REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

KIMBERLY-CLARK CORPORATION (U.S.A.) AND KIMBERLY-CLARK (PHILIPPINES) INC.,
Petitioners,

- versus -

C.T.A. CASE NO. 4288

COMMISSIONER OF INTERNAL REVENUE,
Respondent.
x - - - - - - - - - - - - x

1/30/92

D E C I S I O N

This is a claim for refund of alleged erroneously overpaid withholding tax on royalty.

Petitioner, Kimberly-Clark Corporation (U.S.A.) is a United States Corporation with principal office at Neenah, Wisconsin, U.S.A., while petitioner, Kimberly-Clark (Philippines) Inc. is a corporation organized and existing under the laws of the Philippines, with principal office at Makati, Metro Manila.

On November 1, 1983, petitioner Kimberly-Clark (Philippines) Inc. entered into a licensed, technological and marketing assistance agreement with petitioner Kimberly-Clark Corporation of USA, whereby in consideration for the use of the latter's trademarks, patents and technology on consumer products, the former was obliged to pay the latter one and one-half (1 1/2%) percentum royalty based on the total net sales of the former.

On July 2, 1984, petitioner likewise entered into another license, technological and marketing agreement in the manufacture and sale of cigarettes, paper and other fine products. Kimberly-Clark (Phils.) was obliged to pay Kimberly-Clark Corporation (USA) one and one-half (1 1/2%) percentum royalty based on the former's net sales of the licensed products and an additional one (1%) percentum royalty based on the total net sales of cigarettes and other fine paper products.

Both licensing agreements were duly registered with the Technology Transfer Board of the Ministry of Trade and Industry.

Pursuant to the said agreements petitioner, Kimberly-Clark (Phils.) Inc., alleged that it withheld from the remittable royalties to Kimberly-Clark USA in the amount of P12,634,688 for June 1986 to October 1987, the total amount of P3,158,670 which is equivalent to 25% of the royalties. However, on November 13, 1987, petitioner through its counsel, Bito, Misa & Lozada, obtained from Mr. Bienvenido A. Tan, Jr., then Commissioner of Internal Revenue, BIR Ruling

No. 360-87, holding the royalty payments by virtue of the aforementioned Licensing Agreements subject to 10% withholding tax pursuant to the RP-US Tax Treaty Agreement in relation to the RP-West Germany Tax Treaty. Accordingly, in a letter dated December 19, 1987, duly stamped received by the Bureau of Internal Revenue on December 22, 1987, petitioner through its said counsel, filed a Claim for Refund of the excess tax withheld in the amount of P1,895,202.00. To date respondent has not rendered his decision on petitioners claim for refund and because the two year period within which a suit may be brought to enforce this claim was about to expire, petitioner filed this instant petition for review before this Court.

Respondent on his part denies in general all material facts in the petition for review and as special and affirmative defenses alleged as follows:

a. Petitioner, Kimberly-Clark, Phils. Inc. is not the proper party to claim the refund but Kimberly-Clark Corporation U.S.A.;

b. Petitioner Kimberly-Clark U.S.A. Corporation has no legal capacity to sue. In order to maintain a suit in the

Philippines, petitioner corporation must be registered with the Securities and Exchange Commission pursuant to Section 69 of the Corporation law;

c. That the tax in question was paid in accordance with law;

The issues to be resolved are as follows:

(1) Whether or not Kimberly-Clark (Phils.) Inc. and Kimberly-Clark Corporation (U.S.A.) have legal capacity to institute legal action to claim for refund;

(2) Whether or not petitioners have in fact overpaid the withholding tax or royalties.

It is noteworthy that the first issue has recently been resolved by the Supreme Court in the case of ***Commissioner of Internal Revenue, Petitioner vs. Procter & Gamble Philippine Manufacturing Corp. et. al. Respondent, G.R. No. 66838*** dated December 2, 1991. This settles the original conflicting decisions rendered by the Second Division of the Supreme Court on the same issue on April 15, 1988 and the case of ***Commissioner of Internal Revenue, Petitioner vs. Wander Philippines, Inc. and the Court of Tax***

Appeals, Respondent, G. R. 68375, April 15, 1988 rendered by the Third Division of the Supreme Court on the same issue. The December 2, 1991 resolution by the Supreme Court, en banc, was a result of a motion for reconsideration by private respondent from the said original decision by the Second Division of the Supreme Court.

