REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

UNITED COCONUT PLANTERS BANK
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE No. 725
(CTA Case No. 7614)

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

Promulgated:

AUG 2 3 2012 3:10pm

X- X

DECISION

CASANOVA, J. :

This is an appeal to the Court of Tax Appeals (CTA) *En Banc* filed by petitioner United Coconut Planters Bank, by way of a verified Petition for Review[1], seeking the reversal of the Resolution[2] *(Assailed Resolution)* promulgated on January 26, 2011, by the Former Second Division of this Court in CTA Case No. 7614 denying petitioner's claim for refund or issuance of tax credit certificate in the amount of P43,484,162.00, allegedly

[1] CTA En Banc Rollo, pp. 1-35.
[2] Annex B, Petition for Review, *Ibid.*, pp. 49-60.

representing its unutilized excess creditable withholding tax for taxable year 2004.

The facts of the case, as found by the CTA Former Second Division and, as stated in its Decision[3], are briefly narrated as follows:

> "Petitioner United Coconut Planters Bank is a domestic corporation duly organized and existing under and by virtue of the laws of the Philippines, with principal office at UCPB Building, Makati Avenue, Makati City.
>
> Respondent Commissioner of Internal Revenue, is the chief of the Bureau of Internal Revenue (BIR), the government agency charged with the assessment and collection of all national internal revenue taxes, fees, and charges and the enforcement of all forfeitures, penalties, and fines connected therewith, with office address at the BIR National Office Building, Diliman, Quezon City.
>
> Petitioner, being in the banking business, allegedly had to continuously dispose real properties acquired as payments or unpaid principal and interests by defaulting clients/borrowers during the taxable year 2004. These sales of real properties considered as ordinary assets are subject to 6% creditable withholding taxes, while some clients designated as Top Ten Thousand Corporations are required under existing BIR regulations to deduct 2% creditable withholding tax on their income payments, i.e., interests, service charges, etc. for services rendered by petitioner. Rentals derived from leases of petitioner's properties are likewise subjected to 5% creditable withholding taxes by its lessees.
>
> On April 15, 2005, petitioner, through the BIR's Electronic Filing and Payment System (EFPS), filed its original Annual Income Tax Return (ITR) for the year ended December 31, 2004. During the filing of the said return, petitioner allegedly had difficulty accomplishing the ITR through the EFPS thus resulting in errors and the submission of an ITR which was not entirely filled up. Petitioner subsequently had to re-file its Annual ITR on the same day to complete the necessary details and this re-filed ITR was allegedly captured by the BIR's system as an amended return.
>
> Subsequently, on May 19, 2005 and October 13, 2006, petitioner filed Amended Annual Income Tax Returns, both

[3] CTA En Banc Rollo, pp. 36-48.

reflecting losses and excess tax credits. Considering that petitioner has been incurring and posting net losses for the past several years including the taxable year 2004, it was allegedly not liable for income taxes for 2004, and therefore, the taxes withheld by various payors of petitioner for the year 2004 in the total amount of P43,484,162.00 was not applied against any income taxes and allegedly became excess tax payments.

On March 27, 2007, through a Letter dated March 20, 2007, petitioner filed with the BIR large Taxpayers Audit and Investigation Division I, an administrative claim for the issuance of tax credit certificates or refund of excess creditable withholding tax for 2004, in the total amount of P43,484,162.00.

In view of respondent's inaction on its administrative claim and considering that the period to file a judicial claim for refund was expiring on April 15, 2007 (a Sunday), petitioner filed the instant Petition for Review on April 16, 2007.

An answer was filed by respondent on May 23, 2007, interposing the following counter-arguments:

> '5. Petitioner's alleged claim for refund is subject to administrative routinary investigation/ examination by the Bureau;
>
> 6.The amount of P43,484,162.00 being claimed by petitioner as alleged unutilized creditable withholding tax for taxable year 2004 was not properly documented;
>
> 7. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;
>
> 8. The petition for review is premature. Since petitioner did not submit complete documents in support of its administrative claim for refund as indicated under Section 112 (D) of the NIRC of 1997, the 120-day period starts to run on 27 March 2007, the date when it filed its administrative claim for refund. The said period is yet to expire on 25 July 2007. Hence, the 30-day period within which to file the petition for review before this Honorable Court is yet to expire on 24 August 2007. This being so, this

> Honorable Court has no jurisdiction to act on the instant petition for review.
>
> 9. Petitioner must show that it has complied with the provisions of Sections 204 (C) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit.
>
> 10. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation (*Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)* and such, they are looked upon with disfavor *(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211).'*

> During trial, both parties presented their respective evidence. Petitioner presented a court-commissioned Independent Certified Public Accountant (ICPA), Joseph Cedric V. Calica, together with witnesses Donabel R. Aala and Crisologo F. Sagnip to prove its case. on the other hand, a sole witness Meliza C. Wepee testified for the respondent. After the termination of the parties' presentation of evidence, they were directed to file their respective Memorandum in the Resolution dated July 22, 2009 within thirty (30) days from notice.
>
> Prior thereto, petitioner allegedly received a Letter dated January 28, 2009 from the OIC, Head Reveneu *(sic)* Executive Assistance of the BIR Large Taxpayers Service, Romulo L. Aguila, Jr. effectively denying petitioner's administrative claim for taxable year 2004.
>
> Thereafter, this case was submitted for decision on October 5, 2009 after the filing of petitioner's Memorandum on September 28, 2009 and respondent's Memorandum on September 23, 2009.'

On September 17, 2010, the CTA Former Second Division promulgated its Decision (Assailed Decision), denying petitioner's claim for refund or issuance of tax credit certificate on the basis that there can never be a partial carry-over and a partial granting of refund.

The Assailed Decision states:

> "To consider the remaining balance of P133,396.00 of the present claim as an amount available for refund or issuance of a tax credit certificate would be contrary to the

> provisions of Section 76 of the NIRC of 1997 and a departure from the ruling in the case of *Commissioner of Internal Revenue vs. Bank of the Philippine Islands* that the *'two options under Section 76 are alternative in nature'* and that the *'choice of one precludes the other.'* Thus, once there is a finding that a portion of the excess amount, as shown on the final adjustment return, has been carried over, the remaining amount that had not been carried over, can no longer be the subject of a claim for refund. In other words, there can never be a partial carry-over and a partial granting of refund.
>
> In this connection, although it may be argued that petitioner's <u>third</u> Amended Annual Income Tax Return for the taxable year 2004 had the effect of abandoning or superseding its <u>second</u> Amended Annual Income Tax Return for the same taxable year, petitioner cannot escape the legal consequences brought about by the carrying over of the excess amount of withholding tax reflected in its <u>second</u> Amended Annual Income Tax Return for 2004, in its original Quarterly Income Tax Returns, and in its original and amended Annual Income Tax Return, for taxable year 2005.
>
> Such being the case, the supposed remaining balance of P133,396.00 of the present claim should be treated as no longer available for refund or issuance of a tax credit certificate.
>
> **WHEREFORE**, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

Petitioner filed its Motion for Reconsideration[4] on October 7, 2010. In a Resolution[5] dated January 26, 2011, the CTA Former Second Division reversed its position on the irrevocability rule, and citing the case of *Commissioner of Internal Revenue vs. McGeorge Food Industries, Inc.*[6] (*McGeorge case*), held that the option to seek either refund or carry-over is irrevocable, hence petitioner's option to be issued a tax credit certificate must prevail. Notwithstanding such reversal, petitioner's Motion for Reconsideration

[4] Division Docket, pp. 899-931.
[5] CTA En Banc Rollo, pp. 49-60.
[6] G.R. No. 174157, October 20, 2010.

was denied on the ground that petitioner failed to comply with the second requisite for a refund claim when it failed to prove that it declared as part of its gross income on its 2004 Annual Income Tax Return the income upon which the subject creditable taxes were withheld.

Hence, petitioner filed the instant Petition for Review raising the following issues:[7]

"A.

WHETHER OR NOT THE PETITIONER HAS UNUTILIZED CREDITABLE WITHHOLDING TAX IN THE AMOUNT F P43,484,162.00 AS OF DECEMBER 31, 2004, WHICH IS THE PROPER SUBJECT OF A CLAIM FOR REFUND/ISSUANCE OF A TCC PURSUANT TO SECTION 76 OF THE TAX CODE.

B.

WHETHER OR NOT THE INCOME UPON WHICH THE SUBJECT UNUTILIZED CREDITABLE WITHHOLDING TAXES WERE WITHHELD WERE DECLARED AS PART OF THE PETITIONER'S GROSS INCOME IN ITS ANNUAL INCOME TAX RETURN FOR TAXABLE YEAR 2004.

C.

WHETHER OR NOT THE PETITIONER'S UNUTILIZED CREDITABLE WITHHOLDING TAXES FOR TAXABLE YEAR 2004 IN THE AMOUNT OF P43,484,162.00 ARE DULY SUBSTANTIATED BY DOCUMENTARY EVIDENCE.

D.

WHETHER OR NOT THE PETITIONER'S UNUTILIZED CREDITABLE WITHHOLDING TAXES FOR TAXABLE YEAR 2004 WERE CARRIED OVER AND CLAIMED AS 'PRIOR YEAR'S EXCESS TAX

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[7] *Id.*, pp. 7-8.

CREDITS' DURING THE SUCCEEDING TAXABLE YEARS.

E.

WHETHER OR NOT THE PETITIONER IS ENTITLED TO ITS CLAIM FOR REFUND OR ISSUANCE OF TCC FOR ITS UNUTILIZED CREDITABLE WITHHOLDING TAXES FOR THE TAXABLE YEAR 2004 IN THE AMOUNT OF P43,484,162.00."

Petitioner submits that the CTA Former Second Division erred in holding that it failed to comply with the second condition for the grant of a claim for refund of creditable withholding income tax. Petitioner alleges that it has declared the income payment from which the subject claim for refund were withheld, as part of its gross income in the 2004 annual income tax return, citing an entry in page 14 of the Revised Supplemental Independent CPA Report dated June 4, 2008 as support to its claim. Furthermore, petitioner argues that the reporting of the creditable withholding taxes in the income tax return is not among the requisites for granting a claim for refund or issuance of tax credit certificate. Hence, it is petitioner's position that it is entitled to the refund/issuance of tax credit certificate for its excess creditable withholding taxes for taxable year 2004 in the amount of P43,484,162.00.

On March 11, 2011, this Court issued a Resolution[8] ordering respondent to file her Comment within ten (10) days from receipt thereof.

On March 28, 2011, respondent filed her Comment (Re: Petition For Review dated February 16, 2011).[9] In her Comment, respondent opposes the Petition for Review, alleging that the grounds raised therein are mere rehash of petitioner's arguments which the CTA Former Second Division had already covered, discussed and disposed of in the Assailed Decision and Assailed Resolution. In manifesting her opposition to the Petition for Review,

[8] *Id.*, pp. 62-63.
[9] *Id.*, pp. 64-72.

respondent posited that the CTA Former Second Division correctly ruled that petitioner failed to comply with the conditions for the grant of a claim for refund of creditable withholding tax. Respondent further alleged that it is imperative for petitioner to prove and substantiate its claim for refund as claims for refund are construed strictly against the claimant. Respondent submits that petitioner failed to establish its right to refund, hence, the present petition should be dismissed for lack of merit.

In a Resolution[10] dated April 12, 2011, this Court ordered both parties to submit their respective memorandum within thirty (30) days from receipt thereof. On May 3, 2011, respondent filed her Manifestation,[11] stating that she is adopting her Comment to the Petition for Review filed on March 28, 2011 as her Memorandum while petitioner filed a Motion for Extension of Time to File Memorandum May 25, 2011[12]. The CTA *En Banc* granted petitioner a final and non-extendible period of fifteen (15) days or until June 9, 2011. Petitioner filed its Memorandum[13] on June 9, 2011.

On June 27, 2011 the case at bench was deemed submitted for decision.

After a careful and thorough evaluation and consideration of the records of the case, including both parties' arguments in their respective pleading, this Court finds no merit in the instant petition.

The crux of the controversy in the present petition is whether or not the petitioner is entitled to its claim for refund or issuance of Tax Credit Certificate for its unutilized creditable withholding taxes for the taxable year 2004 in the amount of P43,484,162.00.

Section 76 of the 1997 NIRC clearly provides that the Irrevocability Rule only applies to the option of carry-over.

[10] *Id.*, pp. 74-75.
[11] *Id.*, pp. 76-77.
[12] *Id.*, pp. 80-83.
[13] *Id.*, pp. 85-118.

Section 76 of the 1997 National Internal Revenue Code (NIRC), provides:

> **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)

Under aforequoted section, in case of overpayment of taxes, the taxpayer has two options, namely, first, to carry-over such excess credits; and, second, to claim for a refund of the same or the issuance of a tax credit certificate in the amount of the excess credit.

The abovementioned options of the taxpayer under Section 76 of the 1997 NIRC are further explained in the case of *Philam Asset Management, Inc., vs. Commissioner of Internal Revenue*[14] where the Supreme Court held that:

> " x x x, Section 76 offers two options to a taxable corporation whose total quarterly income tax payments in a

[14] G.R. Nos. 156637/162004, December 14, 2005.

> given taxable year exceeds its total income tax due. These options are (1) filing for a tax refund or (2) availing of a tax credit.
>
> The first option is relatively simple. Any tax on income that is paid in excess of the amount due the government may be refunded, provided that a taxpayer properly applies for the refund.
>
> The second option works by applying the refundable amount, as shown on the FAR of a given taxable year, against the estimated quarterly income tax liabilities of the succeeding taxable year.
>
> **These two options under Section 76 are alternative in nature. The choice of one precludes the other.** Indeed, in Philippine Bank of Communications v. Commissioner of Internal Revenue, the Court ruled that a corporation must signify its intention -- whether to request a tax refund or claim a tax credit -- by marking the corresponding option box provided in the FAR. While a taxpayer is required to mark its choice in the form provided by the BIR, this requirement is only for the purpose of facilitating tax collection.
>
> **One cannot get a tax refund and a tax credit at the same time for the same excess income taxes paid.** (Emphasis supplied).

The last paragraph of the same section, likewise, explicitly sets forth the irrevocability rule stating that once the option to carry-over the excess income tax and apply the same to the income tax due in the succeeding taxable years has been chosen by the taxpayer, such option shall be irrevocable for the taxable year and no claim for refund or issuance of tax credit certificate shall be allowed thereafter.

The Supreme Court, in a long line of cases, had the opportunity to interpret Section 76 of the 1997 NIRC and rule that the aforementioned provision clearly states that the irrevocability rule applies only to the option to carry-over the excess income tax, and not to the claim for refund or issuance of tax credit certificate.

In the case of *Belle Corporation v. Commissioner of Internal Revenue*[15], the Supreme Court made a distinction between Section 69 of the 1977 NIRC and the now prevailing Section 76 of the 1997 NIRC. It held that the irrevocability rule in Section 76 applies solely to the option to carry-over, to wit:

> Thus, under Section 69 of the old NIRC, unutilized tax credits may be refunded as long as the claim is filed within the two-year prescriptive period.
>
> The option to carry over excess income tax payments is irrevocable under Section 76 of the 1997 NIRC.
>
> This rule, however, no longer applies as Section 76 of the 1997 NIRC now reads:
>
> xxx xxx xxx
>
> Under the new law, in case of overpayment of income taxes, the remedies are still the same; and the availment of one remedy still precludes the other. But unlike Section 69 of the old NIRC, the carry-over of excess income tax payments is no longer limited to the succeeding taxable year. Unutilized excess income tax payments may now be carried over to the succeeding taxable years until fully utilized. **In addition, the option to carry-over excess income tax payments is now irrevocable.** Hence, unutilized excess income tax payments may no longer be refunded.
>
> xxx xxx xxx
>
> "To repeat, under the new law, **once the option to carry-over excess income tax payments to the succeeding years has been made, it becomes irrevocable**. Thus, applications for refund of the unutilized excess income tax payments may no longer be allowed." (Emphasis supplied)

The Supreme Court affirmed its position on the irrevocability rule in its decision in the case of *Commissioner of Internal Revenue vs. PL Management*

[15] G.R. No. 181298, January 10, 2011.

International Philippines, Inc.[16] where it declared that only the option to carry-over is irrevocable. It stated:

> "As can be seen, Congress added a sentence to Section 76 of the NIRC of 1997 in order to lay down the irrevocability rule, to wit:
>
> xxx **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 tax refund or issuance of a tax credit certificate shall be allowed therefor**." (Emphasis supplied)

In the case of *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*[17], the Supreme Court held that, once the option to carryover is made, the same becomes irrevocable regardless of the actual application of the excess income tax payment to the subsequent tax liabilities of the taxpayer, it states:

> "Hence, the controlling factor for the operation of the irrevocability rule is that the taxpayer chose an option; and once it had already done so, it could no longer make another one. Consequently, **after the taxpayer opts to carry-over its excess tax credit to the following taxable period, the question of whether or not it actually gets to apply said tax credit is irrelevant. 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**."
>
> 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 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 phrase 'for that taxable period' merely identifies the excess income tax, subject of the option, by referring to the taxable period when it was acquired by the

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[16] G.R. No. 160949, April 4, 2011.
[17] G.R. No. 178490 , July 7, 2009.

> taxpayer. In the present case, the excess income tax credit, which BPI opted to carry over, was acquired by the said bank during the taxable year 1998. The option of BPI to carry over its 1998 excess income tax credit is irrevocable; it cannot later on opt to apply for a refund of the very same 1998 excess income tax credit." (Emphasis supplied).

In the consolidated cases of *Commissioner of Internal Revenue vs. Mirant (Philippines) Operations, Corporation* and *Mirant (Philippines) Operations Corporation (Formerly: Southern Energy Asia-Pacific Operations (Phils.), Inc. vs. Commissioner of Internal Revenue*[18], the Supreme Court remained consistent with its position that the irrevocability rule applies only to the option to carry-over. It held:

> "The last sentence of Section 76 is clear in its mandate. **Once a corporation exercises the option to carry-over and apply the excess quarterly income tax against the tax due for the taxable quarters of the succeeding taxable years, such option is irrevocable for that taxable period. Having chosen to carry-over the excess quarterly income tax, the corporation cannot thereafter choose to apply for a cash refund or for the issuance of a tax credit certificate for the amount representing such overpayment**.
>
> In Commissioner of Internal Revenue v. Bank of the Philippine Islands, the Court, citing the aforequoted pronouncement in Philam Asset Management, Inc., **points out that Section 76 of the NIRC of 1997 is clear and unequivocal in providing that the carry-over option, once actually or constructively chosen by a corporate taxpayer, becomes irrevocable.**" (Emphasis supplied).

Clearly, a careful reading of the provision of Section 76 of the 1997 NIRC will reveal that indeed the irrevocability rule applies solely on the option to carry-over. Nowhere in Section 76 was it stated that the option to claim refund or issuance of tax credit certificate, once chosen, is irrevocable. Likewise, the Supreme Court, in numerous cases, consistently interpreted the law as such. Thus, this Court is constrained to rule that the irrevocability rule

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[18] G.R. Nos. 171742 and 176165, June 15, 2011.

is applicable only on the option to carry-over and not on the option to refund or issuance of tax credit certificate.

Petitioner's reliance on the ruling in the case of McGeorge case[19] is misplaced. The said pronouncement applying the irrevocability rule both on the option to carry-over and option to refund is a mere obiter dictum and should not be given much weight. In fact, in its decisions promulgated after the McGeorge case, the Supreme Court has been consistent in its position that the irrevocability rule applies solely to the option to carry-over. Hence, such ruling in the more recent decisions is reflective of the Supreme Court's sentiments regarding the issue at hand.

It may have been petitioner's initial choice to claim a refund of the excess creditable income tax payments, as shown when it marked the option "To be issued a Tax Credit Certificate" in its first and second 2004 Amended Income Tax Returns. However, such choice was negated when it actually exercised its option to carry-over its excess credits and included the same to the prior year credits to the taxable year 2005 as shown on the original quarterly income tax returns for the first, second, third quarters of the taxable year 2005 and the original Annual Income Tax Return for the taxable year 2005. As the law and jurisprudence provide that the option to carry-over, once chosen, is irrevocable, petitioner cannot now renege on its choice to carry-over the excess credits.

The fact that petitioner later on amended its 2004 and 2005 Annual Income to reflect its choice of claim for refund is of no moment. Petitioner cannot hide behind its right to amend its income tax returns and attempt to revert to its initial choice of claim for refund after actually carrying-over its excess tax payments to the subsequent quarters. Authorizing such action to the present case will be tantamount to allowing petitioner to circumvent the rules and violate the irrevocability rule on the option to carry-over. Settled is the fact that petitioner, in actually carrying-over the excess credits to the

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[19] *Id.*, Note 6.

subsequent quarters, clearly negated its earlier choice of claim for refund. Thus, We have no recourse but to deny the present claim.

The express mention of option to carry-over in the Irrevocability Rule provided under Section 76 effectively excludes all other options.

Under the statutory construction rule of *expressio unius est exclusio alterius*, the express mention of one person, thing, or consequence implies the exclusion of all others.[20] This rule is more clearly explained by the Supreme Court in the case of *Benjamin ("Kokoy") T. Romualdez vs. Hon. Simeon V. Marcelo, In His Official Capacity as The Ombudsman, and Presidential Commission on Good Government*[21], to wit:

> "Indeed, it is an elementary rule of statutory construction that the express mention of one person, thing, act, or consequence excludes all others. This rule is expressed in the familiar maxim 'expressio unius est exclusio alterius.' Where a statute, by its terms, is expressly limited to certain matters, it may not, by interpretation or construction, be extended to others. The rule proceeds from the premise that the legislature would not have made specified enumerations in a statute had the intention been not to restrict its meaning and to confine its terms to those expressly mentioned."

Applying the aforementioned rule to the case at bench, the express mention of option to carry-over under the irrevocability rule implies the exclusion of all other options, in this case, the option to claim refund or issuance of tax credit certificate. By expressly specifying the option to carry-over as irrevocable, it can be inferred that it is the intention of the legislators that the irrevocability rule be applicable solely to such option. This Court

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[20] Victorias Milling Co. vs. Court of Appeals and International Pharmaceuticals, Inc., G.R. No. 168062, June 29, 2010.
[21] G.R. Nos. 165510-33, July 28, 2006 citing Centeno v. Villalon-Pornillos, G.R. No. 113092, September 1, 1994.

cannot go beyond the wisdom of the law and deem the rule applicable to the option to claim refund when the law itself is explicit in excluding the same.

It is a well-settled rule that tax refunds are in the nature of tax exemptions, hence, are construed strictissimi juris against the taxpayer.

Lastly, this Court notes that "tax refunds are a derogation of the State's taxing power. Hence, like tax exemptions, they are construed strictly against the taxpayer and liberally in favor of the State. Consequently, he who claims a refund or exemption from taxes has the burden of justifying the exemption by words too plain to be mistaken and too categorical to be misinterpreted."[22] In the case at bench, petitioner failed to sufficiently establish its claim for refund. Its act of actually carrying-over its excess credits to the subsequent taxable quarters negated its initial choice of claim for refund. Hence, the present petition must fail.

In view of the foregoing, this Court affirms the ruling of the CTA Former Second Division denying petitioner's claim for refund or issuance of tax credit certificate in relation to its unutilized excess creditable income taxes withheld for taxable year 2004 on the ground that the irrevocability rule under Section 76 of the 1997 NIRC applies only on the option to carry-over the excess credits. It is not applicable to the option for a refund or issuance of a tax credit certificate. Petitioner made its choice to claim for a refund or for the issuance of a tax credit certificate but later on negated its previous intention when its subsequent quarterly income tax returns showed that it carried over the amount subject of the claim and included the same in the prior year's excess credits. As the law and the rules are clear that the option

[22] Compagnie Financiere Sucres Et Denrees, vs. Commissioner of Internal Revenue, G.R. No. 133834 August 28, 2006 *citing* Far East Bank & Trust Company v. Court of Appeals, G.R. No. 129130, December 9, 2005 and Commissioner of Internal Revenue v. Phil. Long Distance Telephone Company, G.R. No. 140230, December 15, 2005.

to carry over is irrevocable, petitioner cannot now turn its back on its later choice and choose to revert to its first option when its present circumstances prove that the latter is more advantageous for its benefit. The irrevocability rule simply does not allow such action. Thus, this Court has no other recourse but to deny its claim for refund or issuance of tax credit certificate.

Hence, as the irrevocability rule is inapplicable to claim for refund or issuance of tax credit certificate and this Court holds that petitioner is not entitled to its judicial claim, We find it unnecessary to delve into the other issues raised in the present petition.

In sum, the *CTA En Banc* finds no cogent justification to disturb the findings and conclusion spelled out in the Assailed Decision promulgated by the CTA Former Second Division. What the instant petition seeks is for the Court *En Banc* to view and appreciate the arguments/discussions raised by the petitioner in its own perspective of things, which unfortunately had already been considered and passed upon by the Court.

WHEREFORE, premises considered, the Assailed Decision dated September 17, 2010 promulgated by the CTA Former Second Division is hereby **AFFIRMED *in toto*** and the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(with Dissenting Opinion)
ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

C E R T I F I C A T I O N

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

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MINDARO-GRULLA, and
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

AUG 2 3 2012 3:10pm

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DISSENTING OPINION

***Fabon-Victorino, J.*:**

With due respect, I dissent.

The majority holds that the irrevocability rule under Section 76 of the 1997 NIRC applies solely to the option to carry-over and not to the option to refund. It is with regret that I cannot join the majority's submittal as I adhere to my stance in my draft decision that **the options of a corporate taxpayer,**

whose total quarterly income tax payments exceed its tax liability, are alternative in nature and the choice of one precludes the other. [1]

Pursuant to Section 76 of the NIRC, as amended, there are **only two alternative options** available to a corporate taxpayer whose quarterly income tax payments exceed its tax liability - it may either apply for a refund within the prescribed period, **or** carry over and apply the same to its tax liabilities for the succeeding quarters of the succeeding taxable years. In *Philam Asset Management, Inc. v. Commissioner of Internal Revenue*,[2] the Highest Tribunal elucidates on these two mutually exclusive options, in this wise:

> "The first option is relatively simple. Any tax on income that is paid in excess of the amount due the government may be refunded, provided that a taxpayer properly applies for the refund.
>
> The second option works by applying the refundable amount, as shown on the FAR of a given taxable year, against the estimated quarterly income tax liabilities of the succeeding taxable year.
>
> **These two options under Section 76 are alternative in nature. The choice of one precludes the other**. Indeed, in Philippine Bank of Communications v.

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[1] *Philam Asset Management, Inc. v. Commissioner of Internal Revenue*, 514 Phil. 147, 157 (2005).

[2] 514 Phil. 147, 157 (2005).

> Commissioner of Internal Revenue, the Court ruled that a corporation must signify its intention — whether to request a tax refund or claim a tax credit — by marking the corresponding option box provided in the FAR. While a taxpayer is required to mark its choice in the form provided by the BIR, this requirement is only for the purpose of facilitating tax collection.
>
> One cannot get a tax refund and a tax credit at the same time for the same excess income taxes paid..." (*Emphases supplied*)

It is thus clear that a corporate taxpayer is **not** legally allowed a change of heart once it has chosen an option from the two alternative remedies for the choice of one precludes the other. Significantly, the Supreme Court, speaking through now Acting Chief Justice Antonio T. Carpio, has categorically ruled that an exercise of an option is irrevocable, thus:

> **Under Section 76, the Exercise of an Option is Irrevocable** and a Decision to Carry-over and Apply Tax Overpayment Continues Until the Overpayment has been Fully Applied to Tax Liabilities[3]

The Final Arbiter ruled further that a decision to carry-over and apply tax overpayment continues until the overpayment has been fully applied to tax liabilities. To quote the exact language of the ruling:

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[3] Commissioner of Internal Revenue v. McGeorge Food Industries, Inc., G.R. No. 174157, October 20, 2010.

> "Section 76 of the NIRC of 1997 was formerly Section 69 of the 1977 NIRC and it wrought about two (2) changes therefrom: first, it mandates that **the taxpayer's exercise of its option to either seek refund or crediting is irrevocable**, and second, the **taxpayer's decision to carry-over and apply its current overpayment to future tax liability continues until the overpayment had been fully applied, no matter how many tax cycles it takes**." (*Emphases supplied*)

A contextual appreciation of the ruling would tell us that any of the two alternatives once chosen is irrevocable - be it for refund or carry over. **The controlling factor for the operation of the irrevocability rule is that the taxpayer chose an option; and once it had already done so, it could no longer make another one**.[4]

The Highest Tribunal explains the *rationale* behind the ruling saying that "Section 76 is, like its predecessor Section 69 of the 1977 NIRC, a tax administration measure crafted to ease tax collection. By requiring corporate taxpayers to indicate in their final adjustment return whether, in case of overpayment, they wish to have the excess amount refunded or carried-over and applied to their future tax liability, the provision aims to properly manage claims for refund or tax credit. Administratively

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

speaking, Section 76 xxx xxx xxx is a toll designed to promote rational and efficient functioning of the tax system."[5] To be sure, flip-flapping on the part of the corporate taxpayer will not only run counter to the spirit of the law but will also create chaos and delay in the collection of taxes to the prejudice of the government.

Contrary to an opinion, the ruling is not an *obiter* or something that was made in passing. An *obiter dictum* as defined in Blacks Law Dictionary, 6th Edition is an opinion entirely unnecessary for the decision of the case, a remark made, or opinion expressed by a judge in his decision upon a cause, "by the way," that is incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way illustration or analogy or argument. Such are not binding as precedent.

Guided by the foregoing, I respectfully submit that the ruling in Commissioner of Internal Revenue v. McGeorge Food Industries, Inc. that under Section 76, the exercise of an option is irrevocable is the *law of the case*, which is binding upon all

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[5] CIR v. McGeorge, *supra*.

lower courts. The law of the case is defined as a doctrine which provides that an appellate court's determination on a legal issue is binding on both the trial court on remand and on appellate court on subsequent appeal given the same case substantially the same facts.[6]

It bears to note at this juncture, that in all the subsequent cases brought before the Final Arbiter, to wit, Belle Corporation v. Commissioner of Internal Revenue, G.R. No. 181298, January 10, 2011, Commissioner of Internal Revenue v. PL Management International Philippines, Inc., G.R. No. 160949, April 4, 2011, and the consolidated cases of Commissioner of Internal Revenue v. Mirant (Philippines) Operations Corporation, G.R. No. 171742, June 15, 2011 and Mirant (Philippines) Operators Corporation v. Commissioner of Internal Revenue, G.R. No. 176165, June 15, 2011, the original option exercised by the respective corporate taxpayers therein was to carry over the excess to the succeeding quarter and not refund. Precisely the ruling that the option of the respective corporate taxpayers to carry over excess income tax payment was irrevocable under Section 76 of the 1997 NIRC emphasizing that unutilized excess income tax payments may be carried over to the succeeding taxable years until fully utilized.

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[6] Black Law Dictionary, 6th Edition.

Clearly, the exercise of the option to claim a refund or issuance of a tax credit certificate bars the other option to carry-over as tax credit for application in the subsequent years.[7]

Finally, the Supreme Court is consistent to date in holding that the two (2) options are alternative in nature and that the choice of one bars the other. In fact, even the *Annual Income Tax Return (BIR Form 1702)* under line 30, states that, and I quote:

> **"If overpayment, mark one box only: (<u>once the choice is made, the same is irrevocable</u>)"**

In view of the foregoing, I vote to grant the Petition for Review.

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[7] *United Coconut Planter Bank vs. Commissioner of Internal Revenue*, C.T.A. Case No. 7614, January 26, 2011.