REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Special Third Division

SANKYU CONSTRUCTION PHILIPPINES, INC.,
Petitioner,

- versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8079

Members:
Bautista, *Chairman and*
Cotangco-Manalastas, JJ.

Promulgated:

MAY 31 2013
10:53 a.m.

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D E C I S I O N

BAUTISTA, J.:

The Case

The Petition for Review, filed pursuant to Section 7(a)(2) of Republic Act ("RA") No. 1125, as amended by RA No. 9282 and RA No. 9503, seeks for the issuance of tax credit certificates in the amounts of Php2,101,492.00 and Php2,410,155.00, or an aggregate amount of Php4,511,647.00, representing excess creditable withholding taxes ("CWT") for taxable years ending December 31, 2007 and 2008.

The Parties[1]

Petitioner is a domestic corporation duly registered with the Securities and Exchange Commission, and existing under and by virtue of Philippine laws, with principal office or place of business located at 8th Floor, Salamin Building, Salcedo Street, Legaspi Village, Makati City, Philippines.

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[1] *Records*, pp. 1-2.

Respondent is the duly appointed Commissioner of Internal Revenue vested by law with the power to decide, approve and grant claims for refund or tax credit of internal revenue taxes, including unutilized or excess creditable withholding taxes ("CWT"), and holds office at the Bureau of Internal Revenue ("BIR") National Office Building, BIR/Agham Road, Diliman, Quezon City.

The Facts

Based on the Joint Stipulation of Facts and Issues filed on September 1, 2010,[2] the following are hereby quoted:

> "For the period covering taxable years ending December 31, 2007 and 2008, petitioner filed Annual Income Tax Returns ("ITR") or BIR Form No. 1702 within the period provided under the National Internal Revenue Code of 1997 ("Tax Code" or "1997 NIRC") showing excess CWT in the amounts of Php2,101,492.00 and Php2,410,155.00, respectively.
>
> Petitioner's above excess CWT for taxable years 2007 and 2008 consist of amounts withheld by customers from their income payments to petitioner, which were duly declared by the petitioner in its ITRs as part of its gross income;
>
> The above CWT has not been applied or credited against any IT due and thus remains unutilized to date.
>
> On March 9, 2009, petitioner's Board of Directors issued a resolution approving the cessation of commercial operations effective March 31, 2009 and the liquidation effective June 30, 2009.
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> On July 31, 2009, petitioner filed with the BIR for closure and an application for cancellation of its BIR Registration due to cessation of commercial operations, as per the Board of Director's Resolution.

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[2] *Id.*, Joint Stipulation of Facts and Issues, pp. 46-47.

On March 2, 2010, petitioner filed with the BIR its short period ITR for the period January 1 to June 30, 2009, pursuant to its ceasement of commercial operations.

On April 13, 2010, petitioner filed with RDO No. 47 - East Makati of the BIR an administrative claim for issuance of a Tax Credit Certificate ("TCC") for excess CWT for the taxable years 2007 and 2008 in the amounts of Php2,101,492.00 and Php2,410,155.00, respectively, or an aggregate amount of Php4,511,647.00."

On April 14, 2010, petitioner filed with the Court a Petition for Review,[3] praying that a judgment be rendered ordering:

> "1. Respondent to issue in favor of petitioner a tax credit certificate in the amount of Php4,511,647.00 representing unutilized or excess CWT for taxable years ending December 31, 2007 and 2008 in the amounts of Php2,101,492.00 and Php2,410,155.00, respectively."[4]

On April 30, 2010, respondent filed through registered mail her Answer,[5] asking the Court to dismiss the said Petition for Review for lack of merit. Respondent raised the following Special and Affirmative Defenses:

> "5) Assuming without admitting that Petitioner filed a claim for refund, the same is subject to investigation by the Bureau of Internal Revenue:
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> 6) Petitioner failed to demonstrate that the tax, which is the subject of this case, was erroneously or illegally collected;
>
> 7) Taxes paid and collected are presumed to be made in accordance with the laws and regulations, hence, not refundable;

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[3] *Id.*, pp. 1-7, with annexes.
[4] *Id.*, p. 5.
[5] *Id.*, pp. 16-18.

8) It is incumbent upon the Petitioner to show that it has complied with the provisions of Section 204(C) in relation to Section 229 of the 1997 Tax Code, as amended upon which its claim for refund is premised;

9) In an action for tax refund, the burden is upon the taxpayer to prove that it is entitled thereto, and failure to discharge the said burden is fatal to the claim *(Emmanuel & Zenaida Aguilar v. Commissioner, CA-GR No. Sp. 16432, March 30, 1990 cited in Aban, Law of Basic Taxation in the Philippines, 1st Edition p.* 206);

10) Claims for refund are construed strictly against the claimant, 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 disfavour. *(Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121)."*

On September 1, 2010, the parties submitted a Joint Stipulation of Facts and Issues,[6] with the Court issuing the Pre-Trial Order[7] on September 28, 2010.

On March 5, 2012, petitioner filed its Formal Offer of Evidence,[8] which was resolved by the Court on June 7, 2012.[9] On June 26, 2012, the Court took cognizance through a Resolution that respondent will not present any evidence, thus, ordering the parties to file their respective memoranda.[10]

Respondent's Memorandum was filed on August 23, 2012,[11] while petitioner failed to file its Memorandum.[12]

Thus, on September 10, 2012, the Court promulgated a Resolution submitting the Petition for Review for decision.[13]

Hence, this Decision.

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[6] *Id.*, pp. 45-48.
[7] *Id.*, pp. 50-54.
[8] *Id.*, pp. 133-138.
[9] *Id.*, pp. 144-145.
[10] *Id.*, pp. 148.
[11] *Id.*, pp. 155-164.
[12] *Id.*, p. 154.
[13] *Id.*, p. 167.

The Issues[14]

As stipulated by the parties, the issues for the present case are:[15]

1. WHETHER OR NOT PETITIONER'S CLAIM FOR TAX REFUND OR CREDIT FOR EXCESS CWT FOR TAXABLE YEARS 2007 AND 2008 IN AGGREGATE AMOUNT OF PHP4,511,647.00 WAS FILED WITHIN THE TWO (2)-YEAR PRESCRIPTIVE PERIOD FOR FILING CLAIMS FOR TAX REFUNDS OR CREDITS;

2. WHETHER OR NOT THE INCOME PAYMENTS FROM WHICH THE ABOVE EXCESS CWT BEING CLAIMED WERE WITHHELD WERE DECLARED BY PETITIONER IN ITS ITR AS PART OF ITS GROSS INCOME;

3. WHETHER OR NOT THE FACT OF WITHHOLDING WERE ESTABLISHED BY A COPY OF THE CERTIFICATES OF CREDITABLE TAX WITHHELD AT SOURCE (BIR FORM NO. 2307) DULY ISSUED BY THE INCOME PAYOR (I.E., CUSTOMERS) TO THE PAYEE (I.E., CLAIMANT PETITIONER) SHOWING THE AMOUNT OF INCOME PAID AND AMOUNT OF TAX WITHHELD THEREFROM; AND

4. WHETHER OR NOT THE ABOVE EXCESS CWT BEING CLAIMED ARE DULY SUBSTANTIATED WITH DOCUMENTS.

Simply put, should petitioner be entitled to a tax refund or credit for excess CWT for taxable years 2007 and 2008?

The Ruling of the Court

In claims for refund or issuance of tax credit certificate of CWT, Section 76 of the 1997 National Internal Revenue Code ("NIRC"), 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

[14] *Id.*, Joint Stipulation of Facts and Issues, pp. 47-48.
[15] See Note 2.

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."

Based on the afore-quoted provision, a corporation entitled to a tax credit or refund of the excess estimated quarterly income taxes paid 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 a cash refund. If the option to carry-over the excess credit is exercised, the same shall be irrevocable for that taxable period.[16]

In its Annual Income Tax Return[17] (AITR) for taxable year 2007 filed with the BIR on April 15, 2008, petitioner reflected an income tax overpayment of Php 13,263,672.00, computed as follows:

Sales/Revenues/Receipts/Fees		Php 109,558,074.00
Less:	Cost of Sales/Services	80,303,477.00
Gross Income from Operation		Php 29,254,597.00
Add:	Non-Operating & Taxable Other Income	3,017,046.00
Total Gross Income		Php 32,271,643.00

[16] G.R. No. 176290. September 21, 2007, 533 SCRA 776.
[17] Exhibit "H-2".

Less:	Deductions	29,387,646.00
Taxable Income		Php 2,883,997.00
Income Tax Due		Php 1,009,399.00
Less:	Tax Credits	
	Prior Year's Excess Credits other than MCIT	Php 7,196,093.00
	Creditable Tax Withheld for 1st to 3rd quarters	6,424,801.00
	Creditable Tax Withheld for the 4th quarter	652,178.00
	Total Tax Credits	Php 14,273,072.00
Total Overpayment		Php **13,263,672.00**

While petitioner did not mark any chosen option in its 2007 AITR as regards its income tax overpayment of Php 13,263,672.00, petitioner, however, reflected the said amount as "Prior Year's Excess Credits" in its AITR[18] for taxable year 2008 and was offset against its income tax due for taxable year 2008 in the amount of Php 11,162,180.00 leaving an excess tax credits for 2007 in the amount of Php 2,101,492.00, as shown below:

Sales/Revenues/Receipts/Fees		Php 123,131,085.00
Less:	Cost of Sales/Services	81,073,443.00
Gross Income from Operation		Php 42,057,642.00
Add:	Non-Operating & Taxable Other Income	6,208,079.00
Total Gross Income		Php 48,265,721.00
Less:	Deductions	16,373,778.00
Taxable Income		Php 31,891,943.00
Income Tax Due		Php 11,162,180.00
Less:	Tax Credits	
	Prior Year's Excess Credits other than MCIT	Php 13,263,672.00
	Creditable Tax Withheld for 1st to 3rd quarters	1,434,468.00
	Creditable Tax Withheld for the 4th quarter	975,687.00
	Total Tax Credits	Php 15,673,827.00
Total Overpayment		Php **4,511,647.00**

Clearly, petitioner actually exercised the right to carry over its 2007 excess credits to the succeeding year 2008. Strictly applying Section 76 above quoted, petitioner can no longer claim a refund of the 2007 excess tax credits of Php 2,101,492.00.

With regard to its excess tax credits for taxable year 2008 in the amount Php 2,410,155.00, petitioner again did not indicate any option

[18] Exhibit "H-3," line 30A.

in its 2008 AITR.[19] However, petitioner's filing of a letter-claim[20] with the BIR served as an expression of its choice to have the amount of Php 2,410,155.00 refunded.

Nevertheless, it cannot be ascertained whether the excess amount of Php 2,410,155.00 was not actually carried-over in the succeeding quarters/year 2009 since petitioner failed to present its Quarterly Income Tax Returns and AITR for the succeeding year 2009. The presentation of these returns would be material in determining whether petitioner exercised the irrevocable option of carry-over. On this score, petitioner's claim for taxable year 2008 must be denied.

However, in the case of *Systra Philippines, Inc. vs. Commissioner of Internal Revenue*,[21] the Supreme Court ruled that:

> "Where, however, the corporation permanently ceases its operation before full utilization of the tax credits opted to carry over, it may then be allowed to claim the refund of the remaining tax credits. In such a case, the remaining tax credits can no longer be carried over and the irrevocability rule ceases to apply."

Based on the foregoing, in the event of cessation of business, petitioner may opt to claim for refund even if it previously chose the irrevocable option to carry-over since there is no more opportunity for it to utilize such excess credits.

Nevertheless, it is to be emphasized that in order to be excluded from the irrevocability rule, petitioner must prove it has indeed permanently ceased it business operations.

Unfortunately, petitioner failed to do so.

A corporation is considered dissolved only if it complies with Sections 52(C) and 235(e) of the NIRC of 1997, which state:

> "SEC. 52. *Corporation Returns.* –

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[19] Exhibit "H-3", line 33.
[20] *Id.*, Joint Stipulation of Facts and Issues, p. 47.
[21] See Note 16.

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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*)

"SEC. 235. *Preservation of Books of Accounts and Other Accounting Records.* —

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(e) 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 his 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*)

A dissolving corporation must abide by the above-cited sections before it could be considered legally dissolved, i.e., to secure a Certificate of Tax Clearance from the BIR; then to submit said certificate to the Securities and Exchange Commission (SEC) for the issuance of the Certificate of Dissolution.

While petitioner was able to file with the BIR an application for cancellation of its BIR registration due to cessation of commercial operations,[22] there is no indication that it has been already cleared of, and/or has settled, any of its tax liability as it failed to present or offer a certificate of tax clearance.

Absent a tax clearance certificate from the Bureau of Internal Revenue (BIR) and a certificate of dissolution issued by the Securities and Exchange Commission (SEC), this Court cannot consider petitioner as already dissolved or has permanently ceased its operations to remove it from the application of the irrevocability rule under Section 76 of the NIRC of 1997.

In sum, the Court finds that petitioner can no longer claim a refund of taxable year 2007 excess tax credits of Php 2,101,492.00, as it already exercised the right to carry over its 2007 excess credits to the succeeding year 2008. As for its excess tax credits for taxable year 2008 in the amount Php 2,410,155.00, petitioner did express its intent to refund the said amount, but failed to present Quarterly Income Tax Returns and AITR for the succeeding year 2009, which would have been material in determining whether petitioner exercised the irrevocable option of carry-over. Further, petitioner cannot be exempt from the irrevocability rule since it was unable to prove that it has indeed permanently ceased it business operations.

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[22] *Id.*, Joint Stipulation of Facts and Issues, p. 47.

WHEREFORE, in view of the foregoing, the Petition for Review is hereby **DENIED** for insufficiency of evidence.

LOVELL R. BAUTISTA
Associate Justice

I CONCUR:

AMELIA R. COTANGCO-MANALASTAS
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

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13 of Article VIII 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.

ROMAN G. DEL ROSARIO
Presiding Justice