REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

ASB DEVELOPMENT CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6445

Members:

CASTAÑEDA, JR., *Chairman*
UY, and
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:
FEB 09 2005
[signature]

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DECISION

CASTAÑEDA, JR., *J.*:

This is a judicial claim for the issuance of a tax credit certificate in the amount of P4,600,884.00 allegedly representing excess creditable taxes withheld for the calendar years ended December 31, 1999 and December 31, 2000.

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines with principal office at ASB Center, 114 Benavidez St., Legaspi Village, Makati City. It is engaged in real estate development which includes high rise condominium projects and leasing of properties (*page 6, TSN, August 21, 2002*).

On April 17, 2000, petitioner filed with the Bureau of Internal Revenue (BIR) its tentative income tax return for the taxable year ended December 31, 1999 (*Exhibit A*) reflecting no amount of taxable income but a minimum corporate income tax (MCIT) due of P9,158,188.00 which was deducted from the prior year's excess credits of P28,933,325.00, leaving an overpayment of P19,775,137.00 as shown below:

Gross Income			P 475,911,547.00
Less:	Deductions		475,911,547.00
Taxable Income			P -
Minimum Corporate Income Tax (MCIT)			P 9,158,188.00
Less:	Tax Credits		
	Prior Year's Excess Credits	P 28,933,325.00	
	Creditable Tax Withheld		
	First Three Quarters	-	
	Fourth Quarter	-	28,933,325.00
Tax Overpayment			P 19,775,137.00

In the said return, petitioner indicated its option to be issued a tax credit certificate for the income tax overpayment of P19,775,137.00.

Subsequently, petitioner amended its 1999 income tax return and filed the same with the BIR on September 8, 2000 (*Exhibit B*) also reporting no amount of taxable income but increasing its MCIT liability to P9,688,451.00 and excess tax credits to P29,963,736.00, computed as follows:

Gross Income			P 529,904,344.00
Less:	Deductions		529,904,344.00
Taxable Income			P -
Minimum Corporate Income Tax (MCIT)			P 9,688,451.00
Less:	Tax Credits		
	Prior Year's Excess Credits	P 28,933,325.00	
	Creditable Tax Withheld		
	First Three Quarters	9,921,828.00	
	Fourth Quarter	797,034.00	39,652,187.00
Tax Overpayment			P 29,963,736.00

According to petitioner, since the prior year's excess credits in the amount of P28,933,325.00 was already the subject of a separate claim for refund, the MCIT due of

P9,688,451.00 was offset against the creditable taxes withheld in 1999 amounting to P10,718,862.00. Thus, the income tax overpayment of P29,963,736.00 as of December 31, 1999 consisted of the prior year's (1998) excess credits of P28,933,325.00 and excess creditable taxes withheld in 1999 of P1,030,411.00. Again, petitioner signified its intention to be issued a tax credit certificate for its excess tax credits of P29,963,736.00 as of December 31, 1999 *(Exhibit B-1)*.

On April 18, 2001, petitioner filed its tentative income tax return for the taxable year ended December 31, 2000 (*Exhibit C*) wherein it declared a net loss of P32,754,363.00 and MCIT due of P2,934,981.00. Likewise, petitioner reported the amount of P29,963,736.00 as prior year's excess credits and the amount of P16,407,841.00 as creditable taxes withheld during the first three quarters of 2000. The creditable taxes withheld in the total amount of P46,371,577.00 was applied against the MCIT of P2,934,981.00 resulting to excess tax credits of P43,436,596.00 as of December 31, 2000, to which petitioner opted "To be issued a tax credit certificate", thus:

Gross Income			P 175,403,905.00
Less:	Deductions		208,158,268.00
Net Loss			P (32,754,363.00)
Minimum Corporate Income Tax (MCIT)			P 2,934,981.00
Less:	Tax Credits		
	Prior Year's Excess Credits	P29,963,736.00	
	Creditable Tax Withheld		
	First Three Quarters	16,407,841.00	
	Fourth Quarter	-	46,371,577.00
Tax Overpayment			P 43,436,596.00

On December 7, 2001, petitioner filed with the BIR an amended income tax return for taxable year 2000 (*Exhibit D*), this time reducing its net loss to P26,577,143.00

but increasing its MCIT liability to P3,168,917.00. Also, petitioner no longer reflected the prior year's excess credits and reduced the creditable taxes withheld in 2000 to P6,739,390.00, resulting to an income tax overpayment of P3,570,473.00 to which petitioner chose "To be issued a tax credit certificate" *(Exhibit D-1)*. The said amended return is partly reproduced below:

Gross Income				P 182,241,673.00
Less:	Deductions			208,818,816.00
Taxable Income				P(26,577,143.00)
Minimum Corporate Income Tax (MCIT)				P 3,168,917.00
Less:	Tax Credits			
	Prior Year's Excess Credits		P -	
	Creditable Tax Withheld			
		First Three Quarters	5,943,508.00	
		Fourth Quarter	795,882.00	6,739,390.00
Tax Overpayment				P 3,570,473.00

Although petitioner's income tax returns for the years 1999 and 2000 allegedly in themselves operate as formal applications for tax credit certificate, petitioner, on April 12, 2002, filed with the Large Taxpayers Service of the Bureau of Internal Revenue (BIR), a formal letter in order to reiterate its request for issuance of a tax credit certificate corresponding to the excess tax credits of P1,030,411.00 for taxable year 1999 and of P3,570,473.00 for taxable year 2000 (*Exhibit G*).

As the two-year prescriptive period for filing of a judicial claim was about to lapse, petitioner filed its judicial claim before this Court on the same day.

Respondent, in his Answer to the Petition for Review, raised the following Special and Affirmative Defenses:

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

5. Petitioner miserably failed to demonstrate that the taxes subject of the case at bar were erroneously or illegally collected;

6. The amount of P4,600,884.00 representing alleged unutilized withholding tax credits for the calendar years ended December 31, 1999 and December 31, 2000 was not properly documented;

7. Taxes paid and collected are presumed to have been paid in accordance with law and regulations, hence, not refundable;

8. 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/credit;

9. It is incumbent upon petitioner to show that it has complied with the provisions of Sections 204(C) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit;

10. Well-settled is the rule that claims for tax refund/credit are construed in strictissimi juris against the taxpayer as they partake the nature of exemption from tax and it is incumbent upon the petitioner to show that it is entitled thereto under the law."

The sole issue We are tasked to resolve as stipulated by the parties is: Whether petitioner is entitled to the refund and/or issuance of a tax credit certificate in the amount of P4,600,884.00 representing unutilized creditable income taxes withheld for the taxable years 1999 and 2000.

Petitioner anchored its claim on the provisions of Section 76 of the National Internal Revenue Code (NIRC) of 1997 in relation to Sections 204 and 229 of the same Code, hereunder quoted for easy reference:

"**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 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." (Underlining Ours)

"**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 stamps 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."

Under the afore-quoted provisions of Section 76, the corporate taxpayer's excess credits or overpaid income tax in a given taxable year may either be refunded or claimed as tax credit or applied against its income tax liabilities in the succeeding taxable years. However, once the option to carry-over has been made, such option becomes *irrevocable* for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor.

As stated earlier, the instant claim of P4,600,884.00 is composed of the 1999 excess tax credits of P1,030,411.00 and 2000 excess tax credits of P3,570,473.00, computed as follows:

For taxable year 1999

Minimum Corporate Income Tax (MCIT)		P 9,688,451.00
Less: Creditable Tax Withheld		
First Three Quarters	P 9,921,828.00	
Fourth Quarter	797,034.00	10,718,862.00
		P 1,030,411.00

For taxable year 2000

Minimum Corporate Income Tax (MCIT)		P 3,168,917.00
Less: Tax Credits		
Prior Year's Excess Credits	P -	
Creditable Tax Withheld		
First Three Quarters	5,943,508.00	
Fourth Quarter	795,882.00	6,739,390.00
Tax Overpayment		P 3,570,473.00

In opposing petitioner's 1999 claim of P1,030,411.00, respondent relies upon the investigation report of Revenue Officers M. Macalintal/M. Rugayan (*Exhibit 1, pp. 477-479, BIR Records*) who allegedly found during the audit, that petitioner had a deficiency

MCIT liability of P486,097.55 (inclusive of increments) due to an alleged overstatement on its claimed deduction for direct costs/expenses under the account "Loss on writedown of real estate properties and condominium units" in the amount of P14,587,176.00. Hence, the respondent's examiners believed that the alleged deficiency MCIT of P486,097.55 should be charged against petitioner's claim of P1,030,411.00. The examiners further recommended that the remaining claim of P544,313.45 (P1,030,411.00 less P486,097.55) should also be denied for lack of certification from the Revenue Accounting Division that the same had been remitted to the BIR.

Anent respondent's assertion that the alleged deficiency MCIT of P486,097.55 should be offset against petitioner's 1999 claim of P1,030,411.00, We disagree. We cannot give credence to the alleged deficiency MCIT of P486,097.55 because it has not yet become final and demandable. No formal assessment notice has been served to petitioner and even granting, for the sake of argument, that there was such notice, still, We cannot take cognizance thereof. Under the law and regulations, petitioner is given the opportunity to contest, dispute or settle an assessment to which it is being made liable to pay. Therefore, the judicial claim for refund/tax credit should proceed independently from whatever assessment that may be issued against petitioner. Well-settled is the rule that there can be no off-setting of taxes against the claims that the taxpayer may have against the government. The government and taxpayer are not mutually creditors and debtors of each other under Article 1278 of the New Civil Code and a "claim for taxes is not such a debt, contract or judgment as is allowed to be set-off." (***Republic of the***

Philippines vs. Mambulao Lumber Company. et al, 4 SCRA 622; Cordero vs. Gonda, 18 SCRA 331).

In addition, We disagree with the respondent that a certification from the Revenue Accounting Division is required before the subject excess tax credits may be claimed as refund/tax credit. Section 2.58.3 of Revenue Regulations No. 2-98, as amended, merely requires the presentation of withholding tax certificates. To quote:

> ***"Sec. 2.58.3 Claim for tax credit or refund.***
>
> xxx xxx xxx
>
> (B) Claims for tax credit or refund of any creditable income tax which was deducted and withheld on income payments shall be given due course only when it is shown that the income payment has been declared as part of the gross income and the fact of withholding is established by a copy of the withholding tax statement duly issued by the payor to the payee showing the amount paid and the amount of tax withheld therefrom.
>
> Proof of remittance is the responsibility of the withholding agent."

Nonetheless, We agree with the respondent that petitioner cannot claim for a refund or issuance of a tax credit certificate corresponding to the 1999 excess tax credits of P1,030,411.00.

A perusal of its original and amended 1999 income tax returns (*Exhibits A & B, respectively*) shows that petitioner indicated its option to be issued a tax credit certificate for the reported excess tax credits of P19,775,137.00 and P29,963,736.00, respectively, as of December 31, 1999 by writing an "x" mark in the box corresponding to the said choice. Notwithstanding such signification, petitioner still carried-over the 1999 excess tax credits of P29,963,736.00 to its original income tax return for the taxable year 2000 (*Exhibit C*). Considering that the prior year's excess credits of P29,963,736.00 included the amount of P1,030,411.00 subject of the instant petition, petitioner is barred from claiming a refund or tax credit therefor pursuant to Section 76 of the NIRC of 1997. Petitioner actually exercised the option of carry-over insofar as the 1999 claim of P1,030,411.00 is concerned *(Exhibit C)* and the same is irrevocable. Although petitioner amended its income tax return for taxable year 2000 *(Exhibit D)* wherein it reported no amount as prior year's excess credits (*Exhibit D-2*), an amendment just to change an option already chosen and exercised is not permissible. To hold otherwise will render the irrevocability of the option to carry-over under Section 76 nugatory. Any taxpayer can easily aver mistake or error in its declaration and amend its return not only once but several times, as the case may be. The amendment of returns allowed by Section 6 of the NIRC of 1997 does not extend to changing a taxpayer's chosen option and actual exercise of such option under Section 76 of the same Code. As We already stated, to do so would render Section 76 ineffectual (***Subic Bay Distribution, Inc. vs. The Commissioner of Internal Revenue, CTA Case No. 6640, November 3, 2004***).

Petitioner having made a choice, should apply the 1999 excess tax credits of P1,030,411.00 against its income tax liability of P3,168,917.00 declared in its amended income tax return for taxable year 2000, as follows:

Minimum Corporate Income Tax (MCIT)			P 3,168,917.00
Less:	Prior Year's Excess Credits		1,030,411.00
MCIT Still Payable			P 2,138,506.00
Less:	Creditable Taxes Withheld		
	First Three Quarters	P5,943,508.00	
	Fourth Quarter	795,882.00	6,739,390.00
Excess Creditable Taxes Withheld			P 4,600,884.00

It must be pointed out that the resulting amount of P4,600,884.00 although appears to be the same amount as the subject claim of petitioner, represents only petitioner's excess creditable taxes withheld for 2000. Because as We already discussed, the amount of P1,030,411.00 which was being claimed as 1999 excess tax credits was already applied against petitioner's MCIT for 2000. Inasmuch as in its original and amended 2000 income tax returns (*Exhibits C & D*), petitioner selected the option "To be issued a Tax Credit Certificate" and did not declare any amount of prior year's excess credit in its 2001 income tax return (*Exhibit E-1*), the excess creditable withholding taxes for taxable year 2000 of P4,600,884.00 may be the proper subject of the present claim for an issuance of a tax credit certificate under Section 76 of the NIRC of 1997.

As oft-cited by this Court in a number of similar cases, petitioner's entitlement to a claim of excess creditable withholding taxes is dependent on its compliance with the following requirements:

1. That the claim for refund was filed within the two-year prescriptive period provided under Section 204(C) in relation to Section 229 of the NIRC of 1997;

2. That the fact of withholding is established by a copy of a statement duly issued by the payer (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom; and

3. That the income upon which the taxes were withheld were included in the return of the recipient (***Revenue Regulations No. 2-98, as amended; Citibank, N.A. vs Court of Appeals and CIR, 280 SCRA 459; ACCRA Investments Corporation vs. Court of Appeals, 204 SCRA 957***).

This Court finds petitioner to have complied with the first requirement. The two-year prescriptive period for the filing of a claim for refund commences from the date of filing of the final adjustment return (***ACCRA Investments Corporation vs. Court of Appeals, supra***). The claimed excess creditable withholding taxes pertain to taxable year

2000 to which petitioner filed its tentative annual income tax return on April 18, 2001 *(Exhibit C)*. Counting from this date, petitioner had until April 18, 2003 within which to file its claim both in the administrative and judicial levels. Clearly, petitioner's administrative claim filed with the BIR on April 12, 2002 *(Exhibit G)* and the Petition for Review filed before this Court on the same date, fall within the two-year prescriptive period.

With reference to the second requirement, petitioner presented various Certificates of Creditable Tax Withheld at Source and Withholding Tax Remittance Returns (*Exhibits K-1 to K-59 and J-1 to J-82*) which were summarized in *Exhibits J and K*. These documents proved that petitioner had creditable withholding taxes for taxable year 2000 in the total amount of P6,406,842.89 which comprised of the creditable withholding taxes of P4,596,741.65 arising from its sales of real properties and creditable withholding taxes of P1,801,101.24 pertaining to its lease of real properties and professional fees. However, this Court noted that the said creditable withholding taxes of P6,406,842.89 was lesser by P332,547.11 when compared with those reflected in petitioner's amended 2000 income tax return in the amount of P6,739,390.00.

We proceed to the third requirement.

