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[G.R. No. 66838. December 2, 1991]

COMMISSIONER OF INTERNAL REVENUE, *petitioner, vs.* **PROCTER & GAMBLE PHILIPPINE MANUFACTURING CORPORATION and THE COURT OF TAX APPEALS,** *respondents.*

SYLLABUS

1. TAXATION; REFUND; QUESTION OF INCAPACITY OF CLAIMANT; CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL; CASE AT BAR. — There are certain preliminary aspects of the question of the capacity of P&G-Phil. to bring the present claim for refund or tax credit, which need to be examined. This question was raised for the first time on appeal, *i.e.*, in the proceedings before this Court on the Petition for Review filed by the Commissioner of Internal Revenue. The question was not raised by the Commissioner on the administrative level, and neither was it raised by him before the CTA. We believe that the Bureau of Internal Revenue ("BIR") should not be allowed to defeat an otherwise valid claim for refund by raising this question of alleged incapacity for the first time on appeal before this Court. This is clearly a matter of procedure. Petitioner does not pretend that P&G-Phil., should it succeed in the claim for refund, is likely to run away, as it were, with the refund instead of transmitting such refund or tax credit to its parent and sole stockholder. It is commonplace that in the absence of explicit statutory provisions to the contrary, the government must follow the same rules of procedure which bind private parties. It is, for instance, clear that the government is held to compliance with the provisions of Circular No. 1-88 of this Court in exactly the same way that private litigants are held to such compliance, save only in respect of the matter of filing fees from which the Republic of the Philippines is exempt by the Rules of Court. More importantly, there arises here a question of fairness should the BIR, unlike any other litigant, be allowed to raise for the first time on appeal questions which had not been litigated either in the lower court or on the administrative level. For, if petitioner had at the earliest

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possible opportunity, *i.e.*, at the administrative level, demanded that P&G-Phil. produce an express authorization from its parent corporation to bring the claim for refund, then P&G-Phil. would have been able forthwith to secure and produce such authorization before filing the action in the instant case. The action here was commenced just before expiration of the two (2)-year prescriptive period.

2. ID.; ID.; CLAIMING THEREOF BEFORE COMMISSIONER OF INTERNAL REVENUE; ESSENTIAL FOR MAINTENANCE OF A SUIT FOR RECOVERY OF TAXES ERRONEOUSLY OR ILLEGALLY COLLECTED. — Under Section 306 of the NIRC, a claim for refund or tax credit filed with the Commissioner of Internal Revenue is essential for maintenance of a suit for recovery of taxes allegedly erroneously or illegally assessed or collected. Section 309 (3) of the NIRC, in turn, provides for the Authority of Commissioner to Take Compromises and to Refund Taxes.

3. ID.; ID.; CAPACITY OF WITHHOLDING AGENT TO CLAIM THEREOF; WARRANTED IN CASE AT BAR; REASONS THEREFOR. — Since the claim for refund was filed by P&G-Phil., the question which arises is: is P&G-Phil. a "taxpayer" under Section 309 (3) of the NIRC? The term "taxpayer" is defined in our NIRC as referring to "any person subject to tax imposed by the Title [on Tax on Income]." It thus becomes important to note that under Section 53 (c) of the NIRC, the withholding agent who is "required to deduct and withhold any tax" is made personally liable for such tax" and indeed is indemnified against any claims and demands which the stockholder might wish to make in questioning the amount of payments effected by the withholding agent in accordance with the provisions of the NIRC. The withholding agent, P&G-Phil., is directly and independently liable for the correct amount of the tax that should be withheld from the dividend remittances. The withholding agent is, moreover, subject to and liable for deficiency assessments, surcharges and penalties should the amount of the tax withheld be finally found to be less than the amount that should have been withheld under law. A "person liable for tax" has been held to be a "person subject to tax" and properly considered a "taxpayer." The terms "liable for tax" and "subject to tax" both connote legal obligation or duty to pay a tax. It is very difficult, indeed conceptually impossible,

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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.

4. ID.; ID.; WITHHOLDING AGENT; ACTS AS AN AGENT OF BOTH THE GOVERNMENT AND TAXPAYER. — 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: "The law sets no condition for the personal liability of the withholding agent to attach. The reason is to compel the withholding agent to withhold the tax under all circumstances. In effect, the responsibility for the collection of the tax as well as the payment thereof is concentrated upon the person over whom the Government has jurisdiction. Thus, the withholding agent is constituted the agent of both the Government and the taxpayer. With respect to the collection and/or withholding of the tax, he is the Government's agent. In regard to the filing of the necessary income tax return and the payment of the tax to the Government, he is the agent of the taxpayer. The withholding agent, therefore, is no ordinary government agent especially because under Section 53 (c) he is held personally liable for the tax he is duty bound to withhold; whereas the Commissioner and his deputies are not made liable by law." If, 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. This implied authority is especially warranted where, as in the instant case, the withholding agent is the wholly owned subsidiary of the parent-stockholder and therefore, at all times, under the effective control of such parent-stockholder. In the circumstances of this case, it seems particularly unreal to deny the implied authority of P&G-Phil. to claim a refund and to commence an action for such refund.

5. ID.; TAX ON FOREIGN CORPORATION; NON-RESIDENT CORPORATION; APPLICABILITY OF THE REDUCED

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REMITTANCE OF FIFTEEN PERCENT (15%) TAX RATE; RULE. — The applicability to the dividend remittances by P&G-Phil. to P&G-USA of the fifteen percent (15%) tax rate provided for in Section 24 (b) (1) of the NIRC. The ordinary thirty-five (35%) tax rate applicable to dividend remittances to non-resident corporate stockholders of a Philippine corporation, goes down to fifteen percent (15%) if the country of domicile of the foreign stockholder corporation "shall allow" such foreign corporation tax a credit for "taxes deemed paid in the Philippines," applicable against the tax payable to the domiciliary country by the foreign stockholder corporation. In other words, in the instant case, the reduced fifteen percent (15%) dividend tax rate is applicable if the USA "shall allow" to P&G-USA a tax credit for "taxes deemed paid in the Philippines" applicable against the US taxes of P&G-USA. The NIRC specifies that such tax credit for "taxes deemed paid in the Philippines" must, as a minimum, reach an amount equivalent to twenty (20) percentage points which represents the difference between the regular thirty-five percent (35%) dividend tax rate and the preferred fifteen percent (15%) dividend tax rate. It is important to note that Section 24 (b)(1), NIRC, does not require that the US must give a "deemed paid" tax credit for the dividend tax (20 percentage points) waived by the Philippines in making applicable the preferred dividend tax rate of fifteen percent (15%). In other words, our NIRC does not require that the US tax law deem the parent-corporation to have paid the twenty (20) percentage points of dividend tax waived by the Philippines. The NIRC only requires that the US "shall allow" P&G-USA a "deemed paid" tax credit in an amount equivalent to the twenty (20) percentage points waived by the Philippines.

6. ID.; ID.; ID.; ID.; ID.; APPLICABLE IN CASE AT BAR. — The parent-corporation P&G-USA is "deemed to have paid" a portion of the Philippine corporate income tax although that tax was actually paid by its Philippine subsidiary, P&G-Phil., not by P&G-USA. This "deemed paid" concept merely reflects economic reality, since the Philippine corporate income tax was in fact paid and deducted from revenues earned in the Philippines, thus reducing the amount remittable as dividends to P&G-USA. In other words, US tax law treats the Philippine corporate income tax as if it came out of the pocket, as it were, of P&G-USA as a part of the economic cost of carrying on business operations in the Philippines through the medium

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of P&G-Phil. and here earning profits. What is, under US law, deemed paid by P&G-USA are not "phantom taxes" but instead Philippine corporate income taxes actually paid here by P&G-Phil., which are very real indeed. It is also useful to note that both (i) tax credit for the Philippine dividend tax actually withheld, and (ii) the tax credit for the Philippine corporate income tax actually paid by P&G-Phil. but "deemed paid" by P&G-USA, are tax credits available or applicable against the US corporate income tax of P&G-USA. These tax credits are allowed because of the US congressional desire to avoid or reduce double taxation of the same income stream.

7. ID.; ID.; ID.; ID.; ID.; DETERMINING FACTORS. — In order to determine whether US tax law complies with the requirements for applicability of the reduced or preferential fifteen percent (15%) dividend tax rate under Section 24 (b) (1), NIRC, it is necessary: a) to determine the amount of the 20 percentage points dividend tax waived by the Philippine government under Section 24 (b) (1), NIRC, and which hence goes to P&G-USA; b) to determine the amount of the "deemed paid" tax credit which US tax law must allow to P&G-USA; and c) to ascertain that the amount of the "deemed paid" tax credit allowed by US law is at least equal to the amount of the dividend tax waived by the Philippine Government.

8. ID.; ID.; ID.; ID.; "DEEMED PAID" TAX CREDIT; NEED NOT HAVE BEEN GRANTED BEFORE THE PREFERENTIAL FIFTEEN PERCENT (15%) DIVIDEND TAX RATE. — Clearly, the "deemed paid" tax credit which, under Section 24 (b) (1), NIRC, must be allowed by US law to P&G-USA, is the same "deemed paid tax credit that Philippine law allows to a Philippine corporation with a wholly- or majority-owned subsidiary in (for instance) the US. The "deemed paid" tax credit allowed in Section 902, US Tax Code, is no more a credit for "phantom taxes" than is the "deemed paid" tax credit granted in Section 30 (c) (8), NIRC. We believe, in the first place, that we must distinguish between the legal question before this Court from questions of administrative implementation arising after the legal question has been answered. The basic legal issue is, of course, this: which is the applicable dividend tax rate in the instant case: the regular thirty-five percent (35%) rate or the reduced fifteen percent (15%) rate? The question of whether or not P&G-USA is in

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fact given by the US tax authorities a "deemed paid" tax credit in the required amount, relates to the administrative implementation of the applicable reduced tax rate. In the second place, Section 24 (b)(1), NIRC, does not in fact require that the "deemed paid" tax credit shall have actually been granted before the applicable dividend tax rate goes down from thirty-five percent (35%) to fifteen percent (15%). As noted several time earlier, Section 24 (b)(1), NIRC, merely requires, in the case at bar, that the USA "shall allow a credit against the tax due from [P&G-USA for] taxes deemed to have been paid in the Philippines . . ." There is neither statutory provision nor revenue regulation issued by the Secretary of Finance requiring the actual grant of the "deemed paid" tax credit by the US Internal Revenue Service to P&G-USA before the preferential fifteen percent (15%) dividend rate becomes applicable. Section 24 (b)(1), NIRC, does not create a tax exemption nor does it provide a tax credit; it is a provision which specifies when a particular (reduced) tax rate is legally applicable.

9. ID.; ID.; ID.; ID.; ADMINISTRATIVE IMPLEMENTATION THEREOF; LODGED WITH THE BUREAU OF INTERNAL REVENUE. — A requirement relating to administrative implementation is not properly imposed as a condition for the applicability, as a matter of law, of a particular tax rate. Upon the other hand, upon the determination or recognition of the applicability of the reduced tax rate, there is nothing to prevent the BIR from issuing implementation regulations that would require P&G-Phil., or any Philippine corporation similarly situated, to certify to the BIR the amount of the "deemed paid" tax credit actually subsequently granted by the US tax authorities to P&G-USA or a US parent corporation for the taxable year involved. Since the US tax laws can and do change, such implementing regulations could also provide that failure of P&G-Phil. to submit such certification within a certain period of time, would result in the imposition of a deficiency assessment for the twenty (20) percentage points differential. The task of this Court is to settle which tax rate is applicable, considering the state of US law at a given time. We should leave details relating to administrative implementation where they properly belong — with the BIR.

10. ID.; ID.; ID.; ID.; PURPOSE OF THE REDUCTION. — An interpretation of a tax statute that produces a revenue flow for the government is not, for that reason alone, necessarily the

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correct reading of the statute. There are many tax statutes or provisions which are designed, not to trigger off an instant surge of revenues, but rather to achieve longer-term and broader-gauge fiscal and economic objectives. The task of our Court is to give effect to the legislative design and objectives as they are written into the statute even if, as in the case at bar, some revenues have to be foregone in that process. The economic objectives sought to be achieved by the Philippine Government by reducing the thirty-five percent (35%) dividend rate to fifteen percent (15%) are set out in the preambular clauses of P.D. No. 369 which amended Section 24 (b)(1), NIRC, into its present form. More simply put, Section 24 (b)(1), NIRC, seeks to promote the in-flow of foreign equity investment in the Philippines by reducing the tax cost of earning profits here and thereby increasing the net dividends remittable to the investor. The foreign investor, however, would not benefit from the reduction of the Philippine dividend tax rate unless its home country gives it some relief from double taxation (*i.e.*, second-tier taxation) (the home country would simply have more "post-R.P. tax" income to subject to its own taxing power) by allowing the investor additional tax credits which would be applicable against the tax payable to such home country. Accordingly, Section 24 (b)(1), NIRC, requires the home or domiciliary country to give the investor corporation a "deemed paid" tax credit at least equal in amount to the twenty (20) percentage points of dividend tax foregone by the Philippines, in the assumption that a positive incentive effect would thereby be felt by the investor.

CRUZ, *J., concurring:*

TAXATION; TAX ON FOREIGN CORPORATION; NON-RESIDENT CORPORATION; DIVIDEND REMITTANCE TAX RATE REDUCED FROM THIRTY-FIVE PERCENT (35%) TO FIFTEEN PERCENT (15%); PURPOSE. — The intention of Section 24(b) of our Tax Code is to attract foreign investors to this country by reducing their 35% dividend tax rate to 15% if their own state allows them a deemed paid tax credit at least equal in amount to the 20% waived by the Philippines. This tax credit would offset the tax payable by them on their profits to their home state. In effect, both the Philippines and the home state of the foreign investors reduce

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their respective tax "take" of those profits and the investors wind up with more left in their pockets. Under this arrangement, the total taxes to be paid by the foreign investors may be confined to the 35% corporate income tax and 15% dividend tax only, both payable to the Philippines, with the US tax liability being offset wholly or substantially by the US "deemed paid" tax credits. Without this arrangement, the foreign investors will have to pay to the local state (in addition to the 35% corporate income tax) a 35% dividend tax and another 35% or more to their home state or a total of 70% or more on the same amount of dividends. In this circumstance, it is not likely that many such foreign investors, given the onerous burden of the two-tier tax system, *i.e.*, local state plus home state, will be encouraged to do business in the local state. It is conceded that the law will "not trigger off an instant surge of revenue," as indeed the tax collectible by the Republic from the foreign investor is considerably reduced. This may appear unacceptable to the superficial viewer. But this reduction is in fact the price we have to offer to persuade the foreign company to invest in our country and contribute to our economic development. The benefit to us may not be immediately available in instant revenues but it will be realized later, and in greater measure, in terms of a more stable and robust economy.

BIDIN, *J., concurring opinion:*

1. TAXATION; COMMISSIONER OF INTERNAL REVENUE; SUBJECT TO THE SAME STRINGENT CONDITION APPLICABLE TO AN ORDINARY LITIGANT. — Mr. Justice Edgardo L. Paras in his dissenting opinion argues that the failure of petitioner Commissioner of Internal Revenue to raise before the Court of Tax Appeals the issue of who should be the real party in interest in claiming a refund cannot prejudice the government, as such failure is merely a procedural defect; and that moreover, the government can never be in estoppel, especially in matters involving taxes. In a word, the dissenting opinion insists that errors of its agents should not jeopardize the government's position. The above rule should not be taken absolutely and literally; if it were, the government would never lose any litigation which is clearly not true. The issue involved here is not merely one of procedure; it is also one of fairness: whether the government should be subject to the same stringent

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conditions applicable to an ordinary litigant. As the Court had declared in Wander: "x x x To allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level, would be to sanction a procedure whereby the Court — which is supposed to review administrative determinations — would not review, but determine and decide for the first time, a question not raised at the administrative forum x x x." Had petitioner been forthright earlier and required from private respondent proof of authority from its parent corporation, Procter and Gamble USA, to prosecute the claim for refund, private respondent would doubtless have been able to show proof of such authority. By any account, it would be rank injustice now at this late stage to require petitioner to submit such proof.

2. ID.; TAX CREDIT; CLAIM THEREOF DOES NOT REQUIRE DOCUMENTARY PROOF OF PARENT CORPORATION TO HAVE ACTUALLY RECEIVED THE "DEEMED PAID" TAX CREDIT TO PROPER TAX AUTHORITY. — Paras, *J.*, stressed that private respondent had failed: (1) to show the actual amount credited by the US government against the income tax due from P & G USA on the dividends received from private respondent; (2) to present the 1975 income tax return of P & G USA when the dividends were received; and (3) to submit any duly authenticated document showing that the US government credited the 20% tax deemed paid in the Philippines. I agree with the main opinion of my colleague, Feliciano, *J.*, specifically in page 23 *et seq*. thereof, which, as I understand it, explains that the US tax authorities are unable to determine the amount of the "deemed paid" credit to be given P & G USA so long as the numerator of the fraction, *i.e.*, dividends actually remitted by P & G to P & G USA, is still unknown. Stated in other words, until dividends have actually been remitted to the US (which presupposes an actual imposition and collection of the applicable Philippine dividend tax rate), the US tax authorities cannot determine the "deemed paid" portion of the tax credit sought by P & G USA. To require private respondent to show documentary proof of its parent corporation having actually received the "deemed paid" tax credit from the proper tax authorities, would be like putting the cart before the horse. The only way of cutting through this (what Feliciano, *J.*, termed) "circularity" is for our BIR to issue rulings (as they have been doing) to the effect that the tax laws of particular

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foreign jurisdictions, *e.g.*, USA, comply with the requirements in our tax code for applicability of the reduced 15% dividend tax rate. Thereafter, the taxpayer can be required to submit, within a reasonable period, proof of the amount of "deemed paid" tax credit actually granted by the foreign tax authority. Imposing such a resolutory condition should resolve the knotty problem of circularity.

3. ID.; TAX REFUND; STRICT CONSTRUCTION AGAINST CLAIMANT THEREOF MUST CONSIDER THE LEGISLATIVE INTENT IN IMPLEMENTING TAX REFUND. — Page 8 of the dissenting opinion of Paras, *J.*, further declares that tax refunds, being in the nature of tax exemptions, are to be construed *strictissimi juris* against the person or entity claiming the exemption; and that refunds cannot be permitted to exist upon "vague implications." Notwithstanding the foregoing canon of construction, the fundamental rule is still that a judge must ascertain and give effect to the legislative intent embodied in a particular provision of law. If a statute (including a tax statute reducing a certain (tax rate) is clear, plain and free from ambiguity, it must be given its ordinary meaning and applied without interpretation. In the instant case, the dissenting opinion of Paras, *J.*, itself concedes that the basic purpose of Pres. Decree No. 369, when it was promulgated in 1975 to amend Section 24(b), [1] of the National Internal Revenue Code, was "to decrease the tax liability" of the foreign capital investor and thereby to promote more inward foreign investment. The same dissenting opinion hastens to add, however, that the granting of a reduced dividend tax rate "is premised on reciprocity."

4. ID.; REDUCED DIVIDEND REMITTANCE; CONDITION OF RECIPROCITY; NOT REQUIRED TO GRANT THE PRIVILEGE. — Nowhere in the provisions of P.D. No. 369 or in the National Internal Revenue Code itself would one find reciprocity specified as a condition for the granting of the reduced dividend tax rate in Section 24 (b), [1], NIRC. Upon the other hand, where the law-making authority intended to impose a requirement of reciprocity as a condition for grant of a privilege, the legislature does so expressly and clearly. For example, the gross estate of non-citizens and non-residents of the Philippines normally includes intangible personal property situated in the Philippines, for purposes of application of the estate tax and donor's tax. However, under Section 98 of the

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NIRC (as amended by P.D. 1457), no taxes will be collected by the Philippines in respect of such intangible personal property if the law or the foreign country of which the decedent was a citizen and resident at the time of his death allows a similar exemption from transfer or death taxes in respect of intangible personal property located in such foreign country and owned by Philippine citizens not residing in that foreign country. There is no statutory requirement of reciprocity imposed as a condition for grant of the reduced dividend tax rate of 15%. Moreover, for the Court to impose such a requirement of reciprocity would be to contradict the basic policy underlying P.D. 369 which amended Section 24(b), [1], NIRC. P.D. 369 was promulgated in the effort to promote the inflow of foreign investment capital into the Philippines. A requirement of reciprocity, *i.e.*, a requirement that the U.S. grant a similar reduction of U.S. subsidiaries of Philippine corporations, would assume a desire on the part of the U.S. and of the Philippines to attract the flow of Philippine capital into the U.S. But the Philippines precisely is a capital importing, and not a capital exporting country. If the Philippines had surplus capital to export, it would not need to import foreign capital into the Philippines. In other words, to require dividend tax reciprocity from a foreign jurisdiction would be to actively encourage Philippine corporations to invest outside the Philippines, which would be inconsistent with the notion of attracting foreign capital into the Philippines in the first place.

PARAS, *J.*, *dissenting*:

1. TAXATION; TAX ON FOREIGN CORPORATIONS; NON-RESIDENT CORPORATION; WITHHOLDING AGENT THEREOF CANNOT CLAIM TAX REFUND IN BEHALF OF PARENT CORPORATION. — It is true that private respondent, as withholding agent, is obliged by law to withhold and to pay over to the Philippine government the tax on the income of the taxpayer, PMC-U.S.A. (parent company). However, such fact does not necessarily connote that private respondent is the real party in interest to claim reimbursement of the tax alleged to have been overpaid. Payment of tax is an obligation physically passed off by law on the withholding agent, if any, but the act of claiming tax refund is a right that, in a strict sense, belongs to the taxpayer which is private respondent's parent company.

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The role or function of PMC-Phils., as the remitter or payor of the dividend income, is merely to insure the collection of the dividend income taxes due to the Philippine government from the taxpayer, "PMC-U.S.A." the non-resident foreign corporation not engaged in trade or business in the Philippines, as "PMC-U.S.A." is subject to tax equivalent to thirty five percent (35%) of the gross income received from "PMC-Phils." in the Philippines "as . . . dividends . . ." Being a mere withholding agent of the government and the real party in interest being the parent company in the United States, private respondent cannot claim refund of the alleged overpaid taxes. Such right properly belongs to PMC-U.S.A. It is therefore clear that as held by the Supreme Court in a series of cases, the action in the Court of Tax Appeals as well as in this Court should have been brought in the name of the parent company as petitioner and not in the name of the withholding agent. This is because the action should be brought under the name of the real party in interest. It is true that under the Internal Revenue Code the withholding agent may be sued by itself if no remittance tax is paid, or if what was paid is less than what is due. From this, Justice Feliciano claims that in case of an overpayment (or claim for refund) the agent must be given the right to sue the Commissioner by itself (that is, the agent here is also a real party in interest). He further claims that to deny this right would be unfair. This is not so. While payment of the tax due is an OBLIGATION of the agent, the obtaining of a refund is a RIGHT. While every obligation has a corresponding right (and vice-versa), the obligation to pay the complete tax has the corresponding right of the government to demand the deficiency; and the right of the agent to demand a refund corresponds to the government's duty to refund. Certainly. The obligation of the withholding agent to pay in full does not correspond to its right to claim for the refund. It is evident therefore that the real party in interest in this claim for reimbursement is the principal (the mother corporation) and NOT the agent.

2. ID.; ID.; ID.; U.S. FOREIGN TAX CREDIT; OPERATES ONLY ON FOREIGN TAXES ACTUALLY PAID BY U.S. CORPORATE TAXPAYER; CASE AT BAR. — The U.S. foreign tax credit system operates only on foreign taxes actually paid by U.S. corporate taxpayers, whether directly or indirectly. Nowhere under a statute or under a tax treaty, does the U.S. government recognize much less permit any foreign tax credit

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for spared or ghost taxes, as in reality the U.S. foreign-tax credit mechanism under Sections 901-905 of the U.S. Internal Revenue Code does not apply to phantom dividend taxes in the form of dividend taxes waived, spared or otherwise considered "as if" paid by any foreign taxing authority, including that of the Philippine government. Beyond that, the private respondent failed: (1) to show the actual amount credited by the U.S. government against the income tax due from PMC-U.S.A. on the dividends received from private respondent; (2) to present the income tax return of its parent company for 1975 when the dividends were received; and (3) to submit any duly authenticated document showing that the U.S. government credited the 20% tax deemed paid in the Philippines.

3. **ID.; TAX REFUND; STRICTLY CONSTRUED AGAINST THE PERSON OR ENTITY CLAIMING TAX REFUND. —** Tax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation or sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the exemption. The burden of proof is upon him who claims the exemption in his favor and he must be able to justify his claim by the clearest grant of organic or statute law x x x and cannot be permitted to exist upon vague implications. Thus, when tax exemption is claimed, it must be shown indubitably to exist, for every presumption is against it, and a well founded doubt is fatal to the claim.

4. **ID.; TAX CREDIT APPERTAINING TO REMITTANCE ABROAD OF DIVIDEND EARNED HERE IN THE PHILIPPINES; PURPOSE. —** It will be remembered that the tax credit appertaining to remittances abroad of dividend earned here in the Philippines was amplified in Presidential Decree No. 369 promulgated in 1975, the purpose of which was to "encourage more capital investment for large projects." And its ultimate purpose is to decrease the tax liability of the corporation concerned. But this granting of a preferential right is premised on reciprocity, without which there is clearly a derogation of our country's financial sovereignty. No such reciprocity has been proved, nor does it actually exist.

5. **CIVIL LAW; ESTOPPEL; DOES NOT APPLY TO GOVERNMENT AGENCIES. —** Petitioner Commissioner of Internal Revenue's failure to raise before the Court of Tax Appeals the issue relating to the real party in interest to claim

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the refund cannot, and should not, prejudice the government. Such is merely a procedural defect. It is axiomatic that the government can never be in estoppel, particularly in matters involving taxes. Thus, for example, the payment by the taxpayer of income taxes, pursuant to a BIR assessment does not preclude the government from making further assessments. The errors or omissions of certain administrative officers should never be allowed to jeopardize the government's financial position.

APPEARANCES OF COUNSEL

T.A. Tejada & C.N. Lim for private respondent.

R E S O L U T I O N

FELICIANO, *J.*:

For the taxable year 1974 ending on 30 June 1974, and the taxable year 1975 ending 30 June 1975, private respondent Procter and Gamble Philippine Manufacturing Corporation ("P&G-Phil.") declared dividends payable to its parent company and sole stockholder, Procter and Gamble Co., Inc. (USA) ("P&G-USA"), amounting to ₱24,164,946.30, from which dividends the amount of ₱8,457,731.21 representing the thirty-five percent (35%) withholding tax at source was deducted.

On 5 January 1977, private respondent P&G-Phil. filed with petitioner Commissioner of Internal Revenue a claim for refund or tax credit in the amount of ₱4,832,989.26 claiming, among other things, that pursuant to Section 24 (b) (1) of the National Internal Revenue Code ("NIRC"),[1] as amended by Presidential Decree No. 369, the applicable rate of withholding tax on the dividends remitted was only fifteen percent (15%) (and not thirty-five percent [35%]) of the dividends.

There being no responsive action on the part of the Commissioner, P&G-Phil., on 13 July 1977, filed a petition for

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[1] We refer here (unless otherwise expressly indicated) to the provisions of the NIRC as they existed during the relevant taxable years and at the time the claim for refund was made. We shall hereafter refer simply to the *NIRC*.

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review with public respondent Court of Tax Appeals ("CTA") docketed as CTA Case No. 2883. On 31 January 1984, the CTA rendered a decision ordering petitioner Commissioner to refund or grant the tax credit in the amount of ₱4,832,989.00.

On appeal by the Commissioner, the Court through its Second Division reversed the decision of the CTA and held that:

(a) P&G-USA, and not private respondent P&G-Phil., was the proper party to claim the refund or tax credit here involved;

(b) "there is nothing in Section 902 or other provisions of the US Tax Code that allows a credit against the US tax due from P&G-USA of taxes deemed to have been paid in the Philippines equivalent to twenty percent (20%) which represents the difference between the regular tax of thirty-five percent (35%) on corporations and the tax of fifteen percent (15%) on dividends"; and

(c) private respondent P&G-Phil. failed to meet certain conditions necessary in order that "the dividends received by its non-resident parent company in the US (P&G-USA) may be subject to the preferential tax rate of 15% instead of 35%."

These holdings were questioned in P&G-Phil.'s Motion for Reconsideration and we will deal with them *seriatim* in this Resolution resolving that Motion.

I

1. There are certain preliminary aspects of the question of the capacity of P&G-Phil. to bring the present claim for refund or tax credit, which need to be examined. This question was raised for the first time on appeal, *i.e.*, in the proceedings before this Court on the Petition for Review filed by the Commissioner of Internal Revenue. The question was *not* raised by the Commissioner on the administrative level, and neither was it raised by him before the CTA.

We believe that the Bureau of Internal Revenue ("BIR") should not be allowed to defeat an otherwise valid claim for refund by raising this question of alleged incapacity for the first time on appeal before this Court. This is clearly a matter

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of procedure. Petitioner does not pretend that P&G-Phil., should it succeed in the claim for refund, is likely to run away, as it were, with the refund instead of transmitting such refund or tax credit to its parent and sole stockholder. It is commonplace that in the absence of explicit statutory provisions to the contrary, the government must follow the same rules of procedure which bind private parties. It is, for instance, clear that the government is held to compliance with the Provisions of Circular No. 1-88 of this Court in exactly the same way that private litigants are held to such compliance, save only in respect of the matter of filing fees from which the Republic of the Philippines is exempt by the Rules of Court.

More importantly, there arises here a question of fairness should the BIR, unlike any other litigant, be allowed to raise for the first time on appeal questions which had not been litigated either in the lower court or on the administrative level. For, if petitioner had at the earliest possible opportunity, *i.e.*, at the administrative level, demanded that P&G-Phil. produce an express authorization from its parent corporation to bring the claim for refund, then P&G-Phil. would have been able forthwith to secure and produce such authorization before filing the action in the instant case. The action here was commenced just before expiration of the two (2)-year prescriptive period.

2. The question of the capacity of P&G-Phil. to bring the claim for refund has substantive dimensions as well which, as will be seen below, also ultimately relate to fairness.

Under Section 306 of the NIRC, a claim for refund or tax credit filed with the Commissioner of Internal Revenue is essential for maintenance of a suit for recovery of taxes allegedly erroneously or illegally assessed or collected:

"SECTION 306. *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 excessive or in any manner wrongfully collected, *until a claim for refund or credit has been duly filed with*

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the Commissioner of Internal Revenue; 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 begun after the expiration of two years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: x x x." (Italics supplied).

Section 309 (3) of the NIRC, in turn, provides:

"SECTION 309. *Authority of Commissioner to Take Compromises and to Refund Taxes*. — The Commissioner may:

x x x x x x x x x

(3) credit or refund taxes erroneously or illegally received, x x x *No credit or refund* of taxes or penalties *shall be allowed unless the taxpayer files in writing* with the Commissioner *a claim for credit or refund* within two (2) years after the payment of the tax or penalty." (As amended by P.D. No. 69) (Italics supplied).

Since the claim for refund was filed by P&G-Phil., the question which arises is: is P&G-Phil. a "*taxpayer*" under Section 309 (3) of the NIRC? The term "*taxpayer*" is defined in our NIRC as referring to "*any person subject to tax* imposed by the Title [on Tax on Income]."[2] 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[3] for the correct amount of the tax that should be withheld from the dividend remittances. The withholding

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[2] Section 20 (n), NIRC (as renumbered and re-arranged by Executive Order No. 273, 1 January 1988).

[3] *E.g.*, Section 51 (e), NIRC:

"Sec. 51. *Returns and payment of taxes withheld at source*. — x x x

x x x x x x x x x

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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."[4] 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*,[5] this Court pointed out that a withholding agent is in fact the agent both of the government and of the

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(e) *Surcharge and interest for failure to deduct and withhold.* — If the *withholding agent*, in violation of the provisions of the preceding section and implementing regulations thereunder, fails to deduct and withhold the amount of tax required under said section and regulations, *he shall be liable to pay* in addition to the tax required to be deducted and withheld, a surcharge of fifty per centum if the failure is due to willful neglect or with intent to defraud the Government, or twenty-five per centum if the failure is not due to such causes, *plus interest* at the rate of fourteen per centum per annum from the time the tax is required to be withheld until the date of assessment.

x x x x x x x x x

Section 251 (*Id.*):

"Sec. 251. *Failure of a withholding agent to collect and remit tax.* — *Any person* required to collect, account for, and remit any tax imposed by this Code *who willfully fails to collect such tax, or account for and remit such tax*, or willfully assists in any manner to evade any such tax or the payment thereof, *shall*, in addition to other penalties provided for under this Chapter, *be liable to a penalty equal to the total amount of the tax not collected*, or not accounted for and remitted. (Italics supplied)

[4] *Houston Street Corporation v. Commissioner of Internal Revenue*, 84 F. 2nd. 821 (1936); *Bank of America v. Anglin*, 138 F. 2nd. 7 (1943).

[5] 15 SCRA 1 (1965).

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taxpayer, and that the withholding agent is not an ordinary government agent:

"*The law sets no condition for the personal liability of the withholding agent to attach*. The reason is to compel the withholding agent to withhold the tax under all circumstances. In effect, the responsibility for the collection of the tax as well as the payment thereof is concentrated upon the person over whom the Government has jurisdiction. Thus, *the withholding agent is constituted the agent of both the Government and the taxpayer*. With respect to the collection and/or withholding of the tax, he is the Government's agent. *In regard to the filing of the necessary income tax return and the payment of the tax to the Government, he is the agent of the taxpayer. The withholding agent, therefore, is no ordinary government agent especially because under Section 53 (c) he is held personally liable for the tax he is duty bound to withhold; whereas the Commissioner and his deputies are not made liable by law*."[6] (Italics supplied)

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. This implied authority is especially warranted where, as in the instant case, the withholding agent is the *wholly owned subsidiary of the parent-stockholder* and therefore, *at all times, under the effective control of such parent-stockholder*. In the circumstances of this case, it seems particularly unreal to deny the implied authority of P&G-Phil. to claim a refund and to commence an action for such refund.

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, *before actual payment of the refund or issuance of a tax credit certificate*. What appears to be vitiated by basic

[6] 15 SCRA at 4.

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unfairness is petitioner's position that, although P&G-Phil. is directly and personally liable to the Government for the taxes and any deficiency assessments to be collected, the Government is not legally liable for a refund simply because it did not demand a written confirmation of P&G-Phil.'s implied authority from the very beginning. A sovereign government should act honorably and fairly at all times, even *vis-a-vis* taxpayers.

We believe and so hold that, under the circumstances of this case, P&G-Phil. is properly regarded as a "taxpayer" within the meaning of Section 309, NIRC, and as impliedly authorized to file the claim for refund and the suit to recover such claim.

II

1. We turn to the principal substantive question before us: the applicability to the dividend remittances by P&G-Phil. to P&G-USA of the fifteen percent (15%) tax rate provided for in the following portion of Section 24 (b) (1) of the NIRC:

"(b) *Tax on foreign corporations*. —

(1) *Non-resident corporation*. — A foreign corporation not engaged in trade and business in the Philippines, x x x, shall pay a tax equal to 35% of the gross income receipt during its taxable year from all sources within the Philippines, as x x x dividends x x x *Provided*, still further, that on dividends received from a domestic corporation liable to tax under this Chapter, the tax shall be 15% of the dividends, which shall be collected and paid as provided in Section 53 (d) of this Code, subject to the condition that the country in which the non-resident foreign corporation is domiciled shall allow a credit against the tax due from the non-resident foreign corporation, taxes deemed to have been paid in the Philippines equivalent to 20% which represents the difference between the regular tax (35%) on corporations and the tax (15%) on dividends as provided in this Section x x x."

The ordinary thirty-five percent (35%) tax rate applicable to dividend remittances to non-resident corporate stockholders of a Philippine corporation, goes down to fifteen percent (15%) if the country of domicile of the foreign stockholder corporation "shall allow" such foreign corporation a tax credit for "taxes deemed paid in the Philippines," applicable against the tax payable

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to the domiciliary country by the foreign stockholder corporation. In other words, in the instant case, the reduced fifteen percent (15%) dividend tax rate is applicable if the USA "shall allow" to P&G-USA a tax credit for "taxes deemed paid in the Philippines" applicable against the US taxes of P&G-USA. The NIRC specifies that such tax credit for "taxes deemed paid in the Philippines" must, as a minimum, reach an amount equivalent to twenty (20) percentage points which represents the difference between the regular thirty-five percent (35%) dividend tax rate and the preferred fifteen percent (15%) dividend tax rate.

It is important to note that Section 24 (b) (1), NIRC, does not require that the US must give a "*deemed paid" tax credit for the dividend tax (20 percentage points) waived by the Philippines* in making applicable the preferred dividend tax rate of fifteen percent (15%). In other words, our NIRC does not require that the US tax law *deem the parent-corporation to have paid the twenty (20) percentage points of dividend tax waived* by the Philippines. The NIRC *only* requires that the US "shall allow" P&G-USA a "deemed paid" tax credit in *an amount equivalent to the twenty (20) percentage points* waived by the Philippines.

2. The question arises: Did the US law comply with the above requirement? The relevant provisions of the US Internal Revenue Code ("Tax Code") are the following:

"SECTION 901 — *Taxes of foreign countries and possessions of United States*.

(a) *Allowance of credit.* — If the taxpayer chooses to have the benefits of this subpart, *the tax imposed by this chapter shall*, subject to the applicable limitation of Section 904, *be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under Sections 902* and 960. Such choice for any taxable year may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter for each taxable year. The credit shall not be allowed against the tax imposed by Section 531 (relating to the tax on accumulated earnings), against the additional tax imposed

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for the taxable year under Section 1333 (relating to war loss recoveries) or under Section 1351 (relating to recoveries of foreign expropriation losses), or against the personal holding company tax imposed by Section 541.

(b) *Amount allowed*. — Subject to the applicable limitation of Section 904, the following amounts shall be allowed as the credit under subsection (a):

> (a) Citizens and domestic corporations. — In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

x x x x x x x x x

SECTION 902. — *Credit for corporate stockholders in foreign corporation*.

(A) *Treatment of Taxes Paid by Foreign Corporation* — For purposes of this subject, *a domestic corporation* which owns at least 10 percent of the voting stock of a foreign corporation from which it *receives dividends in any taxable year shall* —

x x x x x x x x x

> (2) *to the extent such dividends are paid by such foreign corporation out of accumulated profits* [as defined in subsection (c) (1) (b)] of a year for which such foreign corporation is a less developed country corporation, *be deemed to have paid the same proportion of any income*, war profits, or excess profits *taxes paid* or deemed to be paid *by such foreign corporation to any foreign country* or to any possession of the United States *on or with respect to such accumulated profits, which the amount of such dividends bears to the amount of such accumulated profits*.

x x x x x x x x x

(c) Applicable Rules

(1) Accumulated profits defined. — For purposes of this section, the term 'accumulated profits' means with respect to any foreign corporation,

> (A) for purposes of subsections (a) (1) and (b) (1), the amount of its gains, profits, or income computed without

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reduction by the amount of the income, war profits, and excess profits taxes imposed on or with respect to such profits or income by any foreign country. x x x; and

(B) for purposes of subsections (a) (2) and (b) (2), *the amount of its* gains, profits, or *income in excess of the income*, war profits, and excess profits *taxes imposed on* or with respect to *such* profits or *income*.

The Secretary or his delegate shall have full power to determine from the accumulated profits of what year or years such dividends were paid, treating dividends paid in the first 20 days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shows otherwise), and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earning x x x." (Italics supplied)

Close examination of the above quoted provisions of the US Tax Code[7] shows the following:

a. US law (Section 901, Tax Code) grants P&G-USA *a tax credit for the amount of the dividend tax actually* paid (*i.e.*, withheld) from the dividend remittances to P&G-USA;

b. US law (Section 902, US Tax Code) grants to P&G-USA *a "deemed paid" tax credit*[8] *for a* proportionate part of the *corporate income tax actually paid* to the Philippines by *P&G-Phil*.

The parent-corporation P&G-USA is "deemed to have paid" a portion of the *Philippine corporate income tax* although that

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[7] The following detailed examination of the tenor and import of Sections 901 and 902 of the US Tax Code is, regrettably, made necessary by the fact that the original decision of the Second Division overlooked those Sections in their entirety. In the original opinion in 160 SCRA 560 (1988), immediately after Section 902, US Tax Code is quoted, the following appears: "To Our mind, there is nothing in the aforecited provision that would justify tax return of the disputed 15% to the private respondent" (160 SCRA at 567). No further discussion of Section 902 was offered.

[8] Sometimes also called a "derivative" tax credit or an "indirect" tax credit; *Bittker and Ebb, United States Taxation of Foreign Income and Foreign Persons*, 319 (2nd Ed., 1968).

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tax was actually paid by its Philippine subsidiary, P&G-Phil., not by P&G-USA. This "deemed paid" concept merely reflects economic reality, since the Philippine corporate income tax was in fact paid and deducted from revenues earned in the Philippines, thus reducing the amount remittable as dividends to P&G-USA. In other words, US tax law treats the Philippine corporate income tax as if it came out of the pocket, as it were, of P&G-USA as a part of the economic cost of carrying on business operations in the Philippines through the medium of P&G-Phil. and here earning profits. *What is*, under US law, *deemed paid by P&G-USA are* not "phantom taxes" but instead *Philippine corporate income taxes actually paid here by P&G-Phil., which are very real indeed.*

It is also useful to note that both (i) the tax credit for the Philippine dividend tax actually withheld, and (ii) the tax credit for the Philippine corporate income tax actually paid by P&G-Phil. but "deemed paid" by P&G-USA, are tax credits available or applicable against the US corporate income tax of P&G-USA. These tax credits are allowed because of the US congressional desire to avoid or reduce double taxation of the same income stream.[9]

In order to determine whether US tax law complies with the requirements for applicability of the reduced or preferential fifteen percent (15%) dividend tax rate under Section 24 (b) (1), NIRC, it is necessary:

a. to determine the *amount* of the 20 percentage points dividend tax waived by the Philippine government under Section 24 (b) (1), NIRC, and which hence goes to P&G-USA;

b. to determine the *amount* of the "deemed paid" tax credit which US tax law must allow to P&G-USA; and

c. to ascertain that the *amount* of the "deemed paid" tax credit allowed by US law is at least equal to the *amount* of the dividend tax waived by the Philippine Government.

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[9] *American Chicle Co. v. U.S.*, 316 US 450, 86 L. ed. 1591 (1942); W.K. *Buckley, Inc. v. C.I.R.*, 158 F. 2d. 158 (1946).

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Amount (a), *i.e.*, the amount of the dividend tax waived by the Philippine government is arithmetically determined in the following manner:

₱100.00	------	Pretax net corporate income earned by P&G-Phil.
x 35%	------	Regular Philippine corporate income tax rate
₱35.00	--------	Paid to the BIR by P&G-Phil. as Philippine corporate income tax.
₱100.00		
- 35.00		
₱65.00	-------	Available for remittance as dividends to P&G-USA.
₱65.00	-------	Dividends remittable to P&G-USA
x 35%	-------	Regular Philippine dividend tax rate under Section 24 (b) (1), NIRC
₱ 22.75	------	Regular dividend tax
₱65.00	-------	Dividends remittable to P&G-USA
x 15%	--------	Reduced dividend tax rate under Section 24 (b) (1), NIRC
₱ 9.75	--------	Reduced dividend tax
₱22.75	-------	Regular dividend tax under Section 24 (b) (1), NIRC
- 9.75	-------	Reduced dividend tax under Section 24 (b) (1), NIRC
₱13.00	-------	Amount of dividend tax waived by Philippine government under Section 24 (b) (1), NIRC

Thus, amount (a) above is ₱13.00 for every ₱100.00 of pre-tax net income earned by P&G-Phil. Amount (a) is also the *minimum* amount of the "deemed paid" tax credit that US tax law shall allow if P&G-USA is to qualify for the reduced or preferential dividend tax rate under Section 24 (b) (1), NIRC.

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Amount (b) above, *i.e.*, the amount of the "deemed paid" tax credit which US tax law allows under Section 902, Tax Code, may be computed arithmetically as follows:

₱65.00 ------- Dividends remittable to P&G-USA

- 9.75 ------- Dividend tax withheld at the reduced (15%) rate

₱55.25 ------- Dividends actually remitted to P&G-USA

₱35.00— Philippine corporate income tax paid by P&G-Phil. to the BIR

$$\frac{\text{Dividends actually remitted by P\&G-Phil. to P\&G-USA}}{\text{Amount of accumulated profits earned by P\&G-Phil. in excess of income tax}} = \frac{₱\,55.25}{₱\,65.00} \times ₱35.00 = ₱29.75^{10}$$

Thus, *for every ₱55.25 of dividends actually remitted* (after withholding at the rate of 15%) by P&G-Phil. to its US parent P&G-USA, *a tax credit of ₱29.75* is allowed by Section 902 US Tax Code for Philippine corporate income tax "deemed

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[10] In his dissenting opinion, Paras, *J*. writes that "the amount of the tax credit purportedly being allowed is not fixed or ascertained, hence we do not know whether or not the tax credit contemplated is within the limits set forth in the law" (Dissent, p. 6) Section 902 US Tax Code does not specify particular fixed amounts or percentages as tax credits; what it does specify in Section 902 (A) (2) and (C) (1) (B) is a *proportion* expressed in the fraction:

$$\frac{\text{dividends actually remitted by P\&G-Phil. to P\&G-USA}}{\text{amount of accumulated profits earned by P\&G-Phil. in excess of income tax}}$$

The actual or absolute amount of the tax credit allowed by Section 902 will obviously depend on the actual values of the numerator and the denominator used in the fraction specified. The point is that the establishment of the proportion or fraction in Section 902 renders the tax credit there allowed *determinate* and *determinable*.

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paid" by the parent but actually paid by the wholly-owned subsidiary.

Since ₱29.75 is much higher than ₱13.00 (the amount of dividend tax waived by the Philippine government), Section 902, US Tax Code, specifically and clearly complies with the requirements of Section 24 (b) (1), NIRC.

3. It is important to note also that the foregoing reading of Sections 901 and 902 of the US Tax Code is identical with the reading of the BIR of Sections 901 and 902 as shown by administrative rulings issued by the BIR.

The first Ruling was issued in 1976, *i.e.*, BIR Ruling No. 76-004, rendered by then Acting Commissioner of Internal Revenue Efren I. Plana, later Associate Justice of this Court, the relevant portion of which stated:

"However, after a restudy of the decision in the American Chicle Company case and the Provisions of Sections 901 and 902 of the U.S. Internal Revenue Code, we find merit in your contention that our computation of the credit which the U.S. tax law allows in such cases is erroneous as the amount of tax 'deemed paid' to the Philippine government for purposes of credit against the U.S. tax by the recipient of dividends includes *a portion of the amount of income tax paid by the corporation declaring the dividend in addition to the tax withheld from the dividend remitted*. In other words, *the U.S. government will allow a credit to the U.S. corporation or recipient of the dividend*, in addition to the amount of tax actually withheld, *a portion of the income tax paid by the corporation declaring the dividend*. Thus, if a Philippine corporation wholly owned by a U.S. corporation has a net income of ₱100,000, it will pay ₱25,000 Philippine income tax thereon in accordance with Section 24(a) of the Tax Code. The net income, after income tax, which is ₱75,000, will then be declared as dividend to the U.S. corporation at 15% tax, or ₱11,250, will be withheld therefrom. Under the aforementioned sections of the U.S. Internal Revenue Code, U.S. corporation receiving the dividend can utilize as credit against its U.S. tax payable on said dividends the amount of ₱30,000 composed of:

(1) The tax 'deemed paid' or indirectly paid on the dividend arrived at as follows:

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$$\frac{₱75,000}{100,000^{*}} \times ₱25,000 = ₱18,750$$

(2) The amount of 15% of ₱75,000 withheld = 11,250

₱30,000

The amount of ₱18,750 deemed paid and to be credited against the U.S. tax on the dividends received by the U.S. corporation from a Philippine subsidiary *is clearly more than 20% requirement of* Presidential Decree No. 369 as 20% of ₱75,000.00 the dividends to be remitted under the above example, amounts to ₱15,000.00 only.

In the light of the foregoing, BIR Ruling No. 75-005 dated September 10, 1975 is hereby amended in the sense that the dividends to be remitted by your client to its parent company shall be subject to the withholding tax at the rate of 15% only.

This ruling shall have force and effect only for as long as the present pertinent provisions of the U.S. Federal Tax Code, which are the bases of the ruling, are not revoked, amended and modified, the effect of which will reduce the percentage of tax deemed paid and creditable against the U.S. tax on dividends remitted by a foreign corporation to a U.S. corporation." (Italics supplied)

The 1976 Ruling was reiterated in, *e.g.*, BIR Ruling dated 22 July 1981 addressed to Basic Foods Corporation and BIR Ruling dated 20 October 1987 addressed to Castillo, Laman, Tan and Associates. In other words, the 1976 Ruling of Hon. Efren I. Plana was reiterated by the BIR even as the case at bar was pending before the CTA and this Court.

4. We should not overlook the fact that the concept of "deemed paid" tax credit, which is embodied in Section 902, US Tax Code, is *exactly the same "deemed paid" tax credit found in our NIRC* and which Philippine tax law allows to Philippine corporations which have operations abroad (say, in

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[*] The denominator used by Com. Plana is the total pre-tax income of the Philippine subsidiary. Under Section 902 (c) (1) (B), US Tax Code, quoted earlier, the denominator should be the amount of income of the subsidiary *in excess of [Philippine] income tax.*

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the United States) and which, therefore, pay income taxes to the US government.

Sections 30 (c) (3) and (8), NIRC, provides:

"Section 30. *Deductions from Gross Income*. — In computing net income, there shall be allowed as deductions — x x x

(c) *Taxes*. — x x x

x x x x x x x x x

(3) *Credits against tax for taxes of foreign countries*. — If the taxpayer signifies in his return his desire to have the benefits of this paragraphs, the tax imposed by this Title shall be credited with x x x

(a) *Citizen and Domestic Corporation*. — In the case of a citizen of the Philippines and *of domestic corporation the amount of net income*, war profits or excess profits, *taxes paid or accrued* during the taxable year *to any foreign country*." (Italics supplied)

Under Section 30 (c) (3) (a), NIRC, above, the BIR must give a tax credit to a Philippine corporation for taxes actually paid by it to the US government — *e.g.*, for taxes collected by the US government on dividend remittances to the Philippine corporation. This Section of the NIRC is the equivalent of Section 901 of the US Tax Code.

Section 30 (c) (8), NIRC, is practically identical with Section 902 of the US Tax Code, and provides as follows:

"(8) *Taxes of foreign subsidiary*. — For the purposes of this subsection *a domestic corporation which owns a majority of the voting stock of a foreign corporation* from which it receives dividends in any taxable year shall be *deemed to have paid the same proportion of any income*, war profits, or excess-profits *taxes paid by such foreign corporation to any foreign country, upon or with respect to the accumulated profits of such foreign corporation* from which such dividends were paid, *which the amount of such dividends bears to the amount of such accumulated profits: Provided*, That the amount of tax deemed to have been paid under this subsection shall in no case exceed the same proportion of the tax against which credit is taken which the amount of such dividends bears to the amount of

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the entire net income of the domestic corporation in which such dividends are included. *The term 'accumulated profits'* when used in this subsection in reference to a foreign corporation, *means the amount of its* gains, profits, or *income in excess of the income*, war-profits, and excess-profits *taxes imposed upon* or with respect to *such* profits or *income*; and the Commissioner of Internal Revenue shall have full power to determine from the accumulated profits of what year or years such dividends were paid; treating dividends paid in the first sixty days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shown otherwise), and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earnings. In the case of a foreign corporation, the income, war-profits, and excess-profits taxes of which are determined on the basis of an accounting period of less than one year, the word 'year' as used in this subsection shall be construed to mean such accounting period." (Italics supplied)

Under the above quoted Section 30 (c) (8), NIRC, the BIR must give a tax credit to a Philippine parent corporation for taxes "deemed paid" by it, that is, *e.g.*, for taxes paid to the US by the US subsidiary of a Philippine-parent corporation. The *Philippine parent* or corporate stockholder *is "deemed"* under our NIRC *to have paid a proportionate part of the US corporate income tax paid by its US subsidiary*, although such US tax was actually paid by the subsidiary and not by the Philippine parent.

Clearly, the "deemed paid" tax credit which, under Section 24 (b) (1), NIRC, must be allowed by US law to P&G-USA, is the same "deemed paid" tax credit that Philippine law allows to a Philippine corporation with a wholly- or majority-owned subsidiary in (for instance) the US. The "deemed paid" tax credit allowed in Section 902, US Tax Code, is no more a credit for "phantom taxes" than is the "deemed paid" tax credit granted in Section 30 (c) (8), NIRC.

III

1. The Second Division of the Court, in holding that the applicable dividend tax rate in the instant case was the regular thirty-five percent (35%) rate rather than the reduced rate of

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fifteen percent (15%), held that P&G-Phil. had failed to prove that its parent, P&G-USA, had in fact been given by the US tax authorities a "deemed paid" tax credit in the amount required by Section 24 (b) (1), NIRC.

We believe, in the first place, that we must distinguish between the legal question before this Court from questions of administrative implementation arising after the legal question has been answered. The basic legal issue is of course, this: which is the applicable dividend tax rate in the instant case: the regular thirty-five percent (35%) rate or the reduced fifteen percent (15%) rate? The question of whether or not P&G-USA is in fact given by the US tax authorities a "deemed paid" tax credit in the required amount, relates to the administrative implementation of the applicable reduced tax rate.

In the second place, Section 24 (b) (1), NIRC, does *not* in fact require that the "deemed paid" tax credit shall have actually been granted *before* the applicable dividend tax rate goes down from thirty-five percent (35%) to fifteen percent (15%). As noted several times earlier, Section 24 (b) (1), NIRC, merely requires, in the case at bar, that the USA "*shall allow* a credit against the tax due from [P&G-USA for] taxes deemed to have been paid in the Philippines x x x." There is neither statutory provision nor revenue regulation issued by the Secretary of Finance requiring the actual grant of the "deemed paid" tax credit by the US Internal Revenue Service to P&G-USA before the preferential fifteen percent (15%) dividend rate becomes applicable. Section 24 (b) (1), NIRC, does not create a tax exemption nor does it provide a tax credit; *it is a provision which specifies when a particular (reduced) tax rate is legally applicable*.

In the third place, the position originally taken by the Second Division results in a severe practical problem of administrative circularity. The Second Division in effect held that the reduced dividend tax rate is not applicable until the US tax credit for "deemed paid" taxes is actually given in the required minimum amount by the US Internal Revenue Service to P&G-USA. But, the US "deemed paid" tax credit *cannot* be given by the US tax authorities unless dividends have actually been remitted

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to the US, which means that the Philippine dividend tax, at the rate here applicable, was actually imposed and collected.[11] It is this practical or operating circularity that is in fact avoided by our BIR when it issues rulings that the tax laws of particular foreign jurisdictions (*e.g.*, Republic of Vanuatu,[12] Hongkong,[13] Denmark,[14] *etc*.) comply with the requirements set out in Section 24 (b) (1), NIRC, for applicability of the fifteen percent (15%) tax rate. Once such a ruling is rendered, the Philippine subsidiary begins to withhold at the reduced dividend tax rate.

A requirement relating to administrative implementation is not properly imposed as a condition for the *applicability, as a matter of law,* of a particular tax rate. Upon the other hand, upon the determination or recognition of the applicability of the reduced tax rate, there is nothing to prevent the BIR from issuing implementing regulations that would require P&G-Phil., or any Philippine corporation similarly situated, to certify to the BIR the amount of the "deemed paid" tax credit actually subsequently granted by the US tax authorities to P&G-USA or a US parent corporation for the taxable year involved. Since the US tax laws can and do change, such implementing regulations could also provide that failure of P&G-Phil. to submit such certification within a certain period of time, would result in the imposition of a deficiency assessment for the twenty (20) percentage points differential. The task of this Court is to settle which tax rate is applicable, considering the state of US law at a given time. We should leave details relating to administrative implementation where they properly belong — with the BIR.

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[11] The US tax authorities cannot determine the amount of the "deemed paid" credit to be given because the correct proportion cannot be determined: the numerator of the fraction is unknown, until remittance of the dividends by P&G-Phil. is in fact effected. Please see computation, *supra*, p. 17.

[12] BIR Ruling dated 21 March 1983, addressed to the Tax Division, Sycip, Gorres, Velayo and Company.

[13] BIR Ruling dated 13 October 1981, addressed to Mr. A.R. Sarvino, Manager-Securities, Hongkong and Shanghai Banking Corporation.

[14] BIR Ruling dated 31 January 1983, addressed to the Tax Division, Sycip, Gorres, Velayo and Company.

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2. An interpretation of a tax statute that produces a revenue flow for the government is not, for that reason alone, necessarily the correct reading of the statute. There are many tax statutes or provisions which are designed, not to trigger off an instant surge of revenues, but rather to achieve longer-term and broader-gauge fiscal and economic objectives. The task of our Court is to give effect to the legislative design and objectives as they are written into the statute even if, as in the case at bar, some revenues have to be foregone in that process.

The economic objectives sought to be achieved by the Philippine Government by reducing the thirty-five percent (35%) dividend rate to fifteen percent (15%) are set out in the preambular clauses of P.D. No. 369 which amended Section 24 (b) (1), NIRC, into its present form:

"WHEREAS, it is imperative to adopt measures responsive to the *requirements of a developing economy* foremost of which is the *financing of economic development programs*;

WHEREAS, nonresident foreign corporations with investments in the Philippines are taxed on their earnings from dividends at the rate of 35%;

WHEREAS, *in order to encourage more capital investment for large projects* an appropriate tax need be imposed on dividends received by non-resident foreign corporations in the same manner as the tax imposed on interest on foreign loans;

x x x x x x x x x"

(Italics supplied)

More simply put, Section 24 (b) (1), NIRC, seeks to promote the in-flow of foreign equity investment in the Philippines by reducing the tax cost of earning profits here and thereby increasing the net dividends remittable to the investor. The foreign investor, however, would not benefit from the reduction of the Philippine dividend tax rate unless its home country gives it some relief from double taxation (*i.e.*, second-tier taxation) (the home country would simply have more "post-R.P. tax" income to subject to its own taxing power) by allowing the investor additional tax credits which would be applicable against the tax payable to such home country. Accordingly, Section 24 (b) (1), NIRC,

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requires the home or domiciliary country to give the investor corporation a "deemed paid" tax credit at least equal in amount to the twenty (20) percentage points of dividend tax foregone by the Philippines, in the assumption that a positive incentive effect would thereby be felt by the investor.

The net effect upon the foreign investor may be shown arithmetically in the following manner:

₱65.00 ------- Dividends remittable to P&G-USA (please see page 16 above)

- 9.75 -------- Reduced R.P. dividend tax withheld by P&G-Phil.

———————

₱55.25 ------- Dividends actually remitted to P&G-USA

₱55.25

x 46% -------- Maximum US corporate income tax rate

———————

₱25.415 ------ US corporate tax payable by P&G-USA without tax credits

₱25.415

- 9. 75 ------ US tax credit for RP dividend tax withheld by P&G-Phil. at 15% (Section 901, US Tax Code)

———————

₱15.66 ------- US corporate income tax payable after Section 901 tax credit.

₱55.25

- 15.66

———————

₱39.59 ------- Amount received by P&G-USA net of R.P. and U.S. taxes *without* "deemed paid" tax credit.

₱25.415

- 29.75 ------ "Deemed paid" tax credit under Section 902, US Tax Code (please see page 18 above)

———————

— 0 — ------ US corporate income tax payable on dividends remitted by P&G-Phil. to P&G-USA after Section 902 tax credit.

₱55.25 ------- Amount received by P&G-USA net of RP and US taxes *after* Section 902 tax credit.

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It will be seen that the "deemed paid" tax credit allowed by Section 902, US Tax Code, could offset the US corporate income tax payable on the dividends remitted by P&G-Phil. The result, in fine, could be that P&G-USA would after US tax credits, still wind up with ₱55.25, the full amount of the dividends remitted to P&G-USA net of Philippine taxes. In the calculation of the Philippine Government, this should encourage additional investment or re-investment in the Philippines by P&G-USA.

3. It remains only to note that under the Philippines-United States Convention "With Respect to Taxes on Income,"[15] the Philippines, *by a treaty commitment*, reduced the regular rate of dividend tax to a maximum of twenty percent (20%) of the gross amount of dividends paid to US parent corporations:

"ARTICLE 11. — *Dividends*

x x x x x x x x x

(2) The rate of tax imposed by one of the Contracting States on dividends derived from sources within that Contracting State by a resident of the other Contracting State shall not exceed —

(a) 25 percent of the gross amount of the dividend; or

(b) *When the recipient is a corporation, 20 percent of the gross amount of the dividend if* during the part of the paying corporation's taxable year which precedes the date of payment of the dividend and during the whole of its prior taxable year (if any), *at least 10 percent of the outstanding shares of the voting stock of the paying corporation was owned by the recipient corporation.*"

x x x x x x x x x"
(Italics supplied)

The Tax Convention, at the same time, established a treaty obligation on the part of the United States that it "shall allow" to a US parent corporation receiving dividends from its Philippine subsidiary "a [tax] credit for the appropriate amount of taxes

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[15] Text in 7 *Philippine Treaty Series 523*; signed on 1 October 1976 and effective on 16 October 1982 upon ratification by both Governments and exchange of instruments of ratification.

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paid or accrued to the Philippines by the Philippine [subsidiary] ——— ."[16] This is, of course, precisely the "deemed paid" tax credit provided for in Section 902, US Tax Code, discussed above. Clearly, there is here on the part of the Philippines a deliberate undertaking to reduce the regular dividend tax rate of thirty-five percent (35%). Since, however, the treaty rate of twenty percent (20%) is a *maximum* rate, there is still a differential or additional reduction of five (5) percentage points which compliance of US law (Section 902) with the requirements of Section 24 (b) (1), NIRC, makes available in respect of dividends from a Philippine subsidiary.

We conclude that private respondent P&G-Phil. is entitled to the tax refund or tax credit which it seeks.

WHEREFORE, for all the foregoing, the Court Resolved to *GRANT* private respondent's Motion for Reconsideration dated 11 May 1988, to *SET ASIDE* the Decision of the Second Division of the Court promulgated on 15 April 1988, and in lieu thereof, to *REINSTATE* and *AFFIRM* the Decision of the Court of Tax Appeals in CTA Case No. 2883 dated 31 January 1984 and to *DENY* the Petition for Review for lack of merit. No pronouncement as to costs.

Narvasa, Gutierrez, Jr., Griño-Aquino, Medialdea, and *Romero, JJ.*, concur.

Cruz and *Bidin, JJ.*, see concurring opinion.

Paras, J., see dissenting opinion.

Melencio-Herrera, Padilla, Regalado, and *Davide, Jr., JJ.*, join Justice Paras in his dissent.

Fernan, C.J., on leave.

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[16] Art. 23(1), Tax Convention; the same treaty imposes a similar obligation upon the Philippines to give to the Philippine parent of a US subsidiary a tax credit for the appropriate amount of US taxes paid by the US subsidiary. (Art. 23 [2], *id.*) Thus, Sec. 902 US Tax Code and Sec. 30(c) (8), NIRC, have been in effect been converted into treaty commitments of the United States and the Philippines, respectively, in respect of US and Philippine corporations.

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CONCURRING OPINION

CRUZ, *J.*:

I join Mr. Justice Feliciano in his excellent analysis of the difficult issues we are now asked to resolve.

As I understand it, the intention of Section 24(b) of our Tax Code is to attract foreign investors to this country by reducing their 35% dividend tax rate to 15% if their own state allows them a deemed paid tax credit at least equal in amount to the 20% waived by the Philippines. This tax credit would offset the tax payable by them on their profits to their home state. In effect, both the Philippines and the home state of the foreign investors reduce their respective tax "take" of those profits and the investors wind up with more left in their pockets. Under this arrangement, the total taxes to be paid by the foreign investors may be confined to the 35% corporate income tax and 15% dividend tax only, both payable to the Philippines, with the US tax liability being offset wholly or substantially by the US "deemed paid" tax credits.

Without this arrangement, the foreign investors will have two pay to the local state (in addition to the 35% corporate income tax) a 35% dividend tax end another 35% or more to their home state or a total of 70% or more on the same amount of dividends. In this circumstance, it is not likely that many such foreign investors, given the onerous burden of the two-tier system, *i.e.*, local state plus home state, will be encouraged to do business in the local state.

It is conceded that the law will "not trigger off an instant surge of revenue," as indeed the tax collectible by the Republic from the foreign investor is considerably reduced. This may appear unacceptable to the superficial viewer. But this reduction is in fact the price we have to offer to persuade the foreign company to invest in our country and contribute to our economic development. The benefit to us may not be immediately available in instant revenues but it will be realized later, and in greater measure, in terms of a more stable and robust economy.

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CONCURRING OPINION

BIDIN, *J.*:

I agree with the opinion of my esteemed brother, Mr. Justice Florentino P. Feliciano. However, I wish to add some observations of my own, since I happen to be the *ponente* in *Commissioner of Internal Revenue v. Wander Philippines, Inc.* (160 SCRA 573 [1988]), a case which reached a conclusion that is diametrically opposite to that sought to be reached in the instant Motion for Reconsideration.

1. In page 5 of his dissenting opinion, Mr. Justice Edgardo L. Paras argues that the failure of petitioner Commissioner of Internal Revenue to raise before the Court of Tax Appeals the issue of who should be the real party in interest in claiming a refund cannot prejudice the government, as such failure is merely a procedural defect; and that moreover, the government can never be in estoppel, especially in matters involving taxes. In a word, the dissenting opinion insists that errors of its agents should not jeopardize the government's position.

The above rule should not be taken absolutely and literally; if it were, the government would never lose any litigation which is dearly not true. The issue involved here is not merely one of procedure; it is also one of fairness: whether the government should be subject to the same stringent conditions applicable to an ordinary litigant. As the Court had declared in Wander:

> "x x x To allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level, would be to sanction a procedure whereby the Court — which is supposed to review administrative determinations — would not review, but determine and decide for the first time, a question not raised at the administrative forum. x x x." (160 SCRA at 566-577)

Had petitioner been forthright earlier and required from private respondent proof of authority from its parent corporation, Procter and Gamble USA, to prosecute the claim for refund, private respondent would doubtless have been able to show proof of such authority. By any account, it would be rank injustice now at this late stage to require petitioner to submit such proof.

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2. In page 8 of his dissenting opinion, Paras, *J*., stressed that private respondent had failed: (1) to show the actual amount credited by the US government against the income tax due from P & G USA on the dividends received from private respondent; (2) to present the 1975 income tax return of P & G USA when the dividends were received; and (3) to submit any duly authenticated document showing that the US government credited the 20% tax deemed paid in the Philippines.

I agree with the main opinion of my colleague, Feliciano, *J*., specifically in page 23 *et seq*. thereof, which, as I understand it, explains that the US tax authorities are unable to determine the amount of the "deemed paid" credit to be given P & G USA so long as the numerator of the fraction, *i.e.*, dividends actually remitted by P & G-Phil. to P & G USA, is still unknown. Stated in other words, until dividends have actually been remitted to the US (which presupposes an actual imposition and collection of the applicable Philippine dividend tax rate), the US tax authorities cannot determine the "deemed paid" portion of the tax credit sought by P & G USA. To require private respondent to show documentary proof of its parent corporation having actually received the "deemed paid" tax credit from the proper tax authorities, would be like putting the cart before the horse. The only way of cutting through this (what Feliciano, *J*., termed) "circularity" for our BIR to issue rulings (as they have been doing) to the effect that the tax laws of particular foreign jurisdictions, *e.g.*, USA, comply with the requirements in our tax code for applicability of the reduced 15% dividend tax rate. Thereafter, the taxpayer can be required to submit, within a reasonable period, proof of the amount of "deemed paid" tax credit actually granted by the foreign tax authority. Imposing such a resolutory condition should resolve the knotty problem of circularity.

3. Page 8 of the dissenting opinion of Paras, *J*., further declares that tax refunds, being in the nature of tax exemptions, are to be construed *strictissimi juris* against the person or entity claiming the exemption; and that refunds cannot be permitted to exist upon "vague implications."

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Notwithstanding the foregoing canon of construction, the fundamental rule is still that a judge must ascertain and give effect to the legislative intent embodied in a particular provision of law. If a statute (including a tax statute reducing a certain tax rate) is clear, plain and free from ambiguity, it must be given its ordinary meaning and applied without interpretation. In the instant case, the dissenting opinion of Paras, *J*., itself concedes that the basic purpose of Pres. Decree No. 369, when it was promulgated in 1975 to amend Section 24(b), [1] of the National Internal Revenue Code, was "to decrease the tax liability" of the foreign capital investor and thereby to promote more inward foreign investment. The same dissenting opinion hastens to add, however, that the granting of a reduced dividend tax rate "is premised on reciprocity."

4. Nowhere in the provisions of P.D. No. 369 or in the National Internal Revenue Code itself would one find reciprocity specified as a condition for the granting of the reduced dividend tax rate in Section 24 (b), [1], NIRC. Upon the other hand, where the law-ranking authority intended to impose a requirement of reciprocity as a condition for grant of a privilege, the legislature does so *expressly* and *clearly*. For example, the gross estate of non-citizens and non -residents of the Philippines normally includes intangible personal property situated in the Philippines, for purposes of application of the estate tax and donor's tax. However, under Section 98 of the NIRC (as amended by P.D. 1457), no taxes will be collected by the Philippines in respect of such intangible personal property if the law or the foreign country of which the decedent was a citizen and resident at the time of his death allows a similar exemption from transfer or death taxes in respect of intangible personal property located in such foreign country and owned by Philippine citizens not residing in that foreign country.

There is no statutory requirement of reciprocity imposed as a condition for grant of the reduced dividend tax rate of 15%. Moreover, for the Court to impose such a requirement of reciprocity would be to contradict the basic policy underlying P.D. 369 which amended Section 24(b), [1], NIRC, P.D. 369 was promulgated in the effort to promote the inflow of foreign

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investment capital into the Philippines. A requirement of reciprocity, *i.e.*, a requirement that the U.S. grant a similar reduction of U.S. dividend taxes on remittances by the U.S. subsidiaries of Philippine corporations, would assume a desire on the part of the U.S. and of the Philippines to attract the flow of Philippine capital *into the U.S.* But the Philippines precisely is a capital *importing*, and *not* a capital exporting country. If the Philippines had surplus capital to export, it would not need to import foreign capital into the Philippines. In other words, to require dividend tax reciprocity from a foreign jurisdiction would be to actively encourage Philippine corporations to invest outside the Philippines, which would be inconsistent with the notion of attracting foreign capital into the Philippines in the first place.

5. Finally, in page 15 of his dissenting opinion, Paras, *J.*, brings up the fact that:

"Wander cited as authority a BIR ruling dated May 19, 1977, which requires a remittance tax of only 15%. The mere fact that in this Procter and Gamble case, the BIR desires to charge 35% indicates that the BIR ruling cited in Wander has been obviously discarded today by the BIR. Clearly, there has been a change of mind on the part of the BIR."

As pointed out by Feliciano, *J.*, in his main opinion, even while the instant case was pending before the Court of Tax Appeals and this Court, the administrative rulings issued by the BIR from 1976 until as late as 1987, recognized the "deemed paid" credit referred to in Section 902 of the U.S. Tax Code. To date, no contrary ruling has been issued by the BIR.

For all the foregoing reasons, private respondent's Motion for Reconsideration should be granted and I vote accordingly.

DISSENTING OPINION

PARAS, *J.*:

I dissent.

The decision of the Second Division of this Court in the case of "*Commissioner of Internal Revenue vs. Procter & Gamble*

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Philippine Manufacturing Corporation, et al.," G.R. No. 66838, promulgated on April 15, 1988 is sought to be reviewed in the Motion for Reconsideration filed by private respondent. Procter & Gamble Philippines (PMC-Phils., for brevity) assails the Court's findings that:

"(a) private respondent (PMC-Phils.) is not a proper party to claim the refund/tax credit;

"(b) there is nothing in Section 902 or other provision of the US Tax Code that allows a credit against the U.S. tax due from PMC-U.S.A. of taxes deemed to have been paid in the Phils. equivalent to 20% which represents the difference between the regular tax of 35% on corporations and the tax of 15% on dividends;

"(c) private respondent failed to meet certain conditions necessary in order that the dividends received by the non-resident parent company in the US may be subject to the preferential 15% tax instead of 35%." (pp. 200-201, Motion for Reconsideration)

Private respondent's position is based principally on the decision rendered by the Third Division of this Court in the case of "*Commissioner of Internal Revenue vs. Wander Philippines, Inc. and the Court of Tax Appeals*," G.R. No. 68375, promulgated likewise on April 15, 1988 which bears the same issues as in the case at bar, but held an apparent contrary view. Private respondent advances the theory that since the Wander decision had already become final and executory it should be a precedent in deciding similar issues as in this case at hand.

Yet, it must be noted that the Wander decision had become final and executory only by reason of the failure of the petitioner therein to file its motion for reconsideration in due time. Petitioner received the notice of judgment on April 22, 1988 but filed a Motion for Reconsideration only on June 6, 1988, or after the decision had already become final and executory on May 9, 1988. Considering that entry of final judgment had already been made on May 9, 1988, the Third Division resolved to note without action the said Motion. Apparently therefore, the merits of the motion for reconsideration were not passed upon by the Court.

The 1987 Constitution provides that a doctrine or principle of law previously laid down either *en banc* or in Division may

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be modified or reversed by the court *en banc*. The case is now before this Court en banc and the decision that will be handed down will put to rest the present controversy.

It is true that private respondent, as withholding agent, is obliged by law to withhold and to pay over to the Philippine government the tax on the income of the taxpayer, PMC-U.S.A. (parent company). However, such fact does not necessarily connote that private respondent is the real party in interest to claim reimbursement of the tax alleged to have been overpaid. Payment of tax is an obligation physically passed off by law on the withholding agent, if any, but the act of claiming tax refund is a right that, in a strict sense, belongs to the taxpayer which is private respondent's parent company. The role or function of PMC-Phils., as the remitter or payor of the dividend income, is merely to insure the collection of the dividend income taxes due to the Philippine government from the taxpayer, "PMC-U.S.A.," the non-resident foreign corporation not engaged in trade or business in the Philippines, as "PMC-U.S.A." is subject to tax equivalent to thirty five percent (35%) of the gross income received from "PMC-Phils." in the Philippines "as . . . dividends . . ." (Sec. 24 [b], Phil. Tax Code). Being a mere withholding agent of the government and the real party in interest being the parent company in the United States, private respondent cannot claim refund of the alleged overpaid taxes. Such right properly belongs to PMC-U.S.A. It is therefore clear that as held by the Supreme Court in a series of cases, the action in the Court of Tax Appeals as well as in this Court should have been brought in the name of the parent company as petitioner and not in the name of the withholding agent. This is because the action should be brought under the name of the real party in interest. (See *Salonga v. Warner Barnes & Co., Ltd.*, 88 Phil. 125; Sutherland, Code Pleading, Practice, & Forms, p. 11; *Ngo The Hua v. Chung Kiat Hua*, L-17091, Sept. 30, 1963, 9 SCRA 113; *Gabutas v. Castellanes*, L-17323, June 23, 1965, 14 SCRA 376; *Rep. v. PNB*, L-16485, January 30, 1945).

Rule 3, Sec. 2 of the Rules of Court provides:

"SECTION 2. Parties in interest. — Every action must be prosecuted and defended in the name of the real party in interest.

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All persons having an interest in the subject of the action and in obtaining the relief demanded shall be joined as plaintiffs. All persons who claim an interest in the controversy or the subject thereof adverse to the plaintiff, or who are necessary to a complete determination or settlement of the questions involved therein shall be joined as defendants."

It is true that under the Internal Revenue Code the withholding agent may be sued by itself if no remittance tax is paid, or if what was paid is less than what is due. From this, Justice Feliciano claims that in case of an *overpayment* (or claim for refund) the agent must be given the right to sue the Commissioner by itself (that is, the agent here is also a real party in interest). He further claims that to deny this right would be *unfair*. This is *not* so. While payment of the tax due is an OBLIGATION of the agent, the obtaining of a refund is a RIGHT. While every obligation has a corresponding right (and *vice-versa*), the obligation to pay the complete tax has the corresponding right of the government to demand the deficiency; and the right of the agent to demand a refund corresponds to the government's duty to refund. Certainly, the *obligation* of the withholding agent to pay in full does not correspond to its *right* to claim for the refund. It is evident therefore that the real party in interest in this claim for reimbursement is the principal (the mother corporation) and NOT the agent.

This suit therefore for refund must be DISMISSED.

In like manner, petitioner Commissioner of Internal Revenue's failure to raise before the Court of Tax Appeals the issue relating to the real party in interest to claim the refund cannot, and should not, prejudice the government. Such is merely a procedural defect. It is axiomatic that the government can never be in estoppel, particularly in matters involving taxes. Thus, for example, the payment by the tax-payer of income taxes pursuant to a BIR assessment does not preclude the government from making *further* assessments. The errors or omissions of certain administrative officers should never be allowed to jeopardize the government's financial position. (See: *Phil. Long Distance Tel. Co. v. Coll. of Internal Revenue*, 90 Phil. 674; *Lewin v. Galang*, L-15253, Oct. 31, 1960; *Coll. of Internal Revenue v.*

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Ellen Wood McGrath, L-12710, L-12721, Feb. 28, 1961; *Perez v. Perez*, L-14874, Sept. 30, 1960; *Republic v. Caballero*, 79 SCRA 179; *Favis v. Municipality of Sabongan*, L-26522, Feb. 27, 1963)

As regards the issue of whether PMC-U.S.A. is entitled under the U.S. Tax Code to a United States Foreign Tax Credit equivalent to at least 20 percentage paid portion spared or waived as otherwise deemed waived by the government, We reiterate our ruling that while *apparently*, a tax-credit is given, there is *actually* nothing in Section 902 of the U.S. Internal Revenue Code, as amended by Public Law-87-834 that would justify tax return of the disputed 15% to the private respondent. This is because the amount of tax credit purportedly being allowed is not fixed or ascertained, hence we do not know whether or not the tax credit contemplated is within the limits set forth in the law. While the mathematical computations in Justice Feliciano's separate opinion *appear* to be correct, the computations suffer from a basic defect, that is we have no way of knowing or checking the figure used as premises. In view of the ambiguity of Sec. 902 itself, we can conclude that no real tax credit was really intended. In the interpretation of tax statutes, it is axiomatic that as between the interest of multinational corporations and the interest of our *own* government, it would be far better, if the absence of definitive guidelines, to favor the national interest. As correctly pointed out by the Solicitor General:

". . . the tax-sparing credit operates on dummy, fictional or phantom taxes, being considered as if paid by the foreign taxing authority, the host country.

"In the context of the case at bar, therefore, the thirty five (35%) percent on the dividend income of PMC-U.S.A. would be reduced to fifteen (15%) percent *if & only if* reciprocally PMC-U.S.A's home country, the United States, not only *would allow* against PMC-U.S.A.'s U.S. income tax liability a foreign tax credit for the fifteen (15%) percentage-point portion of the thirty five (35%) percent Phil. dividend tax actually paid or accrued *but also* would allow a foreign tax 'sparing' credit for the twenty (20%) percentage-point portion spared, waived, forgiven or otherwise deemed as *if paid* by the Phil. gov't. by virtue of the 'tax credit sparing' proviso of Sec.

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24(b), Phil. Tax Code." (Reply Brief, pp. 23-24; *Rollo*, pp. 239-240).

Evidently, the U.S. foreign tax credit system operates *only* on foreign taxes *actually* paid by U.S. corporate taxpayers, whether directly or indirectly. Nowhere under a statute or under a tax treaty, does the U.S. government recognize much less permit any foreign tax credit for spared or ghost taxes, as in reality the U.S. foreign tax credit mechanism under Sections 901-905 of the U.S. Internal Revenue Code does not apply to phantom dividend taxes in the form of dividend taxes waived, spared or otherwise considered "as if" paid by any foreign taxing authority, including that of the Philippine government.

Beyond that, the private respondent failed: (1) to show the actual amount credited by the U.S. government against the income tax due from PMC-U.S.A. on the dividends received from private respondent; (2) to present the income tax return of its parent company for 1975 when the dividends were received; and (3) to submit any duly authenticated document showing that the U.S. government credited the 20% tax deemed paid in the Philippines.

Tax refunds are in the nature of tax exemptions. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the exemption. The burden of proof is upon him who claims the exemption in his favor and he must be able to justify his claim by the clearest grant of organic or statute law ... and cannot be permitted to exist upon vague implications. (*Asiatic Petroleum Co. v. Llanes*, 49 Phil. 466; *Northern Phil. Tobacco Corp. v. Mun. of Agoo, La Union*, 31 SCRA 304; *Rogan v. Commissioner*, 30 SCRA 968; *Asturias Sugar Central, Inc. v. Commissioner of Customs*, 29 SCRA 617; *Davao Light and Power Co., Inc. v. Commissioner of Custom*, 44 SCRA 122). Thus, when tax exemption is claimed, it must be shown indubitably to exist, for every presumption is against it, and a well founded doubt is fatal to the claim (*Farrington v. Tennessee & Country Shelby*, 95 U.S. 679, 686; *Manila Electric Co. v. Vera*, L-29987, Oct. 22, 1975; *Manila Electric Co. v. Tabios*, L-23847, Oct. 22, 1975, 67 SCRA 451).

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It will be remembered that the tax credit appertaining to remittances abroad of dividend earned here in the Philippines was amplified in Presidential Decree No. 369 promulgated in 1975, the purpose of which was to "encourage more capital investment for large projects." And its ultimate purpose is to decrease the tax liability of the corporation concerned. But this granting of a preferential right is premised on reciprocity, without which there is clearly a derogation of our country's financial sovereignty. No such reciprocity has been proved, nor does it actually exist. At this juncture, it would be useful to bear in mind the following observations:

The continuing and ever-increasing transnational movement of goods and services, the emergence of multinational corporations and the rise in foreign investments has brought about tremendous pressures on the tax system to strengthen its competence and capability to deal effectively with issues arising from the foregoing phenomena.

International taxation refers to the operationalization of the tax system on an international level. As it is, international taxation deals with the tax treatment of goods and services transferred on a global basis, multinational corporations and foreign investments.

Since the guiding philosophy behind international trade is free flow of goods and services, it goes without saying that the principal objective of *international taxation* is to see through this ideal by way of feasible taxation arrangements which recognize each country's sovereignty in the matter of taxation, the need for revenue and the attainment of certain policy objectives.

The institution of feasible taxation arrangements, however, is hard to come by. To begin with, international tax subjects are obviously more complicated than their domestic counterparts. Hence, the devise of taxation arrangements to deal with such complications requires a welter of information and data buildup which generally are not readily obtainable and available. Also, caution must be exercised so that whatever taxation arrangements are set up, the same do not get in the way of free

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flow of goods and services, exchange of technology, movement of capital and investment initiatives.

A cardinal principle adhered to in international taxation is the *avoidance of double taxation*. The phenomenon of double taxation (*i.e.*, taxing an item more than once) arises because of global movement of goods and services. Double taxation also occurs because of overlaps in tax jurisdictions resulting in the taxation of taxable items by the country of source or location (source or *situs* rule) and the taxation of the same items by the country of residence or nationality of the taxpayer (*domiciliary* or *nationality* principle).

An item may, therefore, be taxed in full in the country of source because it originated there, and in another country because the recipient is a resident or citizen of that country. If the taxes in both countries are substantial and no tax relief is offered, the resulting double taxation would serve as a discouragement to the activity that gives rise to the taxable item.

As a way out of double taxation, countries enter into tax treaties. A tax treaty[1] is a bilateral convention (but may be made multilateral) entered into between sovereign states for purposes of eliminating double taxation on income and capital, preventing fiscal evasion, promoting mutual trade and investment, and according fair and equitable tax treatment to foreign residents or nationals.[2]

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[1] There are two types of credit systems. The first, is the underlying credit system which requires the other contracting state to credit not only the 15% Philippine tax into company dividends but also the 35% Philippine tax on corporations in respect of profits out of which such dividends were paid. The Philippine corporation is assured of sufficient creditable taxes to cover their total tax liabilities in their home country and in effect will no longer pay taxes therein. The other type provides that if any tax relief is given by the Philippines pursuant to its own development program, the other contracting state will grant credit for the amount of the Philippine tax which would have been payable but for such relief.

[2] The Philippines, for one, has entered into a number of tax treaties in pursuit of the foregoing objectives. The extent of tax treaties entered into by the Philippines may be seen from the following tabulation:

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A more general way of mitigating the impact of double taxation is to recognize the foreign tax either as a *tax credit* or an *item of deduction.*

Whether the recipient resorts to tax credit or deduction is dependent on the tax advantage or savings that would be derived therefrom.

A principal defect of the tax credit system is when low tax rates or special tax concessions are granted in a country for the obvious reason of encouraging foreign investments. For instance, if the usual tax rate is 35 percent but a concession rate accrues

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Table 1 — RP Tax Treaties

RP — West Germany	Ratified on Jan. 1, 1985	
RP — Malaysia	Ratified on Jan. 1, 1985	
RP — Nigeria, Netherlands and Spain	Concluded in September, October and November, 1985, respectively (documents ready for signature)	
RP — Yugoslavia	Negotiated in Belgrade, Sept. 30-Oct. 4, 1985	
Pending Ratification	*Signed*	*Ratified*
RP — Italy	Dec. 5, 1980	Nov. 28, 1983
RP — Brazil	Sept. 29, 1983	
RP — East Germany	Feb. 17, 1984	
RP — Korea	Feb. 21, 1984	
Pending Signature	Negotiations concluded on	
RP — Sweden (rene-negotiated)	May 11, 1978	
RP — Romania	Feb. 1, 1983	
RP — Sri Lanka	June 10, 1983	
RP — Norway	Nov. 11, 1983	
RP — India	March 30, 1984	
RP — Nigeria	Sept. 27, 1985	
RP — Netherlands	Oct. 8, 1985	
RP — Spain	Nov. 22, 1985	

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to the country of the investor rather than to the investor himself. To obviate this, a tax sparing provision may be stipulated. With tax sparing, taxes exempted or reduced are considered as having been fully paid.

To illustrate:

"X" Foreign Corporation income	100
Tax rate (35%)	35
RP income	100
Tax rate (general, 35%, concession rate, 15%)	15

1. *"X" Foreign Corp. Tax Liability without Tax Sparing*

"X" Foreign Corporation income	100
RP income	100
Total Income	200
"X" tax payable	70
Less: RP tax	15
Net "X" tax payable	55

2. *"X" Foreign Corp. Tax Liability with Tax Sparing*

"X" Foreign Corp. income	100
RP income	100
Total income	200
"X" Foreign Corp. tax payable	70
Less: RP tax (35% of 100, the difference of 20% between 35% and 15%, deemed paid to RP)	35
Net "X" Foreign Corp. tax payable	35

By way of resume, We may say that the Wander decision of the Third Division cannot, and should not result in the reversal of the Procter & Gamble decision for the following reasons:

1) The Wander decision cannot serve as a precedent under the doctrine of *stare decisis*. It was promulgated on the same day the decision of the Second Division was promulgated, and while Wander has attained finality this is simply because no motion for reconsideration thereof was filed within a reasonable period. Thus, said Motion for Reconsideration was theoretically never taken into account by said Third Division.

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2) Assuming that *stare decisis* can apply, We reiterate what a former noted jurist Mr. Justice Sabino Padilla aptly said: "More pregnant than anything else is that the court shall be right." We hereby cite settled doctrines from a treatise on Civil Law:

"We adhere in our country to the doctrine of *stare decisis* (let it stand, *et non quieta movere*) for reasons of stability in the law. The doctrine, which is really 'adherence to precedents,' states that once a case has been decided one way, then another case, involving exactly the same point at issue, should be decided in the same manner.

"Of course, when a case has been decided erroneously such an error must not be perpetuated by blind obedience to the doctrine of *stare decisis*. No matter how sound a doctrine may be, and no matter how long it has been followed thru the years, still if found to be contrary to law, it must be abandoned. The principle of *stare decisis* does not and should not apply when there is a conflict between the precedent and the law (*Tan Chong v. Sec. of Labor*, 79 Phil. 249).

"While stability in the law is eminently to be desired, idolatrous reverence for precedent, simply, as precedent, no longer rules. More pregnant than anything else is that the court shall be right (*Phil. Trust Co. v. Mitchell*, 59 Phil. 30)."

3) Wander deals with tax relations between the Philippines and Switzerland, a country with which we have a pending tax treaty; our Procter & Gamble case deals with relations between the Philippines and the United States, a country with which we had no tax treaty, at the time the taxes herein were collected.

4) Wander cited as authority a BIR Ruling dated May 19, 1977, which requires a remittance tax of only 15%. The mere fact that in this Procter and Gamble case the B.I.R. desires to charge 35% indicates that the B.I.R. Ruling cited in Wander has been obviously discarded today by the B.I.R. Clearly, there has been a change of mind on the part of the B.I.R.

5) Wander imposes a tax of 15% without stating whether or not reciprocity on the part of Switzerland exists. It is evident that without reciprocity the desired consequences of the tax credit under P.D. No. 369 would be rendered unattainable.

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6) In the instant case, the amount of the tax credit deductible and other pertinent financial data have not been presented, and therefore even were we inclined to grant the tax credit claimed, we find ourselves unable to compute the proper amount thereof.

7) And finally, as stated at the very outset, Procter & Gamble Philippines or P.M.C. (Phils.) is not the proper party to bring up the case.

ACCORDINGLY, the decision of the Court of Tax Appeals should be REVERSED and the motion for reconsideration of our own decision should be DENIED.

EN BANC

[G.R. No. 88333. December 2, 1991]

NENITA E. DELA CRUZ, *petitioner*, *vs*. **THE HONORABLE CIVIL SERVICE COMMISSION and CYNTHIA C. CRUZ,** *respondents*.

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; CIVIL SERVICE COMMISSION; POWERS THEREOF, LIMITED TO REVIEWING APPOINTMENTS ON THE BASIS OF THE CIVIL SERVICE LAW. — Well-settled is the rule that the authority of the Civil Service Commission is limited to reviewing appointments on the basis of the Civil Service Law. When the appointee is qualified and all the other legal requirements are satisfied, the Commission has no choice but to attest to the appointment in accordance with the Civil Service Law. In fine, the exact nature of the power of the Civil Service Commission to approve or disapprove appointments has already been succinctly defined in the *Luego* case, to wit: "All the Commission is actually allowed to do is check whether or not the appointee possesses the appropriate civil service eligibility