REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

HUNT UNIVERSAL ROBINA CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 4247

8/5/94

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x - x

D E C I S I O N

This petition for review seeks the refund or tax credit of P223,698.01 allegedly representing overpaid withholding tax on royalties for 1986 which petitioner has withheld in favor of Hunt-Wesson Foods, Inc. (HWF).

The facts of this case are simple.

Petitioner is a corporation duly organized and existing under the laws of the Philippines with office at URC Building, 110 Libis, Quezon City.

Sometime 1986, petitioner, Hunt Universal Robina Corporation (HURC) entered into two agreements with Hunt-Wesson Foods, Inc. (HWF), a non-resident foreign corporation organized and existing under the laws of the State of Delaware, U.S.A., namely:

1. Trademark License Agreement (Exh. E-1, pp. 109-116, CTA rec.) concerning the sole and exclusive license to manufacture and sell in the Philippines, in accordance with the formulas and specifications furnished by HWF, canned fruits and vegetables under the trademark "HUNT'S" and cooking and salad oil under the trademark "WESSON"; and

2. Technical Assistance Agreement (Exh. F-1, pp. 119-125, CTA rec.) whereby HWF will provide the required technology and technical assistance to HURC for the manufacture of tomato-based and other new products.

Both Agreements have a five (5) year term, commencing on February 1, 1984 up to January 31, 1989, which may be extended upon mutual agreement of the parties and with the approval of the Philippine Government. Petitioner registered the above-mentioned agreements with the Technology and Transfer Board. On October 28, 1986, Certificates of Registration Nos. 0704 (Exh. E, p. 107, CTA rec.) and 0705 (Exh. F, p. 117, CTA rec.) were issued in favor of petitioner with respect to the Trademark License Agreement and Technical Assistance Agreement, respectively.

The Trademark License Agreement provides for the payment of royalties by HURC in favor of HWF, as follows:

"III. PAYMENT OF ROYALTIES

A) **Royalty**. Licensee shall pay to the Licensor a royalty of one percent (1%) of net sales in Pesos for the use of the Licensor's trademarks in all Licensed Products sold provided that: the 1% royalty fee shall be remittable only if the Licensee has earned sufficient net foreign exchange earnings to cover payment thereof.

As used herein and hereinafter:

1) net foreign exchange earnings shall refer to: 'the gross incremental exports of Hunt Universal Robina Corporation and gross incremental non-traditional exports generated by Hunt Universal Robina Corporation or any of its affiliates and suppliers, which shall be considered as those of Licensee's for purposes of royalty computations' minus 'total foreign exchange outflow from raw material and intermediate component imports in connection with the manufacture of the incremental export sales.'

For this purpose incremental export sales shall be computed as export sales for the current year minus the export sales for the year 1984.

2) net sales is defined as:

'invoice value based on actual sales minus a) trade, quantity or cash discounts and broker's or agent's commission, if any; b) return credits and allowances; c) tax excise or other government charges; and d) freight, insurance and packaging expenses.'

> B) **<u>Payment</u>**. Payment of all royalties shall be in Philippine Pesos at such place as Licensor shall designate from time to time. All royalties shall be payable quarterly or earlier upon mutual agreement of both parties. Each calendar quarter year during the life of this Agreement shall be an accounting period (fractional initial and terminating periods to be treated as accounting periods). Licensee undertakes to remit periodically the royalties due to Licensor in U.S. currency at the prevailing bank selling rate in U.S. dollars at the time of remittance net of any tax that may be imposed by the Philippine Government. Observance by Licensee of any subsequent change in governmental law or regulation preventing or restricting payment in U.S. currency shall not constitute a breach of this Agreement. In such event the parties shall negotiate a mutual acceptable method of payment." (Emphasis theirs.)

For the technical assistance on Tomato Products such as pork and beans, baked beans, tomato sauce and ketchup under the "Hunts" trademark and the technical assistance in the development of new food products such as vegetable oil under the "Wesson" trademark for domestic sale and for export, HWF shall receive from HURC a "<u>technical service fee equivalent to one percent (1%) of net sales of the sum in Pesos of all Licensed Products sold</u>". "HWF shall be reimbursed of its out-of-pocket costs for travel and reasonable living expenses of the personnel providing the technical assistance on new products plus 150% of the salaries paid such personnel during the period (including travel time) they are providing technical services to HURC. Any tax that may be imposed by the Philippine Government shall be for the account of HWF." (Exh. F-1, p. 123, CTA rec.)

