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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

MCCANN GROUP OF COMPANIES, INC.,
(Formerly MCCANN ERICKSON PHILS., INC.),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 5148

Promulgated:
AUG 06 1997 [signature]

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DECISION

This is a petition for review filed by the petitioner, MCCANN Group of Companies, Inc., formerly MCCANN ERICKSON PHILS, INC., against the respondent, Commissioner of Internal Revenue, claiming for the refund of P6,273,952.64, allegedly representing the excess or overpaid final tax withheld and remitted to the BIR by the petitioner on its royalty payments to MCCANN Erickson Marketing, Inc. covering the period January 1, 1986 to October 31, 1993.

The antecedent facts of the case are as follows:

On January 1, 1986, petitioner, a corporation duly organized and existing under the laws of the Philippines, entered into a technical assistance and a consultancy agreement for a period of five (5) years with MCCANN Erickson Marketing, Inc., a corporation organized and existing under the laws of the State of New York, USA. Said agreement was subsequently renewed by the parties for another period of five (5) years, effective January 1, 1991. Both agreements were duly registered with the Bureau of Patents, Trademark and Technology Transfer (BPTTT) of the Department of Trade and Industry . Pursuant to the said agreement, petitioner made the required royalty payments at the rate of one percent (1%) of petitioner's billings to MCCANN Erickson Marketing, Inc. in New York, USA.

During the period January 1, 1986 up to July 31, 1992, petitioner regularly withheld and remitted to the BIR the final withholding tax of ten percent (10%) of the royalty payments it made to MCCANN Erickson Marketing, Inc. in accordance with Article 13 of the RP-US Tax Treaty in relation to Article 12 of the RP-West Germany Tax Treaty.

On July 1, 1992, respondent issued Revenue Memorandum Circular (RMC) No. 39-92, stating that the applicable withholding tax rate on royalty payments under the RP-US Tax Treaty should be twenty five percent (25%) and not ten percent (10%) as previously ruled by the respondent.

As a result thereof, petitioner on October 30, 1992 filed its BIR Form 1743W and paid in addition to the tax originally withheld the amount of P4,491,962.39, representing the additional 15% withholding tax on royalty payments for the period January 1, 1986 to July 31, 1992.

Thereafter, the petitioner, in compliance with the said Revenue Memorandum Circular No. 39-92, subjected its quarterly royalty payments to twenty five percent (25%) withholding tax beginning August 1, 1992 to October 31, 1993.

After taking into account the decision of this Court in the case of **IBM Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4308, March 31, 1993,** which ruled that the correct tax rate on royalties paid to US residents should be 10% and not 25%, applying the "most favored nation clause" of the RP-US Tax Treaty , petitioner filed with the BIR a letter, dated June 10, 1994, requesting for the refund of the amount of ₱6,273,952.64, representing the alleged excess or overpaid final taxes withheld and remitted by the petitioner to the BIR on royalty payments to MCCANN Erickson Marketing, Inc., covering the period January 1, 1986 to October 31, 1993.

Petitioner's claim for refund was not acted upon by the respondent since the time it was filed. Hence, the petitioner, on September 9, 1994, filed with this Court the instant petition for review.

Respondent did not dispute the existence of Article 13 of the RP-US Tax Treaty, and Article 12 of the RP-West Germany Tax Treaty, and the Court of Tax Appeals ruling in the case of IBM v. Commissioner of Internal Revenue, CTA Case No. 4308, *supra.*, she argued and pointed that:

1. Petitioner is not the proper party in interest it being merely a withholding agent;

2. Petitioner has neither shown nor proved that it is authorized by the MCCANN Erickson Marketing, Inc. to file the subject petition for review with this Honorable Court; and

3. Petitioner, who has the burden of proving that it is entitled to tax refund, has failed to establish that the tax subject of its claim for refund was erroneously or illegally collected. Hence, the petition should be dismissed.

