REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

PHILIPPINE NATIONAL BANK,
Respondent.

CTA EB CASE No. 577
(CTA Case No. 7444)

x---------------------------------------x

PHILIPPINE NATIONAL BANK,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE No. 580
(CTA Case No. 7444)

Members:
ACOSTA, *P.J.,*
CASTAÑEDA JR.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

JUL 13 2011 4:01 pm

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DECISION

CASANOVA, *J.*:

This is a consolidation of the respective appeals of both parties filed by way of verified Petitions for Review, assailing the Decision[1] (Assailed Decision) dated April 23, 2009 and the Resolution[2] (Assailed Resolution) dated December 8, 2009, both promulgated by the Court of Tax Appeals Former Second Division.

The facts of the case, as found by the CTA Former Second Division, are as follows:

> "Philippine National Bank (Petitioner) is a corporation duly organized and existing under the laws of the Republic of the Philippines, with principal office at the PNB Financial Center, President Diosdado Macapagal Boulevard, Pasay City.
>
> Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue, vested with authority to carry out all the functions, duties, and responsibilities of said office, including inter alia, the power to decide, approve and grant refunds and/or tax credits of overpaid and erroneously paid or collected internal revenue taxes under the National Internal Revenue Code (NIRC) of 1997. He holds office at BIR National Office, Diliman, Quezon City.
>
> Petitioner filed its Annual Income Tax Return for taxable year 2003 on April 15, 2004, through the Bureau of Internal Revenue's Electronic Filing and Payment System (EFPS), with the following details:

Minimum Corporate Income Tax (MCIT)	P 175,720.62
Less: Tax Credits/Payments	
Prior Year's Excess Credits	P 5,106,339.00
Tax Payments for the first three quarters	
Creditable Tax Withheld for the first three quarters	28,168,024.00
Creditable Tax Withheld for the fourth quarter	
Subtotal	P 33, 274,363.00
Tax Payable (Overpayment)	P (33,098,624.38)

> On October 25, 2004, petitioner filed its first Amended Annual Income Tax Return reporting therein the amount P 40,114,328.38

[1] Division Docket, pp.406-421.
[2] Division Docket, pp.473-479.

representing its excess and unutilized income tax, computed as follows:

Minimum Corporate Income Tax (MCIT)		P 175,720.62
Less:	Tax Credits/Payments	
	Prior Year's Excess Credits	P 5,106,339.00
	Tax Payments for the first three quarters	
	Creditable Tax Withheld for the first three quarters	35,183,710.00
	Creditable Tax Withheld for the fourth quarter	
	Subtotal	P 40,290,049.00
Tax Payable (Overpayment)		P (40,114,328.38)

Subsequently, a second Amended Annual Income Tax Return was filed on November 8, 2004, reporting the following amounts:

Minimum Corporate Income Tax (MCIT)		P 175,720.62
Less:	Tax Credits/Payments	
	Prior Year's Excess Credits	P 5,106,339.00
	Tax Payments for the first three quarters	
	Creditable Tax Withheld for the first three quarters	15,258,457.00
	Creditable Tax Withheld for the fourth quarter	19,976,253.00
	Subtotal	P 40,341,049.00
Tax Payable (Overpayment)		P (40,165,328.38)

On February 17, 2005, petitioner filed its administrative claim for refund. However, on March 29, 2005, petitioner again filed its third amended Annual Income Tax Return, showing the following amount:

Minimum Corporate Income Tax (MCIT)		P 175,720.62
Less:	Tax Credits/Payments	
	Prior Year's Excess Credits	P 5,106,339.00
	Tax Payments for the first three quarters	
	Creditable Tax Withheld for the first three quarters	20,522,533.60
	Creditable Tax Withheld for the fourth quarter	20,003,252.44
	Subtotal	P 45,632,125.04
Tax Payable (Overpayment)		P (45,456,404.42)

On the same date, petitioner filed its amended administrative claim for refund or issuance of tax credit certificate; thus superseding its earlier administrative claim for refund of its alleged unutilized creditable withholding taxes for the taxable year 2003 in the amount of P40,525,786.04, claiming that it carried over the amount of P4,930,618.38 as prior year's excess credits.

As respondent has not acted on petitioner's claim, the latter filed the instant Petition for Review on April 12, 2006 for the refund or issuance of tax credit certificate representing petitioner's excess and unutilized creditable withholding taxes for calendar year 2003 pursuant to Section 76 and 229 of the NIRC of 1997.

A responsive pleading by way of an Answer was filed by respondent on June 5, 2006, averring that:

"4. Petitioner's alleged claim for refund of creditable withholding tax is subject to routinary investigation/examination by the Bureau;

5. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund and failure to sustain the burden is fatal to the claim for refund/credit;

6. Petitioner must show that it has complied with the provisions of Sections 204 (C) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit;

7. Claims for refund are strictly construed against the claimant for the same partake the nature of exemption from taxation and as such they are looked upon with disfavor.

During trial, petitioner presented documentary and testimonial evidence in support of its claim. Respondent's counsel on the other hand, failed to appear during the scheduled hearing for the presentation of respondent's evidence held on June 2, 2008 and respondent was deemed to have waived the right to do so. The Court then directed the parties to file their respective Memorandum on August 26, 2008 while respondent failed to do so within the given period."

On April 23, 2009, CTA Former Second Division promulgated the Assailed Decision partially granting PNB's claim for refund and holding that PNB is entitled to a refund or issuance of a tax credit certificate in the reduced amount of P38,388,331.09.

Both parties filed their respective Motion for Partial Reconsideration of the Assailed Decision. PNB filed its Motion on May 14, 2009 while CIR filed its own Motion on May 20, 2009. In the Assailed Resolution, the CTA Former Second Division denied CIR's Motion for Partial Reconsideration while the resolution of the first assigned error in PNB's Motion for Partial

Reconsideration was held in abeyance pending PNB's submission of its formal offer of Exhibit "GG-1.64" and required the petitioner to submit its Formal Offer of the said exhibit.

In compliance with the abovementioned order of this Court's Former Second Division, PNB filed on December 18, 2009, a Supplemental Formal Offer of Evidence for the purpose of submitting as evidence Exhibit "GG-1.64."

On January 14, 2010, PNB submitted its Petition for Review, docketed as CTA *En Banc* Case No. 580, raising the following ground:

> "WHETHER OR NOT THE CTA-DIVISION ERRED IN DENYING PETITIONER'S CLAIM FOR REFUND OF PHP175,720.62 ON THE GROUND THAT PETITIONER FAILED TO PROVE IT HAD SUFFICIENT PRIOR YEAR'S EXCESS CREDITS AGAINST WHICH IT CAN OFFSET ITS MCIT FOR CY 2003." [3]

PNB argues that the CTA Former Second Division erred in denying its claim for refund of excess CWT in the amount of P175,720.62 as the ruling of the CTA *En Banc* in the Nissan case is not applicable to the present case because, unlike Nissan, it was able to prove that it has sufficient prior year's excess credits from CY 1999 against which it offset its income tax liabilities for the CYs 1999, 2000, 2001, 2002 and 2003.

On January 15, 2010, CIR filed its Petition for Review docketed as CTA *En Banc* Case No. 577, stating the following assigned error:

> "THE HONORABLE SECOND DIVISION ERRED IN GRANTING RESPONDENT'S JUDICIAL CLAIM FOR REFUND IN THE AMOUNT OF P38,338,331.09, REPRESENTING ITS ALLEGED UNUTILIZED EXCESS CREDITABLE WITHHOLDING TAXES FOR THE TAXABLE YEAR 2003."[4]

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[3] En Banc Rollo, (EB Case No. 580), p. 13.
[4] Rollo, EB Case No. 577, p. 12.

In alleging the error of this Court's Former Second Division in granting PNB's judicial claim, CIR argues that PNB has failed to prove with certainty that it did not carry-over and applied its 2003 excess tax credits for the quarters of the succeeding taxable years as provided for under Section 76 of the National Internal Revenue Code (NIRC) of 1997. Furthermore, CIR alleges that PNB employed a hybrid method of accounting for the purpose of determining net income for the taxable year 2003, therefore, it is not entitled to the issuance of tax refund/tax credit certificate.

On January 18, 2010, this Court issued a resolution consolidating the two Petitions for Review, docketed as CTA EB Case No. 577 and CTA EB Case No. 580, considering the fact that the two cases are appeals filed by both parties from the same Decision.

In a resolution dated February 3, 2010, this Court ordered both parties to submit their respective Comment within ten (10) days from receipt thereof.

On February 18, 2010, the CTA Former Second Division promulgated an Amended Decision resolving the issue on the entitlement of PNB to an additional tax refund or issuance of tax credit certificate for creditable taxes withheld in the amount of P900,000.00. This amount represents the creditable taxes withheld by Isetann Department Store, Inc. on behalf of PNB, which were previously disallowed by the CTA Former Second Division on the ground that it was not supported by Creditable Withholding Tax Certificates. PNB prayed for the reconsideration of the disallowance and formally offered as evidence to the Court Exhibit "GG-1.64", the Creditable Withholding Tax Certificate (BIR Form No. 2307) showing the said creditable taxes withheld. Upon review of the evidence presented, this Court's Former Second Division modified its decision and ruled that with the submission of the said evidence, PNB has now substantially proven its entitlement to the refund of the additional amount of P900,000.00. The Court held that:

> "**WHEREFORE**, this instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED** to **REFUND** or **ISSUE A TAX CREDIT CERTIFICATE** in the reduced amount of **THIRTY NINE MILLION TWO HUNDRED EIGHTY EIGHT THOUSAND THREE HUNDRED THIRTY ONE PESOS and NINE CENTAVOS (P39,288,331.09)**, representing petitioner's excess creditable taxes for taxable year 2003.
>
> **SO ORDERED.**"[5]

On March 5, 2010, PNB filed its Comment to CIR's Petition for Review while CIR failed to file her Comment to PNB's Petition.[6]

On April 5, 2010, this Court issued a resolution ordering both parties to submit their respective Memorandum within thirty (30) days from receipt thereof. On May 28, 2010, PNB filed its Memorandum. On the other hand, CIR failed to file her Memorandum.[7]

On June 16, 2010, this Court issued a Resolution submitting the instant case for decision.

As the parties raised dissimilar issues and arguments in their respective petitions, this Court will discuss the two petitions separately.

CIR, in its petition, raised the argument that PNB is not entitled to the refund of its excess creditable withholding tax credits because it failed to sufficiently prove that it did not carry-over and apply its 2003 excess tax credits against its quarterly income tax liabilities for the succeeding years. CIR alleged that PNB's failure to formally offer as evidence its quarterly income tax returns for the taxable year 2004 is fatal to its claim for refund.

This Court is not persuaded.

The presentation of the quarterly income tax returns of PNB for the first, second and third quarters of the taxable year 2004 is not a legal requisite for the claim for refund of excess creditable withholding tax credits for the taxable year 2003.

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[5] Division Docket, p.628.
[6] En Banc Rollo, (EB Case No. 577), p. 78.
[7] En Banc Rollo, (EB Case No. 577), p. 118.

The National Internal Revenue Code (NIRC) of 1997 did not require the presentation of the quarterly income tax returns to prove the claim for refund of creditable withholding taxes. The law 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 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.

Thus, according to the abovementioned provision, a corporate taxpayer who is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid has two options: (1) to carry-over the excess credits to the succeeding taxable years; (2) to apply for the issuance of a tax credit certificate or to claim a cash refund.

Furthermore, Section 2.58 of BIR Revenue Regulations No. 2-98, as amended, set forth the requisites for the entitlement to a refund of excess creditable withholding tax credits:

> 1. That the claim for refund was filed within the two-year prescriptive period as provided under Section 204 (c) in relation to Section 229 of the NIRC of 1997;

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

3. That the income upon which the taxes were withheld were included in the return of the recipient.[8]

Based on the foregoing, it is clear that the nowhere in the law or in its implementing rules and regulations is it indicated that the presentation of quarterly tax returns for the succeeding taxable years is a requisite to establish the entitlement to the refund of excess creditable withholding tax credits.

The Supreme Court, in several cases, confirmed such position. In the case of *Philam Asset Management, Inc. (PAMI) vs. Commissioner of Internal Revenue*[9], the Supreme Court reversed the decision of the Court of Appeals denying PAMI's claim for refund of excess creditable withholding taxes for the taxable year 1997 on the ground that PAMI failed to present its Annual Income Tax Return for the taxable year 1998. In holding that the presentation of the succeeding year's income tax return is not an essential requisite in proving a claim for refund of excess creditable income tax credits, the Supreme Court held that:

"Requiring that the ITR or the FAR of the succeeding year be presented to the BIR in requesting a tax refund has no basis in law and jurisprudence.

First, Section 76 of the Tax Code does not mandate it. The law merely requires the filing of the FAR for the preceding — not the succeeding — taxable year. Indeed, any refundable amount indicated in the FAR of the preceding taxable year may be credited against the estimated income tax liabilities for the taxable quarters of the succeeding taxable year. However, nowhere is there even a tinge of a hint in any of the provisions of the Tax Code that the FAR of the

[8]Decision of CTA Former Second Division dated April 23, 2009, Division Docket, p.414 *citing* Section 2.58, Revenue Regulations No. 2-98, as amended; Citibank N.A. vs, Court of Appeals and CIR, 280 SCRA 459; Banco Filipino Savings and Mortgage Bank vs. Court of Appeals, Court of Tax Appeals and Commissioner of Internal Revenue, G.R. No. 155682, March 27, 2007
[9] GR Nos. 156637/162004, December 14, 2005,

taxable year following the period to which the tax credits are originally being applied should also be presented to the BIR.

Second, Section 5 34 of RR 12-94, amending Section 10(a) of RR 6-85, merely provides that claims for the refund of income taxes deducted and withheld from income payments shall be given due course only (1) when it is shown on the ITR that the income payment received is being declared part of the taxpayer's gross income; and (2) when the fact of withholding is established by a copy of the withholding tax statement, duly issued by the payor to the payee, showing the amount paid and the income tax withheld from that amount.

Undisputedly, the records do not show that the income payments received by petitioner have not been declared as part of its gross income, or that the fact of withholding has not been established. According to the CTA, "[p]etitioner substantially complied with the . . . requirements" of RR 12-94 "[t]hat the fact of withholding is established by a copy of a statement duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom; and . . . [t]hat the income upon which the taxes were withheld were included in the return of the recipient."

The established procedure is that a taxpayer that wants a cash refund shall make a written request for it, and the ITR showing the excess expanded withholding tax credits shall then be examined by the BIR. For the grant of refund, RRs 12-94 and 6-85 state that all pertinent accounting records should be submitted by the taxpayer. These records, however, actually refer only to (1) the withholding tax statements; (2) the ITR of the present quarter to which the excess withholding tax credits are being applied; and (3) the ITR of the quarter for the previous taxable year in which the excess credits arose. To stress, these regulations implementing the law do not require the proffer of the FAR for the taxable year following the period to which the tax credits are being applied."

A similar ruling was enunciated by the Supreme Court in the case of *State Land Investment Corporation vs. Commissioner of Internal Revenue*[10] wherein it held that:

"It was not necessary on the part of petitioner to file with the BIR its income tax return for 1999. In Philam Asset Management, Inc. v. Commissioner of Internal Revenue, we held that the Tax Code merely requires the filing of the final adjustment return for the preceding — not the succeeding — taxable year. Indeed, any

[10] GR No. 171956, January 18, 2008.

refundable amount indicated therein corresponding to the preceding taxable year may be credited against the estimated income tax liabilities for the taxable quarters of the succeeding taxable year. Requiring that the income tax return or the final adjustment return of the succeeding year be presented to the BIR in requesting a tax refund has no basis in law and jurisprudence."

In the case of *Commissioner of Internal Revenue vs. PERF Realty Corporation*[11], the Supreme Court reiterated that the presentation of subsequent year's annual income tax return is not necessary, saying that it is not fatal to the claim for refund of excess creditable withholding taxes as it is the duty of the CIR to verify whether or not the taxpayer carried over its excess tax credits to the succeeding year. The Supreme Court held that:

"We must also point out that, simply by exercising the CIR's power to examine and verify petitioner's claim for tax exemption as granted by law, respondent CIR could have easily verified petitioner's claim by presenting the latter's 1997 Income Tax Return, the original of which it has in its files. However, records show that in the proceedings before the CTA, respondent CIR failed to comment on petitioner's formal offer of evidence, waived its right to present its own evidence, and failed to file its memorandum. Neither did it file an opposition to petitioner's motion to reconsider the CTA decision to which the 1997 Income Tax Return was appended.

x x x

Further, We sustain the CA that there is no need to rule on the issue of the admissibility of the 1998 ITR since the CTA ruled that PERF already complied with the requisites of applying for a tax refund. The verification process is not incumbent on PERF; it is the duty of the CIR to verify whether or not PERF had carried over the 1997 excess income taxes."

Applying the abovementioned provisions of law and jurisprudence to the instant case, this Court concludes that the presentation of quarterly tax returns for the subsequent taxable year 2004 is not a requisite for the establishment of PNB's claim for refund of its excess creditable withholding tax credits for the taxable year 2003. PNB was able to sufficiently prove its claim for refund by complying with the legal requisites set forth under the

[11] G.R. No. 163345, July 4, 2008.

law. It filed its claim within the prescriptive period of two years, it was able to substantiate its claim by presenting the creditable withholding tax certificates issued by the payors and it was able to prove that the income upon which the taxes were withheld were included in its income tax return for the taxable year 2003. Requiring the presentation of its quarterly income tax returns for the taxable year 2004 is a mere superfluity.

In its Petition for Review, CIR also raised the issue on PNB's use of hybrid method of accounting for the purpose of reporting its income for the taxable year 2003, alleging that the method used by PNB in reporting its income was irregular and that it did not clearly reflect its true income. Section 15 of Rule 44 of the 1997 Rules of Court provides that the following questions may be raised on appeal:

> Sec. 15. Questions that may be raised on appeal.
>
> Whether or not the appellant has filed a motion for new trial in the court below, he may include in his assignment of errors any question of law or fact that has been raised in the court below and which is within the issues framed by the parties.

This Court notes that CIR never raised the issue on PNB's use of hybrid accounting before the CTA Former Second Division. Neither is this closely related to the issues framed by both parties in their *Joint Stipulation of Facts and Issues*[12]. Thus, CIR raises this issue for the first time on appeal.

In the case of *Jose De La Santa vs. the Honorable Court of Appeals (Fourth Division) and Valentin Magsumbol and Mrs. Valentin Magsumbol*[13] , the Supreme Court held that "An issue which was neither averred in the complaint nor raised during the trial in the court below cannot be raised for the first time on appeal; because it would be offensive to the basic rule of fair play and justice, and would be violative of the constitutional right to due process of the other party."

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[12] Division Docket, pp.115-118.
[13] G.R. No. L-30560, November 18, 1985.

Furthermore, jurisprudence provides that matters that essentially change a party's theory of the case cannot be raised for the first time on appeal. In the case of *Maximo Carantes (Substituted by Engracia Mabanta Carantes v. Court of Appeals, Bilad Carantes, Lauro Carantes, Eduardo Carantes and Michael Tumpao*[14], the Supreme Court ruled:

> "The settled rule is that defenses not pleaded in the answer may not be raised for the first time on appeal. A party cannot, on appeal, change fundamentally the nature of the issue in the case. When a party deliberately adopts a certain theory and the case is decided upon that theory in the court below, he will not be permitted to change the same on appeal, because to permit him to do so would be unfair to the adverse party."

The issue of hybrid accounting was raised by CIR for the first time on appeal. And as this does not fall under the matters stated in Section 15 of Rule 44 of the 1997 Rules of Court, this Court deems it proper not to consider this argument of the CIR in resolving the case at bar.

PNB, in its petition, argues that this Court's Former Second Division erred in denying its claim for refund of excess CWT in the amount of P175,720.62. It alleged that it has sufficiently proved its prior year's excess credits from which it intends to offset its MCIT for the taxable year 2003.

This Court already resolved this matter in the Assailed Decision and Assailed Resolution. The need for PNB to substantiate its prior year's credits has been established in the extensive discussions in the aforementioned issuances of this Court. The Assailed Decision states that:

> "In order to prove that no amount of the subject claim was utilized to pay for its 2003 MCIT liability of P175,720.62, petitioner presented various Certificates of Creditable Tax Withheld at Source for taxable year 1999 which were summarized in Exhibit "ZZ". Although the certificates showed creditable withholding taxes totalling P1,275,661.75, the Court cannot ascertain whether or not the said documents actually represent petitioner's unutilized 1999 excess creditable withholding taxes as of December 31, 2002.

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[14] G.R. No. L-33360, April 25, 1977.

Records show that the prior Year's Excess Credits of P5,106,339.00 reflected in petitioner's 2003 Income Tax Return originated from the total tax credits/payments of P282,083,824.00 reported in its 1999 Income Tax Return. Thus, petitioner should have presented the certificates/quarterly tax payments supporting the entire amount of P282,083,824.00 in order for the Court to identify with certainty that petitioner indeed had excess tax credits of P13,266,584.00 as of December 31, 1999. Moreover, petitioner should have shown which of the certificates supporting the amount of P13,266,584.00 were credited/applied in taxable years 2000 and 2001 in order for the Court to verify that the certificates used by petitioner to pay off its 2003 MCIT liability of P175,720.62 were never utilized in the said years.

Considering petitioner's failure to prove that it had sufficient prior year's excess credits against which the 2003 MCIT liability of P175,720.62 may be offset or credited, the same shall be deducted from its substantiated claim of P38,564,051.71. Hence, petitioner shall be entitled to the refund or issuance of tax credit certificate only in the reduced amount of P38,388,331.09 x x x"[15]

In resolving the same issue, the Assailed Resolution reiterates the ruling in the Assailed Decision, to wit:

"It is noteworthy that the Court already provided a comprehensive explanation as regards the necessity of substantiating petitioner's prior years excess tax credits in the subject *Decision*. For emphasis, however, the pertinent portions of the *Decision* of this Court *En Banc* in the case of *Commissioner of Internal Revenue vs. Nissan Motor Phil.* are hereunder quoted:

'By asserting that it is not required to substantiate its prior year's excess tax credits, Nissan Motor in effect admits the finding of the Court in Division that it failed to substantiate the same. It may have lost sight of the fact that its Petition for Review in C.T.A. CASE No. 6622 is a judicial claim for refund which partakes of the nature of an exemption which is strictly construed against the claimant. It is well-settled that the claimant has the burden of proof to establish the factual basis of its claim for refund and the failure to discharge said burden is fatal to its claim. Nissan Motor, being the claimant, is duty bound to prove its entitlement to the entire amount of its claim.

Secondly, contrary to what Nissan Motor wants this Court to believe that there is no need to substantiate its prior year's

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[15] Division Docket, pp.419-420.

excess credits, the Supreme Court had ruled that if the claim for refund is based on the taxpayer's final adjustment tax return, said claim should not be treated as a claim for refund of overpaid withholding taxes *per se*, thus:

> The petitioner corporation is not claiming a refund of overpaid withholding tax *per se.* **It is asking for the recovery of** the sum of P82,751.91, **the refundable or creditable amount determined upon the petitioner corporation's filing of its final adjustment return** on or before 15 April 1982 when its tax liability for the year 1981 fell due. The distinction is essential in the resolution of this case for it spells the difference between being barred by prescription and entitlement to refund. *(Emphasis supplied)*

In the above-quoted decision, the Supreme Court categorically made a distinction between a claim for refund of overpaid withholding taxes *per se* and a claim for refund of the refundable or creditable amount reflected on the taxpayer's *final adjustment return*. Nissan Motor's claim for refund is of the latter type, that is, based on the refundable amount indicated on Nissan Motor's final adjustment return for the taxable year 2000 xxx

xxx xxx xxx

In one case, the Supreme Court had explained that 'money is a fungible property' and the amount to be applied against the income tax due in the final adjustment return of petitioner may be taken from its excess credits in a prior year or from those withheld in the current year or from both. This emphasizes that a *Tax Overpayment* is composed of the taxpayer's prior year's credits, current year's tax payments, creditable taxes withheld for the current year and even foreign tax credits (if applicable). **It is therefore necessary to prove or substantiate each and every component of the *Total Tax Credits/Payments* reflected on Nissan Motor's final adjustment return, including its prior year's excess tax credits, because ultimately the remaining balance of the *Total tax Credits/Payment* after deducting its *MCIT* liability becomes the *Tax Overpayment* which is precisely the subject of Nissan motor's claim for refund in C.T.A. CASE No. 6622.**" *(Emphasis supplied)*

> Clearly, in order to establish the factual basis of its claim for refund, petitioner must substantiate its prior year's excess tax credits to overcome the burden of proof required. Failing in this regard, the second assigned error must necessarily fail."[16]

Upon thoroughly considering the matters brought forward by both parties in their respective petitions, this Court holds that PNB was able to sufficiently establish its claim for refund of its excess creditable withholding taxes for the taxable year 2003 in the amount of THIRTY NINE MILLION TWO HUNDRED EIGHTY EIGHT THOUSAND THREE HUNDRED THIRTY ONE PESOS and NINE CENTAVOS (P39,288,331.09).

This Court finds no cogent reason to depart from the ruling of the CTA Former Second Division in the Assailed Decision and Assailed Resolution on the issue of the need for substantiation of the prior year's credits of PNB.

WHEREFORE, both Petitions for Review are hereby **DISMISSED** for lack of merit. Accordingly, the April 23, 2009 Decision and the December 8, 2009 Resolution, as modified by the February 18, 2010 Amended Decision of the CTA Former Second Division in CTA Case No. 7444 entitled *"Philippine National Bank vs. Commissioner of Internal Revenue"*, are hereby **AFFIRMED**.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(Concurs with the Dissenting Opinion of Justice Grulla)
ERNESTO D. ACOSTA
Presiding Justice

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[16] Division Docket, pp.476-478.

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

(Concurs with the Dissenting Opinion of Justice Grulla)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
(With Dissenting Opinion)
CIELITO N. MINDARO-GRULLA
Associate Justice

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

C E R T I F I C A T I O N

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.

ERNESTO D. ACOSTA
Presiding Justice

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

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MINDARO-GRULLA
COTANGCO-MANALASTAS, JJ.

Promulgated:
JUL 13 2011 4:10 pm

x---x

DISSENTING OPINION

MINDARO-GRULLA, J.:

> *It is settled that tax refunds are in the nature of tax exemptions. Laws granting exemptions are construed strictissimi juris against the taxpayer and liberally in favor of the taxing authority. Where the taxpayer claims a refund, the CTA as a court of record is required to conduct a formal trial (trial de novo) to prove every minute aspect of the claim.*[1]

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[1] Kepco Philippines Corporation vs. Commissioner of Internal Revenue, G.R. No. 179356, December 14, 2009.

With due respect, I dissent from the majority opinion and vote to grant the petition docketed as CTA EB No. 577 and to deny the petition docketed as CTA EB No. 580

Under Section 76 of the NIRC of 1997, a taxpayer is not entitled to tax credit or refund should the taxpayer actually or constructively exercise the option to carry over and apply excess amount being claimed against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. Evidently, an excess amount paid does not automatically entitle the taxpayer claimant a refund or tax credit. It must be proven that the same was not carried over and applied against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years.

Suffice it to say that it is incumbent upon the taxpayer to prove that the amount being claimed as refund or tax credit was not carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. It is a matter of evidence and axiomatic that a claimant has the burden of proof to establish the factual basis of his or her claim for tax credit or refund. Tax refunds, like tax exemptions, are construed strictly against the taxpayer.[2] Moreover, entitlement to a tax refund is for the taxpayer to prove and not for the government to disprove.[3] The taxpayer claimant is charged with the heavy burden of proving that all the statutory and administrative requirements to be entitled to the tax refund have been complied with. PNB failed to prove that the amount claimed as refund was not carried over and applied against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years.

It is an established jurisprudence under the "Irrevocable Rule" that if the corporation opted to carry-over and apply the excess against the estimated quarterly income tax due for the taxable quarters of the succeeding taxable years, the same is irrevocable and no cash refund or tax credit shall be allowed. Obviously, before a refund for creditable withholding tax is granted, it is essential that the excess creditable withholding tax should be proven to have not been utilized or carried over to the succeeding taxable quarters considering that the option to carry-over or apply as tax credit in the succeeding taxable quarters cannot be modified in its final adjustment return.

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[2] Commissioner of Internal Revenue vs. Bank of the Philippine Islands, G.R. No. 178490, July 7, 2009.
[3] Commissioner of Internal Revenue vs. Far East Bank & Trust Company, etc., G.R. No. 173854, March 15, 2010.

The 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.[4]

Thus, even if the claim for refund was within the 2-year prescriptive period, the fact of withholding of creditable taxes by the withholding agents was proven and the income upon which the withholding taxes were withheld were included as part of the gross income and they were reflected in the preceding income tax return. Nonetheless, it should be proven that the excess creditable withholding tax has not been utilized or carried over to the succeeding taxable quarters.

Hence, there is a need for the presentation of the succeeding quarterly income tax return and the final adjustment return

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[4] Systra Philippines, Inc. vs. Commissioner of Internal Revenue, G.R. No. 176290, September 21, 2007

indispensable to prove that it did not carry over nor utilized the claimed excess creditable withholding taxes. It is indispensable since the burden of proof is incumbent upon the claimant that the amount claimed was not utilized nor carried over to the succeeding taxable quarters. Absent thereof, there will be no basis for a taxpayer's claim for refund as there will be no evidence that the taxpayer did not carry over or did not utilize the claimed excess creditable withholding taxes to the succeeding taxable quarters.

The best evidence to prove that the excess creditable withholding tax was utilized or carried over to the succeeding taxable quarters is the presentation of the succeeding quarterly income tax return and the annual income tax return of the subsequent taxable year in order for this Court to verify and conclude that the claimed amount was not utilized or carried over to the said quarters.

Significantly, a taxpayer may amend its quarterly income tax return or annual Income tax return or Final Adjustment Return which in either case may modify the previous intention to carry-over, apply as tax credit certificate or refund, as the case may be. In the instant case, petitioner's 2003 Annual Income Tax Return was amended three times. However, the option to carry-over if it was exercised by petitioner

PNB in the succeeding taxable quarters for the taxable year 2004 under the irrevocable rule cannot be modified in its final adjustment return even if it was amended several times.

Concomitantly, the presentation of the quarterly income tax return and the annual income tax return to prove the fact that excess creditable withholding tax was not utilized or carried over or opted to be utilized and carried over to the 1st, 2nd, 3rd quarters and final adjustment return of the succeeding taxable year is not only for convenience to facilitate the tax administration process but are part of the requisites to establish the claim for refund.

Section 76 of the NIRC of 1997 clearly provides that if the taxpayer claimant carries-over and applies the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years, the same is irrevocable and no application for cash refund or issuance of a tax credit certificate shall be allowed. Even if the taxpayer claimant opted and choose a tax refund/credit or did not even make a choice in its final adjustment return but nevertheless carried over to the succeeding quarters of the succeeding taxable year, the taxpayer's claim for refund or credit shall be denied. L

Citing the Philam Case[5], Stateland Case[6] and PERF Realty Case[7] the majority concludes that the presentation of the quarterly return for the succeeding years is not a requisite to establish the entitlement of a tax refund or credit. With all due respect, the Philam Case[8], Stateland Case[9] and PERF Realty Case[10] are not on all fours, considering that there was no irrevocability rule to consider yet.[11] As earlier discussed, under the irrevocability rule, the taxpayer needs to prove that the amount being claimed as refund or tax credit was not carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. Interestingly, distinction should be made in the Philam Case which is a consolidated case of G.R Nos. 156637/162004. In GR. No. 162004, wherein the irrevocable rule was first established, the necessity of the presentation of the succeeding quarterly income tax return and final adjustment return cannot be denied. The Supreme Court held as follows:

[5] Philam Asset Management, Inc. vs. CIR, G.R. Nos. 156637/162004, December 14, 2005.
[6] Stateland Investment Corporation vs. CIR G.R. No. 171956, January 18, 2008.
[7] CIR vs. PERF Realty Corporation, G.R. No. 163345, July 4, 2008.
[8] Philam Asset Management, Inc. vs. CIR, G.R. Nos. 156637/162004, December 14, 2005.
[9] Stateland Investment Corporation vs. CIR G.R. No. 171956, January 18, 2008.
[10] CIR vs. PERF Realty Corporation, G.R. No. 163345, July 4, 2008.
[11] Except in Philam Asset Management, Inc. vs. CIR, G.R. No. 162004, December 14, 2005, irrevocability rule was considered.

> "First, the fact that it filled out the portion "Prior Year's Excess Credits" in its 1999 FAR means that it categorically availed itself of the carry-over option. In fact, the line that precedes that phrase in the BIR form clearly states "Less: Tax Credits/Payments." The contention that it merely filled out that portion because it was a requirement — and that to have done otherwise would have been tantamount to falsifying the FAR — is a long shot.
>
> The FAR is the most reliable firsthand evidence of corporate acts pertaining to income taxes. In it are found the itemization and summary of additions to and deductions from income taxes due. These entries are not without rhyme or reason. They are required, because they facilitate the tax administration process.
>
> Failure to indicate the amount of "prior year's excess credits" does not mean falsification by a taxpayer of its current year's FAR. **On the contrary, if an application for a tax refund has been — or will be — filed, then that portion of the BIR form should necessarily be blank, even if the FAR of the previous taxable year already shows an overpayment in taxes.**
>
> xxx xxx xxx.
>
> Besides, "tax refunds . . . are construed strictly against the taxpayer." Petitioner has failed to meet the burden of proof required in order to establish the factual basis of its claim for a tax refund."(Emphasis Supplied)

In the instant case, petitioner PNB is claiming refund for the excess creditable withholding taxes for the year 2003, thus, it is imperative for the petitioner to prove that it did not utilize or carry over, or opted to utilize and to carry over to the 1st , 2nd , 3rd taxable quarters and final adjustment return of the taxable year 2004. Hence, the presentation of the quarterly income tax return and the final adjustment return are essential. Unfortunately, only petitioner's final c adjustment return of the taxable year 2004 was presented as evidence and the same is insufficient to prove that it did not utilize or carry over, or opted to utilize and carry over to the 1st , 2nd , 3rd taxable quarters. Taxpayer claimant is charged with the heavy burden of proving every aspect of the claim, and petitioner PNB failed to do so. In fine, PNB failed to present sufficient evidence to prove its claim under Section 76 of the NIRC.

IN VIEW OF THE FOREGOING, I vote that the Petition for Review which is docketed as CTA EB Case No. 577 be GRANTED but the Petition for Review which is docketed as CTA EB Case No. 580 be DENIED. Accordingly, the assailed Decision dated April 23, 2009, and the Resolution dated December 8, 2009, as well as the Amended Decision dated February 18, 2010 should be REVERSED AND SET ASIDE. PNB's claim for refund or issuance of a tax credit certificate should be DENIED for insufficiency of evidence.

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

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice