

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

LUZVIMINDA LAND
HOLDINGS, INC.,

Petitioner,

CTA CASE NO. 10035

Members:

- versus -

CASTAÑEDA, JR., Chairperson, and
BACORRO-VILLENA, JJ.

COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

Promulgated: MAY 20 2021

X ----- X
J 9:50 a.m.

RESOLUTION

BACORRO-VILLENA, J.:

For the Court's resolution is respondent Commisisoner of Internal Revenue's (**respondent's/CIR's**) "Motion for Reconsideration (of the Decision dated 03 December 2020)" (**MR**), filed *via* registered mail on 18 December 2020², with petitioner's "Comment and Opposition (RE: Respondent's [MR] of the Decision dated 03 December 2020)"³, filed on 07 January 2021.

In his MR, respondent prays for the Court to re-evaluate and revisit its ruling in the assailed Decision granting the refund to petitioner Luzviminda Land Holdings, Inc. (**petitioner/LLHI**) amounting to ₱33,051,830.00, representing allegedly erroneously paid

¹ Division Docket, pp. 423-443.

² Received by the Court on 06 January 2021.

³ Id., pp. 469-476.

withholding tax and documentary stamp tax (DST), inclusive of surcharges, interests and penalties. In support thereof, respondent forwards the following arguments:

First, the merger between petitioner and Marangal Properties, Inc. (MPI) is an upstream merger which does not qualify under Section 40(C)(2)⁴ of the National Internal Revenue Code (NIRC), as amended. Respondent posits that given that MPI was 60% owned by petitioner, the latter can be considered as the parent company. As such, the reorganization between the two (2) entities results in an upstream merger, where petitioner will not be issuing any shares to MPI, in exchange for the latter’s assets to be transferred to it as a result of the merger. In order for any gain or loss pursuant to a merger to not be recognized, the same requires that the constituent corporation exchanges property solely for the stock of another constituent corporation. Thus, the merger between petitioner and MPI does not qualify as a tax-free merger under Section 40(C)(2).

Second, the non-recognition of gain on an exchange transaction rests upon the confluence of two conditions, to wit: (1) there must be a legal merger/consolidation, or a transfer of all or substantially all of the properties of a corporation for stock of another corporation; and, (2) such business restructuring or reorganization must be for a *bona fide* business purpose.

Respondent asserts that the *bona fide* business transaction is wanting in this case. He points out that after petitioner and MPI effected the merger transaction, the former eventually sold the Ipil Property to IPILRD Marketing, Inc. on 1 July 2016. According to respondent, the merger was petitioner’s attempt and/or preliminary action to escape the burden of taxation.

⁴ **Sec. 40. Determination of Amount and Recognition of Gain or Loss.** –
...
 (C) *Exchange of Property.* –
...
 (2) *Exception.* – No gain or loss shall be recognized if **in pursuance of a plan of merger or consolidation** –
 (a) A corporation, which is a party to a merger or consolidation, exchanges property solely for stock in a corporation, which is a party to the merger or consolidation[.]

Third, the Ipil Property's transfer from MPI to petitioner is subject to DST. Considering that the merger does not qualify as tax-free, it necessarily follows that the transfer of property is subject to DST pursuant to Section 196⁵ of the NIRC, as amended, and petitioner is not entitled to the refund of the DST paid in connection thereto.

Fourth, a Bureau of Internal Revenue (**BIR**) ruling is a condition *sine qua non* for the availment of the non-recognition of gain resulting from a merger transaction. Respondent insists that for an exchange transaction to come within the ambit of the definition of a tax free transaction, all the requisites provided by law must be present; and to confirm the exemption, a tax free exchange ruling must be secured. The importance of which is that if the specific requirements of the law are not present in the transaction alleged to be a tax free exchange transaction, then a different tax consequence will result therefrom.

Respondent stresses that the NIRC, as amended, requires a corporation contemplating merger or dissolution to secure a certificate of tax clearance from the BIR. For him, the issuance of a tax clearance from the BIR is required to be submitted to the Securities and Exchange Commission (**SEC**) before the SEC can issue a certificate of dissolution or reorganization. However, MPI and petitioner were able to secure a Certificate of Filing of the Articles and Plan of Merger with the SEC despite the absence of a tax clearance from the BIR.

Lastly, a tax-free exchange transactions partake of the nature of tax exemptions which are derogation of the power of taxation of the State. Consequently, it is construed strictly against the taxpayer and liberally in favor of the state.

In refutation, petitioner emphasizes that respondent's issues are mere rehash of the averments raised before the Court, which the Court already passed upon. Thus, there is no longer any need to discuss the same issues again, unless there are new and compelling reasons to disturb the Court's findings. Nonetheless, petitioner puts forward the following countervailing arguments: 

⁵ **Sec. 196. Stamp Tax on Deeds of Sale and Conveyances of Real Property.** – On all conveyances, deeds, instruments, or writings, other than grants, patents or original certificates of adjudication issued by the Government, whereby any land, tenement or other realty sold shall be granted, assigned, transferred or otherwise conveyed to the purchaser, or purchasers, or to any other person or persons designated by such purchaser or purchasers, there shall be collected a documentary stamp tax...

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First, the merger cannot be considered an upstream merger. An upstream merger takes place when the parent company absorbs its wholly-owned subsidiary, whereby the merger does not result in the issuance of shares. Such is not the case at bar. Petitioner only owns 60% of MPI, and as a result of the merger, the former issued shares in exchange for the 40% share in the net assets of MPI owned by Coca-Cola Bottlers Philippines, Inc. (CCBPI) (now Coca-Cola Beverages Philippines, Inc.).

Second, the merger, as found by the Court, was a legal merger entered into for a *bona fide* business purpose. The merger was in accordance with the provisions of the Corporation Code and was duly approved by the SEC as evidenced by the Certificate of Filing of the Articles and Plan of Merger dated 27 May 2009.⁶

Additionally, the merger was undertaken for a *bona fide* purpose, that is, to promote and accomplish efficiencies and economies which will serve to reduce costs in all aspects of business. The subsequent sale of the Ipil Property did not negate the *bona fide* purpose of the merger entered into.

Third, the transfer of Ipil Property is not subject to withholding tax and DST. The transfer of Ipil Property to petitioner was in accordance to a tax-free merger. As such, the same is exempt from income tax and therefore exempt from withholding tax, and DST.

Fourth, a BIR ruling is not a condition *sine qua non* for the availment by petitioner of the tax-free exchange of the Ipil Property, as ruled by the Supreme Court in the recent case of *Commissioner of Internal Revenue v. Lucio L. Co., et al.*⁷ In view thereof, the transfer of Ipil Property pursuant to a tax-free merger does not require any prior certification or BIR ruling before petitioner can avail of the exemption of said transfer.

Lastly, as petitioner has fully substantiated its claim for refund, it is entitled to a refund and/or issuance of a tax credit certificate (TCC) of erroneously paid or illegally collected withholding tax and DST. 

⁶ Exhibit "P-3", Division Docket, p. 273.

⁷ G.R. No. 241424, 26 February 2020.

We resolve.

Even after a repeated evaluation of the records, the Court still finds no cogent ground to set aside the assailed Decision. Respondent’s MR still fails to convince this Court that petitioner should not be awarded any refund. He raised no substantial arguments that would warrant a deviation from our earlier findings. At any rate, for emphasis, the Court will elaborate further the reasons for upholding the assailed Decision, as will be essayed below.

THE MERGER BETWEEN PETITIONER
AND MARANGAL PROPERTIES, INC.
(MPI) CANNOT BE CONSIDERED AN
UPSTREAM MERGER

Contrary to respondent’s claim, the merger between petitioner and MPI is not an upstream merger. An upstream merger ensues when the parent company absorbs its *wholly-owned subsidiary*. While petitioner can be considered as the parent company of MPI, having owned 60% of the latter’s outstanding capital stock, MPI is not a wholly-owned subsidiary. Prior to the merger, CCBPI owned MPI’s 40% outstanding capital stock.

In an upstream merger, the parent company, who will be the surviving entity, does not issue shares in exchange for the net assets of the subsidiary (absorbed corporation). The *ratio* for the non-issuance of the shares is to avoid the scenario where the parent entity, being the sole stockholder of the subsidiary, will issue shares to itself, thereby creating treasury shares.⁸

Clearly, such is not the case at bar. Petitioner has sufficiently established that it issued shares equivalent to 40% of the net assets held by CCBPI. Therefore, respondent’s claim that the merger between petitioner and MPI is considered an upstream merger is bereft of factual and legal bases.

THE MERGER QUALIFIES UNDER
SECTION 40(C)(2) OF THE NIRC, AS
AMENDED

⁸ DOF Opinion No. 012-18, 19 November 2018.

We affirm our disquisition in the assailed Decision that the merger between petitioner and MPI falls within the purview of Section 40(C)(2) of the NIRC, as amended, thus qualifies as a tax-free merger. To reiterate, We quote the relevant portion of the assailed Decision.

...

From the foregoing, no gain or loss will be recognized on the exchange of property when two (2) conditions are met: *first*, there must be legal merger, and *second*, such business restructuring was done for a *bona fide* business purpose.

We find that the merger between petitioner and MPI is a legal merger and it was entered into for a *bona fide* business purpose. It bears stressing that the merger was done in accordance with the provisions of the Corporation Code, with the SEC's duly approved Articles and Plan of Merger as evidenced by the Certificate of Filing of the Articles and Plan of Merger dated 27 May 2009.

Moreover, We consider petitioner's intent to reduce costs in the business operation and improve efficiencies and economies as *bona fide* business purpose to merge MPI with it. In the case of *Commissioner of Internal Revenue v. Vicente A. Rufino, et al.*, the Supreme Court explained what constitutes as *bona fide* business purpose in a merger transaction, to wit:

...

The fact that petitioner continues to operate, after taking over MPI's business over a decade ago, only attests to the fact that the merger was for a legitimate business purpose.

Respondent's contention that the merger was not for a *bona fide* purpose, considering that the Ipil Property was later sold, is unavailing. As an incident of its ownership, petitioner possesses the right to dispose of its property. It must also be noted that the Ipil Property was just one of the properties transferred by virtue of the merger. Verily, its subsequent sale seven (7) years thereafter cannot negate altogether the *bona fide* purpose of the merger.

With the above, the Court could only deem that the merger transaction between petitioner and MPI qualifies as a tax-free exchange under Section 40(C)(2) of the NIRC of 1997, as amended. Consequently, the imposition of WT under Section 2.57.2(J) of Revenue Regulations (RR) 2-98 and DST based on Section 196 of the NIRC of 1997, as amended, are without legal mooring. The two provisions contemplate the sale of real properties. Such is not the scenario in a merger transaction.⁹ 

...

A BUREAU OF INTERNAL REVENUE
RULING (BIR) IS NOT A CONDITION
SINE QUA NON FOR THE AVAILMENT
OF THE NON-RECOGNITION OF GAIN
IN A MERGER TRANSACTION

In the same vein, the Court maintains that a BIR ruling is not a pre-requisite for the availment of the non-recognition of gain as a result of the merger. In the case of *Commissioner of Internal Revenue v. Lucio L. Co et al.*¹⁰, the Supreme Court sustained the CTA *En Banc*’s ruling in CTA Case EB No. 1522 entitled *Commissioner of Internal Revenue v. Lucio L. Co, Susan P. Co, Ferdinand Vincent P. Co and Pamela Justine P. Co.*,¹¹ to wit:

...
BIR rulings are the official position of the Bureau to queries raised by taxpayers and other stakeholders relative to clarification and interpretation of tax laws. In this regard, the primary purpose of a BIR Ruling is simply to determine whether a certain transaction, under the law, is taxable or not based on the circumstances provided by the taxpayer. As admitted by the CIR, rulings merely operate to “confirm” the existence of the conditions for exemption provided under the law. If all the requirements for exemption set forth under the law are complied with, the transaction is considered exempt, whether or not a prior BIR ruling was secured by the taxpayer.
...

Moreover, as correctly pointed out by the CTA EB, there is nothing in Section 40(C)(2) of the NIRC of 1997, as amended, which requires the taxpayer to first secure a prior confirmatory ruling before the transaction may be considered as a tax-free exchange. The BIR should not impose additional requirements not provided by law, which would negate the availment of the tax exemption. Instead of resorting to formalities and technicalities, the BIR should have made its own determination of the merits of respondents’ claim for exemption in respondents’ administrative application for refund. **However, the Court notes that, in this case, the CIR not only failed to act on respondents’ administrative claim for refund, it also failed to present evidence during trial before the CTA to prove that the subject transaction is not covered by the tax exemption.**

Indeed, cases filed before the CTA are litigated de novo. As such, party litigants should prove every minute aspect of their cases. Based on the evidence on record, the CTA found that respondents

¹⁰ Supra at note 7.
¹¹ CTA Case No. 8831.

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were able to establish their entitlement to the claimed refund. Accordingly, the Court finds no reason to reverse the findings of the CTA.¹²

...

Verily, it has been sufficiently established that the merger between petitioner and MPI qualifies under Section 40(C)(2) of the NIRC, as amended. Consequently, there is no basis for the imposition of the withholding tax and DST. Likewise, petitioner has proven its entitlement to the refund or issuance of TCC amounting to ₱33,051,830.00.

At this juncture, the Court emphasizes that while tax refunds are strictly construed against the taxpayer, the Government should not resort to technicalities and legalisms, much less frivolous appeals, to keep the money it is not entitled to at the expense of the taxpayers. If the State expects its taxpayers to observe fairness and honesty in paying their taxes, so must it apply the same standard against itself in refunding excess payments of such taxes. Indeed, the state must lead by its own example of honor, dignity and uprightness.¹³

WHEREFORE, premises considered, respondent's Motion for Reconsideration (of the Decision dated 03 December 2020) is **DENIED** for lack of merit.

SO ORDERED.


JEAN MARIE A. BACORRO-VILLENA
Associate Justice

I CONCUR:


JUANITO C. CASTAÑEDA, JR.
Associate Justice

¹² Citations omitted and emphasis supplied.

¹³ *Commissioner of Internal Revenue v. Lucio L. Co., et al.*; supra at note 7.