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THIRD DIVISION

[G.R. No. 206362. August 1, 2018]

RHOMBUS ENERGY, INC., *petitioner, vs.* **COMMISSIONER OF INTERNAL REVENUE,** *respondent.*

SYLLABUS

1. TAXATION; NATIONAL INTERNAL REVENUE CODE (NIRC); TAX CREDIT OR REFUND; IRREVOCABILITY RULE; THE CARRY-OVER OPTION, ONCE ACTUALLY OR CONSTRUCTIVELY CHOSEN BY A CORPORATE TAXPAYER, BECOMES IRREVOCABLE*; CLARIFIED*.— The irrevocability rule is enunciated in Section 76 of the National Internal Revenue Code (NIRC) x x x. The application of the irrevocability rule is explained in *Republic v. Team (Phils.) Energy Corporation formerly Mirant [Phils.] Energy Corporation*, where the Court stated: In *Commissioner of Internal Revenue v. Bank of the Philippine Islands*, the Court, citing the pronouncement in *Philam Asset Management, Inc.,* points out that Section 76 of the NIRC of 1997 is clear and unequivocal in providing that the carry-over option, once actually or constructively chosen by a corporate taxpayer, becomes *irrevocable*. The Court explains: Hence, 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. Consequently, after the taxpayer opts to carry-over its excess tax credit to the following taxable period, the question of whether or not it actually gets to apply said tax credit is irrelevant. Section 76 of the NIRC of 1997 is explicit in stating that once the option to carry over has been made, "no application for tax refund or issuance of a tax credit certificate shall be allowed therefor." The last sentence of Section 76 of the NIRC of 1997 reads: "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 tax refund or issuance of a tax credit certificate shall be allowed therefor." The phrase "for that taxable period" merely identifies the excess income

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tax, subject of the option, by referring to the taxable period when it was acquired by the taxpayer. In the present case, the excess income tax credit, which BPI opted to carry over, was acquired by the said bank during the taxable year 1998. The option of BPI to carry over its 1998 excess income tax credit is irrevocable; it cannot later on opt to apply for a refund of the very same 1998 excess income tax credit x x x.

2. ID.; ID.; ID.; THE IRREVOCABILITY RULE TAKES EFFECT WHEN THE OPTION IS EXERCISED.— Although the CTA *En Banc* recognized that Rhombus had actually exercised the option to *be refunded*, it nonetheless maintained that Rhombus was not entitled to the refund for having reported the prior year's excess credits in its quarterly ITRs for the year 2006 x x x. The CTA *En Banc* thereby misappreciated the fact that Rhombus had already exercised the option for its unutilized creditable withholding tax for the year 2005 *to be refunded* when it filed its annual ITR for the taxable year ending December 31, 2005. Based on the disquisition in *Republic v. Team (Phils.) Energy Corporation, supra*, the irrevocability rule took effect when the option was exercised. In the case of Rhombus, therefore, its marking of the box "To be refunded" in its 2005 annual ITR constituted its exercise of the option, and from then onwards Rhombus became precluded from carrying-over the excess creditable withholding tax. The fact that the prior year's excess credits were reported in its 2006 quarterly ITRs did not reverse the option to be refunded exercised in its 2005 annual ITR. As such, the CTA *En Banc* erred in applying the irrevocability rule against Rhombus.

3. ID.; ID.; ID.; ID.; REQUISITES FOR ENTITLEMENT TO A REFUND; COMPLIED WITH IN CASE AT BAR.— It is relevant to mention the requisites for entitlement to the refund as listed in *Republic v. Team (Phils.) Energy Corporation, supra*, to wit: 1. That the claim for refund was filed within the two-year reglementary period pursuant to Section 229 of the NIRC; 2.When it is shown on the ITR that the income payment received is being declared part of the taxpayer's gross income; and 3. When 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 income tax withheld from that amount. x x x. The members of the CTA First Division were in the best position as trial judges to examine the documents

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submitted in relation thereto, and to make the proper findings thereon. Given their expertise on the matter, we accord weight and respect to their finding that Rhombus had satisfied the requirements for its claim for refund of its excess creditable withholding taxes for the year 2005.

APPEARANCES OF COUNSEL

Follosco Morallos & Herce for petitioner.
BIR Litigation Division for respondent.

D E C I S I O N

BERSAMIN, *J.*:

At issue is whether or not the taxpayer is barred by the irrevocability rule in claiming for the refund of its excess and/or unutilized creditable withholding tax.

The Case

This appeal assails the decision promulgated on October 11, 2012 in CTA EB Case No. 803,[1] whereby the Court of Tax Appeals *En Banc* (CTA *En Banc*) reversed and set aside the decision dated March 23, 2011 of the CTA First Division granting the claim for refund of excess and/or unutilized creditable withholding tax in the total amount of ₱1,500,653.00 filed by Rhombus Energy, Inc. (Rhombus).[2]

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[1] *Rollo,* pp. 51-71; penned by Associate Justice Olga Palanca-Enriquez, with the concurrence of Presiding Justice Ernesto D. Acosta, Associate Justice Juanito C. Castañenda, Jr., Associate Justice Lovell R. Bautista, Associate Justice Caesar A. Casanova, Associate Justice Cielito N. Mindaro-Grulla; Associate Justice Esperanza R. Fabon-Victorino dissented; Associate Justice Erlinda P. Uy and Associate Justice Amelia R. Colangco-Manalastas were on leave.

[2] *Id*. at 12-37; penned by Associate Justice Fabon-Victorino with the concurrence of Associate Justice Uy; Presiding Justice Acosta dissented.

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Antecedents

The factual and procedural antecedents are synthesized by the CTA *En Banc* in its assailed decision as follows:

Records show that from October 1998 to July 2007, respondent was registered with and was under the jurisdiction of Revenue Region No. 8, Revenue District Office ("RDO") No. 50 (South Makati) of the BIR with Taxpayer Identification No. 005-650-790-000. However, due to respondent'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, respondent filed an application for change of home RDO.

Thus, on July 18, 2007, respondent was transferred to the jurisdiction of RDO No. 47, with Certificate of Registration No. OCN9RC0000211342.

In the meantime, on April 17, 2006, respondent filed its Annual Income Tax Return ("ITR") for taxable year 2005, detailed, as follows:

Sales/Revenues/Receipts/Fees		₱59,551,116.00
Less: Cost of Sales		22,351,923.00
Gross Income from Operations		37,199,193.00
Add: Non-Operating and Other Income		209,320,181.00
Gross Income		₱246,519,374.00
Less: Deductions		144,421,350.00
Taxable Income		₱102,098,024.00
Income Tax		33,181,858.00
Less: Prior year's Excess Credits	₱0.00	
Tax Payments for the First 3 Quarters	6,159,215.00	
Creditable Tax Withheld for the 1st 3 Quarters	28,523,296.00	
Total Tax Credits/Payments		₱34,682,511.00
Tax Payable/(Overpayment)		**1,500,653.00**

In said Annual ITR for taxable year 2005, respondent indicated that its excess creditable withholding tax ("CWT") for the year 2005 was "To be refunded".

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On May 29, 2006, respondent filed its Quarterly Income Tax Return for the first quarter of taxable year 2006 showing prior year's excess credits of ₱1,500,653.00.

On August 25, 2006, respondent filed its Quarterly Income Tax Return for the second quarter of taxable year 2006 showing prior year's excess credits of ₱1,500,653.00.

On November 27, 2006, respondent filed its Quarterly Income Tax Return for the third quarter of taxable year 2006 showing prior year's excess credits of ₱1,500,653.00.

On December 29, 2006, respondent filed with the Revenue Region No. 8 an administrative claim for refund of its alleged excess/unutilized CWT for the year 2005 in the amount of ₱1,500,653.00.

On April 2, 2007, respondent filed its Annual Income Tax Return for taxable year 2006 showing prior year's excess credits of ₱0.00.

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

In her Answer, by way of special and affirmative defenses, the CIR alleged: assuming without admitting that respondent filed a claim for refund, the same is subject to investigation by the BIR; respondent failed to demonstrate that the tax was erroneously or illegally collected; taxes paid and collected are presumed to have been made in accordance with laws and regulations, hence, not refundable; it is incumbent upon respondent 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 claim for refund was premised; 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; and claims for refund are construed strictly against the claimant, as the same partake of the nature of exemption from taxation.

After trial on the merits, on March 23, 2011, the First Division rendered the assailed Decision granting the Petition for Review.

On April 14, 2011, petitioner CIR filed a "Motion for Reconsideration", which was denied for lack of merit by the First Division in a Resolution dated June 30, 2011.

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Not satisfied, petitioner CIR filed the instant Petition for Review x x x.[3]

Decision of the CTA *En Banc*

Citing *Commissioner of Internal Revenue v. Mirant (Philippines) Operations, Corporation,*[4] the CTA *En Banc* reversed and set aside the decision dated March 23, 2011 of the CTA First Division, explaining and holding thusly:

> x x x *Section 76* is clear and unequivocal. Once the carry-over option is taken, actually or constructively, it becomes irrevocable. It mentioned no exception or qualification to the irrevocability rule *(Commissioner of Internal Revenue vs. Bank of the Philippine Islands 592 SCRA 231).* Hence, 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. Consequently, after the taxpayer opts to carry-over its excess tax credit to the following taxable period, the question of whether or not it actually gets to apply said tax credit is irrelevant. *Section 76 of the NIRC of 1997* is explicit in stating that once the option to carry over has been made[,] no application for tax refund or issuance of a tax credit certificate shall be allowed therefor' *(supra).*
>
> Applying the foregoing rulings to the instant case, considering that petitioner opted to carry-over its unutilized creditable withholding tax of ₱1,500,653.00 for taxable year 2005 to the first, second and third quarters of taxable year 2006 when it had actually carried-over said excess creditable withholding tax to the first, second and third quarters in its Quarterly Income Tax Returns for taxable year 2006, said option to carry-over becomes irrevocable. Petitioner's act of reporting in its Annual Income Tax Return for taxable year 2006 of prior year's excess credits other than MCIT as 0.00, will not change the fact that petitioner had already opted the carry-over option in its first, second and third quarters Quarterly Income Tax Returns for taxable year 2006, and said choice is irrevocable. As previously mentioned, whether or not petitioner actually gets to apply said excess tax credit is irrelevant and would not change the carry-over option already made.

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[3] *Id*. at 54-57.

[4] G.R. Nos. 171742 & 176165, June 15, 2011, 652 SCRA 80.

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Thus, the present petition praying for refund or issuance of a TCC of its unutilized creditable withholding tax for taxable year 2005 in the amount of ₱1,500,653.00 must perforce be denied in view of the irrevocability rule on carry-over option of unutilized creditable withholding tax.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED.** Accordingly, the Decision of the First Division dated March 23, 2011 and Resolution dated June 30, 2011 are hereby **REVERSED** and **SET ASIDE,** and another one is hereby entered **DISMISSING** the Petition for Review filed in C.T.A. Case No. 7711.

SO ORDERED.[5]

On March 13, 2013, the CTA *En Banc* denied Rhombus' motion for reconsideration.[6]

Hence, Rhombus appeals to resolve whether or not it has proved its entitlement to the refund.

Ruling of the Court

The appeal is meritorious.

The irrevocability rule is enunciated in Section 76 of the National Internal Revenue Code (NIRC), *viz.*:

Section 76. *Final Adjusted Return.* — Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar of 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 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.

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[5] *Rollo,* pp. 68-70.

[6] *Id*. at 199-204.

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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 years 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**. (Bold underscoring supplied to highlight the relevant portion)

The application of the irrevocability rule is explained in *Republic v. Team (Phils.) Energy Corporation (formerly Mirant [Phils.] Energy Corporation*,[7] where the Court stated:

In *Commissioner of Internal Revenue v. Bank of the Philippine Islands*, the Court, citing the pronouncement in *Philam Asset Management, Inc.*, points out that Section 76 of the NIRC of 1997 is clear and unequivocal in providing that the carry-over option, once actually or constructively chosen by a corporate taxpayer, becomes *irrevocable*. The Court explains:

> Hence, 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. Consequently, after the taxpayer opts to carry-over its excess tax credit to the following taxable period, the question of whether or not it actually gets to apply said tax credit is irrelevant. Section 76 of the NIRC of 1997 is explicit in stating that once the option to carry over has been made, "no application for tax refund or issuance of a tax credit certificate shall be allowed therefor."
>
> The last sentence of Section 76 of the NIRC of 1997 reads: "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**

[7] G.R. No. 188016, January 14, 2015, 746 SCRA 41.

taxable period and no application for tax refund or issuance of a tax credit certificate shall be allowed therefor." The phrase "for that taxable period" merely identifies the excess income tax, subject of the option, by referring to the taxable period when it was acquired by the taxpayer. In the present case, the excess income tax credit, which BPI opted to carry over, was acquired by the said bank during the taxable year 1998. The option of BPI to carry over its 1998 excess income tax credit is irrevocable; it cannot later on opt to apply for a refund of the very same 1998 excess income tax credit.

The Court of Appeals mistakenly understood the phrase "for that taxable period" as a prescriptive period for the *irrevocability rule*. This would mean that since the tax credit in this case was acquired in 1998, and BPI opted to carry it over to 1999, then the irrevocability of the option to carry over expired by the end of 1999, leaving BPI free to again take another option as regards its 1998 excess income tax credit. This construal effectively renders nugatory the *irrevocability rule*. The evident intent of the legislature, in adding the last sentence to Section 76 of the NIRC of 1997, is to keep the taxpayer from flip-flopping on its options, and avoid confusion and complication as regards said taxpayer's excess tax credit. The interpretation of the Court of Appeals only delays the flip-flopping to the end of each succeeding taxable period.

The Court similarly disagrees in the declaration of the Court of Appeals that to deny the claim for refund of BPI, because of the *irrevocability rule*, would be tantamount to unjust enrichment on the part of the government. The Court addressed the very same argument in *Philam*, where it elucidated that there would be no unjust enrichment in the event of denial of the claim for refund under such circumstances, because there would be no forfeiture of any amount in favor of the government. The amount being claimed as a refund would remain in the account of the taxpayer until utilized in succeeding taxable years, as provided in Section 76 of the NIRC of 1997. It is worthy to note that unlike the option for refund of excess income tax, which prescribes after two years from the filing of the FAR,

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> there is no prescriptive period for the carrying over of the same. Therefore, the excess income tax credit of BPI, which it acquired in 1998 and opted to carry over, may be repeatedly carried over to succeeding taxable years, *i.e.*, to 1999, 2000, 2001, and so on and so forth, until actually applied or credited to a tax liability of BPI.[8]

The CTA First Division duly noted the exercise of the option by Rhombus in the following manner:

> 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".** 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 excess/ unutilized creditable withholding tax to the succeeding taxable years or quarters.[9] (Bold underscoring is supplied for emphasis)

Although the CTA *En Banc* recognized that Rhombus had actually exercised the option *to be refunded*, it nonetheless maintained that Rhombus was not entitled to the refund for having reported the prior year's excess credits in its quarterly ITRs for the year 2006, *viz.*:

> **Based on the records, it is clear that respondent marked the box "To be refunded" in its Annual Income Tax Return.** It is also clear that the 2005 excess CWT were included in the prior year's excess credits reported in the 2006 Quarter ITRs. The 2006 Annual ITR did not reflect the 2005 excess CWT in the prior year's excess credits.[10] (Emphasis supplied)

The CTA *En Banc* thereby misappreciated the fact that Rhombus had already exercised the option for its unutilized creditable withholding tax for the year 2005 *to be refunded* when it filed its annual ITR for the taxable year ending December

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[8] *Id*. at 54-56.

[9] *Rollo*, pp. 24-25.

[10] *Id*. at 84.

31, 2005. Based on the disquisition in *Republic v. Team (Phils.) Energy Corporation*, *supra*, the irrevocability rule took effect when the option was exercised. In the case of Rhombus, therefore, its marking of the box "To be refunded" in its 2005 annual ITR constituted its exercise of the option, and from then onwards Rhombus became precluded from carrying-over the excess creditable withholding tax. The fact that the prior year's excess credits were reported in its 2006 quarterly ITRs did not reverse the option to be refunded exercised in its 2005 annual ITR. As such, the CTA *En Banc* erred in applying the irrevocability rule against Rhombus.

It is relevant to mention the requisites for entitlement to the refund as listed in *Republic v. Team (Phils.) Energy Corporation*, *supra*,[11] to wit:

1. That the claim for refund was filed within the two-year reglementary period pursuant to Section 229 of the NIRC;

2. When it is shown on the ITR that the income payment received is being declared part of the taxpayer's gross income; and

3. When 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 income tax withheld from that amount.

Finding that Rhombus met the foregoing requisites based on its examination of the documents submitted, the CTA First Division rendered the following findings:

> x x x [P]etitioner filed its Annual ITR for the year 2005 on April 17, 2006. 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.

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[11] *Id*. at 57-58.

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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:

x x x x x x x x x

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
4. 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.

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.[12]

The members of the CTA First Division were in the best position as trial judges to examine the documents submitted in relation thereto,[13] and to make the proper findings thereon. Given their expertise on the matter, we accord weight and respect to their finding that Rhombus had satisfied the requirements for its claim for refund of its excess creditable withholding taxes for the year 2005.

WHEREFORE, the Court **REVERSES** and **SETS ASIDE** the decision promulgated on October 11, 2012 and the resolution issued on March 13, 2013 by the Court of Tax Appeals *En Banc* in CTA EB Case No. 803; **REINSTATES** the decision rendered on March 23, 2011 and the resolution issued on June 30, 2011 by the Court of Tax Appeals, First Division, in CTA Case No. 7711; and **DIRECTS** the Commissioner of the Bureau of Internal Revenue to refund to or to issue a tax credit certificate in favor of petitioner Rhombus Energy, Inc. in the amount of ₱1,500,653.00 representing excess creditable withholding tax for the year 2005.

No pronouncement on costs of suit.

SO ORDERED.

Velasco, Jr. (*Chairperson*), *Leonen, and Gesmundo, JJ.,* concur.

Martires, J., on leave.

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[12] *Id*. at 30-31; 34-35.

[13] See *Sea-Land Service, Inc. v. Court of Appeals,* G.R. No. 122605, April 30, 2001, 357 SCRA 441, 445-46.