REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC
****

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 1684** (CTA Case No. 8939)
	Present:
- versus -	**DEL ROSARIO,** P.J., **CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** and **MANAHAN,** JJ.
BELLE CORPORATION, Respondent.	***Promulgated:*** OCT 10 2018 3:41 p.m.

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DECISION

UY, J.:

Before the Court *En Banc* is a *Petition for Review* filed by the Commissioner of Internal Revenue on July 26, 2017 against Belle Corporation,[1] appealing the Decision dated April 20, 2017[2] and the Resolution dated June 21, 2017[3], both rendered by the Third Division of this Court (Court in Division) in CTA Case No. 8939 entitled *"Belle Corporation, Petitioner, versus Commissioner of Internal Revenue, Respondent"*, the dispositive portions of which respectively read:

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[1] EB Docket, pp. 5 to 10.

[2] Penned by Associate Justice Ma. Belen M. Ringpis-Liban, concurred by Associate Justice Esperanza R. Fabon-Victorino; Associate Justice Lovell R. Bautista entered a Concurring and Dissenting Opinion; EB Docket, pp. 16 to 35.

[3] Also penned by Associate Justice Ma. Belen M. Ringpis-Liban, but already concurred by both Associate Justice Esperanza R. Fabon-Victorino and Associate Justice Lovell R. Bautista EB Docket, pp. 37 to 38.

Decision dated April 20, 2017:

"**WHEREFORE,** premises considered, the instant Petition for Review is **GRANTED**. Accordingly, respondent is **ORDERED TO REFUND OR TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the amount of **₱63,249,000.00**, representing erroneously paid capital gains tax from its receipt of real property by way of liquidating dividends from BBCC.

SO ORDERED."

Resolution dated June 21, 2017:

"**WHEREFORE**, premises considered, Respondent's "Motion for Reconsideration (of the Decision dated 20 April 2017)' is hereby **DENIED** for lack of merit.

SO ORDERED."

THE FACTS

Petitioner is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) empowered to perform the duties of his office, including, among others, to act on and approve claims for refund or tax credit as provided by law. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Respondent Belle Corporation, on the other hand, is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal address at 5th Floor, Two E-Com Center, Mall of Asia Complex, CBP-1A, Pasay City. It is primarily established to invest in the purchase, or otherwise acquire and own, hold, use, develop, lease, sell, assign, transfer, mortgage, pledge, exchange, operate, or otherwise dispose of all properties of every kind, nature and description. Respondent owns 852,455,306 common shares of stocks in Belle Bay City Corporation (BBCC).

On January 27, 2005, the Securities and Exchange Commission approved BBCC's amended Articles of Incorporation,

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which shortened the term of BBCC's existence until January 31, 2004, thus dissolving said corporation.

Following the dissolution of BBCC, respondent received several of BBCC's remaining real properties as liquidating dividends by virtue of a Deed of Conveyance executed on November 12, 2012. Said properties comprised of eight (8) parcels of land located at Barangay Tambo, Aseana Business Park, Parañaque City, having an aggregate area of 42,166 square meters, more or less, and covered by Transfer Certificates of Title Nos. 010-2010000878, 010-2010000879, 010-2010000880, 010-2010000881, 010-2010000882, 010-2010000883, 169890, and 136452 of the Registry of Deeds of Parañaque City.

On May 29, 2007, the BIR issued BIR Ruling No. DA-316-2007, declaring that BBCC's transfer of real properties by way of liquidating dividends to its stockholders is not considered a sale of such assets for tax purposes. Consequently, the same will not give rise to any liability for payment of income tax, creditable withholding tax, and documentary stamp tax since BBCC, as a corporation undergoing the process of liquidation, will not realize a taxable gain or loss during such process.

Respondent filed before the BIR-Revenue District Office (RDO) No. 52 a Withholding Tax Remittance Return and Documentary Stamp Tax on November 16, 2012, without remitting or paying any corresponding withholding tax or documentary stamp tax. In its 2012 Annual Income Tax Return, respondent reported the fact of its receipt of liquidating dividends from BBCC by recognizing a net liquidating gain of ₱413,625,407.00 as part of its *Other Taxable Income not Subjected to Final Tax*, thus, subjecting said liquidating gains to the thirty percent (30%) regular corporate income tax.

On November 28, 2012, respondent remitted capital gains tax under protest in the amount of ₱63,249,000.00 and filed the corresponding Capital Gains Tax Return (BIR Form No. 1706) with the Land Bank of the Philippines-Baclaran Branch, which is among the list of authorized agent banks for BIR-RDO No. 52.

Subsequently, respondent filed the letter dated November 28, 2012 with the BIR, informing the latter that its remittance of capital gains tax is being made under protest.

On April 8, 2014, through its letter dated March 28, 2014, respondent formally filed its application for refund and/or issuance of tax credit certificate with the BIR to recover the capital gains tax amounting to ₱63,249,000.00, arising from its receipt of real properties of BBCC by way of liquidating dividends.

Respondent then filed a *Petition for Review* before the Court in Division on November 28, 2014. The case was docketed as CTA Case No. 8939.

Petitioner filed his *Answer* in CTA Case No. 8939 on February 18, 2015, interposing, among others, the following special and affirmative defenses: (1) the exchange by BBCC of its reclaimed lots with respondent's surrender of shares of stocks is not a mere transfer or return of invested capital but an exchange, and is therefore subject to capital gains tax, under Section 27(D)(5) of the National Internal Revenue Code (NIRC) of 1997, as amended; and (2) respondent does not have legal personality to sue.

Respondent filed its *Reply* to the said *Answer* on March 5, 2015[4] alleging that petitioner, in the said *Answer,* erroneously classified the conveyance of Belle Bay City Corporation's ("BBCC") liquidating dividends, consisting of a portion of its real property, to BELLE subject of Creditable Withholding Tax ("CWT") as provided under Section 27 (D)(5) of Presidential Decree No. 1158, *as amended,* otherwise known as the *National Internal Revenue Code of the Philippines ("*NIRC"). Allegedly, said conveyance may not be considered as a taxable sale or exchange of properties, and therefore not subject to capital gains tax.

CTA Case No. 8939 was set for pre-trial conference on April 28, 2015.[5] On May 8, 2015, the parties filed their *Joint Stipulation of Facts and Issues*[6], which was adopted by the Court in Division in the Pre-Trial Order dated May 28, 2015.[7]

During the trial of CTA Case No. 8939, respondent presented the following witnesses: (1) Cecilia R. Patricio – Senior Vice President for the Corporate Tax Division of SM Investments

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[4] Division Docket, (CTA Case o. 8939), Vol. I, pp.116-127
[5] Notice of Pre-Trial Conference, Division Docket, (CTA Case o. 8939), Vol. I, p. 128
[6] Joint Stipulation of Facts and Issues, Division Docket, (CTA Case o. 8939), Vol. I, pp. 426-433
[7] Pre-Trial Order, Division Docket, (CTA Case o. 8939), Vol. I, pp. 435-440

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Corporation (SMIC); and (2) Rosemarie R. Abueva – respondent's Senior Assistant Vice President for the Accounting Department. Thereafter, respondent formally offered its documentary evidence on October 21, 2015.[8]

The Court in Division issued the Resolution dated November 25, 2015, admitting respondent's evidence.

At the hearing held on February 1, 2016 in CTA Case No. 8939, petitioner's counsel manifested that no report of investigation was submitted by the Revenue Officers; thus, he would no longer present evidence.

As directed by the Court in Division, respondent filed its *Memorandum* on March 2, 2016, while petitioner manifested that he would be adopting all his pleadings filed in relation to CTA Case No. 8939 as his *Memorandum*. Thereafter, CTA Case No. 8939 was declared submitted for decision on April 25, 2016.