For the proper adjudication of the case at bar, the following ISSUES must be resolved by this Court, to wit:

I. WHETHER OR NOT PETITIONER HAS THE LEGAL CAPACITY TO CLAIM FOR REFUND AND TO BRING AN ACTION FOR RECOVERY OF SUCH CLAIM;

II. WHETHER OR NOT ROYALTY PAYMENTS OF THE PETITIONER TO MCCANN ERICKSON MKTG., INC. SHOULD BE SUBJECTED TO THE 25% FINAL WITHHOLDING TAX OR 10% AS PROVIDED IN ARTICLE 13 OF THE RP-US TAX TREATY IN RELATION TO ARTICLE 12 OF THE RP-WEST GERMANY TAX TREATY; AND

III. WHETHER OR NOT PETITIONER WAS ABLE TO ESTABLISH/PROVE THAT IT IS ENTITLED TO THE AMOUNT SOUGHT TO BE REFUNDED.

Anent the first issue regarding the legal capacity of the withholding agent to institute the instant petition, the Supreme Court in the case of **Commissioner of Internal Revenue v. Procter and Gamble Philippines Manufacturing Corporation, 204 SCRA 377,** has ruled that a withholding agent can be regarded as a "taxpayer" within the meaning of Sec. 309, NIRC and therefore impliedly authorized to file the claim for refund and the suit to recover such claim. Pertinent portions of said decision is quoted hereunder:

> "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:
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> > *'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 has 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.'*

> If, 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.
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> There is nothing to preclude the BIR from requiring P&G-Phil. to show some written or telexed confirmation by P&G-USA of the subsidiary's authority to claim the refund or tax credit and to remit the proceeds of the refund, or to apply the tax credit to some Philippine tax obligation of P&G-USA, *before actual payment of the refund or issuance of a tax credit certificate.* What appears to be vitiated by basic unfairness is petitioner's position that, although P&G-Phil. is directly and personally liable to the Government for the taxes and any deficiency assessments to be collected, the Government is not legally liable for a refund simply because it did not demand a written confirmation of P&G-Phil.'s implied authority from the very beginning. A sovereign government should act honorably and fairly at all times, even *vis-a-vis* taxpayers.

Applying the above-mentioned decision of the Supreme Court to the case at bar, this Court hereby resolved the first issue in favor of the petitioner.

Apropos to the second issue, this Court reiterates its ruling in the case of **IBM Philippines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 4308, March 31, 1993**, that the correct final tax imposable on royalties under the RP-US

Tax Treaty should be ten percent (10%) and not twenty five percent (25%) as claimed by the respondent. Pertinent portion of the decision reads:

> "This Court is of the persuasion that petitioner's stand is correct and concurs with the opinion rendered by then Commissioner of Internal Revenue, Bienvenido Tan, Jr., (BIR Ruling No. 456-88, supra.), that under the most favored nation provision of the R.P.-U.S. Tax Treaty [Article 13, paragraph 2(b)(iii)], the tax imposable on royalties derived by a resident of the United States from sources within the Philippines shall be the lowest rate of Philippines tax that may be imposed on royalties of the same kind paid under similar circumstances to a resident of a third state. Article 12, paragraph 2(b) of the R.P.-West Germany Tax Treaty, provides that royalties arising in the Philippines and paid to a resident of West Germany may also be taxed in the Philippines, but that tax so charged shall not exceed 10% of the gross amount of royalties. Said treaty also provides that for as long as the transfer of technology under Philippine law, is subject to approval, the limitation of the tax rate in case of royalties arising in the Philippines, apply if the contract giving rise to such royalties has been approved by Philippine competent authorities.
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> Thus, inasmuch as the Agreement between World Trade and IBM Phils. as well as the Agreement between IBM and IBM Phils. had been approved by the Central Bank of the Philippines, royalties arising in the Philippines and payable to World Trade as well as to IBM by IBM Phils. should be taxed at the rate of 10% because said rate is indicated in the R.P.-West Germany Tax Treaty and pursuant to Article 13, paragraph 2(b)(iii), of the R.P.-U.S. Tax Treaty.

With regard to the third issue, this Court finds that petitioner has excessively remitted to the respondent the total amount of ₱6,273,952.64, representing the overpaid 15% final withholding taxes on royalties, covering the period January 1, 1986 to October 31, 1993.

WHEREFORE, premises considered, judgment is hereby rendered **GRANTING** the petition for review. Respondent is hereby **ORDERED to REFUND** to the petitioner the total amount of ₱6,273,952.64, representing the excess payments of final withholding taxes on royalties from January 1, 1986 to October 31, 1993. No pronouncement as to costs.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that this 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.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals