REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

STABLEWOOD PHILIPPINES, INC. (Formerly Rolls-Royce Philippines, Inc., successor-in-interest of Rolls-Royce Power Ventures (Philippines), Inc.),
Petitioner,

CTA EB No. 751
(CTA Case No. 7705)

Present:

Acosta, *P.J.*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez,
Fabon-Victorino,
Mindaro-Grulla, and
Cotangco-Manalastas, *JJ.:*

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 17 2012 Castpalinario 1:25 p.m.

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D E C I S I O N

CASTAÑEDA, JR., J.:

On appeal are the Decision dated December 10, 2010 denying the Petition for Review filed by Stablewood Philippines, Inc. formerly known as Rolls-Royce Philippines, Inc., successor-in-interest of Rolls-Royce Power Ventures

(Philippines), Inc. for the refund or issuance of a tax credit certificate in the amount of P826,218.14 representing its alleged 2005 excess creditable withholding tax and the Resolution dated March 17, 2011 also denying its Motion for Reconsideration for lack of merit both issued by the Court of Tax Appeals ("CTA") Third Division in CTA Case No. 7705.

THE FACTS

Stablewood Philippines, Inc. ("petitioner") is a corporation duly organized and existing under the laws of the Republic of the Philippines; while the Commissioner of Internal Revenue ("respondent") is a public official tasked to decide disputed assessments, refund of erroneously or excessively paid internal revenue taxes, fees or other charges, penalties, or other matters arising under the National Internal Revenue Code ("NIRC"), as amended.[1]

On April 6, 2006, Rolls-Royce Power Ventures (Philippines), Inc. ("RRPVI") electronically filed its annual income tax return ("ITR") for the taxable year 2005[2] reflecting an income tax overpayment of P10,591,139.21 computed as follows:

Sales/Revenues/Receipts/Fees	P 16,115,324.00
Less: Cost of Sales/Services	13,352,010.00
Gross Income from Operation	2,763,314.00
Add: Non-Operating and Other Income	393,773.00
Total Gross Income	3,157,087.00
Less: Deductions	5,362,689.00
Taxable Income	(2,205,602.00)

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[1] Joint Stipulation of Facts and Issues ,Docket, CTA Case No. 7705, p. 114.
[2] Joint Stipulation of Facts and Issues, Docket, CTA Case No. 7705, p. 116.

Income Tax Due (32%)	-
Minimum Corporate Income Tax (MCIT)	63,141.74
Less: Tax Credits/Payments	
Prior Year's Excess Credits	3,912,763.42
Creditable Tax Withheld for the First Three Quarters	6,100,429.79
Creditable Tax Withheld for the Fourth Quarter	641,087.74
Total Tax Credits/Payments	10,654,280.95
Tax Payable/Overpayment	**P(10,591,139.21)**[3]

On Item No. 30 of the 2005 annual ITR, RRPVI signified its option "To be issued a Tax Credit Certificate".[4]

On January 19, 2007, RRPVI filed an administrative claim for refund of its 2005 excess creditable withholding tax ("CWT") of P826,218.14 with the Bureau of Internal Revenue ("BIR").[5]

The BIR's inaction on the refund claim prompted RRPVI to seek redress by way of a Petition for Review docketed as CTA Case No. 7705 before the CTA's Third Division on November 15, 2007.

During the pendency of the proceedings, upon Motion and the submission of the certified true copies of the certificate of filing of articles and plan of merger and the articles of merger between Orca Energy, Inc. (now Rolls-Royce Philippines, Inc.), surviving corporation, and Orca Plant Operations, Inc., and RRPVI, the Court granted RRPVI's request to be substituted by Rolls-Royce

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[3] Rollo, p. 47.
[4] Rollo, pp.16 & 90.
[5] Joint Stipulation of Facts and Issues, Docket, CTA Case No. 7705, p. 116

Philippines, Inc. and change the case caption to "Rolls-Royce Philippines, Inc. [successor-in-interest of Rolls-Royce Power Ventures (Philippines), Inc.] vs. Commissioner of Internal Revenue" on June 2, 2008.[6]

Due to the Securities and Exchange Commission's ("SEC") approval of change of name on May 8, 2009, the Court likewise granted the Motion of Rolls-Royce Philippines, Inc. to amend the case caption as follows: "Stablewood Philippines, Inc., (formerly: Rolls-Royce Philippines, Inc., and successor-in-interest of Rolls-Royce Power Ventures (Philippines), Inc. vs. Commissioner of Internal Revenue".[7] Stablewood Philippines, Inc. is now the petitioner in the instant case.

