REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

MIRANT (PHILIPPINES) OPERATIONS CORPORATION [formerly: Southern Energy Asia-Pacific Operations (Phils.), Inc.], ***Petitioner,***	**C.T.A. E.B. NO. 125 (C.T.A. CASE NO. 6340)**
	Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
	Promulgated:
COMMISSIONER OF INTERNAL REVENUE, ***Respondent.***	OCT 26 2006 [signature]

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DECISION

UY, J.:

This is a Petition For Review filed under *Section 11 of Republic Act No. 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals),* in relation to *Rule 43 of the Rules of Court*, which seeks the reversal of the Decision of the First Division of this Court dated May 18, 2005 in C.T.A. Case No. 6340 entitled "Mirant (Philippines) Operations Corporation (formerly Southern Energy Asia-Pacific Operations Phils, Inc), petitioner, vs. Commissioner of Internal Revenue, respondent", as well as the Resolution dated September 22, 2005 in the same case, denying the parties' respective "Motion For Partial Reconsideration".

The assailed Decision in C.T.A. Case No. 6340 involves petitioner's judicial claim for refund or issuance of a tax credit certificate allegedly representing excess creditable withholding taxes for the fiscal year ended June 30, 1999, the interim period from July 1, 1999 to December 31, 1999, and for the calendar year ended December 31, 2000, in the total amount of P87,345,116.00. The First Division of this Court found that petitioner is entitled only to the amount of P38,620,427.00 representing unutilized creditable withholding taxes for taxable year 2000. The dispositive portion of the assailed Decision dated May 18, 2005, reads as follows:

> "**IN VIEW OF ALL THE FOREGOING**, the instant Petition for Review is hereby **GRANTED** but in a reduced amount of P38,620,427.00. Accordingly, respondent is **ORDERED TO REFUND**, or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner in the amount of P38,620,427.00 representing unutilized creditable withholding taxes for taxable year 2000.
>
> **SO ORDERED.**"

Both parties filed their respective Motions for Partial Reconsideration of the above Decision, and these were both denied for lack of merit in the Resolution dated September 22, 2005, the dispositive portion thereof reading as follows:

> "**WHEREFORE**, in view of the foregoing, both motions filed by petitioner and respondent are hereby **DENIED** for lack of merit and the pronouncement reached in the assailed DECISION is hereby ***REITERATED***.
>
> **SO ORDERED.**"

Again, both parties filed their respective appeals to the Court En Banc, to wit:

(1) The Commissioner of Internal Revenue filed his Petition for Review on October 13, 2005 docketed as C.T.A. EB No. 123, entitled "Commissioner of Internal Revenue, petitioner, vs. Mirant (Philippines) Operations, Corporation, respondent" which was denied due course and correspondingly dismissed in the Decision dated January 17, 2006; and

(2) Mirant (Philippines) Operations, Corporation filed the instant Petition for Review on November 3, 2005 docketed as C.T.A. EB 125, entitled "Mirant (Philippines) Operations, Corporation (formerly: Southern Energy Asia-Pacific Operations [Phils], Inc.), petitioner, vs. Commissioner of Internal Revenue, respondent.

Although arising from the same case (C.T.A. Case No. 6340), these two cases were not consolidated because the instant case, C.T.A. EB 125, was initially dismissed in the Resolution dated November 29, 2005 due to procedural infirmities, to wit: the Certification/Verification was executed by a certain Laura A. Baui, allegedly the Financial Controller of petitioner corporation without corresponding Board Resolution and/or Secretary's Certificate authorizing her to file the instant petition on behalf of the petitioner herein (Rollo, pp. 45-48).

Subsequently however, upon a Motion for Reconsideration filed petitioner on January 12, 2006, the Court *En Banc* granted said motion in the Resolution dated April 28, 2006, and correspondingly recalled and set aside the dismissal Resolution dated November 29, 2005. Herein respondent was thus directed to file his comment, not a motion to dismiss, to the instant petition for review within ten (10) days from receipt thereof (Rollo, pp. 65-66). On May 15, 2006, respondent filed his Comment (Rollo, pp. 67-74). Hence, this decision.

THE FACTS

As culled from the assailed Decision, the undisputed facts are as follows:

Petitioner, is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines with principal office at Bo. Ibabang Pulo, Pagbilao Grande Island, Pagbilao, Quezon Province. It secured with the Securities and Exchange Commission (SEC) its Certificate of Filing of Amended Articles of Incorporation, reflecting its change of name from Southern Energy Asia-Pacific Operations (Phils.), Inc. to Mirant (Philippines) Operations Corporation on April 30, 2001. Prior to its use of the name Southern Energy Asia-Pacific Operations (Phils.) Inc., it operated under the corporate names CEPA Operations (Philippines) Corporation, CEPA Tileman Project Management Corporation and Hopewell Tileman Project Management Corporation. The change of its corporate name from CEPA Operations (Philippines) Corp. to Southern Energy Asia-Pacific Operations (Phils.) Inc., from CEPA Tileman Project Management Corporation to CEPA Operations (Philippines) Corp. and from Hopewell Tileman Project Management Corp. to CEPA Tileman Project Management Corp. were approved by the SEC on November 24, 2000, November 21, 1997 and July 29, 1994 respectively.

It is duly licensed to do business in the Philippines and is primarily engaged in the business of designing, constructing, erecting, assembling, commissioning, operating, maintaining, rehabilitating and managing gas turbine and other power generating plants and related facilities for the conversion into electricity of coal, distillate and other fuel provided by and under contract with the Government of the Republic of the Philippines, or any subdivision, instrumentality or agency thereof, or any government owned or controlled corporations or other entity engaged in the development, supply or distribution of energy.

Petitioner then entered into Operating and Management Agreements with Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.) and Mirant Sual Corporation (formerly Southern Energy Pangasinan, Inc.) to provide these corporations with maintenance and management services in connection with the operation, construction and commissioning of the coal-fired power stations situated in Pagbilao, Province of Quezon and Sual, Province of Pangasinan, respectively.

On October 15, 1999, it filed with the Bureau of Internal Revenue (BIR) its income tax return for the fiscal year ended June 30, 1999 (*Exhibit "L"*) declaring a net loss of P235,291,064.00 and unutilized tax credits of P32,263,388.00, detailed as follows:

Gross Income	P (64,438,434.00)
Less: Deductions	170,852,630.00
Net Loss	P (235,291,064.00)
Income Tax Due	P -
Less: Prior Year's Excess Credits	4,714,516.00
Creditable Tax Withheld	
First Three Quarters	21,702,771.00
Fourth Quarter	5,846,101.00
Tax Overpayment	P 32,263,388.00

On April 17, 2000, respondent Mirant filed with the BIR an amended income tax return for fiscal year ended June 30, 1999 (*Exhibit "M"*) reporting an increased net loss amount of P379,324,340.00 but reporting the same unutilized tax credits of P32,263,388.00, which it opted to carry-over as tax credit to the succeeding taxable year, thus:

Gross Income		P (131,113,036.00)
Less:	Deductions	248,211,204.00
Net Loss		P (379,324,240.00)
Tax Due		P -
Less:	Prior Year's Excess Credits	4,714,516.00
	Creditable Tax Withheld	
	First Three Quarters	21,702,771.00
	Fourth Quarter	5,846,101.00
Tax Overpayment		P 32,263,388.00

To allegedly synchronize its accounting period with those of its affiliates, petitioner allegedly secured the approval of the BIR to change its accounting period from fiscal year (FY) to calendar year (CY), effective December 31, 1999. Thus, on April 17, 2000, petitioner filed its income tax return for the interim period July 1, 1999 to December 31, 1999 (*Exhibit "N"*) declaring a net loss in the amount of P381,874,076.00 and unutilized tax credits of P48,626,793.00, computed as follows:

Gross Income		P (320,895,462.00)
Less:	Deductions	60,978,614.00
Net Loss		P (381,874,076.00)
Income Tax Due		P -
Less:	Prior Year's Excess Credits	32,263,388.00
	Creditable Tax Withheld	
	First Three Quarters	16,363,405.00
	Fourth Quarter	
Tax Overpayment		P 48,626,793.00

Petitioner indicated the excess amount of P48,626,793.00 as "To be carried over as tax credit next year/quarter".

