REPUBLIC OF THE PHILIPPINES
*Court Of Tax Appeals*
QUEZON CITY

# ***SECOND DIVISION***

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| BAYWATCH REALTY CORPORATION, *Petitioner,* | **C.T.A. CASE NO. 6941** |
| | Members: |
| -versus- | CASTAÑEDA, JR., Chairperson UY, and PALANCA-ENRIQUEZ, JJ. |
| | **Promulgated:** |
| THE COMMISSIONER OF INTERNAL REVENUE, *Respondent.* | AUG 0 3 2007 |

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# D E C I S I O N

**PALANCA-ENRIQUEZ, J.:**

*Legal Principle Involved*

A taxpayer's excess withholding tax credits for the taxable quarter/taxable year shall automatically be allowed as a credit for purposes of filing his income tax return for the taxable quarter/taxable year immediately succeeding the taxable quarter/taxable year in which the aforesaid excess credit arose. This right to refund or credit, however, is not automatic, the taxpayer must be able to prove the same by substantial evidence, in compliance with the basic requirements set forth in our Tax Code.

**THE CASE**

This is a Petition For Review filed by Baywatch Realty Corporation (hereafter 'petitioner") praying for a refund or issuance of a tax credit certificate in the amount of P16,223,276.00, representing excess creditable withholding taxes for calendar year ended December 31, 2001.

**THE FACTS**

In their "Joint Stipulation of Facts", the parties agreed on the following facts:

> "1) Petitioner is a corporation duly organized and existing under and by virtue of Philippine laws, with principal office at Bay Gardens, Metrobank Avenue, Metropolitan Park, Roxas Blvd., Pasay City, and was incorporated primarily to deal and engage in the real estate business.
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> 2) Respondent is the duly appointed Commissioner of Internal Revenue with office address at BIR National Office Building, Diliman, Quezon City.

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3) Petitioner is registered with the Bureau of Internal Revenue (BIR) with Taxpayer's Identification No. 204-553842-000.

4) For calendar year ended December 31, 2001, the Petitioner filed its Annual Income Tax Return with the Bureau of Internal Revenue (BIR) on April 15, 2002.

5) The Petitioner also filed its Quarterly Income Tax Returns for the taxable year 2001.

6) On November 4, 2002, Petitioner filed with the Respondent BIR a claim for refund and/or issuance of tax credit certificate of its total unutilized creditable withholding taxes for the year 2001 in the amount of P16,223,276.00, in accordance with Sections 76 and 204 (C) of the Tax Code.

7) To date, respondent BIR has not yet finally acted on Petitioner's administrative claim for refund and/or issuance of tax credit certificate.

8) The instant Petition was filed within the two-year prescriptive period pursuant to Section 229 of the Tax Code.

9) The Honorable Court of Tax Appeals has exclusive appellate jurisdiction to review the instant Petition For Review, pursuant to Section 7 of Republic Act No. 9282."

In his Answer, respondent Commissioner of Internal Revenue (hereafter "respondent") alleged by way of special and affirmative defenses that petitioner failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected; taxes paid and collected are presumed to have been made in accordance with law and regulations, hence, not refundable; in an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to adduce sufficient proof is fatal to the action for tax refund/credit; and it is incumbent upon the petitioner to show that it has complied with the provisions of *Section 204,* in relation to *Section 229 of the Tax Code, as amended.*

Petitioner presented its Controller, Jocelyn Y. Kho, as witness, and documentary evidence, marked as *Exhibits "A" to V[9]*, together with their submarkings.

On the other hand, respondent presented *Exhibits "1" and "1-A"* showing a recommendation for the approval of the income tax refund and/or issuance of a tax credit certificate in favor of petitioner, but in the lower amount of P15,475,388.63.

Thereafter, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice. Only petitioner filed its "Petitioner's Memorandum" on January 30, 2007. Hence, the case was

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deemed submitted for decision on February 2, 2007, without the memorandum for the respondent.

**ISSUES**

As stipulated upon by the parties, the following are the issues for this Court's consideration:

I

WHETHER OR NOT PETITIONER IS ENTITLED TO THE REFUND OR ISSUANCE OF TAX CREDIT CERTIFICATE IN THE AMOUNT OF P16,223,276.00 REPRESENTING EXCESS/UNUTILIZED CREDITABLE WITHHOLDING TAXES FOR TAXABLE YEAR ENDED DECEMBER 31, 2001.

II

WHETHER OR NOT PETITIONER'S EXCESS/UNUTILIZED CREDITABLE WITHHOLDING TAX IN THE AMOUNT OF P16,223,276.00 FOR TAXABLE YEAR 2001 IS DULY SUPPORTED BY DOCUMENTS SHOWING THE AMOUNT PAID AND THE AMOUNT OF TAX WITHHELD THEREFROM.

III

WHETHER OR NOT THE AMOUNT OF P16,223,276.00 REPRESENTING PETITIONER'S EXCESS/UNUTILIZED CREDITABLE WITHHOLDING TAXES FOR TAXABLE YEAR 2001 WERE CARRIED

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OVER AND APPLIED AS TAX CREDIT TO THE SUCCEEDING TAXABLE YEAR.

IV

WHETHER OR NOT THE INCOME FROM WHICH THE TAXES WERE WITHHELD WAS INCLUDED AS PART OF THE GROSS INCOME IN PETITIONER'S 2001 INCOME TAX RETURN.

*Principal Issue*

The above stipulated issues boil down to the principal issue of whether or not petitioner is entitled to the refund or issuance of a tax credit certificate in the amount of P16,223,276.00, representing excess/unutilized creditable withholding taxes for taxable year ended December 31, 2001.

## THE COURT'S RULING

The Petition is partly meritorious.

The law applicable is *Section 76 of the NIRC of 1997, as amended*, which provides:

> "**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

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> 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 tax still due; or
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> (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 in 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 aforequoted provision, a corporation entitled to a tax credit or refund of its excess estimated quarterly income taxes paid is allowed two (2) options:

> 1) be credited or refunded (either in the form of cash or credit certificate) with the excess amount paid; or
>
> 2) carry-over the excess credit to the succeeding taxable year.

However, once the taxpayer has exercised the option to carry-over and to apply the excess quarterly income tax against income tax due for

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the taxable quarter of the succeeding taxable year, such option becomes irrevocable for that taxable year and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor.

A careful perusal of petitioner's 2001 income tax return shows that its total tax credits during the year in the amount of P20,371,828.00 far exceeded its income tax liability of P4,148,552.00, resulting in an unutilized amount of P16,223,276.00 tax credits. Despite petitioner's failure to make the appropriate marking in its 2001 income tax return, the filing of its written claim with the BIR (*Exhibit "G[8]"*) and the fact that no carry-over of the 2001 excess tax credits of P16,223,276.00 was made in its 2002 income tax return (*Exhibit "W[9]"*) manifests petitioner's intention to request for a refund of the amount of P16,223,276.00, which can be the proper subject of a claim for refund, under *Section 76 of the NIRC of 1997, as amended.*

However, in order to be entitled to refund, petitioner must comply with the following requisites prescribed under *Section 2.58.3 of Revenue Regulations No. 2-98,* otherwise known as the Withholding Tax Regulations:

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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, as amended*;

2) That the fact of withholding is established by a copy of a statement duly issued by the payor (withholding agent) to the payee (BIR form No. 1743-A), showing the amount paid and the amount of tax withheld therefrom; and

3) That it is shown on the return of the recipient that the income payment received was declared as part of the gross income (*Citibank N.A. vs. Court of Appeals and CIR, 280 SCRA 459; ACCRA Investment Corporation vs. CA, 204 SCRA 957*).

Thus, it is imperative that petitioner should be able to prove the above requisites.

*First Requisite*

*Claim for Refund*
*Was Filed Within The*
*Two-Year Prescriptive Period*

Considering that the petitioner and the respondent had jointly stipulated that the instant petition was filed within the two-year prescriptive period pursuant to *Section 229 of the NIRC of 1997, as amended*, the first requisite has been satisfied.

*Second Requisite*

*Taxes Withheld Are Duly Supported by Certificates of Withholding Tax*

Petitioner has complied with the second requisite. In compliance with the second requisite, petitioner presented various Withholding Tax Remittance Returns, which it filed on behalf of its buyers of condominium units for taxable year 2001, together with the corresponding Metrobank official receipts and debit/credit memos. These documents which were enumerated by petitioner in the Amended Summary of Marked Exhibits (*Exhibit "O*[10]) proved the fact of withholding and remittance to the BIR of creditable withholding taxes in the total amount of P20,367,284.08 arising from petitioner's sales of condominium units for taxable year 2001. However, this Court noted that the creditable withholding taxes reflected in the Withholding Tax Remittance Returns in the amount of P20,367,284.08 is lesser by P4,543.92 when compared with the creditable taxes withheld of P20,371,828.00 as reported in petitioner's 2001 income tax return.

Hence, the discrepancy of P4,543.92, should be disallowed from petitioner's claim.

*Third Requisite*

*The Income Withheld Made Part Of Petitioner's Gross Income*

With regard to the third requisite, it was established that the income related to the substantiated creditable taxes withheld of P20,367,284.08 formed part of the P483,513,680.00 real estate sales declared by petitioner in its 2001 Income Tax Return (*Exhibits "1[8]"*) and audited Statement of Income (*Annex "A[10]"*).

Moreover, this is corroborated by the fact that the revenue examiner who conducted investigation on petitioner's claim did not find any underdeclaration of petitioner's real estate sales.

The only objection made by the revenue examiner pertains to petitioner's alleged overstatement of cost of condominium units sold in the amount of P2,337,148.02. As such, the examiner recommended the approval of a refund to petitioner in the reduced amount of P15,475,388.63 (*Exhibits "1" and "1-A"*).

However, We cannot give credence to respondent's recommendation that the alleged overstatement of petitioner's cost of sales should be deducted from its refund claim since there was no formal assessment issued against the petitioner regarding its alleged overstated cost of sales. Under the law and regulations, petitioner is given the opportunity to contest, dispute or settle an assessment for which it is being made liable. Therefore, the judicial claim for refund should proceed independently from whatever assessment that may be issued against petitioner.

Furthermore, well settled is the rule that internal revenue taxes cannot be the subject of compensation. The reason is, the government and the taxpayer "are not mutually creditors and debtors of each other" under Article 1278 of the Civil Code, and a "claim for taxes is not such a debt, demand contract or judgment as is allowed to be set off" *(Cordero vs. Gonda, 18 SCRA 342).* There is a material distinction between a tax and debt. Debts are due to the Government in its corporate capacity, while taxes are due to the Government in its sovereign capacity *(Philex Mining Corporation vs. Commissioner of Internal Revenue, 294 SCRA 695).*

In sum, this Court finds petitioner to have sufficiently complied with the requisites for the issuance of a tax credit certificate corresponding to its unutilized excess creditable withholding taxes for taxable year 2001, but in the reduced amount of P16,218,732.08, computed as follows:

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| Income Tax Due | P 4,148,552.00 |
| Less: Substantiated Creditable Taxes Withheld | 20,367,284.08 |
| Excess Creditable Taxes Withheld | P 16,218,732.08 |

**WHEREFORE**, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is **ORDERED TO REFUND** or in the alternative, to **ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **SIXTEEN MILLION TWO HUNDRED EIGHTEEN THOUSAND SEVEN HUNDRED THIRTY TWO AND 8/100 PESOS (P16,218,732.08)**, representing petitioner's excess creditable withholding taxes for calendar year 2001.

SO ORDERED.

**OLGA PALANCA-ENRIQUEZ**
Associate Justice

**WE CONCUR:**

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**ERLINDA P. UY**
Associate Justice

# ATTESTATION

I attest 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.

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice
Chairperson, Second Division

# CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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.

**ERNESTO D. ACOSTA**
Presiding Justice