REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

SUMISETSU PHILIPPINES, INC., Petitioner,	**CTA EB CASE NO. 870** **(CTA Case No. 7907)**
- versus -	Present: ***Castañeda, Jr., Acting P.J.*** ***Bautista,*** ***Uy,*** ***Casanova,*** ***Fabon-Victorino,*** ***Mindaro-Grulla, and*** ***Cotangco-Manalastas, JJ.***
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** MAR 22 2013

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DECISION

BAUTISTA, J.:

The Case

Before the Court *En Banc* is a Petition for Review,[1] filed by petitioner Sumisetsu Philippines, Inc., on February 14, 2012, pursuant to Section 18 of Republic Act ("RA") No. 1125, as amended by RA No. 9282, and RA No. 9503, praying for the annulment, reversal, and setting aside of the Decision,[2] and Resolution,[3] respectively promulgated by the Second Division of the Court ("Court in Division") on October 19, 2011 and January 16, 2012, and accordingly, to order respondent Commissioner of Internal Revenue to issue a tax credit certificate representing excess and/or unutilized creditable withholding taxes for

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[1] *Rollo*, CTA EB Case No. 870 (CTA Case No. 7907), pp. 1-24, with Annexes.
[2] *Ibid.*, pp. 32-42; penned by Associate Justice Caesar A. Casanova, with Associate Justices Juanito C. Castañeda, Jr., and Cielito N. Mindaro-Grulla, concurring.
[3] *Ibid.*, pp. 44-48.

the taxable year ended December 31, 2006 in the amount of Php20,102,230.33.

Antecedent Facts

The relevant antecedents are succinctly recited by the Court in Division in its Decision dated October 19, 2011, as follows:

> Sumisetsu is a corporation duly organized under Philippine laws, with principal office at 4th Floor, Glass Tower, 115 C. Palanca St., Legaspi Village, Makati City.
>
> Respondent-Commissioner of Internal Revenue is the head of the Bureau of Internal Revenue (BIR), holding office at the BIR National Office, Diliman, Quezon City.
>
> Sumisetsu is engaged in the business of providing electrical and mechanical services for electrical transmission and distribution systems, air conditioning and ventilation systems, telephone and communications systems, and other allied services.
>
> For the taxable year 2006, petitioner entered into various transactions with third parties which included, among others, providing electrical and mechanical services for electrical transmission and distribution systems, air conditioning and ventilation systems, telephone and communication systems and other allied services.
>
> In making payments to petitioner, the third parties would withhold a portion of the contract price and remit the amount to BIR in accordance with Revenue Regulations No. 2-98, as amended, otherwise known as the Withholding Tax Regulations.
>
> On April 13, 2007, Sumisetsu filed its Corporate Annual Income Tax Return for calendar year ended December 31, 2006 (Annual Income Tax Return).
>
> On July 17, 2007, Sumisetsu filed a request for the issuance of tax credit certificate with the BIR. Respondent,

however, failed to act on the said request thus, petitioner filed this instant Petition for Review on April 13, 2009.

In his Answer filed on May 25, 2009, respondent averred the following Special and Affirmative Defenses:

> "7. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau.
>
> 8. The amount of P20,102,230.33 being claimed by petitioner as alleged excess and/or unutilized creditable withholding taxes for the year 2006 was not properly documented.
>
> 9. Petitioner should fully comply with the provisions stated in Revenue Regulations 6-86 and CIR vs. PERF Realty Corp., G.R. No. 163345 dated July 4, 2008, which states that:
>
> 'The CTA, citing Section 10 of Revenue Regulations 6-85 and Citibank, N.A. v. Court of Appeals, determined the requisites for a claim for refund, thus:
>
> 1) That the claim for refund was filed within the two (2) year period as prescribed under Section 230 of the National Internal Revenue Code;
>
> 2) That the income upon which the taxes were withheld was included in the return of the recipient;
>
> 3) That the fact of withholding is established by a copy of a statement (BIR Form 1743.1) duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom.
>
> xxx xxx xxx.'

