REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

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

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 597
(CTA CASE No. 7204)

Present:

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

Promulgated:

MAR 1 7 2011 Liw Apolinario 1:00 p.m.

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DECISION

UY, J.:

Before Us is a partial appeal from the Decision dated September 10, 2009[1] and the Resolution dated February 9, 2010[2], respectively rendered by the First Division and Special First Division of this Court (hereinafter interchangeably referred to as the "Court in Division") in CTA Case No. 7204, entitled *"Raytheon Ebasco Overseas Ltd. – Philippine Branch, petitioner, vs. Commissioner of Internal Revenue, respondent"*, the dispositive portions of which respectively read:

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[1] Penned by Associate Justice Lovell R. Bautista, and concurred by Presiding Justice Ernesto D. Acosta and Associate Justice Caesar A. Casanova. Docket, pp. 19 to 29.
[2] Docket, pp. 79 to 84.

Decision dated September 10, 2009

"**WHEREFORE,** premises considered, the instant Petition for Review is hereby **DENIED** for insufficiency of evidence.

SO ORDERED."

Resolution dated February 9, 2010

"**WHEREFORE**, finding no cogent reason to reverse the previous ruling of this Court, the Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED."

Notably, in the instant Petition for Review, it appears that petitioner merely questions the denial of the Court in Division of its claim for refund for taxable year 2002, and impliedly accepts the denial of its claim for taxable year 2003.

THE FACTS

Petitioner Raytheon Ebasco Overseas Ltd. – Philippine Branch is a foreign corporation duly organized under the laws of the State of Delaware, United States of America, duly licensed to do business in the Philippines under Securities and Exchange Commission (SEC) Certificate of Registration No. A1997-16458 dated December 18, 1997. It is engaged in procurement services, project management, construction management, wholesale marketing, sales, and contract administration; all in connection with industrial projects. It is likewise registered with the Bureau of Internal Revenue (BIR) in Makati City on January 1, 1997, under Certificate of Registration No. OCN8RC0000015850.

Respondent is the duly appointed Commissioner of Internal Revenue vested with the power to decide, approve, and grant refunds or tax credits of overpaid internal revenue taxes as provided by law. He holds office at the Office of the Commissioner, BIR National Office Building, BIR Road, Diliman, Quezon City.

Petitioner filed its Annual Income Tax Returns for taxable year ended December 31, 2002 on April 15, 2003 and for taxable year ended December 31, 2003 on April 15, 2004.

In its Annual Income Tax Return for taxable year 2002, petitioner indicated a tax overpayment of ₱ 39,422,257.00, which it intends to be refunded by marking the box corresponding to the option "To be refunded" with a cross.

Anent its Annual Income Tax Return for taxable year 2003, petitioner declared a tax overpayment of ₱ 6,885,746.00, and manifested its choice by marking with a cross the option box "To be refunded".

Petitioner filed an administrative claim for refund with respondent on April 13, 2005. Due to the inaction of respondent, petitioner elevated the matter to the Court in Division via Petition for Review on April 14, 2005.

Respondent filed his Answer on June 9, 2005, wherein he interposed certain special and affirmative defenses.

After trial on the merits, the case was submitted for decision on October 20, 2008, taking into consideration petitioner's Memorandum filed on July 3, 2008, sans respondent's Memorandum. However, on December 17, 2008, petitioner filed a Motion to Admit Memorandum requesting the withdrawal of its earlier Memorandum as it was intended for CTA Case No. 6458, and to admit instead the attached Memorandum for the case (CTA Case No. 7204). The said motion was granted. Hence, the case was submitted for decision on October 20, 2008, considering petitioner's Memorandum filed on December 17, 2008.

In the assailed Decision, the Court in Division denied the Petition for Review for insufficiency of evidence, both for petitioner's claim for refund for taxable years 2002 and 2003.

On October 2, 2009, petitioner filed a Motion for Reconsideration[3] of said Decision, wherein it noted a typographical error in its BIR Form No. 2307 covering the period October 2003 to December 2003, and prayed that it be allowed to present its general ledger and receipts in support of the said typographical error in the entries. Petitioner likewise prayed that it be allowed to present proof to ascertain the income payments related to the claimed creditable taxes withheld formed part of its taxable gross income in its 2002 and 2003 Income Tax Returns, and to present its First, Second, and Third Quarterly Income Tax Returns for taxable years 2003 and 2004, and the Annual Income Tax Return for taxable year 2004 to show that it did not carry over the 2002 and 2003 unutilized creditable withholding taxes to the succeeding years of 2003 and 2004.

On October 26, 2009, respondent filed an Opposition[4] to petitioner's Motion for Reconsideration contending, *inter alia*, that said Motion is tantamount to a motion for a new trial and should not be permitted as it makes a mockery of an orderly administration of justice; that the evidence sought to be presented by petitioner is old forgotten evidence, which is not a ground for reopening or new trial; that petitioner failed to prove that the income upon which the taxes were withheld were included in the return of the recipient; and that petitioner likewise

[3] Docket, pp. 30 to 60.
[4] Docket, pp. 61 to 69.

failed to prove that it did not carry-over to the succeeding taxable quarters its alleged excess creditable withholding tax.

On December 14, 2009, petitioner filed a Reply[5] to respondent's Opposition arguing that proceedings before this Court shall not be governed strictly by technical rules of evidence; that it complied with all the requisites in order to be entitled for a refund of its excess creditable tax withheld; and that it did not carry-over to the succeeding taxable quarters the excess creditable taxes withheld.

On February 9, 2010, the Court in Division issued the assailed Resolution denying petitioner's Motion for Reconsideration for lack of merit. According to the Court in Division, the documents sought to be submitted by petitioner as evidence cannot be considered as newly discovered evidence but merely forgotten evidence, and to allow a party to submit such evidence which could have been offered with the exercise of due diligence goes against the orderly administration of justice. Furthermore, the Court in Division likewise stressed that a liberal application of the rules of procedure to suit petitioner's purpose would clearly pave the way for injustice as it would be rewarding an act of negligence with undeserved tolerance.

Hence, this recourse before the Court *En Banc* via a Petition for Review, wherein petitioner prays for the granting of the refund of its alleged unutilized tax credits for taxable year 2002 only, through the issuance of a Tax Credit Certificate amounting to ₱ 39,422,257.00.

[5] Docket, pp. 71 to 78.

In the Resolution dated March 26, 2010,[6] the Court *En Banc* directed petitioner to submit a Secretary's Certificate on the authority of the signatory (*i.e.*, Mr. Andrado C. Almalvez) to verify the instant Petition for Review and certify on non-forum shopping within five (5) days from notice.

On April 5, 2010, petitioner filed a Motion for Extension of Time to submit the Secretary's Certificate, manifesting that it is unable to submit the said document within the period directed by the Court considering that its main office, which is located in the United States of America, has yet to send the same. This Motion was granted by the Court through its Resolution dated April 13, 2010[7], and petitioner was given until May 5, 2010 to submit the document in question.

On May 5, 2010, petitioner filed a Manifestation[8], wherein it submitted an authenticated Secretary's Certificate authorizing Mr. Andrado C. Almalvez to verify the instant Petition and to certify on non-forum shopping.

Subsequently, the Court *En Banc* issued the Resolution dated May 17, 2010, directing respondent to file its comment to the instant Petition for Review, within ten (10) days from notice. Respondent, however, never filed said comment.

In the Resolution dated June 23, 2010,[9] the parties were granted a period of thirty (30) days from notice, within which to file their respective memorandum.

Only petitioner filed its Memorandum on July 27, 2010. Petitioner argues that it: (1) had complied with all the requisites in order to claim a refund of its excess creditable withholding taxes for taxable year 2002; (2) clearly opted "(t)o

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[6] Docket, pp. 91 to 92.
[7] Docket, pp. 98 to 99.
[8] Docket, pp. 100 to 106.
[9] Docket, pp. 113 to 114.

be refunded" of its excess tax credit for taxable year 2002; and (3) had already ceased operations in the Philippines, hence, it can no longer incur any tax liabilities to which its excess tax credits may be applied.

Considering the failure of respondent to file a Memorandum within the given period, the case was deemed submitted for decision as of September 22, 2010.[10] Hence, this Decision.

THE ISSUE

The issue presented for the resolution of the Court *En Banc* is as follows:

> "WHETHER OR NOT PETITIONER IS ENTITLED TO A REFUND OR TAX CREDIT CERTIFICATE IN THE TOTAL AMOUNT OF THIRTY NINE MILLION FOUR HUNDRED TWENTY TWO THOUSAND TWO HUNDRED FIFTY SEVEN PESOS (P39,422,257.00) REPRESENTING ITS EXCESS OR UNUTILIZED TAX CREDIT FOR TAXABLE YEAR 2002 BASED ON THE EVIDENCE PRESENTED."

THE COURT EN BANC'S RULING

The two options under Section 76 are alternative in nature. The choice of one precludes the other.

Petitioner contends that it had clearly indicated in its Income Tax Return for taxable year 2002 that it wanted "To be refunded" of its excess tax credits,[11] and that respondent never refuted nor presented evidence to show proof that petitioner carried over its excess tax credit to the succeeding years.

The point of petitioner is well-taken.

Section 76 of the NIRC of 1997 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

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[10] Resolution dated September 22, 2010, Docket, pp. 161 to 162.
[11] Exhibit "N" (Lines 28 and 30).

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)*

It must be emphasized that Section 76 of the NIRC of 1997 was formerly Section 69 of the 1977 NIRC[12] and it brought about two (2) changes therefrom: *first*, it mandates that the taxpayer's exercise of its option to either seek refund or crediting is irrevocable, and *second*, the taxpayer's decision to carry-over and apply its current overpayment to future tax liability continues until the overpayment had been fully applied, no matter how may tax cycles it takes.[13]

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[12] SEC. 69. *Final Adjustment Return.* — Every corporation liable to tax under Sections 24 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 net income of that year the corporation shall either:

(a) Pay the excess tax still due; or

(b) Be refunded the excess amount paid, as the case may be.

In case the corporation is entitled to a refund of the excess estimated quarterly income taxes paid, the refundable amount shown on its final adjustment return may be credited against the estimated quarterly income tax liabilities for the taxable quarter of the succeeding taxable year.

[13] *Commissioner of Internal Revenue vs. McGeorge Food Industries, Inc.*, G.R. No. 174157, October 20, 2010.

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Nevertheless, under Section 76, the availment of one remedy still precludes the other.[14] Such being the case, the choice of petitioner to be refunded of its excess tax credits for taxable year 2002 precludes the choice of the same excess tax credits from being carried over to the income tax due for the taxable quarters of the succeeding taxable years.

Thus, although petitioner has not presented and offered in evidence its First, Second and Third Quarterly Income Tax Returns for taxable year 2003, the option to be refunded must be respected by respondent. Correspondingly, there is no need for the Court in Division to refer to the said Returns *"to determine whether petitioner effectively opted to carry-over the 2002 xxx excess creditable withholding for the succeeding taxable quarters."* After all, respondent ought to know the tax records of all taxpayers and she could have easily disproven claimant's allegations. That she chose not to do so amounts to a waiver of that right.[15]

Be that as it may, petitioner is still charged with the heavy burden of proving that it has complied with and satisfied all the statutory and administrative requirements to be entitled to the tax refund.[16]

Compliance with the conditions for the grant of a claim for refund of creditable withholding tax.

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[14] *Belle Corporation vs. Commissioner of Internal Revenue*, G.R. No. 181298, January 10, 2011.
[15] *Commissioner of Internal Revenue vs. Ironcon Builders and Development Corporation*, G.R. No. 180042, February 8, 2010.
[16] *Commissioner of Internal Revenue vs. Eastern Telecommunications Phils., Inc.*, G.R. No. 163835, July 7, 2010.

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The Supreme Court ruled, in a number of cases[17], that there are three (3) conditions for the grant of a claim for refund of creditable withholding income tax, to wit: 1) the claim is filed with the Commissioner of Internal Revenue within the two-year period from the date of payment of the tax;[18] 2) the fact of withholding is established by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of the tax withheld therefrom;[19] and 3) it is shown on the return of the recipient that the income payment received was declared as part of the gross income.[20]

In the assailed Decision, the Court in Division ruled as follows:

"**Petitioner has complied with the first requirement**.

