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PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

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WASHINGTON, D.C. 20543

**CAPTION:** UNITED STATES, Petitioner V. GOODYEAR TIRE AND RUBBER  
COMPANY AND AFFILIATES

**CASE NO:** 88-1474

**PLACE:** WASHINGTON, D.C.

**DATE:** November 1, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
w. : No. 88-1474  
GOODYEAR TIRE AND RUBBER :  
COMPANY AND AFFILIATES :  
-----x

Washington, D.C.  
Wednesday, November 1, 1989

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
1:53 p.m.

APPEARANCES:  
ALAN I. HOROWITZ, ESQ., Assistant to the Solicitor  
General,  
Department of Justice, Washington, D.C.; on behalf of  
the Petitioner.  
BARRING COUGHLIN, ESQ., Cleveland, Ohio; on behalf of the  
Respondent.

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1 The federal circuit in this case upset the well- settled  
2 rule that the term accumulated profits is to be defined in  
3 accordance with U.S. tax principles and instead held that  
4 it should be determined in accordance with the tax  
5 principles of the foreign country.

6 We believe that the court of appeals' holding is  
7 clearly wrong and completely undermines the statutory  
8 purpose. To explain why that is so I would like to begin  
9 by describing the statutory framework out of which this  
10 case arises.

11 When a U.S. company engages in business in a  
12 foreign country it is likely to be subjected to tax by the  
13 foreign country on the incomes that are earned there.  
14 When it reports this income on its U.S. tax return the  
15 code allows, the code allows it to take a credit to  
16 reflect the foreign tax that has already been paid on the  
17 income, and thereby to avoid double taxation of the same  
18 income.

19 There are two different ways in which a U.S.  
20 company can do business abroad, and they require distinct  
21 treatment in the code. But the goal, which everyone  
22 agrees here, is that more or less the two different ways  
23 of business should be treated the same under the code, and  
24 there should be no advantage of doing one business -- one  
25 way of doing business over the other for foreign tax

1 credit purposes.

2 QUESTION: That is more or less agreed?

3 MR. HOROWITZ: I understand that to be agreed, yes.

4 The simplest case is when the U.S. company operates  
5 a branch -- what is called a branch operation in the  
6 foreign country. That means if there is just one  
7 corporation, no separate taxable entity in the foreign  
8 country, the income that is earned in the foreign country  
9 flows directly to the U.S. company and it is reported  
10 directly on its return as income, and the U.S. company  
11 then gets what is called a direct credit under Section  
12 901. The amount of foreign tax that it paid to the  
13 foreign country on that income is directly credited on its  
14 U.S. return.

15 Now, it is significant to note here that all that  
16 happens is that the U.S. company takes a number, the  
17 amount of British tax that it paid, and puts it on its  
18 U.S. return. It is not concerned, the U.S. tax  
19 authorities are not concerned with how the foreign  
20 government computed that tax. It could be at a given rate  
21 on the same kind of income that the United States rules  
22 would apply, or it could be at a lower rate with a  
23 different computation from United States income. But that  
24 makes very -- that makes no difference to the branch's  
25 reporting on its U.S. return.

1           Now, the other method of doing business overseas  
2 would be through a separately incorporated subsidiary. In  
3 that case you have a different corporation operating in  
4 the foreign country, and it is that corporation, not the  
5 U.S. parent, that pays the foreign tax. The income that  
6 is earned by that foreign corporation, by the same token,  
7 does not automatically flow to the U.S. parent. It is  
8 earned by the foreign company. And two things can happen  
9 to that income.

10           Either it can be distributed down to the U.S.  
11 parent as a dividend. Now, the dividend, as you probably  
12 know, is defined in the Internal Revenue Code as a  
13 distribution that is made out of earnings and profits; it  
14 is defined by Sections 316 and 312 of the code. If it is  
15 distributed as a dividend to the U.S. company it is then  
16 reported as income on the U.S. parents tax return, and it  
17 is subjected to U.S. tax.

18           On the other hand, the foreign subsidiary may  
19 retain the income, not distribute it to the U.S. parent.  
20 In that case the income stays in the foreign sub and it is  
21 immunized from U.S. taxation.

22           Section 902 is designed to provide an appropriate  
23 credit to deal with the subsidiary situation. It is  
24 called the "deemed paid" credit, because it gives the U.S.  
25 parent a credit for foreign tax that it is deemed to have

1 paid, the foreign tax actually having been paid by the  
2 subsidiary. And the goals of Section 902 are to provide  
3 the appropriate credit. That means to -- both to avoid  
4 double taxation and to avoid undertaxation, so as not to  
5 give the subsidiary operation an advantage over the branch  
6 operation.

7 Now, I think the boundaries of how Section 2 --  
8 Section 902 should operate are fairly clear. The credit  
9 should not be available when all of the sub's earnings are  
10 not distributed. If they are retained in the foreign  
11 subsidiary there should be no credit at that point to the  
12 U.S. parent, because the -- none of the earnings have been  
13 subjected to U.S. taxation and there is nothing to credit  
14 against and no possibility of double taxation.

15 On the other hand, when all of the foreign  
16 earnings, the earnings earned by the foreign sub, have  
17 been distributed to the parent, at that point all of the  
18 foreign tax that was paid on those earnings should be  
19 credited to the U.S. company. At that point that is the  
20 close analogy to the branch operation. When all of the  
21 sub's earnings have been distributed to the parent it is  
22 pretty much in the same position as would have been a  
23 branch, the branch having gotten the full credit. From  
24 the start the U.S. parent should now get the full credit.

25 Now, the complication that we have to deal with in



1 this case arises when the subsidiary distributes only a  
2 portion of its earnings and retains some of the others.  
3 Clearly, some sort of a partial credit must be given to  
4 the parent in that situation, and the code's mechanism for  
5 doing that is the allocation formula that we have here in  
6 Section 902. Now, the formula is set forth on page 4 of  
7 our brief, it is a fairly simple formula that sets up a  
8 ratio. The numerator of the ratio is the dividends that  
9 are paid to the U.S. parent, and the denominator is  
10 defined as the accumulated profits of the foreign  
11 corporation, that is, after tax -- accumulated profits.

12 Now, it is our submission that the profits in the  
13 denominator of the fraction must be computed according to  
14 U.S. tax principles, just as the profits are that govern  
15 the determination of the amount of dividends that will be  
16 reported as income on the U.S. return. That is the two  
17 things that are being compared and the necessary  
18 correlation. The whole point of the formula is to compare  
19 the amount of the sub's profits that have been  
20 distributed, and therefore subjected to U.S. taxation,  
21 with the amount of the subs profits that have been  
22 retained in the sub, and therefore still immunized from  
23 U.S. taxation. For the formula to work properly the  
24 denominator must reflect the total amount that is  
25 available for distribution to the U.S. parent as a

1 dividend. And that number is the profits as determined  
2 under U.S. law.