Petitioner's witness, Mr. Rolando Domingo, admitted that there was an apparent discrepancy between the gross income amounts as reflected in its amended 2000 income tax return and those found in the certificates/withholding tax remittance returns. The said witness explained the factors which brought about the discrepancy, thus:

MR. DOMINGO:

A. As I mentioned earlier, there are a couple of factors accounting for this difference. One of the reason (sic) is that we reported some of the Gains on the sales of units during prior years when the sales were made. Some of our individual customers however, pay us in installments. Hence, they withhold on their payments only at the time the installment payments are made. While others withhold only on their last installments. Other reasons for the difference are the fact that some Certificates were not secured, and the fact that the company also recognizes other income. This is why the amount of gross income reported in the 1999 (sic) Amended Annual Corporate Income Tax Return is not exactly the same amount as that in the summaries presented.

ATTY. SANTOS:

Q. Does this mean that petitioner did not include the income received from the sales of units, rental and management fees in its income tax returns?

MR. DOMINGO:

A. No, these were all included and reported in the gross income of petitioner in its 2000 and prior years' Income Tax Returns.
(*pages 26 – 27, TSN, September 16, 2003*)

While the discrepancy between the amounts of gross income as declared in petitioner's 2000 income tax return and as reflected in the withholding tax certificates/remittance returns was allegedly caused by a timing difference between the actual reporting of the income by petitioner and actual withholding of the corresponding creditable income tax by petitioner's customers, this Court finds the Summaries of Creditable Tax Withheld at Source for Taxable Year 2000 (*Exhibits J & K*) submitted by petitioner insufficient to corroborate the testimony of Mr. Rolando Domingo.

As indicated in the withholding tax certificates and in the Summary of Creditable Tax Withheld at Source for Taxable Year 2000 (*Exhibits K to K-59*), the creditable taxes of P1,810,101.24 were withheld from rental fees and professional fees in the respective amounts of P34,163,596.80 and P2,038,428.00 or in the sum of P36,202,024.80. This Court cannot verify with certainty whether these income figures formed part of the gross income from lease of real properties in the amount of P48,082,511.0 and miscellaneous income of P8,673,544.00 reported by petitioner in its amended 2000 income tax return. Petitioner should have presented additional supporting documents such as general ledger, invoices/receipts, sales summary or any other document wherein the income related to the creditable withholding taxes of P1,810,101.24 can be traced as forming part of the income reported in its amended 2000 income tax return.

The same holds true with regard to petitioner's gain on sale from real properties related to the creditable withholding taxes of P4,596,741.65. The Summary of Creditable Tax Withheld at Source for Taxable Year 2000 (*Exhibit J*), merely indicated the amount of the gain on sale corresponding to the creditable withholding taxes of P4,596,741.65 and the date when such gain was reported by petitioner. Petitioner should have presented its income tax returns for prior years when the subject gain on sale was reported, sales lists or schedules of realized gain from the sale of real properties for the subject years indicated in the summary (detailing the customer's name, selling price and cost of property sold and gain on sale), lists of installment payments received or any other document wherein We can verify that the amount of petitioner's gain from sales of real properties pertaining to the creditable withholding taxes of P4,596,741.65 was properly reported in its amended 2000 income tax return and in its prior years income tax returns.

Petitioner's non-compliance with the third requisite is fatal to its claim. A claimant has the burden of proof to establish the factual basis of his or her claim for tax credit or refund ***(Citibank, N.A. vs. Court of Appeals and the Commissioner of Internal Revenue, 280 SCRA 259).*** Tax refunds are in the nature of tax exemptions. As such, they are regarded as derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claim the refund ***(Commissioner of Internal Revenue vs. S.C. Johnson & Son, Inc., 309 SCRA 87)***.

IN VIEW OF THE FOREGOING, the petition for review is hereby **DENIED** for insufficiency of evidence.

SO ORDERED.

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

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

I hereby certify that this decision was reached after due consultation among the members of this Division in accordance with the provisions of Section 13, Article VIII of the Constitution.

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