Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

LOTUS SOFTWARE (PHILIPPINES), INC.,
Petitioner,

C.T.A. CASE NO. 6673

- versus -

Members

Castañeda, Jr., *Chairman*
Uy, and
Palanca-Enriquez, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

MAY 18 2005 *grApolinario*

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DECISION

UY, *J.*:

The instant petition for review filed by petitioner Lotus Software (Philippines), Inc. against respondent Commissioner of Internal Revenue, involves a claim for refund or for the issuance of a tax credit certificate in the amount of Seven Million Nine Hundred Thousand Three Hundred Forty Six Pesos (P7,900,346.00), allegedly representing petitioner's overpaid income taxes for the taxable years 2000 and 2001.

The Facts

Petitioner is a corporation organized and existing under the laws of the Philippines with office address at the 2nd -4th Floors, IBM Plaza, Eastwood City, Cyber Park, Libis, Quezon City. It is engaged in the business of providing software services. Respondent, on the other hand, is the duly appointed Commissioner of the Bureau of Internal Revenue empowered, among others, to act on and approve claims for refund or tax credit, with office address at BIR National Office Building, Diliman, Quezon City.

On April 18, 2001, petitioner filed a Tentative Annual Income Tax Return for the taxable year 2000 reflecting a net loss of P5,236,933.00.

On February 7, 2002, petitioner filed its Final (Amended) Annual Income Tax Return for taxable year 2000, this time reflecting a net loss of P7,935,188.00 and an income tax overpayment in the amount of P7,852,887.00, computed as follows:

Sales Revenues/Receipts	P 65,099,109.00
Less: Cost of Sales	50,575,262.00
Net Income from Operation	P 14,523,847.00
Add: Non-Operating & Other Income	811,997.00
Total Gross Income	P 15,335,844.00
Less: Deductions	23,271,032.00
Taxable Income	P (7,935,188.00)
Income Tax Due	P -
Less: Tax Credits/Payments	
Prior Year's Excess Credit	-
Tax Payments for the First Three Quarters	P 6,903,569.00
Creditable Tax Withheld for the First Three Quarters	-
Creditable Tax Withheld Per BIR Form 2307 for the Fourth Quarter	949,318.00
Total Tax Credits/Payments	P 7,852,887.00
Tax Payable/(Overpayment)	**P(7,852,887.00)**

Petitioner opted to carry over the P7,852,887.00 excess tax credit/payments as shown under Item 31 thereof *(Exhibit D)*.

For the taxable 2001, petitioner claims that it was not able to utilize its prior year's excess tax credits/payments of P7,852,887.00 as it again suffered a net loss. In its Final (Amended) Annual Income Tax Return for taxable year 2001 filed on March 28,

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2003, petitioner reflected a nil income tax due and an income tax overpayment in the amount of P7,900,346.00, computed as follows:

Sales Revenues/Receipts	P 7,291,743.00
Less: Cost of Sales	7,823,245.00
Net Income from Operation	P (531,502.00)
Add: Non-Operating & Other Income	22,372,954.00
Total Gross Income	P 21,841,452.00
Less: Deductions	21,841,452.00
Taxable Income	P -
Income Tax Due	P -
Less: Tax Credits/Payments	
Prior Year's Excess Credit	P 7,852,887.00
Tax Payments for the First Three Quarters	
Creditable Tax Withheld for the First Three Quarters	47,459.00
Creditable Tax Withheld Per BIR Form 2307 for the Fourth Quarter	
Total Tax Credits/Payments	P 7,900,346.00
Tax Payable/(Overpayment)	**P(7,900,346.00)**

On April 11, 2003, petitioner filed a formal claim for refund with respondent, through Revenue District Office No. 40 of the Bureau of Internal Revenue ("BIR"), seeking the refund of the amount of P7,900,346.00 allegedly representing alleged overpaid income taxes for taxable years 2000 and 2001. Respondent has not yet finally acted upon this claim.

In order to toll the running of the two-year prescriptive period allowed under Section 229 of the National Internal Revenue Code of 1997, the instant Petition for Review was filed on April 15, 2003.

The Issues

This Court is tasked to resolve the following issues stipulated by the parties:

1. Whether or not Petitioner has complied with the prescribed requirements under Sections 204 and 229 of the National Internal Revenue Code (NIRC) of 1997.

2. Whether or not Petitioner is entitled to the refund of overpaid income taxes for taxable years 2000 and 2001.

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Petitioner's Claims

Relative to the first issue, petitioner asserts full compliance with the provisions of Sections 204 and 229 of the 1997 National Internal Revenue Code (NIRC) which require the filing of both the administrative claim for refund with the Commissioner of Internal Revenue, and the judicial claim for refund with this Court, within two (2) years from the date of payment of taxes.

To bolster its claim, petitioner cites the rulings of the Supreme Court in the cases of ACCRA Investments Corporation v. Commissioner of Internal Revenue, (204 SCRA 957, 1991) and Commissioner of Internal Revenue v. TMX Sales, Inc. (205 SCRA 184,1992) which held that the two-year prescriptive period within which to claim a refund commences to run, at the earliest, on the date of filing of the final adjustment return.

Anent the second issue, petitioner contends that Sections 58(D) and 76 of the 1997 NIRC and Section 2.58.3 of Revenue Regulations No. 2-98, as amended, clearly authorize the refund of the excess of the amount of tax withheld over the actual income tax computed and shown in the adjustment or final corporate income tax return; that in the event of an overpayment, the taxpayer can either carry over the excess tax credit, be credited or refunded with the excess amount of tax paid by marking the appropriate box in Item 31 of the Annual Income Tax Return. Furthermore, petitioner submits that although Section 76 of the 1997 NIRC provides that once the election is made, the option chosen is irrevocable, and that while it opted to carry over its year 2000 excess credits/payments to the succeeding year, it was no longer in a position to apply/utilize the same on account of cessation of its business. Consequently, the excess tax credits/payments in the aggregate amount of P7,900,346.00 should be refunded as provided for by law.

Respondent's Defenses

Respondent, through counsel, raised the following Special and Affirmative Defenses in its Answer:

1. The claim for refund is still under examination by the respondent's Bureau;

2. The burden of proof is upon the petitioner to prove that it is entitled to the claim for refund;

3. The grant of the claim for refund tantamount [*sic*] to an exemption from taxation which is construed strictly against the claimant and in favor of the taxing authority;

4. The taxes sought to be refunded were paid in accordance with law; the burden of proof to the contrary is upon the petitioner-claimant to show with clear and unambiguous provision of law supporting the same *(Rollo, p. 41)*.

This Court's Ruling

On the first issue of whether petitioner has complied with the requirements set forth under Sections 204 and 229 of the National Internal Revenue Code, these provisions pertain to the timeliness of this petition. Said provisions read:

> "**SEC. 204**. *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may --
>
> "(A) x x x
>
> "(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. <u>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:</u> *Provided, however*, That a return filed showing an overpayment shall be considered as a written claim for credit or refund." *(Underscoring supplied)*

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> "**SEC. 229.** *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery 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, 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 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." *(Underscoring supplied)*

In the case at bar, the two-year prescriptive period for filing a claim for refund commences to run on the date of filing of the 2000 and 2001 Annual Income Tax Returns on April 18, 2001 and April 15, 2002, respectively. The written claim for refund having been filed with the Bureau of Internal Revenue on April 11, 2003 and the instant Petition for Review with this Court on April 15, 2003, Sections 204 and 229 of the NIRC have been appropriately complied with.

With respect to the second issue as to whether petitioner is entitled to the refund of allegedly overpaid income taxes for the taxable years 2000 and 2001, the Court rules to deny the instant claim.

When petitioner filed its tentative income tax return for the year 2000 on April 18, 2001, it reflected a net loss of P5,236,933.00 but it did not indicate its choice of option in any of the option boxes indicated in Item 31 of said return *(Annex "A" of petition, Rollo, p. 13)*. However, when it amended the same on February 7, 2002 to declare an increased net loss of P7,935,188.00 under Item 20 of said return, it signified under Item No. 31, its option "to carry over the excess credits/payments to the succeeding taxable quarter/year" (*Exhibit "D", Rollo, p. 98)*. On April 15, 2002, petitioner filed its tentative income tax return for the year 2001 reflecting no taxable

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income, and it did not indicate any option under Item No. 31 of said return (*Exhibit "J", Rollo, p. 140*).

In its Final Amended Annual Income Tax Return for 2001 filed on March 28, 2003, it reflected under prior year's excess credits found in Item 26A, the amount of P7,852,887.00, and further, it marked the option "to be refunded" under Item 31 of said return *(Exhibit K, Rollo, p. 144).* On April 15, 2003, petitioner filed its Amended Annual Income Tax Return for the year 2002 showing that did it not carry over its prior year's excess tax credits/payments (*Exhibit "N", Rollo, p. 164).*

Based on the returns presented in evidence, it appears that petitioner's total claim for refund in the amount of P7,900,346.00 consists of the following: its alleged income tax overpayment for the year 2000 in the amount of P 7,852,887.00 *(Exhibit "D")* and its Creditable Tax Withheld for the First Three Quarters for the year 2001 amounting to P47,459.00 *(Exhibit "K").*

Petitioner maintains that Sections 58(D) and 76 of the 1997 NIRC and Section 2.58.3 of Revenue Regulations No. 2-98, as amended, clearly authorize the refund of the excess of the amount of tax withheld over the actual income tax computed and shown in the adjustment or final corporate income tax return, all quoted hereunder for easy reference:

> "***SEC. 58. Returns and Payment of Taxes Withheld at Source.*** –
>
> x x x x
>
> (D) *Income of Recipient*- Income upon which any creditable tax is required to be withheld at source under Section 57 shall be included in the return of its recipient but the excess of the amount of tax so withheld over the tax due on his return shall be refunded to him subject to the provisions of Section 204; if the income tax collected at source is less than the tax due on his return, the difference shall be paid in accordance with the provisions of Section 56."
>
> "**SEC. 76. *Final Adjustment Return*** – Every corporation liable to tax under Section 27 shall file a final adjustment return covering

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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 therefore (emphasis supplied).** ”

"Revenue Regulation No. 2-98:

SEC. 2.58.3. ***Claim for Tax Credit or Refund-***

(A) The amount of creditable tax withheld shall be allowed as a tax credit against income tax liability of the payee in the quarter of the taxable year in which income was earned or received.

(B) Claims for tax credit or refund of any creditable income tax which was deducted and withheld on income payment shall be given due course only when it is shown that the income payment has been declared as part of the gross income and 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.

Proof of remittance is the responsibility of the withholding agent.

(C) Excess Credits – An individual or corporate taxpayer's excess expanded withholding tax credits for the taxable quarter/year shall automatically be allowed as a credit against his income tax due for the taxable quarters/years immediately succeeding the taxable quarters/years in which the excess credits arose, provided he submits with his income tax return, a copy of the first page of his income tax return for the previous taxable period showing the amount of excess withholding tax credits, and on which return he has not opted for a cash refund or tax credit certificate.

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> (1) If in lieu of the automatic application of his excess credit, the taxpayer wants a cash refund or a tax credit certificate for use in payment of his other national internal revenue tax liabilities, he shall make a written request therefor, with two years after the payment of the tax (Ref. Sec. 204 (c) and 229 of the Code), provided however, that if the taxpayer has indicated in his income tax return his option for either a cash refund or a tax credit certificate, such indication shall be considered sufficient for the purpose. Upon filing of his request, the taxpayer's income tax return showing the excess expanded withholding tax credits shall be examined. The excess expanded withholding tax so determined, shall be refunded/credited to the taxpayer."

Strictly applying Section 76 above quoted, it appears that petitioner can no longer claim for a refund of the said amount of P7,852,887.00 because it already opted to carry over the same to the succeeding taxable quarter/year. Owing to the circumstances in this case however, *i.e.*, petitioner's alleged cessation of office effective January 2, 2002, the issue that confronts this Court is whether petitioner should be barred from filing this claim for refund for its excess income tax payments on the ground that it opted in its Amended Income Tax Return for the taxable year 2000 filed on February 7, 2002, to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years.

As clearly proscribed under the last sentence of Section 76, once the option to carry-over 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.

It is petitioner's submission that the cessation of its business operations from January 2002, will not allow it to utilize its 2000 income tax overpayments and 2001 creditable withholding tax payments by way of carrying over and applying the same against income tax due for the taxable quarters of the succeeding taxable years. And to prove its claim, petitioner presented the following: (1) the report of Independent Accountants, Joaquin Cunanan & Co., attached to the audited financial statements dated November 25, 2002 *(Exhibit L)*; (2) Board Resolution signed October 21, 2003 where the

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company's directors resolved to dissolve the corporation *(Exhibit Q)*. (3) Testimony of Ms. Ruth Chuaunsu on February 23, 2005 and (4) petitioner's Application for Tax Clearance filed with the BIR February 16, dated 2004 *(Exhibit R)*.

But these documents together with the income tax returns and certificates of creditable taxes withheld at source are not sufficient to prove petitioner's entitlement of the amount sought for.

The Court notes that the person who signed the Report of Independent Accountants from the firm Joaquin Cunanan & Co. dated November 25, 2002, a certain Blesilda A. Pestaño, was not presented in court to affirm and confirm the veracity of the statements contained therein *(Rollo, pp. 140-151)*. In said Report, it was stated, among others, that "the Board of Directors of the Company in its October 26, 2001 meeting, approved the cessation of operations of the Company effective January 2, 2002, **until such time that the Stockholders deem it appropriate to resume business operations**. Pending such determination, the Company shall remain in dormant or inactive status". The phrase "until such time that the Stockholders deem it appropriate to resume business operation" indicates that the cessation of operations of petitioner is not permanent, and that it was to remain dormant or in inactive status pending determination by the stockholders to resume its business operations. Thus, the stockholders have the discretionary option to resume business operations should they deem it appropriate to do so in the future.

Cessation means a temporary or final ceasing or discontinuance (as of action), inactivity or idleness *(Webster's Third World International Dictionary)*. In business therefore, it can either be a temporary or a final ceasing or discontinuance of business operations. From the foregoing, it can be gathered that a mere cessation of operation does not preclude the corporation from returning to business.

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Distinguished from the dissolution of a corporation, dissolution signifies the extinguishment of its franchise and the termination of its corporate existence for business purpose. The mere fact that the corporation has ceased to do business does not necessarily constitute a dissolution *(Villanueva, Philippine Corporate Law, 2001 Ed, p. 671)*. It denotes the complete destruction of the corporation and within contemplation of the law, is equivalent to its death, being sometimes likened to the death of a natural person." *(De Leon, Corporation Code of the Philippines, Annotated, 2002 Ed., p. 727).*

Section 122 of the Corporation Code provides for two legal steps in corporate dissolution. First, the termination of the corporate existence at least as far as the right to go on doing ordinary business is concerned; and second, the winding up of its affairs, *the payment of its debts,* and the distribution of its assets among the shareholders or members and other persons interested. After the winding-up, the existence of the corporation is terminated for all purposes *(De Leon, supra, pp. 728-729).*

In the instant case, what transpired was the purchase of petitioner's assets and liabilities (except tax liabilities) by IBM. Petitioners operations were integrated with that of IBM's. In view of this integration, petitioner ceased operation *(Petitioner's Memorandum, par. 7, Rollo p. 187).* Granting that IBM indeed purchased the assets of petitioner, no evidence was presented to prove that petitioner did actually cease its operation thereafter. Noticeably, the Board Resolution for the dissolution and liquidation of petitioner corporation was passed and approved only on April 30, 2003 or about two (2) years after the claimed cessation of operations, and a few days after this Petition for Review was filed on April 15, 2003, giving it little evidentiary value and support to petitioner's claim in this case.

More importantly, Sections 52 (c) and 235 of the 1997 NIRC require:

SEC. 52. Corporation Returns.- xxx

xxx xxx xxx

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> **(C) Return of the Corporation Contemplating Dissolution or Reorganization.–** Every corporation shall, within thirty (30) days after the adoption by the corporation of a resolution or plan for its dissolution; or for the liquidation of the whole or any part of its 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 by the Securities and Exchange Commission of the Certificate of Dissolution or Reorganization, xxx, **secure a certificate of tax clearance from the Bureau of Internal Revenue** which certificate shall be submitted to the Securities and Exchange Commission.
>
> **SEC. 235. Preservation of Books of Accounts and Other Accounting Records.-** xxx
>
> (a) xxx
> (b) xxx
> (c) xxx
> (d) xxx
> (e) xxx 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 book of accounts xxx to the Commissioner or any of his deputies for examination, after which they shall be returned. **Corporations and partnerships contemplating dissolution must notify the Commissioner and shall not be dissolved until cleared of any tax liability**. *(Emphasis supplied)*

The rationale behind these Sections is to insure 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.

In this case, petitioner failed to prove that it was cleared from any tax liability as required by Sec. 235. Petitioner merely presented its Application for Tax Clearance dated February 16, 2004. Needless to state, an application differs from an approval thereof. Thus, this application is not the tax clearance referred to by the law. Absent this clearance from the Bureau of Internal Revenue this Court cannot ascertain if indeed petitioner has already paid all its tax liabilities to entitle it to the refund claimed in this

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case. In fact, petitioner failed to present the certificate from the Securities and Exchange Commission approving its dissolution.

To grant the refund being claimed by petitioner without indubitable proof that it has been cleared of any and all tax liabilities would put the government in a most disadvantageous position considering that it can no longer run after a non-existing corporation.

Tax refunds are in the nature of tax exemptions. The same are regarded as in derogation of sovereign authority and shall be construed *strictissimi juris* against the person claiming such exemption. In terms of evidence, the taxpayer has the burden of proving that it is entitled to the claim for refund *(BPI-Family Savings Bank vs. Court of Appeals, et al., 330 SCRA 507 [2002]).*

IN VIEW OF THE FOREGOING, the Petition for Review is **DENIED** for insufficiency of evidence.

SO ORDERED.

ERLINDA P. UY
Associate Justice

We Concur:

(On leave)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

I hereby certify that this decision was reached after due consultation among the members of this Division in accordance with the provisions of Section 13, Article VIII of the Constitution.

ERLINDA P. UY
Senior Associate Justice

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