REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

WINEBRENNER & IÑIGO INSURANCE BROKERS, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 824
(CTA CASE NO. 7764)

Present:

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

Promulgated:

DEC 1 1 2012 [signature] 4:20 pm

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DECISION

UY, J.:

This Petition for Review filed before the Court of Tax Appeals *En Banc* on September 22, 2011 seeks a reversal of the Resolution promulgated on August 17, 2011[1], issued by the Third Division of this Court (Court in Division)[2] in CTA Case No. 7764, entitled "Winebrenner & Iñigo Insurance Brokers, Inc., petitioner, vs. Commissioner of Internal Revenue, respondent",

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[1] Resolution dated August 17, 2011, ponencia of. Associate Justice Amelia Cotangco-Manalastas, concurred by Associate Justice Olga Palanca-Enriquez, with Separate Opinion of Associate Justice Lovell R. Bautista; Docket, pp. 30-43.

[2] Chaired by Associate Justice Lovell R. Bautista, with Associate Justice Olga Palanca-Enriquez and Associate Justice Amelia Cotangco-Manalastas as members.

denying petitioner's claim for refund or issuance of a tax credit certificate for its alleged excess and unutilized creditable income taxes withheld for taxable year 2005 for lack of merit.

THE FACTS

The factual antecedents of the case are undisputed.

Petitioner is a domestic corporation duly organized and existing under Philippine laws, with principal office at Suite 803, 88 Corporate Centre, Sedeño corner Valero Streets, Salcedo Village, Makati City. It is registered with the Bureau of Internal Revenue (BIR) and was issued Tax Identification Number (TIN) 000-151-714-000 and BIR Certificate of Registration No. 9RC0000185715.

Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue empowered to perform the duties of said office including, among others, the power to decide, approve, and grant refunds or tax credits of erroneously or excessively paid taxes.

On the following dates, petitioner filed with the BIR its Annual Income Tax Return, First Amended Annual ITR and Second Amended Annual ITR, to wit:

Annual Income Tax Return (2005)	Date of Filing
Original Annual ITR	April 17, 2006
First Amended Annual ITR	May 9, 2006
Second Amended Annual ITR	May 15, 2006

On April 9, 2008, petitioner filed with the BIR Revenue District Office No. 50 an administrative claim for refund of excess and unutilized creditable withholding taxes for taxable year 2005 in the amount of P4,312,694.00.

Thereafter, petitioner filed a Petition for Review before the former First Division of the Court of Tax Appeals[3] on April 14, 2008 docketed as CTA Case No. 7764.

An Answer was filed thereto by the Commissioner of Internal Revenue (CIR) on June 19, 2008, interposing the special and affirmative defense, among others, that petitioner is not entitled to a refund or tax credit because it opted to carry-over its excess creditable withholding tax for 2005 in its Amended Annual Income Tax Return filed on May 9, 2006, which option is allegedly considered irrevocable and cannot be altered by filing an amended annual income tax return pursuant to Section 76 of the 1997 Tax Code.

After the pre-trial conference held on July 4, 2008, the parties filed their Joint Stipulation of Facts and Issues on July 29, 2008. The same was approved by the Court *a quo* in the Resolution dated July 31, 2008.

During trial, petitioner presented its evidence, and formally offered Exhibits "A" to "E12", inclusive, which were admitted in the Resolutions dated June 19, 2009 and September 4, 2009. Thereafter, respondent presented in evidence Exhibits "1" and "1-A" to oppose petitioner's refund claim, which were admitted in the Resolution dated November 16, 2009.

Meanwhile, pursuant to CTA Administrative Circular No. 01-2011 dated January 5, 2010, implementing the fully expanded membership in the Court of Tax Appeals, CTA Case No. 7764 was transferred from the First Division to the Third Division of this Court (Court in Division). On March 12, 2010, the case was submitted for decision before the Court in Division, considering

[3] Chaired by Presiding Justice Ernesto D. Acosta, with Associate Justice Juanito C. Castañeda, Jr. and Associate Justice Lovell R. Bautista as members.

petitioner's Memorandum filed on February 17, 2010, and the report of the Court's Records Division that respondent failed to file a memorandum.

On February 16, 2011, the Court in Division rendered its Decision[4], denying petitioner's claim for refund of its alleged excess or unutilized creditable income taxes withheld for taxable year 2005 in the amount of P4,312,694.00 for lack of merit. The Court *a quo* ruled that the Petition for Review in CTA Case No. 7764 should be denied considering that, although petitioner did not apply to any tax liability the 2005 unutilized excess tax credits of P4,312,694.00, as may be verified in its 2006 Annual Income Tax Return, the fact remains that petitioner's choice to carry over is still irrevocable.

Citing the case of *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*, G.R. No. 178490, July 7, 2009, the Court in Division explained that once the carry-over option had already been made by petitioner, it is already bound by the irrevocability rule under Section 76 of the National Internal Revenue Code (NIRC) of 1997, as amended; and therefore, petitioner can no longer seek a refund of its 2005 excess tax credits even if the same were not utilized in the succeeding year 2006. Petitioner should just apply the 2005 excess tax credits to the succeeding quarters/years until the same are fully utilized.

Petitioner filed a Motion for Reconsideration of the said Decision before the Court *a quo,* through registered mail, on March 8, 2011. In said motion, petitioner argues that it had chosen the option to be refunded of or

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[4] Ponencia of Associate Justice Amelia Cotangco-Manalastas, concurred by Associate Justice Lovell R. Bautista and Associate Justice Olga Palanca-Enriquez; Docket, pp. 48-60.

issued a TCC for its excess CWT, to the exclusion of the option to carry over its excess CWT as tax credit; that its primordial intent and subsequent acts clearly showed its intention to claim the refund or TCC of its excess and unutilized CWT; and that it did not carry over and apply the 2005 unutilized CWT to successive quarters/years. According to petitioner, the irrevocability rule under Section 76 of the NIRC of 1997, as amended, applies not only to the option to carry-over but also to the option to refund or be issued a tax credit certificate.

Although the Court *a quo* found merit in petitioner's foregoing arguments, nevertheless, it denied petitioner's Motion for Reconsideration in the assailed Resolution dated August 17, 2011, due to petitioner's non-compliance with the following legal requirements: (1) that the fact of withholding is established by a copy of a statement duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom; and (2) that the income upon which the taxes were withheld were included in the return of the recipient.

In his Separate Opinion dated August 17, 2011[5], the Honorable Justice Lovell R. Bautista, Chairperson of the Third Division, stated his concurrence with the majority's conclusion to deny petitioner's claim for refund but elucidated that Section 76 remains clear and unequivocal, that is: once the carry-over option is taken, actually or constructively, it becomes irrevocable. Thus, when the law is clear, it is not susceptible to interpretation and must be applied regardless of who may be affected, even if the law may be harsh or onerous.

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[5] Supra., see note 1, at pp. 38-43.

Hence, petitioner filed the instant Petition for Review before the Court *En Banc* praying that the assailed Resolution dated August 17, 2011 of the Court in Division be reversed and set aside, and that a new decision be rendered ordering respondent to refund petitioner the amount of P4,312,694.00, allegedly pertaining to its excess and unutilized creditable withholding tax for taxable year 2005.

Further, petitioner presents the following assigned errors in the Court in Division's assailed Resolution, to wit:

> "A
>
> THE CTA-DIVISION ERRED IN DENYING PETITIONER'S CLAIM FOR REFUND OF EXCESS CWT FOR CY 2005 ON THE BASIS OF PETITIONER'S ALLEGED FAILURE TO PROVE THAT THE INCOME UPON WHICH THE CWTS WERE WITHHELD WAS REPORTED AS PART OF PETITIONER'S GROSS INCOME IN ITS ANNUAL INCOME TAX RETURN FOR CY 2005.
>
> B
>
> EVEN ASSUMING FOR THE SAKE OF ARGUMENT THAT THE EVIDENCE SUBMITTED BY PETITIONER FAILED TO EXPLAIN BY DOCUMENTARY EVIDENCE THE DISCREPANCY BETWEEN PETITIONER'S GROSS INCOME PER ANNUAL INCOME TAX RETURN AND INCOME PAYMENTS PER CWT CERTIFICATES, THE CTA-DIVISION ERRED IN DENYING THE WHOLE AMOUNT OF CWT CLAIMED WHEN IT COULD HAVE DENIED ONLY AN AMOUNT PROPORTIONATE TO THE DISCREPANCY NOTED."[6]

In the Resolution dated October 6, 2011[7], respondent was directed by the Court *En Banc* to file her Comment to the instant Petition for Review.

As no comment was filed by respondent within the given period despite

[6] Petition for Review, p. 6, Docket, p. 12
[7] Docket, pp. 62-63.

notice, this case was considered submitted for decision on January 2, 2012.

Hence, this Decision.

THE ISSUE

Based on the arguments presented by petitioner, the main issue raised for the consideration of this Court is whether or not petitioner is entitled to the refund of its alleged excess and unutilized creditable withholding tax (CWT) for calendar year (CY) 2005 in the amount of Four Million Three Hundred Twelve Thousand Six Hundred Ninety Four Pesos (P4,312,694.00).

Petitioner's Arguments

Petitioner contends that it has substantially proven by preponderance of evidence its subject claim for refund and that, contrary to the Court in Division's findings, it was able to establish, through the testimony of its witness, Ms. Soo Yuk "Irene" Yu, that the income upon which the subject CWT were withheld pertains to commissions that petitioner received from various insurance companies for the year and were reported as part of the revenues declared in its 2nd Final Amended Annual Income Tax Return for CY 2005. Same witness likewise explained that the discrepancy therein was largely due to the timing difference issues arising from an industry practice or method of reporting of income in petitioner's books of accounts, which in any event, could not have affected the entire income reported by petitioner with respect to other CWT certificates.

Moreover, petitioner submits that the inequity of the Court in Division's ruling becomes more evident when one considers the fact that respondent did not even present any evidence during trial nor even controvert petitioner's returns, schedules and other evidence; hence, petitioner's evidence should be accorded due weight and credence.

Lastly, petitioner argues that the Court in Division should have just proportionately reduced the claim by the amount of income that was not proven to have been reported as part of its revenues, as previously ruled in other cases.[8] Thus, it has no cogent reason to deny the entire claim for refund of petitioner since the standards of equity and fairness will favor the interpretation that petitioner should at least be entitled to the proportionate amount of excess CWT that it has legally established.

THE COURT EN BANC'S RULING

The instant Petition for Review calls for an interpretation of Section 76 of the NIRC of 1997, as amended. Said Section 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 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**

[8] Citing Golden Arches Development Corporation vs. Commissioner of Internal Revenue, CTA Case No. 7200, October 15, 2008; Golden Arches Development Corporation vs. Commissioner of Internal Revenue, CTA Case No.6431, April 26, 2004.

> **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 Ours)*

Notably, petitioner assails before the Court *En Banc,* the Resolution dated August 17, 2011 issued by the Third Division of this Court denying petitioner's Motion for Reconsideration of the said Court's Decision dated February 16, 2011 in CTA Case No. 7764. Said Resolution denied petitioner's claim for refund of excess and unutilized creditable withholding tax (CWT) for calendar year 2005 in the amount of P4,312,694.00, for failure of petitioner to fully comply with legal requirements, that is, petitioner failed to prove that the income upon which the claimed excess CWT were withheld are included and reported as part of petitioner's gross income. The Court in Division said:

> "Petitioner in its Motion for Reconsideration argues that the irrevocability rule under Section 76 applies not only to the option to carry-over but also to the option to refund or be issued a tax credit certificate.
>
> Petitioner's argument is meritorious.
>
> Section 76 of the NIRC of 1997, as amended provides the options available to the taxpayer when the sum of the quarterly tax payments made during the taxable year is not equal to the tax due on the entire taxable income of that year. These options are to (1) pay the balance of tax still due; (2) carry-over the excess credit; or (3) be credited or refunded with the excess amount paid. While the provision specifically mentions the option to carry-over when it speaks of irrevocability, 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

m

> 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.'

the Supreme Court has had occasion to rule that "these remedies are in the alternative and the choice of once precludes the other.

x x x   x x x   x x x

In the recent *Commissioner of Internal Revenue vs. PL Management International Philippines, Inc.* case, the Supreme Court once again reiterated that the two options under Section 76 are alternative in nature and the choice of one precludes the other (*Ibid, citing Philam Asset Management Inc, v. Commissioner of Internal Revenue, G.R. Nos. 156637 and 162004, December 14, 2005*). 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 mange another one (*Ibid, citing Commission of Internal Revenue v. Bank of the Philippine Islands, G.R. No. 178490, July 7, 2009*).

Thus, the declaration of the choice of a claim for refund or issuance of a tax credit certificate likewise bars the other option to carry-over as tax credit for application in the subsequent years (*United Coconut Planters Bank vs. Commissioner of Internal Revenue, C.T.A. Case No. 7614, January 26, 2011*)."[9]

Clearly from the foregoing, the Court in Division agreed with petitioner's contention that the controlling factor for the operation of the irrevocability rule under Section 76 of the NIRC of 1997, is that the taxpayer chose an option, and once this option is exercised, it becomes irrevocable. And considering that petitioner's first choice was to be issued a tax credit certificate as reflected in its original Income Tax Return, said option is allegedly irrevocable. Therefore, the subsequent choice exercised by petitioner in its first amended return for taxable year 2005 to carry over its

[9] Resolution dated August 17, 2011, pp. 2-3, Annex "A", Docket, pp. 31-32.

excess creditable withholding taxes did not allegedly overturn its original option to be issued a tax credit certificate. This is why the Court in Division looked into the merits of the case, whether petitioner was able to substantiate its refund claim in accordance with legal requirements.

Nevertheless, as mentioned earlier, petitioner's refund claim was denied by the Court in Division for failure of petitioner to prove the fact of withholding, by a copy of a statement issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom; and that the income upon which the taxes were withheld were included in the return of the recipient.

However, it is worthy to mention that the aforementioned legal basis differs from the legal basis initially pronounced by the Court *a quo* in its assailed Decision dated February 16, 2011. In the said Decision, petitioner's claim for refund was denied on the ground that its choice of the option to carry-over to the succeeding year its unutilized CWT for calendar year 2005, is irrevocable under Section 76 of the NIRC of 1997, as amended, and prevailing jurisprudence. We quote:

> "Records show that on April 17, 2006, petitioner filed its Annual Income Tax Return for taxable year 2005. Subsequently, it amended the said return on May 9, 2006 and on May 15, 2006. xxx
>
> xxx xxx xxx
>
> A closer examination of the foregoing Annual Income Tax Returns reveals that petitioner opted to carry over and apply its excess creditable income taxes withheld for taxable year 2005 to the succeeding year. **While petitioner marked the box pertaining to the phrase 'To be issued a Tax Credit Certificate' for its unutilized excess creditable withholding tax in its original and second amended Annual Income Tax**

Returns for 2005, <u>its first amended Annual Income Tax Return for 2005 explicitly shows that petitioner chose the option of carry-over of its excess creditable withholding tax by marking the box corresponding to the phrase 'To be carried over as tax credit next year/quarter'</u>. Applying the above-quoted provision to this case, the carry-over option is considered irrevocable and cannot be altered by filing an amended Annual Income Tax Return, pursuant to Section 76 of the NIRC of 1997, as amended.

In the case of *Paseo Realty and Development Corporation vs. Court of Appeals, Court of Tax Appeals and Commissioner of Internal Revenue*, the Supreme Court explained Section 76 of the NIRC of 1997, as amended; which provides for the irrevocability of the option chosen by the taxpayer to carry over its excess or unutilized creditable withholding tax. The pertinent portion of the said case 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 period and no application for cash refund or issuance of a tax credit certificate shall be allowed.**'

In the same vein, the High Tribunal reiterated the above ruling in the case of *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue* in this wise:

> '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)*
>
> From the foregoing discussion, it is apparent that the **option chosen by petitioner is the carry-over of its excess creditable income taxes withheld in 2005 and apply the same to the succeeding year. Consequently, the said option is now considered irrevocable**."[10] *(Emphasis and underscoring Ours)*

We find the aforequoted pronouncement of the Court in Division more in accord with the mandates of Section 76 of the NIRC of 1997, as amended. The last sentence of Section 76, clearly and unequivocally refers to the option to "carry-over". Thus, 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 year. Having chosen to carry-over the excess quarterly income tax, the corporation cannot thereafter choose to apply for a cash refund or for the

[10] Decision dated February 16, 2011, Annex "B", Docket, pp. 54-56.

issuance of a tax credit certificate for the amount representing such over payment.[11]

This is known as the "irrevocability rule" as regards the choice of the option to carry over, and not the exercise of the first choice by the taxpayer. The phrase "such option shall be considered irrevocable for that taxable period" means that the **option to carry over the excess tax credits of a particular taxable year can no longer be revoked**.[12] In other words, Section 76 speaks only of the carry over option, which when exercised, actually or constructively, becomes irrevocable, regardless of whether the excess tax credits were actually or fully utilized.

In the present case, it appears that petitioner had effectively exercised the carry-over option pertaining to its declared excess CWT for calendar year 2005 when it clearly chose the option of carry-over of its excess CWT by marking the box corresponding to the phrase "To be carried over as tax credit next year/quarter", in its first amended Annual Income Tax Return for 2005[13]. Having done so, petitioner is bound by the irrevocability rule under Section 76 of the NIRC of 1997, as amended.

Thus, the fact that the amount of P4,312,694.00 representing its excess and unutilized CWT as of December 31, 2005 was not actually applied or utilized to the succeeding taxable year 2006 is of no moment.

In this regard, We adopt the pronouncement of the court *a quo* in its Decision dated February 16, 2011, to wit:

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[11] *Commissioner of Internal Revenue vs. Mirant (Philippines) Operations, Corporation, et seq.*, G.R. Nos. 171742 and 176165, June 15, 2011.
[12] *Systra Philippines, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 176290, September 21, 2007.
[13] Exhibit "G", line 31.

"Upon close verification of petitioner's second amended Annual Income Tax Return for taxable year 2005, it may be gleaned that petitioner had total tax credits of P9,800,963.00; which consisted of the prior year's excess credits in the amount of P5,488,269.00 and creditable taxes withheld during the year 2005 in the amount of P4,312,694.00. Petitioner's income tax due was paid using a portion of its prior year's excess credits of P5,488,269.00, leaving the prior year's excess credits in the amount of P4,421,173.00 (P5,488,269.00 less P1,067,096.00) and creditable taxes withheld during the year 2005 in the amount of P4,312,694.00, or a total of P8,733,867.00, unutilized as of December 31, 2005, xxx

xxx xxx xxx

Indeed, this Court finds that petitioner did not in fact carry over and apply the 2005 unutilized excess tax credits of P4,312,694.00 25 as may be verified in its 2006 Annual Income Tax Return.

Nevertheless, in the case of *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*, the Supreme Court declared that even if the excess income tax credit was not actually applied to a tax liability, the choice to carry over is still irrevocable. The pertinent part of the said case reads:

> 'The choice by BPI of **the option to carry over its 1998 excess income tax credit to succeeding taxable years**, which it explicitly indicated in its 1998 ITR, is **irrevocable, regardless of whether it was able to actually apply the said amount to a tax liability**. Xxx' *(Emphasis supplied)*

Indubitably, the carry-over option had already been made and petitioner is bound by the irrevocability rule under Section 76 of the NIRC of 1997, as amended. <u>Accordingly, petitioner cannot seek a refund of its 2005 excess tax credits in the amount of P4,312,694.00 even if the same were not utilized in the succeeding year 2006. Instead, it should just apply the 2005 excess tax credits to the succeeding quarters/years until the same are fully utilized</u>."[14] *(Emphasis and underscoring Ours)*

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[14] Supra., see note 10, Docket, pp. 57-58.

By way of reiteration, Section 76 of the NIRC of 1997, as amended, categorically states that once the option to carry-over excess income tax payments to the succeeding years has been made, either actually or constructively, it becomes irrevocable. Therefore, applications for refund of the unutilized excess income tax payments may no longer be allowed.

Consequently, as petitioner had already chosen the irrevocable option to carry-over its excess CWT for calendar year 2005, discussion on petitioner's evidence presented to substantiate its entitlement to its refund claim becomes unnecessary.

WHEREFORE, in light of the foregoing considerations, the Petition for Review is hereby **DENIED** for lack of merit.

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

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

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

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

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
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Promulgated:

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DISSENTING OPINION

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

With due respect, I dissent.

While I agree with the majority that the instant claim for refund should be denied, I beg to differ on the justification for the ruling. The majority holds that since petitioner indicated in its first amended Annual Income Tax Return (ITR) that it is exercising the option to carry-over its excess and unutilized creditable withholding tax (CWT) for the year 2005, it can no longer change its position and claim for refund as the chosen option is irrevocable pursuant to Section 76 of the Tax Code of 1997.

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. Indeed, it is difficult to tread the path traversed by the majority setting a precedent on this significant issue. This notwithstanding, I maintain my position that 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, namely, apply for a refund within the prescribed period, **or** carry over the same to the succeeding quarters of the succeeding taxable years until the over payment has been fully applied to the tax liabilities. The two options available to a corporate taxpayer **are <u>alternative in nature and the choice of one precludes the other.</u>** [1]

On this regard, I pay unswerving reverence to the Supreme Court ruling in the case of *Philam Asset Management,*

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

Inc. v. Commissioner of Internal Revenue,[2] on the matter. 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.
>
> <u>**These two options under Section 76 are alternative in nature. The choice of one precludes the other**</u>. 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.
>
> 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 plain from the foregoing disquisition that there are **two options** which a corporate taxpayer may choose when its quarterly income tax payments exceed its tax liability, viz., to refund or to carry over. And once a taxpayer has chosen an

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[2] 514 Phil. 147, 157 (2005).

option, it is **not** legally allowed to have a change of heart for the choice of one precludes the other.

Breathing life into the pertinent provision, the Supreme Court, speaking through Justice Antonio T. Carpio, ruled that an exercise of an option provided under Section 76 of the 1997 NIRC 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]

In the same case, the Final Arbiter went a step further and stated 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:

> 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**

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

> **matter how many tax cycles it takes**.
> (*Emphases supplied*)

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 *raison d' etre of 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 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.

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

In the case at bar, petitioner already exercised its irrevocable option when it marked the box pertaining to the phrase 'To be issued a Tax Credit Certificate' in its original Annual ITR for taxable year 2005 filed on April 17, 2006.[6] This exercise of option was validated by the fact that petitioner did not utilize/apply its excess creditable withholding tax against its tax liabilities for the succeeding quarters. Petitioner's act of marking the box corresponding to the phrase 'To be carried over as tax credit next year/quarter' in its First Amended Annual Income Tax Return for 2005 filed on May 9, 2006 is of no moment for it already exercised its option as early as April 17, 2006, hence, could no longer make another one. Significantly, petitioner reiterated its intention to be issued a tax credit certificate in its Second Amended Annual Income Tax Return for 2005 filed on May 15, 2006.

A scrutiny of 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

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[6] Exhibit F, line 31

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, reveals that 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.

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:

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

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

Respectfully submitted.

ESPERANZA R. FABON-VICTORINO
Associate Justice