[Handwriting: ITAN credit and refund]

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 **Tax Court No. 10055-1-2012**

**RECORD NO.** : 5860-2011

**INTERESTED PARTY** :

**SUBJECT** : Refund

**ORIGEN** : Lima

**DATE** : Lima, June 22, 2012

**IN VIEW OF** the appeal brought by [blank] against Administrative Resolution No. 0150140009628 of March 29, 2011, issued by the Division of Major National Taxpayers of the National Department of Customs and Tax Administration (SUNAT, for its acronym in Spanish), which declared groundless the complaint against Administrative Resolution No. 012-018-0006533/SUNAT, which declared improper the request for refund of the remaining balance of the Temporary Tax on Net Assets (ITAN, for its acronym in Spanish), corresponding to August 2005.

**WHEREAS:**

The appellant states that subsequent to the end of tax year 2005, she submitted her request for refund of the Temporary Tax on Net Assets (ITAN) corresponding to the month of August 2005, basing her request on the fact that said amount could not be used as an income tax credit for tax year 2005.

The appellant also indicates that in accordance with the rules governing the Temporary Tax on Net Assets, said tax can be applied as a credit against estimated tax payments and the tax for income tax regularization for the same tax year, even when payment had been made in an untimely manner, establishing the possibility of applying for a refund of the amount paid after filing the annual income tax return.

Additionally, the appellant maintains that neither the law nor the ITAN regulations expressly call for untimely payments of the tax to be penalized by revoking the right to a refund, as the only condition stipulated for the refund is that the annual income tax return be filed.

She indicates that the present case involves the untimely payment of an ITAN installment (after the deadline for submission of the annual income tax return), which became an overpayment as it could not be used as an income tax credit.

Furthermore, the appellant alleges that the restrictive interpretation of the Administration in not recognizing her right to the ITAN refund corresponding to August 2005 infringes upon her right to equality, given that larger deductions would be accepted for individuals at the same or higher income level, due solely to the fact of having paid the ITAN after filing the annual income tax return. Similarly, she maintains that the principle of legal reservation set forth in Article 74 of the Constitution is thus infringed, as the law has not expressly provided for the nonrecognition of a refund for untimely payment of the ITAN.

Finally, she notes that in the present case a double penalty would exist: on one hand the default interest owed for late payment of the ITAN and on the other hand the nonrecognition of the right to apply the ITAN payment as a credit and/or to request a refund.

For its part, the Administration is in compliance with Article 8 of the Law of ITAN and Article 10 of its regulations; the portion of the ITAN credit that cannot be cancelled out can [be considered for refund] [TN: wording in brackets is unclear]; in that regard, ITAN payments made after submission of the annual income tax return or after the deadline for regularization, inasmuch as it is no longer possible to apply them against the income tax, do not constitute a credit against said tax, so they cannot be refunded either.

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Article 1 of Law No. 28424 creates the ITAN, applicable to category three income earners subject to the income tax, which is applied on net assets on December 31 of the previous year, making it due on January 1 of each tax year.

Article 8 of the same law states that the sum actually paid, in whole or in part, toward this tax can be used as a credit against income tax installment payments for tax periods from March to December of the tax year for which the ITAN was paid, as long as this is confirmed by the deadline of each of the installment payments, and against the payment for income tax regularization for the corresponding tax year; the full or partial ITAN payment can only be used as a credit during the tax year in which the payment is made; and if the refund option is chosen, this right only exists if the annual income tax return for the corresponding year is filed, and the tax loss or lower income tax obtained on the basis of the general tax provisions must be demonstrated for the purposes of requesting a refund.

In accordance with parts b) and d) of Article 9 of the regulations of the aforementioned law, approved by Supreme Decree No. 025-2005-EF, the ITAN actually paid will be considered a credit against installment payments or the income tax regularization payment; for the purposes of applying the credit, the ITAN will only be considered actually paid by the deadline for the income tax installment payment against which it can be applied; a tax actually paid after said deadline can only be applied as a credit against income tax installment payments that are not overdue, up to the installment payment corresponding to the tax period of December of the same tax year.

Part e) of the same article establishes that an ITAN actually paid by the deadline for the annual income tax return for that tax year or by the time it is filed, whichever occurs first, provided it has not been applied as a credit against installment payments referred to in part d) of said article, will constitute a credit to be applied against the income tax regularization payment for the tax year, to which the aforementioned Article 8 refers.

Finally, Article 10 of the regulations states that if after applying the ITAN against the monthly installment payments and/or against the income tax regularization payment for the tax year in which the ITAN was paid, an unused balance remains, this amount can be refunded in accordance with the provisions set forth in Article 8 of the Law, as it cannot be applied against future income tax payments.

In the present case, the appellant used Form 4949 No. 01798192 (page 56) to request a refund of the ITAN corresponding to the month of August 2005 in the amount of 223,012.00 *soles*.

On the declaration for the Temporary Tax on Net Assets corresponding to tax year 2005, filed by means of virtual Form PDT [Electronic Filing Program, PDT for its acronym in Spanish] No. 648 No. 300528 (pages 199 and 199 overleaf), it can be seen that the appellant listed a tax amounting to 2,007,108.00 *soles* and opted for payment in installments.

On the annual income tax return for tax year 2005, filed by the appellant on April 3, 2006 by means of virtual Form PDT 656 No. 3002966 (from pages 206 overleaf to 208), and attached refund request, it can be seen that the appellant did not record any amount for ITAN payments.

On the ITAN payment receipt, attached by the appellant to her request for refund of the aforementioned tax (page 46), it can be seen that the payment for the aforementioned tax was made on July 14, 2006, that is, after the deadline for and the filing of the annual income tax return for tax year 2005.[[1]](#footnote-1)

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Additionally, from the document titled Tax Collection List, which is found on page 200, it can be seen that the appellant made two ITAN payments for the period of August 2008, on July 14, 2006 and January 12, 2007.

In accordance with the aforementioned regulations, it is the court’s understanding that an ITAN actually paid, in whole or in part, can be applied as a credit against the advance payments for March through December or the income tax regularization payment for the tax year in which the ITAN is paid, provided that the ITAN is paid by the deadline for the aforementioned advance payments or by the time of the filing of the annual income tax return or the deadline thereof, whichever occurs first.

In addition, a credit that is not related to compensation can be eligible for refund, which means that if the ITAN payments did not constitute an income tax credit, they could not be refunded either.

As such, the ITAN payment made by the appellant for August 2005 after the filing and/or deadline for the filing of the annual income tax return for tax year 2005, as it does not constitute an income tax credit for said year, could not be refunded to the appellant.

It should be noted that payments that must be made for ITAN represent the fulfillment of a tax obligation; it should also be taken into consideration that this constitutes an independent tax on net assets as an indicator of ability to pay, as the Constitutional Court has affirmed in the judgment issued in Record No. 03797-2006-PA/TC; while the legislature has provided for the possibility of obtaining a refund, said prerogative is conditional on the fulfillment of the stipulations in the regulations governing it and which grant it the character of a credit with a right to refund against the income tax; it does not follow from this exceptional circumstance that the nature of the ITAN is that of a tax whose payment occurs improperly or in excess, and thus the possibility of requesting a refund of it does exist in the majority of cases.

It should be kept in mind that Article 8 of the Law of ITAN gives taxes actually paid the character of a credit against the income tax, and it is on that foundation that the possibility of requesting a refund is considered; to that effect, it is its legal character as a credit with a right of refund against the income tax that allows for claims for recovery of payment; in that sense, the rules governing the ITAN establish the conditions for its refund, as the refund is not granted if these are not met; the appellant’s assertions to the effect that the principles of equality and legal reservation would be infringed upon if the payments are not refunded are unsupported.

In reference to the double penalty alleged by the appellant, to the effect that the late payment interest of the tax combined with the rejection of her refund request represents a duplication of the penalty, it should be noted that such consequences do not represent penalties as they have not come about as a result of actions that can be categorized as violations; furthermore, the two situations arise from different facts – the first is due to a delay in payment of the tax, while the second is due to a failure to fulfill the conditions necessary to be eligible for a refund; the allegation thus lacks a basis in fact, which should be the starting point for an analysis of whether the present case would entail a double penalty. Accordingly, the appellant’s allegation in this regard is unsupported.

Finally, regarding the assertions of the appellant, the appealed resolution is hereby upheld; the Administration shall permit the deduction of the ITAN amount paid for the month of August 2005; it should be noted that as has been stated in the present resolution, payments due for the ITAN represent an independent tax; and while the legislature has provided for the possibility of obtaining a refund, said prerogative is conditional on the fulfillment of the stipulations in the regulations governing it. Thus, an ITAN actually paid, in whole or in part, can be applied as a credit against the advance payments for March through December or the income tax regularization payment for the tax year in which the

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 ITAN is paid, provided that the ITAN is paid by the deadline for the aforementioned advance payments or by the time of the filing of the annual income tax return or the deadline thereof, whichever occurs first, since a credit that is not related to compensation can be eligible for refund, which means that if the ITAN payments did not constitute an income tax credit, they cannot be refunded.

In view of the foregoing, the appealed resolution is hereby upheld.

With members Zúñiga Dulanto and Amico de las Casas, and with member Ramírez Mío participating as rapporteur.

**IT IS DECIDED:**

**TO UPHOLD** Administrative Resolution No. 0150140009628 of March 29, 2011.

Be it so recorded, communicated, and transmitted to SUNAT for its purposes.

[signature]

**ZÚÑIGA DULANTO**

**MEMBER AND PRESIDENT**

[signature]

**AMICO DE LAS CASAS**

**MEMBER**

[signature]

**RAMÍREZ MÍO**

**MEMBER**

[signature]

**Quintana Aquehua**

Clerk-Rapporteur

RM/QA/CV/rmh [TN: abbreviations unknown]

1. Superintendence Resolution No. 004-2006/SUNAT established April 3, 2006 as the deadline for filing the annual income tax return for taxpayers with tax ID number [RUC, for its acronym in Spanish] ending in 0, which is the case for this taxpayer. [↑](#footnote-ref-1)