Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION
****

PHILAQUA CONSULTANTS, INC.,
Petitioner,

C.T.A. CASE NO. 6942

- versus -

Members:

ACOSTA, *Chairperson*
BAUTISTA, *and*
CASANOVA, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

AUG 28 2008 2:45pm

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DECISION

CASANOVA, *J.*

For decision is the Petition for Review filed by Philaqua Consultants, Inc. on April 14, 2004 seeking that judgment be rendered ordering the respondent to refund the aggregate amount of P29,952,928.88 representing petitioner's outstanding excess creditable withholding income tax for the taxable years 2001, 2002 and 2003.

THE FACTS

Philaqua Consultants, Inc. (petitioner) is a corporation duly organized and existing under the laws of the Republic of the Philippines, with principal address at ACCRA Building, 122 Gamboa St., Legaspi Village, Makati City. It is duly registered with the BIR Revenue Region No. 8, RDO No. 47–East Makati with TIN 205-711-881-000.[1] The primary purpose of petitioner includes providing business consultancy services, operations management, project management and supervision of any work, plan or project related to water systems, drainage, deepwells, flood control, dam reservoir, structures, and other edifications and infrastructure development needed and necessary in the ordinary course of life; to act as managers or managing agents of persons, firms, associations, partnerships and other entities excluding the management of funds, assets and portfolios or similar assets of the managed company or entity; to engage in the business of providing or furnishing any or all forms or types of services, assistance and advice for construction, commercial, industrial, infrastructure and other kinds of enterprises and generally to perform all acts connected with the business aforementioned or arising therefrom or incidental thereto and to do or perform any and all acts and things necessary, proper or convenient for and incidental to the furtherance and/or implementation of the purposes abovementioned.[2]

Respondent is the Commissioner of Internal Revenue (respondent), authorized by law to decide on refunds of internal revenue taxes, fees, penalties imposed in relation thereto or matters arising under the National Internal Revenue Code, as amended.

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[1] Rollo, pp. 344-345.
[2] Exhibit "FF".

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On February 24, 2001, the petitioner entered into a Deed of Assignment with Montgomery Watson New Zealand Ltd. and Safege Consulting (collectively known as assignors) that will provide engineering consultancy services to its sole client, Maynilad Water Services, Inc. (Maynilad). Such consultancy services are encapsulated in the Long Term Consulting Services for Water Supply and Wastewater for the West Zone of Manila.[3]

On October 1, 2003, a special meeting of the Board of Directors was held where it was unanimously adopted, approved and resolved that the business operations of the petitioner be closed down effective December 31, 2003. This is reflected in the Secretary's Certificate dated December 29, 2003,[4] signed by Jose Gerardo A. Alampay, Corporate Secretary, Philaqua Consultants, Inc. Pursuant to the cessation of its operations, petitioner likewise alleged that it filed a Notice of Closure with the Securities and Exchange Commission, the Local Government of Makati and with the Bureau of Internal Revenue.

Prior to its closure and as a result of its consultancy activities, petitioner earned service fees subject to Creditable Withholding Tax (CWT) in accordance with Sec. 2.57.2 (B) of the Revenue Regulations No. 2-98, as amended. The following amounts were withheld from petitioner's income from Maynilad for the three taxable years as reflected in its Income Tax Returns (ITRs):

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[3] Rollo, pp. 179-230.
[4] Exhibit "GG-2"

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Taxable Year	Date Filed ITR	Amount in Php	Date filed Amended ITR	Amount in Php
2001	11-Apr-02[5]	P 191,006.00	30-Apr-03[6]	P 4,332,813.00
2002	15-Apr-03[7]	23,997,874.00	24-Apr-04[8]	17,968,890.00
2003	15-Apr-04[9]	7,651,425.88	15-Apr-04[10]	7,651,426.00
TOTAL		P 31,840,305.88		P 29,953,129.00

The details of petitioner's application of the Excess Creditable Withholding Tax (ECWT) applied for the taxable years of 2001, 2002 and 2003[11] are summarized as follows:

Taxable Year	Quarter 1st	2nd	3rd	4th	Total
2001	P 733,536.00	P 1,137,012.00	0	P 2,054,063.00	P 3,924,611.00
2002	0	0	1,184,308.57	286,526.00	1,470,834.57
2003	0	0	0	0	0
Grand Total	**P 733,536.00**	**1,137,012.00**	**P 1,184,308.57**	**P 2,339,589.00**	**P 5,395,445.57**

* As for taxable year 2003, the ITRs filed by the petitioner do not indicate any amount under the item captioned "Prior Year's Excess Credit'"

Petitioner alleged that no portion of its creditable tax withheld in taxable year 2003 was applied against its tax liabilities because there was no income tax due for any of the quarters in view of the losses incurred by the corporation amounting to P30,260,695.00. Accordingly, the amount withheld by the agent was not utilized and may be subject for a claim for refund.

[5] Exhibit "H-3".
[6] Exhibit "H".
[7] Exhibit "P".
[8] Exhibit "O".
[9] Exhibit "U".
[10] Exhibit "T".
[11] Annex "N", Petition for Review.

Petitioner filed administrative and judicial claims for refund on the following dates:

Taxable Year	Administrative Claim	Judicial Claim
2001	13-Apr-04[12]	14-Apr-04[13]
2002	13-Apr-04[14]	14-Apr-04[15]
2003	8-Oct-04[16]	14-Oct-04[17]

Allegedly, there was no action taken by the respondent. To suspend the running of the two-year period provided for by law in claiming for refund, petitioner filed a Petition for Review with this Court on April 14, 2004, docketed as CTA Case No. 6942, and a Supplemental Petition for Review filed on October 14, 2004[18] with the same Court.

In her Answer[19], respondent specifically denied the allegation that the petitioner is a joint venture corporation duly registered with the BIR-Revenue Region No. 8 and was issued Tax Identification Number 205-711-811-000. She raised the following special and affirmative defenses, to wit:

> "6. The petitioner's claim is already barred by prescription;
>
> 7. Granting arguendo that the claim has not prescribed, still the unapplied portion of the excess withholding tax for the year 2000 in the stated amount of P2,245,069.00 which was carried-over to the year 2001 is no longer refundable for being barred by prescription considering that in its 2001 return said amount formed part of the excess withholding

[12] Annex "N", Petition for Review.
[13] Petition for Review.
[14] Annex "N", Petition for Review.
[15] Petition for Review.
[16] Annex "T", Supplemental Petition for Review, p. 328.
[17] Supplemental Petition for Review.
[18] Rollo, p. 165.
[19] Rollo, pp. 134-135.

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tax applied for tax credit certificate and was no longer carried over and applied as tax payment for the year 2002;

8. Amendment of the return can be done only within three years from its filing and provided that no notice for audit and investigation has been actually served upon the taxpayer (Sec.6 (A), NIRC);

9. Petitioner has not shown that the income from which the withholding tax was withheld was declared in their corresponding returns for the years 2001 and 2002;

10. Claims for refund are construed strictly against the claimant, the same being in the nature of exemption from taxes (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95; Manila Electric Co. vs. Commissioner of Internal Revenue, 67 SCRA 35);

11. In an action for tax refund/credit, the burden of proof is on the taxpayer to establish its right to refund and failure to sustain the burden is fatal to the action for refund; [and]

12. It is presumed that taxes paid and collected are made in accordance with law and regulations, hence, not refundable [.]"

As regards petitioner's Supplemental Petition for Review, respondent manifested[20] on November 10, 2004 that she is still adopting her original Answer since the new allegations raised in petitioner's Supplemental Petition for Review are still covered by the special and affirmative defenses she raised in her Answer.

Petitioner presented documentary and testimonial evidence through its Formal Offer of Evidence[21] and Supplemental Formal of Evidence with

[20] Rollo, p. 337.
[21] Rollo, pp. 590-612.

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Manifestation[22] filed on August 30, 2006 and on November 28, 2006, respectively. On July 31, 2007, respondent for his part manifested in open court that he is no longer presenting further evidence[23]. On September 18, 2007, petitioner submitted its Memorandum[24]. The case was submitted for decision on November 7, 2007 *sans* respondent's Memorandum.

ISSUES

The parties raised the following issues[25] for this Court's resolution:

> "A.
> [w]hether or not the excess withholding tax for the year 2000 in the amount of P2,245,069.00 that was carried over to the year 2001 is barred by prescription[;]
>
> B.
> [w]hether or not the amendment of the petitioner's return is allowed by law[;]
>
> C.
> [w]hether or not petitioner has excess creditable withholding income tax for 2001 and 2002[;]
>
> D.
> [w]hether or not petitioner is entitled to the refund of its excess creditable withholding income tax for 2001 and 2002 pursuant to Section 229 in relation to Section 79 (C) of the National Internal Revenue Code of 1997, as follows:
>
> D.1. [w]hether or not the income payments from which the creditable withholding income tax were imposed were reported as part of the gross income of petitioner for 2001 and 2002[;]
>
> D.2 [w]hether or not the excess creditable withholding income tax for 2001 and 2002 are substantiated by certificates of creditable tax withheld at source[;]"

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[22] Rollo, pp. 634-639.
[23] Rollo, pp. 664.
[24] Rollo, pp. 677-746.
[25] Joint Stipulation of Facts and Issues, Rollo, p. 347.

THE COURT'S RULING

Anent the first issue, whether or not the excess withholding tax for the year 2000 in the amount of P2,245,069.00 which was carried over to the year 2001 was barred by prescription, We rule in the negative.

Section 76 of the National Internal Revenue Code (1997 NIRC) states that:

> "SECTION 76. Final Adjustment Return. —
>
> xxx
>
> **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 therefore." (Emphasis Supplied)

Unlike in the old tax code[26] where the carry over is permitted only until a year after the option is exercised, the 1997 NIRC permits carry over in the

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[26] Presidential Decree 1158, as amended:

> Section 69. Final Adjustment Return.- Every corporation liable to tax under Section 24 shall file a final adjustmen 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 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.

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succeeding years until full utilization. A perusal of the evidence presented shows that in the Amended Annual Income Tax Return of the petitioner for the taxable year 2000[27], petitioner marked the box bearing "to be carried over as tax credit next year/quarter." By marking the box, petitioner signified its intent to carry over the said withholding tax to the year 2001 and the following years thereafter, thus, the carry over cannot be barred by prescription because the right to carry over exists until petitioner completely exhausts its unutilized credits.

As to the issue of whether or not the amendment of the return is allowed by law, We rule in the affirmative.

To reiterate, petitioner filed its Annual ITR and Amended Annual ITR on the following dates:

	Date Filed	
Taxable Year	**Annual ITR**	**Amended Annual ITR**
2001	11-Apr-02[28]	30-Apr-03[29]
2002	15-Apr-03[30]	24-Apr-04[31]
2003	15-Apr-04[32]	15-Apr-04[33]

Under the 1997 NIRC, amendment of returns may be made in the following manner:

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[27] Exhibit "D".
[28] Exhibit "H-3".
[29] Exhibit "H".
[30] Exhibit "P".
[31] Exhibit "O".
[32] Exhibit "U".
[33] Exhibit "T".

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"Sec. 6. Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement. –

(A) Examination of Returns and Determination of Tax Due. -

xxx

Any return, statement or declaration filed in any office authorized to receive the same amount shall 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 by the taxpayer." (Emphasis supplied)

Amendments made by the petitioner on its three taxable years were done to reflect the receipt of the withholding tax certificates belatedly issued by Maynilad as withholding agent and to exclude the tax certificates reported in the Amended Income Tax Return for 2001.[34] The amendments were made within three years from the filing of petitioner's original returns without having received any notice for audit or investigation of such returns sought to be amended. Having complied with the conditions of the above section, petitioner's act of amending its aforementioned ITRs is permitted by law.

As regards the third issue, whether or not petitioner has excess creditable withholding income tax for 2001 and 2002, the Court rules partly for the petitioner.

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[34] Exhibit "DD".

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In consideration of the consultancy services offered by the petitioner, it received service fees from Maynilad subject to withholding income tax under Section 2.57.2(B) in relation to 2.57.2(A) of the Revenue Regulations 2-98 to wit:

> "SECTION 2.57.2. Income Payment Subject to Creditable Withholding Tax and Rates Prescribed Thereon. — xxx
>
> (A) Professional fees, talent fees, etc., for services rendered by individuals — xxx
>
> (6) Management and technical consultants"
>
> xxx
>
> (B) Professional fees, talent fees, etc. for services of taxable juridical persons — On the gross professional, promotional and talent fess, or any other form of renumeration enumerated in the preceding subparagraph for the services of taxable juridical persons – 5% (10% after the effectivity of Revenue Regulations No. 6-01).[35] x x x"

Maynilad duly withheld the creditable withholding taxes of the latter for the taxable years 2001, 2002 and 2003, as seen in the Certificates of Creditable Taxes Withheld at Source (BIR Form 2307).[36] As a result of the withholding, Maynilad issued to petitioner Certificates of Creditable Withholding Tax in compliance with Section 2.58 (B) of the Revenue Regulations No. 2-98. The amount of the taxes withheld, as claimed by petitioner, sum up to P 29,952,928.88, broken down as follows:[37]

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[35] Implementing Republic Act No. 8424, "An Act Amending The National Internal Revenue Code, as amended" relative to the Withholding on Income subject to the Expanded Withholding Tax and Final Withholding Tax, Withholding of Income Tax on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes.
[36] Exhibit "II".
[37] Ibid.

Shown as tax credit in the 2001 Annual Income Tax Return	Php 4,332,813.00	*[Exhibit "H"]*
Shown as tax credit in the 2002 Annual Income Tax Return	17,968,690.00	*[Exhibit "O"]*
Shown as tax credit in the 2003 Annual Income Tax Return	7,651,425.88	*[Exhibit "T"]*
Total claim for refund	**Php 29,952,928.88**	

Petitioner claimed that its withholding income taxes were not utilized due to income loss for the years 2001, 2002 and 2003. These were accordingly reported in petitioner's returns filed pursuant to Section 76 of the Tax Code, to wit:

> "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 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 still due; or
> (B) Carry-over the excess credit; or
> (C) Be credited or refunded with the excess amount paid, as the case may be.
>
> In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. **Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash or refund or issuance of a tax credit certificate shall be allowed therefore."** (Emphasis supplied)

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As regards petitioners claim for taxable year 2001, petitioner in its Amended Return[38] reported creditable withholding taxes in the amount of P4,332,813.00. It chose the option "to be issued a tax credit certificate." Despite this option, petitioner partially utilized its creditable withholding taxes when it reported the amount of P2,561,319.00 as "prior year's excess credits" in its original Annual ITR for the year 2002.

Hence, the amount of petitioner's unutilized creditable tax for the year 2001 is computed as follows:

Total Creditable Tax	P 4,332,813.00[39]
Less: Carry Over from Orig. ITR	2,561,319.00[40]
Creditable Tax for 2001	**P 1,771,494.00**

On petitioner's claim for the years 2002 and 2003, the Court agrees with petitioner's amounts of claim in the petition, i.e. P17,968,690.00 and P7,651,426.00, which were duly substantiated by Certificates of Creditable Taxes for the said period. This reduces petitioner claim to:

Shown as tax credit in the 2001 Annual Income Tax Return	Php 1,771,494.00
Shown as tax credit in the 2002 Annual Income Tax Return	17,968,690.00
Shown as tax credit in the 2003 Annual Income Tax Return	7,651,425.88
Total claim for refund	**Php 27,391,609.88**

[38] Exhibit "H".
[39] Exhibit "H".
[40] Exhibit "P".

However for the entitlement of refund, petitioner is subject to the requirements laid down in the case of *Citibank N.A. vs. Court of Appeals and Commissioner of Internal Revenue,* 280 *SCRA 459*, to wit:

> "For a taxpayer to be entitled to a claim for refund, it must satisfy the following requirements:
>
> 1. that the claim for refund was filed within the two-year reglementary period pursuant to Section 230 of the Tax Code, as amended;
>
> 2. that the fact of withholding is established by a copy of the statement duly issued by the payor to the payee showing the amount paid and the amount withheld therefrom; and
>
> 3. that the income upon which the taxes were withheld were included as part of the gross income declared in the income tax return of the recipient."

As regards the first requirement, Section 229 of the NIRC as amended provides:

> "Sec. 229. Recovery of Tax Erroneously or Illegally Collected- No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or any of the penalty claimed 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 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 therefore, 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."

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To reiterate, petitioner's dates of filing its amended ITR, administrative claims with the BIR and judicial claims with this Court are summarized as follows:

	Date Filed			
Taxable Year	**Annual ITR**	**Amended Annual ITR**	**Administrative Claim**	**Judicial Claim**
2001	11-Apr-02[41]	30-Apr-03[42]	13-Apr-04[43]	14-Apr-04[44]
2002	15-Apr-03[45]	24-Apr-04[46]	13-Apr-04[47]	14-Apr-04[48]
2003	15-Apr-04[49]	15-Apr-04[50]	8-Oct-04[51]	14-Oct.-04[52]

Based from the foregoing, the administrative and judicial claims were seasonably filed by the petitioner. However, in the Amended Claim for Refund of Excess Creditable Withholding Tax[53] filed on October 8, 2004 with the RDO No. 47, petitioner included its claim for refund for 2001 and 2002. In the context of Section 229 of the Tax Code, the two year period is counted from the "date of payment of the tax" for refund or corporate tax; the two-year period should be computed from the time of actual filing of the Adjustment Return or Annual Income Tax Return. [54]

[41] Exhibit "H-3".
[42] Exhibit "H".
[43] Annex "N", Petition for Review.
[44] Petition for Review.
[45] Exhibit "P".
[46] Exhibit "O".
[47] Annex "N", Petition for Review.
[48] Petition For Review.
[49] Exhibit "U".
[50] Exhibit "T".
[51] Annex "T", Supplemental Petition for Review, p. 328.
[52] Supplemental Petition for Review.
[53] Exhibit "X".
[54] Vitug, Jose et. al, Tax Law and Jurisprudence, Second Edition, Quezon City, July 2002, p. 316.

In the case at bar, the two-year period should be reckoned from the date of filing the Amended Return for 2001, i.e. April 30, 2003. Thus, the claim for refund for year 2001 was filed within the prescriptive period.

The second requirement was fulfilled through the Certificates of Creditable Taxes Withheld at Source submitted by the petitioner as part of its documentary evidence to this Court. These constitute proof that there are creditable withholding taxes in the name of the petitioner. The aggregate amount of P35,934,198.60 represent the creditable taxes withheld from the twenty-one (21) tax certificates[55] submitted by the petitioner and reflected in the report of the independent CPA, to wit:

Taxable Year 2000

Reference Exhibit	*Period Covered*	*Total Income Payments (Php)*	*Tax Rate*	*Tax Withheld (Php)*
"A-3"	01/01/00-03/31/00	10,100,000.00	5%	505,000.00
"A-4"	04/01/00-06/30/00	53,799,493.08	5%	2,689,974.65
"B-3"	07/01/00-09/30/00	23,480,009.45	5%	1,174,000.47
"C"	10/01/00-12/31/00	33,927,421.00	5%	1,696,371.05
Total		121,306,923.53		**6,065,346.17**

Taxable Year 2001

Reference Exhibit	*Period Covered*	*Total Income Payments (Php)*	*Tax Rate*	*Tax Withheld (Php)*
"J-3"	01/01/01-03/31/01	30,805,441.56	5%	1,540,272.08
"AA"	07/01/0109/30/01	10,083,240.94	5%	504,162.31
"G-3"	07/01/01-09/30/01	73,500.00	5%	3,675.00
"G-4"	07/01/01-09/30/01	6,149,499.60	5%	307,475.25
"G-5"	07/01/01-09/30/01	426,300.00	5%	21,315.00
"J-6"	07/01/01-09/30/01	20,024,245.34	5%	1,001,212.27
"JJ"	10/01/01-12/31/01	1,697,796.00	10%	169,779.60
"J-5"	10/01/01-12/31/01	5,564,864.35	10%	556,486.44
"J-4"	10/01/01-12/31/01	7,397,891.34	5%	369,894,57
Total		82,222,779.13		**4,474,272.52**

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[55] Exhibit "II".

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Taxable Year 2002

Reference Exhibit	*Period Covered*	*Total Income Payments (Php)*	*Tax Rate*	*Tax Withheld (Php)*
"I-3"	01/01/02 03/30/02	35,005,343.62	10%	3,500,534.36
"I-4"	01/01/02-03/31/02	392,000.00	10%	39,200.00
"O-4"	01/01/02-03/31/02	73,999,728.70	10%	7,399,972.87
"M-3"	07/01/02-09/30/02	65,155,630.94	10%	6,515,563.09
"O-3"	10/01/02-12/31/02	19,842,547.60	10%	1,984,254.76
Total		194,395,250.86		**19,439,525.08**

