CLARIFYING THE CONFLICTING CONSTRUCTION ON THE IRREVOCABILITY RULE OF TAX CREDITS*

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ABSTRACT

Section 76 of the Tax Code provides two options for the taxpayer in the event it has excess income tax credits: (1) to carry them over in the taxable quarters of the succeeding taxable years; or (2) to apply for a refund or issuance of a tax credit certificate. The Section likewise provides that once the carry-over has been chosen, such shall be irrevocable and no refund claim shall be allowed, otherwise known as the "Irrevocability Rule." However, the Supreme Court has issued a string of decisions that has provided for conflicting interpretations of Section 76. This Note analyzes the text, history, and intent behind the said Section, evaluates in depth the underlying precedents that led the Court to issue the conflicting decisions on the Irrevocability Rule, and offers a way forward to have a uniform and consistent procedure for the benefit of the Filipino taxpayer.

* *Cite as* Jonas Miguelito P. Cruz, *Clarifying the Conflicting Construction on the Irrevocability Rule of Tax Credits*, 93 PHIL. L. J. 848, [page cited] (2020).

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The views expressed by the author in this Note are his alone and do not reflect those of the institutions he is associated with.

The author would like to express his gratitude to Presiding Justice Roman G. Del Rosario, and the former's colleagues at the Office of the Presiding Justice, Court of Tax Appeals (CTA), for their invaluable support in the writing of this Note. The author would also like to thank CTA Associate Justice Catherine T. Manahan and Atty. Dina D. Lucenario, the author's professors in taxation law, who sparked his interest in writing about the subject of this Note

INTRODUCTION

Taxes are the lifeblood of government.[1] For whatever this metaphor means, it simply connotes the idea that, without taxes, there can be no effective functioning of government. The inevitability of the obligation to pay taxes has made Benjamin Franklin quip his famous aphorism about the payment of taxes being as certain as death.[2] However, aside from this apparent necessity, the payment of taxes likewise establishes a reciprocal obligation between the government and the people.[3] As observed by Justice Isagani Cruz, one of the foremost poets to ever walk the halls of the Supreme Court:

> [E]very person who is able to must contribute his share in the running of the government. The government for its part, is expected to respond in the form of tangible and intangible benefits intended to improve the lives of the people and enhance their moral and material values. This symbiotic relationship is the rationale of taxation and should dispel the erroneous notion that it is an arbitrary method of exaction by those in the seat of power.[4]

Due to the intrinsic importance of taxes, the power to impose it has long been considered an inherent attribute of the State.[5] It has been held by the Court that the collection of taxes should be prompt, and without unnecessary hindrance or delay.[6] In pursuit of this objective, the National Internal Revenue Code of 1997 ("Tax Code")[7] embodies provisions which

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[1] Nat'l Power Corp. v. City of Cabanatuan, G.R. No. 149110, 401 SCRA 259, 269-270, Apr. 9, 2003.

[2] Christina Jonathan & Terence E. Smolev, *The Inevitable: Death and Taxes*, NEW YORK LAW JOURNAL WEBSITE, Jan. 12, 2018, *at* https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/01/12/the-inevitable-death-and-axes/?slreturn=20190025110417

[3] JOSE C. VITUG & ERNESTO D. ACOSTA, TAX LAW AND JURISPRUDENCE 1 (2014). "The theory or underlying basis of taxation is governmental necessity, for indeed, without it, government can neither exist nor endure."

[4] Comm'r of Internal Revenue v. Algue, Inc., G.R. No. 28896, 158 SCRA 9, 16-17, Feb. 17, 1988.

[5] Comm'r of Internal Revenue v. Eastern Telecomm. Phils., Inc., G.R. No. 163835, 624 SCRA 340, 358, July 7, 2010. "The power of taxation is an inherent attribute of sovereignty; the government chiefly relies on taxation to obtain the means to carry on its operations."

[6] Angeles City v. Angeles Electric Corp., G.R. No. 166134, 622 SCRA 43, 51-52, June 29, 2010.

[7] Rep. Act No. 8424 (1997), *amended by* Rep. Act No. 8761 (2000), Rep. Act No. 9010 (2001), Rep. Act No. 9224 (2003), Rep. Act No. 9238 (2004), Rep. Act No. 9243 (2004), Rep. Act No. 9294 (2004), Rep. Act No. 9334 (2005), Rep. Act No. 9337 (2005), Rep. Act No. 9361 (2006), Rep. Act No. 9504 (2008), Rep. Act No. 9648 (2009), Rep. Act No. 10001 (2010), Rep. Act No. 10021 (2010), Rep. Act No. 10026 (2010), Rep. Act No. 10351 (2013), Rep. Act No.

aim to ease the system of tax administration, one of which is found in Section 76 thereof. The provision reads:

> Section 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
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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 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.

Section 76 of the Tax Code is primarily concerned with the requirement of corporate taxpayers[8] to file a final return covering the whole calendar or fiscal year, which incorporates the figures found in the three prior quarterly income tax returns (ITRs).[9] In practice, this means a corporate taxpayer has to file four sets of ITRs—three for the first, second, and third quarters of the taxable year[10]—due within 60 days from the close of the respective quarter,[11] and an Annual ITR for the whole year,[12] due on or before April 15 of the succeeding calendar year, or on or before the 15th day of the fourth month of the succeeding fiscal year.[13] Under Revenue Regulations

10378 (2013), Rep. Act No. 10653 (2015), Rep. Act No. 10864 (2016), Rep. Act No. 10963 (2017), *and* Rep. Act No. 11346 (2019).

[8] *See* TAX CODE, § 22 (B).

[9] § 75.

[10] *See* BIR Form No. 1702Q (June 2013).

[11] TAX CODE, § 77 (B).

[12] *See* BIR Form No. 1702-RT (June 2013).

[13] TAX CODE, § 77 (B).

(R.R.) No. 9-2001,[14] as amended, a certain corporate taxpayer classified by the Bureau of Internal Revenue (BIR) as a "Large Taxpayer"[15] is now mandated to file its quarterly and Annual ITRs through the Electronic Filing and Payment System.

However, the prominent source of controversy in the application and interpretation of Section 76 lies not in its plain mandate for corporate taxpayers to file their final adjustment returns (FARs), sometimes called the Annual ITRs, but in the succeeding clauses which permit them to either carry-over excess tax credits, or apply for a tax refund or issuance of a Tax Credit Certificate (TCC).[16] These credits arise when the corporate taxpayer has payments exceeding its tax liability for the taxable year, which may be sourced from excess payments of the quarterly tax due or excess creditable withholding taxes acquired during the period.

Section 76 of the current Tax Code, as compared to its previous statutory versions, introduced the so-called "Irrevocability Rule." This pertains to the option of the corporate taxpayer to carry-over its excess tax credits to succeeding taxable periods. If such option is selected, it becomes irrevocable, which means it cannot be changed or reversed. In chess parlance, it is considered *touch-move*. The corporate taxpayer has no choice but to apply such credits in deducting its tax due for succeeding periods. The other option of the taxpayer is to apply for a tax refund or issuance of TCC, which, under a textual interpretation of Section 76, is not constrained by any limitation of irrevocability. The taxpayer is allowed to change its mind although it has initially ticked off the box corresponding to refund. But even though this is a straightforward rule, the Supreme Court has rendered decisions stating the Irrevocability Rule likewise applies to the tax refund option.

This Note aims to clarify the rulings of the Court with regard to the Irrevocability Rule. Part I analyzes Section 76 through the different modes of statutory interpretation: text, intent, and legislative history. It also includes a comparative analysis of the carry-over method as practiced in the United States (U.S.), where the Philippines' income tax laws originated. Part II discusses the current construction of the Rule. Part III examines the conflicting interpretations of the Court with regard to the Irrevocability Rule,

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[14] BIR Revenue Reg. No. 09-2001 (2001). Electronic Filing of Tax Returns and Payment of Taxes.

[15] *See* TAX CODE, § 245. *See also* Revenue Reg. No. 1-98 (1998); Revenue Reg. No. 17-2010.

[16] *See* TAX CODE, § 204 (C). "A Tax Credit Certificate validly issued under the provisions of this Code may be applied against any internal revenue tax, excluding withholding taxes, for which the taxpayer is directly liable."

and comes up with a workable doctrine that may be applied by the Supreme Court sitting *en banc* in settling, once and for all, the contrasting construction of the Rule. Finally, a conclusion is offered to synthesize the discussion in this Note, and to provide simple illustrations on their applicability.

I. HOW IT BECAME IRREVOCABLE

Statutory construction is an art that aims to discover and expound on the meaning and intention of the authors of the law with regard to its application.[17] In interpreting the words of the law, reference may be made to both intrinsic and extrinsic aids. Among these are the history, text, and congressional deliberations of the law, as well as comparative practice in other jurisdictions, which would help shed light on the law's import.

A. History

The origin of the country's current Tax Code started with the Internal Revenue Law of 1904,[18] which was enacted by the then-Philippine Commission, and patterned after the tax laws of the U.S. The predominant taxes imposed during this time pertained to license and excise taxes on certain goods and businesses. The U.S. had to pass a constitutional amendment[19] to be able to overturn a U.S. Supreme Court decision invalidating a law that imposed income taxes.[20] Immediately after the ratification of the Sixteenth Amendment to the U.S. Constitution, the U.S. Congress re-imposed the unapportioned income tax,[21] and soon thereafter the Philippines followed suit.[22] The Internal Revenue Law of 1904 would subsequently undergo further changes, but it was not until the enactment of the National Internal Revenue Code of 1939[23] by the Commonwealth-era National Assembly that the codification of the country's tax laws began. Section 46 of the 1939 Tax Code, much like Section 13(b) of the first law imposing income tax in the Philippines, required corporations to file one Annual ITR only, on or before

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[17] DANTE B. GATMAYTAN, LEGAL METHOD ESSENTIALS 2.0 214 (2014), *citing* Caltex (Phils.), Inc. v. Palomar, G.R. No. 19650, 18 SCRA 247, Sept. 29, 1966.

[18] Act No. 1189 (1904).

