368 Phil. 388

THIRD DIVISION

[G.R. No. 127105, June 25, 1999]

COMMISSIONER OF INTERNAL REVENUE, PETITIONER, VS. S.C. JOHNSON AND SON, INC., AND COURT OF APPEALS, RESPONDENTS.

D E C I S I O N

GONZAGA-REYES, J.:

This is a petition for review on *certiorari* under Rule 45 of the Rules of Court seeking to set aside the decision of the Court of Appeals dated November 7, 1996 in CA-GR SP No. 40802 affirming the decision of the Court of Tax Appeals in CTA Case No. 5136.

The antecedent facts as found by the Court of Tax Appeals are not disputed, to wit:

> "[Respondent], a domestic corporation organized and operating under the Philippine laws, entered into a license agreement with SC Johnson and Son, United States of America (USA), a non-resident foreign corporation based in the U.S.A. pursuant to which the [respondent] was granted the right to use the trademark, patents and technology owned by the latter including the right to manufacture, package and distribute the products covered by the Agreement and secure assistance in management, marketing and production from SC Johnson and Son, U. S. A.
>
> The said License Agreement was duly registered with the Technology Transfer Board of the Bureau of Patents, Trade Marks and Technology Transfer under Certificate of Registration No. 8064 (Exh. "A").
>
> For the use of the trademark or technology, [respondent] was obliged to pay SC Johnson and Son, USA royalties based on a percentage of net sales and subjected the same to 25% withholding tax on royalty payments which [respondent] paid for the period covering July 1992 to May 1993 in the total amount of P1,603,443.00 (Exhs. "B" to "L" and submarkings).
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> On October 29, 1993, [respondent] filed with the International Tax Affairs Division (ITAD) of the BIR a claim for refund of overpaid withholding tax on royalties arguing that, `the antecedent facts attending [respondent's] case fall squarely within the same circumstances under which said MacGeorge and Gillete rulings were issued. Since the agreement was approved by the Technology Transfer Board, the preferential tax rate of 10% should apply to the [respondent]. We therefore submit that royalties paid by the [respondent] to SC Johnson and Son, USA is only subject to 10% withholding tax pursuant to the most-favored nation clause of the

RP-US Tax Treaty [Article 13 Paragraph 2 (b) (iii)] in relation to the RP-West Germany Tax Treaty [Article 12 (2) (b)]' (Petition for Review [filed with the Court of Appeals], par. 12). [Respondent's] claim for the refund of P963,266.00 was computed as follows:

Month/ Year	Gross Royalty Fee	25% Withholding Tax Paid	10% Withholding Tax	Balance
July 1992	559,878	139,970	55,988	83,982
August	567,935	141,984	56,794	85,190
September	595,956	148,989	59,596	89,393
October	634,405	158,601	63,441	95,161
November	620,885	155,221	62,089	93,133
December	383,276	95,819	36,328	57,491
Jan 1993	602,451	170,630	68,245	102,368
February	565,845	141,461	56,585	84,877
March	547,253	136,813	54,725	82,088
April	660,810	165,203	66,081	99,122
May	603,076	150,769	60,308	90,461
	P6,421,770	P1,605,443	P642,177	P963,266"[1]

The Commissioner did not act on said claim for refund. Private respondent S.C. Johnson & Son, Inc. (S.C. Johnson) then filed a petition for review before the Court of Tax Appeals (CTA) where the case was docketed as CTA Case No. 5136, to claim a refund of the overpaid withholding tax on royalty payments from July 1992 to May 1993.

On May 7, 1996, the Court of Tax Appeals rendered its decision in favor of S.C. Johnson and ordered the Commissioner of Internal Revenue to issue a tax credit certificate in the amount of P963,266.00 representing overpaid withholding tax on royalty payments beginning July, 1992 to May, 1993.[2]

The Commissioner of Internal Revenue thus filed a petition for review with the Court of Appeals which rendered the decision subject of this appeal on November 7, 1996 finding no merit in the petition and affirming *in toto* the CTA ruling.[3]

This petition for review was filed by the Commissioner of Internal Revenue raising the following issue:

> THE COURT OF APPEALS ERRED IN RULING THAT SC JOHNSON AND SON, USA IS ENTITLED TO THE "MOST FAVORED NATION" TAX RATE OF 10% ON ROYALTIES AS PROVIDED IN THE RP-US TAX TREATY IN RELATION TO THE RP-WEST GERMANY TAX TREATY.

Petitioner contends that under Article 13(2) (b) (iii) of the RP-US Tax Treaty, which is known as the "most favored nation" clause, the lowest rate of the Philippine tax at 10% may be imposed on royalties derived by a resident of the United States from sources within the Philippines only if the circumstances of the resident of the United States are similar to those of the resident of West Germany. Since the RP-US Tax Treaty contains no "matching credit" provision as that provided under Article 24 of

the RP-West Germany Tax Treaty, the tax on royalties under the RP-US Tax Treaty is not paid under similar circumstances as those obtaining in the RP-West Germany Tax Treaty. Even assuming that the phrase "paid under similar circumstances" refers to the payment of royalties, and not taxes, as held by the Court of Appeals, still, the "most favored nation" clause cannot be invoked for the reason that when a tax treaty contemplates circumstances attendant to the payment of a tax, or royalty remittances for that matter, these must necessarily refer to circumstances that are tax-related. Finally, petitioner argues that since S.C. Johnson's invocation of the "most favored nation" clause is in the nature of a claim for exemption from the application of the regular tax rate of 25% for royalties, the provisions of the treaty must be construed strictly against it.

In its Comment, private respondent S.C. Johnson avers that the instant petition should be denied (1) because it contains a defective certification against forum shopping as required under SC Circular No. 28-91, that is, the certification was not executed by the petitioner herself but by her counsel; and (2) that the "most favored nation" clause under the RP-US Tax Treaty refers to royalties paid under similar circumstances as those royalties subject to tax in other treaties; that the phrase "paid under similar circumstances" does not refer to payment of the tax but to the subject matter of the tax, that is, royalties, because the "most favored nation" clause is intended to allow the taxpayer in one state to avail of more liberal provisions contained in another tax treaty wherein the country of residence of such taxpayer is also a party thereto, subject to the basic condition that the subject matter of taxation in that other tax treaty is the same as that in the original tax treaty under which the taxpayer is liable; thus, the RP-US Tax Treaty speaks of "royalties of the same kind paid under similar circumstances". S.C. Johnson also contends that the Commissioner is estopped from insisting on her interpretation that the phrase "paid under similar circumstances" refers to the manner in which the tax is paid, for the reason that said interpretation is embodied in Revenue Memorandum Circular ("RMC") 39-92 which was already abandoned by the Commissioner's predecessor in 1993; and was expressly revoked in BIR Ruling No. 052-95 which stated that royalties paid to an American licensor are subject only to 10% withholding tax pursuant to Art 13(2)(b)(iii) of the RP-US Tax Treaty in relation to the RP-West Germany Tax Treaty. Said ruling should be given retroactive effect except if such is prejudicial to the taxpayer pursuant to Section 246 of the National Internal Revenue Code.

Petitioner filed Reply alleging that the fact that the certification against forum shopping was signed by petitioner's counsel is not a fatal defect as to warrant the dismissal of this petition since Circular No. 28-91 applies only to original actions and not to appeals, as in the instant case. Moreover, the requirement that the certification should be signed by petitioner and not by counsel does not apply to petitioner who has only the Office of the Solicitor General as statutory counsel. Petitioner reiterates that even if the phrase "paid under similar circumstances" embodied in the most favored nation clause of the RP-US Tax Treaty refers to the payment of royalties and not taxes, still the presence or absence of a "matching credit" provision in the said RP-US Tax Treaty would constitute a material circumstance to such payment and would be determinative of the said clause's application.

We address first the objection raised by private respondent that the certification against forum shopping was not executed by the petitioner herself but by her

counsel, the Office of the Solicitor General (O.S.G.) through one of its Solicitors, Atty. Tomas M. Navarro.