Taxable Year 2003

Reference Exhibit	*Period Covered*	*Total Income Payments (Php)*	*Tax Rate*	*Tax Withheld (Php)*
"R-3"	01/01/03-03/31/03	53,029,091.70	10%	5,302,909.17
"S-4"	04/01/03 06/30/03	13,670,264.10	10%	1,367,026.41
"S-3"	07/01/0- 09/30/03	9,814,903.00	10%	981,490.30
Total		76,514,258.80		**7,651,425.88**

As regards the third requirement, Section 32 of the NIRC defines gross income as all income derived from whatever source, including (but not limited to) the following items:

"Sec. 32. Gross Income-

(A) General Definition.- xxx

(1) Compensation from services in whatever form paid, including, but not limited to fees, salaries, wages, commissions, and similar items;

xxx"

After verifying the information in the Amended Income Tax Returns for the years 2001, 2002 and 2003 and after looking through the independent CPA Report, this Court found that the taxes withheld by Maynilad from petitioner's income were included as part of the gross income declared in the petitioner's ITR. Thus, the third requirement is fulfilled.

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From the above discussion, petitioner appears to be fully entitled to the refund of its unutilized creditable withholding taxes. However, there are laws that the petitioner must comply with since it ceased its operations in 2003[56], to wit:

a. Section 52 (C) of the NIRC:

> "Sec. 52. Corporation Returns.
>
> (A) Requirements.- xxx
>
> (C) Return of Corporation Contemplating Dissolution or Reorganization – Every corporation shall, within thirty (30) days after the adoption of a resolution or plan for its dissolution, or for the liquidation of the whole or any part of the capital stock, including a corporation which has been notified of possible involuntary dissolution by the Securities and Exchange Commission, or for its reorganization, render a correct return to the Commissioner, verified under oath, setting forth the terms of such resolution or plan and such other information as the Secretary of Finance, upon recommendation of the Commissioner, shall, by rules and regulations prescribe.
>
> The dissolving or reorganizing corporation shall, prior to the issuance of the Securities and Exchange Commission of the Certificate of Dissolution or Reorganization, as maybe defined by rules and regulations prescribed by the Secretary of Finance, upon recommendation of the Commissioner, secure a **tax clearance** from the Bureau of Internal Revenue which certificate shall be submitted to the Securities and Exchange Commission." (Emphasis supplied)

b. Section 235 of the NIRC:

> "Sec. 235. Preservation of Books of Accounts and Other Accounting Records.- xxx

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[56] *SMI-ED Philippines Landholdings, Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 6649, April 4, 2006.

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> All corporations, partnerships or persons that retire from business shall, within ten (10) days from the date of retirement or within such period of time as may be allowed by the Commissioner in special cases, submit their books of accounts, including the subsidiary books and other accounting records to the Commissioner or any of its deputies for examination, after which they shall be returned. Corporations and partnership contemplating dissolution must notify the Commissioner and **shall not be dissolved until cleared of any tax liability** xxx."(Emphasis supplied)

To simplify, a corporation seeking dissolution must first notify the Commissioner of its intention and secure a tax clearance. The rationale behind this requirement is to ensure that no corporation may escape payment of taxes and other liabilities to the government simply by opting to dissolve the corporation and retire from business or reorganize its business. [57]

However, petitioner alleged that it is a joint venture company and was established to carry out engineering consultancy services for Maynilad, its sole client. On the other hand, respondent specifically denied in her Answer that petitioner is a joint venture.

A joint venture is defined in Section 22(B) of the Tax Code which reads as follows:

"SECTION 22. Definitions. — When used in this Title:

(A) xxx

(B) The term 'corporation' shall include partnerships, no matter how created or organized, joint-stock companies, joint accounts (*cuentas en participacion*), associations, or

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[57] *Lotus Software (Philippines) vs. Commissioner of Internal Revenue*, CTA Case No. 6673, May 18, 2005.

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> insurance companies, but does not include general professional partnerships and a joint venture or consortium formed for the purpose of undertaking construction projects or engaging in petroleum, coal, geothermal and other energy operations pursuant to an operating or consortium agreement under a service contract with the Government. 'General professional partnerships' are partnerships formed by persons for the sole purpose of exercising their common profession, no part of the income of which is derived from engaging in any trade or business.
>
> xxx"

Based from the aforementioned definition of a joint venture, it is formed for the purposed of undertaking construction or engaging in petroleum. The petitioner in this case was not formed for any of these two purposes but for consultancy and engineering services. Further, petitioner is referred to as a corporation duly organized and existing under and by virtue of Philippines laws, which is duly incorporated in the Joint Stipulation of Facts and Issues, hence it can only be surmised that petitioner is a corporation required to comply with the laws for effective dissolution.

Records show that petitioner merely presented its (1) Secretary's Certificate of the Resolution[58] passed by the Board of Directors and approved by the shareholders of the corporation; (2) BIR Form No. 1905[59] to prove that the petitioner filed an application for cessation of registration and change in its registered address; and (3) Notice of Cancellation of Registration addressed to the Bureau of Internal Revenue[60] to this Court.

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[58] Exhibit "GG-2".
[59] Exhibit "GG".
[60] Exhibit "GG-1".

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It should be noted that these documents are not in the requirements set forth by the aforementioned provisions. Needless to say, the only requirement is a tax clearance duly issued by the Bureau of Internal Revenue which petitioner was not able to provide. Notwithstanding the presence of the documents presented by petitioner, this Court cannot ascertain if petitioner settled all its liabilities to be entitled for a refund.

Nonetheless, this merely prevents petitioner from claiming the amount of taxes withheld for the year 2002. In petitioner's original return, it exercised the option "to be carried-over as tax credit next year/quarter." Although its Annual ITR for the year 2003 does not show utilization of carried-over taxes, this does not prevent petitioner from claiming the amount if it continued its operations in 2004.

Petitioner amended its 2002 return in which it crossed the box "to be issued a tax credit certificate."[61] Still, the Supreme Court once ruled that the option to amend does not extend to changing a taxpayer's chosen option to carry-over its unutilized excess income taxes or to refund the same. To permit otherwise would render Section 76 ineffectual.[62] Therefore, petitioner is not entitled to a refund for the year 2002 in the amount of P17,968,690.00.

As regards the claims for 2001 and 2003, petitioner is not precluded thereto. Petitioner did not choose any option in its original returns for 2001 and 2003 but crossed "to be issued a tax credit certificate" in its amended return for

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[61] Exhibit "O".

[62] *Subic Bay Distribution, Inc. vs Commissioner on Internal Revenue*, CTA Case No. 6630, November 3, 2004.

2001 and "to be refunded" in its amended return for 2003. Having chosen as such, there is no danger of subsequent utilization should petitioner continue operations after 2004. In addition, although there was partial utilization of excess income tax for the year 2001 in the year 2002, the claim with respect to the unutilized portion subsists.

The BIR can only issue a certificate of tax clearance when a taxpayer had completely paid off his tax liabilities. The certificate of tax clearance attests that the taxpayer no longer has any outstanding tax obligations to the government.[63] Moreover, no certificate from the Securities and Exchange Commission was presented approving its dissolution. The only requirement laid down by the 1997 NIRC for corporations contemplating cessation of business operations or dissolution opting for refund is the tax clearance duly issued by the BIR. To grant the claim of the petitioner for the year 2002 absent the tax clearance would put the government in a most disadvantageous position considering that it can no longer run after a non-existing corporation.[64]

In view of the foregoing, the aggregate amount that should be considered to be refunded to the petitioner is computed as follows:

Creditable Tax for 2001	P1,771,494.00
Add: Creditable Tax for 2003	7,651,426.00
Total Amount for Refund	**P 9,422,920.00**

[63] BIR-SEC Regulations No.1, Regulations to Implement the Provisions of EO No. 1026, Amending Section 52 (c) of the NIRC, as amended, Requiring Dissolving Corporations to File Information Returns and Secure Tax Clearance from the Commissioner of Internal Revenue, and Providing Adequate Penalties for Violations Thereof.

[64] *SMI-ED Philippines Landholdings, Inc. vs Commissioner of Internal Revenue,* CTA Case No. 6649, April 4, 2006.

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WHEREFORE, the instant Petition for Review is **PARTIALLY GRANTED.** Respondent is hereby required to refund to petitioner the reduced amount of **NINE MILLION FOUR HUNDRED TWENTY TWO THOUSAND NINE HUNDRED TWENTY PESOS (9,422,920.00)**.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

C E R T I F I C A T I O N

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division