

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

THE COMMISSIONER OF
INTERNAL REVENUE ,

Petitioner,

CTA EB No. 159

(CTA CASE No. 6443)

-VERSUS-

FINANCIAL MARKETING
SERVICES CORPORATION,

Respondent

X-----X

FINANCIAL MARKETING
SERVICES CORPORATION,

Petitioner,

CTA EB No. 161

(CTA CASE No. 6443)

-VERSUS-

PRESENT:

Acosta, P.J.,

Castañeda, Jr.,

Bautista,

Uy,

Casanova,

Palanca-Estigarra, II;

COMMISSIONER OF
INTERNAL REVENUE ,

Respondent,

Promulgated:

JUL 19 2007 *W Apolinario*

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DECISION

CASTAÑEDA, JR., J:

The above-captioned consolidated cases are Petitions for Review under Section 18 of Republic Act No. 1125, as amended by Republic Act No. 9282. The appeal filed by the Commissioner of Internal Revenue

petitioner's short term income tax return for the year 2001. (BIR records, page 89).

Third, petitioner has paid all its internal revenue taxes for the years 2000 and 2001 as shown by the result of revenue officers' investigation. (BIR records, pages 225 and 226, Folder No. 1).

Fourth, petitioner's corporate existence was already terminated on April 30, 2001 as evidenced by the minutes of the special meeting of the Board of Directors and stockholder (Exhibits H and I), Application for Registration Information Update (Exhibit J), filing of short term income tax return for 2001. (BIR records, pages 67 to 83, Folder 2) and payment of all internal revenue tax liabilities (BIR records, pages 225 and 226, Folder 1).

After trial on the merits, the Court in Division ruled that the remaining balance of petitioner's 1998 overpaid income tax amounting to P608,621.00 is already barred by prescription pursuant to Section 229 of the National Internal Revenue Code of 1997 (NIRC) which provides that the filing of judicial claim for refund should be made within two (2) years from the date of payment of the tax regardless of any supervening cause that may arise after payment. The Court in Division found that petitioner filed its 1998 annual income tax return on April 15, 1999 but the administrative and judicial claims for refund were only filed on December 12, 2001 and June 12, 2002, respectively. Hence, barred by prescription.

The Court in Division ruled that the claim for refund with respect to the 1999 overpaid income tax in the amount of P35,581,956.00 was

captioned cases involve the same parties and common questions of law and/or facts. The consolidated petitions were submitted for decision on November 8, 2006 *sans* the parties' memoranda in view of the failure of both parties to file the same within the period provided by the Court *en banc*.

ASSIGNMENT OF ERRORS

In C.T.A. E.B. No. 159

The petitioner - *Commissioner of Internal Revenue (CIR)* - assigns the following errors:

I.

THE HONORABLE FIRST DIVISION OF THE CTA ERRED IN HOLDING THAT RESPONDENT IS ENTITLED TO ITS CLAIMED REFUND OF OVERPAID INCOME TAX FOR TAXABLE YEAR 2000, NOT APPLYING THE RULE UNDER SECTION 76 OF THE 1997 TAX CODE, WHICH PROVIDES THAT THE REMEDIES OF CLAIM FOR AUTOMATIC TAX CREDIT FOR THE SUCCEEDING TAXABLE YEAR ARE IN THE ALTERNATIVE, AND THE CHOICE OF ONE PRECLUDES THE OTHER.

II.

THE HONORABLE FIRST DIVISION OF THE CTA ERRED IN HOLDING THAT RESPONDENT IS ENTITLED TO ITS CLAIMED REFUND OF OVERPAID INCOME TAX FOR TAXABLE YEAR 2000 APPLYING THE RULE ON EQUITY AND THE PROVISION OF SECTION 112 (c) OF THE NIRC OF 1997.

III

THE HONORABLE FIRST DIVISION OF THE CIA ERRED IN NOT APPLYING THE RULE THAT TAX REFUNDS BEING IN THE NATURE OF TAX EXEMPTION ARE CONSTRUED STRICTISSIMI JURIS AGAINST THE PERSON OR ENTITY CLAIMING THE EXEMPTION.

In C.T.A. E.B. No. 161

The petitioner - *Financial Marketing Services Corporation (FMSC)*

- makes a lone assignment of error:

THE FIRST DIVISION ERRED IN ITS CONCLUSION THAT PETITIONER'S RIGHT TO CLAIM A TAX CREDIT CERTIFICATE FOR ITS EXCESS AND UNUTILIZED QUARTERLY INCOME TAX PAYMENT FOR CY 1998, IN THE AMOUNT OF P608,621.00 IS BARRED BY PRESCRIPTION PURSUANT TO SECTION 229, TAX CODE.

ARGUMENTS OF THE PARTIES

In his Petition for Review (C.T.A. EB No. 159), the CIR argues that Section 76 of the 1997 Tax Code provides that the remedies of claim for refund and a claim for automatic tax credit for the succeeding taxable year are in the alternative and the choice of one precludes the other. According to the CIR, Section 76 provides that "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.

application of the two-year statute of limitations provided under Section 229 of the tax code.

THIS COURT'S RULING

The petitions are bereft of merit.

C.T.A. EB No. 159

The main argument proffered by the CIR in his Petition for Review in C.T.A. EB No. 159 is that Section 76 of the 1997 Tax Code provides that the remedies of claim for automatic tax credit for the succeeding taxable year are in the alternative and the choice of one precludes the other. Consequently, having chosen 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.

We are not persuaded by CIR's arguments.

The provision of law that is relevant to the instant Petition for Review is Section 76 of the 1997 NIRC, quoted hereunder:

"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 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 rationale behind the afore-quoted Section 76 of the 1997

NIRC has been explained by the Supreme Court in this wise:

Section 76 offers two options to a taxable corporation whose total quarterly income tax payments in a given taxable year exceeds its total income tax due. These options are (1) filing for a tax refund or (2) availing of a tax credit.

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 FAR of a given taxable year, against the estimated quarterly income tax liabilities of the succeeding taxable year.

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* [381 Phil. 916, January 28, 1998] 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 **IR**, this requirement is only for the purpose of facilitating tax collection.

One cannot get a tax refund and a tax credit at the same time for the same excess income taxes paid. Failure to signify one's intention in the FAR does not mean outright barring of a valid request for a refund, should one still choose this option later on. A tax credit should be construed merely as an alternative remedy to a tax refund under Section 76, subject to prior verification and approval by respondent.

The reason for requiring that a choice be made in the FAR upon its filing is to ease tax administration, particularly the self-assessment and collection aspects. A taxpayer that makes a choice expresses certainty or preference and thus demonstrates clear diligence. Conversely, a taxpayer that makes no choice expresses uncertainty or lack of preference and hence shows simple negligence or plain oversight.¹

It is clear from the foregoing discussion of the Supreme Court that the purpose of requiring a corporate taxpayer which has excess income tax payments in a particular year to choose an option whether to file a claim for refund or to carry over the excess as tax credit for its tax liabilities in the succeeding taxable year is to ease tax administration and facilitate tax collection. In addition, it prevents taxpayers from getting a tax refund and a tax credit at the same time for the same excess income taxes paid, as the choice of one precludes the other. *See*

¹ *Philom Asset Management, Inc. vs. Commissioner of Internal Revenue*, G.R. Nos. 156527/159004, December 14, 2005 (471 SCRA 761).

In the instant petition, the CIR is assailing the Decision of the Court in Division partially granting the claim for refund of FMSC's excess income tax payments for the year 1999 in the amount of P35,861,956.00 on the sole ground that the taxpayer "originally elected to have both the 1998 and 1999 income tax payment to be carried over to the succeeding taxable years."²

While it is true that Section 76 of the 1997 NIRC provides that "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 irrevocable³ for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor", nevertheless, this Court *en banc* concurs with the opinion of the Court in Division that a literal application of Section 76 of the 1997 NIRC is not warranted in view of the following circumstances, to wit:

First, FMSC's corporate existence was already terminated on April 30, 2001 as shown by the minutes of the special meeting of the Board of Directors and stockholder (*Exhibits H and I*); Application for Registration Information Update (*Exhibit J*); the filing of short term *Form*

² Petition for Review, C.T.A. EB No. 155, p. 2.

³ *Para Realty & Development Corporation vs. Court of Appeals, Court of Tax Appeals and Commissioner of Internal Revenue*, G.R. No. 179256, October 11, 2004 (440 SCRA 160); *Philam Asset Management, Inc. vs. Commissioner of Internal Revenue*, *supra*.

rendered a verified correct return to the CIR setting forth the terms of the resolution for its dissolution pursuant to Sec. 52 (c) of the 1997 NIRC nor secured the issuance by the Securities and Exchange Commission of the Certificate of Dissolution, with the required submission to the latter of a Certificate of Tax Clearance from the Bureau of Internal Revenue (BIR). Hence, absent the Certificate of Tax Clearance from the BIR, it cannot be ascertained if indeed respondent has already paid all its tax liabilities to entitle it to the refund claimed or issuance of tax credit certificate.

The absence of a tax clearance would have been a valid argument⁸ against a claim for refund were it not for the fact that the issue of the absence of a tax clearance from the BIR was belatedly raised for the first time when the case was already on appeal to this Court *en banc*. The CIR did not even raise the issue at the administrative level, nor in the proceedings in the Court in Division, consequently, said issue can no longer be raised on appeal as ruled by the Supreme Court, thus:

To allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level, would be to sanction a procedure whereby the court — which is supposed to review administrative determinations — would not review but

⁸ *Lone Systems (Philippines), Inc. vs. Commissioners of Internal Revenue*, C.T.A. CASE No. 5673, May 18, 2005; 254-63; *Philippine Broadcasting, Inc. vs. Commissioners of Internal Revenue*, C.T.A. CASE No. 6649, April 1, 2006.

determine and decide for the first time, a question not raised at the administrative forum. This cannot be permitted, for the same reason that underlies the requirement of prior exhaustion of administrative remedies to give administrative authorities the prior opportunity to decide controversies within its competence, and in much the same way that, on the judicial level, issues not raised in the lower court cannot be raised for the first time on appeal.⁹

In fact, in the assailed Resolution dated January 23, 2006, the Court in Division noted the minimal participation of the respondent CIR during the trial phase of C.T.A. CASE No. 6443, thus:

At the outset, it should be noted that except for interposing an Answer and submitting a Joint Stipulation of Facts and Issues, respondent barely participated during the trial. The Court granted several re-sittings of the case due to respondent's failure to appear or his request for postponement. In the end, respondent submitted the case for decision without presenting any evidence and he did not submit his Memorandum as manifested. (*Emphasis supplied*)

In fine, the defense of lack of tax clearance was not even raised during the trial of the case considering the minimal participation of the respondent therein, hence, the issue cannot be taken up on appeal.

Even if this Court will gloss over this procedural defect and resolve the issue of tax clearance on the merits, the taxpayer, FMSC, will still prevail. It was established by FMSC that the revenue examiners who examined petitioner's claim for refund recommended that a tax clearance and a tax credit certificate be issued in favor of the taxpayer for the total claim for refund. *Exhibit K* shows that Letter of *Je*

⁹ *Aguiar de Industria Corporation (Filing New Division) vs. Commissioner of Internal Revenue and the Court of Appeals*, G.R. No. 1-27195, February 25, 1982 (112 SCRA 116).

refund, the State should not invoke technicalities to keep money not belonging to it. No one, not even the State, should enrich oneself at the expense of another.⁶¹ Substantial justice, equity and fair play are on the side of FMSC.

Technicalities and legalisms, however, crafted, should not be misused by the government to keep money not belonging to it and thereby enrich itself at the expense of its law abiding citizens. If the State expects its taxpayers to observe fairness and honesty in paying their taxes, so must it apply the same standard against itself in refunding excess payments of such taxes. Indeed, the State must lead by its own example of honor, dignity and uprightness.⁶²

C.T.A. EB No. 161

The basis of FMSC's appeal in C.T.A. EB No. 161 is that it is exempted from the application of the two-year prescriptive period in Section 229 of the 1997 NIRC because said provision was not intended to apply to entities which had ceased operations due to dissolution, such as herein petitioner's case, hence, the government has no right to keep money which does not belong to it under the principle of *solutio indebiti*. *See*

⁶¹ *BPI Family Savings Bank, Inc., vs. Court of Appeals, Civil of Tax Appeals and the Commissioner of Internal Revenue*, G.R. No. 122480, April 12, 2000 (317 SCRA 367).

⁶² *Id.*

We do not agree. FMSC's arguments are unmeritorious.

Section 229 of the 1997 NIRC reads as follows:

"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."

The above-quoted provision provides that "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*", thus, whatever may be the reason behind a claimant's failure to file its administrative or judicial claim for refund within the two-year prescriptive period is not an excuse for not applying the two-year prescriptive period. This Court had explained Section 229 of the 1997 NIRC as follows:

The language of the law is unequivocal, it provides that no suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax 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.

xxx xxx xxx

The date of payment of the tax is the reckoning point of the two-year period within which a valid claim for refund may be filed in both the administrative [Sec. 204 (C)] and judicial levels. Any claim or proceeding for the recovery of taxes shall be filed within the two-year prescriptive period, otherwise, the taxpayer loses his right *per se* to recover any tax alleged to have been erroneously or illegally collected.

xxx xxx xxx

The argument proffered by the petitioner that the two-year period should commence from the date of the extra-judicial rescission of the *accion en pago* arrangement is contrary to the clear language of Section 229 of the 1997 NIRC. The same is true with respect to the other arguments raised by the petitioner, to wit: that the two year period should be reckoned from the date of judicial determination of the act of rescission, the pendency of the litigation between the petitioner and its creditor bank and the enactment of R.A. 9182 otherwise known as *The Special Purpose Vehicle Act*. These are all extraneous matters from the date of payment of the tax. In fact, they occurred after the payment of the tax, thus, not relevant in determining the prescriptive period. Section 229 explicitly states that the two-year prescriptive period is not affected by any supervening cause, hence, the phrase *regardless of any supervening cause*. This phrase was originally added by P.D. No. 69 dated November 24, 1972 and was retained in both the 1977 and 1997 National Internal Revenue Code. The intent of the law is unmistakable, to establish as a condition *sine qua non* that all claims and actions for refund of any tax or penalty shall be filed within two years from the date of payment of such tax or penalty, even if the taxpayer had no cause for refund as the tax or penalty, was legally collected, and even if after the lapse of the two-year period, a supervening cause should arise which would entitle the taxpayer to refund.²³ (Emphasis supplied) *je*

As found by the Court in *Division*, a portion of this P36,290,577.00 tax overpayment amounting to P608,621.00 pertains to the excess income tax payments for the year 1998 reported in its Annual Income Tax Return which was filed on April 15, 1999. Under Section 229 of the 1997 NIRC, a claim for refund for P608,621.00 should have been filed on or before April 15, 2001 or within two years from the date of filing of its 1998 Annual Income Tax Return. According to herein petitioner's own declaration in the statement of facts in the instant Petition for Review, it filed its administrative claim for refund only on December 12, 2001 and its judicial claim for refund only on April 12, 2002, both beyond the two-year prescriptive period prescribed by Section 229 of the 1997 NIRC. Hence, the Petition for Review in C.T.A. EB No. 161 has no leg to stand on considering that petitioner already has knowledge of its impending dissolution prior to the filing of its 2000 Annual Income Tax Return.

In its Annual Income Tax Return for the year 2000 filed on April 18, 2001, FMSC indicated its option to claim a tax credit certificate for its tax overpayment of P36,290,577.00 as of December 31, 2000. The reason for this selection, as stated by petitioner's own witness, Mr. Tadeo J. Claraval, Jr., was that the management of Financial *Fin*

government to settle claims for refund at the earliest possible time, considering that *taxes are the lifeblood of the Government and their prompt and certain availability is an imperious need* (*Commissioner of Internal Revenue vs. Pineda, 21 SCRA 165*). The availability of funds from the collection of taxes cannot forever be left subject to the contingency of refund brought about by certain acts which are solely within the exclusive control of the private contracting parties, otherwise, fiscal adequacy cannot be achieved. In a recent case, the Supreme Court has even applied the two-year prescriptive period in denying a claim for refund of income tax payments erroneously withheld from the income of certain tax-exempt employers' trusts.¹⁴

In view of all the foregoing, the Court *en banc* finds no reversible error committed by the Court in Division and sees no cogent reason to REVERSE, MODIFY or AMEND the assailed Decision and Resolution.

WHEREFORE, the consolidated Petitions for Review, C.T.A. EB No. 159 filed on February 27, 2006 and C.T.A. EB No. 161 filed on February 10, 2006, are both **DENIED** for lack of merit. Accordingly, the assailed Decision dated September 7, 2005 and Resolution dated January 23, 2006 are hereby **AFFIRMED** *in toto*. *Se*

¹⁴ *Fair Bank and Trust Company, as Trustees of Various Retirement Funds vs. Commissioner of Internal Revenue and The Court of Appeals, G.R. No. 138919, May 2, 2006 (488 SCRA 473).*

SO ORDERED.


JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:


ERNESTO D. ACOSTA
Presiding Justice


LOVELL R. BAUTISTA
Associate Justice

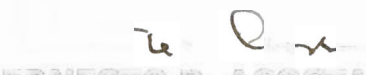

ERLINDA P. UY
Associate Justice

(On Leave)
CAESAR A. CASANOVA
Associate Justice


OLGA TALANCA ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I, is hereby certified that the above Decision has been reached in consultation with the members of this Court before the case was assigned to the writer of the opinion of the Court.


ERNESTO D. ACOSTA
Presiding Justice