REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

KAWASAKI HEAVY
INDUSTRIES LTD.
(Manila Office),
Petitioner,

- versus - C.T.A. CASE NO. 4444

THE COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

2/9/94

x - - - - - - - - - - - - - - x

D E C I S I O N

This case involves a question of whether or not petitioner is entitled to claim a refund of erroneously paid 4% contractor's tax [now 10% Value Added Tax (VAT)] in the amount of P203,856.75 for the first quarter ending March 31, 1988.

The facts of this case are as follows:

Kawasaki Heavy Industries Ltd. (KHI), a foreign corporation organized and existing under the laws of Japan, entered a Joint Venture Agreement with the Philippine Government represented by Philippine Shipyard and Engineering

Corporation (PHILSECO). The objective was for KHI to provide technical assistance to PHILSECO for the construction, operation and management of the ship repair facilities of PHILSECO located in Cabangan Pt., Municipality of Subic, Zambales province.

On March 29, 1978, KHI was able to establish a representative office in Manila (herein petitioner) duly registered with the Securities and Exchange Commission with the prior approval of the Board of Investments. Petitioner is empowered to engage in the following activities:

1. To oversee the implementation of the Joint Venture Agreement between the Philippine Government (through NIDC) and Kawasaki Heavy Industries Ltd.;

2. To conduct and make surveys and studies of market, economic and financial conditions in the Philippines; and

3. To advise and render assistance to local distributors/indentors and customers in the Philippines.

On April 20, 1988, petitioner filed a Contractor's Quarterly Percentage Tax Return for the first quarter ending March 31, 1988. On April 22, 1988, petitioner paid the amount of P203,856.75 representing the contractor's tax for the first quarter of 1988. The payment was covered by BIR Payment Order No. C 2825998 and CB Confirmation Receipt No. B14600864.

On the query posed by PHILSECO to the Bureau of Internal Revenue regarding the liability of petitioner with respect to the

Value-Added Tax (VAT), respondent replied through BIR Revenue Ruling No. 25-000-00-136-89, dated July 4, 1989, that:

"In reply, please be informed as follows:

1. Questions 1, 2 and 3 being interrelated are hereby answered jointly. **KHI Manila Representative is <u>not</u> a resident foreign corporation since it is not engaged in any income generating business in the Philippines.** A resident foreign corporation is a foreign corporation engaged in trade or business in the Philippines [Section 20(h), Tax Code]. Accordingly, KHI Manila is not subject to income tax; hence, it is exempt from filing of the corporate income tax return. (BIR Ruling No. 370-87)

- p. 74

KHI is a non-resident foreign corporation since it is a foreign corporation **not engaged in trade or business in the Philippines** [Sec. 20(i), Tax Code]. The technical service fees which you remit to KHI are considered royalties since they are in consideration for the "technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme". [Sec. 36(a)(3)(F), ibid.] Said technical service fees being Philippine source income of KHI are subject to Philippine corporate income tax at the rate of 35% [Sec. 25(b)(1), ibid.] which shall be withheld by you as the payor-corporation and paid in the same manner and subject to the same conditions as provided in Sec. 51 of the Tax Code. [Sec. 50(a), ibid.]

2. x x x x x x x x x.

3. **KHI Manila Office is not subject to VAT since it is not engaged in any income-generating business activity in the Philippines. A person is subject to VAT if it**

renders service "in the course of trade or business". (Sec. 99, Tax Code)

x x x   x x x   x x x." (Emphasis supplied.)

Petitioner filed on April 19, 1990 a claim for refund in the total amount of P757,160.37, as erroneously paid <u>4% contractor's tax for the first quarter of 1988</u> (subject matter of this petition amounting to P203,856.75) and the 10% value-added tax for the second quarter of 1988 (subject matter of CTA Case No. 4473, amounting to P80,971.98); third quarter of 1988 (subject matter of CTA Case No. 4507, amounting to P112,167.34); fourth quarter of 1988 (amounting to P199,185.18); and the first quarter of 1989 (amounting to P160,979.12). Without waiting for respondent's decision on said claim for refund, petitioner filed this petition on April 20, 1990 pursuant to Section 230 of the Tax Code.

Respondent contends that claims for tax refund are in the same nature of an exemption and therefore should be construed strictly against the taxpayer. The burden is on the taxpayer to prove entitlement thereto.

In support of its claim for refund, petitioner offered the following documentary evidence:

1. Letter claim for refund with the BIR dated April 19, 1990 [Exhs. A, A-1 to A-5-a, inclusive];

2. Letter of petitioner's General Manager authorizing Atty. Douglas G. Baarde to file a claim for refund on behalf of petitioner [Exhs. B and B-1];

3. SEC Registration Certificate [Exh. C] and BOI Certificate of Authority [Exhs. D to D-3, inclusive];

4. Contractor's Quarterly Percentage Tax Return for the first quarter ending March 31, 1988 [Exhs. E, E-1 to E-3, inclusive];

5. BIR Payment Order No. C 2825998 [Exhs. F and F-1] and CB Confirmation Receipt No. B 14600864 [Exhs. G and G-1]; and

6. BIR Revenue Ruling No. 25-000-00-136-89 dated July 4, 1989 [Exhs. H, H-1 to H-4, inclusive].

Respondent alleged that petitioner failed to prove that it is not doing business in the Philippines therefore it is not entitled to the refund claim. To bolster her claim that petitioner is not entitled to the refund sought, respondent offered the following evidence:

a. Letter of Authority No. 000522 NA dated December 20, 1990 [Exh. 1] to prove that respondent's examiner was authorized to examine petitioner's books of accounts and other accounting records for the year 1988 to determine any deficiencies for VAT, Percentage Tax and Documentary Stamp Tax;

b. Memorandum Report of the examiners dated November 26, 1992 [Exh. 2] recommending the denial of the claim for refund and the issuance of an assessment notice amounting to P2,239,298.15 as VAT deficiency for 1988; and

c. The testimony of Mr. Antonio Jonathan Jaminola, Revenue Officer I, as respondent's witness, stating as follows:

"ATTY. SEGUI

Q. In recommending the denial of the petitioner's claim for refund, what was the basis of your denial?

A. Based on our investigation, we are denying the refund on the basis of the following reasons:

1. The financial statement of the taxpayer as audited by SGV and Company, it is stated that Kawasaki Heavy Industries, Ltd., through its Manila Office, is doing business in the Philippines;

2. The taxpayer having filed its own income and business tax returns and having declared gross receipts income for the period under investigation and;

3. The taxpayer failed to submit through re-vat our findings. Under Section 99, of the National Internal Revenue Code it is provided that any person rendering service in the course of trade or business in the Philippines should file a return. Hence filing a return, the taxpayer is deemed properly taxed on its gross receipts and income."

Is petitioner subject to the contractor's tax (now the Value Added Tax)?

In two similar cases involving the same parties, this Court has recently ruled:

"The applicable provision of law is Section 99 of the National Internal Revenue Code, quoted hereunder:

> 'Sec. 99. **Persons Liable.** - Any person who, in the course of trade or business, sells, barters or exchanges goods, renders services, or engages in similar transactions and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 100 to 102 of this Code.'
>
> In view of the findings of the BIR as embodied in its aforementioned ruling that Petitioner is not engaged in any income generating business activity in the Philippines, this Court likewise believes that it will not be subjected to value-added tax pursuant to the aforequoted Section 99 of the Tax Code. Value-added tax is imposable only against person, individual or juridical entity, in the course of their trade or business activities selling, bartering or exchanging of goods, or rendering services for a fee or other similar transaction. Respondent failed to present any evidence that will show that Petitioner has been engaged in any of these economic activities, at least to dispute its own findings contained in the said BIR Ruling." **[Kawasaki Heavy Industries Ltd. (Manila Office) v. Commr. of Internal Revenue, CTA Case No. 4473, June 11, 1993; Kawasaki Heavy Industries Ltd. (Manila Office), v. Commr. of Internal Revenue, CTA Case No. 4507, July 21, 1993.]**

Reliance to BIR Ruling No. 25-000-00-136-89 should be given weight considering that until now the same was never revoked hence, it stands to be applicable. The opinion of Jose U. Ong, then Commissioner of Internal Revenue, that petitioner is <u>not</u> engaged in any trade or business since it is only a representative office is controlling and have a strong persuasive force. It would have been easier for respondent to have revoked said ruling considering that it is within her power to do so under Section 246 of the Tax Code.

Section 246 of said Code provides:

> "**Sec. 246. Non-retroactivity of rulings.** - Any revocation, modification, or reversal of any of the rules and regulations promulgated in accordance with the preceding section or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayers except in the following cases: (a) where the taxpayer deliberately misstates or omits material facts from his return or in any document required of him by the Bureau of Internal Revenue; (b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or (c) where the taxpayer acted in bad faith."

The findings of the revenue examiners that the representations made by PHILSECO for and in behalf of petitioner and KHI Japan, in securing the ruling, were incomplete should have been endorsed to the Commissioner of Internal Revenue for proper action. Aside from their recommendation for the issuance of an assessment notice they should have also suggested for the revocation of BIR Revenue Ruling No. 25-000-00-136-89, dated July 4, 1989. This they failed to do. Hence, no revocation was ever made by the respondent. There being no such revocation the said Ruling stands.

Furthermore, Section 99 of the Tax Code is clear on the point that a person is subject to the VAT (formerly the contractor's tax as in this case) if it renders service "in the course of trade or business". In the case at bar, petitioner merely oversee the implementation of the Joint Venture Agreement, research and study the economic and financial condition of the Philippines and advise local distributors/indentors and customers in the Philippines. It is not engaged in any income generating activity for that matter. Therefore, petitioner is not subject to the Contractor's Tax (now the Value Added Tax).

WHEREFORE, in view of the foregoing, the petition for review is hereby **GRANTED.** Respondent is hereby ordered to **refund** in favor of petitioner the amount of P203,856.75, representing erroneously paid contractor's tax for the first quarter ending March 31, 1988. No pronouncement as to costs of suit.

SO ORDERED.

Quezon City, Metro Manila, February 9, 1994.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

MANUEL K. GRUBA
Associate Judge

CERTIFICATION

This is to certify that the above 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