REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

RAYTHEON-EBASCO OVERSEAS LTD. – PHILIPPINE BRANCH,
Petitioner,

- versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB CASE No. 592
(CTA Case No. 6458)

Present:
Acosta, *PJ,*
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez,
Fabon-Victorino,
Mindaro-Grulla, and
Cotangco-Manalastas, *JJ.*

Promulgated:
AUG 18 2011 [illegible] 1:30 p.m.

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DECISION

COTANGCO-MANALASTAS, *J.*:

On appeal before the Court *En Banc* by way of *Petition for Review*[1] filed on February 11, 2010 by Raytheon-Ebasco Overseas Ltd. – Philippine Branch, pursuant to *Section 18 of Republic Act (R.A.) No. 1125, as amended by Section 11 of R.A. No. 9282, and Section 3(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA)*, is the *Decision*[2] and *Resolution*[3] promulgated by the First Division of this Court on August 6, 2009 and January 21, 2010, respectively. Relevant portions of the assailed *Decision* and *Resolution* are quoted hereunder:

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[1] *Rollo*, pp. 1-14.
[2] *Raytheon-Ebasco Overseas Ltd. – Philippine Branch vs. CIR,* CTA Case No. 6458, August 6, 2009.
[3] *Raytheon-Ebasco Overseas Ltd. – Philippine Branch vs. CIR,* CTA Case No. 6458, January 21, 2010.

Decision dated August 6, 2009:

"Lastly, considering that the issue on the "irrevocability of the option to carry-over" has been finally put to rest by the Supreme Court in the cases earlier cited, petitioner's reliance on the Court of Appeals' Decisions in the cases of **Raytheon Ebasco Overseas Ltd., Philippine Branch vs. Commissioner of Internal Revenue** and **Commissioner of Internal Revenue vs. Citicorp Capital Philippines, Inc.**, is misplaced. Rulings of the Court of Appeals are only persuasive in nature and can have no mandatory effect. In the case of **Systra Philippines, Inc. vs. Commissioner of Internal Revenue**, the Supreme Court emphasized that:

> "Moreover, petitioner can neither properly nor successfully rely on the decisions of the CA in the Bank of the Philippine Islands and Raytheon Ebasco Overseas Ltd. Philippine Branch cases. First, the CA and the CTA are now of the same level pursuant to RA 9282. Decisions of the CA are thus no longer superior to nor reversive of those of the CTA. xxx Finally and most importantly, while a ruling of the CA on any question of law is not conclusive on this Court, all rulings of this Court on questions of law are conclusive and binding on all courts including the CA. All courts must take their bearings from the decisions of this Court."

WHEREFORE, the instant Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED."

Resolution dated January 21, 2010:

"**WHEREFORE**, petitioner's *Motion for Reconsideration* is hereby **DENIED** for lack of merit.

SO ORDERED."

Petitioner prays for this Court '(a) to hold in abeyance the proceedings in the instant case until such time that Petitioner may be able to secure and present its tax clearance certificate from the Bureau of Internal Revenue (BIR) and thereafter, (2)[sic] to grant the refund of its unutilized tax credits for taxable year 1999 through the issuance of a Tax Credit Certificate amounting to Twenty Nine Million Four Hundred Eighty Nine Thousand Nine Hundred Twenty Six & 30/100 (P29,489,926.30)'.

ANTECEDENT FACTS

The antecedent facts, as narrated by the Court in Division in its *Decision*[4], are as follows:

> Raytheon Ebasco Overseas Ltd. — Philippine Branch (petitioner) is a foreign corporation duly organized under the laws of the United States of America and is licensed to do business in the Philippines under Securities and Exchange Commission (SEC) Certificate of Registration No. A1997-16458 dated December 18, 1997. Its principal office is located at 1615-1616 Tower One, Ayala Triangle, Ayala Avenue, Makati City. Petitioner is engaged in the business of procurement services, project management, construction, wholesale marketing, and sales and contract administration, in connection with industrial projects.
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> Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) empowered to perform the duties of his office, including among others, the duty to act upon and approve claims for refund or tax credit as provided by law. He holds office at the 4th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.
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> Petitioner acted as a general contractor for San Roque Power Corporation and Kepco Ilijan Corporation in two major projects in the Philippines. The first project entered with San Roque Power Corporation involved the construction, procurement, erection, testing, and commissioning of a combined flood control and power generation project in Pangasinan. The other project transacted with Kepco Ilijan Corporation pertained to the construction of a 1200 MW gas-fired combined cycle generating plant situated in Ilijan, Batangas. Petitioner received income payments for services rendered to San Roque Power Corporation and Kepco Ilijan Corporation, which were allegedly subjected to one percent (1%) creditable withholding tax, pursuant to Revenue Regulations No. 2-98.

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[4] *Supra* Note 2.

On April 17, 2000, petitioner filed with the BIR its Annual Income Tax Return for taxable year 1999, reflecting no income tax liability either at the minimum corporate income tax (MCIT) rate of two percent (2%) or regular rate of thirty-three percent (33%) as it incurred a gross loss in the amount of P124,154.00 and net loss in the amount of P83,536,340.00. Consequently, petitioner was unable to utilize the reported creditable taxes withheld in taxable year 1999 in the amount of P29,489,926.00, as shown below:

Sales/Revenues/Receipts/Fees		P4,418,398,263.00
Less:	Cost of Sales/Services	4,418,522,417.00
Gross Income from Operation		P (124,154.00)
Add:	Non-Operating & Other Income	679,408.00
Total Gross Income		P 555,254.00
Less:	Deductions	84,091,594.00
Taxable Income		P (83,536,340.00)
Income Tax Due		P -
Less:	Tax Credits	
	Creditable Tax Withheld for the First Three Quarters	P 24,858,518.00
	Creditable Tax Withheld for the Fourth Quarter	4,631,408.00
	Total Tax Credits	P 29,489,926.00
Overpayment		P 29,489,926.00

In its Annual Income Tax Return for taxable year 2000 filed with the BIR on April 18, 2001, petitioner carried over the excess tax credits of P29,489,926.00 for taxable year 1999. Likewise, the Return showed creditable taxes withheld during taxable year 2000 in the amount of P53,062,744.00. Thus, petitioner's total tax credits amounted to P82,552,670.00, which were partially applied against the income tax due of

P1,299,730.00; leaving an income tax overpayment of P81,252,940.00, as shown below:

Sales/Revenues/Receipts/Fees		P5,673,993,150.00
Less:	Cost of Sales/Services	5,720,139,771.00
Gross Income from Operation		P (46,146,621.00)
Add:	Non-Operating & Other Income	144,640,124.00
Total Gross Income		P 98,493,503.00
Less:	Deductions	94,431,848.00
Taxable Income		P 4,061,655.00
Income Tax Due		P 1,299,730.00
Less:	Tax Credits	
	Prior Year's Excess Credits	P 29,489,926.00
	Creditable Tax Withheld for the First Three Quarters	30,772,702.00
	Creditable Tax Withheld for the Fourth Quarter	22,290,042.00
	Total Tax Credits	P 82,552,670.00
Overpayment		P 81,252,940.00

On April 16, 2002, petitioner filed with the BIR a letter claiming refund of the amount of P81,252,940.00, representing excess/unutilized creditable withholding taxes for taxable years 1999 and 2000.

Respondent's inaction on its claim for refund prompted petitioner to file before this Court a Petition for Review, docketed as C.T.A. Case No. 6458 on April 17, 2002.

On May 28, 2002, respondent filed his Answer interposing the following Special and Affirmative Defenses:

"6. The petition states no cause of action as it does not allege the dates when the taxes sought to be refunded were actually paid;

7. Claims for refund are constructed strictly against the claimant, the same being in the nature of exemption from taxes (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95; Manila Electric Co. vs. Commissioner of Internal Revenue, 67 SCRA 35);
8. One who claims to be exempt from payment of a particular tax must do so under clear and unmistakable terms found in the statute (Asiatic Petroleum vs. Llanes, 49 Phil. 466; Union Garment Co. vs. Court of Tax Appeals, 4 SCRA 304);
9. In an action for tax refund, the burden is upon the taxpayer to prove that he is entitled thereto, and failure to sustain the same is fatal to the action for tax refund;
10. It is incumbent upon petitioner to show compliance with the provisions of Section 229 of the National Internal Revenue Code;
11. Taxes paid and collected are presumed to have been made in accordance with the law and regulations, hence not refundable."

In their Joint Stipulation of Facts and Issues filed on October 8, 2002, the parties presented the following issues for this Court's resolution:

"a) Whether or not Petitioner had selected the option to carryover its excess income taxes from CY 1999 to CY 2000.

b) Assuming that Petitioner had selected the option to carryover its excess income taxes from CY 1999 to CY 2000, whether or not Petitioner's selection of the option to carry (sic) over excess income taxes from CY 1999 to CY 2000 is irrevocable only (sic) for CY 1999.

c) Whether or not Petitioner's selection of the option to carry (sic) over excess income taxes from CY 2000 to CY 2001 is irrevocable only (sic) for CY 2000.

d) Whether or not Petitioner is legally (sic) and factually (sic) entitled to its claim for refund in the amount of P81,252,940 for excess creditable (sic) taxes for CY 1999 and CY 2000."

On November 12, 2002, respondent moved to dismiss the Petition on the ground of lack of cause of action to claim refund because petitioner opted to carry-over its excess creditable withholding taxes for taxable years 1999 and 2000 to the succeeding years in violation of Section 76 of the National Internal Revenue Code (NIRC) of 1997. Petitioner counters that the Motion to Dismiss was filed out of time.

In the Resolution dated May 23, 2003, this Court agreed with respondent in dismissing the Petition for Review due to lack of cause of action. The Court concluded that petitioner's option to carry-over the excess tax credits for taxable years 1999 and 2000 is irrevocable for the said taxable years. Accordingly, petitioner is no longer allowed to pursue the instant claim for the issuance of tax credit certificate in the amount of P81,252,940, representing its excess tax credits for taxable years 1999 and 2000.

Acting on petitioner's Motion for Reconsideration of the assailed Resolution dated May 23, 2003, the Court issued another Resolution dated October 16, 2003 denying the Motion for lack of merit.

On November 19, 2003, petitioner appealed to the Court of Appeals by way of a Petition for Review, docketed as "Raytheon Ebasco Overseas Ltd. Philippine Branch vs. Commissioner of Internal Revenue, CA-G.R. No. 80296", and raised the following assignments of error: (1) Whether or not the Court of Tax Appeals erred in dismissing the Petition on the basis of a Motion to Dismiss filed out of time and upon a ground not specifically raised by the movant; and (2) whether or not petitioner is precluded from claiming refund of the excess tax credits under Section 76 of the NIRC of 1997.

The Court of Appeals issued a Decision dated April 11, 2005, granting the said Petition for Review and ordering the remand of the case to the Court of Tax Appeals for further study and reception of evidence. The Court of Appeals concluded that lack of cause of action or failure to state a cause of action in the pleading does not justify the motu proprio dismissal of a Petition such as in the instant case. The Court of Appeals likewise interpreted the meaning of the "irrevocability of option to carry-over" as limited only for the year when such option was exercised, so much so that the taxpayer can still refund the unutilized excess tax credits carried over to the succeeding year. The significant portions of the Court of Appeals' Decision dated April 11, 2005 is hereunder quoted for ready reference, to wit:

> "True that the petitioner indeed opted to carry-over its excess tax credits for 1999 and 2000. However, in 1999, the petitioner company suffered from more than eighty three million net loss. Naturally, no income tax is due when there

> is no income to start with. Hence, even if it chose to have its excess tax credits carried over to the following year, it could not possibly utilize the same. As may be gleaned from the records, the unutilized tax credit of the petitioner around this time amounted to more than eighty one million pesos.
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> In 2000, the petitioner was only able to earn roughly four million in net income. The tax due on the said income was paid by applying it against the eighty two million plus unutilized tax credit of the petitioner company. Resultantly, there was a remaining eighty one million plus still unutilized by the petitioner company which it likewise carried over to the following year.
>
> However, in 2001, petitioner company again suffered another net loss amounting to more than five billion pesos such that, again, it incurred no tax liability to which the tax credit may be applied.
>
> There is therefore no reason for the BIR to withhold the tax refund which belongs to the petitioner. The government cannot illicitly withhold from taxpayers what is justly due them. . . .
>
> xxx xxx xxx
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> Then again, a closer reading of the law would show that even if we construe the provision literally, the 'irrevocability' of the taxpayer's choice of mode of recovery is not absolute inasmuch as it was qualified and followed by the phrase 'for that taxable period'.
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> Seemingly, the proscription lies thus: that once a taxpayer elects to carry-over and apply its excess tax to the following year's tax liability, it could not have this excess refunded until the entire duration of that taxable year has lapsed or expired. In any case, the law was not couched in such a way as to authorize the State to forfeit and absolutely bar innocent taxpayers from recovering the unutilized excess tax credits carried over to the succeeding taxable year."

In accordance with the Court of Appeals' ruling, petitioner filed an Omnibus Motion before this Court on July 19, 2005; primarily praying that the issue on the irrevocability of its choice to carry-over its excess creditable withholding taxes should be considered no longer open to further litigation following the "law of the case" doctrine. However, on October 12, 2005, this Court denied petitioner's Omnibus Motion and reasoned that with the enactment of Republic Act No. 9282 elevating this Court to the same level as that of the Court of Appeals and in order to avoid a collision course with the opinion of the Court of Appeals, it is imperative to proceed with the trial of the case and for the parties to present their respective position on the issues to be determined during the pre-trial conference.

On November 17, 2005, petitioner filed a Motion for Reconsideration of the Resolution dated October 12, 2005. However, during the hearing held on November 18, 2005, this Court denied the said Motion and ordered the case to proceed with the trial proper.

On March 3, 2006, petitioner filed a Petition for Certiorari before the Supreme Court, docketed as "Raytheon-Ebasco Overseas Ltd. — Philippine Branch vs. Court of Tax Appeals (First Division), Commissioner of Internal Revenue, G.R. No. 170929"; while respondent filed his Comment on September 7, 2006. Petitioner subsequently filed a Reply on December 27, 2006.

On August 16, 2006, petitioner filed a Manifestation and Urgent Motion before this Court for the suspension of the proceedings in the instant case, considering that the Petition for Certiorari filed with the Supreme Court allegedly involves the interrelated issue of whether this Court may still require the submission of evidence as well as rule on the legal right of petitioner to claim a tax credit certificate, representing its excess creditable withholding taxes for taxable years 1999 and 2000; notwithstanding the fact that such credits were carried over to succeeding taxable years. This Court however denied the said Motion in open court on August 17, 2006, since no restraining order was issued by the Supreme Court.

On June 4, 2007, petitioner manifested before this Court that it is withdrawing its claim for refund in the amount of P51,763,014.00 for taxable year 2000, because respondent administratively granted its claim for refund for the said year.

On June 14, 2007, this Court ordered petitioner's counsel to amend the Petition for Review in view of the partial administrative grant of refund by respondent.

In the Resolution dated July 9, 2007, this Court admitted petitioner's Amended Petition for Review filed on June 29, 2007 that requests the issuance of tax credit certificate in the reduced amount of P29,489,926.30, representing its accumulated excess creditable withholding taxes for taxable year 1999. On the other hand, respondent manifested that that [sic] he will be adopting his original Answer to petitioner's Amended Petition for Review.

Petitioner filed a Motion before the High Tribunal requesting an early resolution of its Special Civil Action for Certiorari under Rule 65 of the Rules of Court, which the Supreme Court merely noted in the Resolution dated October 8, 2007.

During trial, petitioner proffered testimonial and documentary evidence; while respondent merely submitted the case for decision based on the records.

The case was submitted for decision on August 8, 2008, considering petitioner's Memorandum filed on July 31, 2008, sans respondent's Memorandum.

The Ruling of the Court in Division

The Court in Division ruled in favor of respondent and found petitioner to have effectively chosen the option to carry-over its claimed 1999 excess tax credits in the amount of P29,489,926.30 as "Prior Year's Excess Credits" in its Income Tax Returns (ITR) for Calendar Years (CY) 2000 and 2001; thus, precluding petitioner from claiming a refund or the issuance of tax credit certificate for its excess creditable withholding taxes for the taxable year 1999. The Court *a quo* explained that Section 76 of the National Internal Revenue Code (NIRC) of 1997 is clear and unequivocal, once the carry-over option is chosen, actually or constructively, it becomes irrevocable for that taxable period and no application for tax refund or issuance of tax credit certificate shall then be allowed.

Further, the Court in Division clarified that the phrase "taxable period" refers to the taxable year when petitioner derived the excess income tax payment and elected the option to carry-over, which in the instant case refers to taxable year 1999. The issue on the "irrevocability of the option to carry-over" has been finally put to rest by the Supreme Court in the cases of *Systra Philippines, Inc. vs. CIR*[5] and *Philam Asset Management, Inc. vs. CIR*[6]; thus, petitioner's reliance on the decision of the Court of Appeals in the cases of *Raytheon-Ebasco Overseas Ltd., Philippine Branch vs. CIR*[7] and *CIR vs. Citicorp Capital Philippines, Inc.*[8] is misplaced.

Petitioner filed a Motion for Reconsideration on August 28, 2009. However, the Court *a quo* found no compelling reason to disturb or modify the assailed *Decision*. The Motion was denied in a *Resolution*[9] dated January 21, 2010.

Hence, petitioner filed the instant *Petition for Review*[10].

By reason of petitioner's failure to attach a Secretary's Certificate authorizing affiant Andrado C. Almalvez to file the instant *Petition* and to sign the Verification and Certification against forum shopping, a *Resolution*[11] was issued on June 16, 2010 where the instant *Petition* was denied due course and was accordingly dismissed. Petitioner moved for the reconsideration of the said *Resolution* on July 12, 2010, and attached a certified true copy of the Secretary's Certificate authorizing affiant Andrado C. Almalvez in its motion. With the submission of the certified true copy of the Secretary's Certificate, the Court *a quo* granted petitioner's motion and directed the parties to submit their respective memoranda.

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[5] G.R. No. 176290, September 21, 2007.
[6] G.R. Nos. 156637/162004, December 14, 2005.
[7] CA-G.R. No. 80296, April 11, 2005.
[8] CA-G.R. SP No. 68554, April 12, 2002.
[9] *Supra* Note 3.
[10] *Supra* Note 1.
[11] *Rollo*, pp. 77-79.

Petitioner filed its *Memorandum* [12] on September 30, 2010, whereas respondent failed to file her Memorandum within the period; thus, the above-captioned case was submitted for decision on October 21, 2010.

ISSUES

In its *Petition for Review*, petitioner raised the following issues:

1. Whether this Court through its First Division erred when it failed to consider that the "*law of the case*" principle is applicable in this case;
2. Whether petitioner is entitled to a refund or tax credit certificate in the total amount of Twenty Nine Million Four Hundred Eighty Nine Thousand Nine Hundred Twenty Six Pesos & 30/100 Pesos (P29,489,926.30) representing its unutilized tax credit for taxable year 1999 considering that petitioner had already ceased operation in the Philippines.

Arguments of Petitioner

In this present *Memorandum*, petitioner Raytheon-Ebasco maintains that the legal issue on the irrevocability of the alleged carry-over which had already been the subject of and dealt with in the decision[13] of the Court of Appeals, when this same case was appealed, should have been adopted and applied by the Court *a quo* pursuant to the "*law of the case*" doctrine. The Court of Appeals held that *'the "irrevocability" of the taxpayer's choice of mode of discovery is not absolute inasmuch as it was qualified and followed by the phrase "for that taxable period"'*[14] and that *'the proscription lies thus: that once a taxpayer elects to carry-over and*

[12] *Rollo*, pp. 95-114.
[13] *Raytheon-Ebasco Overseas Ltd., Philippine Branch vs. CIR,* CA-G.R. No. 80296, April 11, 2005.
[14] *Supra*, Note 13.

apply its excess tax to the following year's tax liability, it could not have its excess refunded *until* *the entire duration of that taxable year lapsed or expired'*[15]. Simply put, petitioner's action of carrying-over its excess tax credits for taxable year 1999 is irrevocable only for or during taxable year 2000 and, hence, petitioner may still claim said excess tax credits in the succeeding taxable years.

Also, petitioner argued that even if this Court was elevated to the same level with the Court of Appeals by RA 9282 which took effect on April 23, 2004, it must be noted that the appeal was made by petitioner as early as November 19, 2003, way before the said law was passed and took effect.

According to petitioner, its Annual ITR for taxable year 2001 shows that it had chosen "to be refund" of its excess credit taxes, thus, on petitioner's Annual ITR for taxable year 2002 it did not carry over any excess tax credits from previous years, which necessarily include its excess tax credit for taxable year 1999 amounting to P29,489,926.30.

Lastly, petitioner reasoned that, as of December 31, 2006, it had already ceased its operation in the Philippines. Hence, petitioner can no longer apply its excess tax credits for future tax liabilities.

THE RULING OF THE COURT *EN BANC*

The Court *En Banc* finds no merit in the Petition for Review.

A fastidious examination of the issues brought for the consideration of this Court appears to be on all fours with those raised by petitioner in its Motion for Reconsideration, which had been intricately and sufficiently passed upon and resolved

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[15] *Supra*, Note 13.

in the impugned *Decision* and *Resolution* of the Court *a quo*. However, this Court shall discuss the foregoing issues for further clarification.

"Law of the Case" Principle

In support of the argument which pushes for the application of the decision of the Court of Appeals on the issue of "irrevocability" of the carry-over option under Section 76 of the NIRC of 1997, petitioner harped on the *law of the case* doctrine. Petitioner insists that the decision of the Court of Appeals in this same case[16], declaring that '*once a taxpayer elects to carry-over and apply its excess tax to the following year's tax liability, it could not have its excess refunded* <u>*until*</u> *the entire duration of that taxable year lapsed or expired'*[17], should be adopted and applied by this Court pursuant to the *law of the case* principle.

The Court *a quo*, however, consistently held in both of its *Decision* and *Resolution* that, by reason of petitioner's actual exercise of the option to carry-over as regards its 1999 excess tax credits, it is therefore precluded from claiming a refund (either in the form of cash or tax credit) pursuant to the irrevocability rule under Section 76 of the NIRC of 1997. The Court *a quo's* unbending stance is grounded on the express provision of Section 76 of the NIRC of 1997, the law governing the options for refund, tax credit and carry-over of excess quarterly income tax; and on authorities the Highest Court of the land established as early as 2005, *i.e.*, the cases of *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*[18], *Systra Philippines, Inc. vs. Commissioner of Internal Revenue*[19], *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*[20].

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[16] *Supra*, Note 13.
[17] *Supra*, Note 13.
[18] G.R. No. 156637/ 162004, December 14, 2005.
[19] G.R. No. 176290, September 21, 2007.
[20] G.R. No. 178490, July 7, 2009.

We have carefully considered and evaluated the arguments of the petitioner, the records of this case, vigilantly reviewed the applicable provisions of law and the prevailing jurisprudence on this matter; and the said review and evaluation strengthened our resolve that the principle of the *law of the case* does not apply to the present case.

***Law of the case* has been defined as the opinion delivered on a former appeal**. It is a term applied to an established rule that when an appellate court passes on a question and remands the case to the lower court for further proceedings, the question there settled becomes the law of the case upon subsequent appeal. **It means that whatever is once irrevocably established as the controlling legal rule or decision between the same parties in the same case continues to be the law of the case**, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts of the case before the court.[21]

In the case of *Mercury Group of Companies, Inc., vs. Home Development Mutual Fund*[22], the Supreme Court expounded on the doctrine of the law of the case, reiterating its pronouncement in the case of *Villa vs. Sandiganbayan*[23], *viz*:

> The doctrine has been defined as "that principle under which determination of questions of law will generally be held to govern a case throughout all its subsequent stages where such determination has already been made on a prior appeal to a court of last resort. **It is "merely a rule of procedure and does not go to the power of the court, and will not be adhered to where its application will result in an unjust decision.** It relates entirely to questions of law, **and is confined in its operation to subsequent proceedings in the same case.**
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> In *Jarantilla v. Court of Appeals*, we held:

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[21] *Marcelino Lopez, et al. vs. Jose Esquivel, Jr., et al.*, G.R. No. 168734/170621, April 24, 2009 citing *Cucueco v. Court of Appeals*, 484 Phil. 254, 267 (2004).
[22] G.R. No. 171438, December 19, 2007.
[23] G.R. No. 87186, April 24, 1992, 208 SCRA 283, 295-296.

> "Law of the case" has been defined as the opinion delivered on a former appeal. ...**It is a rule of general application that the decision of an appellate court in a case is the law to the case on the points presented throughout all the subsequent proceedings in the case** in both the trial and appellate courts and no question necessarily involved and decided on that appeal will be considered on a second appeal or writ of error in the same case, provided the facts and issues are substantially the same as those on which the first question rested and, according to some authorities, provided **the decision is on the merits**. (Emphasis and underscoring supplied)

The doctrine "*is merely a <u>rule of procedure</u> and does not go to the power of the court, and will not be adhered to where its application will result in an <u>unjust decision</u>.*"[24] To sustain petitioner's assertion would give rise to an *unjust decision* because such decision would surely contain a dangerous precedent of choosing and exalting a mere "*rule of procedure*" over an express provision of law; tolerating defiance towards a clear and unmistakable statutory provision; and turning a blind eye to a judicial interpretation enunciated by the Highest Court of the land in numerous cases, which interpretation has become part of the law as of the date of legislation. Clearly, the doctrine of the *law of the case* cannot be made to apply to the case at bar.

The last sentence of Section 76 of the NIRC of 1997 pertaining to the *irrevocability rule* states in clear-cut terms that '*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.***' By express mandate of Section 76, once the option to carry-over has been made, such option is irrevocable for that

[24] *Supra,* Note 22, 23.

taxable period and no application for cash refund or issuance of tax credit certificate shall be allowed therefore.

Moreover, as aptly put by the Court *a quo*, the issue on the "irrevocability of the option to carry-over" has been finally put to rest by the Supreme Court in the cases of *Systra Philippines, Inc. vs. Commissioner of Internal Revenue*[25] *(Systra case)*, *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*[26] *(Philam case)*.

In the case of *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*[27] *(BPI case)* the Supreme Court had another occasion to pronounce its consistent view on the "irrevocability of the option to carry-over" when it stated that: '"**Section 76 remains 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*'", thus:

> The Court categorically declared in *Philam* that: "**Section 76 remains 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*.
>
> 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,

[25] G.R. No. 176290, September 21, 2007.
[26] G.R. Nos. 156637/162004, December 14, 2005.
[27] G.R. No. 178490, July 7, 2009.

> 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.

A rule long-standing in this jurisdiction is that, a judicial interpretation of a statute, such as the NIRC of 1997, constitutes part of that law as of the date of its original passage. Subject to the qualification that the interpretation does not create a new law but construes a pre-existing one and merely casts light upon the contemporaneous legislative intent of that law. The discussion by the Supreme Court in the case of *Sharon Castro vs. Hon. Merlin Deloria*[28] is instructive, *viz*:

[28] *Sharon Castro vs. Hon. Merlin Deloria, et al.*, G.R. No. 163586, January 27, 2009 citing *Roos Industrial Construction, Inc. v. National Labor Relations Commission*, G.R. No. 172409, February 4, 2008, 543 SCRA 666.

> Where a judicial interpretation declares a law unconstitutional or abandons a doctrinal interpretation of such law, the Court, recognizing that acts may have been performed under the impression of the constitutionality of the law or the validity of its interpretation, has consistently held that such operative fact cannot be undone by the mere subsequent declaration of the nullity of the law or its interpretation; thus, the declaration can only have a prospective application. **But where no law is invalidated nor doctrine abandoned, a judicial interpretation of the law should be deemed incorporated at the moment of its legislation.**
>
> In the present case, the March 20, 2001 Resolution in *Uy* made no declaration of unconstitutionality of any law nor did it vacate a doctrine long held by the Court and relied upon by the public. Rather, it set aside an erroneous pubescent interpretation of the Ombudsman Act as expressed in the August 9, 1999 Decision in the same case. Its effect has therefore been held by the Court to reach back to validate investigatory and prosecutorial processes conducted by the Ombudsman, such as the filing of the Information against petitioner.
>
> 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.

In the cases of *Philam, Systra* and *BPI* where the Supreme Court articulated its interpretation on the *irrevocability rule* under Section 76 of the NIRC of 1997, **no new law was created, no law was invalidated nor was there any doctrine of the Supreme Court that was abandoned or overruled,** thus, the interpretation on the *irrevocability rule* in the said cases is deemed part of the law as of the date of effectivity of the NIRC of 1997 on January 1, 1998.

In the case before us, the excess income tax credits, which the petitioner opted to carry-over as "Prior Year's Excess Credits" in its 2000 and 2001 ITR's, were acquired during the taxable year 1999. Considering the above disquisitions, petitioner's actual exercise of the option to carry-over its 1999 excess income tax credits is irrevocable; it cannot later on opt to apply for a refund of the very same 1999 excess income tax credits.

Petitioner's alleged cessation of operation as of December 31, 2006

Petitioner maintains that, as of December 31, 2006, it had already ceased its operation in the Philippines, thus, it can no longer apply its excess tax credits for future tax liabilities which the Court *a quo* had advised in its Decision dated August 6, 2009. Petitioner submitted as proof of the cessation of its business a photocopy of its letter to the BIR regarding its cancellation of its registration, and BIR Form No. 1905. In view of the alleged cessation, petitioner prayed that the proceedings in this case be held in abeyance until such time that petitioner may be able to secure and present its tax clearance certificate from the BIR.

First, as for petitioner's prayer to hold the proceedings in abeyance until such time that Petitioner may be able to secure and present its tax clearance certificate from the BIR, *We* find the same to be unfounded and not sanctioned by the Tax Code and by the rules of this Court.

Second, *We* find apropos the Court *a quo's* disposition on the matter in this wise:

> "'Likewise, this Court cannot subscribe to petitioner's allegation that as of December 31, 2006, it had already ceased to operate business in the Philippines and therefore could no longer apply its unutilized tax credits for taxable year 1999 to its future tax liabilities. After all, there is nothing on record that petitioner has shown proof of such dissolution.
>
> The pertinent provisions of the NIRC of 1997, namely, Section 52(C) and 235 thereof, on the dissolution of corporations provide:
>
> "**SEC. 52. Corporation Returns. –**
>
> xxx xxx xxx
>
> (C) **Return of the 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, **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. –**

xxx xxx xxx

(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 book of accounts . . . 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.**

xxx xxx xxx"(Emphasis supplied)

In addition, Section 136 of the Corporation Code provides:

"**Section 136. Withdrawal of foreign corporations.** - Subject to existing laws and regulations, a foreign corporation licensed to transact business in the Philippines may be allowed to withdraw from the Philippines by filing a petition for withdrawal of license. No certificate of withdrawal shall be issued by the Securities and Exchange Commission unless all the following requirements are met:

1. All claims which have accrued in the Philippines have been paid, compromised or settled;
2. All taxes, imposts, assessments, and penalties, if any, lawfully due to the Philippine Government or any of its agencies or political subdivisions have been paid; and
3. The petition for withdrawal of license has been published once a week for three (3) consecutive weeks in a newspaper of general circulation in the Philippines."

Based on the foregoing provisions, there is a need for petitioner to be cleared of any tax liability before it can be allowed to legally retire from business. Absent a tax clearance certificate from the BIR, this Court cannot ascertain if indeed petitioner has paid all its tax liabilities as to entitle it to the refund being claimed in this case."'

This Court is aware and accedes to the prevailing jurisprudential principle that '*a company that has already dissolved its corporate existence can be refunded its unutilized tax credits or overpaid income tax within the two-year prescription period reckoned from the date of payment of the tax. The BIR cannot deny the claim on the basis of Section 76 of the Tax Code, which prescribes that a taxpayer's option to carry over excess tax credits or overpaid income tax is irrevocable and bars him from applying for cash refund or issuance of a tax credit certificate in the future. It would be unjust if a company that has already dissolved its corporate existence cannot be refunded such unutilized taxes.*'[29]

However, 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.

In this case, as found by the Court *a quo*, there is nothing on record sufficient to prove such cessation of operation or dissolution. The pieces of evidence that would satisfactorily prove such fact of dissolution are the Certificate of Dissolution from SEC and the Tax Clearance Certificate from BIR, however, none of these documents were presented and formally offered to this Court. Petitioner merely furnished this Court with a copy of its Request for Cancellation of Registration and Issuance of Tax Clearance Certificate dated January 26, 2007. Without this tax clearance certificate from the BIR this Court cannot ascertain if indeed petitioner has already paid all its tax liabilities to entitle it to the refund claimed in this case.

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[29] *Financial Marketing Services Corporation v. Commissioner of Internal Revenue*, CTA Case No. 6443, September 7, 2005.

In *Lotus Software (Philippines), Inc., vs. Commissioner of Internal Revenue*[30], the Second Division of this Court explained, *thus*:

> "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 government in a most disadvantageous position considering that it can no longer run after a non-existing corporation.
>
> Tax refunds are in the nature of tax exemptions. The same are regarded as in derogation of sovereign authority and shall be construed strictissimi juris against the person claiming such exemption. In terms of evidence, the taxpayer has the burden of proving that it is entitled to the claim for refund (BPI-Family Savings Bank vs. Court of Appeals, et al., 330 SCRA 507 [2002])."

As earlier mentioned, only those companies that have '*already dissolved its corporate existence*'[31] can be refunded their unutilized tax credits or overpaid income tax. Hence, by reason of petitioner's failure to prove that it has already dissolved its corporate existence, the denial of petitioner's claim for the refund of its unutilized tax credits for taxable year 1999 is in order.

WHEREFORE, finding no cogent reason to reverse the *Decision* and *Resolution* assailed in the present case, the Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the assailed *Decision* of the Court in Division dated August 6, 2009 and *Resolution* dated January 21, 2010 in CTA Case No. 6458 are hereby **AFFIRMED**.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

(On Leave)
ERNESTO D. ACOSTA
Presiding Justice

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[30] CTA Case No. 6673, May 18, 2005.
[31] *Supra*, Note 29.

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were 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.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice