REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BORDEN INTERNATIONAL PHILIPPINES, INC.,
Petitioner,

- versus - C.T.A. CASE NO. 3221

THE ACTING COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x - - - - - - - - - - - - x

BORDEN INTERNATIONAL PHILIPPINES, INC.,
Petitioner,

- versus - C.T.A. CASE NO. 3231

THE ACTING COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x - - - - - - - - - - - - x

D E C I S I O N

In its motion for summary judgment in these cases dated June 9, 1987, after the pleadings in answer to the petitions for review have been served, petitioner alleges:

I

The assessments subject of appeal in above-entitled two cases are for alleged deficiency withholding taxes at source on royalties and dividends owing to a non-resident foreign stockholder of petitioner, and were predicated on respondent's theory, as formulated in BIR Ruling No. 71-003, that the "withholding tax is not dependent on remittance of income payable to the non-resident foreign corporation but on accrual thereof."

II

Upon the other hand, petitioner contends that the time for payment of the withholding tax-at-source subject of the disputed assessments is upon actual payment or remittance of the royalties and dividends concerned, not upon accrual thereof.

III

In sum, the basic issue -- essentially one of law -- posed in above-entitled two cases is identical to that which this Honorable Court had already resolved in its decision dated March 16, 1979 in CTA Case No. 2846 entitled "Bayer Pharmaceuticals, Inc. vs. Commissioner of Internal Revenue" wherein this Honorable Court struck down BIR Ruling No. 71-003, holding, so far as pertinent, as follows:

> "The lone question tendered for resolution is whether or not the obligation to withhold and pay income tax-at-source on the royalties is upon the accrual of the

royalties or upon the actual remittance or payment thereof. x x x In submitting that the liability to withhold and pay the income tax withheld at source from royalty payments to a non-resident foreign corporation is at the time of the accrual of said royalties and not at the time of the actual remittance or payment thereof, respondent relies mainly on Bureau of Internal Revenue Ruling No. 71-003, dated February 26, 1971. x x x.

These provisions, by the way, were merely imported and copied almost verbatim from similar withholding tax provisions of the United States Revenue Code /Section 143(b)/. Accordingly, in consonance with settled rules of statutory construction, the interpretation they have received in the United States have authoritative effect in the proper construction and interpretation of our law.

xxx xxx xxx

In arriving at BIR Ruling No. 71-003, dated February 26, 1971, our Bureau of Internal Revenue quoted as authority the excerpt of a United States Internal Revenue Service ruling which is found at par. 4875.405 of CCH, 1969, Volume 5. It appears that the said U.S. ruling is actually Mimeograph Ruling No. 5075, which was issued by the Office of the Commissioner of Internal Revenue, Washington D.C., on July 8, 1940 and can be found at the Cumulative Bulletin 1940-2, at page 141. The said Mimeograph Ruling No. 5075 has been declared <u>obsolete</u> by the United States Internal Revenue Service itself in its Revenue Ruling No. 70-293. (U.S. Internal Revenue Bulletin No. 1970-23, dated June 8, 1970). It is thus evident that in issuing its BIR Ruling No. 71-003 on February 26, 1971, our

> own Bureau of Internal Revenue has relied on a United States Internal Revenue Service ruling that has already been overruled, the same having been declared obsolete as of June, 1970."
>
> (pp. 4, 7-8)

IV

This Honorable Court's aforesaid Bayer decision has acquired finality in view of the denial by the Supreme Court of respondent's petition for review thereof, said denial being embodied in the Supreme Court's Resolution dated September 29, 1986, copy of which Resolution is hereto attached as Annex "A" and made an integral part hereof.

V

Given the finality of this Honorable Court's Bayer decision which, for all legal intents and purposes constitute the "law of the case", the assessments subject of above-entitled two cases ceased to have any legal basis. And since the facts in the Bayer decision are substantially on all fours with fact-situations in the two cases at bar -- as demonstrated by the attached affidavit of petitioner's Corporate Secretary -- there is no longer any genuine issue to speak of. Conformably, therefore, with the suppletorily applicable provisions of Rule 34 of the Revised Rules of Court, a summary judgment consistent with the Honorable Court's Bayer decision may now be properly rendered.

P R A Y E R

WHEREFORE, it is most respectfully prayed that a summary judgment be rendered in the above-entitled two cases declaring erroneous the assessments subject of appeal and ordering respondent to cancel or withdraw the said assessments and to desist from demanding or enforcing payment thereof.

Petitioner further prays for such other reliefs as may be proper and equitable in the premises.

In support of petitioner's motion for summary judgment in these cases, Atty. Lope E. Adriano, incumbent corporate secretary and retained general counsel of petitioner Borden International Philippines, Inc., in his supporting affidavit to which all papers and documents (Exhibits "A" to "K" inclusive) evidencing matters stated therein are attached, avers:

I, LOPE E. ADRIANO, of legal age, after having been duly sworn in accordance with law, hereby depose and state:

I

I am the incumbent corporate secretary and retained general counsel of Borden International Philippines, Inc., (BIPI, for short), petitioner in Court of Tax Appeals Cases Nos. 3221 and 3231 having served in such capacities without interruption from November 1959 to the present.

II

As BIPI's secretary and general counsel, I have been, among my other functions, the custodian of its corporate records, including inter alia its stock and transfer book, the minutes of meetings of its directors and stockholders (which I myself took down), and contracts entered into by it (among which was its "Technical Assistance and Know-How Agreement", with Borden, Inc. of New York, U.S.A.), the drafts of which I either prepared or reviewed before their finalization. I have also been invariably consulted on BIPI's legal problems, including taxation matters, and have been kept posted on developments thereon.

III

Conformably with the stipulation on royalty payments in its aforesaid "Know How and Technical

I

I am the incumbent corporate secretary and retained general counsel of Borden International Philippines, Inc., (BIPI, for short), petitioner in Court of Tax Appeals Cases Nos. 3221 and 3231 having served in such capacities without interruption from November 1959 to the present.

II

As BIPI's secretary and general counsel, I have been, among my other functions, the custodian of its corporate records, including _inter alia_ its stock and transfer book, the minutes of meetings of its directors and stockholders (which I myself took down), and contracts entered into by it (among which was its "Technical Assistance and Know-How Agreement", with Borden, Inc. of New York, U.S.A.), the drafts of which I either prepared or reviewed before their finalization. I have also been invariably consulted on BIPI's legal problems, including taxation matters, and have been kept posted on developments thereon.

III

Conformably with the stipulation on royalty payments in its aforesaid "Know How and Technical

Assistance Agreement", BIPI accrued as liability the total amount of ₱4,922,327.32 representing royalties due for the 2nd to 4th quarters of 1972 and the 1st to 4th quarters of 1973 and 1974 to Borden, Inc. of New York, U.S.A., a non-resident foreign corporation not engaged in trade or business in the Philippines. Said amount of ₱4,922,327.32 is broken down as follows:

	Quarter	Accrued Royalties	
1972	2nd	₱300,508.31	
	3rd	283,984.42	
	4th	320,502.62	₱ 904,995.35
1973	1st	₱301,508.20	
	2nd	373,389.28	
	3rd	476,671.97	
	4th	543,075.45	1,694,644.90
1974	1st	₱725,101.20	
	2nd	704,584.02	
	3rd	490,292.09	
	4th	403,609.76	2,323,587.07
		T O T A L	₱ 4,922,227.32

IV

In the 1st quarter of 1973, BIPI accrued liability dividends in the amounts of ₱962,364.26 and ₱864.60 declared in favor of Borden, Inc., New York, U.S.A. (which is also its controlling stockholder to the extent of 98% of its equity) and Mr. W. C. Palmer, a non-resident foreigner, respectively. Again, in the 1st quarter of 1974, BIPI accrued as liability dividends in the amounts of ₱2,495,190 and ₱2,690.00 declared in favor of Borden Inc. and Mr. W. C. Palmer, respectively.

V

However, due to Central Bank restrictions, BIPI was unable to remit the aforesaid royalties and dividends as and when the obligation to pay the same accrued, although at the time of, and even before, actual remittance of the said royalties and dividends, BIPI, in accomodation of the Bureau's request, already paid the withholding taxes due thereon pursuant to Sections 53 and 54 of the Tax Code, said payments being evidenced by copies of the covering Official Receipts hereto attached as Exhibits "A" through "H", with their corresponding Tax Payment Acceptance Orders and Cash Vouchers.

VI

Pursuant likewise to the aforementioned "Know-How and Technical Assistance Agreement", BIPI accrued as liability the total amount of ₱2,575,147.59 representing royalties due for the 1st to 4th quarters of the year 1975 to Borden Inc. of New York, U.S.A., which amount is broken down as follows:

1st Quarter - - - - - - - -	₱ 496,306.40
2nd Quarter - - - - - - - -	509.930.15
3rd Quarter - - - - - - - -	807,458.14
4th Quarter - - - - - - - -	711,452.90
T O T A L -	₱ 2,525,147.59

However, again due to Central Bank restrictions, BIPI was unable to remit the said royalties as and when these became due, and it was only on or about March 4, 1977, after said Central Bank restrictions had been eased, that BIPI was able to remit to the payee, as it did, the said royalties, at which time of actual remittance, BIPI also paid the withholding taxes due thereon, said withholding taxes being as follows:

1st Quarter - - - - - - - -	₱ 173,707.00
2nd Quarter - - - - - - - -	178,476.00
3rd Quarter - - - - - - - -	282,610.00
4th Quarter - - - - - - - -	249,000.00

Copy of the Official Receipts evidencing said payments are attached hereto as Exhibits "I" and "J", together with their corresponding Tax Payment Orders, Quarterly Returns and Cash Vouchers.

VII

In his letter dated November 9, 1976, -- copy of which is hereto attached as Exhibit "K" -- then Acting Internal Revenue Commissioner Efren I. Plana ruled that Borden, Inc. is subject to only 15% of withholding tax at source and not to 35%, consistent with BIR Ruling No. 76-604 dated July 19, 1976.

VIII

I am executing this "Affidavit" in support of BIPI's Motion for Summary Judgment in CTA Cases Nos. 3221 and 3231.

IN WITNESS WHEREOF, I have hereunto set my hand.

(Sgd.) LOPE E. ADRIANO
(Affiant)

Since no opposing affidavit was filed by respondent within the period given him, the Court on October 8, 1987 promulgated a resolution, to wit:

> It appearing that there is no genuine issue of fact in controversy in these cases and that the identical legal issue involved had already been resolved by this Court in Bayer Pharmaceuticals, Inc. vs. Commissioner of Internal Revenue, C.T.A. Case No. 2846, dated March 16, 1979, which was upheld by the Supreme Court in its resolution in G.R. No. 72054, dated September 29, 1986, and there being no objection on the part of respondent, the motion for summary judgment filed by petitioners on June 9, 1987 is hereby GRANTED.

Accordingly, let the above-entitled cases be considered submitted for decision as of this date.

The main issue in these cases is whether or not the obligation to withhold and pay income tax at source on the royalties and dividends is upon accrual or upon the actual remittance or payment thereof.

Indeed, the issue is not one of first impression. In Bayer Pharmaceuticals, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 2846, March 16, 1979, certiorari denied in Commissioner of Internal Revenue vs. Court of Tax Appeals, et. al., G.R. No. 72054, September 29, 1986, where the factual setting is identical to that in the cases at bar, this Court unequivocally ruled that the time of payment or actual remittance of the royalties and dividends is the maturation point of the withholding duty. Because of its controlling effects on the instant cases, we will quote at length from the decision:

> "What possible ground can there be for us not to apply to petitioner the ruling of the United States Federal Court in L.D. Caulk, supra, for which Bayer Pharmaceuticals, Inc. is similarly situated? A decision buttressed by the law, which is closely if not exactly similar to our law, reason and logic is not to be simply brushed aside to accommodate a

records) Since the royalties could not be remitted to Bayer due to Central Bank restrictions, as stated by respondent himself in his decision appealed from, surely, respondent's counsel should not expect petitioner to make efforts, albeit unlawful, to remit the same. And on respondent's point that since the royalties had been accrued in petitioner's books the income thereon became subject to withholding even if remittance was effected later, suffice it to say that the accrual of the royalties in petitioner's books, as held in the L.D. Caulk case, did not amount to 'gains, profits and income' on the part of non-resident Bayer and, therefore, no necessity to withhold tax devolved on petitioner.

"We, accordingly, rule that since the royalties in question could not be paid or remitted in 1972 by petitioner Bayer Pharmaceuticals, Inc., to non-resident foreign corporation Bayer Aktiengeselischalft, Leverkusen Bayermerk due to Central Bank restrictions, petitioner was under no obligation to withhold and pay income tax-at-source on said royalties and, therefore, it is not liable for the deficiency withholding tax-at-source assessment of respondent Commissioner of Internal Revenue in the amount of ₱36,834.73 for the year 1972."

ACCORDINGLY, the disputed assessments involved in these cases representing deficiency withholding tax at source should be cancelled and set aside. No costs.

SO ORDERED.

Quezon City, Metro Manila, December 23, 1987.

AMANTE FILLER
Presiding Judge

WE CONCUR:

(on official leave)
CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge