x x; it means something distinct from principal or capital. For, while capital is a fund, income is a flow. As used in our income tax law, 'income' refers to the flow of wealth (*Madrigal and Paternol vs. Rafferty and Concepcion*, 38 Phil. 414 [1918]).

"x x x x x x x x x

"The source of an income is the property, activity or service that produced the income. For the source of income to be considered as coming from the Philippines, it is sufficient that the income is derived from activity within the Philippines. In BOAC's case, the sale of tickets in the Philippines is the activity that produces the income. The tickets exchanged hands here and payments for fares were also made here in Philippine currency. The situs of the source of payments is the Philippines. The flow of wealth proceeded from, and occurred within, Philippine territory, enjoying the protection accorded by the Philippine government. In consideration of such protection, the flow of wealth should share the burden of supporting the government.

Supreme Court E-Library

"x x x x x x x x x

"True, Section 37(a) of the Tax Code, which enumerates items of gross income from sources within the Philippines, namely: (1) interest, (2) dividends, (3) service, (4) rentals and royalties, (5) sale of real property, and (6) sale of personal property, does not mention income from the sale of tickets for international transportation. However, that does not render it less an income from sources within the Philippines. Section 37, by its language does not intend the enumeration to be exclusive. It merely directs that the types of income listed therein be treated as income from sources within the Philippines. A cursory reading of the section will show that it does not state that it is an all-inclusive enumeration, and that no other kind of income may be so considered (*British Traders Insurance Co., Ltd. vs. Commissioner of Internal Revenue*, 13 SCRA 719 [1965]).

"x x x x x x x x x

"The absence of flight operations to and from the Philippines is not determinative of the source of income or the situs of income taxation x x x The test of taxability is the 'source'; and the source of an income is that activity x x x which produced the income (*Howden & Co., Ltd. vs. Collector of Internal Revenue*, 13 SCRA 601 [1965]). Unquestionably, the passage documentations in these cases were sold in the Philippines and the revenue therefrom was derived from a business activity regularly pursued within the Philippines. x x x The word 'source' conveys one essential idea, that of origin, and the origin of the income herein is the Philippines (*Manila Gas Corporation vs. Collector of Internal Revenue*, 62 Phil. 895 [1935])."

The above ruling was adopted *en toto* in the subsequent case of *Commissioner of Internal Revenue vs. Air India and the Court of Tax Appeals* (G.R. No. 72443, January 29, 1988, 157 SCRA 648) holding that the revenue derived from the sales of airplane tickets through its agent Philippine Air Lines, Inc., here in the Philippines, must be considered taxable income, and more recently, in the case of *Commissioner of Internal Revenue vs. American Airlines, Inc. and Court of Tax Appeals* (G.R. No. 67938, December 19, 1989, 180 SCRA 274), it was likewise declared that for the source of income to be considered as coming from the Philippines, it is sufficient that the income is derived

Supreme Court E-Library

from activities within this country regardless of the absence of flight operations within Philippine territory.

Verily, JAL is a resident foreign corporation under Section 84 (g) of the National Internal Revenue Code of 1939. Definition of what a resident foreign corporation is was likewise reproduced under Section 20 of the 1977 Tax Code.

The BOAC Doctrine has expressed in unqualified terms:

"Under Section 20 of the 1977 Tax Code:

"(h) the term 'resident foreign corporation' applies to a foreign corporation engaged in trade or business within the Philippines or having an office or place of business therein.

"(i) the term 'non-resident foreign corporation' applies to a foreign corporation not engaged in trade or business within the Philippines and not having any office or place of business therein."

"x x x. There is no specific criterion as to what constitutes 'doing' or 'engaging in' or 'transacting' business. Each case must be judged in the light of its peculiar environmental circumstances. The term implies continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain or for the purpose and object of the business organization (*The Mentholatum Co., Inc., et al. vs. Anacleto Mangaliman, et al.*, 72 Phil. 524 (1941); Section 1, R.A. No. 5455). In order that a foreign corporation may be regarded as doing business within a State, there must be continuity of conduct and intention to establish a continuous business, such as the appointment of a local agent, and not one of a temporary character (*Pacific Micronesian Line, Inc. vs. Del Rosario and Peligon*, 96 Phil. 23, 30, citing Thompson on Corporations, Vol. 8, 3rd ed., pp. 844-847 and Fisher's Philippine Law of Stock Corporation, p. 415).

There being no dispute that JAL constituted PAL as local agent to sell its airline tickets, there can be no conclusion other than that JAL is a resident foreign corporation, doing business in the Philippines. Indeed, the sale of tickets is the very lifeblood of the airline business, the generation of sales being the paramount objective (*Commissioner of Internal Revenue vs. British*

Supreme Court E-Library

Overseas Airways Corporation, *supra*). The case of *CIR vs. American Airlines, Inc.* (*supra*) sums it up as follows:

"x x x, foreign airline companies which sold tickets in the Philippines through their local agents, whether called liaison offices, agencies or branches, were considered resident foreign corporations engaged in trade or business in the country. Such activities show continuity of commercial dealings or arrangements and performance of acts or works or the exercise of some functions normally incident to and in progressive prosecution of commercial gain or for the purpose and object of the business organization."

Under Section 24 of Commonwealth Act No. 466 otherwise known as the "National Internal Revenue Code of 1939," the applicable law in the case at bar, resident foreign corporations are taxed thirty percentum (30%) upon the amount by which their total net income exceed one hundred thousand pesos. JAL is liable to pay 30% of its total net income for the years 1959 through 1963 as contradistinguished from the computation arrived at by the Commissioner as shown in the assessment. Apparently, the Commissioner failed to specify the tax base on the total net income of JAL in figuring out the total income due, *i.e.*, whether 25% or 30% level.

Having established the tax liability of respondent JAL, the only thing left to determine is the propriety of the 50% surcharge imposed by petitioner. It appears that this must be answered in the negative. As held in the case of *CIR vs. Air India* (*supra*):

"The 50% surcharge or fraud penalty provided in Section 72 of the National Internal Revenue Code is imposed on a delinquent taxpayer who willfully neglects to file the required tax return within the period prescribed by the law, or who willfully files a false or fraudulent tax return, x x x.

"x x x x x x x x x

"On the other hand, the same Section provides that if the failure to file the required tax return is not due to willful neglect, a penalty of 25% is to be added to the amount of the tax due from the taxpayer."

Nowhere in the records of the case can be found that JAL deliberately failed to file its income tax returns for the years

Supreme Court E-Library

covered by the assessment. There was not even an attempt by petitioner to prove the same or justify the imposition of the 50% surcharge. All that petitioner did was to cite the provision of law upon which the surcharge was based without explaining why it was applicable to respondent's case. Such cannot be countenanced for mere allegations are definitely not acceptable. The willful neglect to file the required tax return or the fraudulent intent to evade the payment of taxes, considering that the same is accompanied by legal consequences, cannot be presumed (*CIR vs. Air India, supra*). The fraud contemplated by law is actual and constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right. Negligence, whether slight or gross, is not equivalent to the fraud with intent to evade the tax contemplated by the law. It must amount to intentional wrongdoing with the sole object of evading the tax (*Aznar v. Court of Tax Appeals,* G.R. No. L-20569, August 23, 1974, 58 SCRA 519). This was not proven to be so in the case of JAL as it believed in good faith that it need not file the tax return for it had no taxable income then. The element of fraud is lacking. At most, only negligence may be imputed to JAL for not ascertaining the dispensability of filing the tax returns. As such, JAL may be subjected only to the 25% surcharge prescribed by the aforequoted law.

As to the ½% interest per month, the same finds basis in Section 51(d) of the Tax Code then in force which states.

"(d) Interest on deficiency. Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the Commissioner of Internal Revenue; and shall be collected as a part of the tax, at the rate of six per centum per annum from the date prescribed for the payment of the tax . . . PROVIDED, That the maximum amount that may be collected as interest on deficiency shall in no case exceed the amount corresponding to a period of three years, the present provisions regarding prescription to the contrary notwithstanding."

The 6% interest per annum is the same as ½% interest per month and petitioner correctly computed such interest equivalent

Supreme Court E-Library

to three years which is the maximum set by the law.

On the other hand, the compromise penalty amounting to ₱1,500.00 for violation of bookkeeping regulations appears to be without support. The particular provision in the said regulations allegedly violated was not even specified. Furthermore, the term "compromise penalty" itself is not found among the penal provisions of the Bookkeeping Regulations (Revenue Regulations No. V-1, as amended, March 17, 1947, pp. 836-837, Revenue Regulations Updated by Prof. Eustaquio Ordono, 1984). The compromise penalty is therefore, improperly imposed.

In sum, the following schedule as recomputed illustrates the total tax liability of the private respondent for the years 1959 through 1963 —

	Net Income	30% of Net Income as Income Tax Due under Secs. 24(a) and (b) (2)	Add 25 % surcharge under Sec. 72 NIRC of 1939	Add 6% interest per annum for a maximum of 3 years under Sec. 51(d) NIRC of 1939	Summary of Tax Due from the Private Respondent NIRC of 1939
1959	₱ 472,025.16	₱ 141,607.54	₱ 35,401.88	₱ 25,489.35	₱ 202,498.77
1960	476,671.48	143,001.44	35,750.36	25,740.25	204,492.05
1961	734,812.77	220,443.83	55,110.95	39,679.83	315,234.66
1962	1,065,641.63	319,692.48	79,923.12		399,615.60
1963	1,550,230.48	465,069.14	116,267.28		581,336.42
					₱ 1,703,177.40

Accordingly, private respondent is liable for unpaid taxes and charges in the total amount of ONE MILLION SEVEN HUNDRED THREE THOUSAND ONE HUNDRED SEVENTY SEVEN AND FORTY CENTAVOS (₱1,703,177.40) The dismissal for lack of merit by this Court of the appeal in *JAL v. Commissioner of Internal Revenue* (G.R. No. L-30041) on February 3, 1969 is not *res judicata* to the present case. The Tax Court ruled in that case that the mere sale of tickets, unaccompanied by the physical act of carriage of transportation, does not render the taxpayer therein subject to the *common carrier's tax*. The common carrier's tax is an excise tax, being a tax on the activity of transporting, conveying or removing

Supreme Court E-Library

passengers and cargo from one place to another. It purports to tax the business of transportation. Being an excise tax, the same can be levied by the State only when the acts, privileges or businesses are done or performed within the jurisdiction of the Philippines (*Commissioner of Internal Revenue v. British Overseas Airways Corporation*, *supra*).

The subject matter of the case under consideration is income tax, a direct tax on the income of persons and other entities "of whatever kind and in whatever form derived from any source." Since the two cases treat of a different subject matter, the decision in G.R. No. L-30041 cannot be *res judicata* with respect to this case.

PREMISES CONSIDERED, (a) the petition is GRANTED; (b) the decision of the Court of Tax Appeals in CTA Case No. 2480 is SET ASIDE; and (c) private respondent JAL is ordered to pay the amount of ₱1,703,177.40 as deficiency taxes for the fiscal years 1959 to 1963 inclusive of interest and surcharges.

SO ORDERED.

Fernan, C.J., Melencio-Herrera, Padilla, Bidin, Sarmiento, Griño-Aquino, Medialdea, and *Regalado, JJ.*, concur.

Narvasa, Gutierrez, Jr., Cruz, and *Davide, JJ.*, join Justice Feliciano's dissent in the BOAC case.

Feliciano, J., please see dissenting opinion.

Gancayco, J., retired.

DISSENTING OPINION

FELICIANO, *J.:*

As my learned brother Mr. Justice Paras has indicated in his opinion for the majority in this case, the basic issues raised by this case were dealt with in *Commissioner of Internal Revenue v. British Overseas Airways Corp. (BOAC)* (149 SCRA 397 [1987]), a decision reached *en banc*. The majority rule in *BOAC* has been reiterated in two (2) cases: *Commissioner of Internal*

Supreme Court E-Library

Revenue v. Air India (157 SCRA 648 [1988]),* decided by the First Division of the Court; and *Commissioner of Internal Revenue v. American Air Lines, et al.* (180 SCRA 274 [1989]), rendered by the Second Division of the Court. Since the case at bar appears to be the first *en banc* case raising the same questions as *BOAC*, I would like to reiterate, in very summary fashion, the principal points made in my dissenting opinion in *BOAC*.** Since these points were developed at some length in the *BOAC* dissent, there is no necessity for once more referring to or quoting the detailed statutory bases of the conclusions here reiterated (*i.e.*, provisions of the National Internal Revenue Code [NIRC] and Revenue Regulations No. 2 issued by the Secretary of Finance).

1. Whether or not Japan Air Lines (JAL) is a resident foreign corporation doing business in the Philippines, is *not* a relevant consideration under the statutory provisions here involved, as they existed during the taxable years from 1959 through to 1963. Whether a foreign corporation be a *resident* one doing business in the Philippines, or a *non-resident* not doing business in the Philippines, is subject to Philippine income tax *only in respect of its Philippine-source income*. The critical issue, in other words, is always whether or not JAL was, during the taxable years involved, deriving *income from sources within the Philippines*.

2. The tax involved here is the *tax on income*: we are not concerned with a *sales tax* nor with an *excise or privilege tax*. For purposes of income taxation, I respectfully submit, the "source of income" relates *not* to the physical sourcing of a flow of money or the physical situs of payment, but rather to the "*property, activity or service which produced the income*" (*Howden and Co. Ltd. v. Collector of Internal Revenue*, 13 SCRA 601 [1965]; *British Traders Insurance Co. Ltd. v. Commissioner of Internal Revenue*, 13 SCRA 719 [1965]; and *Commissioner of Internal*

* While *Air India* referred to the *BOAC* case, the tax involved in *Air India* was *not* the regular corporate income tax but the 2.5% gross receipts or excise tax imposed by P.D. No. 1355 which amended Section 24 (b) (2), NIRC.

** In which dissent, Narvasa, Gutierrez, and Cruz, *JJ.*, joined.

Supreme Court E-Library

Revenue v. Phoenix Assurance Co. Ltd., 14 SCRA 52 [1965]. Also: 8 Mertens, Law of Federal Income Taxation, Section 45.27 [1957]).

3. The problem is, therefore, one of appropriate characterization of the transactions involved, that is, identifying or determining "the activity or service which produced the income" and the situs or physical location of such activity or service.

In my view, the activity or service giving rise to income, in the present case, is *not* the sale of personal property (so-called "sale of airline tickets"); the generative *activity is rather entering into and performing a contract of service or carriage* from one point of the globe (outside the Philippines) to another point in the globe (also outside the Philippines). This was explained in the *BOAC* dissenting opinion in the following terms:

"The appropriate characterization, in my opinion, of the BOAC transactions is that of entering into contracts of service, *i.e.*, carriage of passengers or cargo between points located outside the Philippines.

The phrase 'sale of airline tickets,' while widely used in popular parlance, does not appear to be correct as a matter of tax law. The airline ticket in and of itself has no monetary value, even as scrap paper. The value of the ticket lies wholly in the right acquired by the 'purchaser' — the passenger — to demand a prestation from BOAC, which prestation consists of the carriage of the 'purchaser' or passenger from one point to another outside the Philippines. The ticket is really the *evidence of the contract of carriage* entered into between BOAC and the passenger. The money paid by the passenger changes hands in the Philippines. But the passenger does not receive in the Philippines the consideration therefor — the service undertaken to be delivered by BOAC. The 'purchase price of the airline ticket' is quite different from the purchase price of a physical good or commodity such as a pair of shoes or a refrigerator or an automobile; it is really the *compensation paid for the undertaking of BOAC* to transport the passenger or cargo outside the Philippines. (Underscoring in the original).

The characterization of the BOAC transactions either as sales of personal property or as purchases and sales of personal property, appear entirely inappropriate from another viewpoint. Consider first purchases and sales; *is BOAC properly regarded as engaged in*

Supreme Court E-Library

trading — in the purchase and sale of personal property? Certainly, BOAC was not purchasing tickets outside the Philippines and selling them in the Philippines. Consider next sales: *can BOAC be regarded as 'selling' personal property produced or manufactured by it?* In a popular or journalistic sense, BOAC might be described as 'selling' 'a product' — its services. However, for the technical purposes of the law on income taxation, *BOAC is in fact entering into contracts of service or carriage. The very existence of 'source rules' specifically and precisely applicable to the rendition of services must preclude the application here of 'source rules' applying generally to sales, and purchases and sales of personal property* which can be invoked only by the grace of popular language. x x x" (149 SCRA 421-422; italics supplied).

4. When the BOAC and JAL transactions are appropriately characterized as contracts of carriage or service, the ordinary "source rule" under our NIRC and Revenue Regulations No. 2 relating to contracts of service or carriage — that the income generated is sourced or earned in the place where the contract is performed — becomes applicable. Applying this "source rule," it will be seen that the income earned by BOAC or JAL by transporting persons and goods between two (2) points both outside the Philippines, must be regarded as non-Philippine source income, and hence not taxable to a foreign corporation.

5. The unfairness arising from characterizing the transactions here as sales of personal property is obvious, when one recalls that a corporate tax payer subject to income taxation is entitled to deduct business expenses necessarily incurred in carrying out the activity or service generating the income. *If* the issuance of airline passage documents is properly determined *as a sale of personal property*, then all the tax payer can deduct are logically the cost of paper and printing of the air passage documents, as well as the salaries of the sales personnel, office rentals, cost of utilities and similar items. But what about the cost of rendering the service that the carrier becomes bound to deliver "to the buyer" of the "airline ticket," the depreciation of the aircraft, the cost of aircraft maintenance and repairs, the cost of high octane aviation fuel, the salaries of the pilots and cabin crew members, landing fees, interest paid on borrowed capital, *etc.* In other words, the price paid for the "airline ticket" —

Supreme Court E-Library

even after deducting the cost of printing the documents and the salaries of the sales personnel — is far from pure profit. I believe this is the very reason why the law in respect of taxation of international carriers was *changed from taxation of net income* (involving normal income tax rates of 25%-35%) to *a gross receipts or excise or privilege tax* of 2.5% on "gross Philippine billings," *i.e.*, to avoid unfairness to international carriers and to cure what appeared to be a conspicuous lack of economic realism.

6. Finally, we should note the provisions of the Convention between the Philippines and the United States of America with respect to taxes on income, signed on 1 October 1976 (Text in 7 Philippine Treaty Series 523) and which went into force and effect on 16 October 1982, upon ratification by both governments and exchange of instruments of ratification. Under Article 9 of the RP-US Tax Convention, profits derived by a resident of one of the Contracting State from sources within the other Contracting State "from the operation of ships in international traffic" or "from operation of aircraft in international traffic" may be taxed. Article 4, entitled "Source of Income," of the Convention provides as follows:

> "(7) Gross revenue from the operation of ships or aircraft in international traffic shall be treated *as income from sources within a Contracting State to the extent they are derived from outgoing traffic originating in that State*." (Italics supplied).

It seems to me that the foregoing reflects the understanding of both States Parties as to the correct source rule applicable for income taxation of revenues derived from the operation in international traffic of aircraft: that is, that they are sourced within a contracting state only to the extent that such revenues arise "*from outgoing traffic originating in that state*," or, in terms of the present case, only to the extent that they are derived from passengers and cargo transported *from the Philippines to some other part of the world*. This is entirely in line with the view respectfully submitted in the *BOAC* dissenting opinion and here reiterated.

I vote to deny the Petition for Review and to affirm the Decision of the Court of Tax Appeals in CTA Case No. 2480.