3 Now, there is one other point that I want to  
4 explain about the statutory framework, and that is the  
5 notion of sourcing, which Respondent discusses at great  
6 length in his brief. It is possible, if the subsidiary  
7 does not distribute the earnings as they are earned, year  
8 by year, but instead accumulates the earnings for a period  
9 of time, that in some year it will make a large  
10 distribution of earnings that are greater than its  
11 earnings in that particular year. The code provides that  
12 these earnings are to be sourced on a year -- excuse me,  
13 these, the dividends distributed is to be sourced on a  
14 year by year basis to the earnings of each year. And this  
15 is done according to the statute, Section 902(c)(1) under  
16 what we call the LIFO system, that is you start with the  
17 current year and then go back year by year exhausting the  
18 earnings as you go.

19 So, for example, if the subsidiary had earned \$800  
20 in a particular year, and that year distributed \$1,000,  
21 but it had accumulated earnings from previous years, then  
22 \$800 of that distribution would be treated by the code as  
23 a distribution in the current year. And 200 -- the extra  
24 \$200 would be treated as a distribution of profits earned  
25 in the previous year. And the tax credit calculation

1 would then be kind of a two-step calculation. They would  
2 get the full credit for the current year of all the  
3 foreign tax they paid in that year, because all the  
4 profits for that year were distributed. And then they  
5 would be treated as having made a \$200 distribution in the  
6 previous year, and would get a foreign tax credit given to  
7 them by a formula for that year.

8 QUESTION: Well, Mr. Horowitz, I guess you have  
9 conceded that at least in one circumstance, where the --  
10 there are no profits under the application of U.S. tax  
11 principles for a year, and yet the foreign subsidiary has  
12 paid a tax, that there is nothing by way of a credit, and  
13 there is in effect double taxation. Is that right?

14 MR. HOROWITZ: That is correct. I mean, we  
15 discussed that point at some length in our reply brief,  
16 Justice O'Connor. I mean --

17 QUESTION: Well, that certainly is a concern.

18 MR. HOROWITZ: Well, it is a concern. It is  
19 something that arises out of the mathematics that when you  
20 multiply anything by zero, what you get is zero. I should  
21 say that it is --

22 QUESTION: Is there no way that the IRS in that  
23 situation could devise a means of recognizing foreign  
24 losses and carrybacks or something, or some mechanism for  
25 adjusting so that you achieve the purpose of the statute?

1 MR. HOROWITZ: Yes, there may well be. As far as I  
2 know there has never been any -- that issue has never come  
3 up in litigation, or litigation that has at least gone to  
4 a decision.

5 There are -- there was a recent article in Tax  
6 Notes which I got a copy of in the mail, and I gather the  
7 Court got a copy of in the mail also, which cites a lot of  
8 commentators and mentions that a couple of the  
9 commentators, although they agree with the government's  
10 basic position here that U.S. tax principles govern,  
11 believe that there should be some way of taking account of  
12 foreign carryback rules.

13 QUESTION: Right.

14 MR. HOROWITZ: That's a separate issue. That is a  
15 detail at the margins of the issue, I think, that is  
16 presented in this case. And I don't think it is necessary  
17 for the Court to get into it here.

18 I think the zero, the zero income question --

19 QUESTION: Yes, but it is a concern if you know  
20 that the rule you adopt is going to result in some  
21 defeating of the statutory goal in some circumstances.

22 MR. HOROWITZ: Well, I guess I am not acknowledging  
23 that, Justice O'Connor, because the zero -- as a practical  
24 matter, the zero income case is not going to come up  
25 except in the area of a loss carryback. I mean, there is

1 not going to be a case where they are subjected to a lot  
2 of foreign tax and yet there is absolutely no U.S. income  
3 for that year. All the examples that are given by the  
4 amici and by the Respondent all involve cases where there  
5 is a deviation in the carryback rules of a loss --

6 QUESTION: And how do the taxpayers here get in  
7 difficulty with the application of your principle?

8 MR. HOROWITZ: The tax -- I am sorry, I am not sure  
9 I understand.

10 QUESTION: How are the taxpayers here adversely  
11 affected, then, by your interpretation?

12 MR. HOROWITZ: Well, they are not adversely  
13 affected at all. They are trying to get a tremendous --  
14 they are trying to get a tremendous tax benefit from the  
15 rule that they apply. There is clearly no zero income  
16 problem in this case, and there is no issue of carryback  
17 in this case. As I said before, it is stipulated that the  
18 deductions, tremendous deductions that they got under  
19 British law here are not available at all under U.S. law.

20 But, just to finish my answer here to your question  
21 before, I mean, the zero income thing can come up where  
22 the carrybacks are made to different years under different  
23 -- under the different tax systems. And what I was just  
24 pointing out is that there is more of an argument there,  
25 that there is some -- that the general principle that U.S.

1 tax principles apply to the definition of profits might be  
2 adjusted by that for carrybacks. That is made by several  
3 commentators. So I don't think the decision in this case  
4 is going to resolve that one way or another. That would  
5 be left for further litigation.

6 QUESTION: Is your position embodied in a Treasury  
7 regulation?

8 MR. HOROWITZ: Our position in this case? Yes,  
9 Section --

10 QUESTION: Yes.

11 MR. HOROWITZ: -- 109 --

12 QUESTION: So it is, this is in a Treasury  
13 regulation.

14 MR. HOROWITZ: Yes. Well, the Treasury regulation  
15 is not very detailed. It says that accumulated profits  
16 are determined according to earnings and profits of the  
17 corporation for the year.

18 QUESTION: Under United States law?

19 MR. HOROWITZ: Yeah, under United States law.

20 QUESTION: Is that what it says?

21 MR. HOROWITZ: Yes. Well, it says, it uses the  
22 term earnings and profits, which is a United States  
23 concept and which is understood to mean the United States  
24 principles.

25 QUESTION: In other words the regulation is

1       ambiguous in the same way the statute is?

2               MR. HOROWITZ: No, I don't think it is ambiguous in  
3       the same way as the statute is, because the regulation  
4       uses a term of art of the United States tax law, earnings  
5       and profits, which is the base on which U.S. dividends are  
6       paid out of. If the statute uses the term accumulated  
7       profits, which appears nowhere else in the code; it  
8       doesn't have an established meaning and is, for these  
9       purposes, is not defined by the code. So, it is left to  
10      the parties to fight over what it means. But accumulated  
11      profits is not a term of art in the same sense that  
12      earnings and profits is. It is our argument that it  
13      should mean pretty much the same thing. Congress left  
14      some things --

15             QUESTION: It is the their argument that it is very  
16      suggestive that they used the word that isn't used  
17      anywhere else in the code, instead of just using earnings  
18      and profits, which makes some sense.

