REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

PHILAM FINANCIAL ADVISORY SERVICES, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7606

Members:

CASTAÑEDA, JR., *Chairperson*
UY, *and*
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:

SEP 0 8 2008
1:00 p.m.

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DECISION

CASTAÑEDA, JR., J.:

Before us is a Petition for Review wherein Philam Financial Advisory Services seeks the refund of its alleged excess creditable withholding taxes in the amount of One Million Three Hundred Sixty One Thousand Four Hundred Two Pesos and 16/100 (P1,361,402.16) for the year ending December 31, 2004.

Philam Financial Advisory Services (Petitioner) is a corporation duly organized and existing under Philippine laws, with principal office address at the 18th Floor, Robinson's Summit Center, Ayala Avenue, Makati City.[1]

[1] Paragraph 1, Joint Stipulation of Facts and Issues (JSFI), *Rollo,* page 79.

Commissioner of Internal Revenue (Respondent) is the duly appointed officer of the Bureau of Internal Revenue (BIR) empowered to perform the duties of her office, including among others, the duty to act and approve claims for refund or tax credit as provided by law. She holds office at the BIR National Office Building, Diliman, Quezon City, where she may be served summons and other court processes.[2]

On April 15, 2005, petitioner filed with the BIR its Annual Income Tax Return (ITR) for year ending December 31, 2004 and declared the following:

Sales/Revenues/Receipts/Fees	P	10,682,837.00
Less: Cost of sales/services		30,733,829.00
Gross income from operation	P	(20,050,992.00)
Add: Non-operating and Other income		135,999.00
Total Gross Income	P	(19,914,993.00)
Less: Deductions		4,738,949.00
Taxable Income	P	(24,653,942.00)

In the same ITR, petitioner did not opt to be refunded, to be issued a Tax Credit Certificate or to be carried over as tax credit next year/quarter.[3] In the same taxable year, petitioner incurred creditable tax withheld from its commission income/service fees amounting to P1,361,402.16, broken down as follows:

	2004				
	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	TOTAL
Philamlife[4]	18,515.38	40,847.32	234,469.02	543,058.68	836,890.40
Philam Asset Management Inc.[5]	16,073.14	42,883.96	64,661.49	33,378.92	156,997.51
Philam Plans. Inc.[6]		69,617.91	147,101.31	139,133.23	355,852.45
Philam Care[7]		295.93	1,785.89		2,081.82

[2] Paragraph 2, JSFI, *ibid.*
[3] Exhibit "C-6", *Rollo*, page 131.
[4] Exhibits "I", "I-2", "J", "J-2", "K", "K-2", "L", and "L-2", *Rollo,* pages 230 to 233.
[5] Exhibits "M", "M-2", "N", "N-2", "O", "O-2", "P", and "P-2", *Rollo,* pages 234 to 237.
[6] Exhibits "Q", "Q-2", "R", "R-2", "S", and "S-2", *Rollo*, pages 238 to 240.
[7] Exhibits "T", "T-2", "U", and "U-2", *Rollo,* pages 241 to 242.

Philam Insurance[8]	925.97		8,654.01		9,579.98
Total	35,514.49	153,645.12	456,671.72	715,570.83	**1,361,402.16**

On April 12, 2007, petitioner filed its administrative claim for refund of the amount of P1,361,402.16, representing excess/unutilized creditable withholding taxes for taxable year 2004.[9] And in order to comply with the prescriptive periods provided by law and to preserve its rights, petitioner filed before this Court the instant Petition for Review on April 13, 2007.

In the Answer filed on June 8, 2007, respondent alleged the following Special and Affirmative Defenses:

> "3. He reiterates and re-pleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses;
>
> 4. Petitioner's alleged claim for issuance of tax credit certificate is still subject to administrative routine investigation/examination by the respondent's Bureau;
>
> 6. Granting that petitioner is at a loss position for the year 2004, it is still required to pay the minimum corporate income tax (MCIT) of two percent (2%) of its gross income as of the end of taxable year 2004 pursuant to Section 27 (E)(1) of the Tax Code which may diminish tremendously its claim;
>
> 7. In an action for refund/credit, the burden of proof is on the petitioner to establish its right to refund and failure to adduce sufficient proof is fatal to the claim for tax refund/credit;
>
> 8. It is incumbent upon the latter to show that it has complied with the provisions under Sections 204 (C) in relation to Section 229 of the Tax Code, otherwise, its failure to prove the same is fatal to its claim for refund;
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> 10. 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

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[8] Exhibit "H", *Rollo,* page 229.
[9] Exhibit "G", *Rollo*, pages 225 to 228.

> ***(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211).***"[10]

On August 29, 2007, the parties filed their "Joint Stipulation of Facts and Issues", which was approved by this Court in a Resolution dated September 4, 2007.[11]

On June 26, 2008, the case was submitted for decision after petitioner's submission of its Memorandum on June 25, 2008, *sans* respondent's Memorandum.

The jointly stipulated issues submitted for this Court's resolution are as follows:

1. Whether or not petitioner has an excess creditable tax of P1,361,402.16 for the year ended December 31, 2004.

2. Whether or not petitioner is still required to pay the minimum corporate income tax (MCIT) of two percent (2%) of its gross income for the year 2004 granting that it was in a loss position for that year.

3. Whether or not petitioner's claim for refund/tax credit of alleged unutilized creditable income tax for the taxable year 2004 is fully substantiated by documentary evidence.

4. Whether or not petitioner is entitled to its claim for excess/unutilized creditable income tax in the amount of P1,361,402.16 under Section 204 in relation to Sections 229 and 76, all of the National Internal Revenue Code, as amended.

Since the issues are intertwined, this Court shall discuss them simultaneously. The focal point of the controversy hinges on petitioner's entitlement to the refund in the amount of P1,361,402.16.

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[10] *Rollo,* pages 56 to 57.
[11] *Rollo*, pages 79 to 80 and 82.

The Supreme Court in the case of ***Citibank N.A. vs. Court of Appeals and Commissioner of Internal Revenue***[12] laid down the basic requirements to avail of the refund of excess creditable withholding taxes, as follows:

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

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

3. The income upon which the taxes were withheld were included in the return of the recipient.[13]

In addition to these requirements, the taxpayer must not have opted to carry-over and credit the excess income tax to the taxable quarters of the succeeding taxable years if it wishes to be refunded or issued a tax credit certificate for the same, as provided in Section 76 of the National Internal Revenue Code (NIRC) of 1997, 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 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**

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[12] G.R. No. 107434, October 10, 1997.
[13] now incorporated in Section 2.58.3 (B) of Revenue Regulations No. 2-98.

> **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*)

This Court shall now determine whether or not petitioner complied with these requirements.

Claim filed within prescriptive period

The provisions of the NIRC pertinent to claiming a tax refund is found in Sections 204(C) and 229, which provides:

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

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

Based on the foregoing provisions, the written claim to the Commissioner (administrative claim) and the suit (judicial claim) must be filed within two (2) years from the date of payment of the tax. In a claim for refund of excess creditable withholding tax, the 2-year period shall be reckoned from the date of filing of the Annual Income Tax Return.[14]

In the present case, petitioner filed its Income Tax Return for taxable year 2004 on April 15, 2005.[15] Counting from this date, petitioner had until April 16, 2007[16] within which to file its administrative and judicial claim. Since petitioner filed its administrative and judicial claims on April 12, 2007[17] and April 13, 2007, respectively, petitioner's claim fell within the two-year period prescribed under Section 229 of the NIRC of 1997.

No excess and unutilized creditable tax reflected on the Annual ITR

A careful scrutiny of the Annual ITR for the year 2004 shows that petitioner did reflect any excess and unutilized creditable tax withheld.[18]

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[14] *ACCRA Investments Corporation vs. Court Appeals*, 204 SCRA 957 (1991); *Commissioner of Internal Revenue vs. TMX Sales, Inc.*, 205 SCRA 184 (1992).
[15] Exhibit "C", *Rollo,* pages 131 to 133.
[16] April 15, 2007 being Sunday.
[17] Exhibit "G", *Rollo,* pages 225 to 228.
[18] Exhibit "C", *supra.*

Neither did petitioner choose any option (*i.e.,* to be refunded, to be issued a Tax Credit Certificate, or to carry over to the succeeding taxable years) in case there is any excess and unutilized creditable tax withheld. Without reflecting any amount of excess creditable tax withheld in its Annual ITR, petitioner is precluded from claiming a refund for there is in fact no excess creditable tax withheld to speak of.

Even assuming *arguendo* that petitioner recognized its excess creditable withholding taxes for the year 2004 amounting to P1,123,148.00 (the same is reported as "Other Assets" in its Audited Financial Statement[19] and indicated the same in its Annual ITR), the claim for tax refund must still fail.

In its original Annual ITR filed on April 17, 2006[20] for taxable year 2005, petitioner clearly manifested its intention to carry-over the excess credits from taxable year 2004, since petitioner declared the amount of P1,257,088.00 as its "Prior Year's Excess Credits other than MCIT" in its Annual ITR for taxable year 2005.

Clearly therefrom, petitioner exercised the option to carry-over the amount being requested for refund amounting to P1,361,402.16 from taxable year 2004 to the immediately succeeding taxable year. Petitioner's subsequent amendment of its Annual ITR for taxable year 2005[21], showing zero amount of "Prior Year's Excess Credits other than MCIT", did not alter the fact that it had already carried-over the excess and unutilized creditable

[19] Exhibit "C-7", *Rollo*, page 149.
[20] Exhibit "D", *Rollo,* pages 153 to 155.
[21] Exhibit "E", *Rollo,* pages 178 to 180.

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tax withheld for the year 2004. Hence, the **irrevocability rule** under Section 76 of the NIRC of 1997 governs.

In Section 76 of the NIRC of 1997, 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.[22] It is not necessary that said excess tax payment/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 to the succeeding taxable year, that choice is irrevocable for that taxable period.[23] The taxable period referred to under Section 76 is that taxable period which the taxpayer made the choice to carry-over and not to the next taxable year when the said excess or unutilized tax credits be carried over.[24]

Inasmuch as petitioner already exercised the option to carry-over its prior year's tax credit of P1,361,402.16 to its Annual ITR for taxable year 2005, it is already barred from claiming a refund/tax credit certificate corresponding thereto. Nevertheless, the amount will not be forfeited in favor of the government but will remain in the taxpayer's account.[25] Petitioner may claim and carry it over in the succeeding taxable years, creditable against future income tax liabilities until it is fully utilized.

However, owing to the peculiar circumstance in this case, *i.e.*, petitioner's alleged shortening of its corporate existence to March 31, 2008,

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[22] *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue,* G.R. Nos. 156637 and 162004, December 14, 2005.
[23] *Honda Cars Philippines, Inc. vs. Commissioner of Internal Revenue,* CA-G.R. SP No.75365, September 29, 2005.
[24] *SC & C Cosmotech Co., Inc. vs. Commissioner of Internal Revenue,* CTA Case No.6650, June 6, 2005.
[25] *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, supra.*

petitioner contends that there is no more opportunity for it to utilize such excess credits.

The pertinent provisions of the NIRC, namely, Section 52(C) and 235 thereof, on the dissolution of corporations provide:

> "**SEC. 52.** *Corporation Returns.* —
>
> xxx xxx xxx
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> (C) *Return of Corporation Contemplating Dissolution or Reorganization.* — Every corporation shall, within thirty (30) days after the adoption by the corporation of a resolution or plan for its dissolution, or for the liquidation of the whole or any part of its capital stock, including a corporation which has been notified of possible involuntary dissolution by the Securities and Exchange Commission, or for its reorganization, render a correct return to the Commissioner, verified under oath, setting forth the terms of such resolution or plan and such other information as the Secretary of Finance, upon recommendation of the Commissioner, shall, by rules and regulations, prescribe.
>
> **The dissolving or reorganizing corporation shall**, prior to the issuance by the Securities and Exchange Commission of the Certificate of Dissolution or Reorganization, as may be defined by rules and regulations prescribed by the Secretary of Finance, upon recommendation of the Commissioner, **secure a certificate of tax clearance from the Bureau of Internal Revenue which certificate shall be submitted to the Securities and Exchange Commission**." (*Emphasis supplied*)
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> "**SEC. 235.** *Preservation of Books of Accounts and Other Accounting Records.* —
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> xxx xxx xxx
>
> xxx. All corporations, partnerships or persons that retire from business shall, within ten (10) days from the date of retirement or within such period of time as may be allowed by the Commissioner in special cases, submit their books of accounts, including the subsidiary books and other accounting records to the Commissioner or any of its deputies for examination, after which they shall be returned. **Corporations and partnerships contemplating dissolution must notify the Commissioner and shall not be dissolved until cleared of any tax liability**." (*Emphasis supplied*) *Jr*

In other words, a corporation seeking dissolution must first notify the respondent of its intention and settle all its tax liabilities in order to secure a tax clearance. The rationale behind these Sections is to ensure that no corporation may escape payment of taxes and other liabilities to the government simply by opting to dissolve the corporation and retire from business or reorganize its business.[26]

In this case, petitioner failed to prove that it was cleared of any tax liability as required by Section 235. Petitioner merely presented the Amended Articles of Incorporation dated February 28, 2007[27], where the company's Board of Directors and stockholders resolved to shorten petitioner's corporate existence to March 31, 2008 and the testimony of Ms. Angelita C. Tad-y, petitioner's Accountant[28]. These documents together with the Income Tax Returns and certificates of creditable taxes withheld are not sufficient to prove petitioner's entitlement to the amount sought. Petitioner was not even able to present any Application for Tax Clearance duly approved by the BIR. Without this clearance from the BIR, the Court cannot ascertain if indeed petitioner has already paid all its tax liabilities and entitle it to the refund claimed in this case.

To grant the refund being claimed by petitioner without indubitable proof that it has been cleared of any and all tax liabilities would put the

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[26] *SMI-ED Philippines Landholdings, Inc. vs. Commissioner of Internal Revenue,* C.T.A. Case No. 6649, April 4, 2006*; Lotus Software (Philippines), Inc. vs. Commissioner of Internal Revenue,* C.T.A. Case No. 6673, May 18, 2005.
[27] Exhibit "B-3", *Rollo,* page 126.
[28] Exhibit "Y", *Rollo,* page 306.

government in a most disadvantageous position considering that it can no longer run after a non-existing corporation.[29]

Well-settled is the rule that tax 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.[30]

IN VIEW OF THE FOREGOING, the Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ATTESTATION

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

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

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[29] *Shell Services International Sendirian Berhad vs. Commissioner of Internal Revenue*, C.T.A. Case No. 6658, March 14, 2006.
[30] *Citibank N.A. vs. Court of Appeals and Commissioner of Internal Revenue, supra.*

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CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice