REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

UPSI MANAGEMENT, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 544
(CTA Case No. 7602)

Present:

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

Promulgated:
SEP 1 5 2010

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DECISION

COTANGCO-MANALASTAS, *J.*:

Before the Court *En Banc* is a Petition for Review filed by UPSI Management, Inc. (petitioner) on October 14, 2009, pursuant to paragraph 2, Section 18 of Republic Act No. 1125, as amended by Republic Act No. 9282 and Rule 8, Section 3(b) of the Revised Rules of the Court of Tax Appeals, praying for the Court *En Banc* to annul and set aside the Decision dated July 6, 2009 and the Resolution dated September 4, 2009, and to issue a new Decision declaring as follows:

1. petitioner's intention to refund its excess creditable taxes withheld in taxable year 2004, through the issuance of a tax credit certificate (TCC), is clear based on evidence presented and circumstances surrounding the case; and

2. petitioner is entitled to refund through the issuance of a TCC in the amount of P2,151,269.00, having sufficiently complied with all the requirements in claiming for refund of excess creditable taxes withheld.

Antecedent Facts

The relevant antecedents are succinctly recited in the assailed Decision as follows:[1]

> "Petitioner is a corporation duly organized and existing under Philippine Laws, with business address at 1122 General Luna Street, Paco, Manila.
>
> Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue with powers to act upon and grant claims for refund of tax credit of overpaid internal revenue taxes, with office address at the Fifth Floor, BIR National Office Building, BIR Road, Diliman, Quezon, City.
>
> On April 15, 2005, petitioner filed its annual income tax return for the taxable year ended December 31, 2004 with Revenue District No. 34, Revenue Region No. 6 of the Bureau of Internal Revenue.
>
> On June 7, 2005 petitioner filed an Amended Annual Income Tax Return (ITR) for taxable year ended December 31, 2004.
>
> On December 19, 2006, pursuant to Sections 204(c) and 229 of the National Internal Revenue Code of 1997 (1997 NIRC), petitioner filed a claim for refund and/or issuance of a Tax Credit Certificate in the total amount of P2,151,269.00 representing the unutilized creditable withholding taxes for taxable year 2004.

[1] *Rollo*, pp. 41-47

In his income tax returns for the calendar year 2004, petitioner reported a net loss of P1,030,044.00, a Minimum Corporate Income Tax (MCIT) due of P68,464.00, Prior Year's Excess Creditable Withholding Taxes amounting to P2,487,900.00 and Creditable Taxes Withheld for the taxable year 2004, in the amount of P2,151,269.00. In sum, petitioner reported excess creditable withholding taxes amounting to P4,639,169.00. As petitioner was in a net loss position, it only paid the MCIT due.

Petitioner indicated its intention 'to be issued a tax credit certificate' to the extent of the unutilized creditable tax withheld for taxable year 2004 by marking the appropriate box with 'x' in its 2004 Amended Income Tax Return. Despite its manifestation that it wishes to be issued a tax credit certificate, its Creditable Taxes Withheld for the year 2004, in the amount of P2,151,269.00, was carried over to Petitioner's Creditable Tax Withheld in its 2005 Annual Income Tax Return. The P2,151,269.00 was part of the Petitioner's Prior Excess Credits of P4,570,705.00 for taxable year 2005.

On December 19, 2006, petitioner filed with the office of the respondent a claim for refund and/or issuance of a tax credit certificate in the total amount of P2,151,269.00 representing the unutilized creditable withholding taxes for taxable year 2004.

Not having received any reply from respondent, petitioner filed the instant case before this Court on April 12, 2007.

Respondent filed his Answer on May 29, 2007 which stated the following Special and Affirmative Defenses:

> '5. Petitioner's claim for refund is still pending administrative investigation[.]
>
> 6. Petitioner has the *burden of proof* to show that it is entitled to the refund of the amounts claimed as refundable because taxes are *presumed* to have been collected in accordance with laws and regulations *(Caltex Phils., Inc. vs. Commissioner of Internal Revenue, CTA Case No. 2871, January 29, 1986).*

7. Claims for refund are to be construed strictly against the petitioner, the same being in the nature of an exemption [from] taxation. Failure on the part of the petitioner to prove the same is fatal to its claim for tax refund (*Meralco Electric Co vs. Commissioner of Internal Revenue, 67 SCRA 351; Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95).*

8. Petitioner must prove that the alleged refundable taxes were neither automatically applied as tax credit against its tax liability for the succeeding quarters of the succeeding year nor included as creditable taxes declared or applied to the succeeding taxable years.

9. Under Section 76 of the 1997 Tax Code, petitioner's excess creditable tax withheld for taxable year 2004 may either be refunded, claimed as tax credit or carried over/applied to the succeeding taxable years as could be explicitly gleaned out from the petitioner's annual income tax return (Annex 'E'). However, once an option has been made, the same becomes irrevocable for the tax period and no application for cash refund shall be allowed therefore.

10. In the case at bar, petitioner opted to claim as tax credit said amount of P2,151,269.00, but the said amount was likewise automatically carried over and/or applied as petitioner's creditable tax withheld in its 2005 income tax return (Annex 'C'). Undoubtedly, petitioner has explicitly violated Section 76 of the 1997 Tax Code for claiming refund, tax, credit and automatic carry-over simultaneously. Said petitioner's practice of claiming the three (3) option[s] simultaneously would not only confuse the respondent of petitioner's claim but it is likewise highly irregular, improper and erroneous.

11. While the petitioner's act of carrying-over of said amount of P2,151,269.00 to petitioner's creditable tax withheld for taxable year 2005 is improper, the fact of carrying-over alone creates serious conflict whether or not respondent would now

allow petitioner's claim for refund and/or tax credit for obvious reason that said act of carrying-over might have been given due course as well. In other words, petitioner could not claim an option of carry-over and refund and/or tax credit at the same time.

12. Moreover, the existence of an excess creditable withholding taxes alone does not per se entitle petitioner to a refund. The petitioner must prove that (1) its claim for refund is filed with the respondent within the two (2) years period from the date of payment of the tax required under Section 204 of the 1997 Tax Code; (2) it must be shown on petitioner's return that the income payment received was declared as part of its gross income; and (3) the fact of withholding is established by copies of statement duly issued by petitioner's payors showing the amount paid and the amount of taxes withheld (*Citytrust Finance Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4134, November 11, 1991; Paseo Realty & Development Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4254, August 10, 1993).'*

The parties submitted their Joint Stipulation of Facts on July 27, 2007 which this Court approved *via* a Resolution on July 31, 2007.

During trial, petitioner presented documentary and testimonial evidence to establish inclusion of its income in its returns, fact of withholding and non-utilization of excess creditable taxes withheld. Petitioner submitted its Formal Offer of Evidence on May 23, 2008 which this Court resolved on July 15, 2008 by admitting all of its documentary exhibits except Exhibits 'E-3, E-4, E-5, GG, GG-1, GG-2, GG-3, R, R-1, R-2 and R-3'.

On August 5, 2008, due to the denial of some of its exhibits, petitioner filed a Motion for Reconsideration of the Resolution dated July 15, 2008. However, in the hearing held on August 7, 2008, because of the lack of date and time of hearing of said Motion, the same was not admitted by the Court; instead, petitioner was given a period of thirty days to file a Motion to Admit the Attached Motion for Reconsideration.

Also in the same hearing, respondent's counsel manifested that it has no witnesses to present and that it is submitting the case for decision based on the pleadings.

In compliance with Court order, petitioner filed its Motion to Admit Attached Motion for Reconsideration on August 7, 2008. On September 30, 2008 the Court denied the Motion to Admit Attached Motion for Reconsideration. Petitioner again filed a Motion for Reconsideration of the Resolution dated September 30, 2008 on October 20, 2008, which this Court granted on December 5, 2008.

Upon submission by the parties of their respective Memorandum, January 8, 2009 for petitioner and January 21, 2009 for respondent, the case was submitted for decision on March 19, 2009."

The issues jointly submitted by the parties for decision are as follows:

1. Whether or not petitioner filed its claim for refund and/or issuance of a tax credit certificate within the two-year period;

2. Whether or not the unutilized Creditable Taxes Withheld for the taxable year 2004 has been used at any time and whether the same has been inadvertently carried over to taxable year 2005;

3. Whether or not petitioner could simultaneously claim refund and/or tax credit certificate of said alleged unutilized creditable income tax withheld of P2,151,269.00 for taxable year 2004 and carried over the same amount of P2,151,269.00 as its prior excess credits in its Income Tax return for taxable year 2005;

4. Whether or not the excess creditable taxes for taxable year 2004 sought to be refunded were actually withheld and remitted to the BIR by the petitioner's payors/withholding agents, as proven by statements duly issued by the payors/withholding agents to petitioner showing the amount paid and the amount of tax withheld therefrom;

> 5. Whether or not the alleged excess creditable taxes for taxable year 2004 sought to be refunded were actually withheld and remitted by petitioner's withholding agents to the BIR in accordance with the provisions of the Tax Code;
>
> 6. Whether or not the Annual Income Tax Return and the Amended Annual Income Tax Return both for taxable year 2004, show that the income payments were received, that were subjected to withholding taxes, were declared as part of petitioner's gross income;
>
> 7. Whether or not petitioner is entitled to be issued a tax credit certificate in the amount of P2,151,269.00 representing the unutilized creditable taxes withheld for taxable year 2004; and
>
> 8. Whether or not petitioner's claim for refund of P2,151,269.00 is proper and in accordance with law."

The Court summed up the foregoing issues into the main issue of whether or not petitioner is entitled to claim as refund the amount of P2,151,269.00.

The Ruling of the Court in Division

The Court in Division ruled in favor of respondent and considered petitioner to have exercised the option to carry-over the amount of P4,570,705.00 despite the fact that it marked the option "To be issued a tax credit certificate"; thus, precluding petitioner from being issued a tax credit certificate for its excess creditable withholding taxes. Said disposition was based on Section 76 of the National Internal Revenue Code (NIRC) of 1997.

The dispositive portion of the Decision of the Court in Division is hereunder quoted, to wit:

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

SO ORDERED."

Petitioner then filed a Motion for Reconsideration on July 29, 2009. However, the Motion was denied by the Court in Division in a Resolution dated September 4, 2009.

The Issue

Hence, petitioner filed the instant Petition for Review on October 14, 2009, raising the following ground:

> **"THE FIRST DIVISION OF THE COURT OF TAX APPEALS DID NOT DECIDE IN ACCORD WITH LAW AND APPLICABLE JURISPRUDENCE WHEN IT RULED THAT PETITIONER IS NOT ENTITLED TO THE REFUND OR ISSUANCE OF A TCC IN THE AMOUNT OF P2,151,269.00 IN VIEW OF THE INADVERTENT INCLUSION OF THE 2004 EXCESS CREDITABLE TAXES WITHHELD IN THE 'PRIOR YEAR'S EXCESS CREDITS' OF TAXABLE YEAR 2005."**

Petitioner asserts that it opted to be issued a TCC for its excess creditable taxes withheld for taxable year 2004, as evidenced by its Amended Annual Income Tax Return for taxable year 2004. Its intention to be issued a TCC is further corroborated by petitioner's filing of a claim for refund and/or issuance of TCC in the total amount of P2,151,269.00, representing unutilized creditable taxes withheld for taxable year 2004. Furthermore, petitioner alleges that the Court in Division failed to appreciate the following overt acts which also manifested petitioner's intent to be issued a TCC:

> "a. Petitioner filed a Petition for Review with the First Division of the Court of Tax Appeals on 12 April 2007,

when the two (2) year prescriptive period for filing the claim for refund through the issuance of a TCC is about to expire.

b. Appropriate corrections and safeguards were put in place at the earliest available opportunity thru the rectification of the inadvertent inclusion of the amount of P2,151,269.00 representing unutilized creditable taxes withheld arising from taxable year 2004 when Petitioner clearly indicated on its Annual Income Tax Return for taxable year 2006 that the unutilized creditable taxes withheld for taxable year 2004 was not used and was deducted and not included there-from.

c. Petitioner's creditable taxes withheld for taxable year 2004, in the amount of P2,151,269.00, has not been utilized in calendar years 2004, 2005, and 2006. Neither was the amount applied as tax credit precisely because Petitioner sustained taxable losses for 2004 and 2005 while in 2006, Petitioner was in a break-even position. There is no tax payable or tax liability where the excess taxes withheld for taxable year 2004 of P2,151,269.00 can be used as payment and the same has not been utilized for any tax payment."[2]

Petitioner likewise contends that by amending its Annual Income Tax Return on July 7, 2005 to indicate in the appropriate box its choice to be issued a TCC, petitioner's intent was not only crystal clear, but more importantly, it "expresses certainty or preference and thus demonstrates clear diligence." By deducting the whole amount of P4,570,705.00 from its excess creditable taxes withheld in 2006, petitioner reiterated its original intention to be refunded through the issuance of a TCC. While petitioner inadvertently included the unutilized creditable taxes withheld in 2004 in the amount of P2,151,269.00 in the "Prior year's excess credits" of the succeeding taxable year of 2005, the inclusion was not intentional and the same was not actually

[2] *Rollo*, p. 19

credited since petitioner was in a net loss position and break-even position for taxable years 2005 and 2006, respectively.

On October 28, 2009, a Resolution[3] was issued by this Court ordering respondent to file his Comment within ten (10) days from receipt of said Resolution. However, respondent failed to file his Comment within the prescribed period; thus, the Court *En Banc* ordered both parties to file their respective memorandum within thirty (30) days from receipt of the Resolution dated December 4, 2009.[4]

On February 9, 2010, the case was submitted for decision, taking into consideration petitioner's Memorandum filed on January 8, 2010 and respondent's failure to file his Memorandum within the period prescribed by this Court.[5]

The Ruling of the Court *En Banc*

The Petition for Review is unmeritorious.

Perusal of the arguments raised by petitioner reveals that they are substantially the same arguments contained in its Motion for Reconsideration filed with the Court in Division on July 29, 2009 and which had been exhaustively addressed in the Resolution promulgated on September 4, 2009.

To reiterate the ruling of the Court in Division, petitioner is precluded from seeking the issuance of tax credit certificate for its excess creditable withholding taxes since it had exercised the option of carry-over despite the fact that it had marked the option "To be issued a tax credit certificate".

[3] *Rollo,* pp. 1171-1172
[4] *Rollo,* pp. 1175-1176
[5] *Rollo,* p. 1208

This is in accordance with the provision of Section 76 of the NIRC of 1997, which provides as follows:

> "SEC 76. *Final Adjustment Return.* - Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the 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 credits; 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)*

In the case of **Commissioner of Internal Revenue vs. Bank of the Philippine Islands**[6], the High Court made a similar observation as regards the implication of petitioner's act of filling out the portion "Prior year's excess credits" in its Return. The Supreme Court said:

> "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

[6] G.R. No. 178490, July 7, 2009, citing Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, G.R. Nos. 156637 and 162004, December 14, 2005

> clearly states 'Less: Tax Credits/Payments.' xxx" *(Emphasis supplied)*

While a taxpayer is required to mark its choice in the form provided by the BIR, this requirement is only for the purpose of facilitating tax collection.[7] Therefore, although petitioner marked with "x" the box corresponding to the phrase "To be issued a tax credit certificate", the categorical availment of the carry-over option by petitioner in filling out the portion "Prior year's excess credits" prevails. As a consequence, petitioner is barred from seeking the issuance of tax credit certificate for its excess creditable withholding taxes.

In the case of **Paseo Realty and Development Corporation vs. Court of Appeals, Court of Tax Appeals and Commissioner of Internal Revenue**[8], the Supreme Court had the occasion to expound on the options contained in Section 76 of the NIRC of 1997 and the irrevocability of the option made by the taxpayer; the pertinent portion of which reads:

> "As clearly seen from this provision, the taxpayer is allowed three (3) options if the sum of its quarterly tax payments made during the taxable year is not equal to the total tax due for that year: (a) pay the balance of the tax still due; (b) carry-over the excess credit; or (c) be credited or refunded the amount paid. If the taxpayer has paid excess quarterly income taxes, it may be entitled to a tax credit or refund as shown in its final adjustment return which may be carried over and applied against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. However, **once the taxpayer has exercised the option to carry-over and to apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years, such option is irrevocable for that taxable**

[7] Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, G.R. Nos. 156637 and 162004, December 14, 2005
[8] G.R. No. 119286, October 13, 2004

> **period and no application for cash refund or issuance of a tax credit certificate shall be allowed.**" *(Emphasis supplied)*

The Supreme Court reiterated said ruling in the case of **Philam Asset Management, Inc. vs. Commissioner of Internal Revenue**[9], in this wise:

> "**These two options under Section 76 are alternative in nature. The choice of one precludes the other**. Indeed, in *Philippine Bank of Communications v. Commissioner of Internal Revenue*, the Court ruled that a corporation must signify its intention - whether to request a *tax refund* or claim a *tax credit* - by marking the corresponding option box provided in the FAR. **While a taxpayer is required to mark its choice in the form provided by the BIR, this requirement is only for the purpose of facilitating tax collection.**
>
> xxx xxx xxx
>
> 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.**
>
> 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. xxx" *(Emphasis supplied)*

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[9] *Supra,* note no. 7

Clearly, the controlling factor for the operation of the irrevocability rule is that the taxpayer chose an option; and once it had already done so, it could no longer make another one. Consequently, after the taxpayer opts to carry-over its excess tax credit to the following taxable period, the question of whether or not it actually gets to apply said tax credit is irrelevant. Section 76 of the NIRC of 1997 is explicit in stating that once the option to carry over has been made, "no application for tax refund or issuance of a tax credit certificate shall be allowed therefor."

Since Section 76 of the NIRC of 1997 mentions no exception or qualification, petitioner's contention that it was not its intention to exercise the option of carry-over considering that the unutilized tax credits of P2,151,269.00 has not been actually credited due to its net loss position and break-even position for taxable years 2005 and 2006, respectively, is of no moment.

Again, in the case of **Commissioner of Internal Revenue vs. Bank of the Philippine Islands**[10], the High Tribunal explained the intention of the legislature in including the last sentence to Section 76 of the NIRC of 1997, in the following manner:

> "(T)he evident intent of the legislature, in adding the last sentence to Section 76 of the NIRC of 1997, is to keep the taxpayer from flip-flopping on its options, and avoid confusion and complication as regards said taxpayer's excess tax credit. The interpretation of the Court of Appeals only delays the flip-flopping to the end of each succeeding taxable period."

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[10] *Supra*, note no. 6

The Court in Division correctly disregarded the choice made by petitioner after its categorical availment of the carry-over option; otherwise, the Court would have negated the irrevocability of said option, thereby defeating the very purpose for which the last sentence of Section 76 was added.

In recapitulation, considering that petitioner carried over its excess creditable withholding tax for the year 2004, this Court upholds the ruling of the Court in Division that petitioner can no longer seek refund or issuance of tax credit certificate pursuant to Section 76 of the NIRC of 1997.

WHEREFORE, finding no cogent reason to reverse the Decision and Resolution assailed in the present case, the Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the assailed Decision of the Court in Division dated July 6, 2009 and the Resolution dated September 4, 2009 in CTA Case No. 7602 are hereby **AFFIRMED**.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice