REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

MSI-ECS PHILS., INC. *(formerly MSI DIGILAND PHILS., INC.)*,
Petitioner,

- versus-

COMMISSIONER OF INTERNAL REVENUE
Respondent,

CTA CASE NO. 7072

Present:

BAUTISTA, *Chairperson*
PALANCA-ENRIQUEZ, and
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

SEP 29 2010
11:19 a.m.

x- x

D E C I S I O N

COTANGCO-MANALASTAS, *J.*:

STATEMENT OF THE CASE

Petitioner, by way of this Petition for Review, is seeking refund of the amount of P12,241,251.00, representing petitioner's alleged cumulative excess creditable withholding taxes as of June 30, 2003.

STATEMENT OF FACTS

MSI-ECS Philippines, Inc. (petitioner) is a domestic corporation duly organized and existing under the laws of the Philippines, with principal office address at Topy II Building, Economia Street, Libis, Quezon City.[1]

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) with authority to act as such, including, among others, the power to decide, approve, and grant refunds or tax credit of overpaid internal revenue taxes as provided by law. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

On October 15, 2002, petitioner filed its Annual Income Tax Return for fiscal year ended June 30, 2002, wherein it reported the following figures in its return:[2]

Sales/Revenue/Receipts/Fees		1, 063,378,347
Less: Cost of Sales		950,913,504
Gross Income from Operations		112,464,843
Add: Non-operating and other Income		1,741,305
Total Gross Income		114,206,148
Less: Deductions		100,189,592
Taxable Income		14,016,556
Income Tax	4,485,298	
MCIT	2,284,123	
Tax Due		**4,485,298**
Prior Year's Excess Credits	0	
Creditable tax withheld for the first 3 quarters	12,629,804	
Creditable tax withheld per BIR Form 2307	2,339,952	
Total Tax Credits/Payments		**14,969,756**

[1] Par. 1, Facts Admitted, Joint Stipulations of Facts and Issues, docket, p. 68
[2] Exhibit "B"; par. 7, Facts Admitted, Joint Stipulations of Facts and Issues, docket pp. 69-70

Tax Payable (Overpayment)		**(10,484,458)**

Petitioner indicated its chosen option regarding the excess creditable withholding tax by marking with "x" the box corresponding to the option "To be refunded" on Line 31 of the return.[3]

On the other hand, for the fiscal year ended June 30, 2003, petitioner filed its Annual Income Tax Return on October 15, 2003, wherein it reported the following amounts:[4]

Sales/Revenue/Receipts/Fees		1,406,830,096
Less: Cost of Sales		1,288,347,725
Gross Income from Operations		118,482,371
Add: Non-operating and other Income		2,046,974
Total Gross Income		120,529,345
Less: Deductions		117,100,193
Taxable Income		3,429,152
Income Tax	1,097,329	
MCIT	2,410,587	
Tax Due		**2,410,587**
Prior Year's Excess Credits	10,484,458	
Creditable tax withheld for the first 3 quarters	1,295,592	
Creditable tax withheld per BIR Form 2307	2,871,788	
Total Tax Credits/Payments		**14,651,838**
Tax Payable (Overpayment)		**(12,241,251)**

[3] Exhibit "B-10"
[4] Exhibit "A"; par. 8, Facts Admitted, Joint Stipulations of Facts and Issues, docket p. 70

Petitioner also indicated its decision to seek refund of its cumulative excess creditable withholding taxes as of June 30, 2003, by marking the box corresponding to the option "To be refunded" on Line 31 of the return.[5]

In view of the alleged tax overpayments indicated in its Annual Income Tax Returns for fiscal years 2002 and 2003, petitioner filed a formal written application for refund with the BIR-Revenue District Office No. 40-Cubao on October 15, 2003, in the amount of P12,241,251.00, representing its cumulative excess creditable withholding taxes as of June 30, 2003.[6]

However, due to the inaction of respondent on petitioner's application for refund, petitioner filed the present Petition for Review before this Court on October 11, 2004.

In his Answer filed on December 6, 2004[7], respondent raised the following Special and Affirmative Defenses:

> "4. Claims for refund are strictly construed against the taxpayer as the same partakes the nature of a tax exemption;
>
> 5. The taxpayer has the burden to show that the taxes were erroneously or illegally paid. Failure on the part of the Petitioner to prove the same is fatal to its cause of action;
>
> 6. The Petitioner should prove its legal basis for claiming the amount being refunded."

On January 4, 2005, a Notice of Pre-Trial Conference was issued by this Court, setting the case for Pre-Trial Conference on February 25, 2005 and requiring both parties

[5] Exhibit "A-10"
[6] Exhibit "D"
[7] Docket, pp. 46-47

to be present at the pre-trial and to file with the Court and serve on the adverse party their pre-trial briefs.[8]

Consequently, petitioner and respondent filed their pre-trial briefs on February 24, 2005 and April 1, 2005, respectively.[9]

On April 20, 2005, the parties filed their Joint Stipulations of Facts and Issues[10], which this Court approved in a Resolution dated April 22, 2005. In the same Resolution, the pre-trial was considered terminated.[11]

On May 31, 2005, petitioner moved for the commissioning of an Independent Certified Public Accountant (CPA) pursuant to CTA Circular No. 1-95. The same was granted during the hearing on July 1, 2005.[12] In due time, the Court-commissioned Independent CPA submitted her report and the same formed part of the evidence of petitioner.

Aside from the Independent CPA Report, petitioner presented and formally offered its documentary and testimonial evidence; while respondent was considered to have waived his right to present evidence for failure to appear before this Court on the various dates set for the initial presentation of respondent's evidence, and upon oral motion of petitioner's counsel.[13]

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[8] Docket, p. 48
[9] Docket, pp. 52-58 and 59-61
[10] Docket, pp. 68-71
[11] Docket, p. 72
[12] Docket, p. 97
[13] Docket, p. 361

The case was submitted for decision on January 18, 2010, taking into consideration petitioner's Memorandum filed on January 4, 2010 and the report of this Court's Record Division that respondent failed to file his Memorandum despite notice.[14]

STATEMENT OF ISSUES

The parties submitted the following issues[15] for this Court's disposition:

> "Whether Petitioner is entitled to be refunded its cumulative excess creditable withholding taxes as of the fiscal year ended June 30, 2003 in the amount of P12,241,251 by showing that -
>
> a) the creditable withholding taxes amounting to P19,137,136 are duly supported by Certificates of Creditable Tax Withheld at Source;
>
> b) the income from which these creditable taxes were withheld were duly declared as part of Petitioner's income in its Annual Income Tax Return for the fiscal years ended June 30, 2002 and 2003;
>
> c) Petitioner did not carry over its unutilized creditable withholding taxes as of fiscal year ended June 30, 2003 to the succeeding taxable year 2004.
>
> d) Petitioner duly filed both the administrative and judicial claims for refund within the two-year prescriptive period provided under Sections 204 and 229 of the Tax Code, as amended."

DISCUSSION/RULING

Petitioner claims that it is entitled to a refund in the amount of P12,241,251.00, representing its alleged cumulative excess creditable withholding taxes as of fiscal year ended June 30, 2003.

[14] Resolution dated January 18, 2010, docket, p. 382
[15] Docket, p. 71

In accordance with settled jurisprudence, petitioner's entitlement to a refund of excess creditable withholding taxes is dependent on its compliance with the following requirements:

1. That the claim for refund was filed within the two-year prescriptive period prescribed under Section 204(C), in relation to Section 229 of the NIRC of 1997, as amended;

2. That the fact of withholding is established by a copy of a statement duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom; and

3. That it is shown on the return of the recipient that the income payment received was declared as part of the gross income.[16]

As regards the first requirement, the relevant provisions of the National Internal Revenue Code (NIRC) of 1997, as amended, are Sections 204(C) and 229, which provide as follows:

> "SEC. 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* — The Commissioner may –
>
> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless **the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty*: Provided, however*, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.**" *(Emphasis supplied)*
>
> "SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have

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[16] Section 2.58 of Revenue Regulations (R.R.) No. 2-98, as amended; *Citibank N.A. vs. Court of Appeals, et al.*, G.R. No. 107434, October 10, 1997; *ACCRA Investments Corporation vs. The Honorable Court of Appeals, et al.*, G.R. No. 96322, December 20, 1991

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

Relevantly, in the case of *ACCRA Investments Corporation vs. The Honorable Court of Appeals, et al.*[17], the Supreme Court said that the reckoning of the two-year prescriptive period for the filing of a claim for refund/tax credit of excess income tax paid/withheld provided in the above-quoted provision should commence from the date of filing of the final adjustment return.

Record shows that the claimed excess creditable withholding taxes involved fiscal years ended June 30, 2002 and June 30, 2003, for which petitioner filed its corresponding Annual Income Tax Returns on October 15, 2002[18] and October 15, 2003[19], respectively. Counting from these dates, petitioner had until October 15, 2004 and October 15, 2005, within which to file its claim for refund or issuance of tax credit certificate for fiscal years 2002 and 2003, respectively, both in the administrative and judicial levels. Petitioner's administrative claim for refund was filed on October 15, 2003[20] and its judicial claim, through its Petition for Review, was filed on October 11, 2004. Clearly,

[17] G.R. No. 96322, December 20, 1991
[18] Exhibit "B-2"
[19] Exhibit "A-2"
[20] Exhibit "D"

both the administrative and the judicial claims for refund were filed well within the two-year prescriptive period.

Going now to the second requisite of establishing the fact of withholding of the claimed creditable taxes withheld for the year 2003 in the amount of P12,241,251.00, petitioner submitted Certificates of Creditable Tax Withheld at Source[21], Summary of Creditable Tax Withheld at Source by Customers[22], and List of Certificates of Creditable Tax Withheld at Source[23], which were examined by the Court-commissioned Independent CPA[24].

Based on the review and validation made by the Independent CPA, the following findings were noted:[25]

CWT Withheld for the FY ended June 30, 2002			
A	CWTs supported by original certificates	Annex 1	P 5,578,220.07
B	CWTs issued for the period after fiscal year ending June 30, 2002	Annex 2	726,649.26
C	CWTs not supported by certificates	Annex 3	72,766.68
D	CWTs supported by original certificate received by the BIR but not listed in the summary list of CWTs claimed	Annex 4	21,019.57
E	CWTs supported by certificates covering Value-added Tax	Annex 5	8,592,119.99
	Total		P14,990,775.57
	Amount Claimed in FY 2002 ITR		14,969,756.00
	Total		**P21,019.57**

CWT Withheld for the FY Ended June 30, 2003			
A	CWTs supported by original certificates	Annex 6	P 4,165,038.68
B	CWTs supported by certificates with the period covered not indicated	Annex 7	2,341.31

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[21] Exhibits "A", pages 21 to 180 and "B", pages 18 to 121
[22] Exhibits "G" and "L"
[23] Exhibits "H" and "M"
[24] Ms. Lorna Rayos del Sol
[25] Exhibit "N", page 4

	Total		**P 4,167,379.99**

Further verification of the evidence revealed that additional creditable taxes withheld for fiscal year 2003 in the amount of P1,415.60 are supported by certificates with the period covered not indicated, to wit:

Withholding Agent	**Exhibit**	**Amount**
Olympia Phils. Inc.	"A124"	P 966.00
Olympia Phils. Inc.	"A125"	449.60
Total		**P 1,415.60**

Taking into consideration all of the above observations, this Court finds that petitioner was able to substantiate by proper withholding tax certificates only the creditable withholding taxes in the amounts of P6,304,869.33 (P5,578,220.07 plus P726,649.26) and P4,163,623.08 (P4,165,038.68 less P1,415.60) for fiscal years ended June 30, 2002 and June 30, 2003, respectively.

Anent the third requisite, petitioner was able to establish that the income corresponding to the substantiated creditable taxes withheld of P4,163,623.08 formed part of the P1,406,830,096.00 sales declared by petitioner in its 2003 Annual Income Tax Return[26]. The same is corroborated by the documentary evidence presented by petitioner such as, but not limited to, Summary of Sales to Customers with Taxes Withheld[27], Summary of Accounts Receivable, Total Invoice, Collections and Tax Withheld for

[26] Exhibit "A-3"
[27] Exhibits "J" and "O"

Customers with Taxes Withheld[28], Monthly Summary of Sales[29], and the related sales invoices[30] and official receipts[31].

On the other hand, for fiscal year 2002, petitioner did not present any document similar to those presented for fiscal year 2003, by which this Court can ascertain if it declared in its Annual Income Tax Return[32] the income payments related to the creditable withholding taxes of P6,304,869.33.

To recapitulate, for fiscal year 2003, petitioner was able to satisfy the three basic requirements for refund of excess creditable withholding taxes, but only to the extent of the amount of P4,163,623.08, out of the total claim of P4,167,380.00. As regards fiscal year 2002, while petitioner was able to establish the timely filing of the claim and the fact of withholding of the amount of P6,304,869.33, out of the total claim of P8,073,871.00, petitioner failed to prove that it declared the income related to the creditable withholding taxes of P6,304,869.33.

After establishing petitioner's compliance with the above-mentioned requisites, this Court will now proceed to determine whether petitioner exercised the option to carry-over its excess creditable withholding taxes to the succeeding quarters, pursuant to Section 76 of the NIRC of 1997. The said provision reads:

> "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:

[28] Exhibit "T"
[29] Exhibit "I"
[30] Exhibits "R" to "R45-434"
[31] Exhibits "W" to "W-977"
[32] Exhibit "B"

(A) Pay the balance of tax still due; or
(B) Carry-over the excess credits; 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)*

Pursuant to the afore-quoted provision, a corporation entitled to a tax credit or refund of the excess income taxes paid in a given taxable year, is allowed two (2) options, namely: (a) be credited or refunded (either in the form of cash or tax credit certificate) with the excess amount paid; or (b) carry-over the excess credit to the quarters of the succeeding taxable years. Once the taxpayer has exercised the option to carry-over and applied the excess quarterly income tax against the income tax due for the taxable quarters of the succeeding taxable years, such option becomes irrevocable for that taxable period and application for cash refund or issuance of tax credit certificate shall no longer be allowed. The "taxable period" referred to in Section 76 is that taxable period which the taxpayer made the choice of carry-over and not the next taxable year when the said excess or unutilized tax credits would be carried over.[33]

In exercising its option, the corporation must signify in its annual corporate adjustment return its intention either to carry-over the excess credit or to claim a refund

[33] *SC & C Cosmetech Co., Inc. vs. Commissioner of Internal Revenue*, CTA EB No. 126, July 31, 2006 (CTA Case No. 6650, June 6, 2005)

by marking the option box provided in the BIR form. These remedies are in the alternative and the choice of one precludes the other.[34]

In this case, while petitioner marked with an "x" the box corresponding to the phrase "To be refunded" in its Annual Income Tax Returns for fiscal years 2002 and 2003, petitioner had actually exercised the carry-over option by carrying over its 2002 excess creditable withholding tax to fiscal year 2003. Petitioner's very act of filling out the portion "Prior Year's Excess Credits" in its 2003 Annual Income Tax Return with the amount of P10,484,458.00[35] manifested petitioner's intention to carry-over, instead of to refund, the excess creditable withholding tax it paid during fiscal year 2002.

Applying the provision of Section 76 in this case, when petitioner exercised the option to carry-over the claimed excess creditable withholding taxes for fiscal year 2002, the said option became irrevocable for that taxable period; thus, no application for cash refund or issuance of tax credit certificate can be allowed.

In the case of *Paseo Realty and Development Corporation vs. Court of Appeals, Court of Tax Appeals and Commissioner of Internal Revenue*[36], the Supreme Court had the occasion to expound on the options contained in Section 76 of the NIRC of 1997 and the irrevocability of the option made by the taxpayer; the pertinent portion of which reads:

> "As clearly seen from this provision, the taxpayer is allowed three (3) options if the sum of its quarterly tax payments made during the taxable year is not equal to the total tax due for that year: (a) pay the balance of the tax still due; (b) carry-over the excess credit; or (c) be credited or refunded the amount paid. If the taxpayer has paid excess

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[34] *Philippine Bank of Communications vs. Commissioner of Internal Revenue, et al.*, G.R. No. 112024, January 28, 1999
[35] Exhibit "A-6"
[36] G.R. No. 119286, October 13, 2004

quarterly income taxes, it may be entitled to a tax credit or refund as shown in its final adjustment return which may be carried over and applied against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. However, **once the taxpayer has exercised the option to carry-over and to apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years, such option is irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed.**" *(Emphasis supplied)*

The High Tribunal reiterated said ruling in the case of *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*[37], in this wise:

"**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.**

xxx xxx xxx

The carry-over option under Section 76 is permissive. A corporation that is entitled to a *tax refund* or a *tax credit* for excess payment of quarterly income taxes may carry over and credit the excess income taxes paid in a given taxable year against the estimated income tax liabilities of the succeeding quarters. **Once chosen, the carry-over option shall be considered irrevocable for that taxable period, and no application for a *tax refund* or issuance of a *tax credit certificate* shall then be allowed.**

xxx xxx xxx

Whether the FIFO principle is applied or not, **Section 76 remains clear and unequivocal. Once the carry-over option is taken, actually or constructively, it becomes *irrevocable*.** Petitioner has chosen that option for its 1998 creditable withholding taxes. Thus, it is no longer entitled to a *tax refund* of P459,756.07, which corresponds to its 1998 excess tax credit. xxx" *(Emphasis supplied)*

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

Significantly, a similar pronouncement was made by this Court in the case of *Shell Services International Sendirian Berhad vs. Commissioner of Internal Revenue*[38], as regards the determination of the option chosen by the taxpayer in accordance with Section 76 of the NIRC of 1997, as amended. The applicable portion of the said Decision reads:

> "In the case before *Us*, **while petitioner marked with an 'x' the box corresponding to the phrase 'to be refunded' in its 2000 ITR, petitioner had *actually exercised* the option to carry-over its 2000 excess creditable withholding tax to the year 2001**, and in fact, *it had already carried over* to the succeeding year its unutilized creditable taxes withheld for the taxable year 2000. **By express mandate of *Section 76*, once the option to carry-over has been made, such option is irrevocable for that taxable period and no application for cash refund or issuance of tax credit certificate shall be allowed therefore.**" *(Emphasis supplied)*

In view of the foregoing discussion, petitioner is already barred from claiming a refund of its 2002 excess tax credits, since it had actually exercised the option of carry-over and applied its 2002 excess tax credits against its 2003 income tax liability.

As regards the excess tax credit for fiscal year ended June 30, 2003, petitioner properly marked the option "To be refunded" in its Annual Income Tax Return. It likewise did not carry-over the excess credits of P12,241,251.00 as of June 30, 2003 to the succeeding year's income tax return, which included the creditable tax withheld for fiscal year 2003 in the amount of P4,167,380.00. As evidenced by its Annual Income Tax Return for fiscal year ended June 30, 2004, the amount indicated in the "Prior Year's Excess Credit" is zero. Hence, the excess creditable tax withheld for fiscal year ended

[38] CTA EB No. 196, June 13, 2007 (CTA Case No. 6658, March 14, 2006)

June 30, 2003 can be the proper subject of a claim for refund under Section 76 of the NIRC of 1997.

Having complied with all the requirements set by law, petitioner is entitled to a refund of its excess creditable withholding taxes for fiscal year ended June 30, 2003, but in the reduced amount of P3,572,607.41, computed as follows:

Substantiated Creditable Withholding Taxes			P 4,163,623.08
Add:	Prior Year's Excess Credits		
	Substantiated Creditable Withholding Tax (FY 2002)	P6,304,869.33	
	Less: Income Tax Due (FY 2002)	4,485,298.00	1,819,571.33
Total Tax Credits			P 5,983,194.41
Less:	Income Tax Due		2,410,587.00
Refundable Excess Tax Credits			**P 3,572,607.41**

WHEREFORE, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** in favor of petitioner the amount of P3,572,607.41, representing its excess creditable withholding taxes for fiscal year 2003.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, 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