REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

RHOMBUS ENERGY, INC., Petitioner,	C.T.A. CASE NO. 7711
	Members:
- versus -	ACOSTA, *Chairperson*, UY, *and* FABON-VICTORINO, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: MAR 23 2011 ; 3:24 pm

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DECISION

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

This is a Petition for Review filed by Rhombus Energy, Inc., praying for the refund or issuance of a Tax Credit Certificate in the amount of PhP1,500,653.00, allegedly representing its excess creditable withholding tax for the taxable year 2005.

THE PARTIES

Petitioner Rhombus Energy, Inc. is a duly organized and existing domestic corporation with Securities and Exchange

Commission (SEC) Registration No. A199807793. Its business address is at Suite 208, 2nd Floor, the Manila Bank Corporation Condominium Building, 6772 Ayala Avenue, Makati City[1].

Respondent Commissioner of Internal Revenue (CIR), on the other hand, is the government officer vested with legal authority to refund overpaid as well as erroneously or illegally collected internal revenue taxes. Respondent is represented by the Legal Division of Revenue Region No. 8 and may be served with summons, pleadings and other court processes at the same office located at the 5th Floor, Atrium Building, Makati Avenue, Makati City[2].

The record shows that from October 1998 to July 2007, petitioner was registered and under the jurisdiction of Revenue Region No. 8, Revenue District Office ("RDO") No. 50 (South Makati) of the Bureau of Internal Revenue (BIR) with Taxpayer Identification No. 005-650-790-000. But due to petitioner's change of address from Suite 1402, BDO Plaza, 8737 Paseo de Roxas, Salcedo Village, Makati City to Suite 208, 2nd Floor, The Manila Bank Corporation Condominium Building, 6772 Ayala Avenue, Makati City, it filed an application for change of home RDO. Thus, on July

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[1] Paragraph 1, Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 90.
[2] Paragraph 2 , Facts, JSFI, Docket, *Ibid*.

18, 2007, petitioner was transferred to the jurisdiction of RDO No. 47 with Certificate of Registration No. OCN 9RC0000211342.[3]

In the meantime, on April 17, 2006, petitioner filed its Annual Income Tax Return (ITR) for taxable year 2005.[4]

In its Annual ITR for taxable year 2005, petitioner indicated that its excess creditable withholding tax (CWT) in 2005 was "To be refunded".[5]

On December 29, 2006, petitioner filed with Revenue Region No. 8 (Makati City) an administrative claim for refund of its alleged excess/unutilized creditable withholding tax ("CWT") for the year 2005 in the amount Php1,500,653.00.[6]

On December 7, 2007, pending respondent's action on its claim for refund or issuance of tax credit certificate of its excess/unutilized CWT in 2005 and before the prescriptive period for the filing of an appeal expired, petitioner filed the instant Petition for Review. ✓

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[3] Paragraph 5, Facts, JSFI, Docket, p. 91.
[4] Paragraph 6, Facts, JSFI, Docket, *Ibid.*
[5] Paragraph 7, Facts, JSFI, Docket, *Ibid.*
[6] Paragraph 8, Facts, JSFI, Docket, *Ibid.*

In her Answer[7] filed on January 28, 2008, respondent has following Special and Affirmative Defenses:

> "4. Assuming without admitting that petitioner filed a claim for refund, the same is subject to investigation by the Bureau of Internal Revenue;
>
> 5. Petitioner failed to demonstrate that the tax, which is the subject of this case, was erroneously or illegally collected;
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> 6. Taxes paid and collected are presumed to have been made in accordance with the laws and regulations, hence, not refundable;
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> 7. It is incumbent upon petitioner to show that it has complied with the provisions of Section 204(C) in relation to Section 229 of the Tax Code, as amended upon which its claimed (*sic*) for refund is premised;
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> 8. In an action for tax refund the burden is upon the taxpayer to prove that he is entitled thereto, and failure to discharge said burden is fatal to the claim (*Emmanuel & Zenaida Aguilar v. Commissioner, CA-GR No. Sp. 16432, March 30, 1990 cited in Aban, Law of Basic Taxation in the Philippines, 1st edition, p. 206)*;
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> 9. Claims for refunds are construed strictly against the claimant, the same partake the nature of exemption from taxation (*Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)* and as such, these are looked upon with disfavor (*Western Minolco Corp. vs. Commissioner of Internal Revenue, 124 SCRA 121*)"

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[7] Docket, pp. 58-60.

In compliance with the Court's directive, petitioner filed its Pre-Trial Brief on February 21, 2008, while respondent on March 10, 2008.[8] On April 16, 2008, the parties filed their Joint Stipulation of Facts and Issues, which the Court approved on April 25, 2008[9].

Trial ensued during which petitioner presented its Financial Controller, Ms. Ma. Daisy N. Lizada. She testified by way of Judicial Affidavit that the instant petition is a claim for refund of petitioner's excess CWT in 2005 in the amount of Php1,500,563.00. Petitioner opted to claim for refund its excess CWT in its 2005 Annual ITR and it did not carry-over to nor utilize in the succeeding taxable year 2006 its excess CWT in 2005.

She further testified that petitioner's revenues in 2005 consists of energy service fees from Distileria Bago, Inc. amounting to Php59,551,116.00 and proceeds from the sale of its generation facility to Ginebra San Miguel, Inc. in the amount of US$8,745,997.00 with peso equivalent of Php472,283,826.36 using an exchange rate of Php54.00 to a dollar. Distileria Bago, Inc. and Ginebra San Miguel, Inc. withheld the total amount of Php28,523,295.45 from their income payments to petitioner in

[8] Docket, pp. 72-77.
[9] Docket, p.112.

2005 as shown in the Certificates of Creditable Withholding Tax at Source (BIR Form No. 2307) that they issued to petitioner. Petitioner reported this in its Annual and Quarterly ITRs for 2005 from which the excess CWT amounting to Php1,500,653.00 is sought to be refunded. [10]

On October 14, 2008, the Court admitted the exhibits formally offered in evidence by petitioner on August 20, 2008.[11]

On January 12, 2009, petitioner filed an Urgent Motion to Present Additional Evidence with Motion to Defer Submission of Memorandum.[12] On February 6, 2009, the Court granted the motion there being no indication of any objection on the part of respondent who failed to appear during the hearing on the incident, despite notice.

On March 31, 2009, petitioner filed a Supplemental Formal Offer of Evidence[13] to which respondent did not file any comment notwithstanding the opportunity granted. In a Resolution dated

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[10] Exhibit "Q", pp. 308 to 324.
[11] Docket, pp. 370 to 371.
[12] Docket, pp. 382 to 387.
[13] Docket, pp. 396 to 398.

May 21, 2009, the Court admitted the supplemental exhibits offered by petitioner[14].

On June 26, 2009, petitioner, for the second time, filed an Urgent Motion to Present Additional Evidence with Motion to Defer Submission of Memorandum[15] which the Court granted in a Resolution dated July 02, 2009.

Thus, on September 14, 2009, petitioner's lone witness Daisy N. Lizada was recalled on the witness stand. She testified that from 2006, petitioner did not have any operations. Precisely its Quarterly and Annual ITRs for taxable years 2006 to 2008 reflected a zero or nil Sales/Revenues/Receipts/Fees. She added that petitioner erroneously included the 2005 excess CWTs in the prior year's excess credits reported in the 2006 Quarterly ITRs.[16] Petitioner corrected this error by removing the 2005 excess CWTs from the prior year's excess credits reported in its 2006 Annual ITR and in its 2007 Quarterly and Annual ITRs, as well as the 2008 Quarterly ITRs.[17]

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[14] Docket, pp. 405 to 406.
[15] Docket, pp. 412 to 418.
[16] Exhibits "DD", "EE" and "FF".
[17] Exhibit "GG".

On September 18, 2009, petitioner filed a Supplemental Formal Offer of Evidence. On October 12, 2009, the Court Admitted Exhibits DD to MM and OO, inclusive of the submarkings, but denied the admission of Exhibits NN and NN-1.

On October 12, 2009, petitioner filed a Partial Motion for Reconsideration for the admission of Exhibits NN and NN-1, which was granted in the Resolution dated January 04, 2010.

On March 02, 2010, respondent submitted the case for decision on the basis of the pleadings filed on the reason that petitioner's claim for refund was still pending investigation with the RDO No. 47.

