REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MS. JULIANE BAIER-NICKEL as represented by MARINA Q. GUZMAN, attorney-in-fact,
Petitioner,

- versus -

C.T.A. CASE NO. 5514

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
APR 29 1999

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DECISION

This is a judicial claim for the refund of ₱512,313.66 allegedly representing erroneously paid income taxes for calendar year 1994.

Petitioner is a non-resident German citizen engaged in the garment business and marketing services. She allegedly contacts for clients in Germany for the products made by Jubanitex, Inc., pursuant to a contract they have mutually agreed upon and for which services she is paid a commission.

For taxable year 1994, Petitioner received from Jubanitex, Inc., the amount of ₱1,707,712.22 representing commissions on sales transacted in the German market. A withholding tax of 10% amounting to ₱170,771.22 was withheld therefrom and remitted by Jubanitex, Inc., to the Respondent.

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On April 17, 1995, Petitioner filed her income tax return and reported therein a taxable income of ₱1,707,712.22 with a tax due of ₱512,313.66 based on a tax rate of 30% as provided in Section 22(b) of the Tax Code. Accordingly, Petitioner paid to the Respondent's Bureau the amount of ₱341,542.44 representing the difference between the tax due and the tax previously withheld and remitted.

On November 8, 1995, Petitioner filed a claim for refund with Respondent's Bureau the amount of ₱512,313.66 on the ground that the aforestated compensation for the personal services of the Petitioner was rendered in Germany, which under Section 36(c)(3) of the 1994 Tax Code, such personal services are considered as income sourced outside the Philippines, hence, not taxable.

Due to alleged inaction of the Respondent, however, Petitioner elevated her case before this Court. Hence, the instant Petition for Review.

At bar, Petitioner reasserts its stance a quo. Respondent, on the other hand, contends, *inter alia*, in her Answer, the special and affirmative defenses, that none of the statements contained in the petition could support the contention that the Petitioner is a German citizen other than a baseless allegation and self-serving document; and that, the case at bar calls for a special power of attorney and other solemnities required by law instead of a mere letter of authority appended to the petition.

In addition, Respondent avers that the issue at bench is already settled in the case of **Philippine American Life Assurance Company, Inc. vs. Hon. Court of Tax Appeals, and The Commissioner of Internal Revenue (CTA Cases Nos. 3504 and 3943, CA-G.R. SP No. 31283);** that the applicable law in the case at bar is Section 36(4)(c), (d) & (f) of the Tax Code; that the claims for tax refund or tax credit are construed in *strictissimi juris* against the taxpayer as they partake the nature of an exemption from tax and it is incumbent upon the Petitioner to prove that it is entitled thereto under the law; and lastly, Petitioner must prove that she has complied with the provision of Section 230 of the Tax Code as amended.

Trial proceedings were conducted with only the Petitioner submitting her evidence. Respondent opted not to present any evidence as she deemed the case at bar as involving a mere question of law. Both parties submitted their respective memorandum. Petitioner maintains, among others, that her instant claim for refund has been filed within the two-year prescriptive period under Section 230 of the Tax Code and that it has complied the requirements of a claim for refund of excess creditable withholding tax as prescribed in Revenue Regulations No. 6-85 as

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cited in the case of Shangri-la Plaza vs. Commissioner of Internal Revenue, CTA Case No. 5346, promulgated on January 9, 1998.

Respondent, however, insists in her memorandum that Petitioner Juliane Baier-Nickel's act of filing the instant petition on April 15, 1997, through Ms. Marina Q. Guzman, her attorney-in-fact, based on a mere letter of authority cannot be given effect; and that, Petitioner failed to prove by convincing evidence that such letter was indeed executed by her, hence, Ms. Guzman's verification in the petition could not supplant the one that should have been done by the Petitioner herself.

Moreover, Respondent argues that the special power of attorney executed by the Petitioner on May 14, 1997 (Exhibit C), subsequent to the filing of the petition before this Court, should not be given retroactive application to the time of filing on April 15, 1997, but rather prospectively, because before May 14, 1997, Ms. Marina Q. Guzman was not clothed with the proper authority as well as the personality to file the present action; that under such situation, the two-year prescriptive period within which to file the instant petition has already elapsed when reckoned from May 14, 1997; and that being so, settled is the rule that a complaint cannot be amended to confer jurisdiction.

Based on the foregoing facts and respective disquisition of the parties, the issues confronting this Court are as follows:

1. Whether or not herein claim for refund can be validly initiated by an attorney-in-fact through a mere letter of authority; and,

2. Whether or not Petitioner may claim as refund the income tax withheld and paid from the income earned as "commissions" for services rendered.

As regards the first issue, We rule in favor of the Petitioner.