The RP-US Tax Treaty of October 1, 1976 provides:

"**Article 13**
Royalties

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

(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) <u>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.</u>" (Emphasis Ours.)

The RP-West Germany Tax Treaty which took effect on January 1, 1985, provides:

"Article 12

Royalties

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

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) 15 per cent of the gross amount of royalties arising from the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films or tapes for television or broadcasting, or

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

The Bureau of Internal Revenue has issued two BIR Rulings material to this case, namely: BIR Ruling No. 37-a-000-00-263-86, dated November 27, 1986, addressed to McGeorge Food Industries, Inc., and BIR Ruling No. 37-a-263-86-087-88, dated March 8, 1988, in favor of Gillette (Philippines) represented by its auditing firm, Sycip Gorres, Velayo & Co., regarding the application of the "most-favored nation" clause in the RP-US Tax Treaty with respect to the lowest rate of Philippine tax that may be imposed on royalties to a US corporation under a Trademark Agreement.

BIR Ruling No. 37-a-000-00-263-86, dated November 27, 1986, issued to McGeorge Food Industries, Inc., is quoted in full as follows: (Exh. B, pp. 100-101, CTA rec.)

"Gentlemen:

> This refers to your letter dated April 21, 1986 requesting that you be allowed to avail of the benefit provided for in Article 13 paragraph 2(b)(iii) of the RP-US Tax Treaty, regarding the lowest rate of Philippine tax that may be imposed on the royalties payable by you to McDonald's (USA), by applying the rate of 10% tax on royalties, as provided for in the RP-West Germany Tax Treaty.
>
> Documentary evidence submitted shows that McGeorge Food Industries, Inc., a duly registered wholly-owned domestic corporation, entered into a license agreement with McDonald's Corporation, a non-resident foreign corporation based in Delaware, U.S.A., whereby McGeorge was granted among others, the right to use in its business operations the trade mark, secret formula, technology and/or patented process owned by McDonald's (USA); that the license agreement dated October 7, 1985, concerning the operation and development of restaurant is duly registered with the Technology Transfer Board of the Ministry of Trade and Industry under Certificate of Registration No. 0638 and is valid for five (5) years from May 8, 1985 to May 7, 1990; and that for the use of the formula or technology, McGeorge is obligated to pay McDonald's (USA) a certain amount of royalty based on a percentage of gross sales to be remitted on a quarterly basis.

In reply, I have the honor to inform you that your request is hereby granted. Under the most favored nation provision of the RP-US 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 Philippine 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 RP-West Germany Tax Treaty, effective January 1, 1985, provides that royalties arising in the Philippines and paid to a resident of West Germany may also be taxed in the Philippines, <u>but the tax so charge shall not exceed 10% of the gross amount of royalties</u> arising from the use of or the right to use, any patent, trade mark, design or model, plan, secret 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. The 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 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 have been approved by the Philippine competent authorities.'

Such being the case and in as much as the license agreement between McGeoarge 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.

Very truly yours,

(SGD.)
BIENVENIDO A. TAN, JR.
Commissioner of Internal Revenue
TAN-T-5150-J0923-A-4"

On March 8, 1988, respondent issued BIR Ruling No. 37-a-263-86-087-88, addressed to Sycip Gorres, Velayo & Co. for Gillette (Philippines), Inc., which provides for a similar grant as in the case of McGeorge Food Industries, Inc. (Exh. C, pp. 102-103, CTA rec.).

For the year 1986, petitioner remitted to the BIR the sum of P372,601.20, representing 25% withholding tax on royalties and technical service fees paid to HWF. In view of the RP-US Tax Treaty in relation to the RP-West Germany Tax Treaty and the Rulings issued by the respondent, petitioner filed a claim for refund alleging that it should pay only 10% withholding tax on royalties and technical service fees remitted abroad to HWF. Hence, petitioner sought the refund or tax credit of the sum of P223,698.01 as overpaid withholding tax on royalties and technical service fees, computed as follows:

Quarters ending	* 25% WT	10% WT	Overpaid
**Dec. 31, 1985	P 6,776.64	P 2,710.66	P 4,065.98
March 31, 1986	81,501.87	33,031.58	48,470.29
June 30, 1986	56,722.54	22,235.68	34,486.86
Sept. 30, 1986	79,719.12	31,772.86	47,946.26
Dec. 31, 986	147,881.03	59,152.41	88,728.62
Total	P372,601.20	P148,903.19	P223,698.01

* As adjusted (See Exh. D-1, p. 105, CTA rec.)
** Paid in 1986

A claim for refund was filed with the respondent's office on April 6, 1988. In order to the toll the prescriptive period of filing a suit for the recovery of an erroneously and excessively paid tax, petitioner instituted the present petition for review.

The issues presented are:

(1) Whether or not petitioner has a cause of action in bringing this suit for the refund or tax credit of the alleged erroneously and excessively paid withholding taxes on royalties for and in behalf of its Licensor - HWF; and

(2) If so, whether or not petitioner is entitled to claim for the refund or tax credit of the alleged overpaid withholding tax on royalties pursuant to the "most-favored nation" clause of the RP-US Tax Treaty.

With regard to the first issue, respondent alleged that the petition states no cause of action since petitioner is not the real party in interest to bring suit for the recovery of alleged overpaid withholding taxes on royalties. The taxpayer and real party in interest is Hunt-Wesson Foods, Inc., a non-resident foreign corporation for whose account the tax on royalty was withheld.

Respondent's contention is without merit.

Petitioner showed to the Court its authority to bring this suit for the recovery of overpaid withholding taxes on royalties. A Special Power of Attorney (Exh. M, p. 132-134, CTA rec.) was executed by John F. Stollsteimer, Executive Vice President of HWF, on April 6, 1989, appointing HURC represented by Dwight G. Triplett, its General Manager, to be its lawful attorney in fact to file the instant petition with this Court and to represent HWF (now Hunt, USA) in its claim for refund or tax credit of the amount of P223,698.01 with the BIR. The above-mentioned Special Power of Attorney was duly authenticated by the Philippine Consul (Exh. M-1, p. 135, CTA rec.). On the same date, a "Substitution of Attorney-In-Fact" (Exhs. N, N-1 and N-2, pp. 136-138, CTA rec.) was executed by Dwight G. Triplett, HURC's General Manager, in California, naming and appointing Mr. Rafael Ma. C. Vinzon as its substitute attorney-in-fact to represent HWF (Hunt USA). The same was properly authenticated by the Philippine Consul (Exh. N-3, p. 139, CTA rec.). It was Mr. Rafael Ma. C. Vinzon who filed the instant petition, on April 7, 1988, as counsel for the petitioner.

Furthermore, in the more recent case of **Commissioner of Internal Revenue v. The Court of Tax Appeals, et. al., G.R. No. 93901, February 11, 1992**, the Supreme Court in a resolution en banc ruled that the withholding agent has sufficient legal interest to bring an action to recover tax overpayment, citing the its own Resolution in the case of **Commissioner of Internal Revenue v. Procter and Gamble Philippine Manufacturing Corporation, et. al., G.R. No. 66383, December 2, 1991**, to wit:

> "x x x. 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.

In Philippine Guaranty Company, Inc. v. Commissioner of Internal Revenue, this 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:

x x x x x x x x x.

If, as pointed out in Philippine Guaranty, 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. x x x."

We believe that, even now, 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, <u>before actual payment of the refund or issuance of a tax credit certificate</u>. 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 <u>vis-a-vis</u> taxpayers." (Citations omitted; emphases in the original).

Again in an earlier ruling of the Third Division of the Supreme Court in **Commissioner of Internal Revenue v. Wander Philippines, Inc., and the Court of Tax Appeals, G.R. No. L-68375, April 15, 1988**, it was held that:

"In any event, the submission of petitioner that Wander is but a withholding agent of the government and therefore cannot claim reimbursement of the alleged overpaid taxes, is untenable. It will be recalled, that said corporation is first and foremost a wholly owned subsidiary of Glaro. The fact that it became a withholding agent of the government which was not by choice but by compulsion under Section 53(b) of the Tax Code, cannot by any stretch of the imagination be considered as an abdication of its responsibility to its mother company. Thus, this Court construing Section 53(b) of the Internal Revenue Code held that 'the obligation imposed thereunder upon the withholding agent is compulsory.' It is a device to insure the collection by the Philippine Government of taxes on incomes, derived from sources in the Philippines, by aliens who are outside the taxing jurisdiction of this Court (Commissioner of Internal Revenue vs. Malayan Insurance Co., Inc., 21 SCRA 944). In fact, Wander may be assessed for deficiency withholding tax at source, plus penalties consisting of surcharge and interest (Section 54, NIRC). Therefore, as the Philippine counterpart, Wander is the proper entity who should claim for the refund or credit of overpaid withholding tax on dividends paid or remitted by Glaro."

Anent the second issue, petitioner maintains that pursuant to the "most-favored nation" clause of Article 13 of the RP-US Tax Treaty in relation to Article 12 of the RP-West Germany Tax Treaty, it is liable only to the 10% withholding tax on royalties instead of the 25% withholding tax it had actually remitted to the government.

Respondent for her part stressed that petitioner should show that this case is covered by the RP-US Tax Treaty.

The "most-favored nation" clause of the RP-US Tax Treaty provides that the tax that may be imposed by the Philippines is "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." Since the royalties received by HWF from petitioner, cover the use of its trademarks "Hunts" and "Wesson", are of the same kind as royalties under the RP-West Germany Tax Treaty, the withholding taxes paid thereon should be 10% and not 25%, the rate actually applied by petitioner. Petitioner's reliance on BIR Rulings Nos. 37-a-000-00-263-86 and 37-a-263-86-087-88, dated November 27, 1986 and March 8, 1988, respectively, is also in order.

Respondent did not contest the presentation of evidence by petitioner. Respondent's counsel waived his right to present evidence. He merely submitted the case based on the pleadings and the records thereof. However, the BIR records of the case was neither submitted to the Court by respondent's counsel. No memorandum was filed in order to guide the Court of respondent's position or stand.

Petitioner, on the other hand, submitted as part of its documentary evidence, the following:

a) Letter claim for refund or tax credit dated April 5, 1988 filed with the BIR on April 6, 1988 (Exh. A, pp. 94-99, CTA rec.);

b) Schedule of Withholding Tax Remittances on Royalties to the BIR for the year 1986 (p.104, CTA rec.);

c) Computation of Overpaid Withholding Taxes on Royalties for the year 1986 (Exh. D-1, p. 105, CTA rec.);

d) Central Bank Confirmation Receipts to prove that the 25% withholding tax on royalties were actually withheld and remitted to the government (Exhs. H-6, H-7, H-8 and H-9, pp. 126-129, CTA rec.); and

e) Certification issued by the BIR's Industry Audit Division and Revenue Accounting Division that the Confirmation Receipts representing petitioner evidence of payments of the withholding taxes on royalties have been verified to be true and correct and were received by the government (Exh. L, p. 131, CTA rec.).

The documents presented by petitioner were sufficient proof for the Court to believe that indeed petitioner is entitled to the claim for refund or tax credit applied for.

This Court have time and again granted similar claims for refund of overpaid withholding tax on royalties pursuant to the RP-US Tax Treaty in the cases of **Polygram Corporation v. The Commissioner of Internal Revenue, CTA Case No. 3890, December 15, 1989; and Beecham Group, P.L.C., Bristol Myers Co., American Homes Products, and Chemfields, Inc. v. Commissioner of Internal Revenue, CTA Case No. 3812, March 30, 1992.**

WHEREFORE, the petition is found meritorious and the claim for refund or tax credit is **GRANTED**. Respondent is hereby ordered to refund or issue a tax credit certificate in favor of petitioner in the amount of P223,698.01, representing overpaid withholding taxes on royalties for the year 1986.

No pronouncement as to cost.

SO ORDERED.

Quezon City, Metro Manila, August 5, 1994.

Ernesto D. Acosta

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

MANUEL K. GRUBA
Associate Judge

(Dissenting)

RAMON O. DE VEYRA
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 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