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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

GILLETTE (PHILIPPINES), INC.,
Petitioner,

- versus - **C.T.A. CASE NO. 4248**

THE COMMISSIONER OF INTERNAL REVENUE
Respondent.

Promulgated:
FEB 08 1995

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D E C I S I O N

This case involves petitioner's claim for refund or tax credit of overpaid withholding tax at source on royalties in the amount of P414,613.48.

The undisputed material facts are as follows:

Petitioner is a domestic corporation duly organized and existing under Philippine laws. Respondent is the Commissioner of Internal Revenue duly authorized and empowered under the National Internal Revenue Code to grant refunds of overpaid and erroneously or illegally collected internal revenue taxes.

Sometime December 1, 1985, petitioner entered into a License Agreement (Exh. G) with Gillette Company, a corporation duly organized and existing under the laws of the State of Delaware, U.S.A., to allow the former to manufacture and distribute the products of Gillette Company, U.S.A., with the right to use it's Trademark and Technology. This License Agreement was registered with the Ministry of Trade and Industry-Technology Transfer Board under Certificate of Registration No. 0699 (Exh. D) issued on October 8, 1986, which is valid for five (5) years from December 1, 1985 to November 30, 1990.

For the years 1986 to 1988, petitioner remitted royalty payments to Gillette Co., U.S.A.. Petitioner paid and remitted to the BIR withholding taxes on all royalties paid to Gillette Co., U.S.A., at the rate of 25% or equivalent to the sum of P691,022.44. On April 8, 1988, petitioner filed a claim for refund or tax credit (Exh. A) with the respondent on the alleged overpaid withholding tax on royalties for the years 1986, 1987 and 1988 in the total amount of P414,613.48, computed as follows:

Payment for	25% Withholding Tax	Should be 10%	Alleged Overpayment
1986	P272,172.04	P108,868.81	P163,303.23
1987	350,426.42	140,170.56	210,255.86
1988	68,423.98	27,369.59	41,054.39
	P691,022.44	P276,408.96	P414,613.48

On same date, petitioner likewise filed a petition for review with this Court in order to interrupt the running of the prescriptive period to file a judicial claim for refund or tax credit. This is in line with Our decision in the case of **Far East Bank**

and Trust Company/Foreign Currency Deposit Unit vs. Commissioner of Internal Revenue, C.T.A. Case Nos. 4356 and 4441, May 5, 1994, where We ruled in favor of the simultaneous filing of the administrative claim for refund with the BIR and the filing of a petition for review with the Court, thus:

> "In Case No. 4356, the written claim for refund of the 1986 excess tax payment of P3,993,067.04 was filed with the BIR on April 14, 1989 and on the same day the court action was commenced.
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> x x x x x x x x x.
>
> It should be noted that herein petitioner adopts the calendar year basis of reporting its income and expenses. For calendar year ending December 31, 1986, petitioner filed its Income Tax Return on April 15, 1987. The Tax Code states it has on or before April 15, 1987 to file said return. Petitioner has then two years within which to file a written claim for refund with the Commissioner of Internal Revenue and with the Court counted from April 15, 1987, the date when petitioner is required to file its final adjustment return. These requirements were duly complied with by petitioner. On April 14, 1989, petitioner filed in writing with the Commissioner of Internal Revenue a claim for refund and on the same day filed a court suit for the refund of the alleged excess tax payments. Both the written claim for refund and the petition for review were filed within the two-year period as the law expressly and clearly provides. Therefore, the claim for refund in CTA Case No. 4356 has not yet prescribed."

In the more recent case of **Commissioner of Internal Revenue vs. Bank of the Philippine Islands, as Liquidator of Paramount Acceptance Corporation and The Court of Tax Appeals, CA-G.R. SP No. 34102, September 19, 1994,** the Court of Appeals affirmed our Decision in the case of **Bank of the Philippine Islands, as Liquidator of Paramount Acceptance Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4257, December 20, 1993,** where it held:

> "It is clear that a claim for refund should be filed with the Commissioner of Internal Revenue as a prerequisite before court action on tax refund cases can be commenced and that the suit for refund must be filed within two years from the date of payment of the tax. It is also clear from Section 204 that the claim for refund must be filed with the Commission (sic) within two years from payment of the tax. When the two-year period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue has not been acted upon by him, for the protection of the interest of the taxpayer, he should file a petition for review with the Court of Tax Appeals within the said two-year period; otherwise, if the decision of the Commissioner is adverse to the taxpayer and it was made after the two-year period he can no longer appeal the same to the Court of Tax Appeals (Gonzales and Gonzales, National Internal Revenue Code, 1988 ed., p. 384, citing Gibbs vs. Collector of Internal Revenue and Court of Tax Appeals, 107 Phil. 232; Johnston Lumber Co. vs. C.T.A., 101 Phil. 151).
>
> Accordingly, We do not agree with appellant that it is necessary for the Commissioner of Internal Revenue to act unfavorably on the claim for refund before the Court of Tax Appeals may acquire jurisdiction. This is so because of the positive

requirement of Section 230 and the doctrine that delay of the Commissioner in rendering decision does not extend the peremptory period fixed by the statute.

Neither are We convinced that the law requires that the claim for refund should have been filed at the earliest instance in order to give the Commissioner an opportunity to rule on it and the court to review the ruling of the Commissioner of Internal Revenue on appeal. The law fixed the same period - two years - for filing a claim for refund with the Commissioner (Sec. 204, par. 3), and for filing suit in court (Sec. 230), unlike in protests of assessment under Sec. 229 which fixed the period (thirty days from receipt of decision) for appealing to the court, thus clearly implying that the prior decision of the Commissioner is necessary for the court to take cognizance of the case. While it may be true that the Court of Tax Appeals is essentially an appellate court, and should act only upon claims for refund that are unfavorably decided by the Commissioner, the remedy is addressed to the legislature.

The taxpayer cannot be faulted for taking advantage of the full two-year period prescribed by law in filing his claim for refund. The Court of Tax Appeals itself acknowledges that the claim for refund with the Commissioner can be pending simultaneously with a suit for refund filed with said court:

> "xxx. In fact the records will show that from the time Petitioner filed its claim for refund either from April 2, 1986 or April 14, 1988 up to promulgation of this decision on December 20, 1993, respondent has failed to act favorably or unfavorably on the said claim for refund. The institution of a petition for review

> covering claim for refund filed with the Bureau of Internal Revenue has never been a bar to the continuous administrative processing of claim for refund. In fact in number of cases filed before this court, petition for review were withdrawn afterwards by the petitioner from this court by reason of the grant of the refund by the respondent." (See Order denying Motion for Reconsideration dated April 27, 1994)"

Petitioner contends that Article 13 of the RP-US Tax Treaty provides for the preferential treatment of tax on royalty from 25% to a much lower rate if imposed on royalties of the same kind paid under similar circumstances to a resident of a third State, to wit:

> "**Article 13**
> **Royalties**
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> 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 other Contracting State shall not exceed:
>
> (a) In the case of the United States, 15 percent of the gross amount of the royalties, and
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> (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." (Emphasis supplied.)

With the effectivity of the RP-West Germany Tax Treaty on January 1, 1985, petitioner asserts that the lower rate of 10% should be applied instead of the 25% rate under the most-favored nation clause of the RP-US Tax Treaty. Article 12(2)(b) of the RP-West Germany Tax Treaty imposes a lower rate of 10% on the gross amount of royalties arising from the use of any trademark derived from sources within the Philippines, pertinent portion thereof reads:

"Article 12
Royalties

1. x x x x x x x x x.

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:

(a) x x x x x x x x x.

(b) 10 per cent of the gross amount of royalties arising from the use of, or the right to use, any patent, trademark, design or model, plan, secret
249 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."

The registration of the License agreement with the Technology Transfer Board as evidence by petitioner's Certificate of Registration No. 0699 only proves that the contract has been approved by the Philippine competent authorities in consonnance with the above-mentioned treaty in relation with BIR Ruling No. 263-86, November 27, 1986, decretal portion of which reads as follows:

> "Such being the case and in as much as the license agreement between McGeorge and McDonald's has been approved by the Transfer Technology Board of the Ministry of Trade and Industry, royalties arising in the Philippines and payable to McDonald's (USA) by McGeorge Food Industries, Inc., are subject to the Philippine tax at the rate of 10% because this rate appears in the RP-West Germany Tax Treaty and pursuant to Article 13, paragraph 2(b)(iii) of the RP-US Tax Treaty. The said tax shall be withheld and paid in the same manner and subject to the same conditions as provided in Section 52 of the Tax Code, as amended."

Finally, petitioner invokes BIR Ruling No. 087-88, dated March 8, 1988, which specifically refers to the letter-request of
250 Gillette (Philippines), Inc., herein petitioner, granting it the

privilege to avail the benefits provided under Article 13(2)(b)(iii) of the RP-US Tax Treaty, regarding the lower rate of Philippine tax that may be imposed on royalties paid to Gillette Co., U.S.A., by applying the rate of 10% on royalties as provided for in the RP-West Germany Tax Treaty.

Respondent remonstrate in her answer that petitioner is not the proper party to claim for the refund or tax credit instead it should be Gillette Co., U.S.A., for it is the income earner from whose account the tax was withheld. She added that the petition was premature for the claim is still pending investigation by the BIR. Furthermore, the petition did not allege the dates when the taxes sought to be refunded or credited were paid. Assuming that petitioner is entitled to the refund or tax credit sought, the claim prior to April 8, 1986 has prescribed, the petition having been filed on April 8, 1988. Petitioner has the burden of proof in claiming entitlement to the refund or tax credit sought.

While the case was being heard, respondent rendered a decision, dated August 28, 1992 (Exh. K), denying petitioner's claim for refund or issuance of a tax credit pursuant to Revenue Memorandum Circular No. 39-92, dated July 1, 1992, which revoked all BIR Rulings allowing the 10% rate of withholding tax on royalties to U.S. recipients effective January 21, 1992. Respondent stressed that as a rule, a resident of a third state is not entitled to the preferential treatment of 10% because the payment of the tax on royalty is not similar since there is a matching credit in Germany (20% for royalties) while there is no

The main issue is whether or not petitioner is entitled to the refund or issuance of a Tax Credit Certificate in the amount of P414,613.48, representing allegedly overpaid withholding tax on royalties paid to Gillette Company, U.S.A., for the years 1986 to 1988.

Deliberating upon the allegations adduced by petitioner and the arguments raised by respondent in her answer, and there being no material objections raised on the evidence presented by petitioner, we find the petition meritorious.

With respect to respondent's contention that petitioner is not the proper party to file the claim for refund or tax credit, the Supreme Court has ruled in a Resolution En Banc in the case of **Commissioner of Internal Revenue vs. Procter & Gamble Philippine Manufacturing Corporation and The Court of Tax Appeals, G.R. No. 66838, December 2, 1991, 204 SCRA 377,** that:

> "Section 309(3) of the NIRC, in turn, provides:
>
> 'Section 309. *Authority of Commissioner to Take Compromises and to Refund Taxes.* - The Commissioner may:
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> x x x x x x x x x.
>
> (3) credit or refund taxes erroneously or illegally received, x x x. *No credit or refund* of taxes or penalties *shall be allowed unless the taxpayer files in writing* with the Commissioner *a claim for credit or refund* within two (2) years after the payment of the tax or penalty.' (As amended by P.D. No. 69) (Emphasis supplied)

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Since the claim for refund was filed by P&G-Phil.

> under Section 309(3) of the NIRC? The term '*taxpayer*' is defined in our NIRC as referring to '*any person subject to tax* imposed by the Tilte [on Tax on Income].' 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-Phil., is *directly and independently liable* 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.
>
> 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 statutorily 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."

The respondent further argued that Revenue Memorandum Circular (RMC) No. 39-92, July 1, 1992, revoked all rulings previously issued by the BIR allowing the availment of the benefits of the "most favored nation's clause". A careful scrutiny of RMC No. 39-92 will show that the revocation is <u>not</u> to be given any retroactive application by virtue of Section 246 of the Tax

Code. Since BIR Ruling No. 87-88, was issued on March 8, 1988 or prior to RMC No. 39-92 the same being a ruling previously issued cannot be revoked by RMC No. 39-92, since the Circular does not provide for its retroactive application. Otherwise, it would be prejudicial to the interest of the taxpayer.

On the merits of petitioner's claim for refund or tax credit of overpaid withholding taxes on royalties, petitioner has overcome the burden of proof by showing the legal provisions that would entitle it to be granted the refund or credit sought for. It has also presented to the Court the documentary evidence to prove the actual 25% tax withheld and remitted to the BIR amounting to P691,022.44, as follows:

1. Annual Return of Final Income Tax Withheld for the years:

   (a) 1986 - Exh. H

   (b) 1987 - Exh. I

2. Attachments to BIR Form 1743-D [Annual Return of Final Income Tax Withheld (Expanded Withholding Tax System)] for the years:

   (a) 1986 (Exh. H-10) showing that Gillette Co., U.S.A., is the payee of the royalties (Exh. H-11) and the same was filed with the BIR showing the stamp receipt thereof (Exh. H-12); and

   (b) 1987 (Exh. I-15) indicating Gillette Co., U.S.A. as the payee of the royalties and that this document was filed with the BIR (Exh. I-16); and

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3. CB Confirmation Receipts evidencing payment of withholding tax on royalties for the years 1986, 1987 and 1988 - Exhs. H-1, H-2-a to H-9-a, inclusive, H-1-a to H-12-a, inclusive, I-13 and I-14; and
4. BIR Payment Order - Exhs. H-1-a, H-2 to H-9, inclusive, I-1 to I-12, inclusive, I-13-a and I-14-a; and
5. Certification, dated January 13, 1992, issued by the Assistant Chief, Revenue Accounting Division of the BIR stating that the corresponding Confirmation Receipts listed in the Annual Return of Final Income Tax Withheld for the years 1986 and 1987 were verified to have been remitted to the BIR - Exhs. J-1 and J-2.

The Court is of the opinion that petitioner's evidence conclusively showed a favorable determination of the desired relief.

WHEREFORE, finding the petition meritorious and in accordance with law, the same is hereby **GRANTED**. Respondent is ordered to refund or issue a Tax Credit Certificate in favor of petitioner in the amount of P414,613.48, representing overpaid withholding tax on royalties for the year 1986 to 1988, pursuant to the most-favored nations clause of the RP-US Tax Treaty in relation to the RP-West Germany Tax Treaty and BIR Ruling No. 087-88, dated March 8, 1988. No pronouncement as to cost.

SO ORDERED.

255 Ernesto D. Acosta

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

MANUEL K. GRUBA
Associate Judge

(dissenting)
RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation among 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