REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THE PHILIPPINE BANKING CORPORATION (now known as GLOBAL BUSINESS BANK, INC.),
Petitioner,

- versus -

C.T.A. CASE NO. 6280

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
AUG 16 2001

x - x

RESOLUTION

On June 7, 2001, Respondent filed through registered mail a "Motion to Dismiss" on the ground of lack of cause of action. According to Respondent, a perusal of Petitioner's 1998 Corporate Annual Income Tax Return would show that Petitioner marked "x" on the box corresponding to the phrase "To be carried as tax credit next year" and since an applicant for tax refund or tax credit is no longer allowed under Section 76 of the 1997 Tax Code, the Petitioner has no cause of action against the Respondent for the grant of a tax refund.

Petitioner opposed said motion on June 25, 2001 and at the same time filed a "Motion to Declare Respondent in Default". In its motion, Petitioner alleged that Respondent had until May 18, 2001 within which to file his Answer to the Petition and to date, no Answer has been filed; that the Motion to Dismiss cannot be considered since it was filed on June 7, 2001, way beyond the May 18, 2001 deadline for filing a responsive pleading and that Respondent should now be considered to be in default on account of his failure to file his Answer within the reglementary period. Petitioner further argued that the motion contains a defective notice of hearing as it failed to state the date and time for the hearing of the motion.

We shall resolve first Petitioner's "Motion to Declare Respondent in Default" because, if indeed, Respondent is in default, then its "Motion to Dismiss" need not be passed upon.

Records show that on May 3, 2001, Respondent filed through registered mail a "Motion for Extension of Time to File Answer" which was received by this Court only on May 18, 2001 (p. 137, CTA records). Through an order dated May 21, 2001, the Court granted Respondent's motion and was given a period of fifteen (15) days from receipt of the said Order to file his Answer. Since Respondent received the Order on May 23, 2001, then he had until June 7, 2001 to file his Answer. Verily, therefore, the "Motion to Dismiss" by Respondent sent through registered mail on June 7, 2001 was timely filed and Respondent cannot be considered to be in default.

As to Petitioner's argument that the motion contains a defective Notice of hearing, the Supreme Court, in the case of **Sun Un Giok vs. Matusa, et. al., 101 Phil. 727,** held:

> "The notice incorporated in the motion to dismiss of counsel for the defendant requests merely that the motion be submitted for the consideration of the Court and as soon thereafter as counsel can be heard, and contains a certification that copy of the motion was sent to the counsel of plaintiff. Granting that the notice is defective for failure to specify the exact date when the motion to dismiss should be heard, the Court in taking cognizance of the motion on the date set for the hearing thereof, cured whatever iota of defect such pleading may have had, specially if it is taken into account that upon

receipt of the motion to dismiss, plaintiff was properly notified of the existence of said pleading. "What the law prohibits is not the absence of previous notice, but the absolute absence thereof and lack of opportunity to be heard" (Borja vs. Tan, 93 Phil., 167; Duran Embate vs. Penolio, 93 Phil., 782).

We proceed to Respondent's "Motion to Dismiss."

Section 76 of the Tax Reform Act of 1997 provides in part:

> **"Section 76.** ***Final Adjustment Return.*** - x x x
>
> 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)

The foregoing provision of law is clear and leaves no room for doubt. It cannot be interpreted otherwise than that an option once exercised, the same shall be considered irrevocable. Since Petitioner has already signified its intention to carry-over to the succeeding year its unutilized creditable taxes withheld for 1998, then it is no longer allowed to pursue the instant claim for refund. The case of **Reliance Commercial Enterprises, Inc. vs. CIR (CTA Case No. 5701, January 4, 2001)** is inapplicable because the said case involves a claim for refund of overpaid income tax involving the fiscal years ended September 30, 1996 and September 30, 1997, when the amendment introduced by the Tax Reform Act of 1997 was not yet in effect.

Finally, while We agree with Petitioner that Respondent's "Motion to Dismiss" should have been anchored not on lack of cause of action but failure to state a cause of action, this Court is nonetheless not precluded from making an order of dismissal when the complaint discloses facts sufficient to defeat the claim.

WHEREFORE, premises considered, Petitioner's "Motion to Declare Respondent in Default" is hereby **DENIED**. Respondent Motion to Dismiss is hereby **GRANTED**. The instant Petition for Review is accordingly **DISMISSED** for failure to state a cause of action.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

ERNESTO D. ACOSTA
Presiding Judge