**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

***EN BANC***

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| **COMMISSIONER OF INTERNAL REVENUE,**<br>*Petitioner,* | **CTA *EB* NO. 1767**<br>(CTA Case No. 8854) |
| *-versus-* | Present:<br><br>**DEL ROSARIO,** *P.J.,*<br>**CASTAÑEDA, JR.,**<br>**UY,**<br>**FABON-VICTORINO,**<br>**MINDARO-GRULLA,**<br>**RINGPIS-LIBAN,**<br>**MANAHAN,**<br>**BACORRO-VILLENA,** *and,*<br>**MODESTO-SAN PEDRO**, *J.J.* |
| **MY SOLID TECHNOLOGIES & DEVICES CORPORATION,**<br>*Respondent.* | Promulgated:<br><br>FEB 11 2020 4:12 p.m. |

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## RESOLUTION

***MANAHAN, J.:***

For this Court's resolution is petitioner's *Motion for Reconsideration* posted on September 5, 2019 praying for the reversal of the Court *En Banc's* Decision dated August 9, 2019, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the Petition for Review is DENIED for lack of merit. The Decision dated August 4, 2017 and the Resolution dated January 4, 2018 of the First Division in CTA Case No. 8854 are **AFFIRMED**.

**SO ORDERED."**

In its *Motion for Reconsideration,* petitioner focuses its arguments on the primary issue resolved by the Court in its Decision dated August 9, 2019, i.e., whether or not a prior filing of an application for notice of merger and/or notification of closure with the Bureau of Internal Revenue (BIR) is a precondition for the utilization of the unused input value-added tax (VAT) credits of the absorbed corporation.

Petitioner asserts that the erroneous ruling of the Court *En Banc* sets an alarming precedent which would allow parties to a merger to file an approved Plan and Agreement and Articles of Merger with the Securities and Exchange Commission (SEC) despite the absence of a tax clearance from the BIR. He further argues that a corporation contemplating merger or dissolution must comply with the provisions of the 1997 National Internal Revenue Code (NIRC), as amended as well as relevant rules and regulations, to ensure that any tax liabilities are paid before the eventual dissolution of the absorbed corporation (or dissolving entity) may take place. This conclusion stems from petitioner's observation that in a corporate merger, one entity is deemed dissolved (absorbed corporation), thus, should comply with all the requirements for the cancellation of business registration or closure/cessation of business before a merger is approved. It is the contention of petitioner that the non-filing of a notice of dissolution or merger/consolidation prevented the BIR from conducting a thorough investigation on the tax liabilities of the absorbed corporation. It is his theory that unless a taxpayer files a notice of merger or dissolution with the BIR and settles its tax obligations, the merger or consolidation should not take effect.

Petitioner disagrees with the ruling of the Court that there is no provision of law which states that the notice of merger filed with the BIR is a precondition for the transfer of the absorbed corporation's unused input tax credits to the surviving corporation in cases of merger. Petitioner cites Sections 52, 235 (e) and 236 (F) of the 1997 NIRC, as amended, and Revenue Regulations (RR)11-2008 which provide the requirements relative to the registration; registration update; cancellation; dissolution and merger of corporations that support its argument that the notice of dissolution or merger should first be filed with the BIR as a precondition for the transfer of the unused input tax credits to the surviving corporation.

In its *Comment (Re: Petitioner's Motion for Reconsideration dated September 4, 2019)* filed on November 6, 2019, respondent contravenes the position of petitioner on the following grounds, and we quote:

"1. There is nothing in Sections 52, 235 (e) and 236 (F) of the 1997, NIRC, as amended and RR 11-2008 that expressly requires the prior filing of an application for merger with and/or notification to the BIR as a precondition for the transfer of the absorbed corporation's unused input tax credits to the surviving corporation. On the contrary, Section 4.106-8 of RR No. 16-2005 (otherwise known as the "VAT Regulations") explicitly provides that in case of merger or consolidation, the unused input taxes of the absorbed corporation, as of the date of merger, shall be transferred to the surviving corporation.

2. There is no basis for petitioner's argument that the non-filing of a notice of merger has prevented the BIR from conducting a thorough investigation on the tax liabilities of Mytel. Notwithstanding such merger, the BIR is not prevented from conducting an investigation of Mytel's internal tax liabilities. In fact, the BIR has already issued a Formal Assessment Notice against Mytel on January 25, 2016 for its alleged deficiency taxes for the 1st and 2nd quarters of calendar year (CY) 2012.
3. As this Honorable Court has accurately stated in its Decision, "the conditions before the registration of a closing entity is canceled under the 1997 NIRC are not the same conditions before the legal effects of a statutory merger may take place. Petitioner failed to make this distinction, hence, resulting to an erroneous application of the provisions of the 1997 NIRC to a statutory merger governed by the Corporation Code."

**RULING OF THE COURT**

Petitioner's Motion for Reconsideration is bereft of merit.

While it was observed that petitioner's arguments involve the same issues which have already been passed upon in the assailed Decision, we find it appropriate to reiterate the rationale of our conclusion for emphasis.

Petitioner attempts to ratify its assessment issued against respondent on the ground that respondent failed to file any application for merger with the BIR, thus, any benefits, e.g., transfer of input tax of the absorbed entity to the surviving entity, cannot be availed of.

The issue that was resolved comprehensively in the assailed Decision is whether a prior filing of an application for notice of merger and/or consolidation or closure with the BIR is a precondition for the utilization of the unused input VAT credits of the absorbed corporation.

We rule in the negative.

In resolving such an issue, we find it imperative to distinguish the effects and the regulatory requirements relative to a closure of a corporation from the effects of a statutory merger as provided under the Corporation Code of the Philippines (Corporation Code). We acknowledge that corporations planning to dissolve their corporate existence must strictly comply with the regulatory requirements prescribed under the 1997 NIRC, as amended, and relevant rules and regulations, to ensure that proper taxes are paid before its eventual closure. The BIR has its own safeguards in place to prevent a closing entity to avoid paying its taxes before its certificate of license is withdrawn or its certificate of registration is canceled by the SEC. One such safeguard is the requirement of securing a tax clearance from the BIR. Petitioner finds it alarming that the Court would rule that a merger may be approved without the corresponding notice of merger having been filed (first) with the BIR which would notify them of the closure of the absorbed entity and which would in turn initiate the investigations of the latter's internal revenue tax liabilities, if any.

Such anxiety on the part of the petitioner has no basis.

As enunciated clearly by respondent in its Comment, the BIR is not prevented from conducting an investigation of the absorbed entity's tax obligations or from issuing an assessment against the latter as a result of its closure. Furthermore, in the case of a merger, the absorbed corporation's outstanding obligations, if any, shall be transferred to the surviving corporation as clearly provided under Section 80 of the Corporation Code, and we quote as follows:

> "Section 80. *Effects of merger or consolidation.* – The merger or consolidation shall have the following effects:
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> 1. The constituent corporations shall become a single corporation, which, in case of merger, shall be the surviving corporation designated in the plan of merger; and, in case of consolidation,

shall be the consolidated corporation designated in the plan of consolidation;

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

In conclusion, it is worthy to reiterate portions of the assailed Decision:

"We also assent to the rationale of the Court in Division when it conclusively stated in the assailed Resolution that petitioner CIR failed to provide a provision of law which requires that the notice of merger filed with the BIR is a precondition for the transfer of the absorbed corporation's unused input tax credits to the surviving corporation in cases of merger.

Sections 235 (e) and 236 (F) of the 1997 NIRC cited by petitioner as his legal bases do not contain any such conditions contrary to his claim. We quote Sections 235 (e) and 236 (F), thus:

"Section 235. *Preservation of Books of Accounts and Other Accounting Records.* –

(e) In the exercise of the Commissioner's power under Section 5 (B) to obtain information from other persons in which case another or separate examination and inspection may be made. Examination and inspection of books of accounts and other accounting records shall be done in the taxpayer's office or place of business or in the office of the Bureau of Internal Revenue. All corporations, partnerships and persons that retire from business shall, within then (10 ) days from the date of merger or within such period of time as may be allowed by the Commissioner in special cases, submit their books of accounts, including their subsidiary books and other accounting records to the Commissioner or 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."

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"Section 236. *Registration Requirements.* –

(F) Cancellation of Registration

(1) General Rule. – The registration of any person who ceases to be liable to a tax type shall be cancelled upon filing with the Revenue District Office where he is registered, an application for registration information update in a form prescribed therefor."

A close reading of the afore-quoted sections cited by petitioner refers to the closure or dissolution of registered entities which would require these entities to file an application for cancellation of registration with the BIR and do not refer to the conditions to be complied with before the legal effects of a merger may be realized under the relevant provisions of the Corporation Code.

In the closure of juridical entities, the BIR will not grant the application for cancellation of registration (which includes the cancellation of their Tax Identification Numbers (TINs)) until all tax liabilities of the closing entity are settled and all penalties for non-filing of tax returns are paid. The closing entity shall be required to submit its accounting records and other documents to enable the revenue officers to conduct an examination to determine its remaining tax liabilities, if any. This process is to ensure that all unpaid taxes and penalties will be paid/settled by the closing entity before the BIR finally cancels its registration and its corresponding TIN. The same requirements apply to an ordinary closure of a company and that of a dissolution of a company by way of merger because in all cases, the registration with the BIR has to be cancelled.

**The effects of a closure of a company from a tax perspective should be distinguished from the effects of a statutory merger resulting to a dissolution of the absorbed company under the provisions of the Corporation Code. Although both contemplate a situation wherein an entity is dissolved, the effects under the 1997 NIRC and the**

**Corporation Code are different. The legal effects of a statutory merger is clear from the provisions of the afore-quoted Section 79 of the Corporation Code and Section 40 (C) (6) (b) of the 1997 NIRC as implemented by RR 14-2005, while Section 80 of the Corporation Code provides the period when these legal effects shall take place.**

The conditions before the registration of a closing entity is cancelled under the 1997 NIRC are not the same conditions before the legal effects of a statutory merger may take place. **Petitioner failed to make this distinction, hence, resulting to an erroneous application of the provisions of the 1997 NIRC to a statutory merger governed by the Corporation Code."** (emphasis supplied)

**WHEREFORE**, the Motion for Reconsideration posted by petitioner on September 5, 2019 is **DENIED** for lack of merit.

**SO ORDERED.**

**CATHERINE T. MANAHAN**
Associate Justice

**WE CONCUR:**

**ROMAN G. DEL ROSARIO**
Presiding Justice

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**ERLINDA P. UY**
Associate Justice

(no participation in the Assailed Decision)
**ESPERANZA R. FABON-VICTORINO**
Associate Justice

**ON LEAVE**

**CIELITO N. MINDARO-GRULLA**
Associate Justice

**MA. BELEN M. RINGPIS-LIBAN**
Associate Justice

**JEAN MARIE A. BACORRO-VILLENA**
Associate Justice

**MARIA ROWENA MODESTO-SAN PEDRO**
Associate Justice