REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

IMPSA CONSTRUCTION CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 685
(C.T.A. CASE NOS. 6921 and 7172)

Present:

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

Promulgated:

MAY 2 4 2011 ArApolinario 9:00 a.m.

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DECISION

PALANCA-ENRIQUEZ, J.:

There would be no unjust enrichment in the event of denial of the claim for refund, in cases where the taxpayer opted to carry-over its excess creditable withholding tax (CWT) under *Section 76 of the NIRC of 1997, as amended*, because there would be no forfeiture of any amount in favor of the government.

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The amount being claimed by petitioner would remain in his account until it is fully utilized in succeeding taxable years. It is worthy to note that unlike the option for refund, which prescribes after two (2) years from the filing of the FAR, there is no prescriptive period for the carrying over of the same *(Commissioner of Internal Revenue vs. Bank of the Philippine Islands, 592 SCRA 219, 232-233).*

THE CASE

This is a Petition for Review filed by Impsa Construction Corporation (hereafter "petitioner") under *Section 11 of RA 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43* of the *1997 Rules of Civil Procedure, as amended,* which seeks to set aside the Decision dated January 5, 2010 and Amended Decision dated September 3, 2010 rendered by the Special First Division of this Court in C.T.A. Case Nos. 6921 and 7172, the respective dispositive portions of which read, as follows:

> "**WHEREFORE,** premises considered, petitioner's claim for refund is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"
>
> "**WHEREFORE,** petitioner's Motion for Reconsideration is hereby **PARTIALLY GRANTED** and the assailed Decision promulgated on January 5, 2010 is hereby **MODIFIED**. Accordingly, respondent is hereby **ORDERED TO REFUND** to petitioner the

amount of **FIFTY-FOUR MILLION TWO HUNDRED SIXTY THOUSAND FOUR HUNDRED EIGHTY-TWO AND 78/100 PESOS (P54,260,482.78)** representing its excess tax credits for taxable year 2003.

SO ORDERED."

THE FACTS

The antecedent facts, as culled from the records, are as follows:

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines, with principal office address at the NPC Compound, San Juan, Kalayaan, Laguna 4015. It is engaged in the construction business and other allied businesses, including design, supply, assembly, erection, commissioning, constructing, enlarging, repairing, removing, developing and other related activities, but limited to projects either primarily foreign funded or registered under the build-rehabilitate-operate-transfer arrangements, pursuant to *RA 6957, as amended.*

Respondent, on the other hand, is the Commissioner of Internal Revenue, who is a public officer, duly appointed by the President of the Philippines, as head of the Bureau of Internal Revenue (BIR), the government agency officially responsible for the assessment and collection of all national and internal revenue taxes. Respondent is vested with the power and authority to refund any internal revenue tax erroneously or illegally assessed or collected, any penalty collected without authority, or any sum excessively or in any manner wrongfully collected; including excess income tax payments and creditable withholding taxes.

On August 18, 2000, petitioner entered into a Turnkey Contract with CBK Power Company Limited (hereinafter "CBK") for the construction of power plants located at Caliraya, Botocan, and Kalayaan, Laguna Province. For services rendered to CBK, petitioner received income payments, which were allegedly subjected to creditable withholding tax.

On April 10, 2002, petitioner filed with the BIR its Annual Income Tax Return for taxable year 2001, reflecting no income tax liability, as it declared a net loss in the amount of P16,264,545.00. Consequently, petitioner was unable to utilize the reported income tax payment for the first three quarters in the amount of P3,286,262.00, and creditable taxes withheld during the year in the amount of P90,055,266.00, in the total amount of P93,341,528.00.

Petitioner opted to carry-over the income tax overpayment of P93,341,528.00, as tax credit to the succeeding year/quarter, by marking the corresponding box in the return.

In its Annual Income Tax Return for taxable year 2002 filed with the BIR on March 20, 2003, petitioner's total tax credits amounted to P200,621,201.00, representing the sum of the prior year's (2001) excess credits in the amount of P93,341,528.00 and creditable taxes withheld during the year 2002 in the amount of P107,279,673.00. Likewise, petitioner reflected an income tax due of P2,146,686.00, which was offset against the total tax credits of P200,621,201.00, leaving an overpayment of P198,474,515.00.

Petitioner, as indicated in the return, again elected to carry-over the income tax overpayment of P198,474,515.00 to the succeeding year/quarter.

On May 20, 2003, petitioner filed an Amended Annual Income Tax Returns for taxable years 2001 and 2002, revising its chosen option from "To be carried over as tax credit next year/quarter" to "To be refunded". Notwithstanding the marking of the option "To be refunded" in its Amended Annual Income Tax Return for taxable year 2001, petitioner reflected the 2001 excess tax credits/payment of P93,341,528.00 as "Prior Year's Excess Credits" in its Amended Annual Income Tax Return for taxable year 2002.

On August 11, 2003, petitioner filed its second Amended Annual Income Tax Return for taxable year 2002, this time indicating no amount of "Prior Year's Excess Credits" and declaring a lower refundable amount of P105,132,987.00.

On April 2, 2004, petitioner filed its Annual Income Tax Return for taxable year 2003, declaring no income tax liability and unutilized creditable taxes withheld during the year 2003 in the amount of P56,250,759.75, which petitioner opted "To be refunded".

On April 5, 2004 and July 15, 2004, petitioner filed with the BIR its claims for refund of excess income taxes paid/withheld for taxable year 2001 in the amount of P93,341,528.00 and for taxable years 2002 and 2003 in the amount of P161,383,746.24, respectively.

Due to respondent's inaction on both claims and in order to toll the running of the two-year prescriptive period, petitioner filed two (2) separate Petitions for Review before this Court, docketed as C.T.A. Case Nos. 6921 and 7172, thus:

CTA Case No.	Date of Filing of Petition for Review	Taxable Year Covered		Amount of Claim
6921	April 6, 2004	2001		P 93,341,528.00
7172	March 18, 2005	2002		105,132,987.00
		2003		56,250,759.75
			Total	P254,725,274.75

In C.T.A. Case No. 6921, on May 19, 2004, respondent filed her Answer, raising the following Special and Affirmative Defenses:

> "4. Section 76 of the 1997 Tax Code provides that if a corporation exercises the option to carry-over its excess tax credits to the succeeding years, the option becomes irrevocable for the

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taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed.

Section 76 of the National Internal Revenue Code provides, thus:

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5. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue;

6. The amount of P93,341,528.00 being claimed by petitioner as alleged income tax overpayment for the year 2001 is not properly documented;

7. In an action for refund/credit, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;

8. Petitioner must show that it has complied with the provisions of Sections 204(C) and 229 of the 1997 Tax Code on the prescriptive period for claiming refund/tax credit.

9. Claims for refund are construed strictly against the claimant for the same partake the nature of exemption from taxation (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95) and as such, they are looked upon with disfavor (Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 1211)."

In C.T.A. Case No. 7172, on May 25, 2005, respondent filed her Answer, alleging by way of Special and Affirmative Defenses that:

"4. Petitioner's alleged claim for refund is subject to administrative investigation by the Bureau;

5. Petitioner must prove that it paid the income taxes so alleged;

6. Petitioner must prove that the creditable withholding taxes so alleged were actually withheld and remitted to the BIR;

7. Petitioner must prove that the alleged creditable withholding taxes so remitted to the Bureau are in excess of its total actual income tax due for the taxable years 2002 and 2003;

8. Petitioner must prove that its alleged excess payments for taxable years 2002 and 2003 were not applied against its income tax liabilities in subsequent years;

9. Petitioner must prove that the alleged claim was filed within the two (2) year period prescribed in Section 229 of the Tax Code;

10. In an action for refund, the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund;

11. Claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation."

On June 3, 2005, petitioner filed a "Motion for Consolidation" of C.T.A. Case No. 7172 with C.T.A. Case No. 6921, on the ground that these cases involved common questions of law and of facts, although involving different taxable years, which the Special First Division granted in a Resolution dated June 15, 2005.

After trial on the merits, the Special First Division rendered the assailed Decision denying the Petition for Review for failure of petitioner to present its quarterly Income Tax Returns for 2004, raising doubt on whether it carried over its 2003 excess credits.

On January 22, 2010, petitioner filed a "Motion for Reconsideration" praying for the admission of the Supplemental Judicial Affidavit of its witness, Noralyn Sy, and consider the same in the resolution of its Motion For Reconsideration. In a Resolution dated March 8, 2010, the Special First Division granted the motion and allowed petitioner to present to the Court the documents attached to the aforesaid motion. Thereafter, the case was set for the presentation of petitioner's additional documentary evidence on April 20, 2010. Thus, in a Resolution dated May 25, 2010, the Special First Division admitted petitioner's additional documentary evidence.

On September 3, 2010, the Special First Division rendered the assailed "Amended Decision", partially granting petitioner's "Motion for Reconsideration".

Not satisfied, petitioner filed this instant Petition for Review on October 7, 2010 raising this sole issue:

> WHETHER OR NOT IMPSA IS ENTITLED TO A REFUND OF ITS EXCESS INCOME TAX PAYMENTS AND CWT FOR TAXABLE YEARS 2001 AND 2002 EVEN IF IT INITIALLY OPTED TO CARRY OVER ITS EXCESS CWT.

On October 21, 2010, without necessarily giving due course to the petition, respondent was ordered to file her comment, within ten (10) days from notice. Respondent failed to file her comment, as per Report of the Judicial

Records Division dated November 23, 2010. Thus, this case was deemed submitted for decision on December 3, 2010.

THE COURT EN BANC'S RULING

The petition is devoid of merit.

Petitioner contends that its cessation of business operations was duly established, hence, the submission of certificate of dissolution and tax clearance should not have been required by the Special First Division. Petitioner maintains that it falls under the ambit of the exception of the irrevocability rule or *Section 76 of the NIRC of 1997, as amended*, since it has already turned over all the power plants to CBK in 2004; thus, its operations completely came to halt and there were no longer income payments forthcoming. Lastly, petitioner invokes the principle of unjust enrichment if its claim for refund will be denied.

We do not agree.

Records show that when petitioner filed its 2001 and 2002 Annual ITRs, it opted to carry-over its excess creditable withholding taxes by marking the box "To be carried over" in said Annual ITRs.

Section 76 of the NIRC of 1997, as amended, provides:

> "SEC. 76. *Final Adjustment Return.* Every corporation liable to tax under Section 27 shall file a final adjustment return covering the

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total taxable income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable net income of that year the corporation shall either:

(A) Pay the 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."

Pursuant to the abovequoted provision, the taxable corporation with excess quarterly income tax payments may apply for a tax refund or tax credit, but not both. The two options are alternative in nature. The choice of one precludes the other. Settled is the rule that once a taxpayer opted for the carry over option, actually or constructively, the same shall be considered irrevocable for that taxable period until fully utilized *(Philam Asset Management, Inc. vs. Commissioner of Internal Revenue, 477 SCRA 761).*

However, *Section 76 of the NIRC of 1997, as amended*, allows certain exceptions on the application of the irrevocability rule. The Tax Code recognizes business transformation, such as a corporation contemplating dissolution, under *Section 52 (C)*. In relation to this, petitioner invokes the case of *Systra Philippines, Inc. vs. Commissioner of Internal Revenue (533 SCRA 776, 787),* where the Supreme Court ruled:

> "Where, however, the corporation **permanently ceases its operations** before full utilization of the tax credits opted to carry over, it may then be allowed to claim the refund of the remaining tax credits. In such a case, the remaining tax credits can no longer be carried over and the irrevocability rule ceases to apply." *(Emphasis ours)*

Based on the foregoing, in the event of cessation of business, petitioner may opt to claim for refund even if it previously chose the irrevocable option to carry-over since there is no more opportunity for it to utilize such excess credits.

However, it must be stressed that in order to exclude the company from the application of the irrevocability rule, the termination of business operation must be permanent in nature. Thus, it must be proven that petitioner's business permanently ceased to operate.

Corollary thereto and as aptly ruled by the Special First Division, to be entitled for the refund of the unutilized creditable withholding taxes, the provisions of *Sections 52(C) and 235 of the NIRC of 1997, as amended*, must

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first be complied with. The rationale behind the aforesaid sections is to ensure that no corporation may escape payment of taxes and other liabilities to the government, simply by opting to dissolve the corporation and retire from business or reorganize its business.

In this case, the Special First Division denied petitioner's claim for its failure to present a certificate of dissolution and tax clearance, pursuant to *Sections 52 (C) and 235 of the NIRC of 1997, as amended.* Petitioner contends that there is no need to present a certificate of dissolution and tax clearance since it has not yet been legally dissolved but it had already ceased operations and it has no longer any income, which could generate income tax against which its excess CWT could be utilized. Petitioner's contentions are totally misplaced. The documentary requirement for the submission of a tax clearance for all dissolving corporations is mandated by the law itself and cannot be considered an unreasonable requirement imposed by the Court. The tax clearance from the BIR will establish not only the fact that petitioner has been cleared of any tax liability, but it will also sufficiently substantiate that it is already dissolved.

Again, in order to be excluded from the application of the irrevocability rule and therefore allow a refund of its remaining tax credits, the cessation of business operation must be permanent in nature, and not merely temporary. In this case, petitioner admitted that it has not yet been legally dissolved, thus, the corporation still exists. Clearly, with its corporate existence, it may still operate and generate income from its business in the future. The fact that petitioner has turned over all the power plants to CBK in 2004 and that the company has no more income which could generate income tax, against which its excess CWT could be utilized, are not grounds for exclusion from the applicability of the irrevocability rule, nor are they sufficient basis to fall under the said exclusion. Petitioner's corporate existence is not dependent on its Turnkey Contract with CBK, thus, the expiry of such contract does not mean the cessation of petitioner's business. Admittedly, petitioner is not even contemplating to dissolve its corporation. Therefore, petitioner may still operate and incur income from other ventures in the future; for this reason, we cannot find any legal basis to grant its claim for refund.

To reiterate, the irrevocability rule is absolute, the rule will only cease to apply upon cessation of business and after determining that the taxpayer has already paid off all its tax liabilities. Undisputedly, petitioner is not even in the process of dissolving its corporate existence; thus, to grant petitioner's claim would render nugatory the irrevocability rule under *Section 76 of the NIRC of*

1997, as amended.

As regards the amendment of petitioner's 2001 and 2002 Annual ITRs, this Court finds the same immaterial. It must be stressed that it is the law itself which clearly provides the irrevocability rule. To repeat, the carry-over option under *Section 76* is irrevocable. 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. The evident intent of the legislature, in adding the last sentence to *Section 76 of the NIRC of 1997, as amended*, is to keep the taxpayer from flip-flopping on its option, and avoid confusion and complication as regards said taxpayer's excess tax credit *(Commissioner of Internal Revenue vs. Bank of the Philippine Islands, supra., 231-232).* Therefore, to allow an amendment on petitioner's 2001 and 2002 Annual ITR to change its option, is a clear violation of the law and will effectively render nugatory the very intention of the law.

Finally, petitioner's contention that to deny its claim for refund would be tantamount to unjust enrichment on the part of the government is likewise devoid of merit. The Supreme Court has already settled this issue in ruling that there would be no unjust enrichment in the event of denial of the claim for refund because there would be no forfeiture of any amount in favor of the government. The amount being claimed by petitioner would remain in his account, until it is fully utilized in succeeding taxable years. It is worthy to note that unlike the option for refund, which prescribes after two (2) years from the filing of the FAR, there is no prescriptive period for the carrying over of the same *(Commissioner of Internal Revenue vs. Bank of the Philippine Islands, supra)*. Considering that petitioner is not precluded from operating a business since its corporate existence has not yet been dissolved, it may still utilize its carried over excess CWTs in its future tax liabilities.

Basic is the rule that a claimant has the burden of proof to establish the factual basis of his or her claim for tax credit or refund. Tax refunds, like tax exemptions, are construed strictly against the taxpayer *(Paseo Realty and Development Corporation vs. Court of Appeals, 440 SCRA 235, 247)*.

Finding no reversible error, we have no recourse, but to deny the petition.

WHEREFORE, premises considered, the instant petition is hereby **DENIED,** and accordingly **DISMISSED**, for lack of merit. The assailed Decision dated January 5, 2010 and Amended Decision dated September 3, 2010 rendered by the Special First Division in C.T.A. Case Nos. 6921 and 7172 are hereby **AFFIRMED**.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

Ernesto D. Acosta
ERNESTO D. ACOSTA
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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

ERNESTO D. ACOSTA
Presiding Justice