

SECOND DIVISION

[G.R. No. 171742, June 15, 2011]

COMMISSIONER OF INTERNAL REVENUE, PETITIONER, VS. MIRANT (PHILIPPINES) OPERATIONS, CORPORATION, RESPONDENT.

[G.R. No. 176165]

MIRANT (PHILIPPINES) OPERATIONS CORPORATION (FORMERLY: SOUTHERN ENERGY ASIA-PACIFIC OPERATIONS (PHILS.), INC.), PETITIONER, VS. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

DECISION

MENDOZA, J.:

These are two consolidated petitions for review on certiorari under Rule 45 of the Rules of Court.

In G.R. No. 171742, petitioner Commissioner of Internal Revenue (*CIR*) seeks the reversal of the January 17, 2006 Decision ^[1] and March 9, 2006 Resolution ^[2] of the Court of Tax Appeals (*CTA*) En Banc in CTA E.B. Case No. 123.

In G.R. No. 176165, petitioner Mirant (Philippines) Operations, Corporation (*Mirant*) seeks the reversal of the October 26, 2006 Decision ^[3] and January 5, 2007 Resolution ^[4] of the CTA En Banc in CTA E.B. Case No. 125.

THE FACTS

Petitioner is empowered to perform the lawful duties of his office including, among others, the duty to act on and approve claims for refund or tax credit as provided by law.

Respondent Mirant is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office at Bo. Ibabang Pulo, Pagbilao Grande Island, Pagbilao, Quezon. ^[5]

Mirant also operated under the names Southern Energy Asia-Pacific Operations (Phils.), Inc., CEPA Operations (Philippines) Corporation; CEPA Tileman Project Management Corporation; and Hopewell Tileman Project Management Corporation. ^[6]

Mirant, duly licensed to do business in the Philippines, is primarily engaged in the design, construction, assembly, commissioning, operation, maintenance, rehabilitation and management of gas turbine and other power generating plants and related facilities using coal, distillate, and other fuel provided by and under contract with the Government of the Republic of the Philippines or any subdivision, instrumentality or agency thereof, or any government-owned or controlled corporations or other entities engaged in the development, supply or distribution of energy. ^[7]

Mirant entered into Operating and Management Agreements with Mirant Pagbilao

Corporation (formerly Southern Energy Quezon, Inc.) and Mirant Sual Corporation (formerly Southern Energy Pangasinan, Inc.) to provide these companies with maintenance and management services in connection with the operation, construction and commissioning of coal-fired power stations situated in Pagbilao, Quezon, and Sual, Pangasinan respectively. [8]

On October 15, 1999, Mirant filed with the Bureau of Internal Revenue (BIR) its income tax return for the fiscal year ending June 30, 1999, declaring a net loss of P235,291,064.00 and unutilized tax credits of ₱32,263,388.00:

Gross Income	P (64,438,434.00)
Less: Deductions	170,852,630.00
Net Loss	<u>P(235,291,064.00).</u>
Income Tax Due	P---
Less: Prior Year's Excess Credits	4,714,516.00
Creditable Tax Withheld	
First Three Quarters	21,702,771.00
Fourth Quarter	5,846,101.00
Tax Overpayment	<u>P32,263,388.00</u> [9]

On April 17, 2000, Mirant filed with the BIR an amended income tax return (ITR) for the fiscal year ending June 30, 1999, reporting an increased net loss amount of ₱379,324,340.00 but reporting the same unutilized tax credits of ₱32,263,388.00, which it opted to carry over as a tax credit to the succeeding taxable year, thus:

Gross Income	P(113,113,036.00)
Less: Deductions	248,211,204.00
Net Loss	<u>P(379,324,240.00).</u>
Income Tax Due	P---
Less: Prior Year's Excess Credits	4,714,516.00
Creditable Tax Withheld	
First Three Quarters	21,702,771.00
Fourth Quarter	5,846,101.00
Tax Overpayment	<u>P32,263,388.00</u> [10]

To synchronize its accounting period with those of its affiliates, Mirant allegedly secured the approval of the BIR to change its accounting period from fiscal year (FY) to calendar year (CY) effective December 31, 1999. Thus, on April 17, 2000, Mirant filed its income tax return for the interim period July 1, 1999 to December 31, 1999, declaring a net loss in the amount of ₱381,874,076.00 and unutilized tax credits of ₱48,626,793.00:

Gross Income	P(320,895,462.00)
Less: Deductions	60,978,614.00
Net Loss	<u>P(381,874,076.00).</u>
Income Tax Due	P---
Less: Prior Year's Excess Credits	32,263,388.00
Creditable Tax Withheld	
First Three Quarters	16,363,405.00
Fourth Quarter	---
Tax Overpayment	<u>P48,626,793.00</u> [11]

Mirant indicated the excess amount of ₱48,626,793.00 as "To be carried over as tax credit

next year/quarter." [12]

On April 10, 2001, it filed with the BIR its income tax return for the calendar year ending December 31, 2000, reflecting a net loss of ₱56,901,850.00 and unutilized tax credits of ₱87,345,116.00, computed as follows:

Gross Income	P(4,080,541.00)
Less: Deductions	52,821,309.00
Net Loss	<u>P(56,901,850.00)</u>
Income Tax Due	P ---
Less: Prior Year's Excess Credits	48,626,793.00
Creditable Tax Withheld	
First Three Quarters	25,336,971.00
Fourth Quarter	13,381,352.00
Tax Overpayment	<u>P87,345,116.00</u> [13]

On September 20, 2001, Mirant wrote the BIR a letter claiming a refund of ₱87,345,116.00 representing overpaid income tax for the FY ending June 30, 1999, the interim period covering July 1, 1999 to December 31, 1999, and CY ending December 31, 2000. [14]

As the two-year prescriptive period for the filing of a judicial claim under Section 229 of the National Internal Revenue Code (NIRC) of 1997 was about to lapse without action on the part of the BIR, Mirant elevated its case to the CTA by way of Petition for Review on October 12, 2001. The case was docketed as CTA Case No. 6340. [15]

The CTA First Division rendered judgment partially granting Mirant's claim for refund in the reduced amount of P38,620,427.00, representing its duly substantiated unutilized creditable withholding taxes for taxable year 2000 out of the total claim of ₱38,718,323.00 therefor. [16] It appears that the total claim was reduced by P97,896.00 for the following reasons: the amount of P92,996.00 was deducted because the CTA First Division found that it was not covered by the withholding tax certificate issued by Southern Energy Quezon, Inc. for the period October 1, 2000 to December 31, 2000. Moreover the additional amount of P4,900.00 was also deducted because based on the reconciliation schedule for the creditable taxes of P745,290.00 withheld by Southern Energy Quezon, Inc. for the period October 1, 2000 to December 31, 2000 on Mirant's Philippine peso billings under Invoice No. 0015, the corresponding creditable taxes claimed by Mirant in its 2000 income tax return amounted to P750,190.00 which was higher by ₱4,900.00 than that reflected in the certificate. [17]

Additionally, Mirant's claim for the refund of its unutilized tax credits for the taxable year 1999 in the total amount of P48,626,793.00, was denied as it exercised the carry-over option with regard to the said unutilized tax credits, which is irrevocable pursuant to the provisions of Section 76 of the 1997 NIRC. [18]

The dispositive portion of the assailed May 18, 2005 Decision [19] of the CTA First Division reads:

IN VIEW OF ALL THE FOREGOING, the instant Petition for Review is hereby **GRANTED** but in a reduced amount of P38,620,427.00. Accordingly, respondent is **ORDERED TO REFUND**, or in the alternative, **ISSUE A TAX CREDIT CERTIFICATE** in favor of the petitioner in the amount of

P38,620,427.00 representing unutilized creditable withholding taxes for taxable year 2000.

Both parties filed their respective motions for partial reconsideration of the above decision, but these were both denied for lack of merit in a Resolution [20] dated September 22, 2005.

Both parties sought redress before the CTA En Banc in two separate petitions for review docketed as CTA EB Case No. 123 and CTA EB Case No. 125, respectively.

According to the CTA, although arising from the same case, CTA Case No. 6340, these two cases were not consolidated because CTA EB Case No. 125 was initially dismissed due to procedural infirmities.

In a Resolution dated April 28, 2006, however, acting on Mirant's motion for reconsideration, the CTA En Banc recalled its earlier resolution and reinstated the case. [21] Eventually, the CTA En Banc in separate decisions, denied due course and dismissed the two cases. The CIR and Mirant filed their respective motions for reconsideration but both were denied. Thus, the CIR and Mirant filed their respective petitions for review with this Court, docketed as G.R. No. 171742 and G.R. No. 176165, respectively.

ISSUES

In G.R. No. 171742, the CIR raises the following issue:

WHETHER OR NOT THE COURT OF TAX APPEALS ERRED ON A QUESTION OF LAW IN HOLDING RESPONDENT ENTITLED TO A REFUND OR TAX CREDIT IN THE AMOUNT OF P38,620,427.00.

In G.R. No. 176165, Mirant raises the following issue:

WHETHER OR NOT PETITIONER IS ENTITLED TO A CLAIM FOR ADDITIONAL REFUND OR ISSUANCE OF A TAX CREDIT CERTIFICATE IN THE AMOUNT OF P48,626,793.00 REPRESENTING EXCESS CREDITABLE WITHHOLDING TAXES FOR THE FISCAL YEAR ENDED JUNE 30, 1999 AND THE INTERIM PERIOD FROM JULY 1, 1999 TO DECEMBER 31, 1999.

In essence, the issue is whether Mirant is entitled to a tax refund or to the issuance of a tax credit certificate and, if it is, then what is the amount to which it is entitled.

RULING OF THE COURT

The Court finds the assailed decisions and resolutions of the CTA En Banc in CTA E.B. Case Nos. 123 and 125 to be consistent with law and jurisprudence.

Once exercised, the option to carry over is irrevocable.

Section 76 of the National Internal Revenue Code (Presidential Decree No. 1158, as

amended) 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 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.** (Underscoring and emphasis supplied.)

The last sentence of Section 76 is clear in its mandate. Once a corporation exercises the option to carry-over and apply the excess quarterly income tax against the tax due for the taxable quarters of the succeeding taxable years, such option is irrevocable for that taxable period. Having chosen to carry-over the excess quarterly income tax, the corporation cannot thereafter choose to apply for a cash refund or for the issuance of a tax credit certificate for the amount representing such overpayment.

In the recent case of *Commissioner of Internal Revenue v. PL Management International Philippines, Inc.*, ^[22] the Court discussed the irrevocability rule of Section 76 in this wise:

The predecessor provision of Section 76 of the NIRC of 1997 is Section 79 of the NIRC of 1985, which provides:

Section 79. *Final Adjustment Return.* - Every corporation liable to tax under Section 24 shall file a final adjustment return covering the total net 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 net income of that year the corporation shall either:

- (a) Pay the excess tax still due; or
- (b) Be refunded the excess amount paid, as the case may be.

In case the corporation is entitled to a refund of the excess estimated quarterly income taxes-paid, the refundable amount shown on its final adjustment return may be credited against the