SC Circular No. 28-91 provides:

> "SUBJECT: ADDITIONAL REQUISITES FOR PETITIONS FILED WITH THE SUPREME COURT AND THE COURT OF APPEALS TO PREVENT FORUM SHOPPING OR MULTIPLE FILING OF PETITIONS AND COMPLAINTS
>
> TO : xxx xxx xxx
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> The attention of the Court has been called to the filing of multiple petitions and complaints involving the same issues in the Supreme Court, the Court of Appeals or other tribunals or agencies, with the result that said courts, tribunals or agencies have to resolve the same issues.
>
> (1) To avoid the foregoing, in every petition filed with the Supreme Court or the Court of Appeals, the petitioner aside from complying with pertinent provisions of the Rules of Court and existing circulars, must certify under oath to all of the following facts or undertakings: (a) he has not theretofore commenced any other action or proceeding involving the same issues in the Supreme Court, the Court of Appeals, or any tribunal or agency; xxx
>
> (2) Any violation of this revised Circular will entail the following sanctions: (a) it shall be a cause for the summary dismissal of the multiple petitions or complaints; xxx"

The circular expressly requires that a certificate of non-forum shopping should be attached to petitions filed before this Court and the Court of Appeals. Petitioner's allegation that Circular No. 28-91 applies only to original actions and not to appeals as in the instant case is not supported by the text nor by the obvious intent of the Circular which is to prevent multiple petitions that will result in the same issue being resolved by different courts.

Anent the requirement that the party, not counsel, must certify under oath that he has not commenced any other action involving the same issues in this Court or the Court of Appeals or any other tribunal or agency, we are inclined to accept petitioner's submission that since the OSG is the only lawyer for the petitioner, which is a government agency mandated under Section 35, Chapter 12, title III, Book IV of the 1987 Administrative Code[4] to be represented only by the Solicitor General, the certification executed by the OSG in this case constitutes substantial compliance with Circular No. 28-91.

With respect to the merits of this petition, the main point of contention in this appeal is the interpretation of Article 13 (2) (b) (iii) of the RP-US Tax Treaty regarding the rate of tax to be imposed by the Philippines upon royalties received by a non-resident foreign corporation. The provision states insofar as pertinent that-

> 1) Royalties derived by a resident of one of the Contracting States from sources within the other Contracting State may be taxed by both Contracting States.

2) However, the tax imposed by that Contracting State shall not exceed.

a) In the case of the United States, 15 percent of the gross amount of the royalties, and

b) In the case of the Philippines, the least of:

(i) 25 percent of the gross amount of the royalties;

(ii) 15 percent of the gross amount of the royalties, where the royalties are paid by a corporation registered with the Philippine Board of Investments and engaged in preferred areas of activities; and

(iii) *the lowest rate of Philippine tax that may be imposed on royalties of the same kind paid under similar circumstances to a resident of a third State.*

xxx xxx xxx

(italics supplied)

Respondent S. C. Johnson and Son, Inc. claims that on the basis of the quoted provision, it is entitled to the concessional tax rate of 10 percent on royalties based on Article 12 (2) (b) of the RP-Germany Tax Treaty which provides:

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

x x x

b) 10 percent of the gross amount of royalties arising from the use of, or the right to use, any patent, trademark, design or model, plan, secret formula or process, or from the use of or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.

For as long as the transfer of technology, under Philippine law, is subject to approval, the limitation of the tax rate mentioned under b) shall, in the case of royalties arising in the Republic of the Philippines, only apply if the contract giving rise to such royalties has been approved by the Philippine competent authorities.

Unlike the RP-US Tax Treaty, the RP-Germany Tax Treaty allows a tax credit of 20 percent of the gross amount of such royalties against German income and corporation tax for the taxes payable in the Philippines on such royalties where the tax rate is reduced to 10 or 15 percent under such treaty. Article 24 of the RP-Germany Tax Treaty states-

1) Tax shall be determined in the case of a resident of the Federal Republic of Germany as follows: