Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

UPSI MANAGEMENT, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 670
(CTA Case No. 7762)

For: Refund

Present:
ACOSTA, P.J.,
CASTAÑEDA, JR.
BAUTISTA
UY
CASANOVA
PALANCA-ENRIQUEZ
FABON-VICTORINO
MINDARO-GRULLA
COTANGCO-MANALASTAS, JJ.

Promulgated:
OCT 19 2011 Apolinario 9:05 a.m.

x---x

DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *en banc* under Section 18 of Republic Act 1125[1], as amended and Rule 4, Section 2(a)(1), in relation to Rule 8, Section 4(b) of the Revised Rules of the Court of Tax Appeals (RRCTA)[2], as amended, assailing the Decision[3]

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[1] An Act Creating the Court of Tax Appeals
[2] Sec. 2. *Cases within the jurisdiction of the Court en banc*. The Court en banc shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Division in the exercise of its exclusive appellate jurisdiction over:

promulgated on April 15, 2010 and the Resolution[4] promulgated on August 10, 2010 of this Court's First Division.[5]

Petitioner seeks a reversal of both the aforesaid Decision and Resolution, the dispositive portions of which, respectively, read as follows:

<u>Decision dated April 15, 2010:</u>

> *"**WHEREFORE**, petitioner's claim for refund is hereby DENIED for insufficiency of evidence.*
>
> ***SO ORDERED."***

<u>Resolution dated August 10, 2010:</u>

> *"**WHEREFORE**, petitioner's Motion for Partial Reconsideration is hereby **DENIED** for lack of merit.*
>
> ***SO ORDERED**."*

The pertinent facts as narrated by this Court's Division read as follows:

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(1) Cases arising from administrative agencies- Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture;

xxx xxx xxx

Sec. 4. *Where to appeal; mode of appeal.*-

(a) xxx.

(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court en banc shall act on the appeal.

(c) xxx.

[3] En banc docket, pp. 59-82.

[4] Ibid. pp. 122-129.

[5] Composed of Presiding Justice Ernesto D. Acosta, Associate Justice Erlinda P.Uy and Associate Justice Esperanza r. Fabon Victorino.

"On April 17, 2006, petitioner filed its annual income tax return for the year ended December 31, 2005 with the Revenue District No. 34 of the Revenue Region No. 6 of the Bureau of Internal Revenue (BIR), declaring among others, the following:

Sales/Revenues/Receipts/Fees	*P18,741,488.00*
Less: Cost of Sales/Services	*14,325,299.00*
Gross Income from Operation	*4,416,189.00*
Add: Non-Operating & Other Income	*466.00*
Total Gross Income	*4,416,655.00*
Less: Deductions	*4,524,900.00*
Taxable Income	*(108,245.00)*
Minimum Corporate Income Tax	*88,333.00*
Income Tax Due	*88,333.00*
Less: Tax Credits/Payments	
Prior Year's Excess Credits	*4,570,705.00*
Creditable Tax Withheld for the First Three Quarters	*1,664,028.00*
Creditable Tax Withheld for the Fourth Quarter	*248,167.00*
Total Tax Credits/Payments	*6,482,899.00*
Tax Overpayment	*(6,394,566.00)*

Moreover, petitioner indicated in the corresponding box of the said return its intention to be issued a tax credit certificate (TCC) by marking the appropriate box thereon.

On 7 March 2008, within the period prescribed by law, petitioner filed a claim for the issuance of a tax credit certificate in the total amount P1,912,195.00 representing unutilized creditable income taxes for the taxable year 2005 pursuant to Section 204 (C) and 229 of the National Internal Revenue Code (NIRC).

While its claims for refund is still pending administrative investigation, petitioner filed on April 14, 2008 the instant Petition for Review pursuant to Section 229 of the National Internal Revenue Code.

In his Answer filed on May 27, 2008, respondent prayed that the petition be dismissed with cost.xxx.

xxx xxx xxx.

After trial, this case was submitted for decision on January 20, 2010 taking into consideration respondent's memorandum filed on November 23, 2009 and petitioner's memorandum filed on December 17, 2009."

On April 15, 2010, the assailed Decision was promulgated denying petitioner's claim for refund for insufficiency of evidence on the ground of failure to present as evidence its quarterly income tax return for the 2006 taxable year. The pertinent portion of which states:

> *"xxx, [P]etitioner still has failed to prove that it did not carry over its claimed excess or unutilized creditable withholding taxes to the succeeding quarters of taxable year 2006. Records of the case disclosed that petitioner failed to present as evidence its 2006 quarterly income tax returns. Although, petitioner presented its Annual Income Tax Return wherein it shows that it did not carry over as tax credit its claimed unutilized creditable withholding taxes of P1,912,195.00 to the succeeding taxable year 2006, however, this evidence is not enough to conclude that petitioner did not apply the said excess or unutilized creditable withholding taxes against the income tax due for the first three quarters of 2006. Petitioner should have presented its quarterly 2006 quarterly income tax returns. The said quarterly income returns could help the Court determine whether petitioner effectively opted to carry over the 2005 excess or unutilized creditable withholding taxes to the subsequent taxable year. If petitioner applied the said excess or unutilized creditable withholding taxes against the income tax due for the first three quarters of taxable year 2006, it therefore effectively exercised the option to carry over the 2005 excess or unutilized creditable withholding taxes the succeeding year 2006; thus, its claim for refund should be denied xxx."*

Petitioner filed a Motion for Partial Reconsideration. This time petitioner attached its 2006 quarterly income tax returns. It is evident in petitioner's 1st ,2nd and 3rd quarterly income tax returns for the taxable year 2006 that the 2005 excess credit was included in the prior excess tax credit. However, petitioner asserts that it was merely through inadvertence and that its claim to be issued a tax credit certificate has been clear and consistent. Moreover, petitioner maintains that the

2005 excess credit was not actually carried over as there were sufficient excess creditable withholding taxes prior to the taxable year 2005 to cover its 2006 1st , 2nd and 3rd quarterly taxes.

On August 10, 2010, the assailed Resolution was promulgated denying petitioner's Motion for Partial Reconsideration for lack of merit. The pertinent portion of which states:

> *"Upon examination of the foregoing additional documents, the Court determined that petitioner had actually carried over and applied its claimed creditable withholding taxes of P1,912,195.00 as part of its " Prior Year's Excess Credit" of P6,394,566.00, to the first , second and third quarters of 2006. Petitioner's explanation that the carry over of its claimed excess creditable withholding taxes in all its quarterly income tax returns as mere inadvertence, does not sway this Court."*

Hence, petitioner filed the instant Petition for Review.

In assailing the Decision and Resolution of this Court's Division, petitioner raised this sole ground:

> **"THE FIRST DIVISION OF THE COURT OF TAX APPEALS DID NOT DECIDE IN ACCORDANCE WITH LAW, APPLICABLE JURISPRUDENCE, AND FACTUAL CIRCUMSTANCES SURROUNDING THE CASE, WHEN IT RULED THAT PETITIONER IS NOT ENTITLED TO THE REFUND OR ISSUANCE OF A TCC IN THE AMOUNT OF P1,912,195.00 REPRESENTING EXCESS CREDITABLE WITHHOLDING TAXES ARISING FROM TAXABLE YEAR 2005 BECAUSE PETITIONER ALLEGEDLY CARRIED OVER THE SAME TO THE SUCEEDING TAXABLE QUARTERS OF 2006."**

Petitioner argues that the issue whether it carried its 2005 excess tax credits to the succeeding taxable year (2006) was never put in issue and assert that both parties even stipulated and admitted that petitioner did not utilize the same. Thus, petitioner wonders why the issue of whether it carried its 2005 excess tax credits to the succeeding taxable year (2006) cropped up.

Petitioner maintains that it clearly indicated on its 2005 income tax return its option to claim for refund through the issuance of a tax credit certificate and the exercise of that option negates any initiation of application of the excess withholding tax credits to the succeeding quarters of 2006. Moreover, petitioner asserts that its 2005 excess tax credits were never utilized in the 2006 taxable year. Petitioner claimed that the inadvertent inclusion of the 2005 excess or unutilized creditable withholding tax in the 2006 quarterly income tax return as "prior years tax credit" did not in any way benefit petitioner or that the same did not automatically mean that petitioner effectively exercised the option to carry over.

In sum, petitioner alleges that the First Division of this Court acted with grave abuse of discretion when it disregarded the stipulated and admitted fact that petitioner did not utilize nor apply the 2005 excess tax credits to any tax liabilities for the taxable year 2006. Petitioner reiterates that the issue of "whether petitioner carried over its 2005 excess creditable withholding taxes to the succeeding year" was never brought up because both parties had already stipulated and admitted that petitioner has unequivocally indicated its intention to be issued a tax credit certificate and that it did not utilize its 2005 excess tax credit. Thus, there is the imputation that the Court a quo did not decide in accordance with law, applicable jurisprudence and factual circumstances of the case.

However, the respondent CIR maintains that the First Division of this Court was correct in declaring that petitioner has effectively exercised the option to carry over its 2005 excess and unutilized creditable withholding taxes to the succeeding year (2006).

We resolve in favor of respondent.

Petitioner finds fault with the First Division of this Court in resolving the issue of "whether petitioner carried over its 2005 excess creditable withholding taxes to the succeeding taxable year" despite the fact that it was not specifically stated in the issues to be resolved, and considering that the stipulation and admission that petitioner exercised its option to refund through the issuance of a tax credit certificate and that it did not utilize its 2005 excess tax credit in the succeeding year, are among those contained in the Joint Stipulation of Facts and Issues.

Suffice it to say that this Court is a court of competent jurisdiction which is vested with the authority to resolve even unassigned issues. It can do so when such a step is indispensable or necessary to a just resolution of issues raised in a particular pleading or when the unassigned issues are inextricably linked or germane to those that have been pleaded.[6]

In the instant case, the fact of whether petitioner carried over its 2005 excess creditable withholding taxes to the taxable quarters of the succeeding taxable year is not only necessary but indispensable in arriving at a just decision of the case. The Division of this Court aptly explained as follows:

> *"The crux of the aforequoted joint stipulated issues is the determination of whether or not petitioner is entitled for refund of its alleged excess or unutilized creditable withholding tax in the amount of P1,912,195.00 for the taxable year 2005.*
>
> *The following are the basic requirements before a refund or issuance of tax credit certificate of excess creditable withholding taxes may be granted, viz:*
>
> 1. *The claim for refund must be filed within the two-year prescriptive period provided under Section 204(C) in relation to Section 229 of the NIRC of 1997, as amended;*
> 2. *The fact of withholding is established by a copy of a statement issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom; and*
> 3. *The income upon which the taxes were withheld were included in the return of the recipient.*
>
> *Equally important, aside from the above-quoted requirements, is that petitioner must prove that it did not carry-over its excess creditable withholding taxes to the succeeding taxable year. This additional requirement is an offshoot of the "irrevocable rule" introduced in the last sentence of Section 76 of the National Internal Revenue Code (NIRC). The said provisions of the NIRC provide:*

[6] Crisanto Rafaelito G. Gualberto V vs. Court of Appeals; Hon. Helen B. Ricafort, Presiding Judge, Regional Trial Court Parañaque City, Branch 260; and Joycelyn D. Pablo-Gualberto, [G.R. No. 156254. June 28, 2005]

> *SEC. 76. Final Adjustment Return. — Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable income of that year, the corporation shall either:*
>
> *(A) Pay the balance of tax still due; or*
> *(B) Carry-over the excess credit; or*
> *(C) Be credited or refunded with the excess amount paid, as the case may be.*
>
> *In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years.* ***Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor.***" *(Emphasis supplied)*

In the case of Systra Philippines, Inc. vs. Commissioner of Internal Revenue, the Supreme Court held that the legislative intent to make the option irrevocable becomes clearer when Section 76 is viewed in comparison to Section 69 of the (old) 1977 Tax Code. Accordingly, under Section 69 of the 1977 Tax Code, there was no irrevocability rule. Instead of claiming a refund, the excess tax credits could be "credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable year," that is, the immediately following year only. In contrast, Section 76 of the present Tax Code formulates an irrevocability rule which stresses and fortifies the nature of the remedies or options as alternative, not cumulative. It also provides that the excess tax credits "may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years" until fully utilized."

It is an established jurisprudence under the "Irrevocable Rule" that if the taxpayer opted to carry-over and apply the excess against the estimated quarterly income tax due for the taxable quarters of the succeeding taxable years, the same is irrevocable and no cash refund or tax credit thereto shall be allowed. Obviously, before a refund for creditable withholding tax is granted, it is essential to prove that the excess creditable withholding tax should have not been carried over to the succeeding taxable quarters considering that the option to carry-over or apply as tax credit in the succeeding taxable quarters cannot be modified in its final adjustment return.

The rule prevents a taxpayer from claiming twice the excess quarterly taxes paid:

> (1) as automatic credit against taxes for the taxable quarters of the succeeding years for which no tax credit certificate has been issued; and
>
> (2) as a tax credit either for which a tax credit certificate will be issued or which will be claimed for cash refund.[7]

Thus, even if the claim for refund was within the 2-year prescriptive period, the fact of withholding of creditable taxes by the withholding agents was proven and the income upon which the withholding taxes were withheld were included as part of the gross

[7] Systra Philippines, Inc. vs. Commissioner of Internal Revenue, G.R. No. 176290, September 21, 2007

income and were reflected in the preceding income tax return. Nonetheless, the taxpayer should prove that the excess creditable withholding tax has not been carried over to the taxable quarters of the succeeding taxable years.

It is a matter of evidence and axiomatic that a claimant has the burden of proof to establish the factual basis of his or her claim for tax credit or refund. Tax refunds, like tax exemptions, are construed strictly against the taxpayer.[8] Moreover, entitlement to a tax refund is for the taxpayer to prove and not for the government to disprove.[9] Thus, the Division of this Court was correct in holding that petitioner must prove that it did not carry-over its excess creditable withholding taxes to the succeeding taxable year or to be more specific to the taxable quarters of the succeeding taxable year. Apparently, the best evidence to prove that the excess creditable withholding tax was not carried over to the succeeding taxable quarters is the presentation of the succeeding quarterly income tax return and the annual income tax return of the subsequent taxable year in order for this Court to verify and conclude that the claimed amount was not utilized or carried over to the said quarters.

[8] *Commissioner of Internal Revenue vs. Bank of the Philippine Islands, G.R. No. 178490, July 7, 2009.*

[9] Commissioner of Internal Revenue vs. Far East Bank & Trust Company, etc., *G.R. No. 173854, March 15, 2010.*

Having discussed the indispensability to prove that petitioner did not carry over its 2005 excess creditable withholding taxes to the taxable quarters of the succeeding taxable year, the stipulation and admission that petitioner exercised its option to refund and that it did not utilize its 2005 excess tax credit in the succeeding year do not render the same moot. The "carry over" and "utilization" of its 2005 excess creditable withholding taxes to the succeeding taxable year is a different set of things.

A taxpayer may have opted to carry over its excess creditable withholding taxes to the succeeding taxable year but not utilize the same. Even though the excess tax credit was not utilized, the taxpayer is not entitled to a refund. The irrevocability rule applies. The question of whether or not the taxpayer actually utilizes said tax credit is irrelevant.[10]

Section 76 of the NIRC of 1997 is explicit in stating that once the option to carry over has been made, "no application for tax refund or issuance of a tax credit certificate shall be allowed therefor."[11] The last sentence of Section 76 of the NIRC of 1997 reads: "Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has

[10] Commissioner of Internal Revenue vs. PL Management International Philippines, Inc., GR. No. 160949, April 4, 2011, citing Commissioner of Internal Revenue vs. Bank of the Philippine Islands, G.R. No. 178490, July 7, 2009.
[11] Ibid.

been made, such option shall be considered irrevocable for that taxable period and no application for tax refund or issuance of a tax credit certificate shall be allowed therefor." The evident intent of the legislature, in adding the last sentence to Section 76 of the NIRC of 1997, is to keep the taxpayer from flip-flopping on its options, and avoid confusion and complication as regards said taxpayer's excess tax credit.[12] Thus, in the case of Commissioner of Internal Revenue vs. Bank of the Philippine Islands[13], the Supreme Court held that:

> "xxx. *When circumstances show that a choice has been made by the taxpayer to carry over the excess income tax as credit, it should be respected; but when indubitable circumstances clearly show that another choice — a tax refund — is in order, it should be granted. "Technicalities and legalisms, however exalted, should not be misused by the government to keep money not belonging to it and thereby enrich itself at the expense of its law-abiding citizens."*
>
> *Therefore, as to which option the taxpayer chose is generally a matter of evidence. It is axiomatic that a claimant has the burden of proof to establish the factual basis of his or her claim for tax credit or refund. Tax refunds, like tax exemptions, are construed strictly against the taxpayer."*

Incidentally, a taxpayer may have indicated the intention to refund the excess creditable withholding taxes but nevertheless may have ACTUALLY CARRIED IT OVER TO THE TAXABLE QUARTERS OF THE SUCCEEDING TAXABLE YEAR which may or may not be utilized. However, taxpayer cannot get a tax refund or a tax credit and carry

[12] Ibid.
[13] G.R. No. 178490, July 7, 2009.

over at the same time for the same excess income taxes paid. Apparently, a taxpayer who has indicated the intention to refund the excess creditable withholding taxes but nevertheless carried them over and utilized the same in the TAXABLE QUARTERS OF THE SUCCEEDING TAXABLE YEAR is not entitled to refund. In the same vein, a taxpayer who has indicated the intention to refund the excess creditable withholding taxes but nevertheless carry them over but was not able to utilize the same in the TAXABLE QUARTERS OF THE SUCCEEDING TAXABLE YEAR is likewise not entitled to refund. Indeed, a taxpayer may amend its quarterly income tax return or annual Income tax return which in either case may modify the previous intention to carry-over, apply as tax credit certificate or refund, as the case may be. But the exercise of the option to carry-over in the succeeding taxable quarters under the irrevocable rule cannot be modified in its final adjustment return.[14]

In the instant case, petitioner signified its intention to refund the 2005 excess creditable withholding tax through the issuance of a tax credit certificate in its 2005 final tax return. However, the same 2005 excess creditable withholding tax which petitioner seeks to refund was actually carried over and included as " prior years excess credits" in the 1st , 2nd and 3rd quarterly income tax returns for the taxable year

[14]Millennium Business Services, Inc. vs. CIR, CTA EB Case No. 510 promulgated on September 28, 2010

2006. The fact that petitioner was not able to actually utilize said tax credit is irrelevant. The fact remains that petitioner actually carried over the 2005 excess creditable withholding tax in the first three taxable quarters of the succeeding taxable year and it negated its previous intention to claim for a refund. Having exercised the option to carry-over with respect to its claimed 2005 excess tax credits as evidenced by the quarterly income tax return, petitioner is bound by the irrevocability rule under Section 76 of the NIRC of 1997, as amended. This is the significance of the presentation of the succeeding quarterly income tax return and the annual income tax return of the subsequent taxable year.

Petitioner's excuse that the carry-over and inclusion of the 2005 excess creditable withholding tax as "prior years excess credits" was through inadvertence and that this did not in any way benefit petitioner, is not tenable. While petitioner did not amend its 2005 annual income tax return signifying therein its intention to claim a refund through a tax credit certificate, the subsequent filing of the quarterly income tax return for the 1st , 2nd and 3rd quarters carrying the 2005 excess creditable withholding tax as "prior years excess credits" belies their claim. The Supreme Court had instructively explained the effect of inclusion of excess tax credit in the "prior years excess credits" as follows:

> *"First, the fact that it filled out the portion "Prior Year's Excess Credits" in its 1999 FAR means that it categorically availed itself of the carry-over option. In fact, the line that precedes that phrase in the BIR form clearly states "Less: Tax Credits/Payments." The contention that it merely filled out that portion because it was a requirement – and that to have done otherwise would have been tantamount to falsifying the FAR – is a long shot.*
>
> *The FAR is the most reliable firsthand evidence of corporate acts pertaining to income taxes. In it are found the itemization and summary of additions to and deductions from income taxes due. These entries are not without rhyme or reason. They are required, because they facilitate the tax administration process."*

