Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION

GOODYEAR PHILIPPINES, INC., Petitioner,	**CTA Case No. 9023** For: Refund
	Members:
-versus-	**DEL ROSARIO, P.J., *Chairperson,* UY, and MINDARO-GRULLA, JJ.**
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: DEC 07 2017 11:00 am

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DECISION

MINDARO-GRULLA, J.:

This resolves the Petition for Review filed by Goodyear Philippines, Inc., pursuant to Section 7(a)(2)[1] of Republic Act (RA) No. 1125, otherwise known as "An Act Creating the Court of Tax Appeals", as amended, as well as Section 3(a)(2)[2] of Rule 4 and Section 4(a)[3] of Rule 8 of the Revised Rules of the Court of Tax Appeals, as amended.

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[1] SEC. 7. *Jurisdiction.* - The CTA shall exercise:
(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
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(2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relations thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial;

[2] SEC. 3. *Cases within the jurisdiction of the Court in Division.* – The Court in Division shall exercise:
(a) Exclusive original over or appellate jurisdiction to review by appeal the following:
xxx
(2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code or other applicable law provides a specific period for action: xxx;

[3] SEC. 4. *Where to appeal; mode of appeal.* –

Petitioner seeks the refund of the alleged erroneously withheld and remitted final withholding tax (FWT) in relation to the redemption of its preferred shares on April 11, 2013 in the amount of ₱18,784,742.85.

Petitioner Goodyear Philippines, Inc. (GPI) is a domestic corporation duly registered with the Philippine Securities and Exchange Commission (SEC) under Company Registration No. 2394, with registered address at the 15th Floor Picadilly Star Building, 4th Avenue comer 27th St., Bonifacio Global City, Taguig.[4] It is registered with the Bureau of Internal Revenue (BIR) as a large taxpayer, with Taxpayer Identification Number (TIN) 000-409-561-000.[5]

On the other hand, respondent Commissioner of Internal Revenue (CIR) is sued in his official capacity as the head of the BIR, having been duly appointed and empowered to perform the duties of his office, including the duty to act and approve claims for refund or tax credit as provided by law. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On August 19, 2003, the SEC approved petitioner's application for the increase of its authorized capital stock from ₱400,000,000.00, divided into 4,000,000 shares with par value of ₱100.00 each, to ₱1,731,863,000.00, divided into 4,000,000 common shares with par value of P100.00 each and 13,318,630 preferred shares with a par value of ₱100.00 each.[6]

Article 7(4) of petitioner's Articles of Incorporation states that each and every certificate of preferred shares shall be subject to redemption, and may, at the option of the Board of Directors, regardless of the existence of unrestricted retained earnings in the books of the Corporation, on any semi-annual dividend date at any

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(a) An appeal from a decision or ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claim for refund of internal revenue taxes erroneously or illegally collected, the decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, and the Regional Trial Court in the exercise of their original jurisdiction, shall be taken to the Court by filing before it a petition for review as provided in Rule 42 of the Rules of Court. The Court in Division shall act on the appeal.

[4] Exhibits "P-2" and "P-3", Formal Offer of Exhibits (FOE) Folder.

[5] Par. 1, Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, pp. 338-339; Exhibit "P-44", FOE Folder.

[6] Exhibits "P-3" and "P-3-3", FOE Folder.

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time after one (1) year from the date of the issuance of such certificate, be called and retired at the price of ₱100.00 for each share and the amount of dividends accrued and unpaid at the date of the redemption.[7]

On March 5, 2013, the Board of Directors and the Stockholders of petitioner unanimously approved the redemption on April 11, 2013[8] of the 2,597,133 preferred shares issued to Goodyear Tire and Rubber Company (GTRC); a non-resident foreign corporation duly organized and existing under the laws of the State of Ohio, United States of America, with office address at 1144 East Market Street Akron, Ohio.[9] GTRC is not registered as a corporation or partnership in the Philippines.

Petitioner paid the total redemption price amounting to ₱384,944,919.00 to GTRC.[10]

On April 3, 2013[11], petitioner withheld and remitted to the BIR the amount of ₱18,784,742.85[12], representing the fifteen percent (15%) FWT imposed under Section 28(B)(5)(b) of the National Internal Revenue Code (NIRC) of 1997, as amended, computed on the basis of the difference between the Redemption Price and the aggregate par value/cost of the shares redeemed, as follows:

Redemption Price	₱384,944,919.00
Par Value/Cost of Acquisition (₱100 per share x 2,597,133 shares) Difference	₱259,713,300.00
Redemption Price	125,231,619.00
Multiplied with 15% FWT	₱ 18,784,742.85

On April 8, 2013, before the payment of the redemption price to GTRC, petitioner filed an Application for Relief from Double Taxation (BIR Form No. 0901-C)[13] with the International Tax Affairs Division (ITAD) of the BIR, requesting confirmation, among others, that the

7 Exhibit "P-3-4", FOE Folder.
8 Exhibit "P-10-3", FOE Folder.
9 Exhibits "P-40" and "P-41", FOE Folder.
10 Exhibits "P-17" and "P-17-2", FOE Folder.
11 Exhibit "P-4-2", FOE Folder.
12 Exhibits "P-4", "P-4-3", "P-5" and "P-6", FOE Folder.
13 Exhibit "P-36", FOE Folder.

redemption by petitioner of its 2,597,133 preferred shares held by GTRC is not subject to Philippine income tax pursuant to paragraph 2 of Article 14 (Capital Gains) and Article 1 of the Reservation Clause of the Republic of the Philippines-United States (RP-US) Tax Treaty.[14]

However, despite alleged numerous inquiries, the BIR ITAD has yet to issue a confirmation on the income tax exemption of the redemption by petitioner of its preferred shares.

Believing that it is entitled to the refund of the alleged erroneously withheld and remitted FWT, petitioner filed an administrative claim[15] for refund on March 31, 2015 before the BIR - Large Taxpayer Regular Audit Division (LTRAD) I, pursuant to Sections 204 and 229 of the NIRC of 1997, as amended.

To date, respondent has yet to act on petitioner's administrative claim for refund. Thus, petitioner filed the instant Petition for Review on March 31, 2015[16].

Within the extended time granted by the Court,[17] respondent filed his Answer[18] through registered mail on May 29, 2015 and received by this Court on June 4, 2015, interposing the following special and affirmative defenses:

"SPECIAL AND AFFIRMATIVE DEFENSES

Respondent incorporates and repleads all the foregoing averments and in further support of the Specific Denials herein set forth, respondent respectfully alleges as her defense that:

The Preferred Shares Issued to Goodyear Tire and Rubber Company (GTRC) and the Amount of Dividends Accrued And Unpaid at the Date of

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[14] Exhibit "P-37", FOE Folder.
[15] Exhibits "P-7", "P-8", and "P-9", FOE Folder.
[16] Docket, p. 10.
[17] Order dated April 28, 2015, Docket, p. 208.
[18] Docket, pp. 209-214.

Redemption is Subject to Final Withholding Tax

Under the National Internal Revenue Code of 1997, there is a stand-alone definition of dividend, which, provides that a dividend is a distribution made by a corporation to its shareholders out of its earning or profits. Clearly therefore, under the tax law dividends are paid to shareholders out of the profits of the company, and not necessarily out of the unrestricted retained earnings.

As here, it must be emphasized that petitioner paid Goodyear Tire and Rubber Company (GTRC) the amount of P384,944,919, representing the outstanding 2,597,133 preferred shares issued to GTRC at 100 per share and the amount of dividends accrued and unpaid at the date of redemption.

Now, petitioner argues that the gain resulting from the redemption is not dividends but capital gain. This should not and cannot be countenanced to breach the tax law on dividends. And in trying to raise a point, petitioner reiterated Wise &. Co., Inc. et al. vs Bibiano L. Meer, G.R. No. 48231, 30 June 1947, arguing that the fact that the distributions were called dividends is not controlling. The determining element is whether the distributions were made in the ordinary course of business and with intent to maintain the corporation as a going concern, or after deciding to quit and with intent to liquidate the business.

Respondent respectfully posits that the instant case was misapplied by petitioner. It is not amiss to state that in that case the Honorable Supreme Court refers to 'liquidating dividends'. The stockholders surrendered and relinquished their stock in return for the distributions made, thus ceasing to be stockholders of the corporation. The corporation was, wiping out all parts of the stockholders' interest in the company, hence, in that case the Honorable Supreme Court:

> 'Amounts distributed in the **liquidation of a corporation** shall be treated as payments in exchange for the stock or share, and any gain or profit realized thereby shall be taxed to the distribute [sic] as other gains or profits' (underscoring supplied)

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Clearly therefore, the case of Wise & Co., Inc. et al. vs Bibiano L. Meer, is not on all fours in the instant petition. The dividends were issued and paid by a going corporation out of current earnings or accumulated surplus. It being clear that the distribution under consideration was ordinary dividend, it must therefore be taxed under Section 28(B)(5)(b) of the NIRC of 1997, as amended.

Petitioner Failed to Exhaust Administrative Remedies

Petitioner miserably failed to exhaust administrative remedies before elevating the case to this Honorable Court.

In **Jariol v COMELEC, 80 SCAD 910, 270 SCRA (1997)**, the Highest Tribunal had occasion to rule the following:

> 'The aggrieved party must not merely initiate the prescribed administrative procedure to obtain relief, **but must also pursue it to its appropriate conclusion before seeking judicial intervention in order to give that administrative agency an opportunity to decide the matter by itself correctly and prevent unnecessary and premature resort to the court**.' (emphasis supplied)

In the instant case, it may be gleaned that the administrative claim for tax refund was filed with the Bureau of Internal Revenue only on **30 Marc[h] 2015** and the Petition for Review was filed with the Court of Tax Appeals on **31 Marc[h] 2015**. Evidently, respondent was not given sufficient time and information to evaluate petitioner's administrative claim for refund, nor was she given sufficient facts to evaluate the administrative claim.

In **Ampil, Jr. vs. COMELEC**, the Supreme Court has repeatedly pronounced the following:

> 'xxx In a long line of cases, this Court has held consistently that before a party is allowed to seek the intervention of the Court, it is a pre-condition that he should have availed of all the means of administrative processes afforded him.

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> Hence, if a remedy within the administrative machinery can still be resorted to by giving the administrative officer concerned every opportunity to decide on a matter that comes within his jurisdiction, then such remedy should be exhausted first before the court's judicial power can be sought. The premature invocation of court's intervention is fatal to one's cause of action'

The purpose of requiring submission of supporting documents relevant to a claim for tax refund is to give the administrative agency the opportunity to ascertain the veracity and validity of the claim. This is the very essence, the very substance of the doctrine of exhaustion of administrative remedies. The doctrine rests upon the presumption that the administrative body, board, or officer, if given the chance to correct its mistake or error, may amend its decision on a given matter and decide it properly.

It is well settled rule in tax laws, that the taxpayer who feels aggrieved by the actions taken by tax authorities may not seek redress in the courts of justice <u>without first exhausting available administrative remedies</u>, except for certain well-recognized exceptions. It is the policy of the law and good practice to discourage court litigations and encourage resort to administrative action whenever the latter is feasible, adequate, and speedy. Another thing, the respect and consideration due to each branch of the government demand that the judicial department abstain, whenever possible from interfering in the acts of the other departments except when the latter transcend their respective shares of action and suitable remedies cannot be obtained by them.

Respondent Is Not Entitled To A Refund

Basic as the hornbook principle that taxes are the lifeblood of the government and should be collected without unnecessary hindrance: It is upon taxation that the Government chiefly relies to obtain the means to carry on its operations and it is of the utmost importance that the means adopted to enforce the collection of taxes levied should be summary and interfered with as little as possible.

Hence, tax refunds are in the nature of tax exemptions and are to be interpreted in the strictest manner. Considering that tax refunds consist of monetary amounts which are currently in the hands of the government, the validity of petitioner's claim should be meticulously verified.

As held, the right of taxation cannot easily be surrendered, statutes granting tax exemptions are considered as a derogation of the sovereign authority. Statutes that grant tax exemptions are construed *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority. The general rule is that claimants of tax refunds bear the burden of proving the factual basis of their claims. Again, taxes are the lifeblood of the nation. Therefore, statutes that allow exemptions are construed strictly against the grantee and liberally in favor of the government."

On June 18, 2015, petitioner filed its Reply[19], stating the following arguments:

a. Petitioner's payment to GTRC does not qualify as taxable dividends under Section 73(A) of the 1997 Tax Code;
b. The difference between the redemption price and the par value of the shares is a capital gain, not a dividend;
c. The redemption of preferred shares is not "equivalent" to distribution of dividends;
d. Payment to GTRC did not come from accumulated surplus of the Corporation;
e. The case of *Wise & Co, Inc. et al vs. Bibiano Meer* is applicable, in so far as it clarifies when a distribution can be considered as "dividends"; and
f. The doctrine of exhaustion of administrative remedies admits exceptions.

The Pre-Trial Conference was set on July 23, 2015.[20] Thus, petitioner filed its Pre-Trial Brief[21] on July 20, 2015, while the Respondent's Pre-Trial Brief[22] was filed through registered mail on July 20, 2015 and received by this Court on July 23, 2015.

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[19] Docket, pp. 218-229.
[20] Notice of Pre-Trial Conference, Docket, pp. 216-217.
[21] Docket, pp. 232-248.
[22] Docket, pp. 296-298.

On August 7, 2015, respondent filed a Motion to Dismiss[23] on the ground that Mr. Ronaldo Jaime D. Castro, petitioner's incumbent president, was not authorized to sign the Certification and Verification of Non-Forum Shopping, to file the instant Petition for Review, and to represent petitioner in court proceedings.

Meanwhile, the parties filed their Joint Stipulation of Facts and Issues[24] on August 20, 2015.

In the Resolution[25] dated October 19, 2015, the Court denied respondent's Motion to Dismiss for lack of merit but directed petitioner to submit the appropriate authorization in favor of Mr. Ronaldo Jaime D. Castro to represent petitioner and to perform all other necessary acts in relation to the instant case. The Court also approved the parties' Joint Stipulation of Facts and Issues and terminated the Pre-Trial.

On November 4, 2015, petitioner filed a Manifestation and Compliance[26] to the order issued by the Court in the Resolution dated October 19, 2015.

Thereafter, the Court issued the Pre-Trial Order[27] on December 9, 2015.

During trial, petitioner presented its Finance Manager, Ms. Marilou F. Rodas[28], as its lone witness.

Petitioner's Formal Offer of Exhibits with Manifestation[29] was filed on May 18, 2016. In the Resolution[30] dated July 15, 2016, the Court admitted petitioner's Exhibits "P-2", "P-2-1", "P-2-2", "P-3", "P-3-1", "P-3-2", "P-3-3", "P-3-4", "P-4", "P-5", "P-6", "P-7", "P-7-2" , "P-7-4", "P-7-5", "P-8", "P-8-1", "P-9", "P-10", "P-10-1", "P-10-2", "P-10-3", "P-

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[23] Docket, pp. 327-333.
[24] Docket, pp. 338-345.
[25] Docket, pp. 402-407.
[26] Docket, pp. 410-414.
[27] Docket, pp. 433-452.
[28] Minutes of the Hearing dated April 19, 2016, Docket, pp. 553-557; Exhibit "P-47", Amended Judicial Affidavit In Lieu Of Direct Testimony, Docket, pp. 509-547.
[29] Docket, pp. 562-587.
[30] Docket, pp. 598-599.

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10-4", "P-10-5", "P-11", "P-11-1", "P-11-2", "P-11-3", "P-12", "P-12-1", "P-13", "P-13-1", "P-14", "P-14-1", "P-15", "P-15-1", "P-15-2", "P-15-3", "P-16", "P-16-1", "P-16-2", "P-16-3", "P-17", "P-17-1", "P-17-2", "P-17-3", "P-18", "P-18-1", "P-18-2", "P-19", "P-19-1", "P-19-2", "P-20", "P-20-1", "P-20-2", "P-21", "P-21-1", "P-21-2", "P-22", "P-22-1", "P-22-2", "P-23", "P-23-1", "P-23-2", "P-23-3", "P-24", "P-24-1", "P-24-2", "P-24-3", "P-25", "P-25-1", "P-25-2", "P-25-3", "P-26", "P-26-1", "P-26-2", "P-26-3", "P-26-4", "P-27", "P-27-1", "P-27-2", "P-28", "P-28-1", "P-28-2", "P-29", "P-29-1", "P-29-2", "P-30", "P-30-1", "P-30-3", "P-31", "P-31-1", "P-31-2", "P-33", "P-33-1", "P-33-2", "P-34", "P-34-1", "P-34-2", "P-35", "P-35-1", "P-35-2", "P-36", "P-37", "P-38", "P-39", "P-39-1", "P-40", "P-41", "P-41-1", "P-42", "P-42-2", "P-44", "P-44-1", "P-45", "P-46", "P-46-1", "P-46-2", "P-50", and "P-47". However, the Court denied the admission of Exhibits "P-43", "P-43-2", "P-48", and "P-49" for failure to present their originals for comparison.

Petitioner's documentary exhibits are as follows:

Exhibit:	Description:
P-2	Amended Articles of Incorporation of Goodyear Philippines, Inc. (GPI) duly approved by the SEC on March 1, 1995
P-2-1	SEC Certified True Copy Stamp
P-2-2	Article 4 of the Amended Articles of Incorporation of GPI duly approved by the SEC ON March 1, 1995
P-3	Certificate of Filing of Amended Articles of Incorporation of GPI issued by the SEC on August 19, 2003 with attached Amended Articles of Incorporation
P-3-1	SEC Certified True Copy Stamp
P-3-2	Certification of majority directors of Goodyear Philippines, Inc. attached to the Certificate of Filing of Amended Articles of Incorporation of Goodyear Philippines, Inc. issued by the SEC on August 19, 2003
P-3-3	Article 7 of Amended Articles of Incorporation approved on August 19, 2003
P-3-4	Article 7(A) (4) of the Amended Articles of Incorporation
P-4	Monthly Remittance Return of Final Income Taxes Withheld BIR Form No. 1601-F filed and paid on April 3, 2013 via electronic Filing and Payment System (eFPS)
P-5	Filing Reference No. 201300007104928 for the eFPS
P-6	Bank of the Philippine Island (BPI) Online Confirmation Receipt No. 135073287 for the eFPS
P-7	Application for Tax Credit/Refunds BIR Form No. 1914 for erroneously paid tax amounting to P18,784,742.85 stamped "Received" by the BIR dated March 30, 2015

P-7-2	Signature of Ms. Malou Rodas
P-7-4	Date of receipt of the application for Tax Credit/Refunds BIR Form No. 1914 for erroneously paid tax amounting to P18,784,742.85 stamped "Received" by the BIR dated March 30, 2015
P-7-5	Claim for tax refund amounting to P18,784,742.85
P-8	Cover letter for the Application for Tax Credit/Refunds by Punongbayan & Araullo for erroneously paid tax amounting to P18,784,742.85 stamped "Received" by the BIR dated March 30, 2015
P-8-1	Certified True Copy Stamp of Punongbayan & Araullo signed by Eleanor Roque
P-9	Special Power of Attorney executed in favor of Punongbayan & Araullo
P-10	Audited Financial Statement (AFS) for the year ended December 31, 2013
P-10-1	SEC Certified True Copy Stamp
P-10-2	Statement of Changes in Equity comparative figures
P-10-3	Note 17 – Paid in Capital: Treasury Shares
P-10-4	Note 17 – Share Capital: Treasury Shares stating that GPI did not declare dividend
P-10-5	Balance Sheet of Audited Financial Statement for the year ended December 31, 2013
P-11	Certificate of Increase of Capital Stock which was issued by the SEC on August 19, 2003
P-11-1	SEC Certified True Copy Stamp
P-11-2	Provision of the Treasurer's Affidavit
P-11-3	Portion of the Certificate of Increase of Capital Stock providing that the 13,318,630 shares were solely and exclusively subscribed by GTRC
P-12	Stock Certificate No. 156 of Goodyear Philippines Inc.
P-12-1	Certified True Copy Stamp and Signature of Corporate Secretary of GPI
P-13	Stock Certificate No. 157 of Goodyear Philippines Inc.
P-13-1	Certified True Copy Stamp and Signature of Corporate Secretary of GPI
P-14	Stock Certificate No. 158 of Goodyear Philippines Inc.
P-14-1	Certified True Copy Stamp and Signature of Corporate Secretary
P-15	General Information Sheet submitted by the Petitioner for the annual/special meeting on March 5, 2013 to SEC
P-15-1	SEC Certified True Copy Stamp
P-15-2	Portion of GIS providing for details of redemption of shares
P-15-3	Portion of GIS providing that no dividend declaration was made during the year 2012
P-16	General Information Sheet submitted by the Petitioner for the annual/special meeting on February 17, 2014 to SEC

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P-16-1	SEC Certified True Copy Stamp
P-16-2	Portion of the GIS providing details on the redemption of preferred shares
P-16-3	Portion of the GIS providing that no dividend was declared on the previous year (2013)
P-17	Minutes of the Annual Stockholders' Meeting held on March 5, 2013
P-17-1	Certified True Copy Stamp and signature of custodian
P-17-2	Provision pertaining to the resolution of the Stockholders on redemption of shares
P-17-3	Provision pertaining to the resolution of the Stockholders on retirement of redeemed shares
P-18	Audited Financial Statement for the year 2004 prepared by Joaquin Cunanan & Co.
P-18-1	SEC Certified True Copy Stamp
P-18-2	Portion of the Balance Sheet in the Audited Financial Statement for the year 2004 prepared by Joaquin Cunanan & Co., showing the retained earnings deficit of the Petitioner
P-19	Audited Financial Statement for the year 2005 prepared by Joaquin Cunanan & Co.
P-19-1	SEC Certified True Copy Stamp
P-19-2	Portion of the Balance Sheet in the Audited Financial Statement for the year 2005 prepared by Joaquin Cunanan & Co., showing the retained earnings deficit of the Petitioner
P-20	Audited Financial Statement for the year 2006 prepared by Joaquin Cunanan & Co.
P-20-1	SEC Certified True Copy Stamp
P-20-2	Portion of the Balance Sheet in the Audited Financial Statement for the year 2006 prepared by Joaquin Cunanan & Co., showing the retained earnings deficit of the Petitioner
P-21	Audited Financial Statement for the year 2007 prepared by Joaquin Cunanan & Co.
P-21-1	SEC Certified True Copy Stamp
P-21-2	Portion of the Balance Sheet in the Audited Financial Statement for the year 2007 prepared by Joaquin Cunanan & Co., showing the retained earnings deficit of the Petitioner
P-22	Audited Financial Statement for the year 2008 prepared by Isla Lipana & Co.
P-22-1	SEC Certified True Copy Stamp
P-22-2	Portion of the Balance Sheet in the Audited Financial Statement for the year 2008 prepared by Isla Lipana & Co., showing the retained earnings deficit of the Petitioner
P-23	Audited Financial Statement for the year 2009 prepared by Isla Lipana & Co.

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P-23-1	SEC Certified True Copy Stamp
P-23-2	Portion of Note 18 – Share Capital of the Audited Financial Statement showing that the Petitioner did not declare dividend on the year 2009
P-23-3	Portion of the Balance Sheet in the Audited Financial Statement for the year 2009 prepared by the Isla Lipana & Co., showing the retained earnings deficit of the Petitioner
P-24	Audited Financial Statement for the year 2010 prepared by Isla Lipana & Co.
P-24-1	SEC Certified True Copy Stamp
P-24-2	Portion of Note 18 – Share Capital of the Audited Financial Statement showing that the Petitioner did not declare dividend on the year 2010
P-24-3	Portion of the Balance Sheet in the Audited Financial Statement for the year 2010 prepared by the Isla Lipana & Co., showing the retained earnings deficit of the Petitioner
P-25	Audited Financial Statement for the year 2011 prepared by Isla Lipana & Co.
P-25-1	SEC Certified True Copy Stamp
P-25-2	Note 16 – Share Capital: Treasury Shares of Audited Financial Statement for the year 2011
P-25-3	Portion of the Balance Sheet in the Audited Financial Statement for the year 2011 prepared by Isla Lipana & Co., showing the retained earnings deficit of the Petitioner
P-26	Audited Financial Statement for the year 2012 prepared by Isla Lipana & Co.
P-26-1	SEC Certified True Copy Stamp
P-26-2	Note 16 – Share Capital: Treasury Shares
P-26-3	Portion of the Balance Sheet in the Audited Financial Statement for the year 2012 prepared by Isla Lipana & Co., showing the retained earnings deficit of the Petitioner
P-26-4	Portion of the Balance Sheet of Audited Financial Statement for the year ended December 31, 2012 showing the net property and equipment of GPI
P-27	General Information Sheet submitted by the Petitioner for the annual/special meeting on February 16, 2004 to SEC for the fiscal year ended December 31, 2003
P-27-1	SEC Certified True Copy Stamp
P-27-2	Portion in the GIS stating that GPI did not declare any dividend cash, property or stock for the year 2003
P-28	General Information Sheet submitted by the Petitioner for the annual/special meeting on February 23, 2005 to SEC for the fiscal year ended December 31, 2004
P-28-1	SEC Certified True Copy Stamp

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P-28-2	Portion in the GIS stating that GPI did not declare any dividend cash, property or stock for the year 2004
P-29	General Information Sheet submitted by the Petitioner for the annual/special meeting on February 14, 2006 to SEC for the fiscal year ended December 31, 2005
P-29-1	SEC Certified True Copy Stamp
P-29-2	Portion in the GIS stating that GPI did not declare any dividend cash, property or stock for the year 2005
P-30	General Information Sheet submitted by the Petitioner for the annual/special meeting on February 20, 2007 to SEC for the fiscal year ended December 31, 2006
P-30-1	SEC Certified True Copy Stamp
P-30-2	Portion in the GIS stating that GPI did not declare any dividend cash, property or stock for the year 2006
P-31	General Information Sheet submitted by the Petitioner for the annual/special meeting on February 20, 2008 to SEC for the fiscal year ended December 31, 2007
P-31-1	SEC Certified True Copy Stamp
P-31-2	Portion in the GIS stating that GPI did not declare any dividend cash, property or stock for the year 2007
P-33	General Information Sheet submitted by the Petitioner for the annual/special meeting on February 19, 2010 to SEC for the fiscal year ended December 31, 2010
P-33-1	SEC Certified True Copy Stamp
P-33-2	Portion in the GIS stating that GPI did not declare any dividend cash, property or stock for the year 2009
P-34	General Information Sheet submitted by the Petitioner for the annual/special meeting on March 1, 2011 to SEC for the fiscal year ended December 31, 2011
P-34-1	SEC Certified True Copy Stamp
P-34-2	Portion in the GIS stating that GPI did not declare any dividend cash, property or stock for the year 2011
P-35	General Information Sheet submitted by the Petitioner for the annual/special meeting on February 28, 2012 to SEC for the fiscal year ended December 31, 2012
P-35-1	SEC Certified True Copy Stamp
P-35-2	Portion in the GIS stating that GPI did not declare any dividend cash, property or stock for the year 2012
P-36	Application for Relief from Double Taxation (TTRA) Form No. 0901-C stamped "Received" by the BIR dated April 8, 2013
P-37	Application letter for relief from Double Taxation filed by Punongbayan & Araullo stamped "Received" by the BIR dated April 8, 2013
P-38	Payment Form BIR Form No. 0605 stamped "Received" on April 8, 2013
P-39	Revenue Accounting Division (RAD) Certification showing that the amount of P18,784,742.85 was received by the BIR

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P-39-1	Portion of the RAD Certification showing the amount of final withholding tax paid by the Petitioner
P-40	Consularized certification from the Department of the Treasury of the Internal Revenue Service (IRS) of the United States of America dated January 22, 2013
P-41	Certification from the Department of Treasury of the United States of America dated January 22, 2013
P-41-1	Declaration of Nancy Aiello that GTRC is resident of the United States
P-42	Comparative schedule of property, plant and equipment (PPE) of Goodyear Philippines Inc. from 2011-2013
P-42-2	Signature of Ms. Marilou Rodas
P-44	Certificate of Registration (COR)/BIR Form No. 2303 issued by the Bureau of Internal Revenue (BIR) with OCN No.: 8RC0000016936
P-44-1	Certified True Copy stamp
P-45	Special Power of Attorney (SPA) authorizing Punongbayan & Araullo to file the request for ruling with the BIR
P-46	Audited Financial Statement of Goodyear Philippines, Inc. for the year ended December 31, 2003
P-46-1	SEC Certified True Copy Stamp
P-46-2	Statement of Changes in Equity of Audited Financial Statement of GPI for the year ended December 31, 2003
P-47	Judicial Affidavit of Marilou F. Rodas dated January 29, 2016
P-50	Secretary's Certificate dated October 24, 2013 for the Board Meeting on June 20, 2013

During the hearing on October 11, 2016, respondent was considered to have waived the right to present his evidence in this case considering that the presentation of respondent's evidence had already been reset upon motion of his counsel, yet no Judicial Affidavit of respondent's witness had been filed, and his counsel of record was absent without any explanation.[31]

Petitioner filed its Memorandum[32] on November 10, 2016. Respondent, on the other hand, failed to file his Memorandum.[33] Thus, in the Resolution[34] dated December 20, 2016, the instant Petition for Review was declared submitted for decision.

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[31] Docket, pp. 609-610.
[32] Docket, pp. 618-643.
[33] Records Verification dated December 5, 2016, Docket, p. 646.
[34] Docket, p. 651.

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The parties stipulated on the following issue[35] for resolution of this Court:

> Whether or not petitioner is entitled to its claim for refund/issuance of tax credit certificate (TCC) in the amount of ₱18,784,742.85 representing Final Withholding Tax withheld and paid on April 4, 2013.

Sections 204(C) and 229 of the National Internal Revenue Code of 1997, as amended, state the requirements for the recovery of tax erroneously or illegally collected, to wit:

> "SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –
>
> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **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:** *Provided, however*, that a return filed showing an overpayment shall be considered as a written claim for credit or refund." *(Emphasis supplied)*
>
> "SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner;

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[35] Stipulated Issue, JSFI, Docket, p. 339.

> but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> **In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment:** *Provided, however*, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." *(Emphasis supplied)*

Pursuant to the above-mentioned provisions, to be entitled to a refund of erroneously or illegally collected tax, the following requisites must be complied with:

> (1) that the tax has been erroneously or illegally collected, or the penalty has been collected without authority, and/or any sum has been excessively or in any manner wrongfully collected; and
>
> (2) that the claim for refund or credit has been filed within two (2) years from the date of payment of tax, or penalty, regardless of any supervening cause that may arise after payment.

Petitioner's administrative and judicial claims for refund were timely filed

The Court shall first determine the timeliness of the filing of petitioner's claim in the administrative and judicial levels. The law mandates that both the administrative and judicial claims for refund of erroneously paid tax must be done within two (2) years from the date of payment of the tax.

Moreover, jurisprudence provides that when the two-year period is about to prescribe and the claim for refund with the Commissioner of Internal Revenue (CIR) has not been acted upon, for the protection of the interest of the taxpayer, he should file a Petition for Review with this Court 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 this Court.[36] Thus, it is not necessary for the CIR to act unfavorably on the claim for refund before this Court may acquire jurisdiction because of the positive requirement of Section 229 and the doctrine that delay of the Commissioner in rendering decision does not extend the peremptory period fixed by the statute. Neither is it required under the law that the claim for refund be filed at the earliest instance in order to give the CIR an opportunity to rule on it and the Court to review the ruling of the CIR on appeal. The law fixed the same period — two years — for filing a claim for refund with the CIR [Section 204(C)], and for filing suit in Court (Section 229)[37] and as long as these two acts fall within this period then, there is no legal impediment to the judicial claim for refund.[38] Section 229 of the NIRC of 1997, as amended, only requires that the administrative claim be priorly filed.[39]

In the case of *Commissioner of Internal Revenue vs. Goodyear Philippines, Inc.*[40], the Supreme Court held that Section 229 of the NIRC of 1997, as amended, states that judicial claims for refund must be filed within two (2) years from the date of payment of the tax or penalty, providing further that the same may not be maintained until a claim for refund or credit has been duly filed with the CIR.

Thus, the settled rule is that both the claim for refund with the BIR and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period from the date of payment of the tax.[41]

A perusal of the records shows that petitioner remitted the subject 15% FWT in the amount of ₱18,784,742.85 on April 3, 2013.

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[36] *Commissioner of Internal Revenue vs. Hitachi Computed Products (Asia) Corporation*, CA-G.R. SP No. 63340, February 7, 2002.
[37] *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.
[38] *Manila Electric Company vs. The Commissioner of Internal Revenue*, CTA Case No. 5091, October 2, 1997.
[39] *CBK Power Company Limited vs. Commissioner of Internal Revenue*, G.R. Nos. 193383-84, January 14, 2015.
[40] G.R. No. 216130, August 3, 2016.
[41] *Commissioner of Internal Revenue vs. Victorias Milling Co., Inc. and The Court of Tax Appeals*, G.R. No. L-24108, January 3, 1968.

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Petitioner presented its Monthly Remittance of Final Income Taxes Withheld (BIR Form No. 1601-F), the corresponding Bank of the Philippine Islands (BPI) Online Payment Confirmation Receipt[42], and the Certification[43] issued by the Revenue Accounting Division as proof.

Counting two years from the said date, petitioner had until April 3, 2015 to file its claim both in the administrative and judicial levels. Clearly, petitioner's administrative claim[44] filed on March 30, 2015 and petitioner's immediate appeal before this Court on March 31, 2015[45] were well within the two-year prescriptive period.

Petitioner's payment of 15% FWT on dividends is erroneous

In an earlier case involving the same parties and issues entitled *Commissioner of Internal Revenue vs. Goodyear Philippines, Inc.*[46] (*Goodyear* case), the Supreme Court ruled that the gain realized by Goodyear Tire and Rubber Company (GTRC) from the redemption of its preferred shares is not a dividend under Article 11(5) of the RP-US Tax Treaty and Section 73(A)(B) of the NIRC of 1997, as amended, to wit:

> "The imposition of 15% FWT on intercorporate dividends received by a non-resident foreign corporation is found in Section 28 (B) (5) (b) of the Tax Code which reads:
>
> > SEC. 28. *Rates of Income Tax on Foreign Corporations.* –
> >
> > xxx xxx xxx
> >
> > (B) *Tax on Nonresident Foreign Corporation.* –

[42] Exhibits "P-4", "P-5", and "P-6", FOE Folder.
[43] Exhibit "P-39", FOE Folder.
[44] Exhibits "P-7", "P-8" and "P-9", FOE Folder.
[45] Petition for Review, Docket, pp. 10-25.
[46] *Commissioner of Internal Revenue vs. Goodyear Philippines, Inc.*, G.R. No. 216130, August 3, 2016.

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(5) *Tax on Certain Incomes Received by a Nonresident Foreign Corporation.* –

(b) *Intercorporate Dividends.* – **<u>A final withholding tax at the rate of fifteen percent (15%) is hereby imposed on the amount of cash and/or property dividends received from a domestic corporation, which shall be collected and paid as provided in Section 57 (A) of this Code</u>**, subject to the condition that the country in which the nonresident foreign corporation is domiciled, shall allow a credit against the tax due from the nonresident foreign corporation taxes deemed to have been paid in the Philippines equivalent to twenty percent (20%), which represents the difference between the regular income tax of thirty-five percent (35%) and the fifteen percent (15%) tax on dividends as provided in this subparagraph: *Provided*, That effective January 1, 2009, the credit against the tax due shall be equivalent to fifteen percent (15%), which represents the difference between the regular income tax of thirty percent (30%) and the fifteen percent (15%) tax on dividends;

xxx xxx xxx
(Emphasis and underscoring supplied)

It must be noted, however, that GTRC is a non-resident foreign corporation, specifically a resident of the US. Thus, pursuant to the cardinal principle that treaties have the force and effect of law in this jurisdiction, the RP-US Tax Treaty complementarily governs the tax implications of respondent's transactions with GTRC.

Under Article 11 (5) of the RP-US Tax Treaty, the term 'dividends' should be understood according to the taxation law of the State in which the corporation making the distribution is a resident, which, in this case, pertains to respondent, a resident of the Philippines. Accordingly, attention should be drawn to the statutory definition of what constitutes 'dividends,' pursuant to

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Section 73 (A) of the Tax Code which provides that '**<u>[t]he term 'dividends' . . . means any distribution made by a corporation to its shareholders out of its earnings or profits</u>** and payable to its shareholders, whether in money or in other property.'

In light of the foregoing, the Court therefore holds that the redemption price representing the amount of P97,732,314.00 received by GTRC could not be treated as accumulated dividends in arrears that could be subjected to 15% FWT. Verily, respondent's AFS covering the years 2003 to 2009 show that it did not have unrestricted retained earnings, and in fact, operated from a position of deficit. **Thus, absent the availability of unrestricted retained earnings, the board of directors of respondent had no power to issue dividends**. Consistent with Section 73 (A) of the Tax Code, this rule on dividend declaration — *i.e.*, that it is dependent upon the availability of unrestricted retained earnings — was further edified in Section 43 of The Corporation Code of the Philippines which reads:

> Section 43. *Power to Declare Dividends.* – **<u>The board of directors of a stock corporation may declare dividends out of the unrestricted retained earnings which shall be payable in cash, in property, or in stock to all stockholders on the basis of outstanding stock held by them</u>:** *Provided*, That any cash dividends due on delinquent stock shall first be applied to the unpaid balance on the subscription plus costs and expenses, while stock dividends shall be withheld from the delinquent stockholder until his unpaid subscription is fully paid: *Provided, further*, That no stock dividend shall be issued without the approval of stockholders representing not less than two-thirds (2/3) of the outstanding capital stock at a regular or special meeting duly called for the purpose.
>
> xxx xxx xxx
>
> (Emphasis and underscoring supplied)

It is also worth mentioning that one of the primary features of an ordinary dividend is that the distribution should be in the nature of a recurring return on stock which, however,

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does not obtain in this case. As aptly pointed out by the CTA *En Banc*, the amount of P97,732,314.00 received by GTRC did not represent a periodic distribution of dividend, but rather a payment by respondent for the redemption of GTRC's 3,729,216 preferred shares. In *Wise & Co., Inc. v. Meer:*

> **<u>The amounts thus distributed among the plaintiffs were not in the nature of a recurring return on stock — in fact, they surrendered and relinquished their stock in return for said distributions</u>**, thus ceasing to be stockholders of the Hongkong Company, which in turn ceased to exist in its own right as a going concern during its more or less brief administration of the business *as trustee* for the Manila Company, and finally disappeared even as such trustee.
>
>> 'The distinction between a distribution in liquidation and an ordinary dividend is *factual*; the result in each case depending on the *particular circumstances of the case and the intent of the parties*. **<u>If the distribution is in the nature of a recurring return on stock it is an ordinary dividend. However, if the corporation is really *winding up its business* or recapitalizing and narrowing its activities, the distribution may properly be treated as incomplete or partial liquidation and as payment by the corporation to the stockholder for his stock.</u>** The corporation is, in the latter instances, wiping out all parts of the stockholders' interest in the company ....' (Montgomery, Federal Income Tax Handbook [1938-1939], 258 ...) (Emphases and underscoring supplied)

All told, the amount of P97,732,314.00 received by GTRC from respondent for the redemption of its 3,729,216 preferred shares were not accumulated dividends in arrears. Contrary to petitioner's claims, it is therefore not subject to 15% FWT on dividends in accordance with Section 28 (B) (5) (b) of the Tax Code."

The present petition is similar to the aforecited case. The records show that GTRC owns 13,318,630 preferred shares of petitioner, which were subscribed by GTRC at a par value of ₱100.00 per share. The said preferred shares have the following rights, privileges, and restrictions: [47]

> 1. The holders of Preferred Shares shall be entitled to and paid a yearly cumulative dividend at the rate of five percent (5%) per annum, and no more, payable semi-annually, commencing on One Hundred Eighty (180) days from the date of subscription and payment in full of the Preferred Shares thereof.
>
> 2. Preferred Shares and all accrued and unpaid dividends, if any, to which they are entitled, shall have a First (1st) lien on the assets of the Corporation. In the event of liquidation or dissolution or winding up, whether voluntary or involuntary, of the Corporation, the holders of Preferred Shares shall be entitled to be paid in full both the par amount of their shares and any unpaid dividends accrued thereon, before any amount shall be paid to the holders of other stock.
>
> 3. Preferred Shares shall not be convertible into Common Stock.
>
> 4. **Each and every certificate of Preferred Shares shall be subject to redemption**, and may at the option of the Board of Directors, regardless of the existence of unrestricted retained earnings in the books of the Corporation, on any semi-annual dividend date at any time after one (1) year from the date of the issuance of such certificate, be called and retired **at the price of One Hundred (₱100.00) for each share and the amount of dividends accrued and unpaid at the date of the redemption**.

[47] Exhibit "P-11", FOE Folder.

5. Except where otherwise prescribed by law, the holders of Preferred Shares shall not be entitled to any voice in the management of the Corporation, or to any voting powers at any Stockholders meeting.

The 2,597,133 preferred shares issued to GTRC, covered by Stock Certificate Nos. 156 to 158[48], were redeemed by petitioner at the total Redemption Price of ₱384,944,919.00[49]; which consisted of the aggregate par value of the shares in the amount of ₱259,713,300.00 and accrued and unpaid dividends in the amount of ₱125,231,619.00, broken down as follows:[50]

Aggregate Par Value (₱100 per share x 2,597,133 shares)	₱ 259,713,300.00
Accrued and unpaid dividends	125,231,619.00
Redemption Price	**₱384,944,919.00**

While GTRC was able to realize a gain of ₱125,231,619.00[51] on the redemption of its preferred shares, such cannot be considered dividends subject to 15% FWT under Section 28(B)(5)(b) of the NIRC of 1997, as amended.

Petitioner's Audited Financial Statements for the years 2003 to 2013 show that it did not have unrestricted retained earnings or profits during those years to cover any dividend declaration, to wit:

Exhibit	Year	Retained Earnings (deficit)
"P-18"	2003	(₱2,085,557,538.00)
"P-19"	2004	(2,010,786,090.00)
"P-19-2"	2005	(1,658,184,812.00)
"P-20-2"	2006	(1,554,486,001.00)
"P-21-2"	2007	(1,415,231,943.00)
"P-22-2"	2008	(1,422,712,090.00)
"P-23-3"	2009	(1,621,010,996.00)
"P-24-3"	2010	(1,438,866,204.00)
"P-25-3"	2011	(1,282,441,348.00)
"P-10"	2012	(112,857,126.00)
"P-10"	2013	(927,684,632.00)

48 Exhibits "P-12" to "P-14", FOE Folder.
49 Exhibits "P-17-2" and "P-17-3", FOE Folder.
50 Exhibit "P-10-3", FOE Folder.
51 The difference between the redemption price of ₱384,944,919.00 and GRTC's cost of acquisition of the 2,597,133 shares of ₱259,713,300.00.

Clearly, GTRC's gain does not represent a recurring return on the shares redeemed but as payment by petitioner to GTRC for the redemption of the preferred shares. The mention of "dividends" in the payment of redemption price was only used to compute and determine the total redemption price to be paid to GTRC and was not meant as distribution of profits accumulated by petitioner.

In fine, the gain resulting from the redemption is not "dividend" as contemplated under the NIRC of 1997, as amended, but a capital gain subject to the 5% or 10% capital gains tax under Section 28(B)(5)(c) of the NIRC of 1997, as amended, which states:

> "SEC. 28. *Rates of Income Tax on Foreign Corporations.* –
>
> xxx xxx xxx
>
> (B) *Tax on Nonresident Foreign Corporation.* –
>
> xxx xxx xxx
>
> (5) *Tax on Certain Incomes Received by a Nonresident Foreign Corporation.* –
>
> xxx xxx xxx
>
> (c) *Capital Gains from Sale of Shares of Stock not Traded in the Stock Exchange.* – **A final tax at the rates prescribed below is hereby imposed upon the net capital gains realized during the taxable year from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation**, except shares sold, or disposed of through the stock exchange:
>
> Not over P100,000 ....5%
> On any amount in excess of P100,000 ....10%"
> *(Emphasis supplied)*

However, as enunciated by the Supreme Court in the *Goodyear* case, considering that GTRC is a resident of the US, the provision of the RP-US Tax Treaty on income earned by GTRC shall also apply.

The CTA *En Banc* in the case of *Commissioner of Internal Revenue vs. Goodyear Philippines, Inc.*[52] held that the gains derived from the disposition of shares owned by a resident of the US in a domestic corporation will be taxable if the latter's assets consist principally of real property interests located in the Philippines, thus:

> "Hence, in general, when preferred shares are redeemed and classified as treasury shares in the books of the issuing corporation, pursuant to RR No. 006-08, the net capital gain derived from the redemption of the preferred shares is generally subject to the 5% and 10% capital gains tax. In the case of a nonresident foreign corporation, the net capital gain shall generally be subject to the capital gains tax imposed under Section 28(B)(5)(c) of the NIRC of 1997, as amended, which is quoted hereunder:
>
> xxx xxx xxx
>
> However, in the instant case, since GTRC is a resident of the US, the provisions of the RP-US Tax Treaty shall also apply in determining the Philippine income taxation of the net capital gain that GTRC derived on the redemption by (respondent) of its 3,729,216 preferred shares, which were reclassified as treasury shares in the books of (respondent).
>
> Article 14 of the RP-US Tax Treaty provides as follows:
>
> **Article 14**
> **CAPITAL GAINS**
>
> (1) Gains from the alienation of tangible personal (movable) property forming part of the business property of a permanent establishment which a resident of a Contracting State has in the other Contracting State or of tangible personal (movable) property pertaining to a fixed base

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[52] CTA EB No. 1041 (CTA Case No. 8188), August 14, 2014.

available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in the other State. However, gains derived by a resident of a Contracting State from the alienation of ships, aircraft or containers operated by such resident in international traffic shall be taxable only in that State, and gains described in Article 13 (Royalties) shall be taxable only in accordance with the provisions of Article 13.

(2) **Gains from the alienation of any property other than those mentioned in paragraph (1) or in Article 7 (Income from Real Property) shall be taxable only in the Contracting State of which the alienator is a resident**. (Emphasis supplied)

Furthermore, the Reservation Clause of the same Treaty provides, in part, as follows:

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Notwithstanding the provisions of Article 14 of the Convention relating to capital gains, **both the Philippines and the United States may tax gain from the disposition of an interest in a corporation if its assets consist principally of a real property interest located in that country**. Likewise, both countries may tax gain from the disposition of an interest in a partnership, trust or estate to the extent the gain is attributable to a real property interest in one of the countries. **The term 'real property interest' is to have the meaning it has under the law of the country in which the underlying real property is located**. (Emphasis supplied)

Therefore, any gain that may be derived by a resident of the US from the alienation of its properties, other than those mentioned in paragraph (1) of Article 14 of the RP-US Tax Treaty, shall be taxable only in the US. However, under the Reservation Clause of the RP-US Tax Treaty, the Philippines may tax the gains derived from the disposition of shares owned by a resident of the US in a domestic corporation, if the latter's assets consist principally of real property interests located in the Philippines.

Under RR No. 4-86 dated April 2, 1986, the term 'Real Property Interest' shall be understood to include real properties as understood under Philippine laws. 'Real Property Interest' means any properties enumerated in Section 3 of RR No. 4-86 which, are not, however, exclusive of others that are similarly situated. Moreover, the term 'Principally' means more than 50% of the entire assets in terms of value."

In the present case, the Audited Financial Statements[53] of petitioner for the years 2012 and 2013 show that the real property components of its Property, Plant and Equipment (PPE) comprise less than 50% of its assets, broken down as follows:

PPE	2012 AFS	2013 AFS
Leasehold Improvements	₱8,866,008.00	₱6,330,781.00
Furniture, Fixtures and Office equipment	7,482,783.00	6,228,559.00
Other equipment	1,252,831.00	1,820,130.00
Construction-in-progress	743,672.00	1,156,504.00
Subtotal	18,345,294.00	15,535,974.00
Total Assets	1,260,240,576.00	1,020,302,091.00
% of Subtotal to Total Assets	1.46%	1.52%

Evidently, petitioner's asset does not consist primarily of real property interest. Thus, the net capital gain derived by GTRC on the redemption of its preferred shares is exempt from the 5% or 10% capital gains tax imposed under Section 28(B)(5)(c) of the NIRC of 1997, as amended.

In sum, considering that the redemption of the 2,597,133 preferred shares issued to GTRC resulted in capital gain amounting to ₱125,231,619.00 and not dividends and that the capital gain realized

[53] Exhibit "P-10-5", FOE Folder.

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therefrom was exempt from capital gains tax pursuant to the RP-US Tax Treaty, the amount of ₱18,784,742.85 representing 15% FWT withheld and remitted by petitioner on the said transaction is erroneous, thus, refundable under Sections 204(C) and 229 of the NIRC of 1997, as amended.

To borrow from *Commissioner of Internal Revenue vs. Fortune Tobacco Corporation*[54], if the state expects taxpayers to observe fairness and honesty in paying their taxes, it must hold itself against the same standard in refunding erroneous exactions and payment of such taxes. It thus behooves the government to refund what it erroneously collected.[55]

WHEREFORE, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, respondent is **ORDERED TO REFUND** in favor of petitioner the amount of **₱18,784,742.85** representing erroneously withheld and remitted FWT in relation to the redemption of 2,597,133 preferred shares issued to GTRC on April 11, 2013.

SO ORDERED.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

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[54] G.R. Nos. 167274-75, July 21, 2008.
[55] *Commissioner of Internal Revenue and Commissioner of Customs vs. Philippine Airlines, Inc.*, G.R. No. 212536-37, August 27, 2014.

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice
Chairperson, 1st Division