ORIGINAL

20-1300

No. _____

In the Supreme Court of the United States

Emilio Torres Luque,
Gabriela Medina,
Emilio Express Inc.,

Petitioners,

vs.

COMMISIONER OF INTERNAL REVENUE SERVICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Brief for Petitioners

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Gabriela Medina,
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In Pro Se

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QUESTIONS PRESENTED

This is a case of first impression. There are no similar cases that either party or the Court's own research could find. The Supremacy Clause of Article VI of the U.S. Constitution states:

> *"This constitution and the laws of the United States which shall be made in Pursuance therefore, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land."*

Approximately 15 million people live in the 2000-mile border region between the United States and Mexico. Many of the citizens of this region, comprised of 4 U.S. States, go back and forth between the two nations on a daily basis. Many live in the U.S. and work in Mexico, vice-versa, or both. It is not unusual for a resident of the border region to earn his income in one country but reside in the other or have residences in both countries due to family circumstances. The application of the US-Mexico tax treaty which went into effect in 1994, and applies to many of these people, needs clarification.

The questions presented are:

1. Is the only method available by the United States-Mexico Tax Convention to not subject taxpayers to double taxation the creation of a system of credits so that each country shall relieve residents of the other from paying taxes on the same

income through a system of tax credits ("RECIPROCITY"), or can dual residents of both countries apply the Treaty Articles to their facts and circumstances and choose one of the two countries as their primary home to compute their tax accordingly?

2. Did the Ninth Circuit Court of Appeals erred when it voided the basis for the Tax Court for granting Summary Judgment to Commissioner and not reversing the Summary Judgment to the Commissioner?

3. Did the Commissioner abused its discretion and acted in bad faith by not following the pronouncements of *Revenue Procedure 2006-54* and Article 26 of the Convention which provide for resolution of disputes by arbitration and subsequently the Tax Court overruled the Mexican Tax Authorities over which it has not authority or jurisdiction?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth District.

OPINIONS BELOW

The unpublished memorandum panel opinion of the Court of Appeals is included in Pet. App. A (2). The denial of the petitions for rehearing *en banc*, the denial of petition for Panel reconsideration and Order that Emilio Express is a proprietorship and not a corporation are included in Pet. App. A (1,3).

The Tax Court opinion and Orders of deficiency stating that tax treaty benefits are by a system of reciprocity and not by exclusion based on residency and granting Summary Judgment to Commissioner are included in Pet. App. B.

JURISDICTION

On February 1, 2019, the Tax court granted the Commissioner's motion for Summary Judgment with deficiencies and denied Petitioners motion for Summary Judgment. On March 6 the Tax Court issued an order that the only way to claim treaty benefits is by a system of reciprocal tax credits.

Petitioners filed a timely appeal to the Ninth Circuit Court of Appeals, which issued a Panel decision on June 12, 2020 affirming, signed by Circuit Judges Leavy, Paez and Bennett. On September 18, 2020, the

Ninth Circuit issued a final order denying Panel Reconsideration and *en banc* rehearing.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The US-Mexico Tax Convention is the law of the land because since it went into effect in 1994, it has not been superseded or abrogated: "*treaties are placed on the same footing and made of like an obligation with an act of legislation. If the two are inconsistent, the one last-in date will control the other*". Whitney v Robinson 124 US 190 (1888), at 194.

Treasury Reg. Section 301.7701(b)-7 (1), Coordination with income tax treaties, which applies to Petitioners as dual-residents, states that Petitioners be "*treated as a nonresident alien of the United States for purposes of computing that individual's United States income tax liability under the provisions of the Internal Revenue Code...*" , .and (2) Computation of tax liability, "*If an alien individual is a dual resident taxpayer, then the rules on residency provided in the convention shall apply for purposes of determining the individual's residence for all purposes of that treaty.*"

INTRODUCTION AND STATEMENT OF THE CASE

Petitioners were audited and were assessed deficiencies after being denied labor costs paid to the drivers (all Mexican nationals) because they were paid in Mexico and being told they could not deduct other expenses because their receipts were in Spanish. Petitioners' tax preparer then created a Corporation to report US deliveries hoping that they could separate income earned and expenses incurred for each country and thus facilitate their tax reporting. However, when they transport cargo between one country to another, part of the income is earned and part of the expenses are incurred in Mexico and the other in the US for the same delivery. It is simply not possible to separate and allocate those amounts. The IRS agent disallowed labor expenses paid to the drivers, who are all Mexican nationals, because Petitioners could not provide documentation to support valid US payroll laws. Furthermore, the agents also disallowed some expenses with receipts in Spanish. Faced with having to pay again for amounts that were not in accordance to their facts and circumstances, prepared amended returns based on the US-Mexico Tax treaty, combining all the income of earned in both countries, and deducting all their expenses incurred in both nations and filing as residents of Mexico and non-residents of the US, as is allowed under 26 USC § 6114, disclosing their treaty based positions on Form 8833 as required.

Petitioners are entitled to claim treaty benefits, their returns were correctly prepared. The finding of the Tax Court that the only way to claim treaty benefits is by a system of credits is not applicable to their facts and circumstances, as the expenses incurred are not tax payments but nevertheless have tax implications. Petitioners are the class of taxpayer for which the Treaty was intended to apply. In the transportation business, some expenses are incurred in one nation for income to be received in another, some income is received in US dollars other in Pesos but for the same load and vice-versa. Their situation is unique as residents of two contiguous nations who chose to make a living by being involved in the chain of commerce promoted by the Treaty. They are law abiding and are entitled to fair treatment. Mexico has accepted their returns as filed for the years under audit. Petitioners have filed their taxes for the years 2006-2019 with the same facts and circumstances as the years under audit (2003-2005), which both Taxing authorities have accepted. The Commissioner should also accept the returns for the years under audit as filed.

REASONS FOR GRANTING THE PETITION

I

A. A System of Credits is not equivalent to an Exemption system

The interpretation of the Tax Court is incoherent with the terms of the treaty and it misrepresents

the facts. Under a system of credits, a taxpayer who pays taxes to a treaty partner from which they derive income can get credited for that amount in his US tax return. However, the Tax Court equates that to an Exemption system in which supposedly a taxpayer would exempt their income from US Taxation, which is not accurate. The Tax Court misinterpreted the application of the Articles of the Treaty to allocate all the income and expenses to the country where the vital economic interests of the Taxpayer are located (See Article 4 of the Treaty for Residency determination) with exempting the income earned in the other country from taxation. The Tax Court states that "*Under an exemption system, two residents of the same country with the same amount of income could be subject to different effective rates of taxation—a resident with low-taxed foreign income would be subject to less total tax than would a resident with purely domestic income*". (App. B (2) page 10). Under this interpretation Petitioners could be charged with tax evasion. Instead what Petitioners have done in preparing their tax return is to consolidate all their income and expenses to what they consider their residency under the criteria of Article 4. The chose Mexico because according to their facts and circumstances that is their "center of vital interests" and also because they are citizens of Mexico and green-card holders in the US. They

compute taxable income (revenue – expenses – applicable deductions allowed by Mexican tax law) and present those tax returns to the Mexican tax authority. Petitioners taxable income as presented to Mexico is usually negative or a very small gain. That amount is then used as the starting point to prepare their US Non-Resident tax returns. Those returns are prepared by a licensed Mexican tax preparer taking advantage of the tax laws legally available to them as is allowed under the convention.

Technical explanation *Article I Paragraph 2*:

"if a deduction would be allowed under the Code in computing the U.S. taxable income of a resident of Mexico, the deduction also is allowed to that person in computing taxable income under the Convention. Paragraph 2 also means that the Convention may not increase the tax burden on a resident of a Contracting State beyond the burden determined under domestic law. Thus, a right to tax given by the Convention cannot be exercised unless that right also exists under internal law."

B. The US and Mexico Are contiguous Nations

In its decision to affirm the decision of the Tax Court, the Ninth Circuit cited UnionBanCal Corp. v. Comm'r, 305 F.3d 976, 986 (9th Cir. 2002) (noting the similar U.S.-U.K. Tax Convention allows both sovereigns to tax residents of the other presuming rules preventing double taxation are followed). (App.

A (2) Page 1). However, the US and U.K. are separated by an Ocean, thousands of miles from each other, whereas Mexico and the US are contiguous, thus the authority is not on point, and since there are no similar cases on point, Petitioners ask this court for guidance and clarification.

II

Basis for granting Summary Judgment no longer exists

The Tax Court granted summary judgment to Commissioner because "Emilio Express is a domestic corporation, see I.R.C. § 7701(a)(30). There is no dispute about this". (App. B (2) page 7).

However, the Ninth Circuit ruled that Emilio Express Inc. is a sole proprietorship (App. A (3)), therefore voiding the basis for granting summary judgment. Furthermore, the Ninth Circuit also based its decision to Affirm on the same fact, i.e. that Emilio Express Inc. was a corporation (App. A (1) page 3), quoting Higgins v. Smith, 308 U.S. 473, 477 (1940)

"A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages".

Since the Corporate form no longer applies, thus all the income and expenses are included in Petitioners' personal returns, and no advantages

resulted from the corporate form.

The granting of summary judgment should be reversed, and all the deficiencies assessed as a result should be vacated.

III

Article 26 of the Treaty and the Guidance of Revenue Procedure 2006-54 were violated

Petitioners were directed by Counsel for the Department of Treasury to seek Competent Authority determination by following the guidelines of Rev. Procedure 2006-54, which Petitioners followed. (Appellants Excerpts of Record pages 29-48). However, after 16 months of deliberations with the Mexican Competent authority, the US unilaterally terminated the discussions because the outcome of the determination regarding residency would favor Petitioners. Rather than terminating the deliberations, the US Competent Authority should have followed the guidelines of Article 26 item 5 and submitted the case to Arbitration, to which the Petitioners were willing to abide by.

Since the Competent Authorities had both deliberated over the amended tax returns presented by Petitioners as residents of Mexico and non-residents of the US, and had agreed that Petitioners owed no income tax to Mexico, when the US Competent Authority notified Petitioners

of that determination on November 6, 2012 (ER page 42), Petitioners accepted that determination, therefore pursuant to RP 2006-54 under Section 12.05 Notification, the matter is final and not subject to further administrative or judicial review. (ER pages 42 and 43), and Appellant's Opening Brief Addendum 3 page 39.

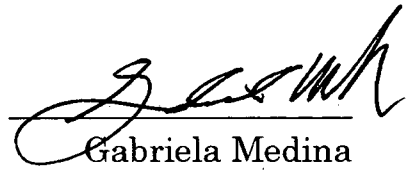
Based on the above guidance, Petitioners submitted their Motion for Summary Judgment to the Tax Court, because the case was "not subject to further administrative or judicial review", supra, however the Tax Court ignored that determination and incorrectly denied Petitioners' Motion and in the process, indirectly overruled the determination of the Mexican Competent Authority and Mexican Tax Authority, over which the Tax Court has no jurisdiction or authority.

CONCLUSION

The petition for a writ of certiorari should be granted and the Court should reverse the Summary Judgment and vacate the Order of deficiencies assessed against Petitioners.

Respectfully submitted on December 14, 2020

Emilio Torres Luque



Gabriela Medina