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. 5633

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JUN 28 2000

x - x

DECISION

This is a petition for review filed by the above-named Petitioner (as represented by her attorney-in-fact); seeking for the refund of P170,777.26 allegedly representing erroneously withheld and paid income taxes for the period covering March 1, 1995 to September 31, 1995.

Herein petitioner is a non-resident German citizen whose services were engaged by JUBANITEX to market their products in Germany and other parts of Europe. JUBANITEX, on the other hand, is a domestic corporation involved in the manufacturing and exporting of tablecloth, linens and other embroidered products. In exchange for the marketing services rendered, herein Petitioner received from JUBANITEX 10% commission based on the volume of sales produced through her efforts. (TSN, October 8, 1998 p. 2) Petitioner likewise admitted that she is the President and stockholder of Jubanitex but claims that she does not receive any compensation as such (TSN, November 10, 1998).

For the taxable year 1995, the Petitioner received the total amount of P1,707,772.64 representing the total commission income she received from the sales of Jubanitex products in the German and European markets. A withholding tax of 10% amounting to P170,777.26 was withheld therefrom and duly remitted by Jubanitex to the Respondent. (TSN, November 10, 1998 p. 23) A Certificate of Creditable Withholding Tax was duly issued by Jubanitex to the Petitioner. (Exhibit B).

On October 17, 1997, Petitioner filed her income tax return with the Metropolitan Bank and Trust Co. (MBTC)- Makati Ave. Branch, reporting a taxable income of P1,707,772.64 and a tax due of P170,777.26 using the rate of 10%. Attached therewith is the Certificate of Creditable Withholding Tax Issued by Jubanitex.

On April 14, 1998, Petitioner filed a claim for tax refund with the BIR (Exhibit Q) on the ground that having rendered marketing services for Jubanitex in Germany and other parts of Europe, any income which she received for said personal services is considered as income sourced outside the Philippines pursuant to Section 36(c)(3) of the Tax Code. Hence, said commission income is not taxable in the Philippines.

Petitioner filed this appeal on April 15, 1998 or a day after she filed the claim for refund with the Bureau of Internal Revenue.

Respondent, in his Answer, propounded the following Special and Affirmative defenses:

5.) That the above-mentioned petitioner is not the real party in interest and has no personality to file the instant petition, hence the same should be dismissed.

6.) That the instant petition has already prescribed.

7.) That the Petitioner has no cause of action.

Petitioner maintains in her memorandum that her instant claim for refund has been filed within the 2-year prescriptive period under Section 230 of the Tax Code and that she has complied with the substantiation requirements as prescribed in Revenue Regulations No. 6-85 as amended.

The controversy in the case at bar therefore hinges on 2 main issues, to wit.

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

(b) If this is so, whether or not Petitioner was able to comply with the 3 basic requirements before a claim for refund of excess creditable withholding tax can be granted pursuant to Revenue Regulations No. 6-85 as amended.

But before proceeding to the pivotal issue confronting Us, we will first tackle some of the Affirmative and Special Defenses raised by Respondent in his Answer (p. 29, CTA records).

On the contention of the Respondent that the petitioner is not the real party in interest and as such has no personality to file the instant petition, We peremptorily rule in favor of Petitioner.

Records of the case would reveal that Petitioner, Juliane Baier-Nickel, executed a Special Power of Attorney (SPA) on February 10, 1998 at Makati City (see Exh. T). This SPA empowered Ms. Marina Guzman to institute the present action before this Court. The act of executing an SPA had the effect of curing the "defect" mentioned by Respondent in his Answer. Thus, Respondent's argument that the initial Petition should be dismissed as Petitioner thereof is not the real party in interest, holds no water as this has already been cured through the execution of the SPA. 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 the claim for refund filed in this Court (see TSN, pp. 35-37, November 10, 1998).

Anent Respondent's contention that the instant petition has already prescribed, the same we hold in the negative.

An action for refund on an erroneously collected income tax is conditional upon the compliance with the two-year prescriptive period provided by law. Thus, for easy reference, We hereinbelow quote the pertinent provision of the Tax Code on the matter:

> **Section 230.** ***Recovery of tax erroneously or illegally collected.*** - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

> In any case, no such suit or proceeding shall be begun after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided*, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

In the case at bar, the reckoning date of the two-year prescriptive period commenced to run on the date petitioner filed her Individual Income Tax Return on October 27, 1997 (see Exhibits "A", "A-1 to A-2"), because this is the date when the income tax was deemed paid by petitioner within the meaning of the aforequoted Section 230. It is to be noted that petitioner was already late in filing her Individual Income Tax Return for the taxable year 1995 but a wealth of jurisprudence dictates that it is upon the actual filing of the Income Tax Return (Annual Income Tax Return for corporations) that the two-year period should commence to run **(ACCRA Investments Corporation vs. Court of Appeals, 203 SCRA 184; Commissioner of Internal Revenue vs. CA, CTA and BPI as Liquidator of Paramount Acceptance Corporation, 301 SCRA 435).**

Counting from October 27, 1997 to April 15, 1998, the date when the petition for review was filed, the present claim for refund is still within the two-year prescriptive period.

We now proceed to discuss the crux of Petitioner's claim for refund.

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, she should be taxed only on income derived from services performed within the Philippines. Considering this premise, it is now the contention of the petitioner that the commissions she received for promoting and selling the products of Jubanitex is not subject to tax since she performed the services outside the Philippines. Thus, petitioner now contends that the amount of P170,777.26 withheld by Jubanitex is now refundable.

We find Petitioner's contention bereft of merit.

Our Tax Code explicitly provides that non-resident aliens, whether or not engaged in trade or business in the Philippines is subject to income tax. Specific provisions of the law on the matter are Section 22(a)(1) and Section 22(b) of the 1995 Tax Code and We quote:

> **Section 22.** ***Tax on non-resident alien individuals.*** - (a) Non-resident alien engaged in trade or business within the Philippines. (1) In general. - Non-resident aliens engaged in trade or business in the Philippines shall be subject to tax in the same manner as resident citizens and aliens on taxable income received from all sources within the Philippines, x x x. Provided that for purposes of this Title, a non-resident alien individual who shall come to the Philippines and stay therein for an aggregate period of more than 180 days during any calendar year shall be deemed a non-resident alien doing business in the Philippines, Section 20(g) of this Code notwithstanding.
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> x x x x x x x x x
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> (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. x x x

Verily, from the aforequoted provisions, the taxability of non-resident aliens under our laws depends on the source of said income. The income of a non-resident alien regardless of whether or not she is engaged in business in the Philippines is taxable if said income comes from sources within the Philippines. This goes to show that the taxing power of the government extends to non-resident aliens for as long as the source of the income comes from within the Philippines.

Petitioner's reliance on the aforementioned Section 36(c)(3) of the 1995 Tax Code as it relates to Section 22(a)(1) and (b) motivated her to ask for a refund of the income tax for the taxable year 1995.

A perusal of the records of the case makes it hard for this Court to believe that petitioner herein is merely a marketing representative of Jubanitex who earns purely commission income from the sales made in Germany. In an earlier decided case involving the same parties entitled **Ms. Juliane Baier-Nickel as represented by Marina Q. Guzman, attorney-in-fact vs. Commissioner of Internal Revenue, CTA Case No. 5514 promulgated on April 29, 1999,** this Court had the occasion to observe and rule thus:

> "x x x 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, 1971). 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 Article 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.

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:

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

b. the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

c. the remuneration is not borne by a permanent establishment of 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 in the Philippines."

Corollary to the conclusion that petitioner is not merely a marketing representative but is no less than the President and majority stockholder of a corporation (Jubanitex, Inc.) based in the Philippines, the concept of the source of income is altogether altered to mean the place of residence of the payor of the income, in this case, Jubanitex, Inc., therefore income derived by petitioner therefrom is taxable here in the Philippines.

The emphasis made by herein petitioner that she is merely a marketing representative of Jubanitex, Inc., is an attempt to focus our attention on the place where the "marketing" activity is performed such that the source becomes the place of activity.

We are not convinced.

In the case of National Development Company vs. Commissioner of Internal Revenue, 151 SCRA 472, the Supreme Court had the occasion to define the "source" of income for purposes of determining the taxability of a non-resident corporation, thus:

> "The petitioner argues that the Japanese Shipbuilders were not subject to tax under the above provision because all the related activities – the signing of the contract, the construction of the vessels, the payment of the stipulated price, and their delivery to the NDC – were done in Tokyo. The law, however, does not speak of activity but of "source", which in this case is NDC. This is a domestic and resident corporation with principal offices in Manila."

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

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate 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