REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**C.T.A. EB NO. 803** **(C.T.A. CASE NO. 7711)**
	Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, JJ.
RHOMBUS ENERGY, INCORPORATED, *Respondent.*	**Promulgated:** OCT 11 2012

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DECISION

PALANCA-ENRIQUEZ, J.:

"Once the taxpayer opts to carry-over the excess income tax against the taxes due for the succeeding taxable years, such option is irrevocable for the whole amount of the excess income tax, thus, prohibiting the taxpayer from applying for a refund for that same excess income tax in the next succeeding taxable years. The unutilized excess tax credits will remain in the taxpayer's account and will be carried over and applied against the taxpayer's income tax liabilities in the succeeding taxable years until fully utilized" *(Commissioner of Internal Revenue vs. Philippine American Life and General Insurance Company, 631 SCRA 551-552).*

THE CASE

This is a Petition for Review filed by the Commissioner of Internal Revenue (hereafter "CIR") under *Section 11 of RA 1125, as amended by Section 18 of RA 9282*, in relation to *Rule 43 of the 1997 Rules of Civil Procedure, as amended*, which seeks to reverse and set aside the Decision dated March 23, 2011 and Resolution dated June 30, 2011 rendered by the First Division of this Court in C.T.A. Case No. 7711, the respective dispositive portions of which read, as follows:

> "**WHEREFORE**, the instant Petition for Review is GRANTED. Consequently, respondent Commissioner of Internal Revenue is hereby DIRECTED TO REFUND or TO ISSUE A TAX CREDIT CERTIFICATE in favor of petitioner Rhombus Energy, Inc. in the amount of Php1,500,653.00, representing the latter's unutilized creditable income taxes withheld for the taxable year 2005.

SO ORDERED."

"**WHEREFORE,** there being no compelling reason to disturb the ruling of the Court in the assailed Decision of March 23, 2011, the Motion for Reconsideration dated April 12, 2011, filed by respondent is hereby **DENIED**, for lack of merit.

SO ORDERED."

THE PARTIES

Petitioner CIR is the government officer vested with legal authority to refund overpaid, as well as erroneously or illegally collected internal revenue taxes, with office address at the Bureau of Internal Revenue ("BIR"), National Office Bldg., BIR Road, Diliman, Quezon City.

Respondent Rhombus Energy, Inc., on the other hand, is a corporation duly organized and existing under the laws of the Republic of the Philippines, with Securities and Exchange Commission Registration No. A199807793, and principal office at Suite 208, 2nd Floor, Manila Bank Corporation Condominium Building, 6772 Ayala Avenue, Makati City.

THE FACTS

The facts, as culled from the records, are, as follows:

Records show that from October 1998 to July 2007, respondent was registered with and was under the jurisdiction of Revenue Region No. 8, Revenue District Office ("RDO") No. 50 (South Makati) of the BIR with Taxpayer Identification No. 005-650-790-000. However, due to respondent's change of address from Suite 1402, BDO Plaza, 8737 Paseo de Roxas, Salcedo Village, Makati City to Suite 208, 2nd Floor, the Manila Bank Corporation Condominium Building, 6772 Ayala Avenue, Makati City, respondent filed an application for change of home RDO.

Thus, on July 18, 2007, respondent was transferred to the jurisdiction of RDO No. 47, with Certificate of Registration No. OCN 9RC0000211342.

In the meantime, on April 17, 2006, respondent filed its Annual Income Tax Return ("ITR") for taxable year 2005, detailed, as follows:

Sales/Revenues/Receipts/Fees		P59,551,116.00
Less: Cost of Sales		22,351,923.00
Gross Income from Operations		37,199,193.00
Add: Non-Operating and Other Income		209,320,181.00
Gross Income		P246,519,374.00
Less: Deductions		144,421,350.00
Taxable Income		P102,098,024.00
Income Tax		33,181,858.00
Less: Prior Year's Excess Credits	P0.00	
Tax Payments for the First 3 Quarters	6,159,215.00	
Creditable Tax Withheld for the 1st 3		

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Quarters	28,523,296.00	
Total Tax Credits/Payments		P34,682,511.00
Tax Payable/(Overpayment)		**P1,500,653.00**

In said Annual ITR for taxable year 2005, respondent indicated that its excess creditable withholding tax ("CWT") for the year 2005 was "To be refunded".

On May 29, 2006, respondent filed its Quarterly Income Tax Return for the first quarter of taxable year 2006 showing prior year's excess credits of P1,500,653.00.

On August 25, 2006, respondent filed its Quarterly Income Tax Return for the second quarter of taxable year 2006 showing prior year's excess credits of P1,500,653.00.

On November 27, 2006, respondent filed its Quarterly Income Tax Return for the third quarter of taxable year 2006 showing prior year's excess credits of P1,500,653.00.

On December 29, 2006, respondent filed with the Revenue Region No. 8 an administrative claim for refund of its alleged excess/unutilized CWT for the year 2005 in the amount of P1,500,653.00.

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On April 2, 2007, respondent filed its Annual Income Tax Return for taxable year 2006 showing prior year's excess credits of P0.00.

On December 7, 2007, pending petitioner's action on respondent's claim for refund or issuance of a tax credit certificate of its excess/unutilized CWT for the year 2005 and before the lapse of the period for filing an appeal, respondent filed the instant Petition for Review.

In her Answer, by way of special and affirmative defenses, the CIR alleged: assuming without admitting that respondent filed a claim for refund, the same is subject to investigation by the BIR; respondent failed to demonstrate that the tax was erroneously or illegally collected; taxes paid and collected are presumed to have been made in accordance with laws and regulations, hence, not refundable; it is incumbent upon respondent to show that it has complied with the provisions of *Section 204(C), in relation to Section 229 of the Tax Code, as amended*, upon which its claim for refund was premised; in an action for tax refund the burden is upon the taxpayer to prove that he is entitled thereto, and failure to discharge said burden is fatal to the claim; and claims for refund are construed strictly against the claimant, as the same partake of the nature of exemption from taxation.

After trial on the merits, on March 23, 2011, the First Division rendered the assailed Decision granting the Petition for Review.

On April 14, 2011, petitioner CIR filed a "Motion for Reconsideration", which was denied for lack of merit by the First Division in a Resolution dated June 30, 2011.

Not satisfied, petitioner CIR filed the instant Petition for Review raising the following:

ISSUES

I

WHETHER OR NOT RESPONDENT IS ENTITLED TO ITS CLAIM FOR REFUND OF UNUTILIZED CREDITABLE WITHHOLDING TAXES IN THE AMOUNT OF P1,500,653.00, FOR TAXABLE YEAR 2005.

II

WHETHER OR NOT RESPONDENT HAD ALREADY EXERCISED ITS OPTION TO CARRY-OVER ITS CLAIM FOR REFUND OF UNUTILIZED CREDITABLE WITHHOLDING TAXES IN THE AMOUNT OF P1,500,653.00 FOR TAXABLE YEAR

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2005 TO THE SUCCEEDING 1ST, 2ND AND 3RD QUARTERS OF TAXABLE YEAR 2006.

On August 18, 2011, without necessarily giving due course to the petition, we required the respondent to file its comment, not a motion to dismiss, within ten (10) days from notice; afterwhich, the petition shall be deemed submitted for decision, unless the Court *en Banc* decides to require the parties to submit their simultaneous memoranda.

Despite the granting of its "Motion for Extension of Time to File Comment to Petition for Review", respondent failed to file its "Comment" within the extension granted.

On September 21, 2011, respondent filed a "Motion to Admit Attached Comment to the Petition for Review", which was denied by the Court in a Resolution dated October 4, 2011. Both parties were granted a period of thirty (30) days from notice within which to file their simultaneous memoranda, after which the case shall be deemed submitted for decision.

On November 3, 2011, petitioner filed a "Manifestation and Motion" stating that she is adopting all her legal arguments/position found in her Petition for Review filed on July 26, 2011 with this Court, as well as the factual findings and conclusions of Presiding Justice Ernesto D. Acosta in his Dissenting Opinions dated March 23, 2011 and June 30, 2011 in C.T.A. Case No. 7711, as part of her memorandum, which the Court noted on November 8, 2011.

On November 9, 2011, respondent filed a "Motion to Admit Attached Respondent's Memorandum", with attached "Respondent's Memorandum". On December 6, 2011, the Court granted the "Motion to Admit Attached Respondent's Memorandum" and admitted respondent's memorandum.

Petitioner CIR's Arguments

Petitioner CIR contends that respondent had already exercised its option to carry-over the amount of P1,500,653.00, representing its excess/unutilized CWT for 2005 when it included said amount in its 1st, 2nd and 3rd quarterly ITR's for taxable year 2006; hence, pursuant to *Section 76 of the 1997 Tax Code*, no claim for refund is allowed since such option is considered irrevocable.

Respondent Rhombus Energy, Inc.'s Counter-Arguments

Respondent counter-argues that its choice to be refunded its 2005 CWT is irrevocable; it did not actually utilize or apply any portion of the 2005 excess CWT as payment of income tax in the 1st, 2nd, and 3rd quarters of 2006, or even in the Annual ITRs of 2006 and 2007; the shareholders and board of directors of respondent approved the dissolution of respondent effective December 31, 2010, hence petitioner would no longer be able to carry-over and utilize the 2005 excess CWT in the succeeding years.

THE COURT *EN BANC'S* RULING

The petition is meritorious.

Section 76 of the 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:
>
> (A) Pay the balance of the 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 therefor."

The above provision gives two options to a taxable corporation whose total quarterly income tax payment in a given taxable year exceeds its total income tax due. These options are (1) be credited or refunded either in the form of cash or credit certificate with the excess amount paid; or (2) carry over the excess credit to the succeeding taxable year.

The first option works simply by applying for a cash refund or tax credit certificate with the BIR for any tax on income that is paid in excess of the amount due to the government. The second option, on the other hand, works by applying the refundable amount, as shown on the Final Adjustment Return, of the given taxable year, against the income tax liabilities of the succeeding taxable year.

Records show that petitioner's Annual Income Tax Return for the year ended December 31, 2005 reflects a net loss of P1,500,653.00 *(Exhibit "B")*.

Since petitioner incurred a net loss for taxable year 2005, on December 29, 2006, petitioner filed with Revenue Region 8 an administrative claim for refund of its excess creditable withholding tax for calendar year 2005 in the amount of P1,500,653.00 *(Exhibit "I")*. In effect, petitioner availed of the first option provided in *Section 76 of the NIRC of 1997, as amended.*

However, a perusal of petitioner's Quarterly Income Tax Return for the first quarter of taxable year 2006 *(Exhibit "DD")* shows that petitioner carried over its unutilized creditable withholding tax for taxable year 2005 in the amount of P1,500,653.00, subject of the present petition for refund or issuance of a TCC.

Also, a perusal of petitioner's Quarterly Income Tax Return for the second quarter of taxable year 2006 *(Exhibit "EE")* shows that petitioner again carried over its unutilized creditable withholding tax for taxable year 2005 in the amount of P1,500,653.00, subject of the present petition for refund or issuance of a TCC.

Likewise, petitioner's Quarterly Income Tax Return for the third quarter of taxable year 2006 *(Exhibit "FF")* shows that petitioner carried over its unutilized creditable withholding tax for taxable year 2005 in the amount of P1,500,653.00, subject of the present petition for refund or issuance of a TCC.

It bears stressing that the last paragraph of *Section 76 of the NIRC of 1997, as amended,* provides that 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 TCC shall be allowed therefore.

Thus, in the recent case of *Mirant (Philippines) Operations Corporation (formerly: Southern Energy Asia-Pacific Operations (Phils.) Inc.) vs. Commissioner of Internal Revenue, 652 SCRA 89-93*, the Supreme Court ruled, as follows:

"Once exercised, the option to carry over is Irrevocable

"xxx xxx

The last sentence of Section 76 is clear in its mandate. Once a corporation exercises the option to carry-over and apply the excess quarterly income tax against the tax due for the taxable quarters of the succeeding taxable years, such option is irrevocable for that taxable period. Having chosen to carry-over the excess quarterly income tax, the corporation cannot thereafter choose to apply for a cash refund or for the issuance of a tax credit certificate for the amount representing such overpayment.

In the recent case of *Commissioner of Internal Revenue v. PL Management International Philippines, Inc. (G.R. No. 160949, April 4, 2011)*, the Court discussed the irrevocability rule of Section 76 in this wise:

The predecessor provision of Section 76 of the NIRC of 1997 is Section 79 of the NIRC of 1985, which provides:

Section 79. Final Adjustment Return. - Every corporation liable to tax under Section 24 shall file a final adjustment return covering the total net 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 net income of that year the corporation shall either:

(a) Pay the excess tax still due; or

(b) Be refunded the excess amount paid, as the case may be.

In case the corporation is entitled to a refund of the excess estimated quarterly income taxes-paid, the refundable amount shown on its final adjustment return may be credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable year.

As can be seen, Congress added a sentence to Section 76 of the NIRC of 1997 in order to lay down the irrevocability rule, to wit:

xxx Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for tax refund or issuance of a tax credit certificate shall be allowed therefor.

In *Philam Asset Management, Inc. v. Commissioner of Internal Revenue (514 Phil. 147, 157 [2005])*, the Court expounds on the two alternative options of a corporate taxpayer whose total quarterly income tax payments exceed its tax liability, and on how the choice of one option precludes the other, viz:

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 *(361 Phil. 916 [1999])*, 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. xxx

In *Commissioner of Internal Revenue v. Bank of the Philippine Islands (G.R. No. 178490, July 7, 2009, 592 SCRA 219, 231)*, the Court, citing the aforequoted pronouncement in Philam Asset Management, Inc., points out that Section 76 of the NIRC of 1997 is clear and unequivocal in providing that the carry-over option, once actually or constructively chosen by a corporate taxpayer, becomes irrevocable. The Court explains:

Hence, the controlling factor for the operation of the irrevocability rule is that the taxpayer chose an option; and once it had already done so, it could no longer make another one. Consequently, after the taxpayer opts to carry-over its excess tax credit to the following taxable period, the question of whether or not it actually gets to apply said tax credit is irrelevant. Section 76 of the NIRC of 1997 is explicit in stating that once the option to carry over has been made, 'no application for tax refund or issuance of a tax credit certificate shall be allowed therefor.'

The last sentence of Section 76 of the NIRC of 1997 reads: 'Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for tax refund or issuance of a tax credit certificate shall be allowed therefor.' The phrase 'for that taxable period' merely identifies the excess income tax, subject of the option, by referring to the taxable period when it was acquired by the taxpayer. In the present case, the excess income tax credit, which BPI opted to carry over, was acquired by the said bank during the taxable year 1998. The option of BPI to carry over its 1998 excess income tax credit is irrevocable; it cannot later on opt to apply for a refund of the very same 1998 excess income tax credit.

The Court of Appeals mistakenly understood the phrase 'for that taxable period' as a prescriptive period for the irrevocability rule. This would mean that since the tax credit in this case was acquired in 1998, and BPI opted to carry it over to 1999, then the irrevocability of the option to carry over expired by the end of 1999, leaving BPI free to again take another option as regards its 1998 excess income tax credit. This construal effectively renders nugatory the irrevocability rule. 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.

The Court similarly disagrees in the declaration of the Court of Appeals that to deny the claim for refund of BPI, because of the irrevocability rule, would be tantamount to unjust enrichment on the part of the government. The Court addressed the very same argument in Philam, where it elucidated that there would be no unjust enrichment in the event of denial of the claim for refund under such circumstances, because there would be no forfeiture of any amount in favor of the government. The amount being claimed as a refund would remain in the account of the taxpayer until utilized in succeeding taxable years, as provided in Section 76 of the NIRC of 1997. It is worthy to note that unlike the option for refund of excess income tax, which prescribes after two years from the filing of the FAR, there is no prescriptive period for the carrying over of the same. Therefore, the excess income tax credit of BPI, which it acquired in 1998 and opted to carry over, may be repeatedly carried over to succeeding taxable years, i.e., to 1999, 2000, 2001, and so on and so forth, until actually applied or credited to a tax liability of BPI."

Pursuant to the above ruling of the Supreme Court, the Congress laid down the irrevocability rule that once the taxpayer opted to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding years, such option to carry over shall be considered irrevocable. Meaning, the taxpayer can no longer change its mind and opts to claim for refund or request for issuance of TCC as regards the excess creditable withholding tax carried-over.

Such option is irrevocable for the whole amount of excess income tax, thus, prohibiting the taxpayer from applying for a refund for that same excess income tax in the next succeeding taxable years. The unutilized excess tax credits will remain in the taxpayer's account and will be carried over and applied against the taxpayer's income tax liabilities in the succeeding taxable years until fully utilized *(Commissioner of Internal Revenue vs. The Philippine American Life and General Insurance Company, supra).*

To reiterate, *Section 76* is 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 *(Commissioner of Internal Revenue vs. Bank of the Philippines Islands 592 SCRA 231).* 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' *(supra).*

Applying the foregoing rulings to the instant case, considering that petitioner opted to carry-over its unutilized creditable withholding tax of P1,500,653.00 for taxable year 2005 to the first, second and third quarters of taxable year 2006 when it had actually carried-over said excess creditable withholding tax to the first, second and third quarters in its Quarterly Income Tax Returns for taxable year 2006, said option to carry-over becomes irrevocable. Petitioner's act of reporting in its Annual Income Tax Return for taxable year 2006 of prior year's excess credits other than MCIT as 0.00, will not change the fact that petitioner had already opted the carry-over option in its first, second and third quarters Quarterly Income Tax Returns for taxable year 2006, and said choice is irrevocable. As previously mentioned, whether or not petitioner actually gets to apply said excess tax credit is irrelevant and would not change the carry-over option already made.

Thus, the present petition praying for refund or issuance of a TCC of its unutilized creditable withholding tax for taxable year 2005 in the amount of P1,500,653.00 must perforce be denied in view of the irrevocability rule on carry-over option of unutilized creditable withholding tax.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED.** Accordingly, the Decision of the First Division dated March 23, 2011 and Resolution dated June 30, 2011are hereby **REVERSED** and **SET ASIDE,** and another one is hereby entered **DISMISSING** the Petition For Review filed in C.T.A. Case No. 7711.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

(On Leave)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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

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

(On Leave)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13, 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 the Court.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	C.T.A. EB No. 803 (C.T.A. CASE NO. 7711)
	Members:
- versus -	ACOSTA, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.*
RHOMBUS ENERGY, INCORPORATED , Respondent.	Promulgated: OCT 1 1 2012 1:00 p.m.

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DISSENTING OPINION

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

In the Decision dated March 23, 2011, which was effectively affirmed in the Resolution dated June 30 2011, the Court in Division granted respondent's judicial claim for refund of its alleged unutilized CWT for the year 2005 in the amount of P1,500,653.00.

Petitioner now seeks to reverse and set aside the assailed Decision contending that respondent had already opted to carry-over the subject amount when it included the same in its 1st, 2nd, and 3rd quarterly ITR's for taxable year 2006, barring it from exercising the option to refund the said amount.

The majority sustains petitioner holding that once the option to carry-over and apply the excess quarterly income tax against income due to 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 TCC shall be allowed therefor. This irrevocability rule under Section 76 of the 1997 NIRC applies solely to the option to carry-over and not to the option to refund.

It is with regret that I cannot join the majority's position. I submit 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 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.

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

> One cannot get a tax refund and a tax credit at the same time for the same excess income taxes paid... (*Emphases supplied*)

It is thus clear that a corporate taxpayer is **not** legally allowed a change of heart once it has chosen an option from the two alternative remedies for the choice of one precludes the other.

In the case at bar, respondent unequivocally signified in its Annual ITR for 2005 its intention to be refunded of its excess creditable tax withheld for the said calendar year. Under Line 31 of the ITR, petitioner marked "x" on the box "To be refunded." This exercise of option to be refunded became more manifest when petitioner did not place any entry under Line 28A "Prior Year's Excess Credits" of its 2006 and 2007 Annual ITRs which simply shows that petitioner did not carry-over its 2005 excess/unutilized creditable withholding tax to the succeeding taxable years or quarters. Even if it wanted to, petitioner could no longer opt to carry over the subject amount to the succeeding quarters or years having exercised one of the available options under the law. It is well to note that the majority initially shared the same observation saying that "petitioner availed of the first option provided in Section 76 of the NIRC of 1997, as amended."

While it may be true that petitioner's Quarterly ITRs for the first three (3) quarters of taxable year 2006 reflect the excess/unutilized creditable withholding tax of P1,500,653.00, the same was merely due to inadvertence rectified when petitioner removed it in its Annual ITR for taxable year 2006 and 2007.

The Supreme Court, speaking through Justice Antonio T. Carpio, has categorically ruled that an exercise of an option is irrevocable, thus:

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

The Final Arbiter 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 exercise of its option to either seek</u>**

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

> **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

[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.

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. 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

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

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 30, 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.