> 10. 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.
>
> 11. 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*)."

On the other hand, petitioner filed its Reply on June 11, 2009, with the following counter-arguments:

> "I. THE BUREAU OF INTERNAL REVENUE CANNOT FEIGN IGNORANCE OVER THE ALLEGATIONS IN THE PETITION AS THESE REFER TO FACTS BORNE BY THE RECORDS OF THE SAID OFFICE.
>
> II. THE BUREAU OF INTERNAL REVENUE WAS GIVEN AMPLE OPPORTUNITY TO CONDUCT AN INVESTIGATION OF SUMISETSU'S CLAIM FOR TAX CREDIT.
>
> III. SUMISETSU HAS FULLY COMPLIED WITH THE REQUIREMENTS TO CLAIM FOR TAX CREDIT."

During trial, petitioner presented testimonial and documentary evidence to prove its case. On June 6, 2011, upon admission of respondent's documentary evidence, this Court ordered the parties to file their respective memorandum within thirty (30) days from receipt of the said resolution.

On July 13, 2011, the case was submitted for decision, taking into consideration petitioner's Memorandum filed on July 8, 2011 and respondent's Memorandum filed on July 11, 2011.

The Ruling of the Court in Division

On October 19, 2011, the Court in Division promulgated a Decision denying petitioner's Petition for Review by ruling that:

> **WHEREFORE,** in view of the foregoing, petitioner's claim for issuance of tax credit certificate for its alleged excess/unutilized creditable withholding tax in the amount of P20,102,230.33 is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**[4]

On November 24, 2011, petitioner filed an "**OMNIBUS MOTION (1. For Reconsideration of the Decision dated 19 October 2011; and (2. To Admit Into Evidence and Consider for Purposes of Resolving this Motion the Supplemental Affidavit of Ms. Cecilia S. Magalona)**." On January 16, 2012, the Court in Division issued a Resolution denying petitioner's claim, the dispositive portion is as follows:

> **WHEREFORE,** in view of the foregoing, petitioner's **OMNIBUS MOTION (1. For Reconsideration of the Decision dated 19 October 2011; and (2. To Admit Into Evidence and Consider for Purposes of Resolving this Motion the Supplemental Affidavit of Ms. Cecilia S. Magalona)** is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**[5]

The Issues

Hence, the present Petition for Review where petitioner proffers the following grounds:

I.

WHETHER THE SECOND DIVISION ERRED IN DENYING SUMISETSU'S CLAIM ON THE GROUND OF ITS PURPORTED VIOLATION OF THE "IRREVOCABILITY RULE" UNDER SECTION 76 OF THE NIRC;

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[4] *Ibid.*, p. 41.
[5] *Ibid.*, p. 48.

A.

UNDER THE BASIC PRINCIPLE OF *SOLUTIO INDEBITI*, THE STATE SHOULD NOT BE ALLOWED TO UNJUSTLY ENRICH ITSELF AT THE EXPENSE OF THE TAXPAYER; and

B.

SUMISETSU HAS COMPILED WITH ALL THE LEGAL REQUIREMENTS FOR THE ISSUANCE OF A TAX CREDIT CERTIFICATE FOR EXCESS AND/OR UNUTILIZED CREDITABLE WITHHOLDING TAXES.[6]

Petitioner's Arguments

Petitioner argues in the following manner: 1) that although it carried over the amount of P37,956,993.00, nevertheless this was unutilized for it incurred a net loss on the subsequent taxable quarter and that it initially opted "To be issued a Tax Credit Certificate"; thus, it should not be precluded from claiming the excess creditable withholding taxes; 2) that the state should not be allowed to unjustly enrich itself at the expense of the taxpayer under the basic principle of *solution indebiti* by withholding the tax payment made due to the "irrevocability clause" pursuant to Section 76 of the 1997 NIRC, as amended; and 3) that it should be allowed to be issued a tax credit certificate for it complied with all the requisites for the issuance of a tax credit certificate pursuant to Sections 204(C) and 229 of the 1997 NIRC, as amended.

On March 5, 2012, respondent was required to comment on petitioner's Petition for Review.

On March 27, 2012, respondent filed her "Comment," to the Petition for Review stating the following: that petitioner may not amend the option indicated in the quarterly income tax return from the option to "be carried over" to "be issued a tax credit certificate"; and that the state was not unjustly enriched by the decision of this Honorable Court.

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[6] *Ibid.*, pp. 5-23.

On April 18, 2012, both parties were required to submit their respective Memoranda within thirty (30) days from receipt of this Resolution. On May 25, 2012, petitioner filed its Memorandum, while respondent, through a "Manifestation,"[7] filed on April 27, 2012, opted to adopt her arguments in her "Comment," as her Memorandum.

The Ruling of the Court En Banc

The Court *En Banc* finds the Petition for Review bereft of merit.

In the Decision dated October 19, 2011, the Court in Division unanimously ruled as follows:

> "The petition has no merit.
>
> Pertinent to the resolution of petitioner's claim are Section 76 in relation to Sections 204 (C) and 229 of the NIRC of 1997, which are all quoted hereunder for easy reference, to wit:
>
> > "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

[7]Ibid., p. 61.

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."

xxx xxx xxx

"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."

xxx xxx xxx

"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 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."

Based on Section 76 of the NIRC of 1997, as amended, the corporate taxpayer's excess tax credits or overpaid income tax in a given taxable year may either be refunded (either in the form of cash or tax credit certificate) or carried-over/applied to the succeeding taxable quarters of the succeeding taxable years. However, once the option to carry-over has been made, the same becomes irrevocable for that taxable period.

A perusal of petitioner's Annual Income Tax Return for taxable year 2006 shows that the excess tax credits as of December 31, 2006 in the amount of P37,956,993.40[8] which petitioner marked as "To be issued a Tax Credit Certificate"[9] consisted of the balance of the prior year's excess credits in the amount of P17,854,763.40 and creditable taxes withheld during the year in the amount of P20,102,230.00,[10] as shown below:

Aggregate Income Tax Due	P11,183,901.60
Less: Prior Year's Excess Credits	29,038,665.00
Balance of Prior Year's Excess Credits	P17,854,763.40
Add: Creditable Taxes Withheld	

[8] Exhibit "A-3."
[9] Exhibit "A -1-C."
[10] Exhibit "A-2."

During the Year	20,102,230.00
Excess Tax Credits	**P37,956,993.40**

Nevertheless, despite having chosen to be issued a tax credit certificate, a perusal of the records shows that in its Quarterly Income Tax Return for the first quarter of the taxable year 2007,[11] petitioner carried over the amount of P37,956,993.00 which includes the amount claimed for refund of P20,102,230.33. A review of petitioner's Quarterly Income Tax Return for the first taxable quarter of 2007 revealed that petitioner incurred a loss, thereby leaving the tax credits carried over from the previous years unutilized. Notwithstanding this, a perusal of petitioner's succeeding quarterly income tax returns, as well as its final adjustment return for the year 2007 showed that petitioner did not carry over the claimed amount of P20,102,230.33.

In light of the foregoing, petitioner's claim for issuance of tax credit certificate cannot be granted pursuant to the "irrevocability rule" under Section 76 of the NIRC of 1997, as amended.

No less than the Supreme Court made this explanation about the irrevocability rule:[12]

> The Court categorically declared in Philam (*Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, G.R. Nos. 156637 and 162004, December 14, 2005, 477 SCRA 761*) that: "**Section 76 remains clear and unequivocal. Once the carry-over option is taken, actually or constructively, it becomes irrevocable**." It mentioned no exception or qualification to the *irrevocability rule*.
>
> 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,

[11] Exhibit "CC-1."
[12] Rollo, p. 40, citing Commissioner of Internal Revenue vs. Bank of Philippine Islands, G.R. No. 178490, July 7, 2009.

> 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.' (Underscoring supplied)

> Well-settled is the rule that refunds are in the nature of tax exemptions and as such they are regarded as in derogation of sovereign authority and to be construed in *strictissimi juris* against the person or entity claiming it.[13]

Subsequently, on January 16, 2012, the Court in Division issued a Resolution finding no merit in the OMNIBUS MOTION (1. For Reconsideration of the Decision dated 19 October 2011; and (2. To Admit Into Evidence and Consider for Purposes of Resolving this Motion the Supplemental Affidavit of Ms. Cecilia S. Magalona), as follows:

> To reiterate, petitioner's claim for issuance of tax credit certificate cannot be granted pursuant to the "irrevocability rule" under Section 76 of the 1997 NIRC, as amended. It is already settled that the option to carry-over is irrevocable[14] and the said option may be taken either actually or constructively.[15]

> In the assailed *Decision*, this Court had thoroughly explained and discussed that despite having chosen to be issued a tax credit certificate, petitioner carried over the amount of P37,956,993.00, which includes the amount claimed for refund of P20,102,230.33, in its Quarterly Income Tax Return for first quarter of 2007. However, the same remained unutilized since petitioner reported a loss in its Quarterly Income Tax Return for the first quarter of 2007.

> Under Section 76, petitioner is bound by the irrevocability rule and is barred from claiming the issuance

[13] Rollo, p. 40, citing Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc., 309 SCRA 87; Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd., 244 SCRA 332; and Commissioner of Customs vs. Court of Tax Appeals, 328 SCRA 822.

[14] Rollo, p. 47, citing Belle Corporation vs. Commissioner of Internal Revenue, G. R. No. 181298, January 10, 2011.

[15] Rollo, p. 47, citing Systra Philippines, Inc. vs. Commissioner of Internal Rvenue, G. R. No. 176290, September 21, 2007.

of tax credit certificate of its unutilized creditable withholding tax in the amount of P20,102,230.33.

Moreover, this Court cannot accept the belated explanation of petitioner that it is not really its intention to carry over its excess creditable withholding in its Quarterly Income Tax Return for the first quarter of 2007, the same being a mere oversight for the fact remains that petitioner carried over the claimed amount and this makes the "irrevocability rule" operative.

Likewise, this Court cannot admit the Supplemental Affidavit of Ms. Cecilia S. Magalona[16] as part of petitioner's evidence. At this point, the same is considered as forgotten evidence. Settled is the rule that forgotten evidence, not presented during the trial nor formally offered, is not newly found evidence that merits a new trial. To allow a party to submit such evidence, which could have been offered during trial with the exercise of due diligence, goes against the orderly administration of justice.[17]

Lastly, this Court cannot subscribe to petitioner's argument that there is *solution indebiti* in the present case for, notwithstanding petitioner's failure to immediately utilize its excess creditable withholding tax for the year 2006, the same can still be carried-over until the amount is fully utilized. Thus, there is no unjust enrichment on the part of the government."

After a careful consideration of the factual milieu in the case at bench, the Court sitting *En Banc* finds no merit in petitioner's claim.

It is a time and honored principle that Section 76 of the 1997 NIRC remains clear and unequivocal. Once the carry-over option is taken, actually or constructively, it becomes irrevocable. This principle has been affirmed by the Supreme Court in the case of *United International Pictures AB vs. Commissioner of Internal Revenue,*[18] which held that once the carry-over option is taken, actually or constructively, it becomes irrevocable for the subsequent taxable years, to wit:

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[16] Rollo, p. 47, citing Annex "A" of the instant Omnibus Motion.
[17] Rollo, p. 48, citing Atlas Consolidated Mining & Development Corporation vs. Commissioner of Internal Revenue, G.R. No. 159490, February 18, 2008.
[18] G.R. No. 168331, October 11, 2012.

Section 76 of the NIRC of 1997 states –

> **Section 76.** ***Final Adjustment Return.*** – Every corporation liable to pay 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 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 therefore**. (Emphasis supplied)

From the aforequoted provision, it is clear that once a corporation exercises the option to carry-over, 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.

To avoid confusion, this Court has properly explained the phrase *"for that taxable period"* in *Commissioner of Internal*

Revenue v. Bank of the Philippine Islands.[19] In said case, the Court held that the phrase merely identifies the excess income tax, subject of the option, by referring to the "***taxable period when it was acquired by the taxpayer.***" Thus:

> x x x **Section 76 remains clear and unequivocal. Once the carry-over option is taken, actually or constructively, it becomes irrevocable.** It mentioned no exception or qualification to the *irrevocability rule.*
>
> **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 therefore." **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 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

[19] G.R. No. 178490, July 7, 2009, 592 SCRA 219.

> refund of the very same 1998 excess income tax credit.
>
> The Court of Appeals mistakenly understood the phrase "for that taxable period" as a prescriptive period for the *irrevocability rule* x x x. 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. The interpretation of the Court of Appeals only delays the flip-flopping to the end of each succeeding taxable period.

Plainly, petitioner's claim for refund for 1998 should be denied as its option to carry over has precluded it from claiming the refund of the excess 1998 income tax payment."

Furthermore, the claim of unjust enrichment by petitioner has no basis for the claimed amount will not be forfeited in the government's favor. Petitioner can claim the said amount as tax credits in the succeeding taxable years. This is held by the Supreme Court in the case of *Philam Asset Management, Inc., vs. Commissioner of Internal Revenue.*[20]

In sum, the Court *En Banc* finds no cogent reason to rule the contrary.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the Decision and the Resolution dated October 19, 2011 and January 16, 2012, respectively, are hereby **AFFIRMED** in toto.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

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[20] Philam Asset Management, Inc., vs. Commissioner of Internal Revenue, G.R. Nos. 156637/162004, December 14, 2005,

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

With Dissenting Opinion
ESPERANZA R. FABON-VICTORINO
Associate Justice

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 Section 13 of Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

SUMISETSU PHILIPPINES, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE ,
Respondent.

C.T.A. EB No. 870
(C.T.A. CASE NO. 7907)

Members:

CASTAÑEDA, JR., *Acting P.J.*
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, *JJ.*

Promulgated:
MAR 2 2 2013

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DISSENTING OPINION

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

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 – ground for the denial of the instant Petition for Review.

With due respect, it is with regret that I cannot join the majority's position. It is submitted 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]

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

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/tax credit 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. 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

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

the two alternative remedies for the choice of one precludes the other.

In the case at bar, petitioner unequivocally signified in its Annual ITR for 2006 its intention "To be issued a Tax Credit Certificate" for its excess creditable tax withheld for the said calendar year in the total amount of Php 37,956,993.40. Having exercised the option "To be issued a Tax Credit Certificate, petitioner, even if it wanted to, could no longer opt to carry over the subject amount to the succeeding quarters or years simply because it is already precluded from doing so by law and jurisprudence.

While it may be true that petitioner's Quarterly ITR for the first quarter of taxable year 2007 reflects the excess/unutilized creditable withholding tax of P37,956,993.00 which includes the amount claimed for refund of P20,102,230.33, the same was not utilized in the succeeding taxable years.

The Supreme Court, articulated the principle of irrevocability of any of the two options through Justice Antonio T. Carpio, in this fashion:

> **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 elucidated 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:

> 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 <u>***the taxpayer's***</u>

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

> **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 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-flopping 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.

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 any of the two options is irrevocable and this doctrine is binding upon all lower courts.

It is also submitted that in all the subsequent cases brought before the Final Arbiter, to wit, Belle Corporation v.

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

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.

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.[6]

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 31, states and I quote:

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

Respectfully submitted.

ESPERANZA R. FABON-VICTORINO
Associate Justice

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