Petitioner proffered its testimonial and documentary evidence. Respondent on the other hand signified that the claim is still pending before the Revenue District Office (RDO) No. 50 and that there is no report of investigation.[8]

In ruling for the respondent, the Court in Division denied petitioner's refund claim or the issuance of tax credit certificate in the amount of P826,218.14 representing its alleged 2005 excess CWT.[9] The Court reasoned that despite having originally opted "To be issued a Tax Credit Certificate" of its 2005 excess CWT, petitioner carried over the P10,591,139.21 (including

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[6] Docket, CTA Case No. 7705, p 217.
[7] Docket, CTA Case No. 7705, pp. 665-667 & 698-699.
[8] Docket, CTA Case No. 7705, p.664.
[9] Rollo, pp. 37-50.

the subject claim of P826,218.14) to the subsequent quarters of taxable year 2006, thus, resulting to the denial of its refund claim.[10]

Dissatisfied, petitioner moved to reconsider the assailed Decision; however, in the Resolution dated March 17, 2011, the Court denied the same for lack of merit.[11]

THE ISSUES

Unfazed, petitioner appealed before the CTA *en banc* raising the following issues:

I.

PETITIONER FULLY SUBSTANTIATED ITS CLAIM FOR REFUND OR ISSUANCE OF TCC IN THE AMOUNT OF PHP 826,218.14 REPRESENTING THE 2005 CWT OF THE DISSOLVED RRPV.

II

THE CTA THIRD DIVISION COMMITTED REVERSIBLE ERROR IN DENYING PETITIONER'S CLAIM FOR REFUND ON THE BASIS ONLY OF THE 2006 1ST TO 3RD QUARTER ITRS AND IN TOTALLY DISREGARDING RRPV'S CATEGORICAL CHOICE TO BE REFUNDED ITS 2005 CWT IN ITS 2005 ANNUAL ITR AND RRPV'S FAILURE TO CARRY OVER SUCH 2005 CWT IN ITS 2006 AND 2007 ANNUAL ITRS.

III.

THE FORMER RRPV WAS DISSOLVED BY OPERATION OF LAW UPON APPROVAL BY THE SECURITIES AND EXCHANGE COMMISSION OF ITS MERGER WITH PETTIONER. THEREFORE, RRPV'S UNUTILIZED CWT OUGHT TO BE REFUNDED OR ISSUED A TAX CREDIT CERTIFICATE SINCE RRPV MAY NO LONGER BE ABLE TO UTILIZE SAID EXCESS CWT AND PETITIONER, AS SUCCESSOR-IN-INTEREST

[10] Penned by Associate Justice Amelia C. Manalastas and concurred in by Associate Justices Lovell R. Bautista and Olga Palanca-Enriquez.
[11] Rollo, pp. 52-56.

OF RRPV, DID NOT CARRY OVER THE PHP826,218.14 EXCESS CWT OF RRPV IN ITS 2008, 2009, AND 2010 ITRs.[12]

Respondent filed her Comment to the Petition on June 30, 2011.[13]

In the Resolution dated September 21, 2011, the Court noted respondent's Manifestation and Motion that she adopts all arguments and affirmative defenses in the Comment/Oppostion and findings of the Court in Division as part of her Memorandum. On account of the filing of respondent's Manifestation and Motion and petitioner's Memorandum, the case was eventually submitted for decision.

THE COURT'S RULING

THE IRREVOCABILITY RULE UNDER SECTION 76 OF THE 1997 NIRC, AS AMENDED, APPLIES WHEN THE OPTION TO CARRY-OVER IS ACTUALLY OR CONSTRUCTIVELY CHOSEN.

The Court finds it necessary to resolve the second issue before it delves on the other grounds.

Petitioner alleges that the 2005 Annual ITR of RRPVI shows that it did not fully utilize its excess CWT in 2005 for the payment of income tax due in the year 2005 since it incurred taxable loss for the same year and, therefore, had minimum corporate income tax ("MCIT") due of P63,141.74.

A portion of the prior year's excess credits in the amount of P3,912,763.42 was applied as payment of the 2005 MCIT due in the amount of P63,141.74 *[initials]*

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[12] Rollo, p. 12.
[13] Rollo, p. 88.

pursuant to the first-in, first-out rule in utilization of tax credits. Thus, RRPVI was not able to utilize its CWT in 2005.

Petitioner likewise asserts that it substantiated RRPVI's prior year's excess credits with CWT certificates issued in 2004 and marked as Exhibits "X" to "EE".

RRPVI did not carry over to the succeeding year 2006 its 2005 CWT in the aggregate amount of P6,741,517.53 (composed of CWT from local sources in the amount of P826,218.14 and foreign tax credits of P5,915,299.39). Its 2006 annual ITR indicates only the amount of P2,636,587.23 as prior year's excess credits which is what remained of the P3,912,763.42 reported as prior year's excess credits in the 2005 annual ITR after deduction of the MCIT due in 2005, CWT in 2004, and deductible foreign tax credits, as follows:

2005 Prior Year's Excess Credits		Php 3,912,763.42
Less: MCIT Due in 2005	Php 63,141.74	
CWT in 2004	1,191,453.14	
Deductible foreign tax credits	21,581.31	Php 1,276,176.19
2006 Prior Year's Excess Credits		**Php2,636,587.23**

Moreover, in the 2005 annual ITR, petitioner chose the option "To be issued a Tax Credit Certificate" for its excess CWT in 2005.

Clearly, petitioner did not carry-over to the succeeding year 2006 the 2005 excess CWT of P826,218.14 which it sought to be covered by a tax credit certificate as reflected in its 2005 annual ITR. *gr*

Petitioner's annual ITRs for the succeeding years of 2006 and 2007 clearly reflect that the 2005 excess CWT sought to be refunded in the form of a tax credit certificate was not carried-over to 2006 and 2007.

The amount of prior year's excess credits in the 2006 and 2007 annual ITRs of RRPVI do not include the 2005 excess CWT in the amount of P6,741,517.53.

Petitioner's clear indication of its option to be refunded of its 2005 excess CWT in the form of a tax credit certificate as shown in the 2005 annual ITR should be controlling.

Respondent argues that petitioner had already exercised its option to carry-over its claimed 2005 excess and unutilized CWT to taxable year 2006. While petitioner's 2005 annual ITR return shows that it elected the option to be issued a tax credit certificate pertaining to its 2005 excess tax credits of P10,591,139.21 including the subject claim of P826,218.14, the quarterly income tax returns for the first three quarters of taxable year 2006 reflect that there was a carry-over of the amount of P10,591,139.21.

We disagree with petitioner's stance.

A corporation which has incurred excess income tax payments is given the option to a) refund in the form of cash or tax credit certificate; or b) carry-over the excess amount against the income tax liabilities for the taxable quarters of the succeeding taxable years pursuant to Section 76 of the 1997 NIRC, as amended. The same provision discusses the irrevocability rule, stating:

"SEC. 76. Final Adjustment Return. xxx *Je*

> "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.**

Under the irrevocability rule, in the event the corporate taxpayer elects the option to carry-over, such option shall be irrevocable for the taxable period, and a refund shall not be allowed. **Thus, the irrevocability rule only applies to the option of carry-over and not the option of a refund as explicitly stated in Section 76 of the 1997 NIRC, as amended.**

The Supreme Court cases of *Belle Corporation v. Commissioner of Internal Revenue*[14], *Commissioner of Internal Revenue v. Mirant (Philippines) Operations, Corporation*[15] and *Commissioner of Internal Revenue v. PL Management International Philippines, Inc.*[16] establish that only the option to carry-over is irrevocable.

In *Belle Corporation v. Commissioner of Internal Revenue*[17], the Supreme Court distinguished the old provision of Section 69 of the NIRC and the present provision of Section 76 of the 1997 NIRC, and emphasized that only the option to Jc

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[14] *Belle Corporation v. Commissioner of Internal Revenue,* G.R. No. 181298, January 10, 2011, 639 SCRA 108.
[15] *Commissioner of Internal Revenue v. Mirant (Philippines) Operations Corporation,* G.R. Nos. 171742 & 176165, June 15, 2011, 652 SCRA 80.
[16] *Commissioner of Internal Revenue v. PL Management International Philippines, Inc.,* G.R. No. 60949, April 4, 2011, 647 SCRA 72.
[17] *Belle Corporation v. Commissioner of Internal Revenue, supra.*

carry-over excess income tax payments is irrevocable. The pertinent excerpts of the *Belle Corporation* case provide:

> ***The option to carry over excess income tax payments is irrevocable under Section 76 of the 1997 NIRC***
>
> This rule, however, no longer applies as Section 76 of the 1997 NIRC now reads:
>
> xxx xxx xxx
>
> Under the new law, in case of overpayment of income taxes, the remedies are still the same; and the availment of one remedy still precludes the other. But unlike Section 69 of the old NIRC, the carry-over of excess income tax payments is no longer limited to the succeeding taxable year. Unutilized exess income tax payments may now be carried over to the succeeding taxable years until fully utilized. **In addition, the option to carry-over excess income tax payments is now irrevocable.** Hence, unutilized excess income tax payments may no longer be refunded. (Emphasis supplied.)

Citing Section 76 of the 1997 NIRC and the case of *Commissioner of Internal Revenue v. Bank of the Philippine Islands*[18], only the option to carry-over was mentioned as irrevocable as declared by the Supreme Court in the case of *Commissioner of Internal Revenue v. PL Management International Philippines, Inc.*[19], *viz*:

> As can be seen, Congress added a sentence to Section 76 of the NIRC of 1997 in order to lay down the irrevocability rule, to wit:
>
> "xxx 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 tax refund or issuance of a tax credit certificate shall be allowed therefore." xxx
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> **In *Commissioner of Internal Revenue v. Bank of the Philippine Islands*, the Court, citing the aforequoted pronouncement in *Philam Asset Management, Inc.*, points out that Section 76 of** Jr

[18] *Commissioner of Internal Revenue v. Bank of the Philippine Islands,* G.R. No. 178490, July 7, 2009, 592 SCRA 219, 231.
[19] *Commissioner of Internal Revenue v. PL Management International Philippines*, Inc., *supra.*

the NIRC of 1997 is clear and unequivocal in providing that the carry-over option, once actually or constructively chosen by a corporate taxpayer, becomes irrevocable. The Court explains:

> Hence, 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. S**ection 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 tax credit certificate shall be allowed therefor."**
>
> **The last sentence of Section 76 of the NIRC of 1997 reads: "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 for that taxable period and no application for tax refund or issuance of a tax credit certificate shall be allowed therefore."** The phrase "for that taxable period" merely identifies the excess income tax, subject of the option, by referring to the taxable period when it was acquired by the taxpayer. In the present case, the excess income tax credit, which BPI opted to carry over, was acquired by the said bank during the taxable year 1998. **The option of BPI to carry over its 1998 excess income tax credit is irrevocable; it cannot later on opt to apply for a refund of the very same 1998 excess income tax credit.** (Emphasis supplied.)

In the recent consolidated cases of *Commissioner of Internal Revenue v. Mirant (Philippines) Operations, Corporation* and *Mirant (Philippines) Operations, Corporation (formerly: Southern Energy Asia-Pacific Operations (Phils.), Inc. v. Commissioner of Internal Revenue*[20], the Supreme Court emphasized that the irrevocability rule solely covers the option of carry-over. The Highest Tribunal explained that:

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[20] *Commissioner of Internal Revenue v. Mirant (Philippines) Operations, Corporation, supra.*

> ***Once exercised, the option to carry-over is irrevocable.***
>
> "**SEC. 76. – Final Adjustment Return.** xxx
>
> The last sentence of Section 76 is clear in its mandate. **Once a corporation exercises the option to carry-over and apply the excess quarterly income tax against the tax due for the taxable quarters of the succeeding taxable years, such option is irrevocable for that taxable period. Having chosen to carry-over the excess quarterly income tax, the corporation cannot thereafter choose to apply for a cash refund or for the issuance of a tax credit certificate for the amount representing such overpayment.** (Emphasis supplied.)
>
> xxx **Section 76 of the NIRC of 1997 is clear and unequivocal in providing that the carry-over option, once actually or constructively chosen by a corporate taxpayer, becomes irrevocable.**
>
> xxx xxx xxx
>
> **Applying the irrevocability rule in Section 76, Mirant having opted to carry over its tax overpayment for the fiscal year ending July 30, 1999 and for the interim period ending December 31, 1999, it is now barred from applying for the refund of the said amount or for the issuance of a tax credit certificate therefor, and for the unutilized tax credits carried over from the fiscal year ended June 30, 1998.**
>
> xxx xxx xxx
>
> **Therefore, as the CTA ruled, Mirant complied with all the legal requirements and it is entitled, as it opted, to a refund of its excess creditable withholding tax for the taxable year 2000 in the amount of P38,620,427.00.**

The irrevocability rule solely pertaining to the option to carry-over has also been reiterated in the CTA *en banc* cases of *United Coconut Planters Bank v. Commissioner of Internal Revenue*[21] and *Benguet Management Corporation v. Commissioner of Internal Revenue*[22].

[21] CTA EB Case No. 725, August 23, 2012.
[22] CTA EB Case No. 200, April 4, 2007.

In the case at bar, the fact that petitioner opted to be issued a tax credit certificate as evidenced by its 2005 annual ITR is of no consequence because this choice is defeated by its act of carrying over its 2005 excess tax credits to the succeeding year. We give credence to the findings of the Court's Third Division in this wise:

> In the parties' Joint Stipulation of Facts and Issues, it was stated that "Item No. 30 of the Annual Income Tax Return for 2005 indicated that the excess CWT in 2005 is 'To be refunded'." However, a scrutiny of the reprint of petitioner's Annual Income Tax Return for taxable year 2005 showed that petitioner marked the choice "To be issued a Tax Credit Certificate".
>
> **Even though petitioner elected the option "To be issued a Tax Credit Certificate" insofar as the excess tax credits as of December 31, 2005 in the amount of P10,591,139.21 (including the subject claim of P826,218.14) is concerned, petitioner nevertheless carried over the said amount in its Quarterly Income Tax Returns for the first, second, and third quarters of the succeeding taxable year 2006. Thus, petitioner's original option to refund (in the form of tax credit certificate) the amount of P826,218.14 is actually negated by its very act of carrying over said excess amount to the succeeding taxable quarters of 2006. Having exercised the option of carry-over with respect to its claimed excess tax credits of P826,218.14, petitioner is bound by the irrevocability rule under Section 76 of the NIRC of 1997, as amended**. Consequently, petitioner cannot seek the refund of the amount of P826,218.14 even if the same was not utilized in the succeeding year 2006. Petitioner's only recourse is to apply the excess amount of P826,218.14 to the succeeding quarters/years until it is fully utilized. (Emphasis supplied.)[23]

Due to the fact that the excess tax credits of P10,591,139.21 which include the amount of P826,218.14 were carried over to the subsequent taxable year, the irrevocability rule bars petitioner refund for the covered period.

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[23] Rollo, pp. 48-49.

ON THE CLAIM OF MERGER

According to petitioner, on November 28, 2007, the SEC approved the merger of RRPVI, Orca Plant Operations, Inc. and Orca Energy, Inc. At the same time, the surviving entity, Orca Energy, Inc.'s name was amended to Rolls-Royce Philippines, Inc. and subsequently to petitioner Stablewood Philippines, Inc.

It is now impossible to actually carry-over the excess CWT since RRPVI, the actual owner of the 2005 excess CWT sought to be refunded was dissolved by operation of law upon its merger with petitioner Stablewood Philippines, Inc.,the successor-in-interest of RRPVI.

RRPVI's dissolution by operation of law due to merger resulted in the acquisition of RRPVI's assets by petitioner Stablewood Philippines, Inc., including the 2005 excess CWT in the amount of P826,218.14.

The surviving company Rolls-Royce Philippines, Inc. which subsequently changed its name to Stablewood Philippines, Inc. did not carry over RRPVI's excess CWT in 2005 to taxable year 2008, the year the merger took effect.

Petitioner's contention deserves scant consideration.

A merger is a union whereby one or more existing corporations are absorbed by another corporation that survives and continues the combined business. [24]

Section 80 of the Corporation Code enumerates the effects of merger, namely:

[24] *Philippine National Bank and National Sugar Development Corporation v. Andrada Electric and Enginerring Company*, G.R. No. 142936, April 17, 2002, 381 SCRA 244 and *Poliand Industrial Limited v. National Development Company et al.* and *National Development Company and Poliand Industrial Limited*, G.R. Nos. 143866 and 143877, August 22, 2005, 467 SCRA 500.

SEC. 80. Effects of merger or consolidation. — The merger or consolidation shall have the following effects:

1. The constituent corporations shall become a single corporation which, in case of merger, shall be the surviving corporation designated in the plan of merger; and, in case of consolidation, shall be the consolidated corporation designated in the plan of consolidation;

2. The separate existence of the constituent corporations shall cease, except that of the surviving or the consolidated corporation;

3. The surviving or the consolidated corporation shall possess all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Code;

4. The surviving or the consolidated corporation shall thereupon and thereafter possess all the rights, privileges, immunities and franchises of each of the constituent corporations; and all property, real or personal, and all receivables due on whatever account, including subscriptions to shares and other choses in action, and all and every other interest of, or belonging to, or due to each constituent corporation, shall be deemed transferred to and vested in such surviving or consolidated corporation without further act or deed; and

5. The surviving or consolidated corporation shall be responsible and liable for all the liabilities and obligations of each of the constituent corporations in the same manner as if such surviving or consolidated corporation had itself incurred such liabilities or obligations; and any pending claim, action or proceeding brought by or against any of such constituent corporations may be prosecuted by or against the surviving or consolidated corporation. The right of creditors or liens upon the property of any of such constituent corporations shall not be impaired by such merger or consolidation."

Clearly in a merger, the rights, assets and obligations of the absorbed corporation are transferred to the surviving corporation.

With the merger among RRPVI, Orca Plant Operations, Inc., and Orca Energy, Inc., now petitioner Stablewood Philippines, Inc., the latter shall acquire all assets and shall assume all liabilities of RRPVI and Orca Plant Operations, Inc. Thus, petitioner would have been refunded the 2005 RRPVI's excess tax credits only if RRPVI did not exercise the option of carry-over the excess tax credits. But since RRPVI had actually opted to carry-over the excess tax credits, petitioner as the surviving corporation cannot claim for refund the amount of P826,218.14 representing the 2005 excess CWT under Section 76 of the 1997 NIRC, as amended.

The Court sees no cogent reason to discuss the remaining issue for being moot.

WHEREFORE, premises considered, Petition for Review is hereby **DISMISSED.** The assailed Decision dated December 10, 2010 and the Resolution dated March 17, 2011 are **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

(Concurs with the Dissenting Opinion of Justice Fabon-Victorino)
ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

(With Dissenting Opinion)
ESPERANZA R. FABON-VICTORINO
Associate Justice

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

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

EN BANC

STABLEWOOD PHILIPPINES, INC. (Formerly Rolls-Royce Philippines, Inc., successor-in-interest of Rolls-Royce Power Ventures [Philippines], Inc.), Petitioner,	C.T.A. EB No. 751 (C.T.A. CASE NO. 7705)
	Members:
- versus –	ACOSTA, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: SEP 17 2012 1:35 p.m.

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DISSENTING OPINION

***Fabon-Victorino, J.*:**

With due respect, I dissent.

The majority holds that the irrevocability rule under Section 76 of the 1997 NIRC applies solely to the option to carry-over and not to the option to refund. It is with regret that I cannot join the majority's submittal as I adhere to my stance in my draft decision that ***the options of a corporate taxpayer,***

whose total quarterly income tax payments exceed its tax liability, are alternative in nature and the choice of one precludes the other. [1]

Pursuant to Section 76 of the NIRC, as amended, there are **only two alternative options** available to a corporate taxpayer whose quarterly income tax payments exceed its tax liability - it may either apply for a refund within the prescribed period, **or** carry over and apply the same to its tax liabilities for the succeeding quarters of the succeeding taxable years. In *Philam Asset Management, Inc. v. Commissioner of Internal Revenue,*[2] the Highest Tribunal elucidates on these two mutually exclusive options, in this wise:

> The first option is relatively simple. Any tax on income that is paid in excess of the amount due the government may be refunded, provided that a taxpayer properly applies for the refund.
>
> The second option works by applying the refundable amount, as shown on the FAR of a given taxable year, against the estimated quarterly income tax liabilities of the succeeding taxable year.
>
> **These two options under Section 76 are alternative in nature. The choice of one precludes the other**. Indeed, in Philippine Bank of Communications v.

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[1] *Philam Asset Management, Inc. v. Commissioner of Internal Revenue*, 514 Phil. 147, 157 (2005).
[2] 514 Phil. 147, 157 (2005).

> 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.
>
> One cannot get a tax refund and a tax credit at the same time for the same excess income taxes paid... (*Emphases supplied*)

It is thus clear that a corporate taxpayer is **not** legally allowed a change of heart once it has chosen an option from the two alternative remedies for the choice of one precludes the other. Significantly, the Supreme Court, speaking through Justice Antonio T. Carpio, has categorically ruled that an exercise of an option is irrevocable, thus:

> **Under Section 76, the Exercise of an Option is Irrevocable** and a Decision to Carry-over and Apply Tax Overpayment Continues Until the Overpayment has been Fully Applied to Tax Liabilities[3]

The Final Arbiter ruled further that a decision to carry-over and apply tax overpayment continues until the overpayment has been fully applied to tax liabilities. To quote the exact language of the ruling:

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[3] Commissioner of Internal Revenue v. McGeorge Food Industries, Inc., G.R. No. 174157, October 20, 2010.

> Section 76 of the NIRC of 1997 was formerly Section 69 of the 1977 NIRC and it wrought 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 many tax cycles it takes**. (*Emphases supplied*)

A contextual appreciation of the ruling would tell us that any of the two alternatives once chosen is irrevocable - be it for refund or carry over. **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**.[4]

The Highest Tribunal explains the *rationale* behind the ruling saying that "Section 76 is, like its predecessor Section 69 of the 1977 NIRC, a tax administration measure crafted to ease tax collection. By requiring corporate taxpayers to indicate in their final adjustment return whether, in case of overpayment, they wish to have the excess amount refunded or carried-over and applied to their future tax liability, the provision aims to properly manage claims for refund or tax credit. Administratively

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[4] *Commissioner of Internal Revenue v. PL Management International Philippines, Inc.*, G.R. No. 160949, April 4, 2011, citing *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*, G.R. No. 178490, July 7, 2009.

speaking, Section 76 xxx xxx xxx is a toll designed to promote rational and efficient functioning of the tax system."[5] To be sure, flip-flopping on the part of the corporate taxpayer will not only run counter to the spirit of the law but will also create chaos and delay in the collection of taxes to the prejudice of the government.

The ruling is certainly not an *obiter* or something that was made in passing. An *obiter dictum* as defined in Blacks Law Dictionary, 6th Edition is an opinion entirely unnecessary for the decision of the case, a remark made, or opinion expressed by a judge in his decision upon a cause, "by the way," that is incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way illustration or analogy or argument. Such are not binding as precedent.

Guided by the foregoing, I respectfully submit that the ruling in Commissioner of Internal Revenue v. McGeorge Food Industries, Inc. that under Section 76, the exercise of an option is irrevocable is the *law of the case*, which is binding upon all lower courts. The law of the case is defined as a doctrine which

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[5] CIR v. McGeorge, *supra*.

provides that an appellate court's determination on a legal issue is binding on both the trial court on remand and on appellate court on subsequent appeal given the same case substantially the same facts.[6]

Significantly, in all the subsequent cases brought before the Final Arbiter, to wit, Belle Corporation v. Commissioner of Internal Revenue, G.R. No. 181298, January 10, 2011, Commissioner of Internal Revenue v. PL Management International Philippines, Inc., G.R. No. 160949, April 4, 2011, and the consolidated cases of Commissioner of Internal Revenue v. Mirant (Philippines) Operations Corporation, G.R. No. 171742, June 15, 2011 and Mirant (Philippines) Operators Corporation v. Commissioner of Internal Revenue, G.R. No. 176165, June 15, 2011, the original option exercised by the respective corporate taxpayers therein was to carry over the excess to the succeeding quarter and not refund. Precisely the ruling that the option of the respective corporate taxpayers to carry over excess income tax payment was irrevocable under Section 76 of the 1997 NIRC emphasizing that unutilized excess income tax payments may be carried over to the succeeding taxable years until fully utilized.

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[6] Black Law Dictionary, 6th Edition.

Clearly, the exercise of the option to claim a refund or issuance of a tax credit certificate bars the other option to carry-over as tax credit for application in the subsequent years.[7]

Finally, the Supreme Court is consistent to date in holding that the two (2) options are alternative in nature and that the choice of one bars the other. In fact, even the *Annual Income Tax Return (BIR Form 1702)* under line 30, states that, and I quote:

> **If overpayment, mark one box only: (once the choice is made, the same is irrevocable)**

In view of the foregoing, I vote to grant the Petition for Review.

ESPERANZA R. FABON-VICTORINO
Associate Justice

I Concur:

ERNESTO D. ACOSTA
Presiding Justice

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[7] *United Coconut Planter Bank vs. Commissioner of Internal Revenue*, C.T.A. Case No. 7614, January 26, 2011.