On April 26, 2010, the case was submitted for decision, after respondent filed her Memorandum on April 5, 2010 and petitioner on April 22, 2010.

The parties stipulated the following issues for the resolution of the Court: [18]

[18] Joint Stipulation of Facts and Issues, Docket, pp. 92-93

"A.

Whether or not income payments from which the taxes were withheld were included in petitioner's gross income for the year 2005.

B.

Whether or not petitioner has excess creditable withholding tax in the year 2005.

C.

Whether or not petitioner carried over to the succeeding taxable years the alleged excess/unutilized creditable withholding tax in the year 2005.

D.

Whether or not petitioner's right to claim the refund of the alleged excess/creditable withholding tax in the year 2005 was duly substantiated.

E.

Whether or not petitioner is entitled to the refund or issuance of a tax credit certificate in the sum of PHP1,500,653.00 as alleged excess/unutilized creditable withholding tax on income payment in the year 2005.

F.

Whether or not the claim for refund was filed within the two (2)-year prescriptive period prescribed under Section 204(C), in relation to Section 229 of the Tax Code."

To dispose the case, the Court needs to resolve two basic issues, to wit: (1) whether petitioner has excess/unutilized creditable withholding tax for the taxable year 2005 in the amount of Php1,500,653.00; and (2) whether petitioner is entitled to a refund or issuance of a tax credit certificate of the said amount and if in the affirmative, whether the claim is properly substantiated.

THE COURT'S RULING

In its Annual ITR[19] for the taxable year 2005, petitioner declared a taxable income of Php102,098,024.00 with a corresponding tax due of Php33,181,858.00.[20] Petitioner also reported in the same Annual ITR a total tax credits/payments of Php34,682,511.00[21] composed of income tax payments for the first three quarters amounting to Php6,159,215.00 and creditable tax withheld for the same period amounting to Php28,523,296.00. Since the total quarterly income tax payments/credits for the first three quarters exceeds its total income tax due for the subject year, petitioner has an income tax overpayments of Php1,500,653.00[22] (Php33,181,858.00 - Php34,682,511.00) for taxable year 2005.

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[19] Exhibit "B".
[20] Exhibit "B-2".
[21] Exhibit "B-4".
[22] Exhibit "B-5".

Given the foregoing circumstances, petitioner as a taxable corporation had two options expressly provided in Section 76 of the NIRC of 1997, as amended, which reads as follows:

> "**SEC. 76.** ***Final Adjustment Return***. — Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar or fiscal year. If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable income of that year, the corporation shall either:
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> (A) Pay the balance of the tax still due; or
> (B) **Carry-over the excess credit**; or
> (C) **Be credited or refunded with the excess amount paid, as the case may be**.
>
> In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor." (*Emphasis supplied*)

Finding import in the above provision, the Supreme Court in *Philam Asset Management, Inc. v. Commissioner of Internal*

Revenue,[23] explained the two options, namely, (a) to file for a tax refund or (b) to avail of a tax credit, 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 [Final Adjustment Return (FAR)] of a given taxable year, against the estimated quarterly income tax liabilities of the succeeding taxable year.
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> **<u>These two options under Section 76 are alternative in nature. The choice of one precludes the other. 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</u>.**
>
> One cannot get a tax refund and a tax credit at the same time for the same excess income taxes paid." (*Boldfacing and underscoring supplied*)

Respondent argues that petitioner had exercised its option to carry-over its claimed 2005 excess creditable withholding taxes to the succeeding taxable years 2006 and 2007. Allegedly, a close

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[23] G.R. No. 156637 and No. 162004, 14 December 2005, 477 SCRA 761.

scrutiny of petitioner's formally offered documentary evidence shows that although petitioner did not put indicative mark in the option box "To be carried as tax credit next year" in its 2005, 2006 and 2007 Annual ITRs, petitioner nonetheless indicated the amount of Php1,500,653.00 as "Prior year's excess tax credit" in its first, second, third, and fourth Quarterly ITRs for taxable years 2006 and 2007. Such declaration of the amount of Php1,500,653.00 as "Prior year's excess tax credit" in the said Quarterly ITRs for taxable years 2006 and 2007 is more than sufficient manifestation of petitioner's intention to carry-over its 2005 excess creditable taxes to the succeeding taxable years.[24]

The Court is not convinced.

The evidence on record shows that petitioner clearly signified its intention to be refunded of its excess creditable tax withheld for calendar year 2005 in its Annual ITR for the said year. Petitioner under Line 31 of the said ITR marked "x" on the box "To be refunded".[25] Moreover, petitioner's 2006 and 2007 Annual ITRs do not have any entries in Line 28A "Prior Year's Excess Credits" which only prove that petitioner did not carry-over its 2005

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[24] Docket, pp 532 to 536, Memorandum for the Respondent.
[25] Exhibit "B-5".

excess/unutilized creditable withholding tax to the succeeding taxable years or quarters.[26]

While it may be true that petitioner's Quarterly ITRs for the first three (3) quarters of taxable year 2006 reflect the excess/unutilized creditable withholding tax of Php1,500,653.00, the record reveals that the inclusion of the said excess/unutilized creditable withholding tax as "prior year's excess credits" was a mere lapse on the part of the petitioner. And in an effort to rectify the flaw, petitioner removed the said excess/unutilized creditable withholding tax of Php1,500,653.00 as "prior year's excess credits" in its Annual ITRs for taxable years 2006 and 2007. This in essence was the testimony of Ma. Daisy N. Lizada in her Judicial Affidavit dated September 9, 2009, to wit:

> **07) FHM**: The quarterly ITRs of Rhombus for taxable year 2006 (Exhibits "DD", "EE", and "FF") reflect prior year's excess credits of Php1,500,653.00. However, the Annual ITR of Rhombus for taxable year 2006 (Exhibit "G") reflects zero or nil prior year's excess credits. What accounts for the discrepancy?
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> **MS. LIZADA**: We erroneously included in the prior year's excess credits reported in the 2006 Quarterly ITRs the 2005 excess CWTs of Rhombus. We corrected this

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[26] Exhibits "G-1" and "II-2".

> error in the 2006 Annual ITR (Exhibit "G") and in the 2007 Quarterly and Annual ITRs as well as the 2008 Quarterly ITRs by removing the 2005 excess CWTs from the prior year's excess credits reported in said 2006 Annual ITR and in the 2007 Quarterly and Annual ITRs as well as the 2008 Quarterly ITRs.

The fact that petitioner's 2006 and 2007 Annual ITRs do not reflect the excess/unutilized creditable withholding tax for taxable year 2005 demonstrates that petitioner did not carry-over its excess creditable withholding tax which it intended for refund.

In the case of *Commissioner of Internal Revenue vs. Team (Philippines) Energy Corporation*,[27] the Court *En Banc*, citing the case of *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*,[28] held that:

> "At any rate, **Section 76 of the 1997 NIRC speaks only of the filing of the Final Adjustment Return and as held by the Supreme Court, the Annual ITR or "(t)he Final Adjustment Return is the most reliable firsthand evidence of corporate acts pertaining to income taxes**. In it are found the itemization and summary of additions to and deductions from income taxes due. These entries are not without rhyme or reason.

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[27] C.T.A. EB Case No. 425. April 15, 2009.
[28] *Supra.*

> They are required, because they facilitate the tax administration process." And in this case, respondent offered in evidence its Annual ITRs for calendar years 2002, 2003 and 2004." (*Boldfacing and underscoring supplied*)

As stated by respondent, petitioner did not put an indicative mark in the option box of its 2005 Annual ITR "To be carried as tax credit next year" as it marked the option box "To be refunded". As the Supreme Court ruled in the case of *Philam Asset Management, Inc. v. Commissioner of Internal Revenue*,[29] the two options under Section 76 of the 1997 NIRC, as amended, are in the alternative, thus, the choice of one precludes the other.

Since petitioner chose to refund the excess/unutilized creditable withholding tax amounting to Php1,500,653.00 as indicated in its 2005 Annual ITR, it can not subsequently apply the said amount in its income taxes due in the succeeding quarters even if it carried-over the same. This is the irrevocability rule laid down in Section 76 of the 1997 NIRC, as amended, - the options are in the alternative and the choice of one precludes the other. The controlling factor for the operation of the said rule is that the taxpayer chose an option; and once it had already done so, it could no longer make another one. In the instant case, petitioner chose

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[29] *Supra*.

to refund the excess/unutilized creditable withholding tax amounting to Php1,500,653.00.

However, to be entitled to a refund in the amount of Php1,500,653.00, petitioner must prove compliance with requirements of the law. To be entitled to a claim for refund or issuance of a tax credit certificate of excess creditable withholding tax at source, a taxpayer like petitioner must satisfy the following requisites:

> 1) the claim for refund must be filed within the two-year prescriptive period, as provided under Section 204(C), in relation to Section 229 of the NIRC of 1997;
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> 2) the fact of withholding must be 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
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> 3) the income upon which the taxes were withheld must be included in the return of the recipient (*Citibank, N.A. vs. Court of Appeals and Commissioner of Internal Revenue, 280 SCRA 459; ACCRA Investment Corporation vs. Court of Appeals, 204 SCRA 957; Section 2.58.3(B) of Revenue Regulations No. 2-98*).

Sections 204 (C) and 229 of the NIRC of 1997, as amended, are the relevant provisions insofar as the first requisite is concern and they read as follows:

> "SEC. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes. — The Commissioner may —
>
> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamped that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.**"

> "SEC. 229. Recovery of Tax Erroneously or Illegally Collected. — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

> **In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax** or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." (*Emphasis supplied*)

The two-year prescriptive period for the filing of a claim for refund or tax credit certificate of excess creditable withholding tax/quarterly tax payment starts to run from the date of filing of the annual ITR as enunciated in the case of *ACCRA Investments Corporation vs. Court of Appeals.*[30]

On the record, petitioner filed its Annual ITR for the year 2005 on April 17, 2006.[31] Counting from the said date, petitioner had until April 17, 2008, within which to file both its administrative and judicial claim for refund or issuance of a tax credit certificate. Clearly, petitioner's administrative claim filed on December 29, 2006 and judicial claim via the instant Petition for Review filed on December 07, 2007, were within the two-year prescriptive limit.

[30] G.R. No. 96322, December 20, 1991.
[31] April 15, 2006 was a Saturday.

To comply with the second requisite, petitioner presented Certificates of Creditable Tax Withheld at Source issued by its sole customer Distileria Bago, Inc., a wholly owned subsidiary of La Tondeña, Inc. (now Ginebra San Miguel, Inc.). The details of the said certificates are summarized as follows:

Exhibit	**Period Covered**	**Withholding Agent**	**Income Payment**	**Income Tax Withheld**
J	1/01/05 to 3/31/05	Distileria Bago, Inc.	Php 5,682,287.00	Php 113,645.74
Y	4/01/05 to 4/30/05	Distileria Bago, Inc.	1,648,531.00	32,970.62
L	5/01/05 to 5/30/05	Distileria Bago, Inc.	1,982,454.54	39,649.09
K	4/01/05 to 4/06/05	Ginebra San Miguel, Inc.	472,283,838.00	28,337,030.00
			Php481,597,110.54	Php28,523,295.45

While respondent admits the existence of the Certificates of Creditable Tax Withheld at Source, she however claims that these documents are not conclusive evidence of payment and remittance to the BIR. To her, they are mere proof of withholding of taxes and not a conclusive proof of payment or remittance of taxes withheld in favor of the government.

Respondent posits that nowhere in the course of the proceedings, nor in the documentary evidences presented by petitioner where it was shown that the taxes withheld by the payor were remitted to the BIR. Respondent opines that the best proof of remittance is the "Certification" from the BIR's Revenue Accounting Division ("RAD") confirming such remittance.

But proof of actual remittance by petitioner is not needed to prove withholding and remittance of taxes withheld to the BIR. Section 2.58.3 (B) of Revenue Regulations No. 2-98 provides in no uncertain term that **proof of remittance is the responsibility of the withholding agent and not of the taxpayer-refund claimant**.

In *Commissioner of Internal Revenue v. Asian Transmission Corporation*,[32] the Court *En Banc* made the following disquisition:

> "It is worthy to note that proof of actual remittance by respondent is not needed in order to prove withholding and remittance of taxes to petitioner. Section 2.58.3 (B) of Revenue Regulations No. 2-98 clearly provides that proof of remittance is the responsibility of the withholding agent and not of the taxpayer-refund claimant. It should be borne in mind by the petitioner that payors of withholding taxes are by themselves constituted as withholding agents of the BIR. The taxes they withhold are held in trust for the government. In the event that the withholding agents commit fraud against the government by not remitting the taxes so withheld, such act should not prejudice herein respondent who has been duly withheld taxes by the withholding agents acting under

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[32] C.T.A. En Banc Case No. 205, July 16, 2007.

> government authority. Moreover, pursuant to Sections 57 and 58 of the NIRC of 1997, as amended, the withholding of income tax and the remittance thereof to the BIR is the responsibility of the payor and not the payee. Therefore, respondent, being the payee in this case, has no control over the remittance of the taxes withheld from its income by the withholding agent or payor who is the agent of the petitioner. **The Certificates of Creditable Tax Withheld At Source issued by the withholding agents of the government are prima facie proof of actual payment by herein respondent-payee to the government itself through said agents. We stress that the pertinent provisions of law and the established jurisprudence evidently demonstrate that there is no need for the claimant, respondent in this case, to prove the actual remittance by the withholding agent (payor) to the BIR.**" (*Emphasis supplied*)

Clearly, respondent's claim that petitioner should present a "Certification" from BIR's RAD to prove the fact of remittance and collection by the BIR of the taxes withheld at source finds no basis in law or jurisprudence. The evidence adduced by petitioner during the trial to which respondent interposed no objection show that respondent was able to substantiate its claim through the presentation of Exhibits "J", "Y", "L", and "K", all Certificates of Creditable Tax Withheld At Source. In fine, the evidence presented by petitioner substantiate petitioner's claim that taxes were withheld from its income in excess of what due the government and that they remain unutilized.

To show compliance with the third requisite that petitioner declared in its return the income related to the creditable withholding taxes of Php28,523,295.45, it presented the following documents:

1. Annual Income Tax Return for the year ended December 31, 2005 with attached audited financial statements and Account Information Form marked as Exhibit "B";

2. Certificates of Creditable Tax Withheld at Source issued to petitioner for the first three quarters of taxable year 2005 marked as Exhibits "J", "Y", "L" and "K";

3. Summary of invoices issued for taxable year 2005 marked as Exhibit "M"; and

3. The sales invoices issued for taxable year 2005 marked as Exhibits "O-1" to "O-14".

The withholding tax certificates reveal that the creditable income taxes of Php28,523,295.45 were withheld from petitioner's energy service fees of Php9,313,272.54 and from the sale of its generation facility amounting to Php472,283,838.00. The energy fees paid by Distileria Bago, Inc. in the amount of Php9,313,272.54 from which creditable withholding tax in the aggregate amount of Php186,265.45 was withheld was reported by petitioner as part of its "Sales/Revenues/Receipts/Fees" amounting to Php59,551,116.00 in Item No. 15A of its 2005 Annual ITR.[33]

As regards the income from the sale of power generation facility in the amount of Php472,283,838.00 from which the amount of Php28,337,030.00 creditable withholding tax was withheld, petitioner reported a gain of only Php209,320,181.00 as appearing under Item 18B (Non-Operating and Other Income) of petitioner's Annual ITR marked as Exhibit B. There was nothing fallacious in doing so for petitioner could deduct valid cost (i.e. Book Value of the asset) from the selling price to arrive at the amount of "Non-operating and Other Income" to be reported in its 2005 Annual ITR.

Thus, it is clear that petitioner's income upon which the taxes were withheld was included in its Annual ITR for taxable year 2005. Evidently, petitioner is entitled to the refund/tax credit in the amount of P1,500,653.00 representing the excess/unutilized creditable withholding taxes on its income earned for taxable year 2005.

WHEREFORE, the instant Petition for Review is **GRANTED**. Consequently, respondent Commissioner of Internal Revenue is

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[33] Exhibit "B-1".

hereby **DIRECTED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner Rhombus Energy, Inc. in the amount of Php1,500,653.00, representing the latter's unutilized creditable income taxes withheld for the taxable year 2005.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

(with Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

ERLINDA P. UY
Associate Justice

CERTIFICATION

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's Division.

ERNESTO D. ACOSTA
Presiding Justice