These petitions for review instituted by the Commissioner of Internal Revenue before the Supreme Court were in turn the result of the favorable decisions rendered by this court in C.T.A. Case Nos. 2883 & 2884, declaring Procter & Gamble, PMC, and Wander Philippines, Inc., respectively, as the proper entity who should claim for refund or credit of overpaid withholding tax on dividends.

As affirmed in the aforementioned Supreme Court resolution en banc, the highest court concluded that by any reasonable standard Procter & Gamble (Phils.) should be regarded as a party in interest or as a person having sufficient legal interest, to bring suit for refund of taxes it believes were illegally collected from it.

This conclusion is arrived at by the Supreme Court after analyzing Section 306 in relation to Sections 309 of the National Internal Revenue Code which requires the filing of a claim for refund by the taxpayer with the Commissioner of Internal Revenue within two (2) years after the payment of the tax or penalty. The ultimate issue to be resolved is whether or not P & G Phils. is a taxpayer under Section 309 (a) of the NIRC. We quote below the discussion made by the Supreme Court on the issue:

> "The Term "taxpayer" is defined in our NIRC as referring to "any person subject to tax imposed by the Title (on Tax on Income)."[2] It thus becomes important to note that under Section 53 (c) of the NIRC, the withholding agent who is "required to deduct and withhold any tax" is made "personally liable for such tax" and indeed is indemnified against any claims and demands which the stockholder might wish to make in questioning the amount of payments effected by the withholding agent in accordance with the provisions of the NIRC. The withholding agent, P & G - Phils., is directly and independently liable[3] for the correct amount of the tax that should be withheld from the dividend remittances. The withholding agent is moreover, subject to and liable for deficiency assessments, surcharges and penalties should the amount of the tax withheld be finally found to be less than the amount that should have been withheld under law.
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> A "person liable for tax" has been held to be a "person subject to tax" and properly considered a "taxpayer." The terms "liable for tax" and "subject to tax" both connote legal obligation or duty to pay a tax. It is very difficult, indeed conceptually impossible, to consider a person who is

> statutory made "liable for tax" as not "subject to tax". "By any reasonable standard, such a person should be regarded as a party in interest, or as a person having sufficient legal interest, to bring a suit for refund of taxes he believes were illegally collected from him." (Underscoring supplied.)

The high court continues its discussion of the issue by citing the case of ***Philippine Guaranty Company, Inc. vs. Commissioner of Internal Revenue, 15 SCRA 1*** (1965), where the Supreme Court pointed out that a withholding agent is in fact the agent both of the government and of the taxpayer, and that the withholding agent is not an ordinary government agent:

> "The law sets no condition for the personal liability of the withholding agent to attach. The reason is to compel the withholding agent to withhold the tax under all circumstances. In effect, the responsibility for the collection of the tax as well as the payment thereof is concentrated upon the person over whom the Government as jurisdiction. Thus, the withholding agent is constituted the agent of both the Government and the taxpayer. With respect to the collection and/or withholding of the tax, he is the Government's agent. In regard to the filing of the necessary income tax return and the payment of the tax to the Government, he is the agent of the taxpayer. The withholding agent therefore, is no ordinary government agent especially because under Section 53 (c) he is held personally liable for the tax he is duty bound to withhold; whereas the Commissioner and his deputies are not made liable by law." (Underscoring supplied.)

If, as pointed out in Philippine Guaranty case, the withholding agent is also an agent of the beneficial owner of the dividends with respect to the filing of the necessary income tax return and with respect to actual payment of the tax to the government, such authority may reasonably be held to include the authority to file a claim for refund and to bring an action for recovery of such claim. This implied authority is especially warranted where, as in the instant case, the withholding agent is the wholly owned subsidiary of the parent-stockholder and therefore at all times, under the effective control of such parent-stockholder. In the circumstances of this case, it seems particularly unreal to deny the implied authority of P & G Phil. to claim a refund and to commence an action for such refund.

On the basis of the above discussions, P & G Phil. is properly regarded as a "taxpayer" within the meaning of Section 30 of the NIRC and as impliedly authorized to file the claim for refund and the suit to recover such claim.

On the second issue, whether or not petitioners have in fact overpaid the withholding tax on royalties.

The claim for refund amounting to P1,895,202.00 represents the difference between the 25% tax withheld and the correct 10% tax on royalties arising in the Philippines and payable to a U. S. corporation pursuant to the RP-US Tax Treaty. This court concurs with the opinion rendered by then Commissioner of Internal Revenue, Bienvenido A. Tan Jr., (BIR Opinion No. 360-87 dated November 13, 1987, Exh. RR.) that pursuant to Article 13, paragraph 2 <b> (iii) of the R.P.-U.S. Tax Treaty, the tax imposable on royalties derived by a resident of the United States from sources within the Philippines shall be 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. In as much as under Article 12, paragraph (2) (b) of the RP-West Germany Tax Treaty the tax on royalties imposable to a resident of West Germany shall not exceed 10% of the gross amount of royalties, this lower rate shall apply as well to a resident of the United States.

To prove its claim, petitioners presented its evidences on the alleged amount sought to be refunded. It submitted its monthly remittances to the BIR as well as its corresponding official receipts. It also submitted the corresponding vouchers charged by affiliated company to prove that royalties were actually paid.

The amount of P1,895,202.00 is proven by the presentation of the following exhibits and is computed as follows:

1986

MONTH	EXHIBIT	AMOUNT	Tax at 25%	Tax at 10%	OVERPAYMENT
June	A-3 to A-5	P893,318.00	P223,330.00	P89,332.00	P133,998.00
July	B-3 to B-5	710,319.00	177,580.00	71,032.00	106,548.00
Aug.	C-3 to C-5	747,289.00	186,822.00	74,729.00	112,093.00
Sept.	D-3 to D-5	744,776.00	186,194.00	74,478.00	111,716.00
Oct.	E-3 to E-5	488,242.00	122,061.00	48,824.00	73,237.00
Nov.	F-3 to F-5	656,129.00	164,032.00	65,613.00	98,419.00
Dec.	G-3 to G-5	473,051.00	118,263.00	47,305.00	70,958.00
1987					
Jan.	H-3 to H-5	630,483.00	157,621.00	63,048.00	94,573.00
Feb.	I-3 to I-5	801,685.00	200,421.00	80,169.00	120,252.00
Mar.	J-3 to J-5	819,058.00	204,765.00	81,906.00	122,859.00
April	K-3 to K-5	663,459.00	165,865.00	66,346.00	99,519.00
May	L-3 to L-5	390,966.00	97,742.00	39,097.00	58,645.00
June	M-3 to M-5	771,164.00	192,791.00	77,116.00	115,675.00
July	N-3 to N-5	962,068.00	240,517.00	96,207.00	144,310.00
Aug.	O-3 to O-5	908,286.00	227,072.00	90,829.00	136,243.00
Sep.	P-3 to P-5	941,081.00	235,270.00	94,108.00	141,162.00
Oct.	Q-3 to Q-5	1,033,294.00	258,324.00	103,329.00	154,995.00
TOTAL					P1,895,202.00

Petitioners have substantiated its claim for refund and thus entitled to the amount sought to be refunded.

WHEREFORE, in view of the foregoing, respondent is hereby ordered to refund to petitioners the amount of P1,895,202.00 representing excess payments of withholding taxes

on royalties paid to petitioner, Kimberly-Clark Corporation (U.S.A.) from June 1986 to October 1987.

SO ORDERED.

Quezon City, Metro Manila, January 30, 1992.

ERNESTO D. ACOSTA
Associate Judge

I CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

C E R T I F I C A T I O N

I hereby certify that this decision was reached after due consultation between the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

CONSTANTE C. ROAQUIN
Associate Judge