19             MR. HOROWITZ: Not too much sense, Justice Scalia.  
20             (Laughter.)

21             MR. HOROWITZ: I mean, they -- it was necessary to  
22      come up with some term there because we are talking about  
23      a foreign corporation here. So to just say earnings and  
24      profits would not be meaningful, because foreign  
25      corporations --

1 QUESTION: It only makes sense in a Treasury  
2 regulation? It wouldn't have made sense in the statute?

3 MR. HOROWITZ: Well, in the Treasury regulation --

4 QUESTION: I mean, I don't see why it makes any  
5 less sense in -- any more sense in the Treasury reg. You  
6 just told us it is very clear what it means in the  
7 Treasury reg, that there is no ambiguity. Justice Kennedy  
8 said that is ambiguous too, you said no, it is not  
9 ambiguous.

10 MR. HOROWITZ: Well, I guess the Treasury reg is  
11 issued in the context of a lot of rulings and court  
12 decisions already that have discussed this issue. But, as  
13 far as the intent of Congress in using this phrase, I  
14 think I should make clear that it is not the government's  
15 contention that the Congress in 1918 and 1921 sat down and  
16 considered the question whether these -- these profits  
17 will be determined in accordance with U.S. law or in  
18 accordance with foreign law, and then decided to use the  
19 term accumulated profits. I don't think there is any  
20 reason to think that the issue occurred to the Congress  
21 that there would possibly be a difference. I think what  
22 we -- we know what the intent of the Congress was,  
23 generally, in enacting the credit, and our position is  
24 that only by using U.S. profits can that -- can that  
25 attempt be effectuated. Obviously, if Congress was aware



1 of this litigation, had the prescience to know that this  
2 litigation, they would have used a different word no  
3 matter who was right in this case. They wouldn't have  
4 used something ambiguous.

5 QUESTION: I suppose that -- don't you -- all you  
6 have to say is that your construction of the statute is a  
7 defensible one or a reasonable one, even if those -- even  
8 if there is another construction?

9 MR. HOROWITZ: Well, to the extent -- yeah, the  
10 administrative construction is entitled to deference. I  
11 guess we tend to rely, in those cases where we think there  
12 is a reasonable argument on the other side. In this case  
13 I think it is so clear that the only way of reading the  
14 statute is the government's. But we'll save that  
15 ammunition for another case. But, I agree with you,  
16 Justice.

17 There are two ways in which the variation in  
18 accumulated profits can affect the computation of the  
19 credit. One is in the allocation ratio, that is the  
20 formula that I quoted before for a given year, for a  
21 single year's profits. If the number in the denominator  
22 is changed and, as they have done in this case, if the  
23 number in the denominator is reduced by using a smaller  
24 foreign definition of profits, that will necessarily  
25 increase the ratio and the amount of credits that you get

1 for a particular distribution.

2 The second way that it can make a difference is in  
3 connection with this sourcing mechanism that I spoke of  
4 before. If the accumulated profits are smaller than a  
5 given distribution of earnings, which is what happened  
6 here, can swallow up the earnings of a given year sooner,  
7 thus resulting in a full credit for that year, and get  
8 back to earlier years and end up soaking up more of the  
9 credit, so to speak. Both of those factors are present in  
10 this case that affected the tax computation.

11 There are a lot of numbers in the Joint Appendix  
12 here on schedules, but I would just call the Court's  
13 attention to pages 30 and 31, which are, I think, the key  
14 schedules, and include the different computations of both  
15 parties. And I guess if I get a chance I might go through  
16 these in a little more detail later. But at least for now  
17 I just mentioned those two pages in the Joint Appendix.

18 What I want to emphasize now about sourcing,  
19 because Respondent put so much emphasis on it, is that  
20 sourcing is a secondary point in this case. I mean, the  
21 issue here is the definition of accumulated profits. Once  
22 that is determined, then how the sourcing calculation is  
23 done, how the allocation formula is applied, all follow as  
24 a matter of course. But there is no suggestion by anyone,  
25 I think, that there is a special rule for sourcing, that

1 accumulated profits means something different when it is  
2 used for sourcing purposes than it does when it is used in  
3 the regular application of the allocation formula. And we  
4 have given in our brief a lot of examples of how messed up  
5 the application of the credit gets, if the other sides  
6 petition is correct.

7 The other side, I think, particularly the single-  
8 year examples, which are the simplest way of looking at  
9 it, the other side hasn't really responded to those, and I  
10 think in part because they suggest that this case is about  
11 sourcing. And I do want to emphasize that you can't  
12 escape the effect of the -- of their position on a single-  
13 year application of the formula by hiding behind the  
14 sourcing idea.

15 We suggest that the use of foreign profits will  
16 mess up the application of the 902 credit in several ways.  
17 One is in the allocation formula itself. The ratio is  
18 simply not meaningful if foreign profits are used in the  
19 denominator. It is essentially comparing apples and  
20 oranges. It is undisputed in this case that the pool of  
21 potential dividends that can be distributed by the  
22 subsidiary and that would be recognized by the U.S. parent  
23 as taxable income is the earnings and profits defined  
24 according to U.S. law. That was held by the *Untermeyer*  
25 case back in 1931, and at page 37 of their brief,

1 Respondent admits to that.

2 Well, if U.S. profits are used in the formula, what  
3 you are doing is computing the proportion of those  
4 potential dividends, which proportion is being distributed  
5 and which proportion is still being immunized from U.S.  
6 taxation. That is, was what the is formula supposed to  
7 do. If you put foreign income into the denominator, you  
8 are getting numbers that don't correlate to that purpose.  
9 You will get a fraction as a mathematical matter, but you  
10 won't get something that is doing what the credit is  
11 designed to do.

12 Another problem that is created by this is that it  
13 destroys the symmetry that Congress many times tried to  
14 preserve, and enhance actually, between branch operations  
15 and subsidiary operations. As I said at the outset, the  
16 branch operation is not at all concerned with how foreign  
17 income is computed, or how the foreign tax is computed.  
18 It just takes the number from the foreign tax return. All  
19 of its -- it recognizes income on the U.S. return  
20 according to U.S. principles of taxation, directly into  
21 the U.S. company. And for the sub to approximate the  
22 treatment of a branch it must similarly look to U.S.  
23 principles in order to determine the income that it is  
24 taking into effect.

25 If you use foreign principles in the allocation

1 formula for the subsidiary, then you will have a case  
2 where there is a complete distribution of all of the  
3 earnings and profits by the subsidiary, which is -- which  
4 puts it in the same position as the branch which took all  
5 those earnings into account in the beginning, and yet you  
6 won't get the full credit.

7 There are a lot of examples given in our brief that  
8 illustrate the distortions that you will get, and I would  
9 like to emphasize that if foreign income is used there  
10 will be a distortion of the way the credit is supposed to  
11 work in every single case, not just in a case where zero  
12 is used as one of the years. Every time the foreign  
13 income is higher than the U.S. income, a full distribution  
14 of all the money available for dividends, which should  
15 yield the full credit, will in fact not yield the full  
16 credit, and it may be lost forever. That is because the  
17 denominator of the fraction will be too high.

18 I should -- I guess I should mention the page  
19 numbers of which our examples are: pages 21 to 22 of our  
20 opening brief, and some more detail at pages 14 to 17 of  
21 our reply brief.

22 On the other hand, if you have this case --

23 QUESTION: And you claim that your system only  
24 doesn't make sense when you got a zero figure?

25 MR. HOROWITZ: That is right. It still makes

1 sense, but it leads to -- I mean, because of the zero  
2 multiplication problem, it leads to a result that is not  
3 one that Congress I think would have wanted to have.

4 QUESTION: It doesn't make sense, really.

5 MR. HOROWITZ: All right.

6 If the foreign income is lower, which is the fact  
7 in this case, what happens is that you can get all the  
8 credit out without distributing all of the available  
9 profits. And I would like to emphasize that because that  
10 is -- the legislative history of the 1921 amendment and  
11 really just the text of the statute makes it clear that  
12 this is the whole point of the allocation formula, is to  
13 prevent the sub from getting an advantage over the branch  
14 operation by being able both to take the full credit and  
15 to keep earnings in the subsidiary and immunize them from  
16 U.S. taxation.

17 And maybe I can illustrate this now by looking at  
18 the actual figures in this case. If you can look at pages  
19 30 to 31 of the Joint Appendix. Those are the fold-out  
20 pages that are in the middle of the appendix. Page 31 is  
21 the government's calculation of how the formula should  
22 work here, using U.S. tax concepts. And you will see that  
23 the numbers at the very top of the page there are the  
24 income, the earnings of the British corporation for these  
25 years. Those numbers are not in dispute, at that point.

1 And when you subtract the taxes out you get down, a couple  
2 lines down I guess, to the second total there, which is  
3 adjusted accumulated profit. This is the U.S. profits for  
4 these years. 1970 and 1971 are the tax years. And you  
5 see in both years the U.S. profits are more than three  
6 million pounds for each year, sizable profits.

7 Now, again, as we understand it, Respondent would  
8 agree that this is the pool of potential dividends, that  
9 if all of these three million pounds were distributed they  
10 would be recognized as dividends and taxed as income on  
11 the United States return. Now, the rest of the  
12 government's calculation --

13 QUESTION: Excuse me. And all of those are  
14 computed under U.S. rules, you said?

15 MR. HOROWITZ: That is right.

16 QUESTION: Up to there.

17 MR. HOROWITZ: That is right, computed under U.S.  
18 rules.

19 QUESTION: You are all in agreement.

20 MR. HOROWITZ: Well, they don't agree that that is  
21 how they should be computed. But as far as the numbers go  
22 that is how it is computed.

23 Now, the calculation on this schedule is fairly  
24 simple after that. There are, the next total line is the  
25 dividends that are paid out in that year. That is just a

1 fact, the dividends that were paid out by the foreign  
2 subsidiary, and there is no dispute about those numbers  
3 either.

4 Now, the way the government allocates these,  
5 according to the sourcing is very simple, because under  
6 our theory the dividends were always less than the total  
7 earnings for that year, so the dividends were just  
8 apportioned to the year in which they were distributed.  
9 So, the 1971 dividend is fully apportioned to 1971; the  
10 1970 dividend is fully apportioned to 1970. And then the  
11 calculation is made down at the bottom using the formula,  
12 and you see that for -- take 1970 as an example, about one  
13 third of the earnings in that year were distributed as a  
14 dividend, and therefore they get about one third of the  
15 foreign taxes that were paid as a credit.

16 QUESTION: Mr. Horowitz, about the middle of the  
17 page, allocation of dividends 94621 -- 946421. Why is  
18 that \$100 different from the figure immediately above?

19 MR. HOROWITZ: I don't know. I think it's a  
20 misprint. I'm pretty sure it's a misprint.

21 QUESTION: So do I.

22 MR. HOROWITZ: Now, on the other side -- I guess I  
23 had better go through this quickly -- but it starts off  
24 with the same income numbers, but there is, on the second  
25 line down where there are numbers, there is this



1 tremendous British loss that is carried back to 1970 and  
2 1971, and that wipes out a large portion of the earnings  
3 for the purposes of the British taxing authority for those  
4 years. Now, what you end up with is the sourcing  
5 calculation that this formula was done, and you see --

6 QUESTION: Mr. Horowitz, could I ask this one  
7 question? Why, on your exhibit on page 31, why isn't  
8 there the credit for 1973 calculated?

9 MR. HOROWITZ: Well, I'm not sure why 1973 is  
10 included on the schedule. The year, this case only  
11 involves the tax years 1970 and 1971. So, actually  
12 neither schedule calculates the credit for 1973.

13 QUESTION: I see.

14 MR. HOROWITZ: I think just some of the numbers are  
15 there for completion.

16 QUESTION: That is just the source of the  
17 carryback, in '73.

18 MR. HOROWITZ: That is right.

19 QUESTION: Okay. Thank you.

20 QUESTION: What are the two numbers further down,  
21 after the years, to 1968 to '69 to '70, '71, '73, there.  
22 There are two more numbers that don't have any --

23 MR. HOROWITZ: I think that is also --

24 QUESTION: They are the credit.

25 MR. HOROWITZ: Well, that is the credit, which is

1 then explained how we got the credit further down. That  
2 probably shouldn't be in that spot.

3 QUESTION: I got you, I see. It is the same  
4 numbers --

5 MR. HOROWITZ: And I think, since I am running out  
6 of time, I will just say that if you look at -- if you  
7 look later -- at the Respondent's calculation you will see  
8 that they, by attributing only \$26,000 of their --  
9 thousand pounds of their 1971 dividend to 1971, they take  
10 out the full credit for that year and move on to the next  
11 year, even though there were more than three million  
12 pounds in earnings and profits for that year. What they  
13 do essentially is to create these islands of large amounts  
14 of earnings and profits that they treat as either  
15 distributed or just ignore, while taking the full credit  
16 out.

17 So, the real evil of the Respondent's position here  
18 is not that they get credit for more tax than they ever  
19 paid; that doesn't happen. But what they do is that they  
20 manage to get the full credit while still retaining a lot  
21 of earnings in the foreign subs.

22 I would like to reserve the remainder of my time.

23 QUESTION: We're doing pretty well on this one,  
24 we're only about 20 years behind.

25 MR. HOROWITZ: The complaint was filed in 1985.

1 QUESTION: Thank you, Mr. Horowitz.  
2 Mr. Coughlin.

3 ORAL ARGUMENT OF BARRING COUGHLIN  
4 ON BEHALF OF THE RESPONDENT

5 MR. COUGHLIN: Mr. Chief Justice, and may it please  
6 the Court:

7 Counsel for the government has already explained  
8 that this case is here on certiorari to the court of  
9 appeals for the federal circuit. If there is no objection  
10 I am going to try to avoid confusion and slips of the  
11 tongue by referring to the Petitioner as the government  
12 and to the Respondent, the Goodyear Rubber and Tire  
13 Company and its affiliates, as Goodyear. Another  
14 corporation involved here as Goodyear's wholly-owned  
15 British subsidiary, which will be referred to as Goodyear  
16 England.

17 The court of appeals granted Goodyear's motion for  
18 summary judgment, thus allowing Goodyear's claim for  
19 refund of federal income taxes for 1970 and 1971. Since  
20 the question was answer -- asked earlier, I will say here  
21 that the year 1973 is not involved as far as the claim for  
22 refund is concerned. It is involved in the sense that the  
23 loss which Goodyear England had in 1973 gave rise to the  
24 net operating loss carryback deduction which affected the  
25 years 1970 and 1971. That is the reason that '73 is in

1 the schedule.

2 In 1970 and 1971 Goodyear received dividends from  
3 its subsidiary Goodyear England, dividends of about  
4 \$946,000 for 1970 and about \$729,000 for 1971. Goodyear  
5 reported the dividends in its U.S. income tax returns, and  
6 in this case its claim for refund is on the ground that it  
7 is entitled to foreign credits, to foreign tax credits for  
8 foreign taxes paid by the subsidiary on its own income,  
9 out of which those dividends were paid.

10 Counsel for the government has already explained  
11 that there are two sections of the Internal Revenue Code  
12 which relate to the foreign tax credit. One is Section  
13 901, which allows a credit for all foreign taxes paid by  
14 the taxpayer, that is by the U.S. taxpayer. The other  
15 one, Section 902, says that under certain circumstances  
16 the U.S. taxpayer is deemed to have paid the taxes paid by  
17 its subsidiary. It doesn't have to be a wholly-owned  
18 subsidiary; it can be only 10 percent, so that you could  
19 have more than one parent, which may be important. So  
20 that in this case the parent, Goodyear, is claiming credit  
21 for taxes paid by its subsidiary.

22 The dispute relates to the computation of the  
23 credit, which, as has been pointed out, depends on just  
24 two words, the phrase "accumulated profits" in Section  
25 902. The parties have stipulated that if Goodyear's

1 definition of accumulated profits is correct, the credit  
2 is to computed in accordance with Exhibit I, which has  
3 already been discussed here. And on the other hand, if  
4 the government's definition is correct, Exhibit J governs.

5 The parties have also stipulated what their  
6 respective positions are as to the definition of the  
7 phrase. There is a little confusion here which might be  
8 alluded to in that the stipulation was that the -- that  
9 Goodyear's position is that in this case what we are  
10 applying is what the British determined to be the taxable  
11 income in Britain, not what some agent in the United  
12 States applying British law might determine it to be, but  
13 what it was determined to be. That is the tax base. I  
14 think that is fairly clear in the stipulation.

15 The other side of it is that the government  
16 stipulated that the taxable -- that what it is talking  
17 about is the taxable income of the subsidiary computed  
18 under U.S. law, which does require, of course, a  
19 recomputation. Now, in this Court, the government has  
20 been arguing that it is the earnings and profits or  
21 something like it. It says it is not exactly thee  
22 earnings and profits, but something related to it and  
23 close to it, but somewhat different from the earnings and  
24 profits is involved. We think we are really talking about  
25 the foreign tax base, or the recomputed taxable income as

1 if it were a U.S. corporation. But, whether it is  
2 earnings and profits or whether it is taxable income, we  
3 still have the problem of what accumulated profits means.

4 Now, before I go on further, I want to mention here  
5 four points which may lead to some misunderstanding, in  
6 fact I think perhaps already have. There are four points.  
7 Number one, the credit Goodyear is seeking is not a credit  
8 for foreign taxes that have already been refunded. There  
9 was a refund here, but Goodyear is seeking credit for  
10 taxes of other years that have not been refunded and have  
11 not been used as the basis for a credit. The claims court  
12 misunderstood that point and thought we were trying to  
13 deduct the same foreign tax credit twice.

14 Number two, Goodyear is not trying to apply foreign  
15 law to the liability of a U.S. taxpayer. We are trying to  
16 interpret the U.S. law. The U.S. law that is applicable  
17 and determines Goodyear's liability is Section 902. And  
18 the question is, what does Section 902 mean.

19 Number three, Section 316, which has to do with  
20 whether a distribution by a corporation is a taxable  
21 dividend or is a return of capital, Section 316 has  
22 nothing whatever to do with this case. As counsel for the  
23 government pointed out, the dividends have been  
24 stipulated. They are a fact; they are not in any event  
25 controlled by the current earnings and profits of any

1 year. There are ample earnings and profits in an  
2 aggregate sense to carry those dividends, and, after all,  
3 most corporations having foreign subsidiaries are not  
4 going to conduct their year -- their year-to-year business  
5 by making distributions out of capital. They are, most of  
6 them, growing, not declining in size, and when they pay a  
7 dividend it is taken for granted that it is ordinary  
8 income on this side. There is no issue about that. If  
9 Section 316 had been repealed the year before the two  
10 years involved here, it would not have made a particle of  
11 difference to this case. It simply is not involved.

12 Number four, there is no way, under either view of  
13 this case, that the U.S. parent can ever claim credit for  
14 more foreign taxes than its subsidiary paid, or more than  
15 it would have paid if it had been in a branch operation.  
16 Under the government's view, however, the U.S. taxpayer  
17 may be restricted to considerably less than it would have  
18 got in a branch operation. And it is this windfall to the  
19 treasury that the government is trying here to preserve.

20 Now, before going on further with the facts, it is  
21 necessary to understand the working of the deemed paid  
22 credit a little more than has been explained so far.  
23 There has been reference to sourcing. It is involved in  
24 this case; it is involved in many cases, and the  
25 definition of accumulated profits has to be something that

1 is going to fit that. Section 902 in general provides  
2 that the U.S. parent receiving a dividend from its foreign  
3 subsidiary is deemed to have paid that proportionate part  
4 of the foreign taxes of the subsidiary that the dividend  
5 bears to the accumulated profits of the subsidiary, in  
6 excess of the foreign taxes on those profits.

7 Now, our problem is what does accumulated profits  
8 mean in that sense. Abbreviating somewhat the statutory  
9 language, the foreign tax deemed paid equals the total  
10 foreign tax times the dividend divided by the accumulated  
11 profit after subtracting the tax. In algebraic terms this  
12 formula is  $T$  times  $D$  divided by  $P$ . It will be noted that  
13 that formula is made up of three factors, the foreign law  
14 -- excuse me, the foreign tax, the dividends paid by the  
15 subsidiary and, in the denominator, the accumulated  
16 profits of the subsidiary after tax.

17 Now, until you become familiar with the workings of  
18 Section 902 you might suppose that  $T$ , the tax, and  $P$ , the  
19 accumulated profit after tax, were to be figured on an  
20 aggregate or pooling sort of a basis. The word  
21 accumulated seems to suggest that. I think perhaps it led  
22 the Respondent astray in that the government's brief  
23 initially talked about pooling, except in some of the  
24 footnotes, all the way through, and is still talking about  
25 it being the total fund out of which dividends could be



1 paid. That is not quite it.

2 Accumulated profits is an annual theory, not a  
3 pooling theory. The pooling theory, which we have been  
4 referring to from time to time as the bucket theory --

5 QUESTION: May I just interrupt to get one thing  
6 clear?

7 MR. COUGHLIN: Yeah.

8 QUESTION: It is not totally an annual theory. If  
9 the dividend in the year in question is larger than the  
10 earnings in that year, then is it not necessary to look to  
11 another year?

12 MR. COUGHLIN: In the application of Section 316,  
13 ordinarily a corporation paying a dividend has some kind  
14 of accumulated --

15 QUESTION: I didn't expect you to respond by  
16 referring to Section 316, because you just told us that  
17 had nothing to do with the case.

18 MR. COUGHLIN: Well, it doesn't, and I think that  
19 may be true of this --

20 QUESTION: But just for purposes of 902, is it not  
21 true that if the dividend is larger than the earnings in  
22 that year, whether computed by British or American  
23 standard, it is necessary to look at a prior year to do  
24 this arithmetic?

25 MR. COUGHLIN: If the dividend exceeds the

1 accumulated profits of the year in which the dividend is  
2 paid, then it must be applied to an earlier year. Whether  
3 the accumulated profits represent the foreign tax base or  
4 something else is what is at issue in this case. But you  
5 are quite right, Your Honor, in saying that if the  
6 dividend exceeds the accumulated profits, whatever those  
7 are, then you go back to earlier years. That is pooling -  
8 -

9 QUESTION: Well, if they exceed --

10 MR. COUGHLIN: That is sourcing.

11 QUESTION: If they exceed, just to get away from --

12 I mean, we're using the answer to frame the question in a  
13 way when you use accumulated profits that way, but if they  
14 exceed the taxable income, however you denominate it,  
15 under British or American sources, in that year, then you  
16 must look at something that was earned in a prior year.

17 MR. COUGHLIN: That is correct.

18 QUESTION: And one arguably could say that the term  
19 accumulated was meant to pick up the extent to which you  
20 have to look at other years.

21 MR. COUGHLIN: The term accumulated was brought in  
22 in order to permit looking at what had been earned in  
23 earlier years.

24 QUESTION: Right.

25 MR. COUGHLIN: When the statute was first enacted

1 in 1918, it didn't say accumulated profits. It said  
2 taxable income. It was found that that phrasing was  
3 leading to a conclusion that whenever you paid a dividend  
4 you could apply the formula and get a credit for the year  
5 in which you paid the dividend, with respect to the  
6 foreign tax of that year. But if the dividend exceeded  
7 the taxable income, the word Your Honor used, for the  
8 dividend year, it wouldn't go back to the earlier year.  
9 And in 1921 they amended the statute and put in  
10 accumulated profits in the place of taxable income.

11 Now, that suggests that perhaps Congress at that  
12 time was thinking of the bucket theory, that we pool all  
13 the taxes together and we pool all the earnings together,  
14 and we divide one by the other, and we get kind of an  
15 average rate of foreign tax, which we then apply to the  
16 dividend that was paid. That is actually the principle  
17 that has been adopted under the 1986 act, which got rid of  
18 Section 902.

19 However, in the General Foods case it was held, and  
20 this has been followed since, it was held that you don't  
21 use a bucket theory, you use what we have referred to in  
22 our brief as the pigeonhole theory. The idea that you are  
23 going to take the dividend for the current year out of a  
24 current pigeonhole of this year's earnings, and you are  
25 going to take the tax that the foreign subsidiary paid out

1 of the same earnings. And if the dividend exceeds what is  
2 in the current pigeonhole, you look in the next  
3 pigeonhole. And now you have exhausted the income and the  
4 tax for the current year and you are looking at the  
5 earlier year. And so on back.

6 Now, this means that in every year, except the  
7 farthest one back, D in the formula is going to always  
8 equal P, the accumulated profits after tax, because you  
9 have exhausted what is in that pigeonhole, and you have  
10 just exhausted it. But when you get back to the end, you  
11 will find a place where you don't quite exhaust it and you  
12 have something left over. Now, this is important to the  
13 whole statutory scheme, and as several cases have said, it  
14 is necessary to have a precise matching between the income  
15 that goes into that pigeonhole and the tax, or the whole  
16 thing isn't going to make sense.

17 Now, the problem is what you are going to do in  
18 determining what accumulated profits really means. I want  
19 to quote Judge Raum in the Rob -- H.H. Robertson case. It  
20 is of critical importance to determine the accumulated  
21 profits of each year so that they can be matched against  
22 the foreign taxes paid for that year. And so that when  
23 dividends are paid out of, or from such accumulated  
24 profits, a foreign tax credit may properly be computed as  
25 a portion, in accordance with the statutory formula, of

1 the foreign taxes paid in respect of the accumulated  
2 profits for that year.

3 Now, let's go back to the facts for a moment. When  
4 Goodyear originally filed its 1970 and 1971 returns, the  
5 accumulated profits for each of those years was sufficient  
6 to yield a substantial tax credit, without sourcing into  
7 any earlier years. And it recovered credits for taxes  
8 paid accordingly.

9 But in 1973 Goodyear England had a loss, which the  
10 British tax authorities allowed as a net operating loss  
11 carryback deduction for 1971 and 1970. This resulted in  
12 refunds of the foreign taxes that had been claimed as  
13 credits for 1970 and 71, but the law required that the  
14 entire credit be recomputed at that point. And there  
15 doesn't seem to have been any difference of opinion about  
16 the fact that it had to be recomputed, except that the  
17 U.S. recomputed it without allowing the carryback  
18 deduction because it didn't allow the loss at all. It  
19 recomputed the 1973 loss and said it was a very large  
20 profit. And since there was no loss there was nothing to  
21 carryback.

22 However, while it didn't adjust the accumulated  
23 profits in the formula, it did adjust the tax for the  
24 refund which the British had paid. And this, of course,  
25 considerably distorts the fraction from what it would have

1 been if you adjusted neither the numerator or the  
2 denominator, or if you adjusted both.

3 Now, keep in mind that of the three factors in the  
4 formula, accumulated profits is the only one in dispute.  
5 The foreign taxes are facts. The dividends are facts.  
6 The government is making some argument that because the  
7 dividends might have been affected by Section 316, but  
8 were not, that therefore the numerator is being determined  
9 under U.S. law. It really isn't. The numerator is being  
10 determined by the man who wrote the check. That part of  
11 the numerator, the dividend part of it, the board of  
12 directors of the corporation declares a dividend and the  
13 corporation pays it. And that is a fact, and it has been  
14 stipulated, not affected by U.S. law.

15 QUESTION: All money that a corporation sends to  
16 its shareholders is treated precisely the same under  
17 British law and under American law --

18 MR. COUGHLIN: As far as this case --

19 QUESTION: -- with regard to its status?

20 MR. COUGHLIN: -- is concerned, all money --

21 QUESTION: Well, but I'm not talking about with  
22 regard to this case. I'm talking about the validity of  
23 the government's argument that you ought to be logically  
24 consistent, and if you are computing the dividends,  
25 deciding whether it is a dividend on the basis of U.S.

1 law, you ought to decide the other amount under U.S. law.  
2 Now, you're saying you don't decide it on U.S. law, that  
3 money is money.

4 MR. COUGHLIN: I'm saying we didn't have to decide  
5 it.

6 QUESTION: Not in this case, but we're talking  
7 general principles. If there were any difference between  
8 whether the receipt of the money constituted a dividend or  
9 not, if there were a difference between U.S. and British  
10 law, do you concede that it would be U.S. law that would  
11 govern?

12 MR. COUGHLIN: If -- yes. If there -- if the  
13 dividend for, under U.S. law, would have -- let's say if  
14 Goodyear England had been a U.S. corporation and a  
15 distribution had been made to its parent, the question  
16 whether that distribution is a dividend or is a capital  
17 distribution is a matter of U.S. law.

18 QUESTION: Okay.

19 MR. COUGHLIN: If there is any difference of  
20 opinion on that point.

21 QUESTION: But you say there happens to have been  
22 none in this case.

23 MR. COUGHLIN: There happens to have been none in  
24 this case.

25 Now, it might be worth mentioning this at this

1 point because there was something said about this which I  
2 think is a little confusing, about the possibility that  
3 the distribution made -- excuse me, that the possibility  
4 that the foreign income tax base might have been less than  
5 or more than the amount of the taxable dividend or of the  
6 earnings and profits, and what the effect might have been.  
7 And the fact of it is that under the theory, as we  
8 understand it to be, if the accumulated profits, in any  
9 sense of the word, should exceed the foreign income tax  
10 base, and the dividend also exceeded that amount, then you  
11 would carry it back. But if it went the other way around,  
12 you would not, because you would have exhausted the  
13 earnings and profits in the dividend you paid, and there  
14 isn't anything left to carryback. So that, it is not  
15 quite right to say that 316 is governing it in either  
16 case.

17 Now, in arguing that the term accumulated profits  
18 means the foreign tax base, Goodyear relies first on the  
19 wording of the statute, second on the decided cases, then  
20 on the fact that any other view produces distortions in  
21 the credit allowed, whether or not we have any zero years,  
22 and finally on the fact that practical difficulties appear  
23 in applying any contrary rule.

24 Section 902(a)(1), when it sets out the formula,  
25 refers to the foreign taxes paid by the foreign



1 corporation on or with respect to the accumulated profits.  
2 This seems to me to suggest that accumulated profits means  
3 the foreign tax base, because the taxes are paid on or  
4 with respect to that amount. But Section 902 goes on and  
5 defines accumulated profits. I am going to read part of  
6 it.

7 For purposes of this section the term accumulated  
8 profits means, with respect to any foreign corporation,  
9 the amount of its gains, profits or income computed  
10 without reduction by the amount of the income or profits  
11 and excess profits taxes imposed on or with respect to  
12 such profits or income by any foreign country or any  
13 possession of the United States.

14 Literally, that says that accumulated profits means  
15 gains, profits or income, because it says it means gains,  
16 profits or income, not adjusted. Our problem now shifts  
17 to finding out what gains, profits or income means. The  
18 language is clear. Surely if the foreign taxes are  
19 imposed on or with respect to the gains, profits or  
20 income, then the gains, profits or income must necessarily  
21 be the amount on which the foreign tax was imposed. The  
22 statute has now told us the same thing twice. Accumulated  
23 profits and gains, profits and income are the same thing.  
24 And both represent -- both represent the amount on or with  
25 respect to which the foreign tax was imposed. That is the

1 foreign tax base. The foreign country doesn't impose its  
2 tax on or with respect to the income recomputed under U.S.  
3 standards.

4 And at that point I would like to say on the side  
5 about part of the argument that was made here for the  
6 government, and that is we have not agreed that the  
7 deduction of the loss in 1970 and '71 was not allowable  
8 under U.S. rules. Under 902 we claim that it was  
9 allowable, because 902 is the U.S. rule, and we think it  
10 must be taken into account because it is a part of the  
11 base.

12 Now, the first case on this was the United Dyewood  
13 case, and the United Dyewood case said specifically, the  
14 total taxable income upon which such taxes were paid, that  
15 was the language in the '18 Act, means the sum used by the  
16 foreign government as a base to compute the foreign tax.

17 Now, the government has pointed out that it is a  
18 dictum, but on the other hand, this was a case in which  
19 they had to apply the formula. It was a complicated  
20 matter because there were two tax bases, there being an  
21 excess profits tax as well as an ordinary income tax. So  
22 they spelled out the formula. The government had tried to  
23 add one-half to one-third and get two-fifths, which  
24 obviously wasn't very good arithmetic, and the court  
25 straightened it out and figured that the way to do it was

1 to figure out the excess profits tax credit first and then  
2 the income tax one. But in both cases they clearly were  
3 talking about the foreign tax base.