On April 10, 2001, it filed with the BIR its income tax return for the calendar year ended December 31, 2000 (*Exhibit "O"*) reflecting a net loss of P56,901,850.00 and unutilized tax credits of P87,345,116.00, computed as follows:

Gross Income		P (4,080,541.00)
Less:	Deductions	52,821,309.00
Net Loss		P (56,901,850.00)
Tax Due		P -
Less:	Prior Year's Excess Credits	48,626,793.00
	Creditable Tax Withheld	
	First Three Quarters	25,336,971.00
	Fourth Quarter	13,381,352.00
Tax Overpayment		P 87,345,116.00

With respect to the excess amount of P87,345,116.00, it indicated its option "To be refunded" thereof.

On September 20, 2001, petitioner filed with the BIR a letter claiming for the refund of the amount of P87,345,116.00 representing overpaid income tax for the FY ended June 30, 1999, the interim period covering July 1, 1999 to December 31, 1999 and CY ended December 31, 2000 (*Exhibit "GG"*). As the two-year prescriptive period for the filing of a judicial claim under *Section 229 of the National Internal Revenue Code (NIRC) of 1997* was about to lapse without action on the part of the respondent, petitioner elevated its case to the Court in Division, on October 12, 2001, by way of a Petition for Review docketed as C.T.A. Case No. 6340 .

After trial on the merits, the First Division of this Court rendered judgment partially granting petitioner's claim for refund in the reduced amount of P38,620,427.00 representing its duly substantiated unutilized creditable withholding taxes for taxable year 2000 out of the total claim of P38,718,323.00 therefor. It appears that said total claim was reduced by P97,896.00 for the following reasons: the amount of P92,996.00 was deducted because it was found by the First Division to be not covered by the withholding tax certificate issued by Southern Energy, Quezon Inc. for the period October 1, 2000 to

December 31, 2000; and the additional amount of P4,900.00 was also deducted because based on the reconciliation schedule, for the creditable taxes of P745,290.00 withheld by Southern Energy Quezon, Inc. for the period October 1, 2000 to December 31, 2000 on petitioner's Philippine peso billings under Invoice No. 0015, the corresponding creditable taxes claimed by petitioner in its 2000 income tax return amounted to P750,190.00 which were higher by P4,900 than those reflected in the certificate..

Additionally, petitioner's claim for the refund of its unutilized tax credits for the taxable year 1999 in the total amount of P48,626,793.00, was denied for the reason that petitioner exercised the option of carry-over with regard to the said unutilized tax credits, which option is irrevocable pursuant to the provisions of Section 76 of the 1997 NIRC.

Dissatisfied, both parties filed their respective Motions For Partial Reconsideration, which the First Division denied in its Resolution dated September 22, 2005. And as mentioned earlier, both parties sought redress before the Court En Banc in two separate petitions for review. The instant petition pertains to that filed by herein petitioner Mirant (Philippines) Operations, Corporation, seeking a review of the denial of its claim for refund in the total amount of P48,626,793.00 representing its excess creditable withholding taxes for the year 1999, with only one issue for the resolution of the Court *En Banc.*

ISSUE

WHETHER OR NOT PETITIONER IS ENTITLED TO A CLAIM FOR ADDITIONAL REFUND OR ISSUANCE OF A TAX CREDIT CERTIFICATE IN THE AMOUNT OF P48,626,793.00 REPRESENTING EXCESS CREDITABLE WITHHOLDING TAXES FOR THE FISCAL YEAR ENDED JUNE 30, 1999 AND THE INTERIM PERIOD FROM JULY 1, 1999 TO DECEMBER 31, 1999.

Petitioner's Arguments:

Petitioner alleges that the CTA disallowed the amount of P48,626,793.00 representing the unutilized tax credits for FY ended June 30, 1999 and the interim period from July 1 to December 31, 1999 for having actually been carried-over to the succeeding taxable year 2000. In both the questioned Decision and Resolution, while the CTA in Division ruled that since the accumulated unutilized tax credits for the FY ending June 30, 1999 and the interim period covering July 1, 1999 to December 31, 1999 in the total amount of P48,626,793.00 were carried over to the succeeding taxable years until the year 2000, the same should be denied outright pursuant to Section 76 of the National Internal Revenue Code of 1997 (1997 Tax Code). Thus, the crux of the controversy allegedly lies in the interpretation of Section 76 of the 1997 Tax Code.

The CTA, in numerous cases, is allegedly consistent with its ruling that a taxpayer's exercise of the option to carry-over its unutilized tax credits is considered irrevocable and the taxpayer cannot claim a refund/tax credit certificate therefore. It is thus important to determine at this point, what is the meaning of "irrevocable for the taxable period".

Petitioner maintains that the Court of Appeals "had ruled that the phrase 'irrevocable for that taxable period' means that once a taxpayer had chosen the option to carry-over and apply the excess tax to the next fiscal year tax liability, it could not have this excess refunded in the meantime during the length of the next taxable year and that there is nothing to prohibit the refund of this carry-over excess tax following the lapse of the taxable year to which it was carried over". Petitioner cited several decisions of the

Court of Appeals in support of its claim (Commissioner of Internal Revenue vs. Hopewell Tileman Power Systems, Inc., CA-G.R. SP No. 60898, March 13, 2002; Commissioner of Internal Revenue vs. Citicorp Capital Philippines, Inc., CA-G.R. SP No. 68554, April 12, 2002; Bank of the Philippine Islands (BPI) vs. Commissioner of Internal Revenue, CA-G.R. SP No. 77665, April 29, 2005).

In the case at bench, petitioner allegedly opted to have its accumulated unutilized tax credits for the fiscal year ending June 30, 1999 and the interim period covering July 1, 1999 to December 31, 1999 in the total amount of P48,626,793.00 carried over as tax credit to the next taxable period (2000). Thus, petitioner believes that it is only barred from claiming as a refund this excess creditable tax during the year 2000, this being the taxable period for which it exercised its option. But once such taxable period lapses, the irrevocability of the option to carry-over also expires. As what happened in this case, after the taxable period 2000, petitioner opted to claim for tax refund its excess creditable taxes in 2001.

Petitioner further contends that it was in a net taxable loss position amounting to P56,901,850.00 for the taxable year 2000 as shown in its Annual Income Tax Return for Calendar Year ended December 31, 2000. Thus, "in 2000, petitioner incurred no income tax due against which its excess tax credits for 1999 could be carried over and applied since it suffered a net operating loss". Hence, there was no actual carrying over of the excess creditable tax that occurred or was realized. Consequently, the excess tax credits remained unutilized by the petitioner. As such, there is no way by which the petitioner could utilize its excess tax credits, which allegedly, is justly due, except to recover the amount by way of a refund or tax credit certificate.

Respondent's Counter-arguments:

Respondent, in his Comment filed on May 15, 2006, posits that the arguments raised in petitioner's instant petition for review filed on November 3, 2005, are mere rehash of its earlier arguments in the CTA First Division (Memorandum and Motion for Reconsideration) which have already been squarely addressed by the said Division in its Decision and Resolution promulgated on May 18, 2005 and September 22, 2005, respectively. Further, he avers that the First Division of this Court did not err in denying the claim for refund in the aggregate amount of P48,626,793.00 considering that petitioner had chosen and actually exercised the option of carry-over in each of the taxable periods; hence, such option became allegedly irrevocable.

Furthermore, as provided in Section 76 of the 1997 Tax Code, the excess tax credits or overpaid income tax of a given taxable year of a corporation may be refunded or may be carried-over and credited against its estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. However, once the option to carry-over has been made, the same allegedly becomes irrevocable for that taxable period.

THE COURT *EN BANC'S* RULING

The petition is without merit.

Based on the arguments raised by petitioner in the instant petition for review and the counter-arguments of respondent in his comment thereto, the Court e*n banc* finds that the sole issue raised by the petitioner devolves upon the proper interpretation of Section 76 of the 1997 Tax Code, specifically the last sentence of the last paragraph thereof, to wit:

"*SEC. 76.* ***Final Adjustment Return***. — Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable income of that year, the corporation shall either:

"(A) Pay the balance of tax still due; or
"(B) Carry-over the excess credit; or
"(C) Be credited or refunded with the excess amount paid, as the case may be.

"In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. **Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor (*Emphasis and underscoring supplied*)."**

As clearly seen from the afore-quoted 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 ***(Paseo Realty & Development Corporation v. Court of Appeals, 440 SCRA 235 [2004])***.

Applying now the foregoing provisions to the facts of the instant case, We find no cogent reason to deviate from the ruling of the Court in Division that petitioner's exercised option to carry over its unutilized excess tax credits for the FY ending June 30, 1999, the interim period covering July 1, 1999 to December 31, 1999 until the year 2000 in the total aggregate sum of P48,626,793.00 is considered irrevocable, and petitioner cannot subsequently claim a refund/tax credit therefor. As aptly ruled by the First Division:

> "Based on Section 76 afore-cited, the corporate taxpayer's excess tax credits or overpaid income tax in a given taxable year may either be refunded (either in the form of cash or tax credit certificate) or carried-over/applied to the succeeding taxable years. However, once the option to carry-over has been made, the same becomes irrevocable for that taxable period.
>
> A closer look at petitioner's income tax returns for the Fiscal Year ended June 30, 1999 (original & amended), the interim period July 1, 1999 to December 31, 1999 and calendar year ended December 31, 2000 shows that the total claim of P87,345,116.00 is composed of the following:

Unutilized Tax Credits for:		
FY ended June 30, 1998	P 4,714,516.00	
FY ended June 30, 1999	27,548,872.00	
Interim period July 1-Dec. 31, 1999	16,363,405.00	P 48,626,793.00
CY ended December 31, 2000		38,718,323.00
Total Claimed Unutilized Tax Credits		P 87,345,116.00

> Inasmuch as the reported unutilized tax credits for FY ending June 30, 1998, FY ending June 30, 1999, the interim period covering July 1, 1999 to December 31, 1999 were accumulated and carried-over to the succeeding taxable years until the year 2000 in the aggregate sum of P48,626,793.00, the same should be denied outright pursuant to Section 76 of the NIRC of 1997. Petitioner exercised the option of carry-over with regard to the said unutilized tax credits of P48,626,793.00. **The same option once made is**

> **considered irrevocable and petitioner cannot claim a refund/tax credit certificate therefor**. Petitioner's only recourse is to carry-over the unutilized tax credits of P48,626,793.00 to the succeeding taxable years until the same is fully utilized [*Pilipinas Transport Industries, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6073, March 1, 2002*] ***(Decision in CTA Case No. 6340 dated May 18, 2005, pp. 8-9, Rollo, pp. 8-23, Emphasis and underscoring supplied)***."

This ruling finds support in the case of ***Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*** of the Supreme Court, penned by then Associate Justice, now Chief Justice, Artemio V. Panganiban, wherein the High Court elucidated as follows:

> "Section 76 offers two options to a taxable corporation whose total quarterly income tax payments in a given taxable year exceeds its total income tax due. These options are (1) filing for a *tax refund* or (2) availing of a *tax credit*.
>
> 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 (Final Adjustment Return) 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 ***(477 SCRA 761, 771-772 [2005]; citing San Carlos Milling Co., Inc. vs. Commissioner of Internal Revenue, 228 SCRA 135, 142 [1993])***."

In the same case, the Supreme Court further said that 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 *(Ibid)*.

In the light of the foregoing considerations, We find no reversible error committed by the Court in Division when it rendered the assailed Decision dated May 18, 2005, and Resolution dated September 22, 2005.

WHEREFORE, premises considered, the instant petition is hereby **DENIED DUE COURSE**, and, accordingly, **DISMISSED** 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

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