The Court in Division then rendered the assailed Decision dated April 20, 2017,[9] granting respondent's *Petition for Review*, and ordering petitioner to refund or to issue a tax credit certificate in favor of the latter in the amount of ₱63,249,000.00, representing erroneously paid capital gains tax from receipt of real property by way of liquidating dividends from BBCC.

Petitioner filed his *Motion for Reconsideration (of the Decision dated 20 April 2017)* on May 22, 2017,[10] seeking to reconsider and set aside the said Decision.

On June 21, 2017, the Court in Division rendered the assailed Resolution,[11] denying petitioner's *Motion for Reconsideration* for lack of merit.

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[8] Petitioner's "Formal Offer of Evidence", Division Docket, (CTA Case o. 8939), Vol. II, pp. 631-645

[9] EB Docket, pp. 16 to 35; Division Docket (CTA Case No. 8939) – Vol. 2, pp. 781 to 800.

[10] EB Docket, pp. 39 to 42; Division Docket (CTA Case No. 8939) – Vol. 2, pp. 801 to 804.

[11] EB Docket, pp. 37 to 38; Division Docket (CTA Case No. 8939) – Vol. 2, pp. 817 to 818.

Petitioner then filed a *Motion For An Extension of Time To File Petition for Review* on July 14, 2017 before this Court *En Banc*,[12] praying for an extension of fifteen (15) days from July 14, 2017 or until July 29, 2017, within which to file his *Petition for Review*. The Court *En Banc* granted petitioner a final and non-extendible period of fifteen (15) days from July 14, 2017 or until July 29, 2017, within which to file the said *Petition for Review*.[13]

On July 26, 2017, petitioner filed the instant *Petition for Review*,[14] praying for the reconsideration and setting aside of the Court in Division's Resolution dated June 21, 2017, and that a new one be rendered dismissing the petition for review filed by respondent in CTA Case No. 8939 for lack of merit.

In the Resolution dated August 17, 2017,[15] the Court *En Banc* ordered respondent to file his *Comment* on the *Petition for Review*, within ten (10) days from receipt thereof. Thus, on September 18, 2017, respondent filed the said *Comment*.[16]

The Court *En Banc* then required, in the Resolution dated October 3, 2017,[17] the parties to submit their respective memorandum within a period of thirty (30) days from receipt thereof. Respondent filed its *Memorandum* on November 20, 2017.[18] Petitioner, however, failed to file his memoranda.[19] On January 9, 2018, the instant case was deemed submitted for decision.[20]

Hence, this Decision.

THE ISSUE

In the Petition for Review, petitioner raises the following issue, to wit:

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[12] EB Docket, pp. 1 to 2.
[13] Minute Resolution dated July 25, 2017, EB Docket, p. 4.
[14] EB Docket, pp. 5 to 10.
[15] EB Docket, pp. 45 to 46.
[16] EB Docket, pp. 47 to 59.
[17] EB Docket, pp. 97 to 98.
[18] EB Docket, pp. 99 to 117.
[19] Records Verification dated December 4, 2017 issued by the Judicial Records Division of this Court, EB Docket, p. 119.
[20] Resolution dated January 9, 2018, EB Docket, pp. 121 to 122.

> "Whether the Honorable Third Division of the CTA erred in denying herein Petitioner's Motion for Reconsideration."[21]

On the other hand, respondent elaborated in its Memorandum filed on November 20, 2017, the issue raised by petitioner as follows:

> "Whether or not the CTA-Third Division erred when it promulgated its *Decision* and *Resolution* holding that the conveyance by BBCC of the subject real property as liquidating dividends in favor of the Respondent is not subject to capital gains tax, and, on such basis, order the refund or issuance of a tax credit certificate in the amount of P63,249,000.00 in favor of the Respondent." [22]

Petitioner's arguments:

Petitioner argues that when BBCC transferred several of its remaining properties to respondent as liquidating dividends, a transaction called "exchange" occurred between BBCC and respondent, and this is because the reclaimed lots being held by BBCC were transferred or exchanged to respondent with the latter's surrender of shares of stocks to BBCC. According to petitioner, by reason of this exchange, it qualifies as one which falls under Section 24(D)(1) of the Tax Code.

Moreover, petitioner contends that Section 24(D)(1) also implies that in order to be liable for capital gains tax, there must be also gain from the sale, exchange or other disposition of real property.

Allegedly, respondent clearly realized a gain from its receipt of liquidating dividends from BBCC; and that in fact, in its 2012 Annual Income Tax Return, respondent recognized a net liquidating gain of ₱413,625,407.00 as part of its Other Taxable Income.

Finally, petitioner claims that considering that a gain was realized from the exchange of the real properties being held by BBCC with respondent's surrender of shares of stocks, the instant case is

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[21] EB Docket, p. 6.
[22] EB Docket, pp. 99-118

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one that is subject to capital gains tax at the rate of 6% final withholding capital gains tax under Section 27(D)(5) of the Tax Code.

Respondent's counter-arguments:

Respondent counter-argues that the Court in Division did not err when it promulgated its Decision and Resolution, considering that the distribution of liquidating dividends on account of the dissolution of a corporation is not considered a sale of asset by the liquidating corporation for the purpose of the imposition of capital gains tax; and consequently, the conveyance by BBCC of the subject real property as liquidating dividends in favor of respondent is not subject to capital gains tax.

THE COURT *EN BANC*'S RULING

The instant *Petition for Review* must be dismissed.

Petitioner failed to observe the requirements under Section 4(b) of Rule 8 of the Revised Rules of the Court of Tax Appeals in relation to Sections 6 and 7 of Rule 43 of the 1997 Rules of Civil Procedure.

In its *Comment*, respondent points out that the instant *Petition for Review* failed to comply with requirements under Section 4(b) of Rule 8 of the Revised Rules of the Court of Tax Appeals in relation to Sections 6 and 7 of Rule 43 of the Rules of Court, now the 1997 Rules of Civil Procedure. Particularly, respondent avers that in the *"Statement of the Case"* portion of the instant *Petition for Review*, petitioner merely quoted the dispositive portions of the assailed Decision and Resolution, without providing a statement of the facts of the case.

We agree with respondent.

Section 4(b) of the Revised Rules of the Court of Tax Appeals provides as follows:

"SEC. 4. *Where to appeal; mode of appeal.* —

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> (b) **An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review <u>as provided in Rule 43 of the Rules of Court</u>.** The Court *en banc* shall act on the appeal." *(Emphasis and underscoring supplied)*

Relative thereto, Sections 6 and 7 of Rule 43 of the Rules of Court, now the 1997 Rules of Civil Procedure reads:

> "SEC. 6. *Contents of the petition.* — **The petition for review shall** (a) state the full names of the parties to the case, without impleading the court or agencies either as petitioners or respondents; (b) **contain a concise statement of the facts** and issues involved and the grounds relied upon for the review; (c) be accompanied by a clearly legible duplicate original or a certified true copy of the award, judgment, final order or resolution appealed from, together with certified true copies of such material portions of the record referred to therein and other supporting papers; and (d) contain a sworn certification against forum shopping as provided in the last paragraph of section 2, Rule 42. The petition shall state the specific material dates showing that it was filed within the period fixed herein.
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> "SEC. 7. *Effect of failure to comply with requirements.* — **The failure of the petitioner to comply with <u>any</u> of the foregoing requirements regarding** the payment of the docket and other lawful fees, the deposit for costs, proof of service of the petition, and **the contents of** and the documents which should accompany **the petition shall be sufficient ground for the dismissal thereof.**" *(Emphases and underscoring supplied)*

Based on the foregoing provisions, a petition for review filed before the Court *En Banc* may be dismissed when the same does not contain a concise statement of the facts involved in the case.

A cursory examination of the instant *Petition for Review* reveals that the same does not contain a concise statement of the facts involved in this case. While the said *Petition* contains the specific material dates showing that it was timely filed within the period fixed under the heading "***TIMELINESS OF THE PETITION***", the parties involved under the heading "***THE PARTIES***", the lone issue raised under the heading ***"ISSUE",*** and lastly, the laws relied upon by petitioner and his arguments in support of the instant petition, under the heading **"DISCUSSION"**. Clearly, it does not contain any statement as to how the case *a quo* came about.

Consequently, the instant *Petition for Review* must be dismissed on procedural grounds.

But even granting that this Court *En Banc* relaxes the above-stated rules of procedure, the instant *Petition for Review* still lacks merit.

Petitioner's stance that the subject transaction is subject to capital gains tax cannot be given retroactive effect.

In this case, it is undisputed that BBCC was able to obtain a ruling from the BIR (via BIR Ruling No. DA-316-07 dated May 29, 2007)[23] as to the tax treatment of the transfer of BBCC of the reclaimed lots to its stockholders, and the receipt of the same by the latter as liquidating dividends. Said BIR Ruling reads, in part, as follows:

> "1. ***The transfer by BBCC of the reclaimed lots to its stockholders as liquidating dividends is not subject to income tax,*** *creditable withholding tax and documentary stamp tax.*
>
> *Income and Creditable Withholding Tax*
>
> **The transfer by the liquidating corporation of its remaining assets to its stockholders is not considered as a sale of these assets. Thus, <u>a liquidating corporation does not realize gain or loss</u>**

[23] Exhibit "P-5", Division Docket (CTA Case No. 8939) – Vol. 2, pp. 687 to 691.

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in partial or complete liquidation. [*W.P. Fox & Sons, Inc., Petitioner vs. Commissioner of Internal Revenue, Respondent*, 15 BTA 115; Jordan Petroleum Company, 13 AFTR 2d 1692 (227 F. Supp. 174); *JTS Brown & Son Company vs. Commissioner of Internal Revenue*, 10TC 840]

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2. *The receipt of reclaimed lots as liquidating dividends by the stockholder, is taxable income or a deductible loss, as the case may be.*

The second paragraph of Section 73 (A) of the Tax Code of 1997 states:

> 'Where a corporation distributes all of its assets in complete liquidation or dissolution, the gain realized or loss sustained by the stockholder, whether individual or corporate, is a taxable income or a deductible loss, as the case may be.'

In the case of *Wise & Co., Inc., et al. vs. Bibiano L. Meer, Collector of Internal Revenue* (78 Phil. 655 [1947]), the Supreme Court held that the amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits. The Supreme Court also stated that '(W)hen the corporation was dissolved and in the process of complete liquidation and its shareholders surrendered their stock to it and it paid the sums in question to them in exchange a transaction took place, which was no different in its essence from a sale of the same stock to a third party who paid therefore.'

However, liquidating gain, which is, the difference between the fair market value of the properties received and the cost basis of the shares to the stockholders derived by an individual stockholder, is to be treated as the gain from the sale or exchange of shares, consistent with the decision of the Supreme Court in Wise & Co., Inc., *supra*, subject, however, not to the 5%/10% final tax rate under Section 24(C), 25(A) or (B), 27(D), 28(A)(7)(c)

> and (B)(5)(c) of the Tax Code of 1997, but to the ordinary income tax rates provided under Sections 24(A)(1), 25(A)(1) and (B) [that is, the 25% rate] of the Tax Code of 1997, depending on the status of the shareholder/ stockholder (for instance, whether the shareholder is a corporation or an individual, resident or non-resident).
>
> **Finally, this Office also notes that a similar treatment has been given to corporate shareholders of a dissolving corporation, in that <u>the liquidating gain realized is subject to the ordinary corporate income tax rate under Sections 27(A) or (E), 28(A)(1) or (2) and (B)(1) of the Tax Code of 1997</u>, rather than to** the then 10%/20% tax rates under Sec. 34(g) of the Tax Code, as amended by Presidential Decree 1739; or **the current 5%/10% final tax rates under Section 27(D)(2) of the Tax Code of 1997** (BIR Ruling Nos. DA-214-96 dated June 26, 1996 and 171-92 dated May 28, 1992)." *(Emphases and underscoring supplied)*

Thus, based on the foregoing, the BIR has already earlier ruled, among others, that the transfer by BBCC of the reclaimed lots to its stockholders (including respondent) as liquidating dividends is not subject to, *inter alia*, income tax, which perforce includes capital gains tax; while the receipt of respondent of the said property resulting to a liquidating gain it realized is taxable income subject to the ordinary income tax rate under Sections 27(A) or (E), 28(A)(1) or (2) of the NIRC of 1997, or a deductible loss, as the case may be.

Relative thereto, it was duly proven in the proceedings *a quo* that respondent relied in good faith on BIR Ruling No. DA-316-07.[24] Thus, in this case, petitioner cannot now revoke such ruling and say that the transaction is an exchange subject to the capital gains tax, and apply such revocation retroactively.

Section 246 of the NIRC of 1997 provides as follows:

> "SEC. 246. *Non-Retroactivity of Rulings.* – **Any revocation, modification or reversal of** any of the rules and regulations promulgated in accordance with the preceding Sections or **any of the rulings or circulars**

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[24] Pars. 21 and 22, Exhibit "P-15" (*Amended Judicial Affidavit of Ms. Cecilia R. Patricio dated June 25, 2015*), Division Docket (CTA Case No. 8939), p. 468.

> **promulgated by the Commissioner shall not be given retroactive application <u>if the revocation, modification or reversal will be prejudicial to the taxpayers</u>,** except in the following cases:
>
> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
>
> (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
>
> (c) Where the taxpayer acted in bad faith."
> *(Emphasis and underscoring supplied)*

Based on the foregoing, it is clear that a reversal of the BIR regulation or ruling cannot adversely prejudice a taxpayer who, in good faith, relied on the BIR regulation or ruling prior to its reversal.[25] In other words, petitioner is precluded from adopting a position contrary to one previously taken where injustice would result to the taxpayer.[26]

To rule otherwise, would be contrary to the tenets of good faith, equity, and fair play.[27]

In *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*,[28] the Supreme Court ruled:

> "...in seeking a refund of its excess output tax, respondent relied on VAT Ruling No. 003-99, which reconfirmed BIR Ruling No. 023-95 'insofar as it held that the services being rendered by BWSCMI is subject to VAT at zero percent (0%).' **Respondent's reliance on these BIR rulings binds petitioner.**

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[25] *Team Energy Corporation (Formerly Mirant Pagbilao Corporation) vs. Commissioner of Internal Revenue*, G.R. No. 197760, January 13, 2014.
[26] *Commissioner of Internal Revenue vs. Philippine Health Care Providers, Inc.*, G.R. No. 168129, April 24, 2007, citing *ABS-CBN Broadcasting Corp. vs. Court of Tax Appeals, et al.*, G.R. No. 52306, October 12, 1981.
[27] *Commissioner of Internal Revenue vs. Philippine Health Care Providers, Inc.*, supra.
[28] G.R. No. 153205, January 22, 2007.

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> **Petitioner's filing of his Answer before the CTA challenging respondent's claim for refund effectively serves as a revocation of VAT Ruling No. 003-99 and BIR Ruling No. 023-95. However, such revocation cannot be given retroactive effect since it will prejudice respondent.** Changing respondent's status will deprive respondent of a refund of a substantial amount representing excess output tax. **Section 246 of the Tax Code provides that any revocation of a ruling by the Commissioner of Internal Revenue shall not be given retroactive application if the revocation will prejudice the taxpayer. Further, there is no showing of the existence of any of the exceptions enumerated in Section 246 of the Tax Code for the retroactive application of such revocation.**" *(Emphases supplied)*

Consistent with the foregoing ruling, respondent's reliance on BIR Ruling No. DA-316-07 binds petitioner. Thus, although petitioner's filing of his *Answer* on February 18, 2015[29] before the Court in Division in CTA Case No. 8939 serves as a revocation of the said BIR Ruling No. DA-316-07, such revocation cannot be given retroactive effect since it will prejudice respondent. This must be so because there is no showing of the existence of the exceptions enumerated in the above-quoted Section 246 for the retroactive application of such revocation.

Thus, with the foregoing discussions, the instant case can already be disposed of against petitioner. However, even granting that BIR Ruling No. DA-316-07 was not obtained by BBCC, petitioner's contention that the subject transaction is an "exchange" and thus, subject to the capital gains tax under Section 27(D)(5) of the NIRC of 1997, deserves scant consideration.

The subject transaction is not an "exchange". Furthermore, there is no showing that the subject real properties transferred by BBCC to respondent are capital assets. Hence, the capital gains tax under Section 27(D)(5) of the NIRC of 1997, as amended, may not be imposed.

[29] Division Docket (CTA Case No. 8939) – Vol. 1, pp. 112 to 115.

Section 27(D)(1) of the NIRC of 1997, as amended, provides as follows:

> "SEC. 27. *Rates of Income on Domestic Corporations.* –
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> xxx xxx xxx
>
> (D) *Rates of Tax on Certain Passive Incomes.* –
>
> xxx xxx xxx
>
> (5) ***Capital Gains Realized from the Sale, Exchange or Disposition of Lands and/or Buildings. –*** **A final tax of six percent (6%) is hereby imposed on the gain presumed to have been realized on the sale, exchange or disposition of lands and/or buildings which are not actually used in the business of a corporation and are <u>treated as capital assets</u>,** based on the gross selling price or fair market value as determined in accordance with Section 6(E) of this Code, whichever is higher, of such lands and/or buildings." *(Emphasis and underscoring supplied)*

Under the foregoing provision, a capital gains tax of six percent (6%) is imposed on the gains presumed to have been realized in the sale, exchange or disposition of lands and/or buildings which are not actively used in the business of a corporation and which are treated as capital assets based on the gross selling price or fair market value as determined in accordance with Section 6(E) of the NIRC, whichever is higher.[30]

Capital gains tax is defined as a tax on the gain from the sale of the taxpayer's property forming part of capital assets.[31] The term "sale" covers the term "exchange". This is so because an "exchange" is equivalent to "purchase",[32] which, in turn, *"denotes the act of acquiring anything sold"* or means *"to buy"*.[33] Simply put, for the

[30] *Commission of Internal Revenue vs. Aquafresh Seafoods, Inc.*, G.R. No. 170389, October 20, 2010.
[31] Refer to *Commissioner of Internal Revenue vs. B.F. Goodrich Phils., Inc., et al.*, G.R. No. 104171, February 24, 1999.
[32] *Navarra vs. People of the Philippines, et al.*, No. L-6469, April 29, 1955, 96 Phil. 857; and Philippine Law Dictionary, Third Edition, © 1988, pp. 340 and 772.
[33] The Attorney's Pocket Dictionary, ©1981, p. 387.

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capital gains tax to be imposed under Section 27(D)(5) of the NIRC of 1997, as amended, there must be a sale.

