REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

NEC LOGISTICS PHILIPPINES, INC., Petitioner,	**CTA EB NO. 1300** (CTA Case No. 8533)
- versus -	Members: **DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: MAY 12 2017 2:35 pm

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DECISION

RINGPIS-LIBAN, *J.*:

The Case

Before the Court is a Petition for Review[1] seeking the nullification of the Decision[2] dated December 18, 2014 (assailed Decision) and Resolution[3] dated April 7, 2015 (assailed Resolution) of the Court of Tax Appeals First Division (First Division), denying petitioner's claim for refund or issuance of a tax credit certificate in the amount of ₱19,783,739.51, representing petitioner's excess and unutilized creditable withholding taxes as of fiscal year ending March 31, 2010.

The Facts

1 Under Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals.
2 Penned by Presiding Justice Roman G. Del Rosario, with Associate Justices Erlinda P. Uy and Cielito N. Mindaro-Grulla concurring. Docket, pp. 16-34.
3 Docket, pp. 43-47.

The facts as found by the First Division are as follows:

> Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines and is in the process of dissolution; it is represented herein by SCS Global, a corporation organized and existing under Philippine laws with office address located at 14th floor, 6788 Ayala Avenue, Oledan Square, Legaspi Village, Makati City.
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> Respondent is the duly-appointed Commissioner of Internal Revenue (Commissioner). [He] is vested under appropriate laws with the authority to carry out the functions, duties and responsibilities of [his] office, including, *inter alia*, the power to decide disputed assessments, cancellation and abatement of tax liabilities, and grant of tax refund or issuance of tax credit certificates, pursuant to the provisions of the National Internal Revenue Code of 1997, as amended (NIRC) and other laws, rules and regulations. x x x
>
> On October 15, 2009, the Board of Directors of NEC held a meeting wherein, among other things, they adopted a resolution to dissolve the corporation, *viz*:
>
>> "RESOLVED, that the Corporation dissolve its corporate existence by shortening its corporate term to 28 February 2010 pursuant to Section 210 of the Corporation Code of the Philippines and, to that end, Article FOURTH of the Corporation's Articles of Incorporation shall be amended to read as follows:
>>
>>> '**FOURTH**: The term for which the Corporation is to exist shall expire on 28 February 2010.'"
>
> During the same meeting, SCS Global was appointed by NEC's Board of Directors as its trustee for purpose of liquidation and winding up pursuant to Section 122 of the Corporation Code of the Philippines.
>
> On March 11, 2010, petitioner applied for the cancellation of its registration with the Bureau of Internal Revenue (BIR) and for the issuance of a Tax Clearance Certificate.

On August 20, 2010, NEC filed its Corporate Annual Income Tax Return (ITR) for the fiscal year ending March 31, 2010, wherein it reported that it incurred Total Excess and Unutilized Tax Credit Withheld of ₱28,683,719.00.

On March 4, 2011, NEC, through counsel, filed a written claim for refund or issuance of a tax credit certificate for the excess/unutilized creditable withholding taxes for the fiscal year ending March 31, 2010, in the aggregate amount of ₱28,683,719.00.

On August 17, 2012, in order to preserve its right and to toll the running of the two-year prescriptive period of its judicial claim, petitioner filed the subject Petition for Review.

x x x

In the meantime, on December 20, 2012, a Certificate of No Outstanding Liability was issued by the BIR Revenue District No. 57, Biñan, Laguna certifying that as of December 20, 2012, petitioner has no outstanding internal tax liability with the BIR.[4]

The Rulings of the First Division

On December 18, 2014, the First Division promulgated the assailed Decision denying the Petition for Review, the dispositive portion of which reads:

> **WHEREFORE**, premises considered, the subject Petition for Review filed on August 17, 2012 by NEC Logistics Philippines, Inc. is hereby **DENIED** for lack of merit.[5]

Aggrieved, petitioner filed a Motion for Reconsideration on January 21, 2015, which the First Division denied in the assailed Resolution, thus:

> **WHEREFORE**, premises considered, petitioner's **Motion for Reconsideration** filed on January 21, 2015 is hereby **DENIED** for lack of merit.[6]

On April 27, 2015, petitioner filed the present Petition for Review.[7]

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4 Docket, pp. 16-21.
5 Docket, p. 33.
6 Docket, p. 47.
7 Docket, pp. 1-11. Record shows that petitioner received the assailed Resolution on April 14, 2015; Division docket, p. 268.

On October 8, 2015, the Court issued a Resolution[8] ordered respondent to comment on the Petition for Review. Respondent filed on November 12, 2015 a Motion for Extension of Time to File Comment,[9] which the Court granted on November 16, 2015,[10] giving respondent until November 22, 2015 within which to file his comment. However, respondent failed to do so.[11]

On January 29, 2016, the Court issued a Resolution[12] giving due course to the instant petition, and requiring the parties to submit their respective memoranda. Petitioner filed its Memorandum[13] on March 11, 2016. On the other hand, respondent again requested for an extension of time to file[14] but failed to file his memorandum.[15]

On May 17, 2016, the Court issued a Resolution[16] submitting the case for decision.

<u>The Issues</u>

Petitioner raises the following grounds in support of its petition:

1. The Honorable First Division erred in dismissing petitioner's judicial claim for refund or issuance of a tax credit certificate for failure of petitioner to present an SEC-approved amended articles of incorporation and an SEC-issued certificate of dissolution.

2. The Honorable First Division erred in not finding that a duly issued certificate of tax clearance showing payment of tax liabilities is sufficient basis to warrant the conclusion that a corporation is already dissolved or has permanently ceased operation.

3. The Honorable First Division erred in ruling that petitioner's claim for refund or issuance of a tax credit certificate for excess/unutilized creditable withholding tax for taxable years 2007 to 2009 is barred by prescription.

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8 Docket, pp. 71-73.
9 Docket, pp. 74-76.
10 Docket, p. 78.
11 Records Verification Report issued by the Judicial Records Division on January 14, 2016 stating that respondent failed to file comment to the Petition for Review; docket, p. 80.
12 Docket, pp. 82-83.
13 Docket, pp. 84-98.
14 Docket, pp. 111-113.
15 Records Verification Report issued by the Judicial Records Division on April 21, 2016 stating that respondent failed to file his memorandum.; docket, p. 116.
16 Docket, pp. 118-119.

4. The Honorable First Division erred in ruling with respect to petitioner's claim for refund or issuance of a tax credit certificate for excess/unutilized creditable withholding tax for FY 2010 that petitioner has failed to satisfy the requirement that the income upon which the subject taxes were withheld were included and reported by petitioner in its income tax return.

5. The Honorable First Division erred in failing to apply the principle of *solutio indebiti* in favor of petitioner and against the respondent.

6. The Honorable First Division failed to render justice in dismissing petitioner's judicial claim for refund or issuance of a tax credit certificate.[17]

The Ruling of the Court

The petition has no merit.

The irrevocability rule provided in Section 76 of the NIRC admits of an exception in its application in the event of cessation of business. Dissolution, however, must be sufficiently proven. Absent proof of dissolution, the exception to the irrevocability rule is not available.

Section 76 of the NIRC, which embodies the irrevocability rule, states:

> 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 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. <u>Once the option</u>

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[17] Docket, pp. 4-5.

> 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. *(Underscoring supplied.)*

Under the irrevocability rule, a corporation with excess income tax may either carry-over the excess credit to the succeeding taxable quarters or claim a refund or the issuance of a tax credit certificate for the same. Once the option to carry-over is made, such option is irrevocable for that taxable period and the corporation may no longer claim a refund or the issuance of a tax credit certificate.

In *Systra Philippines, Inc. v. Commissioner of Internal Revenue*,[18] the Supreme Court held –

> 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.
>
> In exercising its option, the corporation must signify in its annual corporate adjustment return (by marking the option box provided in the BIR form) its intention either to carry over the excess credit or to claim a refund. To facilitate tax collection, these remedies are in the alternative and the choice of one precludes the other.
>
> This is known as the irrevocability rule and is embodied in the last sentence of Section 76 of the Tax Code. The phrase "such option shall be considered irrevocable for that taxable period" means that the option to carry-over the excess tax credits of a particular taxable year can no longer be revoked.
>
> This rule prevents a taxpayer from claiming twice the excess quarterly taxes paid: (1) as automatic credit against taxes for the taxable quarters of the succeeding years for which no tax credit certificate has been issued and (2) as a tax credit either for which a tax credit certificate will be issued or which will be claimed for cash refund.

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[18] G.R. No. 176290, September 21, 2007.

In the same case, the Supreme Court found that an exception to the irrevocability rule is when a corporation has already dissolved its corporate existence. The Supreme Court held –

> Where, however, the corporation permanently ceases its operations before full utilization of the tax credits it 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. *Cessante ratione legis, cessat ipse lex.*[19]

To avail of the exception, therefore, a corporation must be able to prove that it has permanently ceased its business operations. To be considered dissolved, a corporation must comply with Sections 52(C) and 235(e) of the NIRC, which provide:

> SEC. 52. Corporation Returns. – x x x
>
> (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 prescribe 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.
>
> SEC. 235. Preservation of Books of Accounts and Other Accounting Records. – x x x
>
> (e) x x x 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

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19 Id.

> 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.

The First Division found that petitioner was not able to prove that it had ceased its business operations, thus:

> A dissolving corporation must abide by the requirements as stated in the afore-quoted provisions before it could be considered legally dissolved for tax purposes, *viz*, (1) to secure a Certificate of Tax Clearance from the BIR and (2) to secure a Certificate of Dissolution from the Securities and Exchange Commission (SEC).
>
> While petitioner duly informed the BIR of its intention to cease business operations and permanently close the corporation and was issued a Certificate of No Outstanding Liability by the BIR, there is no indication that petitioner has already been dissolved or has permanently ceased its business operations as petitioner failed to present its SEC-approved amended articles of incorporation and the certificate of dissolution issued by the SEC. Thus, this Court cannot exclude petitioner from the application of the irrevocability rule under Section 76 of the NIRC of 1997, as amended.[20]

The meat of the controversy before the Court is petitioner's insistence that it was able to prove its dissolution. Petitioner is of the view that the First Division was redundant and superfluous and engaged in judicial legislation in requiring the submission of the Certificate of Dissolution from the SEC in addition to the Certificate of Tax Clearance from the BIR.

Petitioner's argument is untenable. The SEC is the government agency mandated to implement the Corporation Code.[21] The SEC has jurisdiction and supervision over all corporations, partnerships or associations who are the grantees of primary franchises and/or a license or a permit issued by the government.[22]

The First Division correctly held that the Certificate of Tax Clearance from the BIR is insufficient to prove that petitioner had already been dissolved. It is not within the authority of the BIR to determine whether a corporation has ceased its corporate existence. It is but reasonable for the Court to require a

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20 Docket, pp. 25-26.
21 Batas Pambansa Blg. 68.
22 Section 5(a) of Republic Act No. 8799, known as the Securities Regulations Code.

certification, that petitioner has already been dissolved, from the authority competent to do so.

The effect of petitioner's failure to prove that it had already been dissolved is the inapplicability of the exception to the irrevocability rule. Hence, petitioner's acts of opting to carry over its excess tax credits for FYs 2007, 2008, and 2009 are irrevocable. Thus, the First Division correctly found that –

> Evidently, petitioner actually exercised the option to carry over its prior years' excess credits to the succeeding year 2010. Applying Section 76 above quoted, petitioner can no longer exercise the option to claim a refund of the excess tax credits for FYs 2007, 2008 and 2009 in the respective amounts of ₱7,674,102.00, ₱3,085,904.51 and ₱4,586,046.00, or in the total amount of ₱15,346,052.51. Thus, only the excess tax credits for FY 2010 in the amount of ₱4,437,684.00 may be the proper subject of a claim for the issuance of TCC pursuant to Section 76 of the NIRC of 1997, as amended.

The First Division, however, found that petitioner was unable to substantiate its claim for FY 2010. This was discussed extensively in the assailed Decision. Ultimately, petitioner's claim fails due to its inability to substantiate the same.

The First Division found that the claim for CWT of FY 2010 was: (1) filed within the two-year prescriptive period; and (2) supported by Certificates of Creditable Tax Withheld at Source issued to it by various withholding agents. However, petitioner was not able to prove that the income upon which the subject taxes were withheld were included and reported in its income tax returns. There were discrepancies between the total revenues per sales books and per certificates. There were also discrepancies between petitioner's revenues in its sales book compared to the income payments reflected in the certificates. Unfortunately for petitioner, it was not able to account for the discrepancies.

The First Division held:

> This brings us to the third requirement of whether or not the income upon which the subject taxes were withheld were included and reported by petitioner in its income tax returns.
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> x x x
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> To further support its claim, petitioner submitted its FYs 2006 to 2010 Annual Income Tax Returns; FYs 2006 to 2010 Quarterly Income Tax Returns and the related Quarterly Summary

Alphalist of Withholding Agents of Income Payments subjected to Withholding Tax at Source (SAWT); FYs 2007 to 2010 Audited Financial Statements; FYs 2007 to 2010 General Ledger of Revenue-related accounts; FYs 2007 to 2010 Sales Books; FYs 2007 to 2010 Cash Receipts Journal. Although petitioner's revenues in its sales books in the amount of ₱263,774,520.04 was higher by ₱2,935,085.20 when compared with the income payments of ₱260,839,434.84 reflected in the certificates, it cannot be established that petitioner reported the income related to the claimed creditable withholding taxes of ₱3,750,742.30. Petitioner failed to fully account for the discrepancies. Moreover, it cannot be determined and verified from the sales books whether the income payments subjected to CWT were recorded therein. Petitioner should have provided the detailed composition of its revenues as reflected in the certificates on a per customer basis and should have shown in what particular part of the sales books the said revenues were recorded. Thus, petitioner's failure to satisfy the third requisite is fatal to its claimed CWT for FY 2010 of ₱3,750,742.30.[23]

Claims for refund are construed *strictissimi juris* against the person claiming the same. Having failed to discharge the burden of proof to establish its claim for refund, petitioner's claim was correctly denied by the First Division.

WHEREFORE, premises considered, the Court hereby **DENIES** the Petition for Review for lack of merit. The Decision dated December 18, 2014 and the Resolution dated April 7, 2015 of the First Division in CTA Case No. 8533 are hereby **AFFIRMED**.

SO ORDERED.

Ma. Belen S L

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

(with Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

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

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23 Docket, pp. 31-33.

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(with Separate Concurring Opinion)
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

NEC LOGISTICS PHILIPPINES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1300
(CTA CASE No. 8533)

Present:

DEL ROSARIO, *P.J.,*
CASTANEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, *JJ.*

Promulgated:
MAY 12 2017 2:31 PM

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* in denying the Petition for Review filed by NEC Logistics Philippines, Inc. thereby affirming the Court in Division's Decision dated December 18, 2014 and Resolution dated April 7, 2015.

I find it necessary, however, to address the argument raised by petitioner in its Petition for Review that the Court in Division erred in ruling that its claim for refund or issuance of a tax credit certificate for excess/unutilized creditable withholding tax for taxable years 2007 to 2009 was already barred by prescription. Petitioner claims that the reckoning date in computing the two (2) year prescriptive period commences on August 20, 2010. Petitioner posits that the reckoning point of the two-year prescriptive period for the filing of a claim for refund of excess income tax paid/withheld should commence to run only from the time that the refund is ascertained, which can only be determined after a final adjustment return is accomplished, regardless of any supervening cause that may arise thereafter. Petitioner avers that it was on October 15, 2009 when petitioner's Board of Directors resolved to dissolve and cease business operations and further resolved to dissolve its corporate existence by shortening its corporate term to February 28, 2010, prior to which the excess income tax payments for the taxable years 2007 up to 2009 cannot yet be determined citing CTA Case No. 7242 entitled *Manila Electric Company vs. Commissioner of Internal Revenue.*[1]

As elucidated in the assailed Resolution, since petitioner cannot be considered to have ceased its operations as a dissolved corporation, it cannot find solace in invoking the exception to the irrevocability rule. Having opted to carry over its excess and unutilized creditable withholding tax covering fiscal years (FYs) 2007 to 2009 to the succeeding taxable year/s, petitioner can no longer claim a refund or apply for the issuance of tax credit certificate (TCC) covering said excess and unutilized creditable withholding taxes. On the other hand, assuming petitioner is allowed to claim for a refund/TCC of its excess and unutilized creditable taxes withheld for the FYs 2007 to 2009 in the amount of ₱15,346,052.51, the same may not be granted due to prescription, as expounded in the assailed Decision, *viz.*:

> "As to the first requirement, Sections 204(C) and 229 of the NIRC of 1997, as amended, provide as follows:
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> '**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 stamped 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…'

[1]December 6, 2010.

> **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, 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 therefore, 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 added)*

Following the Supreme Court's ruling in *ACCRA Investments Corporation vs. The Honorable Court of Appeals, et al., supra*, the reckoning of the two-year prescriptive period for the filing of a claim for refund of excess income tax paid/withheld commences from the date of filing of the final adjustment return. As stated earlier, the instant claim of ₱19,783,739.51 covers creditable taxes withheld during the FYs 2007 to 2009 in the aggregate amount of ₱15,346,052.51, which originated from years prior to FY 2010 and carried forward to FY 2010 as part of the prior year's excess credits and creditable taxes withheld during the FY 2010 in the amount of ₱4,437,687.00. Reckoned from July 13, 2007, July 14, 2008, September 23, 2009 and August 20, 2010, the respective dates when petitioner filed its Annual Income Tax Returns for FYs 2007, 2008, 2009 and 2010, petitioner's claim for refund both in the administrative and judicial levels should have been filed on the dates indicated below:

Deadline for Filing the Administrative/Judicial Claims

Exhibit	Fiscal Year	Date of Payment of the Tax	End of two (2) year period	Date of Filing Administrative Claim	Date of Filing Judicial Claim	Creditable Taxes Withheld During the Year
C	2007	07/13/07	07/13/09	03/04/11	08/17/12	₱ 7,674,102.00
D	2008	07/14/08	07/14/10			3,085,904.51
E	2009	09/23/09	09/23/11			4,586,046.00

F	2010	08/20/10	08/20/12			4,437,687.00
Total						**₱ 19,783,739.51**

The above table shows that petitioner's administrative and judicial claims for refund of creditable taxes withheld for the FY 2010 fall within the two-year prescriptive period. With regard, however, to the unutilized prior year's excess credits, although the administrative claim for the FY 2009 is well within the two-year prescriptive period, the administrative claim for the FYs 2007 to 2008 and the judicial claim for the FYs 2007 to 2009 fall beyond the period prescribed by law." (*Citations omitted*)

Additionally, with due respect, I wish to address the statement of my distinguished colleague, the Honorable Associate Justice Catherine T. Manahan in her Separate Concurring Opinion that "contrary to the finding of the Court in Division that petitioner failed to prove such dissolution, this SEC Certificate approving the amended charter of petitioner which shortens its corporate life to February 28, 2010, was such proof." [2] It must be noted that petitioner did not present before the Court in Division during trial or attach in its Petition for Review before the Court *En Banc* the Certificate of Filing of Amended Articles of Incorporation issued by the Securities and Exchange Commission (SEC)[3] and Amended Articles of Incorporation[4] referred to in the Separate Concurring Opinion. Petitioner itself alleges in its Memorandum that it was impossible for it to submit the said Certificate of Filing of Amended Articles of Incorporation as part of its Petition for Review or during the trial.[5]

While the Certificate of Filing Amended Articles of Incorporation was already issued by the SEC as early as January 8, 2014, the assailed Decision was rendered by the Court in Division almost one (1) year after its issuance.

Moreover, petitioner's Motion for Reconsideration of the assailed Decision was filed on January 21, 2015. Evidently, petitioner had the opportunity to move for re-opening of trial for the purpose of presenting the Certificate of Filing Amended Articles of Incorporation. Had petitioner done so, the Court in Division could have appropriately considered the same.

In a number of cases, it has been declared that cases filed before the Court of Tax Appeals are litigated *de novo*, as such parties

[2] Separate Concurring Opinion, pp. 1-2.
[3] Annex B, *En Banc* Docket, p. 100.
[4] Annex E, *En Banc* Docket, pp. 103-110.
[5] *En Banc* Docket, p.85.

must prove every minute aspect of their cases.[6] More importantly, as enunciated in *Pilipinas Shell Petroleum Corporation vs. Commissioner of Customs,*[7] **for evidence to be considered by the court, the same must be formally offered.**

Given that petitioner did not offer in evidence its Certificate of Filing of Amended Articles of Incorporation issued by the SEC and its Amended Articles of Incorporation during trial, the Court in Division or the Court *En Banc* could not be faulted for not considering the same. The *ponente* of the Court *En Banc* Decision is correct in not considering the Certificate of Filing of Amended Articles of Incorporation and Amended Articles of Incorporation albeit the same was attached to petitioner's Memorandum. Petitioner's failure to offer in evidence said documents is fatal to its cause.

All told, I **VOTE** to **DENY** the Petition for Review filed by NEC Logistics Philippines, Inc. for lack of merit.

ROMAN G. DEL ROSARIO
Presiding Justice

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[6] *Pilipinas Shell Petroleum Corporation vs. Commissioner of Customs*, G.R. No. 195876, December 5, 2016.
[7] *Id.*

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MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

Promulgated:
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Separate Concurring Opinion

MANAHAN, J.:

I concur with the decision of the ponencia to deny the Petition for Review of NEC Logistics Philippines, Inc., which claims a refund of P 19,783,739.51 as excess and unutilized creditable withholding taxes (CWT) for fiscal year ending March 31, 2010.

However, with due respect, my concurrence is grounded on a different legal basis which is lack of jurisdiction for having been filed prematurely.

It is indisputable that based on the facts of the case, the petitioner undertook all the necessary legal steps to dissolve itself, such as the shortening of its corporate term of existence pursuant to Section 120 of Batas Pambansa Blg. 68 otherwise known as the Corporation Code of the Philippines, the appointment of a liquidator, namely, SCS Global, and the

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issuance by the Securities and Exchange Commission of its Certificate of Filing of Amended Articles of Incorporation[1] on January 8, 2014 and its Amended Articles of Incorporation[2]. Thus, contrary to the finding of the Court in Division that petitioner failed to prove such dissolution, this SEC certificate approving the amended charter of petitioner which shortens its corporate life to February 28, 2010, was such proof.

Another legal requirement that the petitioner should have observed is Section 52(c) of the National Internal Revenue Code as amended (NIRC), which provides that:

> **SEC. 52. Corporation Returns.** -
>
> **xxx xxx**
>
> **(C) Return of Corporation Contemplating Dissolution or Reorganization.** - Every corporation shall, <u>within thirty (30) days after the adoption by the corporation of a resolution or plan for its dissolution</u>, 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, <u>render a correct return to the Commissioner, verified under oath, setting forth the terms of such resolution or plan</u> and such other information as the Secretary of Finance, upon recommendation of the commissioner, shall, by rules and regulations, prescribe.
>
> <u>The dissolving or reorganizing corporation shall, prior to the issuance by the Securities and Exchange Commission of the Certificate of Dissolution or Reorganization</u>, as may be defined by rules and regulations prescribed by the Secretary of Finance, upon recommendation of the Commissioner, <u>secure a certificate of tax clearance from the Bureau of Internal Revenue which certificate shall be submitted to the Securities and Exchange Commission.</u> (*Underscoring ours*)

The interpretation of the short period return contemplated in the foregoing codal provision of the NIRC was aptly explained by the Supreme Court in the case of *Bank of the Philippine Islands v. Commissioner of Internal Revenue*[3], to wit:

> Sec. 244. *Return of corporations contemplating dissolution or retiring from business.*-- All corporations, partnership, joint accounts and associations, contemplating dissolution or

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[1] *Rollo*, CTA EB No. 1300, Memorandum, Annex B, p. 100.
[2] *Rollo*, CTA EB No. 1300, Memorandum, Annex E, pp. 103-110.
[3] G.R. No. 144653, August 28, 2001.

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> retiring from business without formal dissolution shall, within 30 days after the approval of such resolution authorizing their dissolution, and within the same period after their retirement from business, file their income tax returns covering the profit earned or business done by them from the beginning of the year up to the date of such dissolution or retirement and pay the corresponding income tax due thereon upon demand by the Commissioner of Internal Revenue. . .. x x x
>
> Thus, as required by §244 of Revenue Regulation No. 2, any corporation contemplating dissolution must submit tax return on the income earned by it from the beginning of the year up to the date of its dissolution or retirement and pay the corresponding tax due upon demand by the Commissioner of Internal Revenue. Nothing in §78 of the Tax Code limited the return to be filed by the corporation concerned to a mere information return. (*Underscoring ours*)

The required short period tax return under Section 52(c) of the NIRC as implemented by Section 244 of Revenue Regulations No. 2 or the Income Tax Regulations was further explained by this Court in the 2016 CTA en banc case of *Mindanao II Geothermal Partnership v. Commissioner of Internal Revenue*[4], *viz*:

> Notably, in the recent case of *Mindanao II Geothermal Partnership v. CIR*, involving petitioner's claim for refund or issuance of TCC for excess and unutilized CWT for CY 2007, the Court *En Banc* outlined the guidelines for the application of the exception to the irrevocability rule, to wit:
>
> 1. Once the corporate taxpayer opts to carryover the excess income tax against the income taxes due for the succeeding taxable years or quarters, such option is irrevocable for the whole amount of the excess income tax;
>
> 2. The unutilized excess CWT 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;
>
> 3. If, however, the excess CWT remains unutilized or has been partially utilized in the year the subject corporation permanently ceases its operation, the same may be the subject of a refund claim;

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[4] CTA EB No. 1206 (CTA Case No. 8251), April 20. 2016.

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4. The corporation must file a short period return from the beginning of the year when the corporation was dissolved up to the date of its dissolution or retirement. It shall pay the corresponding tax due, if any, or reflect and excess tax credits from the previous year(s) or the shortened period;

5. The filing of the short period return, covering the income earned within the shortened period, must be made within thirty (30) days after the approval by the SEC of the plan or resolution of dissolution; and

6. The counting of the two (2)-year prescriptive period for filing a refund claim shall commence thirty (30) days after the approval by the SEC of its plan for dissolution. (*Underscoring supplied*)

Applying now the above-cited legal provisions and jurisprudence, the claim for refund was filed prematurely as borne out by the factual records of the case.

The petitioner filed its administrative claim for refund with the Bureau of Internal Revenue (BIR) on March 4, 2011 after filing the Income Tax Return (ITR) and paying the tax for its fiscal year ending March 31, 2010 on August 20, 2010. On the other hand, petitioner filed its judicial claim before the Court in Division on August 17, 2012.

Having secured the SEC approval of its shortened corporate life on January 8, 2014, petitioner should have filed the short period return on or before February 7, 2014, which is the 30th day from the date of SEC approval, covering the period April 1, 2013 (the beginning of the fiscal year of petitioner) to January 8, 2014 (the date of SEC approval of its dissolution). Petitioner should have filed its administrative and judicial claim within the period of 2 years from February 7, 2014 or on or before February 6, 2016, which is the last day of the prescriptive period to file the claim for refund. Thus, the filing of its administrative claim with the BIR on March 4, 2011 and judicial claim on August 17, 2012, respectively, were premature and thus, the Court lacked jurisdiction over the petition.

Anent the denial of the claim for refund of CWTs for the years 2007 to 2009 by the Court in Division on the ground of prescription, it must be noted that when the option to carry

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over excess tax credits under Section 76 of the NIRC is chosen, the 2-year prescriptive period to file a claim for refund under Section 229 of the NIRC does not apply. As pronounced in *Commissioner of Internal Revenue v. Bank of Philippine Island*[5] viz:

> 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,[14] 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. (*Emphasis supplied*)

However, as an exception to the irrevocability of the option to carry over excess tax credits under the aforecited section of the NIRC and allowing said excess tax credits to be refunded, the Court in Division rightfully cited the case of *Systra Philippines, Inc. v. Commissioner of Internal Revenue*[6], wherein the Supreme Court ruled, *to wit*:

> Where, however, the corporation permanently ceases its operations before full utilization of the tax credits it 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. *Cessante ratione legis, cessat ipse lex.*

The rationale for this exception to the rule on irrevocability is the principle of *solutio indebiti* because the BIR received excess tax payments that it was not entitled to. Thus, it has to return the same. The government should not

[5] G.R. No. 178490, July 07, 2009.
[6] G.R. No. 176290, September 21, 2007.

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use technicalities to hold on to money that does not belong to it.[7]

Ergo, based on the factual and legal ramifications which I highlighted, I vote to deny the petition for review filed by NEC Logistics Philippines, Inc.

CATHERINE T. MANAHAN
Associate Justice

[7] *Southern Philippines Power Corporation v. Commissioner of Internal Revenue*, G.R. No. 179632, October 19, 2011.