**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

# FIRST DIVISION

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**FAMILY FIRST, INC.,**
Petitioner,

C.T.A. CASE NO. 6661

Members:

- versus -

**ACOSTA,** *Chairperson*
**BAUTISTA,** and
**CASANOVA,** *JJ.*

**THE COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

Promulgated:
AUG 3 1 2006

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## DECISION

***CASANOVA, C., J.:***

This case is a claim for the refund or issuance of a tax credit certificate in the amount of P54,900,981.00 allegedly representing unutilized excess creditable withholding taxes for the taxable years 2000 and 2001.

The facts of the case are simple.

Petitioner is a corporation, organized and existing under the laws of the Philippines with principal office at 9$^{TH}$ Floor, Tower II, The Enterprise Center, 6766 Ayala Ave. corner Paseo de Roxas, Makati City and is a registered VAT taxpayer with Tax Identification No. 005-284-760.

On the other hand, respondent is the duly appointed COMMISSIONER OF INTERNAL REVENUE vested with authority to exercise functions of said office, including, the power to refund or credit any internal revenue tax erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected. He is holding office at the BIR National Office Building, Diliman, Quezon City.

On August 28, 2000, the Large Taxpayer Service of the Bureau of Internal Revenue, National Office classified petitioner as a Large Taxpayer, and was monitored by the Large Taxpayer District Office (LTDO) of Revenue Region No. 8 in Makati City.[1]

In the ordinary course of its business, petitioner solicits, markets and promotes the pre-need plans, contracts and life insurance policies of Berkley International Plans, Inc. (BIP) and Berkley International Life Insurance Co., Inc. (BIL), respectively, both affiliates. Petitioner's business comes mainly from these affiliates and the commissions it earns are based on agreed rates. Total fees earned from the said affiliates in 2000 and 2001 amounted to P525,328,819.00 and P407,195,858.00, respectively.[2]

Berkley International Plans, Inc. and Berkley International Life Insurance Co., Inc. allegedly deducted and withheld 5% withholding tax upon payment of said commission fees to petitioner.

On April 16, 2001 and April 15, 2002, respectively, petitioner filed its 2000 and 2001 income tax returns with the Bureau of Internal Revenue (BIR). These returns reflected petitioner's income tax overpayments arising from its unutilized creditable withholding taxes in the respective amounts of P44,036,862.00 and P54,900,981.00, computed as follows:

| | **2000**[3] | **2001**[4] |
|---|---|---|
| Sales/Revenues/Receipts/Fees | P525,328,819.00 | P407,195,858.00 |
| Less: Cost of Sales/Services | 184,258,450.00 | 305,184,554.00 |

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[1] Paragraph 4, Stipulation of Facts
[2] Item 5, Notes To Financial Statements for taxable years 2001 and 2000, page 176, Records
[3] Exhibit "O"
[4] Exhibit "X"

| | | |
|---|---|---|
| Gross Income from Operation | P341,070,369.00 | P102,011,304.00 |
| Add: Non-Operating & Other Income | (68,327.00) | 4,047,319.00 |
| Total Gross Income | P341,002,042.00 | P106,058,623.00 |
| Less: Deductions | 321,664,829.00 | 59,772,482.00 |
| Taxable Income | P 19,337,213.00 | P 46,286,141.00 |
| | | |
| Tax Due (32%) | P 6,187,908.00 | P 14,811,565.00 |
| Less: Tax Credits | | |
| Prior Year's Excess Credit | - | 43,930,622.00 |
| Creditable Tax Withheld for the First Three Quarters | 43,900,859.00 | 16,848,247.00 |
| Creditable Tax Withheld for the Fourth Quarter | 6,323,911.00 | 8,933,677.00 |
| Total Tax Credits | P 50,224,770.00 | P 69,712,546.00 |
| Tax Overpayment | P 44,036,862.00 | P 54,900,981.00 |

On August 5, 2002, petitioner filed with respondent an application for the issuance of a tax credit certificate and/or tax refund of these excess creditable withholding taxes for the periods covering January 1 to December 31, 2000 and January 1 to December 31, 2001 in the amount of FIFTY-FOUR MILLION NINE HUNDRED THOUSAND NINE HUNDRED EIGHTY-ONE PESOS (P54,900,981.00).

On April 14, 2003, due to respondent's inaction on its claim, and to toll the running of the two-year prescriptive period for filing of claims, petitioner filed the instant Petition for Review before this Court.

On June 18, 2003, respondent filed his Answer raising the following special and affirmative defenses:

> "5. The claim for refund or tax credit of petitioner is no longer allowed because the option to carry-over the excess tax credit for the year 2000, which formed the bulk of the claim, was actually exercised by petitioner in the year 2001 when it carried over to said year the amount of P43,930,622.00 and under the law such option is irrevocable.
>
> 6. The existing rule if the taxpayer fails to signify his choice, i.e. to refund, to be issued tax credit certificate or to carry-over, in the return is to consider the excess taxes to be automatically carried-over to succeeding quarter or year, which is applicable in the case of petitioner for both years 2000 and 2001;
>
> 7. Petitioner has not shown that the income from which the withholding tax was withheld was declared in their corresponding returns for years 2000 and 2001;

> 8. Claims for refund are construed 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);
> 9. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to the refund and failure to sustain the burden is fatal to the action for tax refund;
> 10. Taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable;"

On October 8, 2004, petitioner formally offered its evidence. On the other hand, in open court on February 23, 2006, the Court declared respondent to have waived his right to present evidence in view of his continued failure to appear in Court. On the same day, the Court likewise gave petitioner a period of thirty (30) days to file its Memorandum.

On April 24, 2006, petitioner filed its Memorandum. Then, in a Resolution promulgated on May 4, 2006, the case was submitted for decision.

The parties stipulated on the following issues for the resolution of the Court:

> 1. Whether the income payments upon which taxes were withheld at source were declared as part of petitioner's gross income for the taxable years 2000 and 2001.
>
> 2. Whether the excess withholding taxes are considered automatically carried-over and applied to the succeeding taxable quarters or year, if petitioner did not signify its option regarding the excess.
>
> 3. Whether said unutilized excess creditable withholding taxes for the taxable years 2000 and 2001 were carried over or applied against any income tax liability of the petitioner in 2002 or in any succeeding taxable periods.
>
> 4. Whether or not petitioner is entitled to a tax refund and/or tax credit certificate for the unutilized excess creditable withholding taxes.
>
> 5. Whether petitioner's claim for taxable years 2000 and 2001 are properly substantiated by documentary evidence.

Applicable in this case is Section 76 of the National Internal Revenue Code (NIRC), it reads:

> "**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.**" *(Emphasis supplied)*

Petitioner anchors its claim on Section 2.58.3(C) of Revenue Regulations No. 2-98, which implements the above-quoted Section 76. The Regulation provides:

***"Sec. 2.58.3. Claim for tax credit or refund.*** –

xxx xxx xxx

(C) Excess Credits – An individual or corporate taxpayer's excess expanded withholding tax credits for the taxable quarter/year shall automatically be allowed as a credit against his income tax due for the taxable quarters/years immediately succeeding the taxable quarters/years in which the excess credit arose, provided he submits with his income tax return, a copy of the first page of his income tax return for the previous taxable period showing the amount of his excess creditable tax credits, and on which return he has not opted for a cash refund or tax credit certificate.

(1) If in lieu of the automatic application of his excess credit, the taxpayer wants a cash refund or tax credit certificate for use in payment of his other national internal revenue tax liabilities, he shall make a written request thereof, within two years after the payment of the tax (Ref. Secs. 204(c) and 229 of the Code), provided however, that if the taxpayer indicated in his income tax return his option for either a cash refund or a tax credit certificate, such indication shall be considered sufficient for the purpose. Upon filing of his request, the taxpayer's income tax return showing the excess expanded withholding tax credits shall be examined. The excess expanded withholding tax so determined, shall be refunded/credited to the taxpayer."

In other words, Section 76 gives a corporation three options as regards its excess quarterly income tax payments/creditable withholding taxes, namely:

a) to be refunded,

b) to be issued a tax credit certificate, and

c) to carry-over as excess credit to the succeeding taxable quarters/years. Section 76 is likewise explicit. Once the option of "carry-over" has been chosen, the same becomes irrevocable for that taxable period. Consequently, an application for cash refund or issuance of tax credit certificate shall no longer be allowed.

This Court in several cases had categorically ruled that once the option to carry-over and apply the excess quarterly income tax against the income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable and no application for cash refund or issuance of a tax credit certificate shall be allowed therefore.[5]

The present claim in the amount of P54,900,981.00 covers excess creditable withholding taxes for taxable years 2000 and 2001. A scrutiny of petitioner's 2000 income tax return shows that petitioner reflected an excess tax credit of P44,036,862.00. In its 2000 return, petitioner did not mark any of the option boxes insofar as the reported excess tax credits of P44,036,862.00 is concerned, however, it actually carried-over the same as shown in its income tax return for the succeeding taxable year 2001, but in the reduced amount of P43,930,622.00.

After applying the 2000 excess tax credits of P43,930,622.00 against its 2001 income tax liability of P14,811,565.00, petitioner still had excess tax credits for taxable year 2000 in the amount of P29,119,057.00, which was added to the creditable withholding taxes for taxable year 2001 in the amount of P25,781,924.00, resulting in the total subject claim of P54,900,981.00.

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[5] Bank of the Philippine Islands vs. Commissioner of Internal Revenue, CTA Case No. 6276, dated March 12, 2003; Philam Asset Management, Inc. vs. Commissioner Internal Revenue, CTA Case No. 6210, dated May 2, 2002; Pilipinas Hino, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6074, dated April 19, 2002; Pilipinas Transport Industries vs. Commissioner of Internal Revenue, CTA Case No. 6073, dated March 1, 2002; and The Philippine Banking Corporation (now known as Global Business Bank, Inc.) vs. Commissioner of Internal Revenue, CTA Resolution, CTA Case No. 6280, August 16, 2001

Anent petitioner's claimed excess creditable withholding taxes for taxable year 2000 in the amount of P29,119,057.00, the Court holds petitioner not entitled to it.

Based on the facts above discussed, petitioner had actually exercised the option of "carry-over" and even applied the 2000 excess tax credits of P43,930,622.00 against its 2001 income tax liability of P14,811,565.00. Such option is *irrevocable* and petitioner is therefore precluded from claiming a refund/tax credit certificate of this 2000 unutilized excess tax credits of P29,119,057.00, pursuant to the provisions of Section 76, as quoted earlier.[6] Nevertheless, petitioner may still carry-over its excess tax credits of P29,119,057.00 to the succeeding taxable quarters/years until the same are fully utilized.

In the case of ***Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, 477 SCRA 761***, the Supreme Court made the following pronouncements:

> The carry-over option under Section 76 is permissive. A corporation that is entitled to a *tax refund* or a *tax credit* for excess payment of quarterly income taxes may carry over and credit the excess income taxes paid in a given taxable year against the estimated income tax liabilities of the succeeding quarters. Once chosen, the carry-over option shall be considered irrevocable for that taxable period, and no application for a *tax refund* or issuance of a *tax credit certificate* shall then be allowed.
>
> According to petitioner, it neither chose nor marked the carry-over option box in its 1998 FAR. As this option was not chosen, it seems that there is nothing that can be considered irrevocable. In other words, petitioner argues that it is entitled to a refund of its 1998 excess income tax payments.
>
> The argument does not hold water. The subsequent acts of petitioner reveal that it has ***effectively chosen*** the carry-over option.
>
> 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."
>
> xxx xxx xxx
>
> Whether the FIFO principle is applied or not, Section 76 remains clear and unequivocal. Once the carry-over option is taken, actually or constructively, it becomes irrevocable. Petitioner has chosen that option for its 1998 creditable withholding taxes. Thus, it is no longer entitled to a tax refund of P459,756.07, which corresponds to its 1998 excess tax credit.

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[6] SC & C COSMETECH CO., INC. vs. COMMISSIONER OF INTERNAL REVENUE, CTA CASE No. 6650, June 6, 2005

> Nonetheless, the amount will not be forfeited in the government's favor, because it may be claimed by petitioner as tax credits in the succeeding taxable years. (*Emphasis supplied*)

Applying the above conclusion of the High Tribunal, petitioner's remaining claim in the amount of P25,781,924.00 representing excess creditable withholding taxes for the taxable year 2001 must also be denied.

In its 2001 income tax return, petitioner again did not indicate its intention whether the claimed income tax overpayment for the taxable year 2001 is: a) "To be refunded"; b) "To be issued a Tax Credit Certificate"; or c) "To be carried over as credit to next year/quarter". Petitioner offered in evidence only its amended annual income tax return for taxable year 2002 reflecting no amount of prior year's excess credits[7]. However, the same cannot be the basis in granting its claim.

Petitioner's 2002 original annual income tax return is crucial to determine if indeed the original chosen option of the petitioner was to refund the excess income tax payment and not to carry-over excess credit to succeeding year/quarter. For if petitioner has originally chosen the option 'to be carried over as tax credit next year', it can no longer claim refund/tax credit of the same excess payments.

Stated otherwise, petitioner's failure to present its original 2002 income tax return is fatal to its claimed excess creditable withholding taxes for taxable year 2001 in the amount of P25,781,924.00.

Well-settled is the rule that tax refunds are in the nature of tax exemptions and as such they are regarded as in derogation of sovereign authority and to be construed in *strictissimi juris* against the person or entity claiming it (***Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc., 309 SCRA 87***).

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

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[7] Exhibit " BB-1"

**SO ORDERED.**

**CAESAR A. CASANOVA**
Associate Justice

WE CONCUR:

**ERNESTO D. ACOSTA**
Presiding Justice

**LOVELL R. BAUTISTA**
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's Division.

**ERNESTO D. ACOSTA**
Presiding Justice
Chairperson, First Division