In *Fernando vs. Sps. Reginaldo Lim and Asuncion Lim,*[34] the Supreme Court has categorically ruled that the receipt of the shares of stock surrendered by the stockholder to the liquidating corporation or the transfer of assets by the latter to the said stockholder is not treated as a sale, to wit:

> "The share of each stockholder in the remaining assets of the corporation upon liquidation, after the payment of all corporate debts and liabilities, is what is known as liquidating dividend.[35] In its interpretation of recent tax laws, the Bureau of Internal Revenue viewed the distribution of liquidating dividends not as a sale of asset by the liquidating corporation to its stockholder but as ***a sale of shares by the stockholder to the corporation or the surrender of the stockholders['] interest in the corporation, in place of which said stockholder receives property or money from the corporation about to be dissolved.***[36] Thus, on the part of the stockholder, any gain or loss is subject to tax, <u>while on the part of the liquidating corporation, no tax is imposed on its receipt of the shares surrendered by the stockholder or transfer of assets to said stockholder because said transaction is not treated as a sale</u>.[37]" *(Underscoring supplied)*

Such being the case, there can be no merit in petitioner's contention that the capital gains tax under Section 27(D)(5) of the NIRC of 1997, as amended, may be imposed on the transfer by BBCC to respondent of its assets as liquidating dividends.

In the same vein, even when it can be presumed that there is a "sale" in this case, there is still no indication that the real properties

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[34] G.R. No. 176282, August 22, 2008.

[35] PDIC vs. Reyes, G.R. No. 154973, June 21, 2005.

[36] See, however, Jose Campos, The Corporation Code Volume II, p. 417, citing *Stockholders of Guanzon vs. Register of Deeds*, No. L-18216, October 30, 1962, 6 SCRA 373.

[37] BIR Ruling No. DA-111-2005, April 5, 2005. See also *Commissioner vs. Court Holding Co.* (324 U.S. 331 [1945]), in which the US Supreme Court held that that a corporation realizes no taxable gain by a mere distribution of its assets in kind, or in partial or complete liquidation, however much they may have appreciated in value since acquisition.

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transferred by BBCC to respondent are classified as capital assets to warrant the imposition of the said capital gains tax.

Section 39(A)(1) of the NIRC of 1997 defines what are "capital assets", to wit:

> "SEC. 39. *Capital Gains and Losses.* –
>
> (A) *Definitions.* – As used in this Title –
>
> (1) *Capital Assets.* – **The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Subsection (F) of Section 34; or real property used in trade or business of the taxpayer.**" *(Emphasis supplied)*

As thus defined by law, the term "capital assets" includes all the properties of a taxpayer whether or not connected with his trade or business, ***except***: (1) stock in trade or other property included in the taxpayer's inventory; (2) property primarily for sale to customers in the ordinary course of his trade or business; (3) property used in the trade or business of the taxpayer and subject to depreciation allowance; and (4) real property used in trade or business.[38]

In this connection, it bears emphasis that in the determination of whether a piece of property is a capital asset or an ordinary asset, a careful examination and weighing of all circumstances revealed in each case must be made.[39] In this case, however, no such examination and weighing can be fully had, because petitioner failed to show that the assets transferred by BBCC to respondent are indeed capital assets to justify the imposition of the capital gains tax.

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[38] *Tuason, Jr. vs. Lingad*, G.R. No. L-24248, July 31, 1974.
[39] *Idem.*

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Needless to state, in answering the question of who is subject to tax statutes, it is basic that in case of doubt, such statutes are to be construed most strongly against the government and in favor of the subjects or citizens because burdens are not to be imposed nor presumed to be imposed beyond what the statutes expressly and clearly import. As burdens, taxes should not be unduly exacted nor assumed beyond the plain meaning of the tax laws.[40]

All told, We see no reason to justify the imposition of the capital gains tax on the transfer by BBCC of the subject properties to respondent. Thus, We affirm the ruling made by the Court in Division in granting the refund sought by respondent.

WHEREFORE, in light of the foregoing considerations, the *Petition for Review* is **DISMISSED**. Accordingly, the Decision dated April 20, 2017 and the Resolution dated June 21, 2017, both rendered by the Court in Division in CTA Case No. 8939 are **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[40] *Commissioner of Internal Revenue vs. Fortune Tobacco Corporation*, G.R. No. 167274-75, July 21, 2008.

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

Ma. Belen
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice