**REPUBLIC OF THE PHILIPPINES**
**Court of Tax Appeals**
**QUEZON CITY**

## ***SECOND DIVISION***

PHILIP G. BRODETT,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7049

Members:

**CASTAÑEDA, JR.,** *Chairperson*
**UY,** *and*
**PALANCA-ENRIQUEZ,** *JJ.*

**Promulgated:**

JAN 0 9 2009
4:05 p.m.

x-----------------------------------------------------------x

# DECISION

UY, *J.*:

This Petition for Review seeks the cancellation and withdrawal of the deficiency assessments dated April 22, 2004 issued by the Commissioner of Internal Revenue against petitioner, Philip G. Brodett, and reiterated in the former's Final Decision on Disputed Assessment dated August 6, 2004 pertaining to petitioner's alleged deficiency Documentary Stamp Tax (DST) liabilities for the taxable year 1996 in the amount of **Php143,437.50,** and deficiency Documentary Stamp Tax and deficiency Capital Gains Tax (CGT) for taxable year 1997 in the amounts of **Php132,143.84,** and **Php8,069,584.13,** respectively for the alleged transfers of shares of stocks during the taxable years 1996 and 1997, or for the total aggregate amount of **Php8,345,165.47**.

## THE FACTS

Petitioner Philip G. Brodett, an individual taxpayer residing at 36 Cambridge St., Hillsborough Subdivision, Alabang, Muntinlupa City[1], is a stockholder and the Vice-President of Liberty Mines, Inc., now Philcomsat Holdings Corporation (Philcomsat).[2]

Respondent, on the other hand, is the Commissioner of the Bureau of Internal Revenue (BIR) who was duly appointed and empowered to perform the duties of his office, including, among others, the power to cancel disputed assessments. He holds office at the BIR National Office Building, Diliman, Quezon City.[3]

In the year 1996, petitioner alleges that Jose Ma. Ozamiz, Fernando P. Jacinto, Jr., Winston A. Lee, Ma. Melizza Mendoza del Rosario, Jose Ma. G. Santos, and Grace Saulog (referred to as Beneficial Owners) orally requested that he purchase, on their behalf, shares of Liberty Mines, Inc.[4] With this request, petitioner allegedly contacted his business associate, Prudencio C. Somera, Jr., informing him of the Beneficial Owners' intention to acquire stocks. As Somera allegedly wanted to deal solely with petitioner, and in order to accommodate the Beneficial Owners' request in Somera's allocation of shares, a *Declaration of Trust with Assignment* was executed between

---

[1] Petition for Review, Par. 1, Docket, p. 1.
[2] Transcript of Stenographic Notes (TSN), February 6, 2006, p. 6; TSN, December 5, 2005, p. 6.
[3] Petitioner's Memorandum, Par. 2, Docket, pp. 306-307.
[4] *Ibid.*, Par. 3, Docket, p. 307; TSN, December 5, 2005, p. 6.

petitioner and Somera on July 24, 1996.[5] On the same day, the latter subscribed to 500 million shares of the proposed increase of capital stock of Liberty Mines, Inc. with a cost of Php .01 per share or FIVE MILLION PESOS (Php5,000,000.00) payable in the following manner:[6]

1. 25% of subscription price or P1,250,000.00 as down payment;

2. the balance of 75% upon call made by the Board of Directors of the Company.

On July 24, 1996, Somera paid the down payment[7] that was allegedly advanced by petitioner.[8] Sometime in July 1997, each of the Beneficial Owners executed a *Declaration of Trust with Assignment,*[9] naming herein petitioner as their respective trustee. The details of the said *Declaration of Trust with Assignment* are summarized as follows:

| TRUSTOR | NUMBER OF SHARES | DATE OF DEED |
|---|---|---|
| Grace Saulog | 12,500,000 | July 28, 1997 |
| Melizza Mendoza | 75,000,000 | July 25, 1997 |
| Winston Lee | 75,000,000 | July 25, 1997 |
| | 50,000,000 | July 25, 1997 |
| Fernando Jacinto | 250,000,000 | July 25, 1997 |
| Jose Ma. Santos | 12,500,000 | July 25, 1997 |
| Jose Ma. Ozamiz | 25,000,000 | July 25, 1997 |
| Total | 500,000,000 | |

On July 28, 1997, petitioner acknowledged receipt of the following amounts from the Beneficial Owners:[10]

[5] TSN, December 5, 2005, p. 7-8.
[6] Exhibit "D", Docket, p. 186.
[7] Exhibit "L", Docket, p. 210.
[8] Petition for Review, Par. 45, Docket, p. 20.
[9] Exhibits "E", "F","G", "H", "I", "J", "K", Docket, pp. 189-209.
[10] Annexes "O" to "O-7," Docket, pp. 81-88. The annexes included 2 other acknowledgement receipts from Mary Rose Ezpeleta and Jose Maria P. Jacinto for P1,000,000.00 and P2,000,000.00 respectively but they are not one of the named Beneficial Owners thus, the transaction that it covers is not considered in this instant case. Moreover, another acknowledgement receipt from Jose Ma. Santos in the amount of P250,000.00 is included in the annexes but it is a mere duplicate.

| PAYOR | AMOUNT |
|---|---|
| Grace Saulog | Php 250,000.00 |
| Melizza Del Rosario | 1,500,000.00 |
| Winston Lee | 2,000,000.00 |
| Fernando Jacinto | 2,000,000.00 |
| Jose Ma. Santos | 250,000.00 |
| Total | Php 6,000,000.00 |

From these payments of the Beneficial Owners, petitioner allegedly reimbursed himself for his advances on the down payment and at the same time forwarded the amount of Php3,750,000.00 to Somera to settle the 75% balance on the subscription agreement. On August 4, 2007, Somera paid the balance of Php3,750,000.00 to Liberty Mines, Inc., now Philcomsat. Upon full payment, the corresponding Certificates of Stocks[11] were issued in the name of Somera on August 30, 1997. The certificates have the following details:[12]

| Certificate Number | Stockholder | Number of Shares |
|---|---|---|
| LM-3209 | Prudencio Somera | 12,500,000 |
| LM-3205 | Prudencio Somera | 75,000,000 |
| LM-3206 | Prudencio Somera | 25,000,000 |
| LM-3207 | Prudencio Somera | 250,000,000 |
| LM-3208 | Prudencio Somera | 12,500,000 |
| LM-3210 | Prudencio Somera | 75,000,000 |
| LM-3211 | Prudencio Somera | 50,000,000 |
| Total | | 500,000,000 |

On September 4, 2002, petitioner received a Tax Verification Notice (TVN) dated August 30, 2002 from the BIR informing him that Revenue Officer Efren Clemente was authorized to examine and verify his documents and other pertinent records, pertaining to capital gains tax return for the taxable year/period July 25, 1997.[13]

[11] Annexes "G", "G-1" to "G-5," Docket, pp. 54-59.
[12] BIR Records, p. 76.
[13] Exhibit "1", BIR Records, p. 25.

On February 3, 2003, petitioner availed of the Voluntary Assessment and Abatement Program (VAAP) and paid the capital gains and documentary stamp taxes on the 25,000,000 shares sold to Jose Ma. Ozamiz.[14] However, on March 26, 2003, petitioner, through the Assistant Vice-President of Philcomsat, Johnny R. Tan, asked for confirmation from the BIR regarding the exemption from Capital Gains Tax, Documentary Stamp Tax, and Donor's Tax of the transfer of the stocks from the trustees/nominees, Somera (first trustee) and petitioner (second trustee) in favor of the Beneficial Owners.[15]

In response, on April 1, 2003, Officer-in-Charge-Regional Director Anselmo G. Adriano wrote that under BIR Ruling Nos. DA 136-2000 and DA-101-2001, where the conveyance of property by the trustee in favor of the trustor-beneficiary, who is the real owner of the subject property is without consideration, the conveyance is exempt from CGT. Adriano likewise mentioned that the questioned transfers are also exempt from DST, pursuant to Section 176 of the National Internal Revenue Code (NIRC) of 1997, and Donor's Tax, due to lack of intent to donate on the part of the trustees under Section 98 of the same Code.[16]

On May 16, 2003, Jose Ma. Ozamiz, one of the alleged Beneficial Owners, wrote Adriano seeking the revocation of his April 1, 2003 Ruling, on the ground that the transfers were not trust agreements but in reality, were actually sales; citing the following circumstances:

> "1. First and foremost, Mr. Brodett represented that Mr. Somera did not exercise his right to subscribe to Liberty Mines, Inc. shares. This is inaccurate. Attached hereto as Annexes 'A-

[14] Annex "D", Petition for Review, Docket, p. 49.
[15] BIR Records, pp. 86-88.
[16] Annex "S", Petition for Review, Docket, pp. 93-95.

1' and is a copy of the Subscription Agreement signed by Mr. Prudencio Somera, dated 24 July 1996 pertaining to 500,000,000 shares of Liberty Mines, Inc. which shares are the ones involved in this particular transaction made on the said subscription, by Somera.

2. In fact, shares were issued in the name of Somera by Liberty Mines, Inc., later renamed as Philcomsat Holdings Corporation. Attached hereto as Annexes 'B' thru 'B-1' and 'B-5' are copies of the certificates. If you examine the back portion, the shares were later endorsed by Somera, and delivered by Robert Brodett to the buyers.

3. What was described as a trust in favor of certain parties indicated in page 1 of your letter, were actual transfers of shares purchased by Mr. Somera, and later purchased and paid, by the said parties/'beneficiaries' (borrowing your word) from Brodett.

> 3.1 Attached is a distribution list duly signed by Mr. Brodett, naming the persons to whom the shares will be eventually transferred and the number of shares for each buyer.
>
> 3.2 Also attached are the acknowledgment receipts of payments (Annexes 'C' and series) made by the purchasers of the shares, <u>MADE IN THE FORM OF MANAGER'S CHECKS (IN COMPLIANCE WITH THE MODE OF PAYMENT INSISTED ON BY MR. BRODETT).</u> Also attached, for your ready reference is a detailed list of the payments made to Mr. Brodett.
>
> 3.3 If you will compare the acquisition cost of Mr. Brodett for the shares and the selling price to the so-called beneficiaries, you will readily determine that Mr. Brodett made a profit of P5 Million. To my mind, he should also be held liable for income tax (please see also the affidavit executed by the undersigned, dated July 30, 2002, copy attached as Annex 'D'.[17]"

On July 24, 2003, with the documents submitted by Jose Ma. Ozamiz, the Legal Division Chief, Cesar Pangilinan, revoked the April 1, 2003 Ruling

---

[17] Letter dated May 6, 2003 of Jose Ma. Ozamiz to Mr. Anselmo G. Adriano, Exhibit "3", BIR Records, pp. 89-90.

of Adriano on the basis that there was a misrepresentation of facts made by petitioner when he sought a legal opinion; since what actually transpired were sales transactions as evidenced by the Acknowledgment Receipts of payments dated July 28, 1997.[18]

On October 24, 2003, petitioner received a Notice of Conference[19] inviting him to an informal conference on October 27, 2003. In a Letter dated October 27, 2003, petitioner informed the BIR that he will not be able to attend the conference due to a scheduled meeting.[20] The case of petitioner was re-assigned to Revenue Officer Loida A. Ladignon, who assumed the investigation and computation of petitioner's liabilities on November 3, 2003.[21]

On April 1, 2004, petitioner received a Preliminary Assessment Notice dated March 24, 2004[22], assessing him for deficiency DST for the year 1996 on the *Declaration of Trust with Assignment* between himself and Somera with the following computations, to wit:

| | | | |
|---|---|---|---|
| I. | Deficiency Documentary Stamp Tax | | |
| | Par value of shares | | Php5,000,000.00 |
| | Computation of Basic Tax 5,000,000.00 x 200/1.50[23] | | Php 37,500.00 |
| | Basic Tax Due | | 37,500.00 |
| | Add: 50% Surcharge | 18,750.00 | |
| | Interest 08-25-96 to 03-31-04 (151.9954) | 85,497.41 | 104,247.41 |
| | Deficiency Capital Gains Tax | | Php 141,747.41 |

On April 26, 2004, petitioner received two formal assessment notices (FAN). One FAN reiterated the computation above with the minor increase of

[18] Memorandum for The Regional Director from Wilmer B. Dekit, Revenue Attorney III, concurred by Cesar A. Pangilinan, Chief, Legal Division, Approved by Anselmo G. Adriano, Acting Regional Director, Exhibit "5", BIR Records, pp. 95-96.
[19] Exhibit "8-b", BIR Records, p. 170.
[20] BIR Records, p. 172.
[21] Exhibit "13", BIR Records, p. 173; TSN, February 14. 2007, p. 10.
[22] Exhibit "10", BIR Records, p. 194; TSN, February 14. 2007, pp. 19-20.
[23] Should be 5,000,000 *1.5/200 = P37,500.00

interest to P87,187.50, adjusting the total deficiency DST to P143,437.50.[24]

The second FAN assessed petitioner for deficiency CGT and DST for the year 1997 on the *Declaration of Trust with Assignment* in favor of Mr. Ozamiz, *et al.* The details of this FAN[25] are shown below:

***Deficiency Capital Gains Tax***

| | | |
|---|---|---|
| Net Capital Gain Tax Realized | | P 11,500,000.00 |
| Computation of Basic Tax | 100,000.00 x 10% | P 10,000.00 |
| | 11,400,000.00 x 20% | 2,280,000.00 |
| Basic Tax Due | | P 2,290,000.00 |
| Add: Surcharge (50%) | | 1,145,000.00 |
| Interest 08-26-97 to 05-24-04 | | 4,634,584.13 |
| **TOTAL AMOUNT DUE** | | **P 8,069,584.13** |

***Deficiency Documentary Stamp Tax***

| | | |
|---|---|---|
| Par value of shares | | P 5,000,000.00 |
| Computation of Basic Tax | 5,000,000.00 x 200/1.50[26] | P 37,500.00 |
| Basic Tax Due | | P 37,500.00 |
| Add: Surcharge (50%) | | 18,750.00 |
| Interest 08-26-97 to 05-24-04 | | 75,893.84 |
| **TOTAL AMOUNT DUE** | | **P 132,143.84** |

As explained by the BIR, the deficiency CGT was arrived at by using as tax base the market value of the 500 million shares at P0.033 per share less acquisition cost, computed as follows:[27]

| | Per Return | Per Investigation | Adjustment/ Disallowance |
|---|---|---|---|
| **Deficiency Capital Gains Tax** | | | |
| Selling Price / B.V. of LMI Shares | P 0 | P 16,500,000.00 | P 16,500,000.00 |
| Less: Acquisition Cost | 0 | 5,000,000.00 | 5,000,000.00 |
| **Net Capital Gains / Loss** | **P 0** | **P 11,500,000.00** | **P 11,500,000.00** |

In response to the FANs, petitioner filed formal letters of protest on May 24, 2004 with the BIR. For the assessment of deficiency DST for the

[24] Exhibit "11", BIR Records, p. 203.
[25] Exhibit "15", BIR Records, p. 198-199.
[26] Should be 5,000,000 *1.5/200 = P37,500.00
[27] Details of Discrepancies, Exhibit "15-B", BIR Records, p. 196-197.

year 1996, petitioner reiterated that the transaction between Somera and himself was not a sale but a Trust Agreement.[28] The same holds true for the deficiency CGT and DST assessment for the year 1997; that what transpired between himself and the Beneficial Owners were Trust Agreements and not sale transactions. Petitioner further added that if indeed he was liable for deficiency CGT, the basis of the assessment was erroneous and contrary to Revenue Regulations No. 2-82, since what the revenue officer used was the market value instead of the book value, considering that the stocks were not listed in the stock exchange.

The computation should allegedly use the following formula, which is based on the last audited financial statements at that time: [29]

***"Total Stockholder's Equity/Shares Issued and Outstanding = Book Value/Share"***

With the foregoing formula, petitioner states that the book value per share is P.0025 and not P.033 – market value, computed as follows:

249,227,049 / 99,639,125,400 = P.0025/ share

This will give a total market value of shares in the amount of Php1,250,648.00, which is much less than the acquisition cost of the shares of Php5,000,000.00. Petitioner alleges that this shows lack of capital gain and thus providing no basis for the deficiency CGT assessment.[30]

Despite the foregoing arguments, submitted by petitioner, a Final Decision[31] was received by petitioner on August 6, 2004, affirming the deficiency assessments against him with the increased amounts due to interest, as shown below:

---

[28] Exhibit "A", Docket, p. 179.
[29] Exhibit "B", Docket, pp. 180-183.
[30] *Ibid.*
[31] Petition for Review, Annex "D", Docket, pp. 48-50; BIR Records, pp. 292-294.

| | | |
|---|---|---|
| Deficiency Documentary Stamp Tax for 1996 | Php | 146,250.00 |
| Deficiency Capital Gains Tax for 1997 | Php | 8,241,331.01 |
| Deficiency Documentary Stamp Tax for 1997 | Php | 134,956.29 |

On September 3, 2004, petitioner filed the instant Petition for Review, praying for the cancellation and withdrawal of the foregoing assessments against him.

In the Answer filed on November 25, 2004,[32] respondent submits the following Special and Affirmative Defenses:

> "4. The investigation of the petitioner's internal revenue tax liabilities for the year 1996 revealed a tax obligation of Php8,069,584.13 as deficiency capital gains tax and Php132,143.84 as deficiency documentary stamp tax all inclusive of surcharges and interests.
>
> 5. The subject deficiency tax assessments were issued in accordance with law and pertinent regulations and has complied with the provisions of Section 228 of the 1997 Tax Code, as amended, relative to the taxpayer being informed in writing of the facts and laws in which the assessment is based, the same is contained in the 'Details of Discrepancies' dated April 22, 2004.
>
> 6. Petitioner is found to be liable for deficiency capital gains tax in the amount of Php8,069,584.13 and deficiency documentary stamp tax in the amount of Php132,143.84 for the reason that supposed transfer of the subject shares of stocks to Mr. Jose Ma. Ozamis, et al. were really a sale and not by virtue of a Trust Agreement.
>
> 7. All presumptions are in favor of the correctness of tax assessments and the burden of proof to prove otherwise is upon the petitioner.[33]"

During trial, petitioner presented testimonial and documentary evidence primarily aimed at proving that the contractual relationships of the parties involved are that of trustor-trustees and not that of seller-buyers. On the other hand, respondent presented evidence to establish the basis for the

[32] Posted on November 17, 2004.
[33] Docket, pp. 108-110.

deficiency assessments by proving that petitioner misrepresented the transactions to be Trust Agreements and not contracts of sale.

Upon the admission of respondent's evidence in the Resolution dated December 3, 2007, the parties were directed to simultaneously file their respective Memorandum within thirty (30) days from receipt thereof. Only petitioner submitted its Memorandum[34] on January 10, 2008, and this case was deemed submitted for decision on February 1, 2008, *sans* respondent's Memorandum.[35]

## THE ISSUES

The stipulated issues by the parties are as follows:

"1. Whether or not the conveyance or transfer of Liberty Mines, Inc. shares from Philip Brodett to Jose Ma. Ozamis, et. al. was actually a sale.

2. Whether or not petitioner is liable for deficiency documentary stamp tax in the amount of Php143,437.50 in 1996 and deficiency capital gains tax and documentary stamp tax in the amount of Php8,069,584.13 and Php132,143.84 respectively for taxable year 1997 for the supposed transfer of the subject shares of stock to Mr. Jose Ma. Ozamis, et al.

3. Assuming a taxable sale between Petitioner and Beneficial Owners, whether or not the subject Liberty Mines, Inc. shares (which are not listed nor traded through the stock exchange), should be valued at the market value of P0.33 per share, as claimed by the Respondent, or at the book value thereof nearest the valuation date, which is P.0025 per share, for purposes of capital gains tax.[36]"

***Petitioner's Arguments***

Petitioner argues that the transfer of shares from the trustee to the trustors without monetary consideration and by virtue of the Deeds of Trust

[34] Docket, pp. 306-335.
[35] Docket, p. 338.
[36] Joint Stipulation of Facts and Issues, Docket, pp. 137-138.

and Assignment is not subject to DST under Section 176 of the NIRC of 1997, the rationale being that the conveyance by the trustee in favor of the trustor of the properties, which the former acquired by virtue of the trust agreement, is merely to be treated as a continuation and confirmation of the title in favor of the ultimate and real beneficiary of the subject properties.

Respondent's insistence that there is no trust created between petitioner and the Beneficial Owners is allegedly misplaced because there are separate Declarations of Trust with Assignment which were subsequently executed by the Beneficial Owners in favor of petitioner in July 1997, and it invariably provides that the trustee acknowledges and admits that the beneficial ownership of the shares by the trustor and undertakes and promises to hold, vote and dispose of the same in trust for and under the instruction of the trustee. Thus, these Declarations of Trust with Assignment actually confirm that trust was indeed agreed upon between petitioner and the Beneficial Owners.

Petitioner further emphasizes the fact that the Declarations of Trust with Assignment expressly state that the shares form part of the subscription agreement for 500 million shares subscribed by and registered in the name of Somera, under Subscription Agreement No. S4-027 who has executed a Declaration of Trust with Assignment covering said 500 million shares in favor of the trustee (Brodett); and although these declarations were executed by and between the Beneficial Owners and petitioner almost one year after the subscription agreement was signed by Somera, this should not affect the character of the said declarations as it is merely a continuation and confirmation of title in favor of the ultimate and real beneficiary of the shares of stocks.

With respect to the acknowledgement receipts (a total of eight [8] receipts amounting to Php9,250,000.00) relied upon by the respondent, petitioner alleges that only five (5) receipts amounting to Php6,000,000.00 should be considered, since two (2) others are acknowledged by persons other than the Beneficial Owners, while the other one (1) is a mere duplicate. Furthermore, petitioner insists that the excess of Php1,000,000.00 does not represent gain but would pertain, among others, to reimbursements by the Beneficial Owners of the expenses incurred by the petitioner as trustee such as, but not limited to, expenses incurred in the execution of the Declarations of Trust with Assignment between petitioner and Somera, and petitioner and the Beneficial Owners – legal and notarial fees, fees paid out to stock and transfer agent, and trustee fees in consideration of petitioner's agreement to act as trustee in favor of the Beneficial Owners. Thus, no gain may be attributed to petitioner that would make him liable for capital gains tax.

Moreover, petitioner contends that the payment of CGT and DST on the 25 million shares sold to Ozamiz under the Voluntary Assessment and Abatement Program (VAAP) of February 3, 2003 by petitioner is not an implied admission that the transaction was a sale of shares of stock; and that in fact, there are proofs to the contrary – such as the Declarations of Trust with Assignment between petitioners and the Beneficial Owners, including Ozamiz. According to petitioner, he availed of the VAAP only as regards the 25 million shares upon insistence of Ozamiz, contrary to petitioner's erstwhile belief that the assignment of shares should have been subjected to CGT and DST.

Finally, in computing for the CGT, petitioner claims that it was erroneous for the BIR to have used the market value of Php0.033 per share, giving rise to a total market value of Php16,500,000.00 for the 500 million shares, considering that the shares involved herein are not listed through the stock exchange. Petitioner points out that under Revenue Regulations No. 2-82 it is provided that unlisted shares shall be valued at their book value nearest the valuation date. The book value of these unlisted shares of stock shall be *prima facie* considered as their fair market value[37]. The computation of the book value should thus be based on the Audited Financial Statements for the period ending December 31, 1996 that is Php.0025[38] per share.

***Respondent's Counter-Arguments***

In the Answer, respondent alleges that petitioner is found to be liable for deficiency CGT and DST for the years 1996 and 1997 for the reason that the supposed transfers – from Somera to petitioner, and from petitioner to the Beneficial Owners, of the subject shares of stocks were actually a sale and not a trust despite the existence of the Deeds of Trust with Assignment.

Respondent also places emphasis on the doctrine that all presumptions are in favor of the correctness of tax assessments as these were issued in accordance with law and pertinent regulations, thus the burden of proof to prove otherwise is upon the petitioner.

---

[37] Petitioner's Memorandum, Docket, p. 333.
[38] Total Stockholders' Equity / Number of Shares Issued and Outstanding = Book Value, computed as Php249,172,257 / 99,639,125,400 = Php 0.0025.

## THE COURT'S RULING

Respondent assessed petitioner based on the premise that what actually transpired between petitioner and the Beneficial Owners were sales transactions. Contrary thereto however, petitioner maintains that he entered into Trust Agreements, first with Somera, and thereafter, with the Beneficial Owners because the latter allegedly took it in their best interests to subscribe to a portion of the increase in the capital stock of Liberty Mines, Inc. (now Philcomsat) amounting to 94 billion shares, through him. Although, there was no Trust Agreement at the onset, a ratification of this Trust Agreement was allegedly made through the subsequent execution of *Declarations of Trust with Assignment,* approximately one year from subscription.[39]

***First Issue:***

***Whether or not conveyance or transfer of Liberty Mines, Inc. shares from Philip Brodett to Jose Ozamis, was actually a sale.***

To resolve the first issue, We look into the nature of a contract of sale and trust agreement.

By the contract of sale, one of the contracting parties obligates himself to transfer the ownership of and to deliver a determinate thing, and the other to pay therefore a price certain in money or its equivalent. A contract of sale may be absolute or conditional.[40] Based on the foregoing definition, the requisites of a contract of sale are: (1) consent on the part of the seller, to transfer and deliver, and on the part of the buyer, to pay; (2) object which must be a determinate thing; and (3) cause or price certain in money or its equivalent.

---

[39] Petitioner's "Memorandum", Pars. 3-5, Docket, pp. 307-308.
[40] Article 1458, Civil Code of the Philippines

nrb

On the other hand, trust is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person which arises as the result of a manifestation of an intention to create it.[41] Trusts are either express or implied. An express trust is created by the intention of the trustor or of the parties. Implied trust come into being by operation of law.[42] No particular words are required for the creation of an express trust, it being sufficient that a trust is clearly intended.[43]

The intention to create a trust, which must be manifest before an express trust can be found to have been created, may be determined from the employment by the trustor of express or explicit language, or it may be by construction or inference from what the trustor has said or done, the nature of a transaction and the surrounding circumstances.[44]

In the instant case, it is petitioner's contention that there was no contract of sale, but actually trusts agreements that were entered into between him and the supposed Beneficial Owners, namely, Jose Ma. Ozamiz, Fernando P. Jacinto, Jr., Winston A. Lee, Ma. Melizza Mendoza del Rosario, Jose Ma. G. Santos, and Grace Saulog, pertaining to the latter's acquisition of shares of stocks of Liberty Mines, Inc. sometime in 1996, as allegedly supported by the "Declarations of Trust with Assignment", initially,

[41] Black's Law Dictionary, 5th Edition, 1979, p.1352.
[42] Article 1441 of the 1987 Civil Code.
[43] Article 1444 of the 1987 Civil Code.
[44] 54 Am. Jur. 52,53.

between him and Prudencio Somera, Jr.,[45] and subsequently, between him and the Beneficial Owners.[46]

On the other hand, respondent insists that what actually transpired between Prudencio C. Somera, Jr. and petitioner, on one hand, and the Beneficial Owners on the other hand, were sales transactions.

We find respondent's contention meritorious and resolve the first issue in the affirmative.

The Court notes that the total amount received by petitioner from the Beneficial Owners is substantially in excess of the cost of the subscription. We however modify respondent's findings that petitioner received the sum of Php10,000,000.00 when the cost of the subscription is only Php5,000,000.00[47] considering that a verification of the Acknowledgment Receipts reveal that petitioner received P9,000,000.00 instead. The details are summarized as follows:[48]

| Payor | Manager's Check No. | Bank | Amount | Corresponding Shares | Payee |
|---|---|---|---|---|---|
| Wilson Lee | 12573 | FEBTC | Php 1,000,000.00 | 125,000,000 | P. Brodett |
| | 0163 | Metrobank | 1,000,000.00 | | |
| Fernando Jacinto | 41907 | BPI | 2,000,000.00 | 100,000,000 | P. Brodett |
| Mary Rose Ezpeleta | 41906 | BPI | 1,000,000.00 | 50,000,000 | P. Brodett |
| Jose Ma. Jacinto | 74479 | PCIBank | 2,000,000.00 | 100,000,000 | P. Brodett |
| Grace Saulog | 41911 | BPI | 150,000.00 | 12,500,000 | P. Brodett |
| | 037385 | PCIBank | 100,000.00 | | P. Brodett |
| Melissa Del Rosario | 2282 | PCIBank | 1,250,000.00 | 75,000,000 | P. Brodett |
| | 13278 | FEBTC | 250,000.00 | | P. Brodett |
| Jose Ma. Santos | 190978 | Prudential | 250,000.00 | 12,500,000 | P. Brodett |
| Total | | | Php 9,000,000.00 | 475,000.00 | |

Petitioner claims that respondent made a mistake in relying on all the Acknowledgment Receipts as the basis to conclude that sales transactions

[45] Exhibit "C", Docket, pp. 184-185.
[46] Exhibit "E" to "K", Docket, pp. 189-209.
[47] Respondent's Pre-trial Brief, Docket, p. 114.
[48] BIR Records, pp. 77-84.

transpired, because not all the payors of the said receipts were covered by Declarations of Trust with Assignment in favor of Brodett, the pertinent details of which are mentioned in petitioner's Memorandum[49], to wit

| Trustor | No. of Shares |
|---|---|
| Grace Saulog | 12,500,000.00 |
| Ma. Melizza Mendoza Del Rosario | 75,000,000.00 |
| Winston A. Lee | 75,000,000.00 |
| Winston A. Lee | 50,000,000.00 |
| Fernando P. Jacinto, Jr. | 250,000,000.00 |
| Jose Maria G. Santos | 12,500,000.00 |
| Jose Ma. Ozamiz | 25,000,000.00 |
| **TOTAL** | **500,000,000.00** |

The amounts that should allegedly be considered are only those Acknowledgment Receipts pertaining to the Beneficial Owners amounting to Php6,000,000.00[51], with the following details:

| Name of Person To Whom Issued | Amount Acknowledged |
|---|---|
| Fernando P. Jacinto, Jr | Php 2,000,000.00 |
| Grace Saulog | 250,000.00 |
| Melissa Del Rosario | 1,500,000.00 |
| Jose Ma. Santos | 250,000.00 |
| Wilson Lee[50] | 2,000,000.00 |
| **TOTAL** | **Php 6,000,000.00** |

Out of this amount, the excess over the subscription cost of the 500 million shares is P1,000,000.00. Petitioner alleges that this amount was reimbursement for legal and notarial fees, stock and transfer agent fees, and trustee fees.[52]

---

[49] Docket, pp. 308.
[50] Wilson Lee is taken to be the same person as Winston Lee, based on the allegations in Petitioner's Memorandum.
[51] Docket, p. 309.
[52] Petition for Review, Par. 45, Docket , pp. 20-21.

Following petitioner's argument, the amount of Php6,000,000.00 which he acknowledged to have received from the Beneficial Owners would pertain only to 325 million shares as shown below:

| Name of Person to Whom Issued | Amount | Corresponding Shares | Payee |
|---|---|---|---|
| Wilson Lee[53] | Php 1,000,000.00 | 125,000,000 | P. Brodett |
| | 1,000,000.00 | | |
| Fernando P. Jacinto[54] | 2,000,000.00 | 100,000,000 | P. Brodett |
| Grace Saulog[55] | 150,000.00 | 12,500,000 | P. Brodett |
| | 100,000.00 | | P. Brodett |
| Melissa Del Rosario[56] | 1,250,000.00 | 75,000,000 | P. Brodett |
| | 250,000.00 | | P. Brodett |
| Jose Ma. Santos[57] | 250,000.00 | 12,500,000 | P. Brodett |
| **Total** | **Php 6,000,000.00** | **325,000.00** | |

Out of the alleged subscribed shares of 500 million, 175 million shares left unpaid or unaccounted for, and therefore, technically speaking, the amount of six million (Php6,000,000.00) pesos received by petitioner pertained only to 325 million shares.

Assuming that indeed Php1,000,000.00 was for reimbursement of expenses advanced by petitioner, no evidence was offered in support of this claim, nor was there any accounting record presented to breakdown the excess payment. This leads to the logical conclusion that whatever petitioner received substantially above the cost of subscription is sufficient consideration, or to put it in another way, income for petitioner.

From the foregoing, We cannot determine with reasonable certainty that the intent was merely to create a mere Trust Agreement between the Beneficial Owners and petitioner, nor can We say that the amounts received

[53] Annex "O-5" and "O-6", Docket, pp. 86-87.
[54] Annex "O", Docket, p. 81.
[55] Annex "O-1", Docket, p. 82.
[56] Annex "O-2". Docket, p. 83.
[57] Annex "O-3", Docket, p. 84.

were "mere reimbursements". The prevailing circumstances in the instant case present the existence of the elements of a contract of sale, which are: (1) *consent of the parties*: on the part of Brodett, to transfer and deliver; on the part of the Beneficial Owners, to pay therefore; (2) *determinate object*: the shares of stocks of Liberty Mines, Inc., now Philcomsat; and (3) *cause or price certain in money or its equivalent:* substantial consideration given by the Beneficial Owners to Brodett. We find the payments of the Beneficial Owners to Brodett too substantial to be considered as mere reimbursements.

On the other hand, the intention to create a trust and manifestation thereof with reasonable certainty, are essential to the creation and existence of a trust. This means an intention specifically to create a trust and not to do something else, as to create a gift or to make a transfer of property.[58]

At this point, it is wise to go back to the basis of the ruling of the BIR initially exempting petitioner from CGT. The OIC-Regional Director at that time, Mr. Anselmo Adriano, ruled that petitioner has no tax liability based on the following justification:

> "In the instant case, since this is a resulting trust in view of the owner's intention to create a trust, *i.e.*, **the transfer of the aforesaid shares in the name of Prudencio C. Somera, Jr. to Philip G. Brodett, as trustee, for and in behalf of Fernando P. Jacinto, Jr., Winston Lee, Maria Melizza Mendoza del Rosario, Jose Ma. Ozamis, Jose Ma. G. Santos and Grace Saulog, as beneficiaries, <u>is without monetary consideration</u>** and the trustee acknowledges and confirms the title and ownership over the above-mentioned shares of the latter, this Office is of the opinion as it hereby holds that the transfer of the aforesaid shares in favor of Philip G. Brodett, as trustee for and in behalf of the afore-named beneficiaries by way of Deed of Conveyance is not subject to capital gains tax. Similarly, the subsequent transfers/conveyances of the aforesaid shares by Philip G. Brodett to the afore-named beneficiaries under the

[58] 54 Am. Jur. 33.

> Deed of Conveyance that is without consideration because the latter are the real owners (pro-rata) of the 500 million shares, is exempt from capital gains tax imposed under Section 24(C) of the 1997 Tax Code."[59] (*Emphasis and underscoring supplied*)

The excess payments received by petitioner from the Beneficial Owners, negate the abovementioned finding that the transfers were without monetary consideration, thus making it no longer viable to say that petitioner is not liable for the CGT for the subject transfers to the Beneficial Owners.

However, We find it necessary to differentiate the Trust Agreement between petitioner and Somera; and that between petitioner and the Beneficial Owners.

A perusal of the *Declaration of Trust with Assignment* between petitioner and Somera executed on July 24, 2006 indicates that petitioner advanced the initial payment of 25% of the subscription value or the amount of P1,250,000.00 paid by Somera to Liberty Mines, Inc. on the same date, as shown by the official receipt[60] issued by the said corporation in favor of Somera. The pertinent provision of the Agreement[61] states that:

> "WHEREAS, the TRUSTEE has subscribed to 500.0 Million shares under SUBSCRIPTION AGREEMENT NO. S4-027 (the SHARES) with a par value of P0.01 per share of the capital stock of Liberty Mines, Inc. (the CORPORATION), a corporation duly organized and existing under the laws of the Philippines, on which **an amount equivalent to 25% of the subscription value at par appears to have been paid by the TRUSTEE, with funds provided by the TRUSTOR.**" (*Emphasis supplied*)

In this instance, the advance payment made by petitioner establishes the fact he is the true owner of the shares purchased by Somera. No

[59] Annex "S", Petition for Review, Docket, pp. 93-95.
[60] Exhibit "L", Docket, p. 210.
[61] Exhibit "C", Docket, pp. 184-185.

evidence to the contrary was presented for this Court to rule otherwise. Notably however, the aforequoted provision is absent in all the *Declarations of Trust with Assignment* executed between petitioner and he Beneficial Owners thus, casting doubt on petitioner's claim that he merely advanced payments for the stocks on behalf of the Beneficial Owners.

***Second and Third Issues:***

> ***Whether or not petitioner is liable for deficiency documentary stamp tax in the amount of Php143,437.50 in 1996 and deficiency capital gains tax and documentary stamp tax in the amount of Php8,069,584.13 and Php132,143.84 respectively for taxable year 1997 for the supposed transfer of the subject shares of stock to Mr. Jose Ma. Ozamis, et al.***
>
> ***Assuming a taxable sale between Petitioner and Beneficial Owners, whether or not the subject Liberty Mines, Inc. shares (which are not listed nor traded through the stock exchange), should be valued at the market value of P0.33 per share, as claimed by the Respondent, or at the book value thereof nearest the valuation date, which is P.0025 per share, for purposes of capital gains tax.***[62]"

Being interrelated, we shall resolve the second and third issues together.

On the subject of DST, petitioner was assessed the amount of Php143,437.50 for the year 1996 and the amount of Php132,143.84 for the year 1997. Through his Revenue Officers, respondent applied Section 176 of the National Internal Revenue Code (1993 Tax Code)[63] which reads:

> "**SEC. 176. *Stamp Tax on Sales, Agreements to Sell, Memoranda of Sales, Deliveries or Transfer of Due-bills, Certificates of Obligation, or Shares of Certificates of Stock.* -** On all sales, or agreements to sell, or memoranda of sale, or deliveries or transfer of bonds, due-bills, certificates of obligation, or shares of certificates of stock, in any association, company, or corporation, or transfer of such securities by assignment in blank, or by delivery, or by any paper or agreement, or memorandum or other evidences of transfer or

[62] Joint Stipulation of Facts and Issues, Docket, pp. 137-138.
[63] Exhibits "11" and "15," BIR Records, p. 203 and p. 198, respectively.

> sale whether entitling the holder in any manner to the benefit of such bonds, due-bills, certificates of obligation or stock, or to secure the future payment of money, or for the future transfer of any bond, due-bills, certificates of obligation or stock, there shall be collected a documentary stamp tax of one peso (P1.00) on each two hundred pesos or fractional part thereof, of the par value of such bonds, due-bills, certificates of obligation or stock; *Provided*, That only one tax shall be collected on each sale or transfer of stock or securities from one person to another, regardless of whether or not a certificate of stock or obligation is issued, indorsed, or delivered in pursuance of such sale or transfer: *And Provided, further,* That in the case of stock without par value the amount of documentary stamp tax herein prescribed shall be equivalent to twenty-five percentum (25%) of the documentary stamp tax paid upon the original issue of said stock: *Provided, furthermore,* That the tax herein imposed shall be increased to one peso and fifty centavos (P1.20) beginning 1996."

A documentary stamp tax is a tax on documents, instruments and papers evidencing the acceptance, assignment, sale or transfer of an obligation, right or property incident thereto. It is not imposed upon the business transacted but is an excise upon the privilege, opportunity or facility offered at exchanges for the transaction of the business. It is an excise upon the facilities used in the transaction of the business separate and part from the business itself.[64]

Petitioner argues that for both sets of *Declarations of Trust with Assignment*, there was no change in the beneficial ownership and legal ownership as these remained in favor of the Beneficial Owners. Petitioner cited several BIR Rulings mainly discussing that the execution of a Declaration of Trust, whereby a nominee shareholder acknowledges and states that he is holding certain shares in trust for the real owners, is not a taxable transaction/event, and is thus exempt from documentary stamp tax.

---

[64] *Commissioner of Internal Revenue vs. Heald Lumber Co.*, G.R. No. L-16340, February 29, 1964.

Petitioner also adds that the transfer of shares from the trustees to the trustors without monetary consideration is not subject to DST.

A cursory reading of the *Declaration of Trust with Assignment* between petitioner and Somera shows that there was indeed no shift in the beneficial and legal ownership of subject shares of. stocks. In effect there was no transfer of shares as contemplated under Section 176 of the Tax Code of 1993 between Somera and petitioner as there was no new conveyance upon which DST can be imposed. The transfer was merely a continuation and confirmation of title in favor of the ultimate and real beneficiary of the subject properties.[65] There being no new conveyance to speak of, there was no new exercise of a privilege that may be taxed. Hence, the assessment for deficiency DST of P143,437.50 for the year 1996 is invalid.

On the other hand, this does not hold true for the deficiency DST assessment for the year 1997 covering the transactions between petitioner and the Beneficial Owners. The transfers of the subject shares of stocks in favor of the Beneficial Owners for valuable consideration result in the consummation of new transactions upon which DST can be imposed, as there were changes in the titles or ownerships of subject properties, and these transaction are considered as sales transactions.

Thus, the assessment in the amount of deficiency DST for the year 1997 P132,143.84 is valid pursuant to Section 21(d)(1) of the 1993 Tax Code, the applicable legal provision during the taxable year 1997, the pertinent provision of which is quoted hereunder for easy reference, to wit:

[65] BIR Ruling No. 031-99; BIR Ruling No. DA-365-03.

"**SEC. 21.** ***Tax on citizens or residents.*** -

xxx xxx xxx

(d) *Capital gains from sales of shares of stock.* - The provisions of Section 33 (b) notwithstanding, capital gains realized from the sale, exchanges or disposition of shares of stocks in any domestic corporation shall be taxed as follows:

(1) Net capital gain as defined in Section 33 (a) (2) realized during each taxable year from the sale, exchange or other disposition of shares of stock not traded through a local stock exchange:

Not over P100,000 . . . . . . . . . . . . . .10%
Over P100,000. . . . . . . . . . . . . . . . .20%"

Capital gains tax is a tax on income.[66] It is an income tax defined as a tax on a person's income, wages, salary commissions, emoluments, profits and the like.[67] The concept of income implies gain, profit or flow of wealth.[68]

The question to consider, at this point, is whether or not petitioner derives any gain from the transfer of shares from himself to the Beneficial Owners by virtue of the Deeds of Trusts?

We rule in the affirmative.

As We have discussed earlier, petitioner derived a substantial amount over and above the cost of the value of the shares showing flow of income, or profit; hence, he is liable for CGT, the rates of which depend on whether or not the shares of stock sold are listed and traded through the local stock exchange, as provided under Section 21(d) of the 1993 Tax Code.

---

[66] *CIR vs. Universal Molasses Corp.*, CA-G.R. S.P. 52297, December 28, 2000.
[67] Black's Law Dictionary, 6th Edition.
[68] *Madrigal, et al. vs. Rafferty, et al.*, G.R. No. 12287, August 7, 1918.

Petitioner invokes Revenue Regulations No. 2-82 which provides that unlisted shares shall be valued at their book value nearest the valuation date. The book value of these unlisted shares of stock shall be *prima facie* considered as their fair market value.[69]

We agree with petitioner's submission that in computing the net capital gain or loss, unlisted shares shall be valued based on its book value nearest the valuation date. However, a careful review of the records show that the Annual Report for 1996[70] of Liberty Mines, Inc., which reflects the Audited Financial Statements for the year ending December 31, 1996, indicates that the Securities and Exchange Commission approved its increase in capital stocks on November 13, 1996 and that it is listed in the Philippine Stock Exchange without any notation nor distinction as to the volume of the shares that are listed or not.

It should be noted that the Deeds of Trust with Assignment between petitioner and the Beneficial Owners were executed in 1997, thus, respondent correctly based the computation for the CGT on the market value of the shares of stock. Moreover, petitioner failed to present evidence before this Court during trial to show that the 500 million shares of stocks in question were actually not listed with the stock exchange during the material dates of the Deeds of Trust, nor at the time of the issuance of the certificates of stocks. We cannot rely solely on petitioner's unsubstantiated claim that the subject shares were not listed with the stock exchange.

---

[69] Petitioner's Memorandum, Docket, p. 333.
[70] Petition for Review, Annex "T", pp. 6 – 7; Docket, p. 98.

The Supreme Court has ruled in several cases that the examiner's assessments should be given full weight and credit absent proof to the contrary. In the case of ***COMMISSIONER OF INTERNAL REVENUE VS. CONSTRUCTION RESOURCES OF ASIA, INC. ET AL.***[71], the said legal principle was stated as follows:

> "All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed. They will be presumed to have taken into consideration all the facts to which their attention was called. No presumption can be indulged that all of the public officials of the State in the various countries who have to do with the assessment of property for taxation will knowingly violate the duties imposed upon them by law."

Tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a BIR officer and approved by his superior officers will not be disturbed.[72] Hence, this Court upholds respondent's assigned valuation on the shares of stocks – using the stock's market value – in determining the net capital gain on the transaction between petitioner and the Beneficial Owners.

**WHEREFORE**, the instant *Petition for Review* is hereby **PARTIALLY GRANTED**. The Final Assessment Notice dated April 22, 2004 finding petitioner liable for deficiency Documentary Stamp Tax for the year 1996 in the amount of P143,437.50 is hereby **CANCELLED**. However, the Final Assessment Notice also dated April 22, 2004, finding petitioner liable for deficiency Capital Gains Tax and Documentary Stamp Tax for the year 1997 is hereby **AFFIRMED**.

[71] G.R. No. L-68230, November 25, 1986.
[72] *Bonifacia Sy Po vs. Honorable Court of Tax Appeals, et al.*, G.R. No. L-81446, August 18, 1988.

Accordingly, petitioner is hereby **ORDERED TO PAY EIGHT MILLION SIXTY NINE THOUSAND FIVE HUNDRED EIGHTY FOUR PESOS and 13/100 (P8,069,584.13)** for deficiency Capital Gains Tax and **ONE HUNDRED THIRTY TWO THOUSAND ONE HUNDRED FORTY THREE PESOS and 84/100 (P132,143.84)** for deficiency Documentary Stamp Tax for the year 1997. Said amounts are broken down as follows:

| | | | |
|---|---|---|---|
| **Deficiency Capital Gains Tax** | | | |
| Net Capital Gain Tax Realized | | | P 11,500,000.00 |
| Computation of Basic Tax | | 100,000.00 x 10% | P 10,000.00 |
| | | 1,400,000.00 x 20% | 2,280,000.00 |
| Basic Tax Due | | | P 2,290,000.00 |
| Add: | Surcharge (50%) | | 1,145,000.00 |
| | Interest 08-26-97 to 05-24-04 | | 4,634,584.13 |
| **TOTAL** | | | **P 8,069,584.13** |
| **Deficiency Documentary Stamp Tax** | | | |
| Par value of shares | | | P 5,000,000.00 |
| Computation of Basic Tax 5,000,000.00 | | x 200/1.50 | P 37,500.00 |
| Basic Tax Due | | | P 37,500.00 |
| Add: | 50% Surcharge | | 18,750.00 |
| | Interest 08-26-97 to 05-24-04 | | 75,893.84 |
| **TOTAL** | | | **P 132,143.84** |

In addition, petitioner is **ORDERED TO PAY** respondent twenty percent (20%) delinquency interest *per annum* on the amounts of **P8,069,584.13** and **P132,143.84**, computed from September 5, 2004 until the amount is fully paid.

**SO ORDERED.**

ERLINDA P. UY
Associate Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**OLGA PALANCA-ENRIQUEZ**
Associate Justice

## ATTESTATION

I attest 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.

Juanito C. Castañeda, Jr.
**JUANITO C. CASTAÑEDA, JR.**
Associate Justice
Chairperson

## CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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.

**ERNESTO D. ACOSTA**
Presiding Justice