REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

DOOSAN HEAVY INDUSTRIES & CONSTRUCTION CO. LTD. (PHILIPPINE BRANCH),
Petitioner,

CTA Case No. 8462

- versus-

Members:

Castañeda, Jr., *Chairperson*
Casanova, and
Cotangco-Manalastas, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 23 2013
4:10 p.m.

x- x

DECISION

COTANGCO-MANALASTAS, *J.:*

STATEMENT OF THE CASE

This case is a claim for refund or issuance of tax credit certificate in the amount of ₱38,380,606.00, allegedly representing petitioner's excess creditable withholding taxes as of December 31, 2009.

STATEMENT OF FACTS

Petitioner Doosan Heavy Industries & Construction Co. Ltd. (Philippine Branch) is a foreign company organized and existing under the laws of the Republic of Korea. Petitioner established its Philippine Branch and obtained a license to transact business in the Philippines from the Securities and Exchange Commission on April 4, 2008. The Philippine Branch started commercial operation in April 2008 and has its principal office at KEPCO Power Plant, Colon, City of Naga, Province of Cebu.[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. She holds office at the BIR National Office Building, Diliman, Quezon City.

On April 14, 2010, petitioner filed with the BIR its Annual Income Tax Return (ITR) for calendar year (CY) 2009, showing a net loss of ₱387,622,107.00 and an overpayment of income tax of ₱38,380,606.00. Petitioner opted to be issued a tax credit certificate by marking the appropriate box in the ITR.[2]

On January 21, 2011, petitioner filed with the Revenue District Office (RDO) No. 83 an administrative application for the issuance of a tax credit certificate in the amount of ₱38,380,606.37, representing its excess creditable withholding taxes as of December 31, 2009.[3]

On April 12, 2012, petitioner filed the instant Petition for Review before this Court.

In her Answer[4], respondent interposed the following special and affirmative defenses:

> "3. Petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected.
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> 4. It is explicitly stated under Section 76 of the NIRC of 1997, as amended, that once a taxpayer chooses the option of carry-over, it shall be irrevocable for that taxable period and no application for a tax refund or tax credit certificate shall then be allowed **(Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, G.R. Nos. 156637/162004, December 14, 2005)**. Petitioner, therefore, must proved [*sic*] that it did not carry-over its 2008 [*sic*] alleged unutilized creditable withholding taxes to

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[1] Par. 1, Facts Admitted, Joint Stipulation of Facts and Issues, docket, pp. 123-124.
[2] Exhibit "A".
[3] Exhibit "M".
[4] Docket, pp. 99-100.

the succeeding taxable quarters/years, otherwise, petitioner is precluded from claiming a cash refund or for issuance of tax credit certificate [of] its excess tax credit for taxable year 2008 [*sic*].

5. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable.

6. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to adduce sufficient proof is fatal to the action for tax refund/credit.

7. It is incumbent upon the petitioner to show that it has complied with the provisions of Section 76 in relation to Sections 204 and 229 of the 1997 Tax Code, as amended, including Revenue Regulations No. 2-98, as amended.

8. Claims for refund are construed strictly against the claimant for the same partakes the nature of exemption from taxation **(Commissioner of Internal Revenue vs. Ledesma, G.R. No. L-13509, January 30, 1970, 31 SCRA 95)** and as such, they are looked upon with disfavor **(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121).**"

During trial, petitioner presented and formally offered its pieces of testimonial and documentary evidence. On the other hand, respondent, through counsel, manifested that there is no report on the investigation with regard to petitioner's administrative claim and that she is submitting the case for decision.[5] As a consequence, counsels for the parties were given thirty (30) days within which to file their respective Memorandum.

The case was submitted for decision on April 3, 2013, considering petitioner's Memorandum[6] filed on March 4, 2013 and the report dated March 26, 2013 of the Court's Records Division that no Memorandum has been filed by respondent.[7]

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[5] Docket, p. 258.
[6] Docket, pp. 259-281.
[7] Docket, p. 283.

STATEMENT OF ISSUES

The following are the issues[8] submitted by the parties for this Court's resolution:

> "1. Whether or not the Petitioner has an unutilized/excess creditable withholding tax amounting to Thirty Eight Million Three Hundred Eighty Thousand and Six Hundred Six Pesos (P38,380,606.00) for the CY 2009?
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> 2. Whether or not the income from which the taxes were withheld was included as part of the gross income in the Petitioner's income tax returns?
>
> 3. Whether or not the Petitioner's claim for refund of the unutilized/excess creditable withholding tax is substantiated by documentary evidence?"

The enumerated issues can be summarized as follows:

"Whether or not petitioner is entitled to the refund or issuance of tax credit certificate in the amount of ₱38,380,606.00 representing its purported excess creditable withholding tax for CY 2009."

DISCUSSION/RULING

Section 76 of the National Internal Revenue Code (NIRC) of 1997, as amended, 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:
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> (A) Pay the balance of tax still due; or

[8] Docket, p. 125.

> (B) Carry-over the excess credit; or
> (C) Be credited or refunded with the excess amount paid, as the case may be.
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> 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 tax credit certificate shall be allowed therefor."

Pursuant to above-quoted provision, 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 years. The carry-over option, however, once taken is irrevocable for that taxable period and no application for a tax refund or issuance of a tax credit certificate shall then be allowed.[9]

The Supreme Court in the case of *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*[10] explained the two options of a corporate taxpayer whose quarterly income tax payments exceed its tax liability, 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 [final adjustment return] of a given taxable year, against the estimated quarterly income tax liabilities of the succeeding taxable year."

In its Annual ITR[11] for CY 2009 filed on April 14, 2010, petitioner declared no income tax liability, either at the regular

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[9] *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*, G.R. Nos. 156637 and 162004, December 14, 2005.
[10] *Ibid.*
[11] Exhibit "A".

rate of thirty percent (30%) or Minimum Corporate Income Tax rate of two percent (2%), as it incurred a net loss in the amount of ₱387,622,107.00 and a gross loss of ₱345,628,592.00. Thus, the creditable tax withheld for the first three quarters in the amount of ₱28,987,793.00 and the creditable tax withheld for the fourth quarter in the amount of ₱9,392,813.00, in the total amount of ₱38,380,606.00, remained unutilized as of December 31, 2009, as shown below:

Sales/Revenues/Receipts/Fees	₱ 1,512,027,856.00
Less: Cost of Sales/Services	1,857,656,448.00
Gross Income from Operation	₱ (345,628,592.00)
Add: Non-Operating & Other Income	6,387,978.00
Total Gross Income	₱ (339,240,614.00)
Less: Deductions	48,381,493.00
Taxable Income	₱ (387,622,107.00)
Tax Rate	30%
Income Tax	**₱ 0.00**
Less: Tax Credits/Payments	
Creditable Tax Withheld for the First Three Quarters	₱ 28,987,793.00
Creditable Tax Withheld for the Fourth Quarter	9,392,813.00
Total Tax Credits/Payments	**₱ 38,380,606.00**
Tax Payable/(Overpayment)	**₱ (38,380,606.00)**

Petitioner opted to apply for a tax credit certificate by marking the appropriate box in the Annual ITR.[12] Verification of the subsequent Annual[13] and Quarterly[14] Income Tax Returns for CY 2010 disclosed that the excess/unapplied creditable withholding tax (CWT) of ₱38,380,606.00 was not carried over. Therefore, the creditable taxes withheld in the amount of ₱38,380,606.00 may be a proper subject of a claim for refund or issuance of tax credit certificate pursuant to Section 76 of the NIRC of 1997, as amended.

In *Commissioner of Internal Revenue vs. Far East Bank and Trust Company (now Bank of the Philippine Islands)*[15], the Supreme Court enumerated the requisites for a tax refund or issuance of tax credit certificate for excess creditable withholding tax, to wit: /

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[12] Exhibits "A" and "A-7".
[13] Exhibits "E", "E-5".
[14] Exhibits "F", "F-4", "G", "G-4" and "H".
[15] G.R. No. 173854, March 15, 2010.

1. the claim must be filed with the CIR within the two-year period from the date of payment of the tax;

2. it must be shown on the return that the income received was declared as part of the gross income; and

3. the fact of withholding must be established by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of the tax withheld.

Petitioner complied with the first requisite. The said requirement is based on Sections 204(C) and 229 of the NIRC of 1997, as amended, which provide:

> "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."
>
> "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."

In the case of *ACCRA Investments Corporation vs. The Honorable Court of Appeals, et al.* [16], the Supreme Court said that the reckoning of the two-year prescriptive period for the filing of a claim for refund or tax credit of excess income tax paid/withheld provided in the above-quoted provisions should commence from the date of filing of the final adjustment return.

Petitioner filed its Annual ITR for CY 2009 on April 14, 2010.[17] Counting two years from the said date, petitioner had until April 16, 2012[18] to file its claim for refund or issuance of tax credit certificate both in the administrative and judicial levels. Since petitioner's administrative and judicial claims for refund were filed on January 21, 2011[19] and April 12, 2012, respectively, the filing of the said claims for refund or issuance of tax credit certificate were made on time.

The Court will now address the second requisite.

Records show that the claimed CWT in the amount of ₱38,380,606.37 were withheld on income payments in the amount of ₱1,919,030,319.06 received by petitioner in the year 2009 from its contract[20] with Kepco SPC Power Corporation in the construction of Cebu Coal Fired Power Plant which is the very same amount reflected in petitioner's Summary of Billings[21] and Summary of Collections[22]. However, out of the total collections of ₱1,919,030,319.06, only the amount of ₱1,512,027,856.00 was declared as Contract Revenues in petitioner's 2009 Annual ITR[23] and Statement of

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[16] G.R. No. 96322, December 20, 1991.
[17] Exhibit "A".
[18] April 14, 2012 was a Saturday.
[19] Exhibit "M".
[20] Exhibit "U".
[21] Exhibits "P" and "P-4" to "P-17" (Invoices).
[22] Exhibits "Q" and "R" to "R-12" (Official Receipts).
[23] Exhibit "A-3".

Comprehensive Income[24]. This is due to the fact that petitioner uses the Percentage of Completion Method in determining the appropriate amount of revenues to be recognized in a given period which is in accordance with Section 48[25] of the NIRC of 1997, as amended. Furthermore, petitioner, in determining the stage of completion, made reference to the weight of the project at the end of each reporting period as a percentage of total estimated weight (per engineering plan) of the project.[26]

Consequently, the Contract Revenues of ₱1,512,027,856.00 reflected in petitioner's 2009 Annual ITR was arrived at by multiplying the Revised Contract Price of ₱3,545,606,981.00, net of VAT, with the percentage of completion rate of 54.235% as of December 31, 2009, less the Realized Contract Revenue in CY 2008, as shown below:

Contract Price (Inclusive of VAT)[27]	₱ 3,968,988,800.00
Less: VAT	425,248,800.00
Net of VAT	3,543,740,000.00
Add: Change Order[28]	1,866,981.00
Revised Contract Price	3,545,606,981.00
Certified Progress Rate as of December 31, 2009[29]	54.235%
Total Realized Contract Revenue to Date	1,922,959,946.14
Realized Contract Revenue in CY 2008[30]	410,932,090.00
Realized Contract Revenue in CY 2009	**₱1,512,027,856.14**

The remaining amount of ₱407,002,463.06[31] was recorded as liability under the account "Unearned Contract Revenues".[32] /̸

[24] Exhibit "A-12-1".
[25] "SEC. 48. Accounting for Long-term Contracts. — Income from long-term contracts shall be reported for tax purposes in the manner as provided in this Section. As used herein, the term 'long-terms contracts' means building, installation or construction contracts covering a period in excess of one (1) year. Persons whose gross income is derived in whole or in part from such contracts shall report such income upon the basis of percentage of completion. The return should be accompanied by a return certificate of architects or engineers showing the percentage of completion during the taxable year of the entire work performed under contract. There should be deducted from such gross income all expenditures made during the taxable year on account of the contract, account being taken of the material and supplies on hand at the beginning and end of the taxable period for use in connection with the work under the contract but not yet so applied. If upon completion of a contract, it is found that the taxable net income arising thereunder has not been clearly reflected for any year or years, the Commissioner may permit or require an amended return."
[26] Par. 2.7 Revenue and Expense Recognition, Notes to Financial Statements, December 31, 2009, attached to Exhibit "A".
[27] Exhibit "U-2", Appendix 1-1, "Price Schedule".
[28] Exhibits "V", "V-2".
[29] Exhibits "M-7" to "M-7-1", Progress Rate for Construction Work.
[30] Exhibit "J".
[31] (₱1,919,030,319.06 less ₱1,512,027,856.00).
[32] Included in the total amount of ₱889,092,851.00, Exhibit "A-11-1".

The Independent CPA confirmed the computations and findings as correct and in order, as stated in her report in the following manner:

> "2.1 I found that the income reported for the year is computed based on the percentage of completion at the end of the calendar year which is in accordance with Section 48 of the Tax Code requiring the reporting of income based on percentage of completion for long term contracts.
>
> The Contract Revenue for CY 2009 is correct and computed based on the Contract Price under the Construction Contract and Change Order (Exhibits U, U-1, U-2, V and V-2) multiplied by the agreed percentage of completion rate of 54.235% (Exhibits M-7 and M-7-1) at December 31, 2009 less the amount accomplished in CY 2008.
>
> 2.2 As shown in Findings and Observations 1 of this report, I noted that the income payments on billings collected in CY 2009 which was subjected to creditable withholding tax amounted to ₱1,919,030,319.06. Portion of the billings was recorded as Contract Revenues (computed based on the percentage of completion) in the amount of ₱1,512,027,855.74 and the balance of ₱407,002,463.32 is taken up as Unearned Contract Revenues.
>
> 2.3 The cumulative balance of the Unearned Contract Revenue at December 31, 2009 amounting to P889,092,851 at December 31, 2009 [sic] (Exhibits A-11 and A-11-1) was recognized as part of the income realized in CY 2010 amounting to P1,444,788,657 (Exhibit E and E-4)."[33]

Hence, petitioner has sufficiently proven that the income payment from which the creditable withholding tax of ₱38,380,606.00 was withheld was declared in the Annual ITR for CYs 2009 and 2010.

Petitioner likewise satisfied the third requisite. Petitioner presented Certificates of Creditable Tax Withheld at Source (BIR Form No. 2307)[34] duly issued by KEPCO SPC Power Corporation. In addition, petitioner presented the two reports of the Court-commissioned Independent Certified Public Accountant (CPA) dated September 15, 2012[35] and October 9,

[33] Exhibit "Y", Independent CPA Report, pp. 7-8.
[34] Exhibits "A-8" to "A-10", "B-4" to "B-7", "C-4" to "C-6", and "D-4" to "D-6".
[35] Exhibit "Y".

2012[36]. The Independent CPA confirmed that the total creditable taxes withheld at source were properly supported by certificates issued by the customer of petitioner showing CWT in the total amount of ₱38,380,606.37[37], broken down as follows:

EXHIBIT	PAYOR	PERIOD	GROSS INCOME	CWT
B-4	KEPCO SPC Power Corporation	12-01-08 to 12-31-08	₱ 46,068,619.50	₱ 921,372.39
B-5	KEPCO SPC Power Corporation	01-01-09 to 01-31-09	46,068,619.64	921,372.39
B-6	KEPCO SPC Power Corporation	02-01-09 to 02-28-09	49,612,359.82	992,247.20
B-7	KEPCO SPC Power Corporation	03-01-09 to 03-31-09	131,118,380.36	2,622,367.61
C-4	KEPCO SPC Power Corporation	04-01-09 to 04-30-09	99,224,719.64	1,984,494.39
C-5	KEPCO SPC Power Corporation	05-01-09 to 05-31-09	99,224,719.64	1,984,494.39
C-6	KEPCO SPC Power Corporation	06-01-09 to 06-30-09	99,224,719.64	1,984,494.39
D-4	KEPCO SPC Power Corporation	07-01-09 to 07-31-09	308,305,380.36	6,166,107.61
D-5	KEPCO SPC Power Corporation	08-01-09 to 08-31-09	301,217,900.00	6,024,358.00
D-6	KEPCO SPC Power Corporation	09-01-09 to 09-30-09	269,324,240.18	5,386,484.80
A-8	KEPCO SPC Power Corporation	10-01-09 to 10-31-09	223,255,619.64	4,465,112.39
A-9	KEPCO SPC Power Corporation	11-01-09 to 11-30-19	152,380,819.64	3,047,616.39
A-10	KEPCO SPC Power Corporation	12-01-09 to 12-31-09	94,004,221.00	1,880,084.42
TOTAL			**₱1,919,030,319.06**	**₱38,380,606.37**

In sum, the Court finds the evidence adduced by petitioner to be sufficient to support its claim for refund or issuance of a tax credit certificate in the amount of ₱38,380,606.00 representing unutilized/excess CWT for taxable year 2009.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the full amount of ₱38,380,606.00, representing petitioner's excess creditable withholding taxes as of December 31, 2009.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

[36] Exhibit "BB".
[37] Amount of claim is lower by ₱0.37 due to rounding-off.

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

CAESAR A. CASANOVA
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.

JUANITO C. CASTAÑEDA, JR.
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.

ROMAN G. DEL ROSARIO
Presiding Justice