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As regards the second requisite of establishing the fact of withholding, petitioner submitted its Certificates of Creditable Tax Withheld at Source [BIR Form 2307] issued by Kepco Ilijan Corporation and San Roque Power Corporation, showing creditable withholding taxes for taxable years 2002 and 2003 in the respective amounts of P39,422,257.75 and P19,212,263.57 xxx.

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Therefore, petitioner was able to substantiate by proper withholding tax certificates only the creditable withholding taxes in the amounts of P39,422,257.75 and P3,908,788.57 (P19,212,263.57 less P15,303,475.00) **for taxable years 2002** and 2003, respectively.

This Court shall now discuss if petitioner complied with the third requirement of whether or not the income upon which the subject taxes were withheld were included and reported by petitioner in its 2002 and 2003 Income Tax Returns.

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[17] *Banco Filipino Savings and Mortgage Bank vs. Court of Appeals, et al.*, G.R. No. 155682, March 27, 2007; *Commissioner of Internal Revenue vs. Perf Realty Corporation*, G.R. No. 163345, July 4, 2008, and *Commissioner of Internal Revenue vs. Far East Bank & Trust Co. (Now Bank of the Philippine Islands)*, G.R. No. 173854, March 15, 2010.

[18] Sections 204(C) and 229, NIRC of 1997; Jose C. Vitug and Ernesto D. Acosta, Tax Law and Jurisprudence, 329 (2006), citing *Gibb v. Collector,* 107 Phil. 230 (1960).

[19] Section 2.58.3(B) of Revenue Regulations No. 2-98.

[20] Id.; *Calamba Steel Center, Inc. v. Commissioner on Internal Revenue*, G.R. No. 151857, April 28, 2005, 457 SCRA 482.

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> A perusal of the withholding tax certificates revealed that the creditable income taxes of P39,422,257.75 and P3,908,788.57 for taxable years 2002 and 2003 were withheld on gross income payments of P1,971,112,887.50 and P195,028,311.25 (P210,331,786.25 less P15,303,475.00) respectively.
>
> On the other hand, petitioner's gross income in its 2002 and 2003 Income Tax Returns and Audited Financial Statements amounted to P1,670,926,625.00 and P1,042,752,358.00, respectively. **Petitioner submitted various official receipts and invoices; however, petitioner failed to present proofs, such as a detailed general ledger, sales register, reconciliation schedules or any other document whereby the Court can trace that the income payments related to the claimed creditable taxes withheld formed part of its taxable gross income in its 2002 and 2003 Annual Income Tax Returns.**" *(Emphases supplied)*

Hence, the crux of the controversy in the instant case lies on petitioner's compliance with the third requisite.

At the level of the Court in Division, petitioner urges Us to look unto the attached Annexes (general ledger and reconciliation schedule) and explanation about its adoption of the percentage-of-completion method of revenue recognition in its Motion for Reconsideration[21] of the assailed Decision *"in order to clarify the discrepancy pointed out by the Honorable Court"*[22] with reference to its compliance with the above-stated third requisite. For this purpose, petitioner invokes the case of *Philippine Phosphate Fertilizer Corporation vs. Commissioner of Internal Revenue*[23] for Us to consider petitioner's failure to present the said documents and explantion during trial as "excusable negligence".

On this score, We agree with petitioner.

The Supreme Court in the said case ruled as follows:

> "It is true that petitioner could not move for new trial on the basis of newly discovered evidence because in order to have a new trial on the basis of newly discovered evidence, it must be proved that: (a) the

[21] Docket, pp. 30 to 60.
[22] Docket, p. 127.
[23] G.R. No. 141973, June 28, 2005.

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evidence was discovered after the trial; (b) such evidence could not have been discovered and produced at the trial with reasonable diligence; (c) it is material, not merely cumulative, corroborative or impeaching; and (d) it is of such weight that, if admitted, will probably change the judgment. This does not mean however, that petitioner is altogether barred from having a new trial. As pointed out by Judge Acosta, the reasons put forth by petitioner could fall under mistake or excusable negligence.

The 'mistake' that is allowable in Rule 37 is one which ordinary prudence could not have guarded against. Negligence to be 'excusable' must also be one which ordinary diligence and prudence could not have guarded against and by reason of which the rights of an aggrieved party have probably been impaired. The test of excusable negligence is whether a party has acted with ordinary prudence while transacting important business.

In this case, it cannot be said that petitioner did not act with ordinary prudence in claiming its refund with the CTA, in light of its previous cases with the CTA which did not require invoices and the non-mandatory nature of CTA Circular No. 1-95.

Respondent also argues that petitioner's motion for new trial was filed out of time and should therefore be dismissed in view of Sec. 1, Rule 37 and Sec. 4, Rule 43 of the Rules of Court.

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We reiterate the fundamental principle that technical rules of procedure are not ends in themselves but are primarily designed to aid in the administration of justice. And in cases before tax courts, Rules of Court applies only by analogy or in a suppletory character and whenever practicable and convenient shall be liberally construed in order to promote its objective of securing a just, speedy and inexpensive disposition of every action and proceeding. The quest for orderly presentation of issues is not an absolute. It should not bar the courts from considering undisputed facts to arrive at a just determination of a controversy. This is because, after all, the paramount consideration remains the ascertainment of truth. Section 8 of R.A. No. 1125 creating the CTA also expressly provides that it shall not be governed strictly by technical rules of evidence." *(Emphasis supplied)*

Therefore, We shall consider the said Annexes and explanation, coupled with the evidence presented by petitioner during trial, in resolving petitioner's compliance with the third requisite or condition for the grant of a claim for refund of creditable withholding income tax, *i.e.*, that there must be a showing **on the return** of the petitioner that the **income payment subjected to witholding tax** was declared as part of the gross income.

After a careful evaluation of the said documents, however, We are convinced that petitioner failed to show its compliance with the said requisite or condition. Particularly, We **cannot** say that there is a showing on the petitioner's return for taxable year 2002 that the income payments subjected to witholding tax were declared as part of its gross income.

While it may be true that official receipts, invoices, general ledger, and reconciliation schedule vis-à-vis explanation adopted the percentage-of-completion method of reporting income would tend to support petitioner's compliance with the said third condition, the first and foremost document to be closely examined is the final adjustment return or Annual Income Tax Return of petitioner for taxable year 2002,[24] particularly the entries made therein.

In the said return, specifically Schedule 1 thereof or the *"Schedule of Sales/Revenues/Receipts/Fees"*, stating a revenue in petitioner's Sale of Service in the amount of ₱ 1,670,926,625.00, there is no entry whatsoever in the *"Creditable Tax Withheld"* column. Thus, this declaration is to the effect, or at the very least, can be taken to mean, that no part of the gross income reported therein were ever subjected to creditable withholding tax. Correspondingly, the supposed income payments (in the total amount of ₱ 1,971,112,887.00) to which taxes were withheld (in the total amount of ₱ 39,422,257.00—the amount of the

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[24] Exhibit "N".

present claim for refund), cannot be said to have been declared as part of the gross income for taxable year 2002.

As cases filed before this Court are litigated *de novo*, party-litigants should prove **every minute aspect** of their cases.[25] Thus, there should be no room for inconsistencies, especially on the part of claimant, who has the burden of proof to establish the factual basis of its claim for tax refund.

In fine, We reiterate our consistent ruling that actions for tax refund, as in the instant case, are in the nature of a claim for exemption and the law is not only construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence presented entitling a taxpayer to an exemption is *strictissimi* scrutinized and must be duly proven.[26]

WHEREFORE, all the foregoing considered, the instant Petition for Review is hereby **DENIED**. The assailed Decision dated September 10, 2009 and Resolution dated February 9, 2010, is hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

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[25] *Dizon vs. Court of Tax Appeals, et al.,* G.R. No. 140944, April 30, 2008; *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue,* G.R. No. 145526, March 16, 2007; and *Commissioner of Internal Revenue vs. Manila Mining Corporation,* G.R. No. 153204, August 31, 2005.

[26] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
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 before the case was assigned to the writer of the opinion of the Court *En Banc*.

ERNESTO D. ACOSTA
Presiding Justice