REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ASIA INTERNET HOLDING CO., LTD.,
Petitioner,

- versus -

C.T.A. CASE NOS. 6208 AND 6229

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAR 23 2004

x - x

DECISION

The instant case is a consolidation of CTA Case Nos. 6208 and 6229 for a claim for refund or tax credit in the amounts of P337,554.00 and P2,593,676.20 representing petitioner's overpaid withholding tax on royalties for the period covering September to October of 1998, and from December 1998 to September 2000, respectively.

Petitioner is a non-resident foreign corporation duly organized and existing under and by virtue of Japanese laws, with principal office address at Takebashi Yashuda Bldg., 8/F, 3-13 Kanda Nishiki-cho, Chiyoda-Ku, Tokyo 101, Japan. It is not engaged in trade or business in the Philippines and neither is it any way registered with the Securities and Exchange Commission (SEC); ***(Paragraphs 1 and 2, Consolidated Joint Stipulation of Facts and Issues; Exhibit "A").***

Petitioner states that this action is based on an isolated transaction. Thus, citing the case of *New York Marine Managers, Inc. vs. Court of Appeals, G.R. No. 111837, dated October 24, 1995,* where the Supreme Court ruled that a foreign corporation not engaged in business in the Philippines may exercise the right to file an action in

Philippine courts for an isolated transaction, and the case of *Ms. Juliane Baier-Nickel vs. Commissioner of Internal Revenue, CTA Case No. 5514 dated April 29, 1999*, where a judicial claim for refund filed by a non-resident German citizen was acted upon by this court, petitioner brought this petition for review.

By virtue of a Special Power of Attorney ***(Exhibit D)***, petitioner authorized SGV & Co., with office address at 6760 Ayala Avenue, Makati City, to act as its representative and attorney-in-fact in the Philippines with full power and authority to bring and act on related matters in furtherance of the present action. ***(Paragraph 3, Consolidated Joint Stipulation of Facts and Issues, p. 143, CTA Records)***

Infocom Technologies, Inc. (hereinafter referred to as "Infocom") is a corporation duly organized and existing under and by virtue of Philippine laws, with principal office address at 31st Floor, PLDT Tower II Bldg., 6799 Ayala Avenue, Makati City. It is registered with the Bureau of Internal Revenue ("BIR") as a value-added tax (VAT) taxpayer bearing RDO Control No. 97-041-017076 and with Taxpayer Identification Number 041-003-948-484 VAT ***(Exhibit "C").***

On January 22, 1998, petitioner entered into an agreement with Infocom, denominated as A-Bone Connectivity Agreement (***Exhibit "F"***), under which petitioner shall provide internet services through its A-Bone Backbone Network to Infocom, for a monthly royalty fee of US$47,000 ***(Exhibit "G-1"; Paragraph 4, Consolidated Joint Stipulation of Facts and Issues, p. 143, CTA Records)***. These services involved the disclosure of technical and commercial information belonging to the petitioner.

On November 1, 1999, the parties amended the agreement with respect to the royalty/service fee payable by Infocom to the petitioner under Article 1.1 of the A-Bone Service Fee Agreement resulting in a new monthly rate of US$23,500.00 which became effective on the same date; ***(Exhibits "G", "H"and "H-1").***

From September 1998 to September 2000, Infocom subjected its royalty payments to the petitioner to the withholding tax rates under Section 28(B)(1) of the 1997 Tax Code pertaining to royalty income received by nonresident foreign corporations. Infocom paid and remitted the withholding taxes to the BIR within the prescribed periods. Consequently, the royalty payments were subjected to withholding tax at the rates of 34% for taxable year 1998, 33% for taxable year 1999, and 32% for taxable year 2000. The payments to the BIR were made through the Land Bank of the Philippines, an authorized agent bank as evidenced by the machine validation on the monthly remittance returns ***(Paragraphs 9 and 10, Consolidated Joint Stipulation of Facts and Issues, p. 144, Exhibits "I" to "Z", "AA" to "GG")***

In view of the existing tax treaty between Japan and the Republic of the Philippines of which Infocom and the petitioner are residents, respectively, petitioner alleges that the withholding tax rate applied should have been that under Article 12(2)(b) of the RP-Japan Tax Treaty which is 25% of the gross amount of royalties.

Thus, on December 7, 2000, petitioner, through SGV & Co., filed with the BIR a formal request for refund or tax credit of the excess or overpaid withholding tax on royalty payments amounting to P337,554.00 for the period September 1998 to October 1998 ***(Paragraph 6, Consolidated Joint Stipulation of Facts and Issues, p. 143 CTA Records; Annex D, Petition for Review, CTA Case No. 6208)***. Alleging inaction of the BIR to petitioner's administrative claim for refund, petitioner, on December 8, 2000, filed a Petition for Review with this court, docketed as CTA Case No. 6208.

On January 16, 2001, respondent filed his Answer, stating by way of Affirmative Defenses the following:

> "10. The petition in the instant case is fatally defective. Petitioner failed to clearly allege its duly authorized representative or resident agent in the Philippines for the filing and prosecution of the instant case and/or the extent of

> petitioner's counsel's authority if he is the duly authorized representative or resident agent. The "verification and certificate of forum shopping" accompanying the petition shows that it was executed and signed in Tokyo, Japan by Koichi Suzuki, who vaguely stated his "capacity as Representative and President of petitioner" without specifying whether in Japan or in the Philippines. It is settled that the petition filed on behalf of non-resident foreign corporation is fatally defective if there is no allegation identifying its duly authorized representative or resident agent in our jurisdiction. x x x Petitioner also failed to comply with the requirements on certification against non-forum shopping because the said verification and certification was not subscribed. The rule on certification against forum shopping mandates that it should be "under oath" (Sec. 5, Rule 7 of the 1997 Rules of Civil Procedure).
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> 11. The petition in the instant case was filed out of time. Petitioner's two (2) years prescriptive period for recovery of erroneously paid or collected taxes had already elapsed. Petitioner paid the alleged excess royalty taxes on October 26, 1998 and November 10, 1998 but filed its formal claim for tax refund or credit only on December 7, 2000 and December 8, 2000, respectively. x x x.
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> 12. The petition states no cause of action because petitioner merely cited a tax treaty, without showing that it met the conditions necessary for refund or credit of taxes erroneously paid. In COMMISSIONER OF INTERNAL REVENUE V. PROCTER & GAMBLE PHILIPPINE MANUFACTURING CORPORATION and THE COURT OF TAX APPEALS (G.R. No. 66838. December 2, 1991), the Supreme Court reiterates, thus: x x x."

On January 23, 2001, petitioner, through SGV & Co., filed with the BIR another formal request for refund or tax credit of the excess or overpaid withholding tax on royalty payments amounting to P2,593,676.20 for the period September to December 1998, the whole of taxable year 1999 and January to September 2000 ***(Exhibit LL; Paragraph 7, Consolidated Joint Stipulation of Facts and Issues, p. 143, CTA Records)***. Said request for refund covers the double remittance made by Infocom for the months of September and October of 1998, as well as the additional overpayments in the monthly royalty payments to petitioner for the months of December 1998 to September of 2000. Again, petitioner, claiming inaction of the BIR to its administrative claim for refund, filed, on January 24, 2001, a Petition for Review with this court, docketed as CTA Case No. 6229.

Then, on March 5, 2001, respondent filed his Answer to CTA Case No. 6229 stating the following Affirmative Defenses, thus:

> "12. The petition in the instant case is fatally defective and, as such, should have been dismissed outright. The Special Power of Attorney authorizing petitioner's counsels as petitioner's agents for the purpose of the filing and prosecution of the instant case and the petition's "verification and certificate of forum shopping" are patently invalid. The SPA indicates that it was signed by Koichi Suzuki, in his capacity as petitioner's Representative Director and President, but not subscribed by him but by another person in the name of Shiro Komaki. Likewise, the verification and certificate of non-forum shopping indicates that it was signed by Koichi Suzuki but subscribed by Shiro Komaki. Consequently, the authority of petitioner's counsel to file and prosecute the instant case is unclear to say the least. It is settled that the petition filed on behalf of non-resident foreign corporation is fatally defective if there's no clear designation of its duly authorized representative or resident agent in our jurisdiction (THE COMMISSIONER OF CUSTOMS v. K.M.K. GANI, INDRAPAL & CO., and the HONORABLE COURT OF TAX APPEALS, G.R. NO. 73722, February 26, 1990). On the other hand, it is evident that there was no compliance with the requirement on certification against forum shopping because the submitted certification was not "under oath" by the person who executed it. The rule is that failure to comply with the requirement on certification against forum shopping "shall be cause for the dismissal of the case" (Sec. 5, Rule 7 of the Rules of Court).
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> 13. The petition states no cause of action because petitioner merely cited a tax treaty, without showing that it met the conditions necessary for refund or credit of taxes erroneously paid. Tax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the exemption. The burden of proof is upon him who claims the exemption in his favor and he must be able to justify his claim by the clearest grant of organic law or statute and cannot be permitted to exist upon vague implications. (COMMISSIONER OF INTERNAL REVENUE v. PROCTOR (sic) & GAMBLE PHILIPPINES MANUFACTURING CORPORATION and THE COURT OF TAX APPEALS, G.R. No. 66838, December 2, 1991)."

On March 9, 2001, respondent filed a Motion to Dismiss CTA Case No. 6208 ***(p. 74, CTA Records)*** which was opposed by petitioner. The motion was denied by this court in a resolution dated April 17, 2001 ***(p. 90, CTA Records)***. A Motion for Reconsideration ***(p.96, CTA Records)*** subsequently filed by respondent on April 27, 2001 was likewise denied by this court.

On July 24, 2001, petitioner filed a "Motion for Consolidation (of CTA Case Nos. 6208 and 6229)" praying for the consolidation of the said two cases in order to avoid unnecessary costs or delay in these two (2) proceedings. There being no objection to the motion by respondent's counsel, said Motion for Consolidation was granted in open court during the hearing on August 22, 2001 ***(p. 133, CTA Records).***

The issues submitted for the consideration and resolution of the court are as follows:

1. Whether or not the payments for royalties are entitled to the preferential rate under the RP-Japan Tax Treaty;

2. Whether or not the claim for refund is substantiated by documentary evidence; and

3. Whether or not petitioner is entitled to a tax refund or tax credit certificate in the amount of P337,554.00 and P2,593,676.20 representing overpaid withholding tax on royalties for the period covering September 1998 to September 2000.

Petitioner claims that Infocom's royalty payments to petitioner should not be subjected to the withholding tax rate under Section 28 (B) (1) of the 1997 Tax Code pertaining to royalty income received by nonresident foreign corporations. Petitioner's contention is anchored on Article 12 of the RP-Japan Tax Treaty which provides that:

"ARTICLE 12

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

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

(a) 15 per cent of the gross amount of the royalties if the royalties are paid in respect of the use of or the right to use cinematograph films and films or tapes for radio or television broadcasting;

(b) <u>25 per cent of the gross amount of the royalties in all other cases</u>.

(3) Notwithstanding the provisions of paragraph (2), the amount of tax imposed by the Philippines on the royalties paid by a company, being a resident of the Philippines, registered with the Board of Investments and engaged in preferred

pioneer areas of investment under the investment incentives laws of the Philippines to a resident of Japan, who is the beneficial owner of the royalties, shall not exceed 10 percent of the gross amount of the royalties.
x x x" ***(Underscoring supplied)***

With agree with petitioner's contention.

Taking into consideration the transaction entered into by petitioner and Infocom, the special conditions necessary for the application of the 15% or 10% rate as stated in Article 12(2)(a) and (3) of the RP-Japan Tax Treaty do not apply to the parties at hand, as petitioner is not engaged in preferred pioneer areas of investment under Executive Order No. 226, otherwise known as the Omnibus Investments Code, and the transactions in the instant case do not involve the use of or the right to use cinematograph films and films or tapes for radio or television broadcasting. Thus, the correct withholding tax rate on the royalty payments made by Infocom to the petitioner is twenty five percent (25%), pursuant to Article 12 (2) (b) of the RP-Japan Tax Treaty.

Initially, an entitlement to the preferential rates as provided for by the RP-Japan Tax Treaty or any Tax Treaty entered into by the Republic of the Philippines with another country for that matter, is determined by the availability of evidence, particularly documentary proofs showing that erroneous payments have indeed been made to the respondent BIR.

Such documentary proofs are required before an Application for Relief from Double Taxation may successfully be filed with the International Tax Affairs Division (ITAD) of the BIR. Said accompanying documents are listed under BIR Form No. 0901 ***(Exhibit "HH", pp. 351-352, CTA Records)***, or the Application For Relief From Double Taxation filed with the ITAD, and which consist of the following:

1. Letter providing information on transactions covered by treaty provisions and requested tax treaty treatment for such transactions, and legal justification;

2. Original copy of proof of residence of income recipient such as a certification by the tax authority of its country or a certified copy of Articles of Incorporation duly certified by the Securities and Exchange Commission (or its equivalent)/Philippine Consulate/Embassy of the respective country;

3. Original copy of certification from the Philippine Securities and Exchange Commission (SEC) that income recipient is not registered to engage in business in the Philippines;

4. Original copy of Special Power of Attorney (SPA) duly executed by the income recipient authorizing the withholding agent/representative in the Philippines to file a claim for tax treaty relief or certification by the withholding agent/representative that he is the duly authorized representative in the Philippines of the income recipient;

5. Certified copy of duly notarized Royalty Agreement or Technology Transfer Agreement or Licensing Agreement;

6. Photocopy of withholding tax returns which reflect erroneous payments and the Annual Withholding Tax Return or BIR Form 1604 (1743 IR)

After a careful examination of the evidence offered by petitioner, we observed that petitioner has filed with the ITAD on December 7, 2000 and January 23, 2001 its letter requests for Applications for Relief from Double Taxation in the amount of P337,554.00 and P2,593,676.20, respectively, representing overpaid withholding tax on royalty payments made by Infocom for the period of September to October 1998, and September 1998 to September 2000. Said letters provided for the details on the related transactions, and legal bases to support its claims for refund or tax credit.

As for petitioner's proof of residence in Japan, petitioner has submitted with the ITAD its Certificate of Records and Articles of Incorporation, duly authenticated by the Consul General of the Embassy of the Republic of the Philippines in Japan ***(Exhibit "B")***. Petitioner has also submitted with the ITAD Certification of Non-Registration of Corporation/Partnership issued by the SEC to prove that petitioner has not been licensed to do business in the Philippines ***(Exhibit "A")***.

As for the requirement of a Special Power of Attorney ***(SPA)***, petitioner has submitted to the ITAD an SPA appointing SGV & Co. to prepare and file the Application for Relief from Double Taxation, as well as an SPA naming Attys. Suzette L. Lopez, Emmylou G. Patnugot and Marnie Nathalie D. Veloso or any of their representatives as proof that the counsels of record are authorized to do any and all acts in connection with the instant case ***(Exhibits "D" and "E")***.

As for the requirement of a certified copy of a Royalty Agreement, petitioner has submitted with the ITAD the A-Bone Connectivity Agreement executed by petitioner and Infocom on January 22, 1998 as proof of a valid and existing contract between petitioner and Infocom, which gave rise to Infocom's payment of royalties to petitioner ***(Exhibit "F")***.

As for the requirement for photocopies of the withholding tax returns which reflect erroneous payments, petitioner submitted to the ITAD infocom's Monthly Remittance Returns of Income Taxes Withheld for the months of September of 1998 to September of 2000. Said returns were likewise presented in open court and identified by Mr. Avila to prove that royalty payments made by Infocom to the petitioner were withheld to the BIR at the rates specified under Section 28B(1) of the 1997 Tax Code, in excess of the preferential rates provided for by the RP-Japan Tax Treaty ***(Exhibits "I" to "Z", "AA" to "GG")***.

In sum, as petitioner was able to successfully provide documentary proof in support of its claim for refund of excess royalty payments with the ITAD and considering that petitioner was able to present such documentary proof in open court, this court resolves that Infocom's payments for royalties are indeed entitled to the preferential rate under the RP-Japan Tax Treaty.

Anent the last two issues, this court finds that petitioner has clearly and satisfactorily presented the documentary and testimonial proofs required in the establishment of its claim for refund ***(Exhibits "I" to "Z", "AA" to "GG", TSN dated January 24, 2002, May 7, 2002 and August 13, 2002)***. However, the total claim of petitioner for refund or tax credit representing overpaid withholding tax on royalties for the months of September of 1998 to September 2000 is reduced to the amount which is supported by evidence, computed as follows:

Period Covered	Royalty Payments to Asia Internet	Amount of Tax Withheld	RP-Japan Tax Rate	Refundable Amount
		1998-34%		
Sept	none	none	none	none
Oct	none	none	none	none
Nov	1,875,300 (rental for Sept.)	637,602	468,825	168,777
Dec	1,875,300 (rental for Oct.)	637,602	468,825	168,777
	1,875,300 (Sept. double remittance)	637,602	468,825	168,777
	1,875,300 (Oct. double remittance)	637,602	468,825	168,777
	1,880,000	639,200	470,000	169,200
		1999-33%		
Jan.	1,790,700 (rental for Dec.)	623,220	447,675	175,545
	1,833,000 (rental for January)	604,890	458,250	146,640
Feb.	none	none	none	none
Mar.	none	none	none	none
Apr.	none	none	none	none
May	1,795,400 (rental for May)	610,436	448,850	161,586
	1,795,400	529,384.50 (adjusted amount)	448,850*	80,534.50

Jun.	1,788,350	590,155.50	447,087.50	143,068
Jul.	1,809,500	597,135	452,375	144,760
Aug.	none	none	none	none
Sept.	3,828,150 (rental for Aug & Sept.)	1,263,289	957,037.50	306,251.50
Oct.	1,888,460	623,191.80	472,115	151,076.80
Nov.	none	none	none	none
Dec.	1,908,905	629,938.65	477,226.25	152,712.40
		2000-32%		
Jan.	940,000	310,200	235,000	75,200
Feb.	940,000	300,800	235,000	65,800
Mar.	940,000	300,800	235,000	65,800
Apr.	940,000	291,400	235,000	56,400
May	none	none	none	none
Jun.	940,000 (rental for May)	300,800	235,000	65,800
	987,000 (rental for Jun.)	315,840	246,750	69,090
Jul.	none	none	none	none
Aug.	987,000 (rental for Jul.)	315,840	246,750	69,090
	987,000 (rental for Aug.)	315,840	246,750	69,090
Sept.	987,000 (rental for Sept.)	315,840	246,750	69,090
Total				P2,911,840.50

(Exhibit "OO")

The schedule, which has been offered in evidence as Exhibit "OO", is comprised of five columns. The first column provides for the period covered; the second column provides for Infocom's monthly royalty payments to the petitioner; the third column provides for the amounts of taxes withheld, referring to the monthly royalty payments that were subjected to the rates under Section 28B(1) of the 1997 Tax Code; the fourth column provides for the amounts had the monthly royalty payments made by Infocom been subjected under the preferential 25% rate as provided for by Article12(2)(b) of the RP-Japan Tax Treaty; and lastly, the fifth column provides for the refundable amount, which is the difference between the third column (tax withheld under the 1997 Tax Code) and the fourth column (tax withheld under the RP-Japan Tax treaty).

WHEREFORE, the instant petition is **PARTIALLY GRANTED**. Respondent is hereby **ORDERED** to *REFUND* or *ISSUE A TAX CREDIT CERTIFICATE* in favor of petitioner in the total amount of P2,911,840.50 representing petitioner's overpaid withholding tax on royalties for the period September 1998 to September 2000.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Judge

WE CONCUR:

(On Leave)
ERNESTO D. ACOSTA
Presiding Judge

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
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.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Judge