Similarly, the quarterly income tax return is required to facilitate tax administration process and the entries therein are not without rhyme or reason. While petitioner excluded the 2005 excess creditable withholding tax as "prior year's excess credits" in its final adjustment return or 2006 annual income tax return, it appears that it is a mere afterthought considering that the 2005 excess creditable withholding tax was not utilized nor applied. Nonetheless, the fact remains that petitioner did carry over said excess tax credit in the quarterly tax return for the 1st, 2nd and 3rd quarters of the taxable year 2006. The inclusion of the 2005 excess creditable withholding tax as "prior year's excess credits" means that it effectively carried over and availed of the carry-over option which is irrevocable regardless of its previous intention in order to avoid confusion and flip-flopping of options. Section 76 is clear and unequivocal. Once the carry-over option is taken, actually or constructively, it becomes irrevocable.[15] Nevertheless, petitioner's 2005 excess creditable withholding tax will not be forfeited in the government's favor, because it may be claimed by petitioner as tax credits in the succeeding taxable years until it has been fully applied to petitioner's tax liabilities.[16]

WHEREFORE premises considered, the petition for review is hereby **DENIED**. The Decision of the First Division of this Court in CTA Case No.7762, promulgated on April 15, 2010 and its Resolution, promulgated on August 10, 2010, are hereby **AFFIRMED**. No pronouncement as to costs.

SO ORDERED.

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

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

Juanito C. Castañeda Jr.
(with Separate Concurring and Dissenting Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

[15] Philam Asset Management, Inc. v. Commissioner of Internal Revenue; G.R. Nos. 156637 and 162004, 14 December 2005, 477 SCRA 761, 780.
[16] Ibid.

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(On Leave)
OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

UPSI MANAGEMENT, INC.,
Petitioner,

CTA EB No. 670
(CTA Case No. 7762)

Present:
Acosta, *P.J.,*
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez,
Fabon-Victorino,
Mindaro-Grulla, and
Cotangco-Manalastas, *JJ.*

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PROMULGATED:

OCT 19 2011 Apolinario 9:05 a.m.

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SEPARATE CONCURRING AND DISSENTING OPINION

CASTAÑEDA, JR., *J.*:

I vote to AFFIRM the assailed Decision[1] dated April 15, 2010 and the Resolution[2] dated August 10, 2010 promulgated by the CTA First Division which DENIED the petition seeking the refund or issuance of a tax credit certificate in

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[1] *Rollo*, pp. 59-82. Penned by Presiding Justice Ernesto D. Acosta, with Associate Justice Erlinda P. Uy and Associate Justice Esperanza R. Fabon-Victorino, concurring.
[2] *Rollo*, pp. 122-129.

the amount of P 1,912,195.00 allegedly representing petitioner's excess/unutilized creditable withholding tax (CWT) for the taxable year 2005.

I concur in the result on the basis that once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable. As shown in petitioner's subsequent quarterly returns, the first, second and third quarters of 2006, petitioner reflected the amount of P 6,394,566 as prior year's excess credits. This action signified its intention to carry-over its 2005 excess CWT to the next succeeding taxable year. In the recent case of *Commissioner of Internal Revenue vs. McGeorge Food Industries, Inc.,*[3] the Supreme Court held that the exercise of an option to carry-over is irrevocable. So that once the taxpayer has chosen to carry over the excess CWT to the succeeding taxable years, it can no longer file a claim for refund. In this case, petitioner can no longer file a claim for refund because it effectively carried-over its 2005 excess CWT to the succeeding taxable quarters.

Nonetheless, I maintain my position that the submission of the subsequent income tax returns (ITR) for the succeeding taxable year is not required to prove refund of excess CWT as illustrated in several Supreme Court decisions. In the case of *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue,*[4] the Supreme Court exhaustively discussed the reasons why gz

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[3] G.R. No. 174157, October 20, 2010, 634 SCRA 193.
[4] G.R. Nos. 156637/162004, December 14, 2005, 477 SCRA 761.

the ITR or the Final Adjustment Return (FAR) of the succeeding year is no longer necessary when a taxpayer requests for a tax refund. It categorically ruled that the said requirement has no basis in law and jurisprudence. The Supreme Court held:

> **Requiring that the ITR or the FAR of the *succeeding* year be presented to the BIR in requesting a *tax refund* has no basis in law and jurisprudence.**
>
> *First,* Section 76 of the Tax Code does not mandate it. The law merely requires the filing of the FAR for the *preceding* -- not the succeeding -- taxable year. Indeed, any refundable amount indicated in the FAR of the preceding taxable year may be credited against the estimated income tax liabilities for the taxable quarters of the succeeding taxable year. However, nowhere is there even a tinge of a hint in any of the provisions of the Tax Code that the FAR of the taxable year following the period to which the *tax credits* are originally being applied should also be presented to the BIR.
>
> *Second,* Section 5 of RR 12-94, amending Section 10(a) of RR 6-85, merely provides that claims for the refund of income taxes deducted and withheld from income payments shall be given due course only (1) when it is shown on the ITR that the income payment received is being declared part of the taxpayer's gross income; and (2) when the fact of withholding is established by a copy of the withholding tax statement, duly issued by the payor to the payee, showing the amount paid and the income tax withheld from that amount.
>
> xxx xxx xxx
>
> The established procedure is that a taxpayer that wants a cash refund shall make a written request for it, and the ITR showing the excess expanded withholding tax credits shall then be examined by the BIR. For the grant of refund, RRs 12-94 and 6-85 state that all pertinent accounting records should be submitted by the taxpayer. These records, however, actually refer only to (1) the withholding tax statements; (2) the ITR of the present

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quarter to which the excess withholding tax credits are being applied; and (3) the ITR of the quarter for the previous taxable year in which the excess credits arose. To stress, these regulations implementing the law do not require the proffer of the FAR for the taxable year following the period to which the *tax credits* are being applied.

Third, there is no automatic grant of a *tax refund*. As a matter of procedure, the BIR should be given the opportunity "to investigate and confirm the veracity" of a taxpayer's claim, before it grants the refund. Exercising the option for a tax refund or a tax credit does not *ipso facto* confer upon a taxpayer the right to an immediate availment of the choice made. Neither does it impose a duty on the government to allow tax collection to be at the sole control of a taxpayer.

Fourth, the BIR ought to have on file its own copies of petitioner's FAR for the succeeding year, on the basis of which it could rebut the assertion that there was a subsequent credit of the excess income tax payments for the previous year. Its failure to present this vital document to support its contention against the grant of a *tax refund* to petitioner is certainly fatal.

Fifth, the CTA should have taken judicial notice of the fact of filing and the pendency of petitioner's subsequent claim for a refund of excess creditable taxes withheld for 1998. The existence of the claim ought to be known by reason of its judicial functions. Furthermore, it is decisive to and will easily resolve the material issue in this case. If only judicial notice were taken earlier, the fact that there was no carry-over of the excess creditable taxes withheld for 1997 would have already been crystal clear.

Sixth, the Tax Code allows the refund of taxes to a taxpayer that claims it in writing within two years after payment of the taxes erroneously received by the BIR. Despite the failure of petitioner to make the appropriate marking in the BIR form, the filing of its written claim effectively serves as an expression of its choice to request a *tax refund*, instead of a *tax credit*. To assert that any future claim for a tax refund will be instantly hindered by a failure to signify one's intention in the FAR is to render nugatory the clear provision that allows for a two-year prescriptive period.

> In fact, in *BPI-Family Savings Bank v. CA*, this Court even ordered the refund of a taxpayer's excess creditable taxes, despite the express declaration in the FAR to apply the excess to the succeeding year. **When circumstances show that a choice of tax credit has been made, it should be respected. But when indubitable circumstances clearly show that another choice -- a tax refund -- is in order, it should be granted.** "Technicalities and legalisms, however exalted, should not be misused by the government to keep money not belonging to it and thereby enrich itself at the expense of its law-abiding citizens."
>
> In the present case, although petitioner did not mark the refund box in its 1997 FAR, neither did it perform any act indicating that it chose a tax credit. On the contrary, it filed on September 11, 1998, an administrative claim for the refund of its excess taxes withheld in 1997. In none of its quarterly returns for 1998 did it apply the excess creditable taxes. Under these circumstances, petitioner is entitled to a *tax refund* of its 1997 excess tax credits in the amount of ₱522,092. (emphasis ours)

Citing the *Philam Asset Management* case, the Supreme Court made a similar ruling in the case of *State Land Investment Corporation vs. Commissioner of Internal Revenue* [5] attesting as unnecessary the presentation of the final adjustment return for the subsequent year as follows:

> As previously mentioned, after paying P4,187,523.00 as income tax due in 1998, there remained an unutilized tax credit of P9,742,270.51. **It was not necessary on the part of petitioner to file with the BIR its income tax return for 1999. In Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, we held that the Tax Code merely requires the filing of the final adjustment return for the preceding — not the succeeding — taxable year.** Indeed, any refundable amount indicated therein corresponding to the preceding taxable year may be credited against the estimated income tax liabilities for the taxable quarters of the succeeding taxable year. Requiring that the income tax return or the final adjustment return of the succeeding year be presented

[5] G.R. No. 171956, January 18, 2008, 542 SCRA 114.

to the BIR in requesting a tax refund has no basis in law and jurisprudence.

For as long as the claimant complied with the tax refund requisites, it is pointless to further require it to present the income tax return of the succeeding taxable year. The presentation of subsequent ITRs is a mere superfluity as declared by the Supreme Court in the case of *Commissioner of Internal Revenue vs. PERF Realty Corporation*,[6] viz.:

> xxx xxx xxx
>
> **Further, We sustain the CA that there is no need to rule on the issue of the admissibility of the 1998 ITR since the CTA ruled that PERF already complied with the requisites of applying for a tax refund. The verification process is not incumbent on PERF; it is the duty of the CIR to verify whether or not PERF had carried over the 1997 excess income taxes**. (Emphasis ours)

It is also worth mentioning that in cases of refund involving the 1997 taxable year as what happened in the above-mentioned cases, the Supreme Court ruled that Section 76 of the 1997 NIRC controls, the law in effect at the time the taxpayer made known to the BIR its preference to carry over and apply its overpayment in 1997 to its tax liability in 1998. This was clarified in the case of *Commissioner of Internal Revenue vs. McGeorge Food Industries, Inc.*[7], thus, even if the transactions occurred before 1 January 1998, the date of effectivity of 1997 NIRC, Section 76 of the said code was held to be the ga

[6] G.R. No. 163345, July 4, 2008, 557 SCRA 165.
[7] *Supra,* note 3.

applicable provision following the general rule on the prospective application of laws.[8] The Supreme Court held:

> xxx Administratively speaking, Section 76 serves the same purpose as its companion provisions in Title II, Chapter XII of the 1997 NIRC, namely, Section 74 on the declaration of income tax by individuals, Section 75 on the declaration of quarterly corporate income tax, and Section 77 on the place and time of filing and payment of quarterly corporate income tax – they are all tools designed to promote rational and efficient functioning of the tax system. These provisions should be distinguished from the provisions in Title II, Chapter IV (Tax on Corporations) and Chapter VII (Allowable Deductions), among others, relating to the question on the intrinsic taxability of corporate *transactions*.
>
> **Thus treated, Section 76 and its companion provisions in Title II, Chapter XII should be applied following the general rule on the prospective application of laws such that they operate to govern the conduct of corporate taxpayers the moment the 1997 NIRC took effect on 1 January 1998.** There is no quarrel that at the time respondent filed its final adjustment return for 1997 on 15 April 1998, the deadline under Section 77 (B) of the 1997 NIRC (formerly Section 70(b) of the 1977 NIRC), the **1997 NIRC was already in force, having gone into effect a few months earlier on 1 January 1998. Accordingly, Section 76 is controlling.** (emphasis ours)

Also, in the recent case of *Commissioner of Internal Revenue vs. PL Management International Philippines, Inc.*,[9] the Supreme Court applied Section 76 of the 1997 NIRC in the claim for refund of the excess CWT of taxable year 1997.

Considering that in the cases of *Philam-Asset*, *State Land* and *PERF Realty*, the High Court did not require the submission of final adjustment return of the succeeding taxable year to prove the claimant's entitlement to excess or

[8] *Supra*, note 3.
[9] G.R. No. 160949, April 4, 2011.

unutilized creditable withholding tax; logically, there is no sufficient basis to require the claimant to submit quarterly income tax returns for the subsequent taxable period.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice