

**REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY**

FIRST DIVISION

**IMPSA CONSTRUCTION
CORPORATION,**

Petitioner,

- versus -

**COMMISSIONER OF INTERNAL
REVENUE,**

Respondent.

**C.T.A. CASE NOS. 6921
and 7172**

Members:

**ACOSTA, Chairperson
BAUTISTA, and
CASANOVA, JJ.**

Promulgated:

JAN 05 2010 ; 2:47pm

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DECISION

BAUTISTA, J.:

This case is a consolidation of two Petitions for Review, separately filed by petitioner, seeking the refund of alleged excess income tax payment and creditable income taxes withheld for taxable years 2001, 2002, and 2003 in the aggregate amount of P254,725,274.75; broken down as follows:

CTA Case No.	Taxable Year Covered	Amount of Claim	
6921	2001		P 93,341,528.00
7172	2002	P105,132,987.00	
	2003	56,250,759.75	161,383,746.75
		Total	P254,725,274.75



Petitioner IMPSA Construction Corporation is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines, with principal office address at the NPC Compound, San Juan, Kalayaan, Laguna 4015. It is a duly registered taxpayer engaged in the construction business and other allied businesses, including the design, supply, assembly, erection, commissioning, constructing, enlarging, repairing, removing, developing and other related activities, but limited to projects either primarily foreign-funded or registered under the build-rehabilitate-operate-transfer arrangements, pursuant to Republic Act No. 6957, as amended.¹

Respondent Commissioner of Internal Revenue is a public officer duly appointed by the President of the Philippines as head of the Bureau of Internal Revenue (BIR), the government agency officially responsible for the assessment and collection of all national and internal revenue taxes. Respondent is vested with the power and authority to refund any internal revenue tax erroneously or illegally assessed or collected, any penalty collected without authority, or any sum excessively or in any manner wrongfully collected; including excess income tax payments and creditable withholding taxes.

On August 18, 2000, petitioner entered into a Turnkey Contract with CBK Power Company Limited (hereinafter referred to as "CBK") for the construction of power plants located at Caliraya, Botocan, and Kalayaan, Laguna Province.² For services rendered to CBK, petitioner received income payments which were allegedly subjected to creditable withholding tax.

¹ Annexes "A" and "B", Petition for Review; par. 1, "Facts", Joint Stipulation of Facts and Issues for Trial (JSFIT), docket, p. 150

² Par. 2, item 1 captioned "Organization", Notes to Financial Statements, Exhibit "O"



On April 10, 2002, petitioner filed with the BIR its Annual Income Tax Return for taxable year 2001, reflecting no income tax liability as it declared a net loss in the amount of P16,264,545.00. Consequently, petitioner was unable to utilize the reported income tax payment for the first three quarters in the amount of P3,286,262.00 and creditable taxes withheld during the year in the amount of P90,055,266.00, totaling P93,341,528.00, as shown below:

Sales/Revenues/Receipts/Fees	P 5,467,939,353.00
Less: Cost of Sales/Services	5,467,597,240.00
Gross Income from Operation	P 342,113.00
Add: Non-Operating & Other Income	3,974,816.00
Total Gross Income	P 4,316,929.00
Less: Deductions	20,581,474.00
Taxable Income	P (16,264,545.00)
Income Tax Due	P -
Less: Tax Credits/Payments	
Tax Payments for the First Three Quarters	3,286,262.00
Creditable Tax Withheld for the First Three Quarters	33,535,733.00
Creditable Tax Withheld for the Fourth Quarter	56,519,533.00
Total Tax Credits/Payments	93,341,528.00
Tax Overpayment	P (93,341,528.00)

Petitioner opted to carry-over the income tax overpayment of P93,341,528.00 as tax credit to the succeeding year/quarter by putting an "x" mark on the corresponding box in the return.³

In its Annual Income Tax Return for taxable year 2002⁴ filed with the BIR on March 20, 2003, petitioner's total tax credits amounted to P200,621,201.00, representing the sum of the prior year's excess credits (2001) in the amount of P93,341,528.00 and creditable taxes withheld during the year 2002 in the amount of P107,279,673.00. Likewise, petitioner reflected an income tax due of P2,146,686.00, which was offset against the total tax credits of P200,621,201.00, leaving an overpayment of P198,474,515.00; computed as follows:

³ Exhibit "M-9"

⁴ Exhibit "P"

Sales/Revenues/Receipts/Fees	P6,094,078,251.00
Less: Cost of Sales/Services	6,070,834,209.00
Gross Income from Operation	P 23,244,042.00
Add: Non-Operating & Other Income	32,918,128.00
Total Gross Income	P 56,162,170.00
Less: Deductions	49,453,775.00
Taxable Income	P 6,708,395.00
Income Tax Due	P 2,146,686.00
Less: Tax Credits/Payments	
Prior Year's Excess Credits	P 93,341,528.00
Creditable Tax Withheld for the First Three Quarters	79,337,653.00
Creditable Tax Withheld for the Fourth Quarter	27,942,020.00
Total Tax Credits/Payments	P 200,621,201.00
Tax Overpayment	P (198,474,515.00)

Petitioner, as indicated in the return, elected to carry-over the income tax overpayment of P198,474,515.00 to the succeeding year/quarter.⁵

On May 20, 2003, petitioner filed Amended Annual Income Tax Returns for taxable years 2001 and 2002, revising its chosen option from "To be carried over as tax credit next year/quarter" to "To be refunded".⁶ Notwithstanding the marking of the option "To be refunded" in its Amended Annual Income Tax Return for taxable year 2001, petitioner reflected the 2001 excess tax credits/payment of P93,341,528.00 as "Prior Year's Excess Credits" in its Amended Annual Income Tax Return for taxable year 2002.

On August 11, 2003, petitioner filed its second Amended Annual Income Tax Return for taxable year 2002⁷, this time indicating no amount of "Prior Year's Excess Credits"⁸ and declaring a lower refundable amount of P105,132,987.00, as shown below:⁹

⁵ Exhibit "P-9"

⁶ Exhibits "N-9" and "Q-9"

⁷ Exhibit "R"

⁸ Exhibit "R-10"

⁹ Exhibit "R-8"

Sales/Revenues/Receipts/Fees	P6,094,078,251.00
Less: Cost of Sales/Services	6,070,834,209.00
Gross Income from Operation	P 23,244,042.00
Add: Non-Operating & Other Income	32,918,128.00
Total Gross Income	P 56,162,170.00
Less: Deductions	49,453,775.00
Taxable Income	P 6,708,395.00
Income Tax Due	P 2,146,686.00
Less: Tax Credits/Payments	
Prior Year's Excess Credits	
Creditable Tax Withheld for the First Three Quarters	P 79,337,653.00
Creditable Tax Withheld for the Fourth Quarter	27,942,020.00
Total Tax Credits/Payments	P 107,279,673.00
Tax Overpayment	P(105,132,987.00)

On April 2, 2004, petitioner filed its Annual Income Tax Return for taxable year 2003, declaring no income tax liability and unutilized creditable taxes withheld during the year 2003 in the amount of P56,250,759.75, which petitioner opted "To be refunded"¹⁰; detailed as follows:

Sales/Revenues/Receipts/Fees	P1,654,294,127.00
Less: Cost of Sales/Services	2,093,082,271.00
Gross Income from Operation	P(438,788,144.00)
Add: Non-Operating & Other Income	24,331,706.00
Total Gross Income	P(414,456,438.00)
Less: Deductions	2,216,650.00
Taxable Income	P(416,673,088.00)
Income Tax Due	P -
Less: Tax Credits	
Creditable Tax Withheld for the First Three Quarters	P 46,150,415.47
Creditable Tax Withheld for the Fourth Quarter	10,100,344.28
Total Tax Credits/Payments	P 56,250,759.75
Tax Overpayment	P (56,250,759.75)

On April 5, 2004 and July 15, 2004, petitioner filed with the BIR its claims for refund of its excess income taxes paid/withheld for taxable year 2001 in the amount of P93,341,528.00 and for taxable years 2002 and 2003 in the amount of P161,383,746.24.¹¹

¹⁰ Exhibit "WW"

¹¹ Exhibits "S" and "GG"

Due to respondent's inaction on both claims and in order to toll the running of the two-year prescriptive period, petitioner filed two separate Petitions for Review before this Court, namely:

CTA Case No.	Date of Filing of Petition for Review	Taxable Year Covered	Amount of Claim	
6921	April 6, 2004	2001		P 93,341,528.00
7172	March 18, 2005	2002	P105,132,987.00	
		2003	56,250,759.75	161,383,746.75
			Total	P254,725,274.75

On May 19, 2004, respondent filed his Answer in CTA Case No. 6921, raising the following Special and Affirmative Defenses:

"4. Section 76 of the 1997 Tax Code provides that if a corporation exercises the option to carry-over its excess tax credits to the succeeding years, the option becomes irrevocable for the taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed.

Section 76 of the National Internal Revenue Code provides, thus:

xxx

xxx

xxx

5. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue;

6. The amount of P93,341,528.00 being claimed by petitioner as alleged income tax overpayment for the year 2001 is not properly documented;

7. In an action for refund/credit, 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. Petitioner must show that it has complied with the provisions of Sections 204(C) and 229 of the 1997 Tax Code on the prescriptive period for claiming refund/tax credit.

9. 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 as such, they are looked upon with disfavor (**Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211**)."

On May 25, 2005, respondent likewise filed his Answer in CTA Case No. 7172, alleging by way of Special and Affirmative Defenses that:

"4. Petitioner's alleged claim for refund is subject to administrative investigation by the Bureau;

5. Petitioner must prove that it paid the income taxes so alleged;

6. Petitioner must prove that the creditable withholding taxes so alleged were actually withheld and remitted to the BIR;

7. Petitioner must prove that the alleged creditable withholding taxes so remitted to the Bureau are in excess of its total actual income tax due for the taxable years 2002 and 2003;

8. Petitioner must prove that its alleged excess payments for taxable years 2002 and 2003 were not applied against its income tax liabilities in subsequent years;

9. Petitioner must prove that the alleged claim was filed within the two (2) year period prescribed in Section 229 of the Tax Code;

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;

11. Claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation."

On June 3, 2005, petitioner filed a motion for the consolidation of CTA Case No. 7172 with CTA Case No. 6921, considering that these cases involved common questions of law and of facts albeit for different years.¹² The Court granted the said motion in open court, followed by a confirming Resolution dated June 15, 2005.¹³



¹² CTA Case No. 7172, pp. 179-181

¹³ CTA Case No. 7172, p. 184

During the proceedings, petitioner proffered testimonial and documentary evidence. Respondent, on the other hand, waived his right to present evidence since no report was furnished by Revenue District Office (RDO) No. 55.¹⁴

The case was submitted for decision on January 9, 2009, after both parties filed their respective Memorandum.

The sole issue to be resolved by this Court is whether or not petitioner is entitled to a refund of the amount of P254,725,274.75, representing excess income taxes paid/withheld for taxable years 2001, 2002, and 2003.

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

"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*)

A corporation entitled to a tax credit or refund of the excess estimated quarterly income taxes paid/withheld has two options: (1) to carry-over the excess credit or (2) to apply for the issuance of a tax credit certificate or to claim

¹⁴ CTA Case No. 6921, p. 1059

a cash refund. If the option to carry-over the excess credit is exercised, the same shall be irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed.¹⁵

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, by marking the option box provided in the BIR form. These remedies are in the alternative and the choice of one precludes the other.¹⁶

The present claim covers petitioner's excess income taxes paid/withheld for taxable years 2001, 2002, and 2003, in the respective amounts of P93,341,528.00, P105,132,987.00, and P56,250,759.75, or the total amount of P254,725,274.75.

Records show that petitioner originally elected to have both the 2001 and 2002 excess tax credits/payments to be carried over to the succeeding year/quarter.¹⁷ As the option to carry-over under Section 76 of the NIRC of 1997, as amended, is irrevocable, petitioner cannot file a claim for cash refund or for issuance of tax credit certificate corresponding to its unutilized tax credits/payments for taxable years 2001 and 2002, in the respective amounts of P93,341,528.00 and P105,132,987.00.

The operative act which makes the option irrevocable is the mere act of marking the boxes that corresponds to the taxpayer's option as regards the excess amount/credit. It is not necessary that said excess amount/credit is actually applied against the tax due for the succeeding taxable year. As long as the taxpayer had elected to carry-over said amount/credit to the succeeding

¹⁵ *Systra Philippines, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 176290, September 21, 2007

¹⁶ *Philippine Bank of Communications vs. Commissioner of Internal Revenue, et al.*, G.R. No. 112024, January 28, 1999

¹⁷ Exhibits "M-9" and "P-9"



taxable year, that choice is irrevocable for that taxable period.¹⁸ Therefore, the moment petitioner opted to carry-over its excess tax credits/payments for taxable years 2001 and 2002 to the taxable quarters of the succeeding taxable years, such option became irrevocable and petitioner is mandated to carry-over the same to the taxable quarters of the succeeding taxable years until the same is fully utilized or applied against petitioner's succeeding tax liabilities.

Even though petitioner amended its income tax return for taxable years 2001 and 2002, by changing its option to "To be refunded"¹⁹, such amendment to change an option already chosen is not permissible. To hold otherwise will render the irrevocability of the option to carry-over under Section 76 nugatory. Any taxpayer can easily aver mistake or error in its declaration and amend its return not only once but several times. The amendment of returns allowed by Section 6 of the NIRC of 1997 does not extend to changing a taxpayer's chosen option and actual exercise of such option under Section 76 of the same Code. To do so would render Section 76 ineffectual.²⁰

Section 76 of the NIRC of 1997 is clear and unequivocal. Once the carry-over option is taken, actually or constructively, it becomes irrevocable for that taxable period and no application for a tax refund or issuance of tax credit certificate shall then be allowed.²¹

As regards the claimed excess tax credits for taxable year 2003 in the amount of P56,250,759.75, petitioner properly marked the option "To be

¹⁸ Honda Cars Philippines, Inc. vs. Commissioner of Internal Revenue, CA-G.R. SP No. 75365, September 29, 2005

¹⁹ Exhibits "N-9", "Q-9", and "R-9"

²⁰ Subic Bay Distribution, Inc. vs. The Commissioner of Internal Revenue, CTA Case No. 6640, November 3, 2004

²¹ Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, G.R. Nos. 156637 and 162004, December 14, 2005

refunded" in its 2003 Annual Income Tax Return²². However, petitioner failed to prove sufficiently that it did not carry-over the claimed creditable withholding taxes of P56,250,759.75 to the succeeding first, second, and third quarters of 2004, since petitioner merely presented its Annual Income Tax Return for taxable year 2004²³. While there was no amount of "Prior Year's Excess Credits" reflected in petitioner's 2004 Annual Income Tax Return²⁴, this evidence is not enough to conclude that petitioner did not apply the said unutilized creditable withholding taxes against the income tax due for the first three quarters of 2004. Petitioner should have presented as evidence its Quarterly Income Tax Returns for the first, second, and third quarters of 2004 in order for the Court to determine whether petitioner effectively opted to carry-over the 2003 excess creditable withholding taxes to the subsequent taxable quarter/s. If petitioner applied the said unutilized creditable withholding taxes against the income tax due for the first three quarters of taxable year 2004, it would mean that it effectively exercised the option to carry-over the 2003 unutilized creditable withholding taxes to the succeeding taxable year 2004. Accordingly, its claim for refund should be denied, pursuant to Section 76 of the NIRC of 1997, as amended.

The presentation of the Quarterly Income Tax Returns is very important; without which, it cannot be ascertained whether petitioner did not carry-over the 2003 excess/unutilized creditable withholding taxes to the subsequent quarters of 2004. Petitioner may have carried over its 2003 unutilized creditable withholding taxes to its Quarterly Income Tax Returns for 2004, and it may have amended

²² Exhibit "WW-9"

²³ Exhibits "GGG" and "HHH"

²⁴ Exhibit "GGG", line 27A and Exhibit "HHH", line 28A

said returns whereby such unutilized creditable withholding taxes are no longer reflected therein; thus, it follows that its 2004 Annual Income Tax Return will likewise not show any amount of prior year's excess credits. This doubt could have been avoided had petitioner presented the Quarterly Income Tax Returns for 2004.²⁵

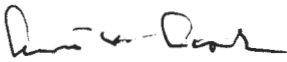
WHEREFORE, premises considered, petitioner's claim for refund is hereby **DENIED** for lack of merit.

SO ORDERED.



LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:



ERNESTO D. ACOSTA
Presiding Justice



CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

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



ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division

²⁵ Millenium Business Services, Inc. vs. The Commissioner of Internal Revenue, CTA Case No. 7441, February 11, 2009