REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIPPINE COMMUNICATIONS SATELLITE CORPORATION,
Petitioner,

CTA EB NO. 383
(CTA CASE No. 6976)

~ *versus* ~

Present:

Acosta, *PJ,*
Castañeda,
Bautista,
Uy,
Casanova, *and*
Palanca-Enriquez, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

DEC 18 2008 4:40 p.m.

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DECISION

ACOSTA, ***PJ:***

The Case

This is an appeal, by way of a Petition for Review, filed by petitioner pursuant to paragraph 2, Section 18 of Republic Act No. 1125, as amended by Republic Act No. 9282, and the Revised Rules of the Court of Tax Appeals, praying that the Decision dated November 21, 2007 rendered by the Court of Tax Appeals Second

Division[1] in CTA Case No. 6976, which ordered petitioner to pay deficiency expanded withholding tax amounting to P32,973,104.90 and 20% delinquency interest from April 30, 2004 until full payment; and the Resolution of the same Court promulgated on March 6, 2008 denying petitioner's Motion for Reconsideration be reversed and set aside.

The Facts

The pertinent facts which were aptly narrated in the Decision by the Court *a quo* are hereunder reproduced:

> "Petitioner is a domestic corporation duly registered before the Securities and Exchange Commission (SEC), with business address at the 12th Floor Telecoms Plaza Bldg., 316 Senator Gil Puyat Avenue, Makati City, Metro Manila.
>
> Respondent is the duly appointed Commissioner of Internal Revenue mandated by law to enforce and implement the National Internal Revenue Code and related statutes, including, among others, the power to cancel disputed assessments. He holds office at the Bureau of Internal Revenue (BIR) National Office Building, Diliman, Quezon City.
>
> On August 31, 2001, as a result of an investigation pursuant to the revalidated Letter of Authority No. 00059010 dated April 12, 2000, the Assistant Commissioner for the BIR Large Taxpayer Service, Virginia L. Trinidad, issued against petitioner a Preliminary Assessment Notice (PAN) and Details of Discrepancies for deficiency income tax, withholding tax on compensation, expanded withholding tax (EWT), and value added tax (VAT) for taxable year 1997.
>
> On December 18, 2001, petitioner filed with the BIR its protest against the PAN. On same date, petitioner also wrote the BIR and claimed that it had remitted the amount of P10,298,510.00 as payment for Capital Gains Tax (CGT), but was intended as payment for withholding tax, due from petitioner's purchase of real property in Pasig City. Thus, it requested the setting aside of the tax assessment as it had complied with its obligation as withholding agent.
>
> On January 21, 2002, petitioner received a Final Assessment Notice (FAN) No. EWT-97-000029, with Letter of Demand and Details of Discrepancy, for deficiency expanded withholding tax. The discrepancy was computed as follows:

[1] Herein referred as Court *a quo*.

Deficiency Expanded Withholding Tax	
Acquisition of Land	238,438,500.00
Multiply by Rate	7.5%
Creditable W/H Tax Due	17,882,887.50
EWT Remitted	0.00
Basic W/H Tax Due	17,882,887.50
Add: Increments-	
Interest (1/26/1998 to 4/15/2002)	15,090,217.40
Compromise Penalty	25,000.00
Amount due and collectible	32,998,104.90

On February 20, 2002, petitioner filed a protest letter disputing the validity of the subject EWT assessment.

On March 31, 2004, petitioner received respondent's letter affirming the assessment and demanding payment of the deficiency expanded withholding tax for 1997. The letter constituted respondent's final decision on the protest.

Hence, on April 30, 2004, petitioner filed before this Court a Petition for Review. It alleged that consistent with the Court's ruling in the case of Universal Molasses Corporation v. Commissioner of Internal Revenue, petitioner cannot be held liable for the deficiency EWT since the sale of land could not be perfected pending the resolution of the issue of ownership. As regards the property located in Pasig City, petitioner claimed that it already paid the EWT in the amount of P10,298,510.00, but mistakenly remitted as CGT. Petitioner likewise contended that the January 18, 2002 assessment was issued beyond the three-year prescriptive period, since petitioner filed its 1997 tax return on April 15, 1998, respondent only had until April 15, 2001 within which to issue an assessment. Furthermore, the Final Letter of Demand and Assessment Notice were issued in violation of the due process requirement under the tax law and BIR rules and regulations."

(References omitted)

After case trial, the Court *a quo* handed a Decision on November 21, 2007 dismissing the petition for review for lack of merit. The said Court ordered petitioner to pay the deficiency expanded withholding tax of P32,973,104.90 and the 20% delinquency interest computed from April 30, 2004 until full payment pursuant to Section 249 of the Tax Code, but cancelled the compromise penalty of P25,000.00 finding that there was no mutual agreement made by the parties.

In disposing the merits of the case, the Court *a quo* held that there were consummated sales of real properties in Cavite and Pasig City in 1997 wherein petitioner was the purchaser; the said sales are subject to income tax and the

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corresponding withholding tax pursuant to Section 50(b) of the National Internal Revenue Code ("NIRC") of 1977, as amended and Section 1(j)(4) of Revenue Regulations ("RR") No. 6-85 as amended by RR 12-94; for failure to remit the withholding taxes arising from its purchase of the said real properties, petitioner was correctly assessed by the BIR of deficiency EWT; petitioner's allegation that it has already paid the EWT on the property located in Pasig City although by mistake remitted said payment as capital gains tax instead is untenable because it could not present the actual returns and the receipt to prove the payment; respondent's right to assess and to collect the said tax has not prescribed pursuant to Section 223 (a) of the 1977 NIRC as amended and the ten (10)-year prescriptive period applies to the case since no withholding of taxes and declaration were made in the monthly returns filed by petitioner with the BIR.

The *fallo* of the questioned Decision reads:

> "**WHEREFORE**, this instant Petition for Review is hereby **DISMISSED** for lack of merit. Accordingly, petitioner is **ORDERED TO PAY** deficiency expanded withholding tax, computed as follows:

Deficiency Expanded Withholding Tax	
Acquisition of Land	238,438,500.00
Multiply by Rate	7.5%
Creditable W/H Tax Due	17,882,887.50
EWT Remitted	-
Basic W/H Tax Due	17,882,887.50
Add: Increments -	
Interest (1/26/1998 to 4/15/2002)	15,090,217.40
Amount due and collectible	32,973,104.90

> The compromise penalty in the amount of P25,000.00 is hereby **CANCELLED** in the absence of a mutual agreement by the parties. In addition, petitioner is **ORDERED TO PAY** a 20% delinquency interest computed from April 30, 2004 until full payment, pursuant to Section 249 of the Tax Code.
>
> **SO ORDERED.**"

Undaunted, petitioner filed a Motion for Reconsideration on December 14, 2007, which the Court *a quo* denied in its Resolution promulgated on March 6, 2008.

Hence, this present recourse.

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The Issue

The lone issue raised in this Petition for Review is whether or not petitioner is liable for deficiency expanded withholding tax in the amount of ₱32,973,104.90.

Parties' Arguments

Petitioner's arguments

Petitioner argued that there was no perfected contract of sale as regards the purchase of property located in Cavite; it paid taxes as regards the sale of property located in Pasig City, *albeit* in the form of capital gains tax and documentary stamp tax which were accepted and approved by the BIR; since it paid capital gains and documentary stamp taxes on the transactions, it is only liable for the balance of the EWT for taxable year 1997; and the right of respondent to issue an assessment against the petitioner had already prescribed at the time the final assessment notice was issued.

Respondent's arguments

In her Comment/Opposition (Re: Petition for Review), respondent asserted that petitioner is liable for deficiency EWT on the property located in Cavite because there was a perfected contract of sale and a transfer of the said property; petitioner is liable for deficiency EWT on the transfer of property located in Pasig City notwithstanding the fact that it paid documentary stamp taxes and capital gains taxes; petitioner's allegation that it had already paid the EWT on the properties located in Pasig City, although mistakenly remitted the amount as capital gains tax instead of EWT, is unavailing because it did not present the capital gains tax returns and proofs of payment; and the right of the government to assess has not yet prescribed.

The Court's Ruling

The proper disposition of this appealed case depends foremost upon the proper determination of the classification of the properties subject of the disputed assessment under review.

Petitioner was assessed of deficiency withholding tax on its purchases of land from various vendors. The "Details of Discrepancy"[2] reveals respondent's basis in arriving at the aforesaid assessment, to quote:

> "Acquisition of Land not subjected to W/H Tax – P238,438,500.00
>
> The taxable expenses were culled-out from the general ledger/financial statements and were compared with the total remittances pursuant to Section 50(b) of the NIRC. However, per comparison made, the alpha list gross amount of income payment was greater than the ones established per Financial Statements. Further analysis, however, revealed **several transactions on the acquisition of land**. They were **ascertained to be subject to creditable withholding tax at the rate of 7.5% pursuant to Revenue Regulations No. 12-94. The real properties acquired were considered to have been purchased from persons not habitually engaged in the real estate business**."

(Emphasis supplied)

As gleaned from the above explanation, respondent assessed petitioner of deficiency withholding tax at the rate of 7.5% on the latter's acquisition of land pursuant to Revenue Regulations No. 12-94.[3] The pertinent portions of the said regulations provide:

> "Sec.1. *Income payments subject to creditable withholding tax and rates prescribed thereon.* – Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines.
>
> (j) Gross selling price or total amount of consideration or its equivalent paid to the seller/owner for the sale, exchange or transfer of – xxx

[2] Exhibit B.
[3] Amendment to Revenue Regulations No. 6-85, as amended, Otherwise Known as the Expanded Withholding Tax Regulations.

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4. Real property, other than capital assets, by an individual, estate, trust, trust fund or pension fund **OR** real property, whether held as capital or ordinary asset, by a corporation not habitually engaged in the real estate business – *seven and one-half percent* (7.5%)."

(Emphasis supplied)

Noticeably, the above revenue regulations imposed 7.5% creditable withholding tax on sale, exchange or transfer of:

1. real property, other than capital assets, by an individual, estate, trust, trust fund or pension fund; or

2. real property, whether held as capital or ordinary asset, by a corporation not habitually engaged in the real estate business.

In the present case, the subject real properties were considered by the BIR to have been purchased from persons not habitually engaged in the real estate business. It can be inferred that the respondent assumed that the sellers in various purchased transactions were corporations because of the qualification – "not habitually engaged in the real estate business."

Records of this case, however, reveal that the sellers are not corporation but individuals[4]. Considering this important fact, there is a need to determine the proper classification of the real properties subject of the purchased transactions because of the corresponding tax implications. If the real properties involved are ordinary assets, then, there should have been a withholding tax per transactions pursuant to Revenue Regulations No. 12-94, while, if the said properties are capital assets, then, there is no need to withhold a tax because in lieu thereof, there is a capital gains tax paid by the seller per transaction.

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[4] Transfer Certificates of Title showing the name of the individual sellers (Exhibit AA in relation to Exhibit BB, Exhibit CC in relation to Exhibit DD, Exhibit EE in relation to Exhibit FF, Exhibit GG in relation to Exhibit HH, Exhibit II in relation to Exhibit JJ, Exhibit KK in relation to Exhibit LL, Exhibit MM in relation to Exhibit NN); TCT (Exhibit M) in relation to Escrow Agreement (Exhibits G and I) and Supplemental Agreements (Exhibits F and H); and Deeds of Absolute Sale (BIR Records, pp. 382-420).

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At this juncture, it is proper to distinguish capital assets from that of ordinary assets for the purpose of determining the proper tax applicable to petitioner's purchased transactions. Section 34[a][1] of the National Internal Revenue Code (NIRC) defines capital assets as follows:

> "[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 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 subsequent [f] of section thirty; or real property used in the trade or business."

In ***Tomas Calasanz, et al. vs. Commissioner of Internal Revenue and the Court of Tax Appeals***,[5] the Supreme Court held that:

> "The statutory definition of capital assets is negative in nature. If the asset is not among the exceptions, it is a capital asset; conversely, assets falling within the exception are ordinary assets. And necessarily, <u>any gain resulting from the sale or exchange of an asset is a capital gain or an ordinary gain depending on the kind of asset involved in the transaction</u>.
>
> However, there is <u>no rigid rule or fixed formula by which it can be determined</u> with finality <u>whether property sold by a taxpayer was held primarily for sale to customers in the ordinary course of his trade or business OR whether it was sold as a capital asset</u>. Although several factors or indices[6] have been recognized as helpful guides in making a determination, none of these is decisive; neither is the presence nor the absence of these factors conclusive. Each case must in the analysis rest upon its own peculiar facts and circumstances.
>
> Also a property initially classified as a capital asset may thereafter be treated as an ordinary asset if a combination of the factors indubitably tend to

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[5] G.R. No. L-26284, October 9, 1986.

[6] In determining the correct boundary between these two types of assets the following must be considered:

1. the purpose for which the property was initially acquired;
2. the purpose for which the property was subsequently held;
3. the extent to which improvements, if any, were made to the property by the taxpayer;
4. the frequency, number and continuity of sales;
5. the extent and nature of the transactions involved;
6. the ordinary business of the taxpayer;
7. the extent of advertising, promotion, or other activities used in soliciting buyers for the sale of the property;
8. the listing of property with brokers; and
9. the purpose for which the property was held at the time of sale *(Tuason , Jr. vs. Lingad, 58 SCRA 170 citing Klarkowski, TCM 1965-328. Affd 385 F[2d] 398 [Ca-7, 1967])*.

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> show that the activity was in the furtherance of or in the course of the taxpayer's trade or business. Thus, a sale of inherited real property usually gives capital gain or loss even though the property has to be subdivided or improved or both to make it salable. However, if the inherited property is substantially improved or very actively sold or both it may be treated as held primarily for sale to customers in the ordinary course of the heir's business."
>
> (Emphasis supplied)

In ruling that the properties sold are ordinary assets in the aforesaid ***Tomas Calasanz*** case, the Supreme Court held that "one strong factor against petitioner's contention is **the business element of development** which is very much in evidence. Petitioners did not sell the land in the condition in which they acquired it. While the land was originally devoted to rice and fruit trees, it was subdivided into small lots and in the process converted into a residential subdivision." Another factor considered by the High Court is **the existence of contract receivables**, which accordingly, "the sizable amount of receivables in comparison with the sales volume during the same period signifies that the lots were sold on installment basis and suggests the number, continuity and frequency of the sales."

Applying the aforesaid jurisprudence in the case at bench would reveal that the properties involved in the disputed assessment are capital assets because of the following factors:

> *First*, the sellers in this case are individuals[7], not corporation; and are NOT habitually engaged in the real estate business as discovered/explained by the BIR[8], which based on this finding alone of the respondent, will readily show that the properties involved in various purchased transactions are capital assets.
>
> *Second*, the classification of the properties is residential.[9]

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[7] Deeds of Absolute Sale – pp. 382 to 420, BIR Records.
[8] Exhibit B.
[9] BIR Records, pp. 382 to 420.

Third, unlike in *Tomas Calasanz* case, here the cash prices were paid at once, not on installment basis, except for the Cavite property wherein certain amount is held under an Escrow Agreement.[10]

Fourth, except for one deed pertaining to the property owned by spouses Sia[11] where the capital gains tax is for the account of the vendee, all the other deeds of absolute sale[12] provide that the capital gains tax is for the account of the vendor; thus, it is error for the BIR and the Court *a quo* to require the petitioner to present the capital gains tax returns because petitioner was not the seller but the buyer in those purchased transactions. As held in ***Tomas K. Chua vs. Court of Appeals and Encarnacion Valdez-Choy***,[13] *"the buyer can retain the amount for the capital gains tax and pay it upon authority of the seller, or the seller can pay the tax, depending on the agreement of the parties. The buyer has more interest in having the capital gains tax paid immediately since this is a pre-requisite to the issuance of a new Torrens title in his name."* Here, there were agreements that the capital gains taxes due on several transactions were for the account of the seller. The payments of said capital gains taxes were correctly established by the Court *a quo*.[14] The said payment of capital gains taxes had cause the BIR to issue Certificates Authorizing Registration,[15] which further became the basis in the issuances of Transfer Certificates of Titles (TCT).[16] Paragraph no. 5 of Revenue Memorandum Circular (RMC) No. 41-86[17] supports this conclusion. The pertinent provisions of the said RMC are hereby quoted:

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[10] Exhibits H, V; and BIR Records, pp. 382 to 420.
[11] BIR Records, pp. 387 to 389.
[12] Exhibit H; BIR Records, pp. 382 to 420.
[13] G.R. No. 119255, April 9, 2003.
[14] Fallo, pages 50 and 56.
[15] Exhibits P, R, T, X, Y.
[16] Exhibits M, AA, CC, EE, GG, II, KK and MM.
[17] November 18, 1986.

> "5. BIR Clearance. – Batas Pambansa Blg. 37 provides "no registration of any document transferring real property shall be effected by the Register of Deeds unless the Commissioner of Internal Revenue or his duly authorized representative has certified that such transaction has been reported and the tax herein imposed has been paid.
>
> (a) The said clearance is required only if the vendor/transferor is an individual, estate, or a trust. Accordingly, such clearance is not required if the vendor/transferor is a corporation, regardless of whether or not the real property was a capital asset in the hands of the said corporation.
>
> (b) xxx
>
> (c) If the vendor/transferor is an individual, estate or trust, BIR clearance shall be required, regardless of whether or not the real property was a capital asset or an ordinary business asset in the hands of the said vendor/transferor.
>
> If the real property was a capital asset in the hands of the vendor/transferor, BIR clearance shall be issued after payment of the corresponding (i) capital gains tax; and (ii) documentary stamp tax.
>
> If the real property was an ordinary business asset in the hands of the said vendor/transferor, BIR clearance shall be issued after the vendor/transferor has filed a sworn statement that the said real property was held as ordinary asset in accordance with Section 7 of Revenue Regulations No. 8-79 which took effect on September 7, 1979, otherwise known as the implementing regulations of Batas Pambansa Blg. 37.
>
> *(Emphasis supplied)*

Considering that the capital gains taxes were already paid as corroborated by the presence of Certificates Authorizing Registration which were issued only after payment of the capital gains taxes by the individual sellers pursuant to RMC 41-86, and that such Certificates became the basis of the issuances of TCTs by the Register of Deeds in favor of the petitioner, then, it is crystal clear that the properties subject of the disputed assessment were capital assets.

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Having established that the properties subject of the various purchased transactions are capital assets of the sellers (who are individuals, and not corporations), then, it is error to impose Creditable Withholding Tax because such tax is imposed only on the ordinary assets sold by an individual pursuant to Revenue Regulations No. 12-94. It should be noted that gains on sale of capital assets, like in the case at hand, is subject to capital gains tax which is a form of final tax. Thus, any deficiency in the payment of capital gains tax should be for the account of the various sellers because as far as the government is concerned, the capital gains tax remains a liability of the seller since it is a tax on the seller's gain from the sale of real estate.[18] Thus, the BIR should run after the sellers to assess and ultimately collect the deficiency capital gains tax, *if any*.

Since the petitioner is not required to withhold taxes because the properties involved in several purchased transactions are capital assets, then, the deficiency withholding tax assessment should be cancelled. Therefore, there is no need to discuss the prescriptive period to assess the subject withholding tax because there is no legal basis to assess petitioner of such tax. Logically, petitioner could not present the withholding tax returns because the properties involved in various transactions are capital assets, which were subjected to capital gains tax, which fact became the basis of the BIR in issuing the Certificates Authorizing Registration and the latter, in turn became the basis of the Register of Deeds to issue Transfer Certificates of Titles. Moreover, the petitioner could not present the capital gains tax returns because the custody thereof is with the sellers, having been responsible for settling the capital gains tax pursuant to various deeds of sale and the jurisprudence itself.

While it is a settled rule that "assessments are *prima facie* presumed correct and made in good faith; that it is the taxpayer, and not the Bureau of Internal Revenue who has the duty of proving otherwise; that in the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed;

[18] Tomas K. Chua vs. Court of Appeals and Encarnacion Valdez-Chua, *Supra.*

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and that all presumptions are in favor of tax assessments,[19] however, in the present case, such prima facie presumption is overturned by the BIR's own explanation stated in the Details of Discrepancy that "**the persons** *(the individual sellers)* **are NOT habitually engaged in the real estate business.**[20] Such explanation would show that indeed those sellers are not engaged into such kind of business, and that the properties involved are really capital assets; thus, the BIR erred in assessing petitioner of deficiency withholding tax on purchased of capital assets. Due to this glaring error committed by the BIR, judicial affirmation of the subject assessment is improper.

WHEREFORE, the instant Petition for Review is hereby **GRANTED**. The assailed Decision dated November 21, 2007 including the questioned Resolution dated March 6, 2008 of the Court *a quo* is hereby **REVERSED AND SET ASIDE**. The Deficiency Expanded Withholding Tax assessment is hereby **CANCELLED.**

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

(With Dissenting Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

(Concur with the Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

See attached Separate Concurring Opinion
(With Separate Concurring Opinion)
OLGA PALANCA-ENRIQUEZ
Associate Justice

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[19] Commissioner vs. Court of Appeals, et. al., GR Nos. 104151 & 105563, March 10, 1995.
[20] Exhibit B.

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIPPINE COMMERCIAL SATELLITE CORPORATION,
Petitioner,

C.T.A. EB No. 383
(C.T.A. Case No. 6976)

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
DEC 18 2008 4:40 p.m.

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DISSENTING OPINION

We respectfully disagree with our esteemed colleagues and vote to uphold the assessment with modification against the petitioner arising from the sales transactions of real properties located in Pasig City and Cavite, under Revenue Regulations No. 12-94[1] on the following grounds:

[1]AMENDMENTS TO REVENUE REGULATIONS NO. 6-85, AS AMENDED, OTHERWISE KNOWN AS THE EXPANDED WITHHOLDING TAX REGULATIONS.

I.MATTERS NOT RAISED IN THE ADMINISTRATIVE LEVEL AND THE COURT IN DIVISION CANNOT BE TAKEN COGNIZANCE ON APPEAL;

II. THE BURDEN OF PROOF IS ON THE PETITIONER TAXPAYER;

III.THERE IS A PERFECTED CONTRACT OF SALE OF THE REAL PROPERTY IN CAVITE; and

IV. TIMELY ASSESSMENT OF PETITIONER'S 2007 EXPANDED WITHHOLDING TAX LIABILITY.

I. MATTERS NOT RAISED IN THE ADMINISTRATIVE LEVEL AND THE COURT IN DIVISION CANNOT BE TAKEN COGNIZANCE ON APPEAL

Petitioner admitted in the letter protest dated February 19, 2002 that the capital gains tax ("CGT") erroneously remitted to the Bureau of Internal Revenue ("BIR") should be treated in satisfaction of its expanded withholding tax ("EWT") liability for taxable year 1997, thus acknowledging liability to pay the latter tax. The letter protest reads:

February 19, 2002

BUREAU OF INTERNAL REVENUE
BIR Road, Quezon City

Attention: **MS. VIRGINIA TRINIDAD**
Assistant Commissioner-Large Taxpayers Division

Re: Formal Letter of Demand
Dated January 18, 2002

Gentlemen:

xxx xxx xxx

2) Purchase of lots in Pasig City

In another letter also dated December 14, 2001, we requested for the setting aside of your assessment due to our honest mistake in remitting P10,299,510.00 as capital gain tax rather than withholding tax as required under Section 1.4 of Rev. Reg No. 12-94 xxx xxx xxx

Very truly yours,

CARMELO P. AFRICA, JR.
Chairman/President[2]

Petitioner made a complete turn around when on appeal with the Court *en banc,* it stated in the Petition for Review that the 1997 EWT assessment should be cancelled due to its previous payment of CGT arising from the real property sales transactions pertaining to the lots in Pasig City for the taxable year 1997. Once a taxpayer paid CGT for a sale transaction, the BIR should no longer impose EWT.[3] Such posture is diametrically opposed to its previous admission of EWT liability for the same taxable year.

It is not within the Court *en banc's jurisdiction* to resolve petitioner's belated defense of CGT payment in lieu of the assessed EWT for taxable year 1997. *gc*

[2] Exhibit "C". See C.T.A Docket (C.T.A. Case No. 6976), pp. 277-278.
[3] Petitioner's Memorandum dated July 25, 2008, p. 10.

Under Section 7 (a) (1) of Republic Act (R.A.) No. 9282[4], this Court exercises **"appellate jurisdiction to review by appeal**, as herein provided: (1) **Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes** xxx xxx xxx". Otherwise stated, this Court should only take cognizance of the defenses earlier raised by the petitioner before the administrative proceedings. A party is barred from introducing fresh defenses and facts at the appellate stage.[5] In the case of *Aguinaldo Industries Corporation v. Commissioner of Internal Revenue*[6], the Supreme Court explained the importance why it is necessary for a court to resolve only matters earlier raised at the administrative level, as follows:

> To allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level, would be to sanction a procedure whereby the court-which is supposed to review administrative determinations-would not review, but determine and decide for the first time, a question not raised at the administrative forum. **This cannot be permitted, for the same reason that underlies the requirement of prior exhaustion of administrative remedies to give administrative authorities the prior opportunity to decide controversies within its competence, and in much the same way that, on the judicial level, issues not** Je

[4] AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS(CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF REPUBLIC ACT NO. 1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES which took effect on April 23, 2004.
[5] *Me-Shurn Corporation v. Me-Shurn Workers Union-FSM*, G.R. No. 156292, January 11, 2005, 448 SCRA 41.
[6] G.R. No. L-29790, February 25, 1982, 112 SCRA 136.

> **raised in the lower court cannot be raised for the first time on appeal.**[7](Emphasis supplied.)

This Court further illustrated the consequence should there be a failure to dispute the findings of administrative bodies as enunciated in the case of *Subic Power Corporation v. Commissioner of Internal Revenue*[8]:

> Since petitioner did not protest or **dispute administratively the disallowance of this pre-operational expense as capital expenditure, petitioner cannot raise this issue for the first time on appeal in this Court. This cannot be permitted, for the same reason that underlies the requirement of prior exhaustion of administrative remedies to give administrative authorities the prior opportunity to decide controversies within their competence, and in much the same way that, on the judicial level issues not raised in the lower court cannot be raised for the first time on appeal. To sanction such procedure whereby the court –which is supposed to review administrative determinations – would not review, but determine and decide for the first time, a question not raised at the administrative forum.**[9] (Emphasis supplied.)

Had respondent known of the newly raised defense at an earlier stage, he would have been afforded the opportunity to properly decide the issues raised before him. To allow newly raised defense, is offensive to the basic rules of fair play and justice, violative of respondent's constitutional right to due process. The courts will likewise be burdened by never-ending litigation, should newly raised issues be permitted at this stage. *ga*

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[7] Cited in *Benguet Corporation v. Central Board of Assessment Appeals*, G.R. No. 100959, June 29, 1992, 210 SCRA 579, 584. See also *Commissioner of Internal Revenue v. Wander Philippines, Inc.*, G.R. No. L-68375, April 15, 1988, 160 SCRA 573 and *Atlas Consolidated Mining & Development Corporation v. Commissioner of Internal Revenue*, G.R. Nos. L-26911 and L-26924, January 27, 1981, 102 SCRA 247.
[8] C.T.A Case No. 6059, May 8, 2003.
[9] Ibid.

It bears stressing that when the case was earlier elevated to the Court in Division, petitioner again recognized its EWT liability when it stated in paragraph 16 of the Petition for Review dated April 30, 2004 that:

PETITION FOR REVIEW

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> 16. With respect to the property located in Pasig City, **Petitioner respectfully submits that it had already paid the EWT due in the amount of P10,299,510.00. However, it was mistakenly remitted as capital gains tax instead of EWT.** There being proper payment of the tax, Petitioner should no longer be held liable for the EWT due on the sale of the Pasig City Property. xxx[10]

The admissions made at the administrative level and before this Court are conclusive, and serve as sufficient basis why the Division in its Decision dated November 21, 2007 and the Resolution dated March 6, 2008 sustained petitioner's liability to EWT for taxable year 1997 concerning the real properties in Pasig City under Revenue Regulations ("R.R.") No. 12-94.

Petitioner's belated retraction on EWT liability casts doubt on the veracity of its claim.

[10] C.T.A Docket (C.T.A Case No. 6976), p.7.

II. THE BURDEN OF PROOF IS ON THE PETITIONER TAXPAYER

All presumptions are in favor of the correctness of the assessments[11] pertaining to petitioner's EWT liability for taxable year 1997. The burden of proof is upon the petitioner as taxpayer to prove the contrary.[12]

In the letter protest, petitioner only interposed the following defenses:

1. With respect to the lot in Cavite, there is no perfected contract of sale yet. Allegedly, the ownership of the lot sold to PHILCOMSAT is still being disputed in court. Hence, notwithstanding the execution of the deed of absolute sale between the parties, it should not be held liable for not withholding the corresponding tax due thereon;
2. With respect to the lots in Pasig, PHILCOMSAT alleged that it made an honest mistake of remitting P10,299,510.00 as capital gains tax instead of the proper withholding tax. Thus, after considering the aforesaid payment, its withholding tax liability should amount to only P1,787,259.00.[13]

The respondent denied petitioner's protest and sustained its EWT liability because it failed to dispute the presumption of the correctness of the assessment. Petitioner may not allege new matters at this stage because it is estopped from raising new defenses not raised in the protest. Je

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[11] *Commissioner of Internal Revenue v. Bank of the Philippine Islands,* G.R. No. 134062, April 17, 2007, 521 SCRA 373, 386. See also *Commissioner of Internal Revenue v. Construction Resources of Asia, Inc.*, G.R. No. L-68230, November 25, 1986,145 SCRA 679.

[12] See *Tan Guan v. Court of Tax Appeals,* L-23676, April 27, 1967, 19 SCRA 903,907; *Commissioner of Internal Revenue v. Hantex Trading Co., Inc.* G.R. No. 136975, March 31, 2005,454 SCRA 301, 329; *Commissioner of Internal Revenue v. Antonio Tuason, Inc.*, G.R. No. 85749, May 15, 1989, 173 SCRA 397; and *Mindanao Bus Co. v. Commissioner of Internal Revenue*, G.R. No. L-14078, February 24, 1961, 1 SCRA 538.

[13] Exhibits "C" and "D". See C.T.A. Docket(C.T.A. Case No. 6976), pp.277-283.

It should be noted that **only** the real property in Pasig City covered by Tax Declaration No. E-022-02271 and TCT No. 52768 sold by Spouses Emiliano Jr. and Aurora Caruncho is evidenced by a certified true copy of the CGT return stamped with machine validated payment in the amount of P358,325.00.[14] Petitioner failed to present CGT returns for the Cavite property and the rest of the Pasig lots, and receipts or machine validated proofs of CGT payment. In equity, if not in law, if petitioner had shown CGT payment documented in tax returns with receipts or machine validated proofs of tax payment, then, We may apply the same to its EWT liability as prayed for by petitioner in its protest and in the Petition.

Analogous to the case at bar is the case of *Far East Bank and Trust Company v. Court of Appeals,*[15] where the Supreme Court emphasized the relevance of presenting EWT returns to establish the nature of the payments and the fact of withholding, and failure to submit such documents during the trial stage results to an outright denial of a claim. In the Far East Bank case, the Supreme Court ruled in this wise:

> Petitioner also asserts that the confusion or difficulty in the implementation of Revenue Memorandum Circular 7-90 was the reason why CDB took upon itself the task of withholding the taxes arising from the sale, to ensure accuracy. **Assuming this were true, CDB should have, nevertheless, accomplished the necessary returns to clearly identify the nature of the payments made and file the same with the BIR.** Section 2 of the circular clearly provides that the amount of withholding tax paid by a corporation to the BIR during the

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[14] Exhibit "V". See C.T.A. Docket(C.T.A. Case No. 6976), p.321.
[15] G.R. No. 129130, December 9, 2005, 477 SCRA 49, 57.

> quarter on sales or exchanges of property and which are creditable against the corporation's tax liability are evidenced by Confirmation/Official Receipts and covered by BIR Form Nos. 1743W and 1743-B. On the other hand, Revenue Regulation 6-85 states that BIR Form No. 1743.1 establishes the fact of withholding. **Since no competent evidence was adduced by petitioner, the failure to offer these returns as evidence of the amount of petitioner's entitlement during the trial phase of this case is fatal to its cause.** For its negligence, petitioner "cannot be allowed to seek refuge in a liberal application of the [r]ules." The liberal interpretation and application of rules apply only in proper cases of demonstrable merit and under justifiable causes and circumstances. xxx xxx xxx(Emphasis Ours supplied).[16]

Thus, petitioner should have submitted the corresponding returns and receipts or machine validated payment of CGT at the earlier stages of the proceedings, before the BIR and the Court in Division.

We are confounded why the originals or certified true copies of the CGT returns were not presented in evidence when these documents can easily be obtained from proper government agencies, particularly the BIR as well as the Registrar of Deeds where the properties sold are located. The failure to present these documents belies petitioner's claim.

On the other hand, the Certificates Authorizing Registration ("CARs") pertaining to the lots in Pasig City merely authorize the buyer to register the real property in his name. A CAR does not establish that the person in whose favor this document was issued has no tax liability as regards the transaction. On the contrary the CARs proferred by petitioner provide that the BIR is not precluded from collecting any tax deficiency, thus:

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[16] Ibid.

REPUBLIKA NG PLIPINAS
KAGAWARAN NG PANANALAPI
CERTIFICATE AUTHORIZING REGISTRATION

xxx xxx xxx

CERTIFICATION

xxx xxx xxx

> **The certification is issued for registration purposes only, pursuant to the requirements of the National Internal Revenue Code, as amended. The Bureau Internal Revenue, however, is not precluded from assessing and collecting whatever deficiency internal revenue taxes that may be found due from the seller/transferor after examination.** xxx xxx xxx.[17] (Emphasis supplied)

Despite the issuance of the CARs, revenue officers may still assume the function relative to the tax assessment or collection, if upon investigation, appropriate taxes have not been fully paid. It is well-settled that the Government cannot be estopped from collecting taxes by the mistake, negligence, or omission of its agencies[18] because:

> Upon taxation depends the Government ability to serve the people for whose benefit taxes are collected. To safeguard such interest, neglect or omission of government officials entrusted with the collection of taxes should not be allowed to bring harm or detriment to the people, in the same manner as private persons may be made to suffer individually on account of his own negligence, the presumption being that they take good care of their personal affairs. This should not hold true to government officials with respect to matters not of their own personal concern. This is the philosophy behind the government's

[17] Exhibits "P", "R", "T", "X" and "Y". See C.T.A. Docket(C.T.A. Case No. 6976), pp. 311,314,317,323 and 325.
[18] *Philippine National Oil Company v. Court of Appeals*, G.R. Nos. 109976 and 112800, April 26, 2005, 457 SCRA 32, 102.

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> exception, as a general rule, from the operation of the principle of estoppel. xxx. [19]

Hence, CGT returns with receipts or machine validated payments, and not the CARs are the best evidence to prove CGT payment.

The respondent anchors petitioner's EWT liability for taxable year 1997 in accordance with subsection 4 of Section 1 (j) of R.R. No. 12-94 which provides:

> Section 1. Income payments subject to creditable withholding tax and rates prescribed thereon. – Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines
>
> xxx xxx xxx
>
> (j)Gross selling price or total amount of consideration or its equivalent paid to the seller/owner for the sale, exchange or transfer of-
>
> xxx xxx xxx
>
> 4. Real property, other than capital asset, by an individual, estate, trust, trust fund or pension fund or real property, whether held as capital or ordinary asset, by a corporation not habitually engaged in the real estate business- seven and one-half percent (7.5%).

As shown in the above provision, EWT liability arises if the seller is an individual, estate, trust, trust fund or pension receiving income

[19] *Vera v. Fernandez,* G.R. No. L-31364, March 30, 1979, 89 SCRA 199, 204.

payments from the sale of real property classified as ordinary asset, not capital asset.

Citing the 1977 Tax Code, as amended[20], the case of *Tomas Calasanz v. Commissioner of Internal Revenue*[21] distinguished between capital assets and ordinary assets, *viz*:

> *[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 thirty; or **real property used in the trade or business of the taxpayer.***
>
> **The statutory definition of capital assets is negative in nature. If the asset is not among the exceptions, it is a capital asset; conversely, assets falling within the exceptions are ordinary assets. And necessarily, any gain resulting from the sale or exchange of an asset is a capital gain or an ordinary gain depending on the kind of asset involved in the transaction.** (Emphasis supplied).

There are four (4) instances when an asset is classified as ordinary asset, namely: 1) 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; 2) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or

[20] The instant case covering taxable year 1997 is governed by the 1977 Tax Code, as amended.
[21] G.R. No. L-26284, October 9, 1986, 144 SCRA 664, 669.

business; 3) property used in the trade or business of a character which is subject to the allowance for depreciation; and 4) real property used in the trade or business of the taxpayer. Assets excluded among the aforementioned four should be treated as capital assets.

In the document denominated as "Second Supplemental Agreement", the Cavite lot is primarily held for sale as mentioned in paragraph 8:

> SECOND SUPPLEMENTAL AGREEMENT
>
> xxx xxx xxx
>
> **8. That, the VENDOR further undertakes and shall be responsible for the full conversion of lot 5764 into a residential/commercial subdivision**, and assumes all expenses that may be incurred in securing DAR exemption over the aforementioned property **as to enable the VENDEE or its assigns to develop the said parcel of land (Lot 5764) into a residential/commercial subdivision;**
>
> xxx xxx xxx
>
> IN WITNESS WHEREOF, the parties hereto hereunto set their hand at the place and on the date above set forth.
>
> FLORINDA V. ESTRADA
> Vendor
>
> PHILIPPINE COMMUNICATIONS SATELLITE CORPORATION
> Vendee

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xxx xxx xxx[22] (Emphasis supplied).

The same property consisting of two hundred eighty nine thousand six hundred sixty two square meters (289,662 sq. m.) will be extensively developed by the seller into "a residential/commercial subdivision" indicating that the same is an ordinary asset.

It should be noted that the parties agreed in the Second Supplemental Agreement that seller Florinda V. Estrada shall be responsible for the conversion of the lot into residential/commercial subdivision. In other words, what is being sold is a residential/commercial subdivision.[23]

The nature of the transaction and the size of the lot are factors reinforcing respondent's findings that petitioner is liable to pay EWT pertaining to the Cavite lot since the same property is an ordinary asset, a fact never disputed in the protest and in the Petition.

Concerning the lots in Pasig City, We are likewise not persuaded with the majority's assertion that on the basis of the issuance of the certificates authorizing registration ("CARs") subsequent to alleged CGT payment, it can be concluded that these real properties are capital assets. It is incumbent upon petitioner to establish that the lots in Pasig City are

[22] Exhibit "H", C.T.A. Docket(C.T.A. Case No. 6976), p. 297.
[23] Ibid.

capital assets pursuant to the 1977 Tax Code, as amended, **in view of its own admission that it erroneously paid CGT instead of EWT.**

III. PERFECTED CONTRACT OF SALE OF THE REAL PROPERTY IN CAVITE

Petitioner's contention that there was no perfected contract of sale of the real property in Cavite because another party claims ownership to the same resulting to a spurious agreement, thus, negating any tax obligation due from it deserves scant consideration.

The perfected contract of sale executed between the seller Florinda V. Estrada and the petitioner pertaining to the lot in Cavite, is attested by the cancellation of TCT No. T-630341, and the corresponding issuance of TCT No. T-649189 in the latter's favor.[24] TCT No. T-649189 is a public document which establishes ownership of such property by the petitioner. The best proof of ownership of a piece of land is the Certificate of Title which is entitled to respect and great weight until another person can show a better right to such property.[25] Moreover, a Torrens Certificate of

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[24] See Exhibit "M",C.T.A Docket(C.T.A. Case No. 6976), p. 308;and Exhibit "2", BIR Records, p.593.

[25] *Felicidad M. Tolentino, as Administratix of the Estate of Fortunato F. Halili v. Court of Industrial Relations and Halili Bus Drivers & Conductors Union (PTGWO)*, G.R. No. L-38655, May 30, 1996, 257 SCRA 174; *Spouses Felix Abad and Elena R. Abad v. The Honorable Court of Appeals,* G.R. No. 84908, December 4, 1989, 179 SCRA 827.

title is indefeasible and binding upon the whole world unless and until it has been nullified by a court of competent jurisdiction.[26]

Petitioner's allegation that the purchase of the Cavite real property is spurious and void should be raised at the proper forum and in a separate action. Titles cannot be subject to collateral attack.[27] Thus, this Court cannot rule on the validity of the contract of sales for the purpose of determining the liability or non-liability of a taxpayer. The Court of Tax Appeals is a court of special and limited jurisdiction exercising powers over cases specified in Section 7 of R.A. No. 9282.

Verily, a certificate of title is a conclusive evidence of ownership of the land described therein; the validity of which shall not be subject to a collateral attack, especially in an assessment case for deficiency taxes. In this case, the purported defects of TCT No. T-649189 should await a proper action, that is, one that directly assails its validity.

IV. TIMELY ASSESSMENT OF PETITIONER'S 2007 EWT

The absence of tax returns which would prove payment of EWT justifies the assessment thereof within ten (10) years from discovery of the omission pursuant to Section 223 (a) of the 1977 Tax Code, as amended which provides:

[26] *Co v. Militar*, G.R. No. 149912, January 29, 2004, 421 SCRA 455, 459.
[27] Supra note 26 at 460.

> Sec. 223. Exceptions as to period of limitation of assessment and collection of taxes.- (a) In the case of a false or fraudulent return with intent to evade or of failure to file a return, the tax may be assessed , or a proceeding in court after the collection of such tax may be begun without assessment at any time within ten years, after the discovery of the falsity, fraud, or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

The Court in Division correctly ruled that prescription has not set in since petitioner neither withheld taxes nor made any declaration in the monthly returns filed with the BIR. Final Assessment Notice ("FAN") No. EWT-97-000029 with the attached Letter of Demand issued on January 18, 2002 and received by the petitioner on January 21, 2002 was issued well within the reglementary period in view of the omission of the filing of EWT returns.

Considering that petitioner was able to adduce documentary evidence of CGT return on the lot covered by Tax Declaration No. E-022-02271 and TCT No. 52768[28], we find it iniquitous for the respondent to collect both CGT and EWT on the same transaction, as the Government would be enriching itself at the expense of the taxpayer.[29] Thus, the computation of the deficiency EWT assessment for the taxable year 1997 is as follows:

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[28] Exhibit "V". C.T.A. Docket(C.T.A. Case No. 6976), p. 321.

[29] *Roberto U. Genova v. Levita De Castro*, G.R. Nos. 132076 and 140989, July 22, 2003, 407 SCRA 177 citing *Panay Electric Co., Inc. v. The Collector of Internal Revenue and the Court of Tax Appeals*, May 28, 1958, 103 Phil. 819, 827.

Deficiency Expanded Withholding Tax	
Acquisition of Land	238,438,500.00
Multiply by Rate	7.5%
Creditable W/H Tax Due	17,882,887.50
EWT Remitted	-
Basic W/H Tax Due	17,882,887.50
Less: CGT Payment	358,325.00 (Exhibit V)
Basic W/H Tax Still Due	17,524,562.50
Add: Increments -	
Interest(1/26/1998 to 4/15/2002)	14,787,850.00
Amount due and collectible	32,312,412.50

The assailed Decision dated November 21, 2007 and the Resolution dated March 6, 2008 issued by the Court in Division should only be modified to the extent that petitioner should pay the respondent the amount of THIRTY TWO MILLION THREE HUNDRED TWELVE THOUSAND FOUR HUNDRED TWELVE PESOS and 50/100 (P32,312,412.50) representing deficiency EWT for taxable year 1997, plus 20% delinquency interest per annum from April 30, 2004 until full payment, pursuant to Section 249 of the 1977 Tax Code, as amended.

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

I CONCUR:

LOVELL R. BAUTISTA
Associate Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

PHILIPPINE COMMUNICATIONS SATELLITE CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 383
(C.T.A. CASE NO. 6976)

Present:

ACOSTA, Presiding Justice,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, JJ.

Promulgated:

DEC 18 2008 4:40 p.m.

x -- x

SEPARATE CONCURRING OPINION

PALANCA-ENRIQUEZ, J.:

With all due respect to my esteemed colleagues, after taking a second hard look at the pertinent facts of the case, in relation to applicable laws and jurisprudence, I agree with the *Ponente* that the deficiency withholding tax assessment against petitioner should be cancelled.

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Records show that the deficiency withholding tax assessment in the amount of P32,973,104.90 arose as a result of petitioner's purchases of real properties from individuals *(Deeds of Absolute Sale, BIR Records, pp. 382-420).* Said individuals are not habitually engaged in real estate business, as found by the respondent *(Details of Discrepancies, Exhibits "B" and "1").* A careful examination of the evidence on record shows that the classification of said real properties is residential *(Deeds of Absolute Sale, supra, and Certificates Authorizing Registration, Exhibits "P", "T", "X" and "Y").*

Section 33 of the NIRC of 1977, as amended, defines "capital assets", as follows:

> "SEC. 33. 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 hi 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, or a character which is subject to the allowance for depreciation provided in subsection (f) of section twenty-nine; or real property used in the trade or business of the taxpayer."

Pursuant to the above provision, capital assets, include those properties held by the taxpayer, other than (a) stock in trade, (b) property held for sale in the ordinary course of trade or business, and (c) property used in the trade or business. The statutory definition of capital assets is negative in nature. Thus, if the asset is not among the exceptions, it is a capital asset *(Tomas Calasanz, et al. vs. Commissioner of Internal Revenue, 144 SCRA 669)*. Since the real properties sold in the instant case are residential properties, and not among the enumerated exceptions in said *Section 33*, they are, therefore, considered as capital assets.

Being capital assets, and considering further that they are sold by individuals, not by corporations, they are subject to capital gains tax under *Section 21 (e) of the NIRC of 1977, as amended*, which provides as follows:

> "SEC. 21. Tax on citizens or residents. – (a) Taxable compensation income. –
>
> xxx xxx
>
> (e) Capital gains from sales of real property. – The provisions of Section 33 (b) notwithstanding, capital gains presumed to have been realized from the sale, exchange or other disposition of real property located in the Philippines classified as **capital assets**, including pacto de retro sales

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> and other forms of conditional sales, **by individual**, including estates and trust, shall be taxed at the rate of 5% based on the gross selling price or the fair market value prevailing at the time of sale whichever is higher; Provided, That the tax liability, if any, on gains from sales or other dispositions of real property to the government or any of its political subdivisions or agencies or to government-owned or controlled corporations shall be determined either under Section 21 (a) or under this subsection, at the option of the taxpayer."

Corollary thereto, *Revenue Memorandum Circular No. 7-90* provides:

> "This Circular seeks to clarify and amplify some pertinent provisions of the aforesaid regulations.
>
> 1. *Coverage.* All sales, exchanges, or transfers of real properties (whether classified as ordinary or capital asset) by corporation, consummated on or after January 1, 1990, are subject to the creditable withholding tax. However, in the case of individuals, estates, trusts, trust funds or pension funds, only sales, exchanges or transfers of real properties classified as ordinary assets, consummated on or after January 1, 1990, are subject to the creditable withholding tax. **Sales by individuals of real properties classified as capital assets remain subject to the 5% capital gains (final) tax."**

Accordingly, respondent's assessment for deficiency withholding tax against petitioner by reason of its purchases of said real properties is, therefore, erroneous.

Since the assessment is erroneous, I agree with the *Ponente* that the deficiency withholding tax assessment against petitioner should be cancelled.

It cannot be argued that the withholding tax assessment against petitioner by the respondent is in lieu of the capital gains tax that should have been assessed against respondent with respect to its purchases of real properties. First, well settled is the rule that the function of the Court is to make a ruling on the basis of the assessment made by the BIR and the evidence on record. It cannot encroach the power of the BIR, as an administrative body tasked to make assessment. Second, even assuming *arguendo* that petitioner is liable for capital gains tax, records show that except for the Deed of Absolute Sale of the property owned by the spouses Sia *(BIR Records, pp. 387-389)*, all the capital gains taxes are for the account of the vendor. Logically, the vendors are the ones who paid the capital gains tax. Petitioner, therefore, as the vendee, cannot be compelled to present the capital gains tax return. Third, even if the obligation to pay the capital gains taxes was for the account of the vendor, except for one transaction which is for the account of petitioner, it appears from the record that the capital gains taxes with respect to the real properties purchased by petitioner were duly paid, as evidenced by the Certificates Authorizing Registration *(Exhibits "P", "R", "T", "X" and "Y")* and Capital Gains Tax Return *(Exhibit "U")*. The Certificate Authorizing Registration is a certification from the BIR that based on the capital gains tax return filed and other documents submitted to the BIR, the capital gains tax had been paid on the property described therein. Considering that the capital gains taxes on the real property purchased by petitioner were duly paid, petitioner has no more deficiency tax liability.

For all the foregoing, the deficiency expanded withholding tax assessment against petitioner should, therefore, be cancelled.

WHEREFORE, premises considered, I vote to **GRANT** the instant Petition for Review, and to cancel the Deficiency Expanded Withholding Tax Assessment against petitioner.

OLGA PALANCA-ENRIQUEZ
Associate Justice