It is a matter of record that Petitioner's attorney-in-fact, Ms. Marina Guzman, filed the instant Petition for Review on April 15, 1997, armed only with a mere letter of authority (page 10, CTA records) issued by the former authorizing the latter to file, in her behalf, a claim for tax refund with this Court. However, the records of this case also disclose that Petitioner Juliane Baier-Nickel, subsequently executed a Special Power of Attorney (SPA) on May 14, 1997 empowering Ms. Marina Guzman to institute the present action before this Court. This act of executing an SPA had the effect of curing the "defect" mentioned by Respondent in his Answer. The non-observance by the Petitioner of the formalities required by law in authorizing another to file a petition for review in this Court, resulted in the latter's lack of legal capacity to sue which is a ground for a Motion to Dismiss. However, as discussed earlier, the subsequent execution of an SPA clothed the attorney-in-fact with the requisite legal capacity, hence the lack thereof should no longer be made an issue. Respondent's argument that the absence of an SPA resulted in lack of jurisdiction is erroneous to say the least, because as defined by the Supreme Court, "a plaintiff lacks the capacity to sue when the plaintiff does not have the character or representation he claims, which is a matter of evidence" (**Lunsod vs. Ortega, 46 Phil. 664**). The ground of lack of jurisdiction is not the proper issue to be addressed by this Court but lack of legal capacity to sue which, as discussed earlier, was already cured. Furthermore, any doubts raised on the authority of Ms. Marina Guzman was already erased when Petitioner herein, personally appeared and testified in Court that she indeed authorized Ms. Marina Guzman to represent her in her claim for refund filed in this Court (see TSN, dated August 12, 1997).

With respect to the merits of Petitioner's claim for refund which is the second issue presented in this case, We find that Petitioner is not entitled to the relief prayed for.

Petitioner anchors her claim for refund on Section 36(c)(3) of the 1994 Tax Code which provides that compensation for personal services performed without the Philippines is considered gross income from sources outside the Philippines and since Petitioner considers herself a non-resident alien not engaged in trade or business in the Philippines, she should be taxed only on income derived from services performed within the Philippines. Petitioner explains that she was merely hired by a Philippine firm, Jubanitex, Inc., to be their sales agent to promote and sell its goods in Germany. She further alleges that in consideration for these services, she was paid 10% sales commission on all sales "actually collected" in accordance with the appointment letter signed by the general manager of Jubanitex, Ms. Marina Guzman (see Exh. "B").

Records show that Petitioner paid the total amount of ₱512,712.22 to the Bureau of Internal Revenue as income tax on the alleged "commissions" received by her during 1994. She is now claiming this amount as refund on the ground that she did not have to pay income tax on these "commissions" because they were derived from services performed outside the Philippines.

Respondent disagrees with the Petitioner and maintains that the facts of this case infer that the latter as consultant, president of a domestic company or person involved with "product development" is subject to

Philippine income taxation pursuant to Section 36 of the 1994 Tax Code.

From the allegations found in the Petition for Review and memorandum, it would appear that Petitioner would like us to believe that she was hired exclusively by Jubanitex as a sales agent to promote and sell their products in Germany. A perusal of the documents submitted and the testimonies made during the hearings reveal that Petitioner Juliane Baier-Nickel was not only a mere sales agent of Jubanitex but also a stockholder and president of said company. Quoted hereunder are excerpts of Petitioner's testimony delivered during the hearing held on August 12, 1997, thus:

Q. What is your position?

A. President.

Q. As president what are your duties for Jubanitex?

A. Overlooking the situation of the company. But I am more concentrated on the marketing.

JUDGE ACOSTA:

Are you a stockholder of Jubanitex, Inc.?

A. In 1994, I have one share.

JUDGE ACOSTA:

Today?

A. I have more.

JUDGE ACOSTA:

How many more? Are you the majority stockholder?

A. Yes.

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It was also during this same hearing that Ms. Nickel claimed that she was not paid any compensation as president of Jubanitex and that the latter company merely paid for her food and offered her living quarters inside the office premises whenever she comes to the Philippines. She further insisted that her income is limited to sales commissions for sales consummated in Germany.

It is evident from the foregoing that a discrepancy exists between what was admitted by Petitioner in her testimony in open court and what is being claimed in the Petition for Review and memorandum as to her working status and business relationship with Jubanitex. It is not accurate to state that Petitioner was engaged as a sales agent to look for customers in Germany as alleged in Petitioner's memorandum because the records show that not only was Petitioner a stockholder of Jubanitex, she was also its president. The misleading statements of Petitioner make it easier perhaps to lead this Court to conclude that Section 36(c)(3) applies conveniently to the instant case because the personal services performed outside by a commission agent who is a non-resident alien may be said to be taxable only in the place where the services where performed and this is supported by various BIR Rulings issued by Respondent.

If Petitioner is a mere sales agent who receives purely commission income on every sale made in Germany then we can safely assume that this income is not taxable here as the activity of selling was performed abroad hence, considered as income sourced outside the Philippines. However as revealed by the testimony of Petitioner, she is both a stockholder and president of Jubanitex. After 1994, she even became the company's majority stockholder (see TSN, dated August 12, 1997). The name Jubanitex may conveniently be an acronym of her own name (Juliane Baier-Nickel). All of these facts point us to the inescapable conclusion that Petitioner did not sell the products of Jubanitex as a sales agent independent of Jubanitex but rather in her capacity as president of the company.

As president of Jubanitex, any remuneration received by Petitioner stems from her employment as president of said company and thus discards her allegation that as a sales agent she just receives commissions.

The taxability of the income derived by a resident of (West) Germany from an employment exercised here in the Philippines is governed by Article 15 of the R.P.-Germany Tax Treaty which provides, thus:

ARTICLE 15

Dependent Personal Services

> 1. Subject to the provisions of Articles 16,18 and 19, salaries, wages and other remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
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> 2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first mentioned State if
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> a. the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the calendar year concerned; and
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> b. the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and
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> c. the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

The situation of the Petitioner falls squarely within the provisions of paragraph 1 of the aforequoted Article 15 and does not in any way fall under paragraph 2. While Petitioner is trying to show that she has stayed in the country for less than 183 days, nevertheless, as discussed above, her remuneration in the form of commissions is borne by a permanent establishment in the Philippines, that of Jubanitex. Thus, the remuneration received by the Petitioner is taxable in the

Philippines. The income tax paid by Petitioner in the year 1994 was correctly made hence, no refund should be granted. The rule on *strictissimi juris* on claims for tax refund is hereby reiterated.

WHEREFORE, in view of the foregoing, the Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

(Dissenting)
AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that the above 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

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DISSENTING OPINION

With all due respect to the opinion of my esteemed colleagues, I humbly express my opposition to the decision denying Ms. Juliane Baier-Nickel's claim for refund.

The denial of the claim was based on the theory that the "commission" income earned by petitioner was in the nature of a compensation and remuneration derived from her employment as president of a domestic firm, Jubanitex, Inc., hence taxable in the Philippines, pursuant to Article 15 of the R.P.-West Germany Tax Treaty.

I respectfully disagree with the above contention and find that the petitioner is entitled to the claim for refund for the following reasons:

1) As a non-resident foreign national, petitioner's income derived from an activity done in a country of which he or she is a citizen is taxable only in the country of which she is a "national" (see R.P.-West Germany Tax Treaty);

2) Notwithstanding the seemingly misleading statements made by petitioner, the fact of being a stockholder and a resident of a domestic firm is not significant in determining the taxability of the commissions earned by her.

It is undisputed that said income was derived by petitioner from the selling activities performed by the latter in Germany. Section 22(b) of the 1994 Tax Code provides, thus:

> (b) *Non-resident aliens not engaged in trade or business within the Philippines.* - There shall be levied, collected and paid for each taxable year upon the entire income received from all sources within the Philippines by every non-resident alien individual not engaged in trade or business within the Philippines as interest, dividends, rents, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable annual or periodical or casual gains, profits, and income, and capital gains (except capital gains, realized from buying and/or selling shares of stocks of Philippine corporations listed in the dollar or any acceptable foreign currency board of any stock exchange), a tax equal to 30% of such income: *Provided*, That capital gains realized from sales of shares of stocks in any domestic corporation and real property shall be subject to the tax prescribed under subsections (d) and (e) of Section 21. (Underscoring supplied)

The aforequoted provision states that non-resident aliens not engaged in trade or business in the Philippines shall be taxable upon their entire income from all sources within the Philippines implying that income derived from sources outside the country shall not be taxable in the Philippines. The source of an income is the property, activity or service that produced the income (**Commissioner of Internal Revenue vs. British Overseas Airways Corporation, 149 SCRA 395; Howden and Co. vs. Collector of Internal Revenue, 13 SCRA 601**). In the instant case, the activity that produced the income of Ms. Nickel is the selling of the products of Jubanitex to clients in Germany. The "source" of income then is the activity of selling which produced the income received by Ms. Nickel and since this activity was performed abroad then said income is not taxable in the Philippines. However, any income derived by the petitioner as president and stockholder of Jubanitex, Inc. may be subject to tax on dividends or capital gains, as the case may be, inasmuch as said non-resident alien does not receive any salary or compensation for being such as president or stockholder of Jubanitex, Inc..

> (3) No evidence was adduced by respondent to disprove the allegations of petitioner that the only income she earned was from the sale of goods in Germany. Furthermore, the Individual Income Tax Returns submitted by petitioner do not indicate any compensation income but only business/professional income for the year covered by the claim.

IN VIEW OF THE FOREGOING, I vote to grant the refund of ₱512,313.66 in favor of petitioner.

AMANCIO Q. SAGA
Associate Judge

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