Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

AXIA POWER HOLDINGS PHILIPPINES CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 1203
(CTA CASE NO. 8092)

Present:

DEL ROSARIO, *P.J.*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS *and*
RINGPIS-LIBAN, *J.J.*

Promulgated:

DEC 02 2015 11:40am

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DECISION

Ringpis-Liban, *J*.:

For Decision of this Court *En Banc* is a Petition for Review filed by petitioner on August 27, 2014 ("Petition") under Section 3 (b), Rule 8 of the Revised Rules of the Court of Tax Appeals (CTA) seeking the reversal of the Decision dated February 25, 2014 rendered and Resolution of this Court dated July 14, 2014 rendered by this Court through its First Division in CTA Case No. 8092 and both denying petitioner's Amended Petition in said case.

The instant Petition has its roots in petitioner's claim for refund of or the issuance of a tax credit certificate for its excess creditable withholding taxes for the calendar year ended December 31, 2007.

The pertinent facts are as follows:[1]

Marubeni Energy Services Corporation ("MESC") was a corporation duly organized and existing under and by the laws of the Philippines. On December 22, 2009, the Board of Directors of MESC approved its merger with petitioner Axia Power Holdings Philippines Corporation ("APHPC"), Marubeni Pacific Energy Holdings Corporation (MPEHC) and Marubeni Pacific II Energy Holdings Corporation, with herein petitioner as the surviving entity. The merger was approved by the Securities and Exchange Commission (SEC) on March 20, 2010, which effectively dissolved MESC as a corporate entity. The Certificate of Filing of Articles and Plan of Merger dated March 29, 2010 specifically mentioned that the entire assets and liabilities of MPEHC and MESC will be transferred and aborted by the petitioner APHPC.

Respondent is the duly appointed Commissioner of Internal Revenue, vested by law with the power and authority to act and decide upon applications for refund or tax credit of excess internal revenue tax payments, and in general to enforce the provisions of the 1997 Tax Code. On April 15, 2008, MESC filed with the BIR its Annual Income Tax Return (ITR) for the Calendar Year (CY) ended December 31, 2007.

The management fees derived by MESC are subject to expanded withholding tax (EWT) pursuant to Revenue Regulations No. 2-98, as amended. MESC indicated on the face of its said Annual ITR its intention to have its unutilized withholding tax credit carried over as a tax credit for the next year. Hence, the amount of P16,370,326.00 was carried over as a tax credit to the succeeding CY 2008 including the other unutilized withholding tax credits for the year 2004 to 2006.

On April 15, 2010, MESC filed with respondent CIR a written claim for refund or issuance of tax credit certificate of the above unutilized creditable withholding taxes allegedly in accordance with Section 240(c) of the 1997 National Internal Revenue Code ("Tax Code"), as amended.[2] Likewise on April 15,

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[1] Docket, Pages 411 to 412; Pre-Trial Order (CTA Case No. 8092) – Admitted Facts, pages 2-3.

[2] Docket, Pages 411 to 412; Pre-Trial Order (CTA Case No. 8092) – Admitted Facts, pages 2-3; Petitioner's Exhibit "O", Judicial Affidavit of Witness Ivy Acosta, page 16 to 17; Petitioner's Exhibit "D", "Administrative Claim", "D-1", and "D-2".

2010, MESC sent the original Petition in CTA Case No. 8092 through registered mail.[3]

On October 15, 2010, MESC filed an Amended Petition with this Court in order to properly designate the correct petitioner as herein petitioner APHPC.[4]

After trial, this Court through its First Division denied petitioner's Amended Petition on the application of the "Irrevocability Rule" under Section 76 of the Tax Code.[5] Under the irrevocability rule, once the option to carry-over excess CWT is chosen by the taxpayer, such option shall be irrevocable for the taxable period, and a refund of excess CWT shall not be allowed.[6] Hence, upon the effectivity of the merger among MESC, MPEHC, and MPEHC II, as the absorbed corporations, and APHPC, as the surviving corporation, the rights, assets and obligations of the absorbed corporations were transferred to petitioner APHPC. Since MESC chose to carry over its excess CWT for the CY ended December 31, 2007, as shown in its 2007 ITR, petitioner, having succeeded to the rights, properties and liabilities of MESC as a result of their merger, cannot claim for a refund of MESC's excess CWT for CY ended December 31, 2007.[7]

The Court, through its First Division decided thus:[8]

> "**WHEREFORE**, premises considered, the Amended Petition for Review filed by petitioner Axia Power Holdings Philippines Corporation is hereby **DENIED** for lack of merit."

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[3] Docket, page 7, *supra*.

[4] Docket, page 151; Petitioner's Amended Petition for Review, page 1

[5] SEC. 76. *Final Adjustment Return*. Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceding calendar or fiscal year.
If the sum of the quarterly tax payments made during the said taxable year is not equal to the total tax due on the entire taxable income of that year, the corporation shall either:
(A) Pay the balance of tax still due; or
(B) Carry-over the excess credit; or
(C) Be credited or refunded with the excess amount paid, as the case may be.
In case the corporation is entitled to a tax credit or refund of the excess estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years.
Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefor.

[6] Belle Corporation v. Commissioner of Internal Revenue, G.R. No. 181298, January 10, 2011, 639 SCRA 108; Commissioner of Internal Revenue v. Mirant (Philippines) Operations Corporation, G.R. Nos. 171742 & 176165, June 15, 2011, 652 SCRA 80; Commissioner of Internal Revenue v. PL Management International Philippines, Inc., G.R. No. 60949, April 4, 2011, 647 SCRA 72.

[7] See Docket, pages 917 to 918; Decision (CTA Case No. 8092), pages 13 to 14.

[8] See Docket, page 918; Decision (CTA Case 8092), page 14.

Petitioner moved for reconsideration alleging that there is an exception to the irrevocability rule when a corporation is dissolved by either permanent cessation of business or by operation of law, i.e., merger; and contends that the effect is the same in that both lose their corporate personality; and since it is impossible for MESC to carry over its excess CWT to succeeding years since it was dissolved by merger, with herein petitioner APHPC to survive it.[9]

Deciding that no such exception exists in the case of corporations dissolved by merger, this Court through its First Division resolved the motion thus:[10]

> "**WHEREFORE**, premises considered, the "MOTION FOR RECONSIDERATION" filed on March 19, 2014 is hereby **DENIED** for lack of merit."

Hence, the instant Petition, in which petitioner assigns the following errors to this Court in denying its Amended Petition and Motion for Reconsideration in CTA Case No. 8092:11

"THE HONORABLE FIRST DIVISION ERRED –

A. IN FAILING TO RECOGNIZE THE EXCEPTION TO THE IRREVOCABILITY RULE IN THE CASE OF MESC WHICH HAD BEEN DISSOLVED;

B. IN MAKING A DISTINCTION BETWEEN DISSOLUTION BY PERMANENT CESSATION OF BUSINESS AND DISSOLUTION BY OPERATION OF LAW"

Issue

The only issue in this case is whether or not this Court erred in denying Petitioner's Amended Petition and Motion for Reconsideration in CTA Case 8092.

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[9] See Docket, page 923; Petitioner's Motion for Reconsideration dated march 27, 2014, page3.
[10] See Docket, page 22; Decision (CTA Case 8092), page 15.
11 Docket, page 33; Petiton for Review, page 8.

The Decision of this Court En Banc

This Court first looks at the allegations in the instant Petition, which reproduces the following facts also narrated in its original and amended petitions in CTA Case No. 8092:[12]

> MESC was a corporation duly organized under and by virtue of Philippine laws. It was primarily engaged in the business of operating and maintenance services.
>
> On December 22, 2009 the Board of Directors and Stockholders of MESC, MPEHC and MP2EHC approved their merger with petitioner Axia Power Holdings Philippines Corporation (Axia) with the latter as the surviving entity. The merger was approved by the Securities and Exchange Commission (SEC) on March 29, 2010, which effectively dissolved MESC as a corporate entity.
>
> On April 15, 2010, MESC filed with respondent CIR a written claim for refund or issuance of tax credit certificate of the above unutilized creditable withholding taxes allegedly in accordance with Section 240(c) of the 1997 National Internal Revenue Code ("Tax Code"), as amended.
>
> Since respondent has not acted upon MESC's claim for tax refund or tax credit certificate for its excess or unutilized creditable withholding tax for the calendar year 2007, MESC was constrained to file its judicial claim.

It is a settled rule that where lack of jurisdiction clearly appear from the pleading filed, the action may be dismissed *motu proprio* by the appellate court even if the case is for review on different grounds.[13] Moreover, jurisdiction over the subject matter is conferred by law and is determined by the allegations in the complaint and the character of the relief sought.[14]

The foregoing facts, particularly that MESC itself filed its administrative claim for refund or tax credit with respondent on April 15, 2010, give rise to a

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[12] Docket, pages 27 to 29; Petition for Review, pages pages 2 to 4.
[13] Katon vs. Palanca, et al., G.R. No. 151149, September 7, 2004.
[14] Alemars (Sibal & Sons), Inc. *v.* CA, 350 SCRA 333, 339, January 26, 2001; Gochan *v.* Young, 354 SCRA 207, 211 & 216, March 12, 2001; Saura *v.* Saura Jr., 313 SCRA 465, 472, September 1, 1999.

question of jurisdiction, namely, whether or not the Petition for Review should be dismissed for petitioner's failure to exhaust administrative remedies when it failed to comply with Section 229 of the Tax Code, which provides as follows:

> "**SEC. 229**. Recovery of Tax Erroneously or Illegally Collected. - **no suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, 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." (Emphasis supplied.)

Upon closer examination of petitioner's averments in the present Petition, as well as the Amended Petition in CTA Case No. 8092 and the evidence it presented therein, this Court finds that it must dismiss the instant Petition.

Section 80 of the Corporation Code of the Philippines provides that in a merger, the separate existence of the constituent corporations shall cease, except that of the surviving or the consolidated corporation, to wit:

> Sec. 80. *Effects or merger or consolidation.* - The merger or consolidation shall have the following effects:
>
> 1. The constituent corporations shall become a single corporation which, in case of merger, shall be the surviving corporation designated in the plan of merger; and, in case of consolidation, shall be the consolidated corporation designated in the plan of consolidation;
> 2. **The separate existence of the constituent corporations shall cease, except that of the surviving or the consolidated corporation**; (Emphasis supplied.)

A merger, however, does not become effective upon the mere agreement of the constituent corporations. The procedure to be followed is prescribed under the Corporation Code.[15] It is a long procedure, which under Section 79 of

[15] Pertinent provisions of the Corporation Code read:
"Sec. 76. *Plan of merger or consolidation.* — Two or more corporations may merge into a single corporation which shall be one of the constituent corporations or may consolidate into a new single corporation which shall be the consolidated corporation.

said Code culminates with the approval by the Securities and Exchange Commission ("SEC") of the articles of merger.[16] Significantly, Section 79 of the Corporation Code is explicit that **a merger shall be effective only upon the issuance by the SEC of a certificate of merger. The effectivity date of the merger is crucial for determining when the merged or absorbed**

The board of directors or trustees of each corporation, party to the merger of consolidation, shall approve a plan of merger or consolidation setting forth the following:

1. The names of the corporations proposing to merge or consolidate, hereinafter referred to as the constituent corporations;
2. The terms of the merger or consolidation and the mode of carrying the same into effect;
3. A statement of the changes, if any, in the articles of incorporation of the surviving corporation in case of merger; and, with respect to the consolidated corporation in case of consolidation, all the statements required to be set forth in the articles of incorporation for corporations organized under this Code; and
4. Such other provisions with respect to the proposed merger or consolidation as are deemed necessary or desirable.

Sec. 77. *Stockholders' or members' approval.* — Upon approval by a majority vote of each of the board of directors or trustees of the constituent corporations of the plan of merger or consolidation, the same shall be submitted for approval by the stockholders or members of each of such corporations at separate corporate meetings duly called for the purpose. Notice of such meetings shall be given to all stockholders or members of the respective corporations, at least two (2) weeks prior to the date of the meeting, either personally or by registered mail. Said notice shall state the purpose of the meeting and shall include a copy or a summary of the plan of merger or consolidation, as the case may be. The affirmative vote of stockholders representing at least two-thirds (2/3) of the outstanding capital stock of each corporation in case of stock corporations or at least two thirds (2/3) of the members in case of non-stock corporations, shall be necessary for the approval of such plan. Any dissenting stockholder in stock corporations may exercise his appraisal right in accordance with the Code: *Provided*, That if after the approval by the stockholders of such plan, the board of directors should decide to abandon the plan, the appraisal right shall be extinguished.

Any amendment to the plan of merger or consolidation may be made, provided such amendment is approved by majority vote of the respective boards of directors or trustees of all the constituent corporations and ratified by the affirmative vote of stockholders representing at least two-thirds (2/3) of the outstanding capital stock or two-thirds (2/3) of the members of each of the constituent corporations. Such plan, together with any amendment, shall be considered as the agreement of merger or consolidation.

Sec. 78. *Articles of merger or consolidation.* — After the approval by the stockholders or members as required by the preceding section, articles of merger or articles of consolidation shall be executed by each of the constituent corporations, to be signed by the president or vice-president and certified by the secretary or assistant secretary of each corporation setting forth:

1. The plan of the merger or the plan of consolidation;
2. As to stock corporations, the number of shares outstanding, or in the case of non-stock corporations, the number of members; and
3. As to each corporation, the number of shares or members voting for and against such plan, respectively.

[16] Sec. 79. *Effectivity of merger or consolidation.* - The articles of merger or of consolidation, signed and certified as herein above required, shall be submitted to the Securities and Exchange Commission in quadruplicate for its approval: Provided, That in the case of merger or consolidation of banks or banking institutions, building and loan associations, trust companies, insurance companies, public utilities, educational institutions and other special corporations governed by special laws, the favorable recommendation of the appropriate government agency shall first be obtained. If the Commission is satisfied that the merger or consolidation of the corporations concerned is not inconsistent with the provisions of this Code and existing laws, it shall issue a certificate of merger or of consolidation, at which time the merger or consolidation shall be effective.

If, upon investigation, the Securities and Exchange Commission has reason to believe that the proposed merger or consolidation is contrary to or inconsistent with the provisions of this Code or existing laws, it shall set a hearing to give the corporations concerned the opportunity to be heard. Written notice of the date, time and place of hearing shall be given to each constituent corporation at least two (2) weeks before said hearing. The Commission shall thereafter proceed as provided in this Code.

corporation ceases to exist; and when its rights, privileges, properties as well as liabilities pass on to the surviving corporation.[17]

The allegations in the present Petition, as well as that in the original and amended petitions in CTA Case No. 8092, all stated above, establish that MESC ceased to exist when its merger with petitioner APHPC was approved by the Securities and Exchange Commission (SEC) on March 29, 2010. This effectively dissolved MESC as a corporate entity. Nevertheless, it was MESC that filed the administrative claim on April 15, 2010, not herein petitioner APHPC the surviving corporation. This Court considers such to be fatal to petitioner's claim considering that MESC no longer had any legal personality at the time the administrative claim was filed, and no such administrative claim was filed by petitioner APHPC itself despite the plan of merger having been approved by the SEC. In other words, no administrative claim can be considered filed, thus no suit or proceeding can be maintained in any court for the recovery of the tax hereafter alleged to have been collected.

The Supreme Court has emphasized that the requirements for entitlement to the issuance of tax credit certificate involving excess withholding taxes are as follows[18]:

1. That the claim for refund was filed within the two-year reglementary period pursuant to Section 229 of the NIRC;

2. When it is shown on the ITR that the income payment received is being declared part of the taxpayer's gross income; and

3. 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 income tax withheld from that amount.

In this case, no such claim was filed by an entity with legal personality hence there is no decision or even inaction of respondent to appeal from since none was necessitated by a valid administrative claim. Consequently, the same should be dismissed for lack of jurisdiction over the subject matter over the same due to herein petitioner's failure to exhaust administrative remedies mandated by the Tax Code, which is apparent from the allegations in the instant Petition and in the original and amended petitions in CTA Case No. 8072.

To be clear, this Court recognizes that the surviving corporation in a merger shall after the merger possess all the rights, privileges, immunities and

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[17] Associated Bank v Court of Appeals, G.R. No. 123793, June 29, 1998.
[18] Republic of the Philippines represented by the Commissioner of Internal Revenue v. Team (Phils.) Energy Corporation, G.R. No. 188016, January 14, 2015.

franchises of each of the constituent corporations; and all property, real or personal, and all receivables due on whatever account, including subscriptions to shares and other choses in action, and all and every other interest of, or belonging to, or due to each constituent corporation, shall be deemed transferred to and vested in such surviving or consolidated corporation without further act or deed; such is provided under Section 80 of the Corporation Code.[19] However, the surviving corporation can only acquire or benefit from what the dissolved corporation had or did during its lifetime, not after it had become dissolved. And there is no winding up of the affairs or liquidation of the assets of a dissolved corporation in a merger, because the surviving corporation automatically acquires all its rights, privileges and powers, as well as its liabilities[20], when it existed. The fact is that MESC no longer existed when the only administrative claim alleged and proven in this case was filed. Petitioner cannot benefit from a claim of a non-entity.

This Court notes that the procedure for a merger is a long one. MESC therefore had plenty opportunity to file its claim before the certificate of merger was approved, and while it existed. This Court wonders why the administrative claim was filed in MESC's name after it ceased to exist, and more importantly said administrative claim was filed the very same day that MESC, which had already ceased to exist, posted its judicial claim by registered mail. This Court believes said acts to be indicative of negligence or bad faith. In any case, such failure gives ground for this Petition, and the amended petition before it in CTA Case No. 8092, to be dismissed for Petitioner's failure to comply with Section 229 of the Tax Code.

One more distressing finding is that MESC's original petition was verified by certain Ryukichi Kawaguchi who alleged himself to be the president of MESC

[19] Sec. 80. *Effects or merger or consolidation.* - The merger or consolidation shall have the following effects:
1. The constituent corporations shall become a single corporation which, in case of merger, shall be the surviving corporation designated in the plan of merger; and, in case of consolidation, shall be the consolidated corporation designated in the plan of consolidation;
2. The separate existence of the constituent corporations shall cease, except that of the surviving or the consolidated corporation;
3. The surviving or the consolidated corporation shall possess all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Code;
4. The surviving or the consolidated corporation shall thereupon and thereafter possess all the rights, privileges, immunities and franchises of each of the constituent corporations; and all property, real or personal, and all receivables due on whatever account, including subscriptions to shares and other choses in action, and all and every other interest of, or belonging to, or due to each constituent corporation, shall be deemed transferred to and vested in such surviving or consolidated corporation without further act or deed; and
5. The surviving or consolidated corporation shall be responsible and liable for all the liabilities and obligations of each of the constituent corporations in the same manner as if such surviving or consolidated corporation had itself incurred such liabilities or obligations; and any pending claim, action or proceeding brought by or against any of such constituent corporations may be prosecuted by or against the surviving or consolidated corporation. The rights of creditors or liens upon the property of any of such constituent corporations shall not be impaired by such merger or consolidation.

[20] Associated Bank v. Court of Appeals, G.R. No. 123793, June 29, 1998.

on April 15, 2010.[21] There was however no corresponding Board Resolution or Secretary's Certificate attached to MESC's petition that would evidence Kazunobu's authority to sign said petition, as there could not be since the merger was approved by the SEC on March 29, 2010 and effectively dissolved MESC as a corporate entity. Moreover, even the Amended Petition was signed by Kazunobu Takijima as late as October 15, 2010.[22] On the other hand, the Secretary's Certificate that accompanied the Amended Petition was executed by the Corporate Secretary of petitioner APHPC authorizing only the officers of APHPC to sign the Amended Petition, and in particular Mr. Naoto Tago its "President"[23]; Kazunobu was not authorized to sign the same. The absence of any valid verification violates Rule 6, Section 2 of the Rules of the Court of Tax Appeals[24] and is again ground to dismiss said petition.

WHEREFORE, the instant "Petition for Review" is hereby **DISMISSED**; the petition filed in CTA Case No. 8092 is likewise dismissed for petitioner's failure to exhaust administrative remedies.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO with separate concurring opinion
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

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[21] Docket, page 6.
[22] Docket, page 157.
[23] Docket, page 246.
[24] RULE 6 PLEADINGS FILED WITH THE COURT xxx xxx xxx
SEC. 2. *Petition for review; contents.* – The petition for review shall contain allegations showing the jurisdiction of the Court, a concise statement of the complete facts and a summary statement of the issues involved in the case, as well as the reasons relied upon for the review of the challenged decision. The petition shall be verified and must contain a certification against forum shopping as provided in Section 3, Rule 46 of the Rules of Court. A clearly legible duplicate original or certified true copy of the decision appealed from shall be attached to the petition.

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII 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.

ROMAN G. DEL ROSARIO
Presiding Justice

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RINGPIS-LIBAN, *JJ.*

Promulgated:
DEC 02 2015 11:40am

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SEPARATE CONCURRING OPINION

DEL ROSARIO, PJ.:

I concur with the *ponencia* in dismissing the present Petition for Review but on a different ground for lack of merit and not on the ground of lack of jurisdiction for failure to exhaust administrative remedies.

In dismissing the Petition for Review filed in CTA Case No. 8092 on the ground of lack of jurisdiction for petitioner's failure to exhaust administrative remedies, the *ponencia* disregarded the administrative claim for refund filed by Marubeni Energy Services Corporation (MESC), one of the absorbed corporations. The *ponencia* stressed that as the plan of merger was approved by the Securities and Exchange Commission (SEC) on March 29, 2010, MESC, as an absorbed corporation, had ceased to exist and accordingly had no more legal personality to file the administrative claim for refund.

Pursuant to Section 235 of the National Internal Revenue Code (NIRC) of 1997, as amended, a dissolved corporation (by operation of law through a merger) is not considered dissolved for tax purposes unless and until the Bureau of Internal Revenue (BIR) has issued a tax clearance, *viz*:

> "Sec. 235.**Preservation of Books and Accounts and Other Accounting Records**. – xxx
>
> xxx xxx xxx
>
> *(e)* xxx. Corporations and partnerships contemplating dissolution must notify the Commissioner and **shall not be dissolved until cleared of any tax liability**."

It is patent from the afore-quoted provision that a corporation may not be considered dissolved until a tax clearance from the BIR is issued in its favor.

In the case at bar, a perusal of the records shows that the administrative claim filed by MESC on April 15, 2010 is incorporated in an application for cancellation of TIN and issuance of tax clearance certificate with a claim for refund of excess input value added tax (VAT) and creditable withholding tax (CWT). MESC's application is plainly in compliance with the provisions of Section 235 of the NIRC of 1997, as amended. Needless to say, MESC has a legal personality to file such application in order to dissolve its corporate existence, specifically for tax purposes. Otherwise stated, at the time MESC filed its application for cancellation of TIN, issuance of tax clearance and claim for refund, it is not yet a dissolved corporation, as contemplated under Section 235 of the NIRC of 1997, as amended.

It must be noted that the claim for tax refund of excess CWT was anchored pursuant to *Commissioner of Internal Revenue v. Financial Marketing Services Corporation (FMSC case),*[1] wherein the CTA *En Banc* granted the claim for refund of excess CWT of a dissolved corporation, *viz:*

> "In view of the foregoing undisputed facts, the Court en banc concurs with the Court in Division's ruling that the refund in the total amount of P35,681,956.00 representing FMSC's excess income tax payments for the year 1999 is proper considering that 'there is no possible

[1] CTA EB Case No. 159, July 19, 2007.

> way by which petitioner can utilize the excess payment because petitioner will no longer incur future income tax liability.'
>
> As explained by the Supreme Court, the rationale behind the irrevocability of the option chosen by the taxpayer is to prevent a taxpayer from getting a tax refund and a tax credit at the same time for the same excess income taxes paid. **FMSC had sufficiently proven that it will not be able to apply its excess income tax payments to any future income tax liabilities on account of its corporate dissolution, hence, the danger sought to be avoided by the irrevocability option has been totally eliminated. Considering that the danger of double utilization of a single tax payment, a claim for tax refund and at the same time a carry-over of excess tax credits, does not exist anymore due to the dissolution of its corporate existence, FMSC is entitled to be refunded of a portion of its total unapplied excess income tax payments which is not yet barred by prescription.**" *(Emphasis supplied)*

It is in this context that MESC, as the dissolved corporation due to merger, filed its administrative claim for refund of unapplied CWT together with the application for the cancellation of TIN and issuance of tax clearance.

I, therefore, find it unnecessary for petitioner to file an administrative claim for refund in this case considering that the absorbed corporation, MESC, had already filed one. With the filing of the administrative claim for refund by MESC in this case, petitioner, which acquired the rights of MESC, is deemed to have exhausted administrative remedies.

Nonetheless, even if petitioner has exhausted administrative remedies, its claim for refund must still be denied as opined in the assailed decision:

> "**Upon the effectivity of the merger among MESC, MPEHC and MPEHC II as the absorbed corporations and petitioner Axia as the surviving corporation, the rights, assets and obligations of the absorbed corporations were transferred to petitioner Axia which shall continue the combined business.** The excess CWT of MESC, being a prepaid tax asset, was transferred to petitioner Axia by operation of law, as a necessary consequence of the merger. **Since MESC has chosen to carry over its excess CWT for CY ended December 31, 2007, as shown in its 2007 Annual ITR, petitioner Axia, having succeeded to the rights, properties and liabilities of MESC, cannot now claim for a refund of MESC's excess CWT for CY ended December 31, 2007.**" *(Emphases supplied)*

All told, I **VOTE** to **DISMISS** the present Petition for Review for lack of merit and maintain the denial of petitioner's claim for refund for reasons stated in the assailed decision.

ROMAN G. DEL ROSARIO
Presiding Justice