[19] U.S. CONST. amend. XVI. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

[20] *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) *and* 158 U.S. 601 (1895).

[21] 40 Stat. 1057 (1918). Revenue Act of 1918.

[22] *See* Act No. 2833 (1919).

[23] Com. Act No. 466 (1939).

the first of March of the succeeding calendar year, or within 60 days following the close of the fiscal year,[24] as compared to the current practice of filing quarterly ITRs. Hence, there was no provision regarding the filing of any FAR, and there were no carry-over or tax refund options found in the ITR to speak of.

The earliest version of Section 76 appeared in the National Internal Revenue Code of 1977,[25] under Section 69 thereof, where for the first time corporate taxpayers were required to file quarterly returns instead of just one annual return. Section 69 of the 1977 Tax Code reads as follows:

> Section 69. *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 estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable year.

Despite the substantial similarities, there are notable differences between Section 69 of the 1977 Tax Code and its present version under Section 76 of the 1997 Tax Code. Section 69 of the 1977 Tax Code uses the term *net income* instead of *taxable income*. *Net income*, in accounting parlance, is shown in the profit or loss statement when total revenues are greater than total expenses (as compared to net loss).[26] *Taxable income*, on the other hand, means the "pertinent items of gross income[27] less the deductions[28] and/or

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[24] § 46 (b). "The return shall be rendered on or before the first day of March of each year for the preceding calendar year, or if the corporation has designated a fiscal year, then within sixty days after the close of such fiscal year."

[25] Pres. Dec. No. 1158 (1977).

[26] CHARLES T. HORNGREN, WALTER T. HARRISON, JR. & LINDA SMITH BAMBER, INTRODUCTION TO ACCOUNTING 18 (6th ed. 2005).

[27] *See* TAX CODE, § 32 (A).

[28] § 34.

personal and additional exemptions,[29] if any, authorized for such types of income[.]"[30] However, under the 1939 and 1977 Tax Codes, net income effectively had the same definition as that of taxable income.[31] It was only after the issuance of Executive Order No. 37, series of 1986, that the term *net income* was replaced by *taxable income* in certain provisions of the 1977 Tax Code, perhaps to avoid confusion among taxpayers of the different definitions of the two terms.[32] Interestingly, this amendment under Executive Order No. 37 did not cover Section 69 of the 1977 Tax Code. However, it can be surmised that even if the term *net income* was left unchanged in Section 69, it was understood as meaning the same as *taxable income*, and was not to be construed in its accounting terminology.

Also, the 1977 Tax Code permitted the carry-over option only for the "taxable quarters of the succeeding taxable year." As will be discussed, this provision, in effect, limits the carry-over of excess payments only to the succeeding taxable year. For example, any tax credits generated in taxable year 1980 can only be used in the taxable quarters of year 1981. If any tax credits sourced from 1980 are left, the corporate taxpayer may apply for a refund of the balance. As compared to the current wording of Section 76, the carry-over option now applies to the "taxable quarters of the succeeding taxable years," which means the tax credits should apply until they are fully exhausted. In the same example, assuming the 1997 Tax Code is in effect, if any tax credits are still left after 1981, then such tax credits are carried-over to succeeding years 1982, 1983, and so on, until fully utilized.

More importantly, Section 69 of the 1977 Tax Code does not contain any provision on the irrevocability of the carry-over option. It is a rule in statutory construction that an amendment by the deletion of words or phrases indicates an intention to change the statutory meaning.[33] The same is true for the addition of new words or clauses. The duty, therefore, is to construe the original and additional words as a whole in order for every portion to be

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[29] § 35, *deleted by* Rep. Act No. 10963 (2017), § 12. Tax Reform for Acceleration and Inclusion ("TRAIN Act").

[30] § 31.

[31] Com. Act No. 466 (1939), § 38; Pres. Dec. No. 1158 (1977), § 27.

[32] For accountants and tax law practitioners, there is a whale of difference between *net income* and *taxable income*. *Net income* pertains to all revenues and receipts of the corporation, less cost of sales or services, and any and all expenses, including payments for taxes, while *taxable income* does not cover all revenues and receipts, as there are exclusions provided for by law, and not all expenses are considered allowable deductions for income tax purposes. *See* International Financial Reporting Standards Foundation, International Accounting Standards 12—Income Taxes, *available at* http://eifrs.ifrs.org/eifrs/bnstandards/en/IAS12.pdf (last visited Mar. 22, 2020).

[33] Obiasca v. Basallote, G.R. No. 176707, 613 SCRA 110, 129, Feb. 17, 2010.

considered together and remain subservient to the general intent of the whole enactment.[34] Hence, the addition of the last sentence in Section 76 of the 1997 Tax Code would evidently elicit a new manner of interpreting Section 69 of the 1977 Tax Code.

The legislative history of Section 76 is outlined in the case of *Philam Asset Management, Inc. v. Commissioner of Internal Revenue*,[35] which shall be the subject of analysis in a latter part of this Note. In this case, the Supreme Court traced the amendments of the 1977 Tax Code in general, and to Section 69 thereof in particular:

> The provision on the final adjustment return (FAR) was originally found in Section 69 of Presidential Decree (PD) No. 1158, otherwise known as the "National Internal Revenue Code of 1977." On August 1, 1980, this provision was restated as Section 86 in PD 1705.
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> On November 5, 1985, all prior amendments and those introduced by PD 1994 were codified into the National Internal Revenue Code (NIRC) of 1985, as a result of which Section 86 was renumbered as Section 79.
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> On July 31, 1986, Section 24 of Executive Order (EO) No. 37 changed all "net income" phrases appearing in Title II of the NIRC of 1977 to "taxable income." Section 79 of the NIRC of 1985, however, was not amended.
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> On July 25, 1987, EO 273 renumbered Section 86 of the NIRC as Section 76, which was also rearranged to fall under Chapter 10 of Title II of the NIRC. Section 79, which had earlier been renumbered by PD 1994, remained unchanged.
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> Thus, Section 69 of the NIRC of 1977 was renumbered as Section 86 under PD 1705; later, as Section 79 under PD 1994; then, as Section 76 under EO 273. Finally, after being renumbered and reduced to the chaff of a grain, Section 69 was repealed by EO 37. Subsequently, Section 69 reappeared in the NIRC (or Tax Code) of 1997 as Section 76[.][36]

Thus, from 1939 to 1977, corporations were only required to file one ITR annually. The Tax Code of 1977 changed the practice by mandating the

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[34] Fort Bonifacio Dev't Corp. v. Comm'r of Internal Revenue, G.R. No. 158885, 602 SCRA 159, 164, Oct. 2, 2009.

[35] [Hereinafter "Philam"], G.R. No. 156637, 477 SCRA 761, Dec. 14, 2005.

[36] *Id.* at 769-771.

filing of three quarterly ITRs and one FAR or Annual ITR. Section 69 remained substantially the same throughout the many amendments to the 1977 Tax Code. It was only in 1997, with the enactment of Republic Act No. 8424, or the Tax Reform Act, that Section 76 as it is now worded was introduced.

The purpose of allowing the corporate taxpayer to make a choice of a carry-over or refund upon the filing of its FAR is to ease the process of tax administration, particularly the self-assessment and collection aspects.[37] The Irrevocability Rule helps attain this objective by: (1) allowing the taxpayer to use its excess payments as tax credits in the immediately succeeding taxable years once the carry-over option is selected, without need for any other administrative or judicial filing before the BIR or the courts; and (2) allowing the BIR to ascertain that any claim for refund or issuance of a TCC has not been used as a tax credit in the succeeding taxable years.

B. Text

A cardinal rule of statutory construction is that when the law is clear and unambiguous, no further interpretation is necessary.[38] There being no doubt on the meaning of the words of the law, the courts are not called to exercise their power of construction, but merely their power to apply the law in a given case.

For purposes of this Note, Section 76 may be divided into three portions. *First*, there is the provision which mandates every corporate taxpayer to file a FAR covering the previous calendar or fiscal year. S*econd*, the illustration of the situation where the sum of the tax payments for the first three quarters of the year does not match the total tax due for the whole taxable year. If the sum of the quarterly payments is less than the total tax due, then the corporate taxpayer is mandated to pay the balance, but if the sum of quarterly payments exceeds the total tax due, then the taxpayer is given two options—carry-over the excess, or use it to apply for a refund. *Finally*, the third provision, the Irrevocability Rule proper, states that once the choice to carry over the excess tax credits is made, it becomes *irrevocable* for *that* taxable period, and any application for refund or issuance of TCC is prohibited.

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[37] *Id.* at 772.

[38] Abello v. Comm'r of Internal Revenue, G.R. No. 120721, 452 SCRA 162, 169, Feb. 23, 2005, *citing* Rizal Comm'l Banking Corp. v. Intermediate App. Ct., G.R. No. 74851, 320 SCRA 279, 289, Dec. 9, 1999.

The first portion of Section 76 offers no controversy. It is clear and concise in its directive that corporate taxpayers should file their FARs. The second portion of the Section is also unambiguous. Though it is not as straightforward as regards the respective effects of any excess tax payments or excess tax due, it can be summarized as follows:

Situation	Result	Recourse of Taxpayer	Provision of Section 76
Total tax due for the year is greater than total quarterly tax payments made	Tax Liability	Pay the balance of the tax still due	Paragraph (A)
Total quarterly tax payments made is greater than the total tax due for the year	Tax Credit	Carry-over to the next taxable periods	Paragraph (B)
		Apply for a refund or issuance of a TCC	Paragraph (C)

It is in the third portion of Section 76 that controversies regarding statutory construction arise, particularly on the *intent* behind the addition of the Irrevocability Rule, how it applies to the option of tax refund, and until when is the carry-over supposed to apply.

To textually analyze the Irrevocability Rule requires the dissection of its clauses. The Rule states that once the option to carry-over is exercised by the taxpayer, it shall be considered *irrevocable*, which means that it is "unalterable [or] committed beyond recall."[39] Hence, the choice to carry-over cannot anymore be changed or amended once selected. Even though the taxpayer is given the opportunity to file an amended FAR,[40] such would not affect the choice already made in the original FAR if the carry-over option

[39] BLACK'S LAW DICTIONARY 2344 (8TH ed. 2004).

[40] TAX CODE, § 6(A). "Any return, statement of declaration filed in any office authorized to receive the same shall not be withdrawn: *Provided*, That within three (3) years from the date of such filing, the same may be modified, changed, or amended: *Provided, further*, That no notice for audit or investigation of such return, statement or declaration has in the meantime been actually served upon the taxpayer." *See also* Revenue Memo. Circ. No. 50-2013.

had been chosen, for to give effect to a change in option found in the amended FAR would be tantamount to circumventing the Irrevocability Rule.

Under the text, irrevocability applies "for *that* taxable period" when the carry-over option was chosen. To illustrate, if a corporate taxpayer has excess tax payments for calendar year 2015 in the amount of PHP 1 million, and if the carry-over option is selected, the said amount will be used as a tax credit for the 2015 FAR, and onwards. If in calendar year 2016 the corporate taxpayer again incurs excess tax payments of PHP 2 million, the choice of the carry-over option in 2015 does not preclude the taxpayer's choice for either carry-over or refund in 2016, as the PHP 2 million may be used for the 2016 FAR, and onwards.

In practice, the choice of whether to exercise the carry-over or refund option resets for each taxable year, and the choice of carry-over for a certain year does not affect the choice for the succeeding ones. Every taxable year is a clean slate for the taxpayer in terms of choosing whether to carry-over or apply for a refund for the amount earned or accumulated in that period. The taxpayer is thus given the chance to properly plan its tax exposure, for it can use the carry-over option for 2015, but apply for refund or issuance of a TCC in 2016, depending on its business needs.

Perhaps what encapsulates the essence of the Irrevocability Rule is found in the last clause of the last paragraph of Section 76, which states "no application for cash refund or issuance of a tax credit certificate shall be allowed" when the option to carry-over has been selected. The addition of this provision is clear as to its effect—once the option to carry-over has been chosen, there can never be a situation where the taxpayer is allowed to change its mind and apply for a refund instead. Precisely, irrevocability clearly applies when the carry-over option *alone* has been selected. There is no provision, before or after such clause found in Section 76, or anywhere in the Tax Code, that would indicate that the limitation likewise applies for applications for refund or issuance of TCC. There is no *vice versa*; it is not a two-way street.

C. Congressional Records

Deliberations of members of the legislature are used as an aid to ascertain the true intent behind the law.[41] However, the deliberations of the Tenth Congress, even those of the bicameral conference committee convened for what would eventually become the Tax Code, are bereft of any discussion

[41] *See* Comm'r of Internal Revenue v. SM Prime Holdings, Inc., G.R. No. 183505, 613 SCRA 774, Feb. 26, 2010.

on Section 76, as most of them centered on adjustments to the tax bases, tax rates, and allowable deductions. However, enlightening is Section 39 of House Bill No. 9077, the bill that resulted in the 1997 Tax Code, which sought to amend Section 69 of the 1977 Tax Code:

> Section [69] 111. *Final Adjustment Return.* – Every corporation liable to tax under Section 24 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 payment 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] BALANCE OF TAX still due; or
>
> (b) 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 [refundable] EXCESS amount shown on its final adjustment return may be CARRIED OVER and credited against the estimated quarterly income tax liabilities or the taxable quarters of the succeeding taxable year. ONCE THE OPTION TO CARRY-OVER AND APPLY THE EXCESS QUARTERLY INCOME TAX AGAINST INCOME DUE FOR THE TAXABLE QUARTERS OF THE SUCCEEDING TAXABLE YEAR HAS BEEN MADE, SUCH OPTION CHOSEN SHALL BE CONSIDERED FIXED FOR THAT TAXABLE PERIOD AND NO CASH REFUND MAY BE AVAILED OF.[42]

Even though there is nothing in the provision that mentioned the word "irrevocable," the intent behind the proposed amendment is evident: once the carry-over option has been chosen, it shall be considered "fixed" and no tax refund may be availed of. This is the same essence of the Irrevocability Rule as currently worded in Section 76. There is no other provision that likewise provides a "fixed" choice for the refund option; it is only when the carry-over is chosen that it is "fixed." Thus, it can be said the intent behind Section 76 has always been to limit the Irrevocability Rule to the carry-over option.

[42] H. No. 9077, 10th Cong., 2nd Sess., § 39 (1997). Act Amending the National Internal Revenue Code. (Capitalization and bracketing in the original.)

D. Comparative Practice

In the U.S., where the Philippines' income tax laws originated,[43] there is a similar provision on the carry-over option found in the U.S. Internal Revenue Code. First introduced in 1968, U.S. corporations are allowed to adjust their income tax overpayments under Section 6425 of the said Code.[44] This provision has been amended many times over the course of history, with the latest version introduced in 2018.[45]

Under Section 6425, the corporate taxpayer, who deems that there has been an overpayment of its estimated income tax, may file a so-called "application for adjustment" after the close of the taxable year and on or before the 15th day of the fourth month thereafter, and before it files its return for the said taxable year. Similar to the carry-over option, an application for adjustment is not treated as a claim for credit or refund.[46] Thereafter, the U.S. Secretary of the Treasury, through the Internal Revenue Service (the BIR counterpart in the U.S.), would conduct a limited examination of the application for 45 days from the date the application was filed.[47] Upon finding cause for such adjustment, the IRS may then allow the crediting of the adjustment to *any* internal revenue tax due on the part of the taxpayer, and if there be a remainder, refund the same.[48] This adjustment is treated as a reduction in the estimated income taxes paid on the day the credit is allowed or the refund paid by the IRS.[49] This same procedure is provided in the regulations issued by the U.S. Secretary of the Treasury implementing Section 6425 of the U.S. Internal Revenue Code.[50]

As a point of difference, the Philippine Tax Code mandates the quarterly filing of the ITR, while the U.S. has maintained the traditional method of requiring the filing of only one Annual ITR on April 15 for those following the close of the calendar year, or the 15th day of the fourth month following the close of the fiscal year.[51] Hence, the American taxpayer is not mandated to file quarterly ITRs. What it is permitted to do is to file an application for adjustment, a distinct document, which the taxpayer files separate from its Annual ITR.

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[43] VICTORINO MAMALATEO, PHILIPPINE INCOME TAX 8 (2010).
[44] *See* 82 Stat. 262 (1968).
[45] *See* 132 Stat. 1198 (2018).
[46] 26 U.S.C. § 6425, ¶ A (1).
[47] ¶ B (1).
[48] ¶ B (2).
[49] ¶ B (4).
[50] *See* 26 C.F.R. § 1.6425-3.
[51] 26 U.S.C. § 6072.

Moreover, before the taxpayer may be able to use the overpayments as a credit to its tax obligations, the application for adjustment must first be examined, and thereafter allowed, by the IRS. In the Philippines, claims for refund or issuance of TCC are also subject to BIR scrutiny. However, when a taxpayer opts to carry-over, no such application is necessary. All the taxpayer needs to do in that case is attach a copy of the first page of the prior year's FAR or Annual ITR showing the choice to carry-over in the FAR to which it claims the tax credit.[52] This would be the basis for applying the carry-over option, and a form of evidence reflecting the amount to be carried-over. Also, once an application for adjustment has been granted by the IRS, such amount may be used to deduct against *any* internal revenue tax due from the taxpayer. As compared, the carry-over option may only be used to deduct the *estimated quarterly income tax* of the succeeding taxable years. The use of carry-over is restricted to future income tax liabilities of the taxpayer, and cannot be applied to other internal revenue taxes.

The differences between Sections 76 of the Philippine Tax Code and Section 6425 of the U.S. Internal Revenue Code are glaring and significant. It is therefore safe to assume that guidance by U.S. courts interpreting Section 6425 would not be useful if contemplated within the Philippine context. Section 76 is genuinely Filipino. Hence, its interpretation need not be guided by U.S. rulings, but on how the Philippine Supreme Court has built on it over time.

II. IRREVOCABILITY AS CURRENTLY CONSTRUED

The corporate taxpayer, in filling out its FAR or Annual ITR, is presented with a choice in the event that it has excess income tax payments for the taxable year. That choice is signified by marking an "X" in a box corresponding to its option.

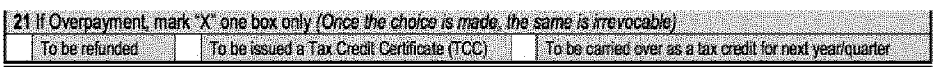
21 If Overpayment, mark "X" one box only *(Once the choice is made, the same is irrevocable)*
☐ To be refunded ☐ To be issued a Tax Credit Certificate (TCC) ☐ To be carried over as a tax credit for next year/quarter

FIGURE 1. Item 21 of BIR Form 1702-RT or the current Annual ITR for corporations, partnerships and other non-individual taxpayers subject only to regular income tax.

[52] BIR Revenue Reg. No. 2-98 (1998), § 2.58.3(C).

33 Total Amount Payable/(Overpayment) (Sum of Items 31 & 32D).. 33

If overpayment, mark one box only: (once the choice is made, the same is irrevocable)

☐ To be refunded ☐ To be issued a Tax Credit Certificate ☐ To be carried over as tax credit next year/quarter

FIGURE 2. Item 33 of old BIR Form 1702 or the Annual ITR in use from 2008 to 2013.

The relative ease by which the taxpayer is afforded the opportunity to utilize its income tax credits benefits both the taxpayer and the BIR. However, if the taxpayer chooses the refund option, this is only the preliminary step in the whole refund process.

Sections 204 (C) and 229 of the Tax Code provide for the requirements in the filing of tax refund applications before the BIR, *viz*:

> Section 204. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes*.—The Commissioner may—
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> * * *
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: *Provided, however*, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.
>
> * * *
>
> Section 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, of any sum alleged to have been excessively or in any manner wrongfully 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 common thread that runs through these two sections of the Tax Code is the requirement for the filing of the written claim for refund within two years from the date of payment of the erroneously or illegally collected tax. The primary difference is that Section 204 (C) pertains to the administrative claim for refund to be filed with the BIR, and Section 229 pertains to the judicial claim for refund to be filed with the Court of Tax Appeals (CTA).[53] What the Tax Code requires is the filing of an administrative claim before the judicial claim. The purpose is to give a "notice of warning" to the BIR that unless the administrative claim is granted, court action will follow.[54] However, the lapse of time between the filing of the administrative and judicial claims is immaterial as long as both claims were filed within the two-year prescriptive period. In the recent case of *CBK Power Co. Ltd. v. Commissioner of Internal Revenue*,[55] the Supreme Court held that the five-day difference between the filing of the administrative claim and the petition for review, and the failure of the taxpayer to file the judicial claim three months after the administrative claim but before the expiration of the prescriptive period, cannot be used as bases for the denial of the refund application, for as long as all the requisites of Section 229 are met. Once the administrative claim for refund has been filed, the taxpayer has no obligation to wait until the BIR renders action, and he may file his judicial claim as long as it is still within the prescriptive period.

Under Section 2.58.3 (B) of R.R. No. 2-98, any claim for tax credit or refund of creditable income tax shall only be given due course when it is shown that the income payment has been declared as part of the gross income, and 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 the amount of tax withheld therefrom. Alongside this regulatory instruction, jurisprudence has synthesized the three conditions for the grant of a claim of refund as follows: (1) the claim is filed with the Commissioner of Internal Revenue (CIR) within the two-year period from the date of

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[53] CBK Power Co. Ltd. v. Comm'r of Internal Revenue, G.R. No. 193383, 746 SCRA 93, 108, Jan. 14, 2015.

[54] P.J. Kiener Co. Ltd. v. David, G.R. No. 5163, 92 Phil. 945, Apr. 22, 1953.

[55] 746 SCRA at 93.

payment of the tax; (2) it is shown on the return of the recipient that the income payment received was declared as part of the gross income; and (3) the fact of withholding is established by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of the tax withheld therefrom.[56]

For the grant of a claim for refund of excess income taxes paid, it must therefore be shown by the corporate taxpayer that it signified such intent in the FAR according to Section 76, that it filed its administrative and judicial claims within the two-year prescriptive period under Sections 204 (C) and 229 of the Tax Code, and that it has discharged its burden of proof that would show its entitlement to the refund claim, considering that tax refunds are construed in *strictissimi juris* against the taxpayer.[57]

The same process is likewise observed when the taxpayer opts for the issuance of a TCC. It must be noted that under Paragraph (C) of Section 76, the taxpayer can be "credited" or "refunded" with the excess taxes paid. In essence, there is no substantial difference between claiming a refund and issuance of a TCC for the purpose of Section 76; they are of the same class and must undergo the processes laid down in both Sections 204 (C) and 229 of the Tax Code. It is only for ease of tax administration on the part of the BIR that the refund and TCC options were separated in the current BIR form of the FAR or Annual ITR. In the eyes of the Tax Code and for purposes of this Note, however, there is no distinction that would separate a claim for tax refund and for issuance of a TCC.

It is to be noted that the procedure for application of a claim for refund of, or issuance of TCC for, unutilized input VAT, in addition to the requirements of Sections 204 (C) and 229, must follow a different procedure under Section 112 of the Tax Code, as interpreted by the Supreme Court in the landmark cases of *Commissioner of Internal Revenue v. Aichi Forging Co. of Asia, Inc.*[58] and *Commissioner of Internal Revenue v. San Roque Power Corp.*[59]

As compared to the refund or TCC option, the choice of carry-over is not that tedious and burdensome. The carry-over option operates using the *going-concern principle*, which is the assumption that the business entity will

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[56] Banco Filipino Savings & Mortgage Bank v. Ct. of Appeals, G.R. No. 155682, 519 SCRA 93, 96, Mar. 27, 2007.

[57] Atlas Consolidated Mining & Dev't Corp. v. Comm'r of Internal Revenue, G.R. No. 159490, 546 SCRA 150, 163, Feb. 18, 2000.

[58] G.R. No. 184823, 632 SCRA 422, Oct. 6, 2010.

[59] G.R. No. 187485, 690 SCRA 336, Feb. 12, 2013.

remain in operation for the foreseeable future.[60] This principle allows preparers of financial statements to assume that the corporation has neither the intention nor the need to liquidate or materially curtail the scale of its operations.[61] In the same vein, the preparer of the corporate taxpayer's FAR or Annual ITR operates on the similar assumption that, since the company would likely be in existence during the succeeding calendar or fiscal years, the benefit derived from the excess tax credits may be applied in said years. As compared to a claim for refund or issuance of TCC, there is no need to file any administrative or judicial claim to utilize the tax credits. Once the choice of carry-over has been made in the FAR, no other action on the part of the taxpayer is needed. The amount reflected as overpayment of income taxes for that year may now be used in the immediately succeeding calendar or fiscal year. All the taxpayer needs to do is to attach a copy of the first page of the prior year's FAR or Annual ITR showing the choice to carry-over the excess payments.[62]

But the ease with which the carry-over option is used today has not always been the case. The first interpretation in relation to the carry-over option was decided by the Supreme Court under the aegis of the 1977 Tax Code in *San Carlos Milling Co., Inc. v. Commissioner of Internal Revenue*.[63] There, the taxpayer filed an administrative claim for income tax credits sourced in 1983 to be used in 1984. The CIR denied the claim, but the taxpayer was unperturbed and effected a unilateral set-off of the tax credits with its tax liabilities. The Supreme Court ruled there is no "automatic" tax credit scheme as contended by the taxpayer, and the taxpayer still needs to seek approval of the CIR for there to be a valid availment of the tax credit scheme. For the Court, the option to refund and to carry-over the income tax credit are *alternative* remedies "subject to the fulfillment of certain requirements, *i.e.*, prior verification and approval by the [CIR]."[64] Hence, prior to 1997, the corporate taxpayer must, similar to a refund, file a written claim to avail of the carry-over scheme.

As found in Figure 1 of this Note, the current BIR form of FAR or Annual ITR provides that "[o]nce the choice is made [between carry-over, refund or issuance of TCC], the same is irrevocable." In a string of decisions, the Supreme Court held that the choice between carry-over and refund or

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[60] HORNGREN, HARRISON & BAMBER, *supra* note 26, at 10.

[61] SEC. REG. CODE, Rules 68 and 68.1, § 4(b)(ii). Rules and Regulations Covering Form and Content of Financial Statements.

[62] BIR Revenue Reg. No. 2-98 (1998), § 2.58.3 (C).

[63] [Hereinafter "San Carlos Milling"], G.R. No. 103379, 228 SCRA 135, Nov. 23, 1999.

[64] *Id.* at 142.

issuance of TCC is *alternative*, meaning, the choice of one precludes the other. If the taxpayer has signified its selection of the carry-over, such cannot be changed to a refund or issuance of TCC. This affirms the application of the Irrevocability Rule. However, if a refund or issuance of TCC has been chosen, then it cannot be changed to carry-over. For the Court, irrevocability likewise applies. As will be discussed hereafter, this reading of Section 76 belies the historical and textual support for the Irrevocability Rule.

But what if the taxpayer has not made a choice between carrying over the income tax credits and claiming a refund or issuance of a TCC, can the taxpayer still validly avail its excess income tax credits? In the case of *Philam*, the taxpayer failed to choose between a carry-over or the application for a refund of its income tax credits. However, the Supreme Court looked not only on the face of the FAR or Annual ITR to uncover the taxpayer's intent on how to utilize its excess income tax credits, but likewise examined the taxpayer's "subsequent acts" in order to determine its true intent on whether it "effectively" or constructively chose to carry-over or apply for refund.[65] For example, the FAR or Annual ITR shows an overpayment of income tax for calendar year 2018. However, the corporate taxpayer was not able to mark an "X" on the boxes corresponding to refund, issuance of TCC, or carry-over. In the next taxable year, however, it was shown that the taxpayer claimed the same amount of overpayment in the 2018 Annual ITR in the line item "Prior Year's Excess Credits Other Than MCIT" found in the 2019 Annual ITR. For the Court, this would be an indication that the taxpayer has constructively carried over its income tax credits to the immediately succeeding taxable year.[66]

III. CLARIFYING CONFLICTING CONSTRUCTION

A. Which One Is It?

Perhaps the most controversial issue that needs clarity is the question of whether the Irrevocability Rule applies to both the refund/TCC and carry-over options, or to just the latter. Contributing to the state of uncertainty are the conflicting decisions of the Supreme Court on the matter, and, as will be shown, the erroneous invocation of jurisprudence that has supported, up to now, a misreading of Section 76 of the Tax Code. A survey of related cases tackling the subject is therefore necessary to determine the bases for the

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[65] *Philam*, 477 SCRA at 778.

[66] *Id.*

Supreme Court's ruling that the Irrevocability Rule applies to both the refund/TCC and carry-over options.

Philam is the first case where the Supreme Court interpreted the provisions of Section 76 of the Tax Code as currently worded. The case is actually a consolidation of two petitions filed by the taxpayer assailing the decisions which denied its claims for refund.

The first petition involved the claim for tax refund by the taxpayer for excess income taxes paid for taxable year 1997. The taxpayer filed both an administrative claim before the CIR, and thereafter a judicial claim before the CTA. The CIR did not act on the taxpayer's written claim, and the CTA ruled that the taxpayer is not entitled to the refund. This decision by the CTA was affirmed by the Court of Appeals.[67] The second petition involved a similar tax refund claim for taxable year 1998. Due to the inaction of the CIR, the taxpayer filed its judicial claim before the CTA. The petition for review was denied by the tax court. The Court of Appeals likewise dismissed the taxpayer's appeal.

Ruling on the petitions, the Court made a conscious effort to distinguish the applicable law governing the two refund claims. For the first petition covering taxable year 1997, the Court ruled Section 69 of the 1977 Tax Code is applicable, while for the second petition covering taxable year 1998, Section 76 of the 1997 Tax Code applies.[68] But even with this distinction of the applicable law, the Court in *Philam* continuously cited Section 76, instead of Section 69, as the statutory basis in ruling on the first petition. For whatever reason the Court did this, the resulting confusion is glaring and damaging. The Court then elaborated that the two options of tax refund or tax credit found in Section 76 (nay 69) are *alternative* in nature; the choice of one precludes the other. The Court then cited as jurisprudential bases the cases of *San Carlos Milling*[69] and *Philippine Bank of Communications v. Commissioner of Internal Revenue*.[70]

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[67] At the time the cases were filed before the CTA, the latter had not been elevated to the level of an appellate court by virtue of Rep. Act No. 9282 (2004), hence, cases were appealable to the Court of Appeals per Supreme Court Circ. No. 1-91 (1991) prescribing the rules governing appeals to the Ct. of Appeals from a final order or decision of the CTA and quasi-judicial agencies. *Compare* RULES OF COURT, Rule 43, § 1, *with* A.M. No. 05-11-07-CTA (2008), Rule 8.

[68] The National Internal Revenue Code of 1997 went into force on Jan. 1, 1998.

[69] 228 SCRA 135.

[70] [Hereinafter "PBCom"], G.R. No. 112024, 302 SCRA 241, Jan. 28, 1999.

Resolving the first petition, the Court found that the taxpayer failed to indicate in its 1997 ITR whether it was availing of a tax credit or refund, and it did not submit its 1998 ITR to show the claimed tax credit for 1997 was not used in 1998. Even so, the Court ruled the taxpayer was still entitled to the refund claim, primarily because it did not perform any act indicating it chose the tax credit option.

On the second petition, the Court for the first time ruled on the Irrevocability Rule. It held that the carry-over option is "permissive,"[71] which means discretion is granted to the taxpayer on whether or not it would exercise such an option, as compared to a mandatory or compulsory remedy or course of action. But this is a rather superfluous statement as the options of carry-over, refund, or issuance of TCC are all permissive. The Court would go on and interpret Section 76 in a textual manner by essentially reiterating the provision that once the carry-over option has been selected, it shall be irrevocable, and no application for tax refund or issuance of TCC shall be allowed.

Similar to the first petition, the taxpayer here failed to mark the carry-over option in its 1998 Annual ITR. The Court then ruled that even without this express intention, the taxpayer had "effectively chosen" the carry-over option as evidenced by its subsequent acts. There was, in essence, a *constructive* expression of choice of the carry-over option, hence, no refund claim for taxable year 1998 was allowed. It was found that the taxpayer had filled out the item "Prior Years Excess Credits" in its 1999 Annual ITR, which was tantamount to carrying-over the 1998 tax credits in the succeeding year.

The confusion in saying Section 76 applies in the first petition, for which Section 69 clearly applies, has led the Supreme Court to an erroneous interpretation of the Irrevocability Rule. This would, in turn, lead the Court to the mistaken invocation of *San Carlos Milling* and *PBCom* cases which, having been decided under the aegis of the 1977 Tax Code, construed Section 69. It is evident that this erroneous citation of Section 76, as applicable to the first petition, was the interpretation used by the Court in the second petition, where it did not categorically say that the choice of tax refund or credit is irrevocable, but only if the carry-over option is exercised. However, if Sections 69 and 76 were one and the same, there would be no need to distinguish which law was applicable for the two petitions. There would likewise be no need to say that irrevocability applied only to the carry-over option.

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[71] *Philam*, 477 SCRA 761.

San Carlos Milling cannot be used as a jurisprudential anchor in this case. As discussed, *San Carlos Milling* was decided under the aegis of the 1977 Tax Code. The words of the law then in force were very much different from the words of today's 1997 Tax Code. Moreover, *San Carlos Milling* applied the provisions of R.R. No. 10-77, which provided for a vastly different procedure in the use of tax credit, or in the words of Section 76 currently in effect, in carrying the excess payments over to the next taxable year. As compared to the relatively easy application of the carry-over option, R.R. No. 10-77 had a prerequisite on the part of the CIR to first evaluate the application for *tax credit* made by the taxpayer before the latter can use it to deduct its income tax liabilities for the succeeding taxable year. As explained in *San Carlos Milling*:

> Prior approval by the Commissioner of Internal Revenue of the tax credit under then [S]ection 86 (now [S]ection 69) of the Tax Code would appear to be the most reasonable interpretation to be given to said section. An opportunity must be given the internal revenue branch of the government to investigate and confirm the veracity of the claims of the taxpayer. The absolute freedom that petitioner seeks to automatically credit tax payments against tax liabilities for a succeeding taxable year, can easily give rise to confusion and abuse, depriving the government of authority and control over the manner by which the taxpayers credit and offset their tax liabilities, not to mention the resultant loss of revenue to the government under such a scheme.[72]

What *San Carlos Milling* says is that the *tax credit* option then, or the carry-over option now, requires a prior investigation by the CIR, which is similar to a claim for refund. For the analogous process of these two options, it was then easy for the Supreme Court to conclude that, apparently, there is a sense that these options are really *alternative* in nature. But to extend this interpretation to the carry-over option now existing, which does not require prior examination by the CIR, is contrary to the text, history, and intent of Section 76.

In the subsequent case of *Commissioner of Internal Revenue v. Bank of the Philippine Islands*,[73] the Court invoked the ruling in *Philam* and held "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."[74] The Court here did not make a conscious effort to rule that irrevocability only applies to the carry-over option, but in a blanket

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[72] *San Carlos Milling*, 228 SCRA at 141.

[73] [Hereinafter "BPI"], G.R. No. 178490, 592 SCRA 219, July 7, 2009.

[74] *Id.* at 231.

pronouncement declared that irrevocability likewise applies to the choice of refund. In *Commissioner of Internal Revenue v. PL Management International Philippines, Inc.*,[75] the Court again cited the case of *Philam* and declared there are two "alternative" options for a corporate taxpayer under Section 76 of the Tax Code, although the taxpayer here chose the carry-over option, which the Court found to be irrevocable under Section 76. The Supreme Court likewise ruled to uphold the Irrevocability Rule in relation to the carry-over option in *Commissioner of Internal Revenue v. Mirant (Philippines)*[76] *Operations Corp.* It held that once the carry-over option has been selected, the corporate taxpayer cannot thereafter choose to apply for a refund. However, the Court here continued to cite the case of *PL Management*, and quoted the decision in *Philam*, which stated the carry-over and refund are alternative options.

Perhaps the most consequential decision that invoked the erroneous doctrine in *Philam* came in the case of *Republic v. Team (Philippines) Energy Corp.*[77] As compared with the previous cases where the Court upheld the irrevocability of the carry-over option, the taxpayer in *Team Energy* specifically chose the refund option in its FAR. For the Court, once the choice to be refunded has been made, it can never be subject to change, or in short, is irrevocable. The Court held that "[t]he two options are alternative and not cumulative in nature, that is, the choice of one precludes the other."[78] However, reiterating the ruling from *Philam* was not even necessary to resolve the case, as the only issue for resolution was whether or not the taxpayer proved its entitlement to the refund. What was questioned was not whether the choice of refund was applicable, but rather, if the taxpayer was able to discharge the burden of proof necessary to show it was entitled to the refund being claimed. The issue was rather evidentiary—was there a need to submit the quarterly income tax returns for the succeeding period?—and did not touch on the Irrevocability Rule under Section 76. In the end, the Supreme Court affirmed the findings of the CTA in Division and CTA *en banc* in ruling that the Annual ITR for the succeeding taxable periods, as well as the findings of the court-commissioned Independent Certified Public Accountant, support the corporation's claim for the tax refund.

A singular case which has shed light on the proper reading of the Irrevocability Rule is the decision of the Supreme Court's Third Division[79] in

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[75] [Hereinafter "PL Management"], G.R. No. 160949, 647 SCRA 72, Apr. 4, 2011.

[76] [Hereinafter "Mirant"], G.R. No. 171742, 652 SCRA 80, June 15, 2011.

[77] [Hereinafter "Team Energy"], G.R. No. 188016, 746 SCRA 41, Jan. 14, 2015.

[78] *Id.* at 53.

[79] A decision of a Division of the Supreme Court is considered a decision of the whole Court, and the doctrine laid down in the Division's decision may be modified or reversed only by the Court sitting *en banc*. *See* CONST., art. VIII, § 4(3). *See also* Firestone

the case of *University Physicians Services Inc.-Management, Inc. v. Commissioner of Internal Revenue.*[80] Here, the taxpayer filed its Annual ITR for taxable year 2006 and opted to have its income tax overpayments refunded. Subsequently, the taxpayer filed its ITR for the short period after changing to a fiscal year, where the overpayments were claimed as "Prior Year's Excess Credits," or was carried over to the short period. On the same day of filing the said ITR, however, the taxpayer filed an amended Annual ITR reflecting the removal of the claimed overpayments from the "Prior Year's Excess Credits." Thereafter, the taxpayer filed an administrative claim for refund before the CIR, but it was not acted upon, so the taxpayer filed a judicial claim before the CTA. The CTA in Division denied the taxpayer's claim, and this was affirmed by the CTA *en banc*. Essentially, the tax appellate court held that when the taxpayer claimed the overpayments as part of "Prior Year's Excess Credits" in the ITR, such had the effect of carrying-over the overpayments, and once a carry-over has been chosen, though inadvertently, it was deemed irrevocable.

The taxpayer in *University Physicians* was contending that the choice of refund in its 2006 Annual ITR was irrevocable in nature, citing the cases of *Philam* and *PL Management*, which held that the choice of either refund or carry-over precludes the other. In short, the taxpayer also posits, much like what the Supreme Court has been stating since the promulgation of the decision in *Philam*, that the refund option is likewise irrevocable.

The Supreme Court, however, did not side with the taxpayer, and categorically ruled the Irrevocability Rule applied to the carry-over option only. As clearly and appropriately stated by the Court:

> A perfunctory reading of the law unmistakably discloses that the irrevocable option referred to is the carryover option only. There appears nothing therein from which to infer that the other choice, *i.e.*, cash refund or tax credit certificate, is also irrevocable. If the intention of the lawmakers was to make such option of cash refund or tax credit certificate also irrevocable, then they would have clearly provided so.
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> In other words, the law does not prevent a taxpayer who originally opted for a refund or tax credit certificate from shifting to the carryover of the excess creditable taxes to the taxable quarters of

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Ceramics, Inc. v. Ct. of Appeals, G.R. No. 127022, 334 SCRA 465, 478, June 28, 2000 (Gonzaga-Reyes, *J.*, *dissenting*). "[D]ecisions or resolutions of a division of the [C]ourt, when concurred in by a majority of its members who actually took part in the deliberations on the issues in a case and voted thereon is a decision or resolution of the Supreme Court itself."

80 [Hereinafter "University Physicians"], G.R. No. 205955, 858 SCRA 1, Mar. 7, 2018.

> the succeeding taxable years. However, in case the taxpayer decides to shift its option to carry over, it may no longer revert to its original choice due to the irrevocability rule. As Section 76 unequivocally provides, once the option to carry over has been made, it shall be irrevocable. Furthermore, the provision seems to suggest that there are no qualifications or conditions attached to the rule on irrevocability.[81]

The Court further ruled that other provisions of the Tax Code support the view that only the carry-over option is irrevocable. The Court cited Section 228 of the Tax Code, which authorizes the CIR to issue a final assessment, even without the benefit of a pre-assessment notice, for a taxpayer who initially chose the refund option but thereafter carried it over to the succeeding taxable year. For the Court, this is a remedy on the part of the CIR for the easier issuance of an assessment where there might be a double recovery on the part of the taxpayer whose refund may have been granted, but at the same time the amount was carried over to the succeeding taxable years.

Interestingly, however, the Court in *University Physicians* tried to veer away from the seeming incongruity of precedents invoked by the taxpayer, namely *Philam* and *PL Management*, which held that the choice of one option (either that of refund or carry-over) precludes the other. The Court here reasoned:

> [P]revious incarnations of the words "the options are alternative [...] the choice of one precludes the other" did not lay down a doctrinal rule that the option of refund or tax credit certificate is irrevocable.[82]

It must be noted that the Third Division of the Supreme Court decided *University Physicians*. It cannot overturn what the Court has laid down in *Philam* and *PL Management*, as only the Court sitting *en banc* can overturn such rulings.[83] What the Third Division did was to simply reason out that *Philam* and *PL Management* did not really mean the refund option was also irrevocable. However, this ruling would be put to test in the subsequent case of *Rhombus Energy, Inc. v. Commissioner of Internal Revenue*,[84] which was decided by the same Division of the Court in the same year, after the promulgation of *University Physicians*.

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[81] *Id.* at 15-16.
[82] *Id.* at 23.
[83] CONST., art. VIII, § 4(3).
[84] [Hereinafter "Rhombus"], G.R. No. 206362, 876 SCRA 73, Aug. 1, 2018.

In *Rhombus*, the taxpayer opted for a refund of its excess creditable withholding tax for taxable year 2005. For the three taxable quarters of the succeeding taxable year 2006, however, the taxpayer claimed the amount it wished to be refunded as "Prior Year's Excess Credit." In filing the Annual ITR, the taxpayer suddenly declared the yearlong total of the "Prior Year's Excess Credit" as zero. The taxpayer then filed a refund claim before the CIR, which was not acted upon, leading the former to file a petition for review before the CTA. The CTA in Division granted the taxpayer's petition. The CTA *en banc*, however, reversed the decision of the CTA in Division, and cited the case of *Mirant* in ruling that the taxpayer has actually opted to use the carry-over option when it claimed in the succeeding taxable quarters as "Prior Year's Excess Credit" the amount being claimed as refund.

The Supreme Court ruled to reverse the decision of the CTA *en banc*, and held the taxpayer's choice of claiming a refund was irrevocable. The Court held thus:

> [T]he 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 [*e*]*n* [*b*]*anc* erred in applying the irrevocability rule against Rhombus.[85]

Thereafter, the Court held that the taxpayer met the requisites of a valid claim for refund. In essence, *Rhombus* was ruled upon differently from *University Physicians* in that irrevocability was held to be applicable to the refund option. *Rhombus* upheld the doctrines laid down in *Philam* onwards.

With the discussion in this Note analyzing Section 76 through its text, history, and intent, it is believed *University Physicians* offers the correct interpretation of the Irrevocability Rule, that is, only the carry-over option is irrevocable, and not the refund option. This issue, however, can only be settled in a case decided by the Supreme Court sitting *en banc*,[86] and it is hoped the discussion in this Note may become useful guideposts for consideration by the Court *en banc*.

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[85] *Id.* at 83. (Emphasis supplied.)

[86] A.M. No. 10-4-20-SC (2010), Rule 2, § 3(i). The Internal Rules of the Supreme Court. "The Court *en banc* shall act on the following matters and cases: […] (i) cases involving conflicting decisions of two or more divisions[.]"

B. Until When Is It Irrevocable?

If a corporation chooses the carry-over option, until when shall it become irrevocable? If the corporation incurs a taxable loss in the succeeding taxable year, does that mean it is entitled to a refund because it failed to make use of the prior year's excess credits that should have been carried over?

In a line of decisions, the Supreme Court was consistent in interpreting that a carry-over, once chosen, shall not be subject to change, and the excess credits shall be applied in *all* taxable quarters of the succeeding taxable years until fully utilized. This was the change brought by Section 76 of the Tax Code, which was different with what the previous Section 69 provided.

Under Section 69 of the 1977 Tax Code, once the carry-over option has been selected, such carry-over (or credit) is only applicable in the next succeeding taxable year. If any balance remains from such credit, it may be applied for by the corporation as a refund claim. This was explained by the Supreme Court in the case of *Systra Philippines, Inc. v. Commissioner of Internal Revenue*,[87] where the Court delineated the differences between Section 76 of the current Tax Code and Section 69 of the 1977 Tax Code. Here, the Court held that under Section 69, the excess tax credits may only be applied to the "taxable quarters of the succeeding taxable year"—that is, the immediately following year only. However, Section 76 provides that excess credits may be carried over to the "taxable quarters of the succeeding taxable years," meaning, the unutilized balance will not be forfeited in favor of the government and will remain in the taxpayer's account until fully utilized. Thus, once the taxpayer opted to carry-over its excess creditable withholding taxes, such may be used in *x* number of years for as long as there is a balance that can be claimed as a credit.

In the subsequent case of *Commissioner of Internal Revenue v. Bank of the Philippine Islands*,[88] the taxpayer indicated in its 1999 ITR that it would carry-over its excess payments from taxable year 1998, but failed to indicate any option for 1999. The CTA ruled the taxpayer had opted to carry-over its 1998 overpayments, and was thus precluded in claiming for a refund. However, this was reversed by the Court of Appeals, which held the taxpayer was entitled to a refund claim because it was not able to use said carry-over for 1999 since the taxpayer incurred a net loss, thus no tax due and payable. The appellate

[87] [Hereinafter "Systra"], G.R. No. 176290, 533 SCRA 776, Sept. 21, 2007.
[88] *BPI*, 592 SCRA 219.

court cited the case of *BPI-Family Savings Bank, Inc. v. Court of Appeals*[89] to support its view.

The Supreme Court ultimately reversed the decision of the Court of Appeals. It reasoned that the said case of *BPI-Family Savings Bank* is inapplicable because it applied Section 69 of the 1977 Tax Code, and not the 1997 Tax Code which governs the case. The Court went on to say that the appellate court erred in construing that the carry-over option was only applicable for the next *taxable period*, not *periods*, and that there is a one-year prescriptive period for the Irrevocability Rule. The Court of Appeals' reasoning that the taxpayer was again free to choose what to do with its 1998 overpayments at the end of taxable year 1999 is inconsistent with the Irrevocability Rule. Simply put, the Court held that the Irrevocability Rule precluded the taxpayer from changing its previous selection of the carry-over option in 1999 even though it did not apply said carry-over in that period. The Irrevocability Rule was instituted, the Court stated, "to keep the taxpayer from flip-flopping on its options, and avoid confusion and complication as regards said taxpayers excess tax credit."[90]

In *Asiaworld Properties Philippines Corp. v. Commissioner of Internal Revenue*,[91] the Supreme Court affirmed the irrevocability of the carry-over option for all succeeding taxable years of the taxpayer, and not just the immediately succeeding one. Here, the taxpayer was claiming for a refund of income tax payments in excess of what had been carried over. The Supreme Court clarified in this case that Section 76 of the 1997 Tax Code is different from Section 69 of the 1977 Tax Code. In the former, the carry-over is applicable to the succeeding taxable years of the taxpayer, and in the latter, it is only limited to the immediately succeeding taxable year. Thus, under Section 76, once the carry-over option is chosen, such is not subject to change, and the balance of the overpayments may be used in all succeeding taxable years until it is fully used.

In the case of *Commissioner of Internal Revenue v. Philippine American Life and General Insurancce Co.*,[92] the taxpayer had creditable taxes withheld and remitted. However, it incurred a net loss for the year, and even though it indicated in the ITR that it is exercising the carry-over option, it was not able to use said creditable taxes. Hence, it filed an application for refund for which

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[89] [Hereinafter "BPI-Family Savings Bank"], G.R. No. 122480, 330 SCRA 507, Apr. 12, 2000.

[90] *BPI*, 592 SCRA at 232.

[91] [Hereinafter "Asiaworld"], G.R. No. 171766, 626 SCRA 172, July 29, 2010.

[92] G.R. No. 175124, 631 SCRA 545, Sept. 29, 2010.

the CTA denied; this, however, was reversed by the Court of Appeals. The Supreme Court, in deciding this case, invoked the ruling in *Asiaworld*, and held that even though the creditable taxes carried over were not used, once the carry-over option has been chosen, such cannot be amended. Non-use of the creditable taxes does not operate to remove the irrevocability of the carry-over option. It only means that it may be used by the taxpayer in other succeeding periods when there exists a tax liability on the part of the taxpayer.

The case of *Commissioner of Internal Revenue v. McGeorge Food Industries*[93] continues the streak of the Supreme Court in ruling that once the carry-over option has been selected, such is irrevocable, and non-use of the overpayments of income tax in the succeeding taxable year is not a ground for changing the option to a refund. The overpayments carried over may be used in all succeeding taxable years, or as the Court said, "no matter how many tax cycles,"[94] until it is fully utilized. The Court here likewise invoked the ruling in *Asiaworld* to discuss the import of Section 76 of the Tax Code allowing the use of the income tax overpayments to be carried over to succeeding taxable years.

Belle Corp. v. Commissioner of Internal Revenue[95] is no different from the previous cases, where the Court held that the applicable law for the taxpayer was the 1997 Tax Code, for which Section 76 was the specific law. It ruled, "unlike Section 69 of the old NIRC, the carry-over of excess income tax payments is no longer limited to the succeeding taxable year. Unutilized excess income tax payments may now be carried over to the succeeding taxable years until fully utilized."[96] This was affirmed in the resolution on the motion for reconsideration filed in this case, where the Court clarified that the taxpayer's unutilized excess income tax payments may be used as income tax credit to succeeding taxable years until fully utilized.[97]

In *PL Management*, the Court further clarified that the irrevocable choice of carrying over the excess income tax credits may be used for as long as there is a remaining balance. The Court here stated, "prescription did not bar [the taxpayer] from applying the amount as tax credit considering that there was no prescriptive period for the carrying over of the amount as tax credit in subsequent taxable years."[98] Thus, it can be said that at least for the irrevocability of the carry-over option, there is forever.

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[93] G.R. No. 174157, 634 SCRA 193, Oct. 20, 2010.
[94] *Id.* at 201.
[95] G.R. No. 181298, 639 SCRA 108, Jan. 10, 2011.
[96] *Id.* at 121.
[97] G.R. No. 181298, 644 SCRA 433, Mar. 2, 2011.
[98] *PL Management*, 647 SCRA at 82, *citing BPI*, 592 SCRA 219.

C. How To Prove A Refund Claim

When a refund claim is filed, it is incumbent upon the taxpayer to prove such claim.[99] Included therein is the evidence to show that the taxpayer has not chosen to carry-over, or has not actually carried over, the amount sought to be refunded in the taxable quarters of the succeeding taxable years.

Jurisprudence has provided that for a corporation who has a claim for a refund of excess creditable withholding tax, it is necessary to comply with the following requisites: (1) the claim for refund must be filed with the CIR within the two-year period from the date of payment of the tax; (2) it must be shown on the return of the recipient that the income received was declared as part of the gross income; and (3) the fact of withholding is established by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of tax withheld.[100] However, important in the discussion in this Note is another requisite: (4) that the taxpayer has sufficiently proved that it did not utilize the excess credits as a carry-over in the taxable quarters of the succeeding taxable years. This would show that no double recovery is being sought by the taxpayer.

The Supreme Court has decided in a string of cases that it is not required for the taxpayer to submit its quarterly income tax returns, but only the Annual ITR or FAR of the succeeding taxable years. In *Winebrenner & Iñigo Insurance Brokers, Inc. v. Commissioner of Internal Revenue*,[101] the Court ruled that Section 76 of the Tax Code, and the revenue regulations issued to implement the same, do not require the submission of the quarterly income tax returns to claim a refund. The Court further explained thus:

> If the excess tax credits of the preceding year were deducted, whether in whole or in part, from the estimated income tax liabilities of any of the taxable quarters of the succeeding taxable year, the total amount of the tax credits deducted for the entire taxable year should appear in the Annual ITR under the item "Prior Year's Excess Credits." Otherwise, or if the tax credits were carried over to the succeeding quarters and the corporation did not report it in the annual ITR, there would be a discrepancy in the amounts of combined income and tax credits carried over for all quarters

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[99] Accenture, Inc. v. Comm'r of Internal Revenue, G.R. No. 190102, 676 SCRA 325, 645-46, July 11, 2012. "A taxpayer claiming a tax credit or refund has the burden of proof to establish the factual basis of that claim. Tax refunds, like tax exemptions, are construed strictly against the taxpayer."

[100] Comm'r of Internal Revenue v. Team (Phils.) Operations Corp., G.R. No. 185728, 707 SCRA 467, 474, Oct. 16, 2013.

[101] [Hereinafter "Winebrenner"], G.R. No. 206526, 748 SCRA 591, Jan. 28, 2015.

> and the corporation would end up shouldering a bigger tax payable. It must be remembered that *taxes computed in the quarterly returns are mere estimates. It is the annual ITR which shows the aggregate amounts of income, deductions, and credits for all quarters of the taxable year. It is the final adjustment return which shows whether a corporation incurred a loss or gained a profit during the taxable quarter.* Thus, the presentation of the annual ITR would suffice in proving that prior year's excess credits were not utilized for the taxable year in order to make a final determination of the total tax due.[102]

The disquisitions in *Winebrenner* were not agreed to unanimously by members of the Court. Associate Justice Marvic M.V.F. Leonen registered a dissenting opinion to the ruling that the quarterly income tax returns are not indispensable.[103] The dissent had three important points, namely: (1) the inapplicability of the precedents cited in the *ponencia*; (2) the implicit requirement by Section 76 for such quarterly returns; and (3) the comparative advantage of requiring the presentation of such returns on the part of the taxpayer and not shift the burden to the BIR.

Justice Leonen was of the view that the cited cases of the *ponencia* in *Winebrenner*, namely: (1) *Philam*;[104] (2) *State Land Investment Corp. v. Commissioner of Internal Revenue*;[105] (3) *Commissioner of Internal Revenue v. PERF Realty Corp.*;[106] and (4) *Mirant*,[107] are all inapplicable. The first three cases were decided under the aegis of Section 69 of the 1977 Tax Code, which provides, as has been discussed in this Note, a different treatment of the carry-over option. The fourth case, *Mirant*, was decided under Section 76 of the current Tax Code, and did not squarely rule on the issue of requiring the quarterly income tax returns of the succeeding taxable years, and in fact the taxpayer there opted for the carry-over option rather than refund.

The dissent likewise pointed out the differences between Section 69 of the 1977 Tax Code and Section 76 of the current one. The most important distinction between the two is that Section 76 now provides that the carry-over option may be used to apply "the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years." Thus, the earliest opportunity for a taxpayer to apply the carry-over option is in the

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[102] *Id.* at 611. (Emphasis in the original.)
[103] *Id.* at 617-633.
[104] 477 SCRA 761.
[105] G.R. No. 171956, 542 SCRA 114, Jan. 18, 2008.
[106] G.R. No. 163345, 557 SCRA 165, July 4, 2008.
[107] 652 SCRA 80.

first quarter of the succeeding taxable year, and which shall be reflected in the quarterly ITR.

The third point of the dissent touches on the economic concept of *absolute* and *comparative advantage*, where Justice Leonen reasoned:

> At first glance, it might seem that the Bureau of Internal Revenue is in a better position to assess if a taxpayer has already selected to carry over excess income tax payments. It could be said that the Bureau of Internal Revenue has the absolute advantage over gaining this information, considering that the returns are filed with it. However, the Bureau of Internal Revenue does not have comparative advantage over producing a single taxpayer's previous returns for purposes of tax refund. The Bureau of Internal Revenue manages millions of taxpayers' returns. Assessing if a taxpayer's claim for refund has not yet been subject to carry over will entail the opportunity cost of the other functions of the Bureau of Internal Revenue.
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> On the other hand, the taxpayer manages only its own taxes. The taxpayer is aware of whether it has selected the option to carry over or the option to refund in its adjusted returns. Requiring the taxpayer to present the adjusted returns does not entail substantial opportunity costs to it. Hence, the allocation of the burden of proof to the taxpayer is more efficient than requiring the Bureau of Internal Revenue to do the same task.[108]

Thus, on an efficiency standpoint, it is much better for the taxpayer to offer in evidence the quarterly returns, instead of passing the burden to the BIR.

In the recent case of *Commissioner of Internal Revenue v. Philippine National Bank*,[109] the Court upheld the doctrine laid down in *Winebrenner* that quarterly income tax returns are not indispensable in proving a claim for refund, as the Annual ITR or FAR may prove whether any carry-over was made.

However, upon examination of the text, history, and intent behind Section 76 as discussed in this Note, it is believed that the dissent of Justice Leonen in *Winebrenner* offers a more sound justification that necessitates the requirement of presenting the quarterly income tax returns for a valid claim of refund. It must be remembered that the reckoning point of irrevocability

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108 *Winebrenner*, 748 SCRA at 631-32 (Leonen, *J.*, *dissenting*).

109 [Hereinafter "PNB"], G.R. No. 212699, Mar. 13, 2019, *available at* http://sc.judiciary.gov.ph/4388/ (last visited Mar. 25, 2020).

is when the choice of carry-over was made. *Philam* provides that such choice may be made actually or constructively. The jurisprudence discussed in this Note has shown that even though a taxpayer initially chose the refund option, once it has carried over the excess credits in the succeeding quarters, such would trigger the application of the Irrevocability Rule. The facts of *Rhombus* show that a taxpayer may even claim "Prior Year's Excess Credits" in the three quarterly ITRs, but in the end reverse itself in the Annual ITR by claiming a zero balance in the "Prior Year's Excess Credits" account. In such case, the carry-over option was made as early as the first quarter of the succeeding taxable year. The Annual ITR would not show that such option was made, and would actually mislead the BIR and the courts to believe that no carry-over was effected during the taxable quarters of the succeeding years because the Annual ITR does not capture such vital information. By not requiring the submission of the quarterly returns, the taxpayer may easily skirt the Irrevocability Rule.

Moreover, it is well to repeat the oft-cited doctrine that tax refunds are construed in *strictissimi juris* against the taxpayer. *Winebrenner*'s reasoning that the CIR could have easily verified through its own records the quarterly returns goes against the cited doctrine. It is not the CIR's duty to refute a refund claim, but a taxpayer must submit all evidence necessary to satisfy the legal requirements for a refund. Such requirements include proof that in the taxable quarters of the succeeding taxable years, no carry-over was effected, and only the quarterly ITRs, submitted by the taxpayer in evidence to prove the refund, would show such information. Without the said quarterly ITRs, taxpayers are able to evade the Irrevocability Rule by reversing themselves upon the filing of the Annual ITR, when in fact the carry-over option has already been exercised in the intervening quarters.

However, it is admitted that the standing rule is that the submission of quarterly returns is not indispensable for a refund claim. The Supreme Court sitting *en banc* may reverse the said doctrine, but until then, *Winebrenner* and *PNB* operate as *stare decisis*.

D. Exception to Irrevocability

University Physicians stated the Irrevocability Rule as worded in Section 76 provides for no qualifications or conditions.[110] But in the case of a corporation which has ceased its operations or terminated its juridical personality, how can carry-over still be applied?

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[110] *University Physicians,* 858 SCRA at 15.

It is well to remember that the underlying assumption of the carry-over option is that the corporation runs as a going concern, or that it will remain in operation for the foreseeable future. Once there is cessation of business operations, then the corporation ceases to be a going concern. This was stated in *Systra*, where the Court said, in Footnote 23 thereof:

> Where, however, the corporation permanently ceases its operations before full utilization of the tax credits it opted to carry over, it may then be allowed to claim the refund of the remaining tax credits. In such a case, the remaining tax credits can no longer be carried over and the irrevocability rule ceases to apply. *Cessante ratione legis, cessat ipse lex*.[111]

While there is no authority that establishes whether footnotes form part of the doctrine laid down in an opinion, it is worthy to note that "they serve the larger function of restating the law and establishing precedent, thereby contributing to the law's predictability and uniformity."[112] The value of a footnote cannot be gainsaid, especially when looked in relation to the most renowned footnote in legal history—Footnote Four of the opinion in the case of *United States v. Carolene Products*[113]—where the U.S. Supreme Court stated, as a matter of policy, that strict scrutiny applies for certain protections under the Bill of Rights.[114]

To be exempt from the application of the Irrevocability Rule, the cessation of operations must be permanent, and not a mere loss which can be reversed in the normal course of business. In the case of *Impsa Construction Corp. v. Commissioner of Internal Revenue*[115] decided by the CTA *en banc*, the tax court stated a corporation who wished to be refunded due to cessation of business, after selecting the carry-over option, must first comply with Sections 52 (C) and 235 of the Tax Code.

Section 52 (C) of the Tax Code requires a dissolving corporation to file a return within 30 days after the adoption of the resolution or plan of liquidation. Section 235, specifically Paragraph (e) thereof, requires the dissolving corporation to notify the CIR of its decision to dissolve, and

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[111] *Systra*, 533 SCRA at 787 n.23.

[112] *See* Edward R. Brecker, *In Praise of Footnotes*, 74 WASH. U. L.Q. 1 (1996).

[113] 304 U.S. 144 (1938).

[114] *See* Louis Weinberg, *Unlikely Beginnings of Modern Constitutional Thought*, 15 U. PA. J. CONST. L. 291, 292 (2012). "Footnote Four [of] *Carolene Products* gave us, in essence, the method of constitutional analysis peculiarly associated with the rights-based constitutional litigation of our time—tiered scrutiny."

[115] CTA EB No. 685 (Ct. of Tax Appeals May 24, 2011).

thereafter apply for clearance for any tax liability. The said tax clearance is a prerequisite before the Securities and Exchange Commission (SEC) issues a Certificate of Dissolution.

Thus, to prove a valid refund claim, the dissolving corporation must submit its short-period return to ascertain whether there exists a balance in the unutilized creditable withholding tax. In addition, the corporation should likewise submit a Certificate of Tax Clearance issued by the BIR, and a Certificate of Dissolution issued by the SEC.[116] These pieces of evidence would prove the corporation has been actually dissolved, for if not, it may still operate and generate income for which no refund may be granted since the carry-over option must still be applied. Logic dictates that when a corporation ceases its business, there is no use for the carry-over, and refund is the most viable option as the amount refunded may be used to pay corporate creditors, with any balance to be distributed to shareholders during liquidation.[117]

CONCLUSION

Section 76 of the Tax Code has seen conflicting interpretations issued by the Supreme Court. However, as has been discussed, the text of the law itself is clear and unambiguous in saying that the Irrevocability Rule only applies for the carry-over option. This is supported by the legislative history of Section 76 and the Congressional records that brought the Irrevocability Rule as it is now. The silver lining is that the Court has recognized, at least in one case, the proper interpretation of the Irrevocability Rule. It is now up to the Court sitting *en banc* to abandon, or at least harmonize, unsound precedents it has laid down in the past.

The following are a few theoretical scenarios to further illustrate the application of the Irrevocability Rule, as discussed in this Note.

Scenario 1. ABC Corporation filed its 2019 Annual ITR on April 15, 2020. In the said Annual ITR, it chose the carry-over option. The 2019 Annual ITR showed that the corporation has PHP 1 million excess creditable withholding taxes paid. The corporation applied PHP 250,000.00 worth of "Prior Year's Excess Credits" to each of the first three taxable quarters of 2020. By the end of taxable year 2020, ABC Corporation filed a refund claim before the BIR for the remaining PHP 250,000.00 unutilized creditable

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[116] *See* NEC Logistics Phils., Inc. v. Comm'r of Internal Revenue, CTA Case No. 8533 (Ct. of Tax Appeals Apr. 7, 2015).

[117] *See* REV. CORP. CODE, § 139.

withholding tax. Will the refund claim prosper? The answer is a simple no, because the irrevocability rule precludes ABC Corporation from changing its choice. ABC Corporation may, however, use the balance of PHP 250,000.00 in the succeeding quarters of 2021.

Scenario 2. In Scenario 2, the facts in *Rhombus* are replicated, however, bearing in mind the discussions in this Note, the ruling in *University Physicians* was applied. Instead of choosing the carry-over option in its 2019 Annual ITR, ABC Corporation chose to be refunded or issued a TCC. Thereafter, it applied PHP 250,000.00 worth of "Prior Year's Excess Credits" to each of the first three taxable quarters of 2020. Because it chose to be refunded as reflected in its 2019 Annual ITR, it filed a refund claim before the BIR for the whole amount of P1 million. Will the refund claim prosper? The answer is likewise no, because even when ABC Corporation selected the refund option, such was not irrevocable and was in fact changed to the carry-over option when it utilized the excess credits in the first three taxable quarters of the succeeding taxable year. Such carry-over is irrevocable, and the remaining PHP 250,000.00 may be used in the succeeding quarters of 2021.

In the following scenarios, the proper application of a refund claim as explained in *University Physicians* is illustrated:

Scenario 3.1. Assuming that in the 2019 Annual ITR, ABC Corporation chose the refund option. It thereafter filed an administrative claim for refund of PHP 1 million before the BIR. The BIR granted the refund sought. However, in the 2020 Annual ITR, ABC Corporation still claimed the amount as a "Prior Year's Excess Credit." Is such carry-over permissible? The answer is no, because there is obvious double recovery, and the CIR in this case is empowered to issue a final assessment against the corporation under Section 228 of the Tax Code.

Scenario 3.2. Similar circumstances as Scenario 3.1, but the refund claim is still pending before the BIR. Thereafter, ABC Corporation utilized the PHP 1 million claim as a "Prior Year's Excess Credit" in the 2020 Annual ITR. Is such carry-over still permissible? In such a case, the carry-over is allowed. The choice of refund is not irrevocable, and may be subject to change by the taxpayer, for as long as the refund claim has not been granted. The CIR should not issue a final assessment, but instead merely deny the refund claim since the amount sought to be refunded has actually been used as a carry-over.

Scenario 4. In this scenario, the imprescriptible nature of the carry-over option is illustrated. ABC Corporation filed its 2019 Annual ITR and selected the carry-over option for its excess creditable withholding taxes of PHP 1 million. However, for the three succeeding taxable years, 2020, 2021 and 2022, the corporation experienced business losses for which the PHP 1 million remained unutilized. The two-year prescriptive period to file a refund claim has also lapsed. Fortunately, for 2023, ABC Corporation experienced a business reversal and posted a taxable income for which the income tax due was PHP 2 million. Can ABC Corporation still apply the balance of its PHP 1 million creditable withholding taxes sourced from 2019 to its income tax due in 2023? Yes, because such excess credit remained in the account of ABC Corporation and may be used in succeeding taxable years, including 2023, until it is fully utilized.

Scenario 5. This scenario illustrates the problematic standing doctrine of not requiring quarterly income tax returns in a refund claim. ABC Corporation filed its 2019 Annual ITR and chose to be refunded in the amount of PHP 1 million. However, it applied PHP 250,000.00 "Prior Year's Excess Credit" to each of the first three taxable quarters of 2020. It then filed its 2020 Annual ITR, but in the portion of "Prior Year's Excess Credit," the corporation reflected that the amount was zero, essentially reversing the carry-over done in the quarterly returns. The corporation then filed a refund claim and submitted in evidence the 2020 Annual ITR. Will the refund claim prosper? Yes, because the 2020 Annual ITR has shown that no carry-over was effected, per the ruling in *Winebrenner* and *PNB*.

Scenario 6. Here, the exception to the Irrevocability Rule is illustrated. ABC Corporation filed its 2019 Annual ITR and selected the carry-over option for its excess creditable withholding taxes of PHP 1 million. However, considering the sustained business losses it has incurred in the past, and the bleak possibility of turn around, its board of directors resolved to dissolve the business. The corporation filed a return within 30 days from the resolution of the board, and thereafter applied for a Tax Clearance Certificate, which the BIR granted. It was likewise able to secure a Certificate of Dissolution issued by the SEC. The corporation then filed a refund claim for the PHP 1 million excess creditable withholding taxes before the BIR. Will the refund claim prosper? The answer is yes, because the corporation has permanently ceased to exist, and there is no use for the carry-over of the excess creditable withholding taxes.

With the disquisitions in this Note, it is hoped that the conflicting construction of the Irrevocability Rule be clarified, ultimately by the Supreme Court, for there to be a uniform and consistent procedure for the benefit of the Filipino taxpayer.

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