4 Now, this Court decided the American Chicle case.  
5 By that time the statute had been amended, it no longer  
6 said taxable income, it now said accumulated profits. But  
7 this Court said that the accumulated profits were the  
8 total taxable profits. Taxable by whom? Obviously,  
9 taxable by the only tax authority that affected the  
10 foreign subsidiary. It certainly did not mean profits  
11 that would have been taxable in the United States if it  
12 had been taxable in the United States, which it wasn't.

13 QUESTION: Mr. Coughlin, I am sorry, but can I  
14 interrupt you with a question?

15 MR. COUGHLIN: Certainly.

16 QUESTION: Earlier you say -- you quoted the  
17 language in 90(c)(1), a gains, profits or income computed,  
18 and then I got the impression you were saying those same  
19 words were repeated with -- were used when you described  
20 the amount on which the foreign -- the foreign tax base.  
21 Is that, did I understand you correctly?

22 MR. COUGHLIN: Yes. It says --

23 QUESTION: And where is the other section where the  
24 same words are used? Because that is not quite the same  
25 language.

1 MR. COUGHLIN: It's in the same, it says it -- it  
2 says gains, profits or income, and then it says profits or  
3 income.

4 QUESTION: You're reading -- the profits or income  
5 is in 901, 901(b), isn't it?

6 MR. COUGHLIN: I was reading from 901, wait till I  
7 get the exact wording.

8 QUESTION: The language there is income or profits  
9 and excess profits taxes. Is that what you were to --  
10 your parallel here?

11 MR. COUGHLIN: It says -- yes.

12 QUESTION: Okay --

13 MR. COUGHLIN: The accumulated profits means the  
14 gains, profits or income --

15 QUESTION: And then you said --

16 MR. COUGHLIN: -- computed without reduction --

17 QUESTION: Right.

18 MR. COUGHLIN: -- by the amount of the dit dit dit  
19 taxes imposed on or with respect to such profits or  
20 income. Now, it didn't repeat the word gains, but I think  
21 the word such is probably enough to pick up the earlier  
22 language.

23 QUESTION: Oh, I see, that is the comparison. All  
24 right, thank you. I understand what you are --

25 MR. COUGHLIN: Now, when I said it had done it

1 twice, it is because I think in the first section, when it  
2 referred to the accumulated profits in excess of the taxes  
3 imposed on such accumulated profits, that also implies  
4 that you must be talking about foreign income, because you  
5 aren't imposing a foreign tax on anything else.

6 Now, the tax court has also reached a result that  
7 is consistent with these others in the Champion --

8 QUESTION: Excuse me, may I disagree with that? I  
9 mean, it seems to me, not, not a bad use of language to  
10 speak of imposing foreign taxes on the same sum of money  
11 that would have been income under United States tax law.  
12 Why is that a distorted use of language? I mean, I --

13 MR. COUGHLIN: Because the foreign government does  
14 not impose its tax on an amount computed under U.S. terms.  
15 It imposes its tax on the foreign tax base.

16 QUESTION: That may well be, but it does impose it  
17 upon a certain sum of money.

18 MR. COUGHLIN: Yes.

19 QUESTION: And what the statute might be saying is,  
20 that portion of that sum of money which is income which is  
21 taxable under U.S. law on which that tax was imposed. I  
22 don't know why that would be -- I think the language would  
23 bear it, Mr. Coughlin. I --

24 MR. COUGHLIN: I think the language doesn't really  
25 carry it. I think the Second Circuit, two Judges, Hand

1 and Judge Swan, were correct in treating it as being the  
2 foreign tax base. The tax court has ruled that you must  
3 take into account the foreign net operating loss  
4 carryback. And both courts below in the present case,  
5 even though one court decided its case the other way, both  
6 courts said that gains, profits or income as used in  
7 Section 902 means the foreign tax base.

8 QUESTION: Thank you, Mr. Coughlin.

9 Mr. Horowitz, do you have any rebuttal? You have  
10 two minutes remaining.

11 REBUTTAL ARGUMENT OF ALAN I. HOROWITZ

12 ON BEHALF OF THE PETITIONER

13 MR. HOROWITZ: Yes, Mr. Chief Justice. Just a  
14 couple of points.

15 Respondent at least suggested in its argument that  
16 there might be a question whether under the government's  
17 interpretation Goodyear would ever get credit for all the  
18 foreign taxes that it paid. There is no question that it  
19 would, as soon as it gets around to distributing all the  
20 income that it has kept in the foreign sub it will get  
21 credit for all the taxes that it paid. The question here  
22 is whether it can accelerate those credits without  
23 distributing the money that is available for distribution  
24 as dividends.

25 He also suggested that, going away from the facts

1 of this case to hypothetical situations, that the  
2 government's approach can lead to the denial of credit for  
3 all the taxes paid. That is true, as we discussed earlier  
4 in the limited case of the zero year, but I would like to  
5 emphasize that under Goodyear's interpretation it is  
6 similarly true that the --that the company can lose credit  
7 for all of the taxes that are paid, and that will happen  
8 every time the foreign income definition is higher than  
9 the U.S. government definition. And that is explained in  
10 the examples of page 22 of our brief, and pages 15 to 16  
11 of the reply brief. Now, Goodyear is not worried about  
12 that because in their case the foreign income is lower and  
13 therefore it rebounds to their benefit.

14 Another point I would like to make is that there is  
15 obviously, nothing wrong with the fact that the tax here  
16 was adjusted because of the change in the British taxing.  
17 Obviously they don't want to get -- they said at the  
18 outset that they don't expect to get credit for taxes that  
19 were already refunded by Great Britain. The tax is not  
20 part of the numerator of the fraction. The tax is a  
21 constant against which the fraction is multiplied, and  
22 there is no reason for there to be any correlation between  
23 the denominator and the foreign taxes.

24 And finally, my last point, I would just like to  
25 second what Justice Scalia said about the language of the

1 statute. From the perspective of the U.S. tax code and  
2 the U.S. corporation, all that this language means is that  
3 the, you look to the income for the year, for the foreign  
4 -- the income on which the foreign tax is imposed is the  
5 income for that year on which the foreign tax is paid. If  
6 you look at a branch that has, say, \$1,000 in income under  
7 U.S. law, it views the British tax imposed for that year  
8 as being imposed on that \$1,000, and it is not concerned  
9 with how the British would compute the income. And the  
10 same should be true here.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Horowitz.  
12 The case is submitted.

13 (Whereupon, at 2:54 p.m., the case in the above-  
14 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-1474 - UNITED STATES, Petitioner V. GOODYEAR TIRE AND RUBBER COMPANY AND

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AFFILIATES

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

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