REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

LAWL PTE. LTD.,
Petitioner,

- versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8307

Members:

Castañeda, Jr., *Chairperson*
Casanova, and
Cotangco-Manalastas, *JJ.*

Promulgated:

NOV 07 2013

4:00 p.m.

x- -x

DECISION

COTANGCO-MANALASTAS, *J.:*

This Petition for Review filed by petitioner LAWL Pte. Ltd. seeks the refund of the amount of P185,003,035.80, allegedly representing capital gains tax and interest paid on July 6, 2009 in connection with the sale of petitioner's 236,000 Class B Common Shares in Maynilad Water Services, Inc. (Maynilad).

THE FACTS

Petitioner is a corporation duly organized and existing under the laws of Singapore, with principal office at One Marina Boulevard #28-00, Singapore.[1] It does not engage in trade or business in the Philippines.[2]

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) with authority to act as such, including, among others, the power to decide, approve,

[1] Joint Stipulation of Facts and Issues (JSFI), docket, p. 408; Exhibits "A" and "B".
[2] Exhibit "C".

and grant refunds or tax credit of erroneously paid or overpaid internal revenue taxes as provided by law. She holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

Maynilad Water Services, Inc. is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines.[3] It has a Concession Agreement with the Metropolitan Waterworks and Sewerage System (MWSS), granting Maynilad the right to operate the waterworks and sewerage services of area west as a concessionaire.[4]

Petitioner owns a total of 236,000 Maynilad Class B Common Shares[5] registered in its own name or through its nominees, with a par value of P1,000.00 per share. On February 9, 2009, petitioner executed a Deed of Absolute Sale[6] involving said shares in favor of Metro Pacific Investments Corp. (MPIC), a corporation organized and existing under the laws of the Philippines, for the price of P2,029,212,960.00.

On March 6, 2009, petitioner filed with the BIR Revenue District Office (RDO) No. 39 a capital gains tax return[7] for the sale of its shares, indicating that it is availing of the tax exemption under the Philippines-Singapore Tax Treaty. Likewise, petitioner applied for a tax treaty relief with the International Tax Affairs Division of the BIR (BIR-ITAD) on March 25, 2009.[8]

On July 6, 2009, petitioner paid the corresponding capital gains tax and interest[9] accrued on the sale of Maynilad shares[10] to secure the BIR Certificate Authorizing Registration for the transfer of the Maynilad shares from petitioner to MPIC and to deliver the said certificate to the latter.

Respondent, on the other hand, issued BIR Ruling No. ITAD 102-11 dated April 4, 2011[11], denying petitioner's

[3] Par. 3, JSFI, docket, p. 409; Exhibit "D".
[4] Exhibit "I".
[5] Annex "J" of Exhibit "H".
[6] Exhibits "E" and "F".
[7] Exhibits "G" and "G-1".
[8] Exhibits "H" and "H-2".
[9] Exhibits "M", "N", and "O".
[10] Exhibit "G".
[11] Exhibit "P".

application for tax treaty relief for lack of legal basis. Consequently, petitioner filed a letter requesting a review of the said BIR Ruling with the Secretary of Finance on May 18, 2011.[12]

On June 14, 2011[13], petitioner filed its administrative claim[14] with the BIR-ITAD for the refund of the capital gains tax and interest paid. Petitioner likewise filed this Petition for Review on July 6, 2011, while its administrative claim for refund and review of the BIR Ruling No. ITAD 102-11 were pending, to comply with the two-year prescriptive period within which to file a claim for tax refund.

In his letter dated August 10, 2011, the Secretary of Finance affirmed the ruling of the BIR, which was received by petitioner on August 26, 2011.[15]

In her Answer[16] filed on August 11, 2011, respondent interposed special and affirmative defenses, alleging, among others, that petitioner is not entitled to the claim being sought for failure to file a timely and appropriate written claim for refund as required by Section 229, in relation to Section 204, of the National Internal Revenue Code (NIRC) of 1997, as amended; that petitioner's "administrative claim for refund" dated June 13, 2011 filed with the Office of the ITAD through its Chief, Atty. Roberto F. Bernardo, was in total and wanton disregard of the express provision of Sections 229 and 204 of the NIRC of 1997, as amended, which provides that taxpayers who wish to claim refund of illegally or erroneously collected taxes must file with the Commissioner of Internal Revenue (CIR) a written claim for refund; that a perusal of Revenue Administrative Order (RAO) No. 11-2000 dated August 21, 2000, which describes the organization and functions of the Legal Service including its Division and Section, would reveal that ITAD is not given authority to receive or process application and/or claims for tax refund/credit certificates; that petitioner, having filed its capital gains tax (CGT) return and paid its CGT with Revenue District Office No. 39, where it is registered, should have filed its administrative claim for refund with the said office; that assuming arguendo that the claim for refund was properly filed, petitioner's claim is

[12] Exhibit "Q".
[13] Exhibit "R-3".
[14] Exhibit "R".
[15] Exhibits "S" and "S-1".
[16] Docket, pp. 330-349.

unfounded, petitioner failed to point out the specific provision of the Philippines-Singapore Tax Treaty which particularly finds application to its case; and that respondent, thru BIR ruling No. ITAD 102-11, already denied the tax relief application filed by petitioner, therefore, such payment cannot be considered erroneously or illegally collected.

On August 26, 2011, petitioner filed its Reply[17] to respondent's Answer. Thereafter, petitioner and respondent submitted their respective Pre-Trial Brief on September 12, 2011 and September 9, 2011. Likewise, the parties submitted their Joint Stipulation of Facts and Issues[18] on October 5, 2011, which this Court approved via Resolution[19] dated October 6, 2011. In the same Resolution, pre-trial was terminated.

During trial, petitioner presented its witnesses, namely: Atty. Ronald Policarpio, Alfredo S. Ramos, Manuel P. Quizon, Randolph T. Estrellado, and Patricia M. Empleo. Respondent, on the other hand, presented her sole witness, Myra V. Castor.

Both parties presented and formally offered their respective pieces of evidence, which were all admitted by this Court.

On May 16, 2013, the case was submitted for decision after the Court considered petitioner's Memorandum filed on April 22, 2013 and respondent's Memorandum filed on May 14, 2013.

ISSUES

The issues[20] submitted for this Court's resolution are the following:

> "1. Whether or not Petitioner's claim for tax refund of capital gains tax and interest was filed within the period prescribed by law.

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[17] Docket, pp. 352-364.
[18] Docket, pp. 408-410.
[19] Resolution dated October 6, 2011, docket, p. 411.
[20] JSFI, docket, p. 409.

2. Whether or not Petitioner is entitled to refund of capital gains tax and interest in the total amount of Php185,003,035.81.

3. Whether or not Maynilad's real property interest as of 31 December 2008 is less than 50% of its total assets.

   3.1 Whether or not the Concession Agreement should be considered a contract for public works which is treated as immovable property under Article 415 of the Civil Code of the Philippines.

   3.2 Whether or not the Concession Fees should be considered as part of the real property interests of Maynilad for purposes of determining the proportion of Maynilad's real properties to its total assets.

4. Whether petitioner has complied with the submission of complete documents in support of its claim for refund."

DISCUSSION/RULING

Petitioner argues that its administrative and judicial claims were filed within two years from its payment of the capital gains tax. It likewise asserts that under RAO No. 11-00, the BIR-ITAD is expressly granted the authority to process claims for tax credit/refund of erroneously collected internal revenue taxes arising from the application of tax treaty provisions including requests for exemptions. Petitioner points out that its claim for refund was properly addressed to Commissioner Kim S. Jacinto-Henares in her capacity as BIR Commissioner but was received by the BIR-ITAD, which holds office in the same building and under the authority of respondent. Assuming that the BIR-ITAD failed to refer petitioner's application to the appropriate personnel or office, the said omission cannot be attributed to petitioner and should not have the effect of defeating its claim. Petitioner notes that the Supreme Court has consistently declared that "the government must not be allowed to deal dishonorably or capriciously with its citizens, and must not play an ignoble part or do a shabby thing".[21]

Respondent counter-argues that petitioner did not file an administrative claim for refund with the CIR as required in Section 204, in relation to Section 229 of the NIRC of 1997, as amended. She alleges that the letter dated June 13, 2011[22], which was addressed to the Chief of the ITAD and filed with the same division of the BIR, is not the one contemplated under Sections 229 and 204 of the NIRC, requiring taxpayer claiming refund of illegally or erroneously collected taxes to file a written claim with the CIR. Further, respondent stresses that the ITAD has limited authority to receive or process applications or claims for tax refund or tax credit. She insists that ITAD's functions primarily involve the preparation of rulings on issues involving interpretation of tax treaties and international agreements and evaluation of all tax treaty relief application. Even though it has authority to process claims for refund or tax credit, the same is limited only to VAT refunds of foreign embassies and their qualified personnel and/or dependent. It does not include receiving and processing of applications for tax refund of any other taxpayer.

Section 204(C) of the NIRC of 1997, as amended, provides:

> "SEC. 204. – *Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – The Commissioner may –
>
> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two**

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[21] *Newsounds Broadcasting Network, Inc., et al. vs. Dy, et al.*, G.R. Nos. 170270 and 179411, April 2, 2009; *Estate of the Late Jesus S. Yujuico vs. Republic of the Philippines, et al.*, G.R. No. 168661, October 26, 2007; *National Housing Authority vs. Baello, et al.*, G.R. No. 143230, August 20, 2004.

[22] Exhibit "R".

> **(2) years after the payment of the tax or penalty**: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund." *(Emphasis supplied)*

Pertinent thereto, Section 229 of the NIRC of 1997, as amended, states:

> "SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* – **No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected**, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, **until a claim for refund or credit has been duly filed with the Commissioner**; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid." *(Emphasis supplied)*

Corollary thereto is Paragraph III(E)(2.3) of RAO No. 11-00, which provides:

> "III. Functions:
>
> xxx xxx xxx
>
> E. International Tax Affairs Division shall:
>
> xxx xxx xxx
>
> 2. Tax Treaty Implementation and Exchange of Information Section shall:
>
> xxx xxx xxx
>
> 2.3. Process claims for tax credit/refund on erroneously collected internal revenue taxes arising

> from the application of tax treaty provisions including requests for exemptions;"

Scrutiny of the records shows that petitioner paid the capital gains tax and interest accrued on the sale of its 236,000 Maynilad Class B Common Shares on July 6, 2009[23]. From the said date, petitioner had two years or until July 6, 2011 within which to file its administrative and judicial claims. Petitioner filed its administrative claim[24] with the BIR-ITAD on June 14, 2011[25]. Its written claim was addressed to the Commissioner of Internal Revenue, but it was coursed through the Chief of International Tax Affairs Division, to wit:

> "**The Honorable**
> **Kim S. Jacinto-Henares**
> Commissioner of Internal Revenue
> Bureau of Internal Revenue
> National Office Building
> Diliman, Quezon City
>
> Attention: **Atty. Robert F. Bernardo**
> Chief, International Tax Affairs Division"
> *(Emphasis supplied)*

Thus, petitioner has complied with Sections 204(C) and 229 of the NIRC of 1997, as amended, when it filed its written claim with the Commissioner.

As to the allegation of respondent that the BIR-ITAD has no authority to receive and process applications for tax refund of any other taxpayer, the Court finds it unmeritorious. It is clear from Paragraph III(E)(2.3) of RAO No. 11-00 that the International Tax Affairs Division, specifically its Tax Treaty Implementation and Exchange of Information Section shall process claims for tax credit/refund of erroneously collected internal revenue taxes arising from the application of tax treaty provisions including requests for exemptions. Thus, petitioner has properly filed its administrative claim before the BIR-ITAD.

Petitioner filed its judicial claim before this Court on July 6, 2011, two years after it paid the capital gains tax and

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[23] Exhibits "M", N", and "O", inclusive of sub-markings.
[24] Exhibit "R".
[25] Exhibit "R-3".

interest. Clearly, petitioner's judicial claim for tax refund was filed within the prescriptive period.

As to the issue of submission of complete documents in support of petitioner's claim for refund, petitioner alleges that it submitted the following documents together with the administrative claim for refund:

1. Request for Review of BIR Ruling No. ITAD 102-11 dated April 4, 2011 filed with the Department of Finance Revenue Operations Group;

2. Copy of capital gains tax return and proof of payment; and

3. Other supporting documents already submitted with the BIR-ITAD and forming part of the case docket of BIR Ruling No. ITAD 102-11.

It is a rule that examiner cannot demand what type of supporting documents should be submitted; otherwise, the taxpayer will be at the mercy of the examiner, who may require the production of documents that the taxpayer cannot submit. Likewise, records confirm that petitioner filed the administrative claim together with the copy of capital gains tax return and proof of payment. Further, it is indicated in its claim that the other supporting documents are already with the BIR-ITAD as part of the docket of BIR Ruling No. ITAD 102-11.

Petitioner based its tax exemption on Article 13 of the Philippines-Singapore Tax Treaty. It states therein that any gains from the alienation of shares of a company, the property of which consists principally of immovable property situated in a Contracting State, may be taxed in that State. Under Revenue Regulations No. 04-86[26], the term "principally" means more than fifty percent (50%) of the entire assets in terms of value.

Likewise, Paragraph 2 of Article 6 of the Philippines-Singapore Tax Treaty provides that the term "immovable

[26] Determination of Whether the Assets of a Corporation Consist Principally of Real Property Interest under the Philippine Tax Treaties.

property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources.

Thus, it is important to ascertain first whether Maynilad's real property interest as of December 31, 2008 is less than 50% of its total assets.

In the Audited Financial Statement of Maynilad for taxable year ended December 31, 2008[27], its assets are broken down as follows:

	2008	2007 (As restated – Note 2)
ASSETS		
Current Assets		
Cash and cash equivalents (Notes 4, 24 and 25)	P1,363,240	P1,344,599
Short-term investments (Notes 4, 24 and 25)	5,575,108	1,159,853
Trade and other receivables – net (Notes 5, 24 and 25)	1,449,576	1,006,513
Other current assets (Notes 6, 24 and 25)	732,637	544,718
Total current Assets	9,120,561	4,055,683
Noncurrent Assets		
Service concession assets – net (Notes 1, 8 and 12)	22,236,673	17,144,831
Deferred tax assets – net (Note 15)	2,995,663	2,977,172
Property and equipment – net (Notes 7 and 22)	330,268	201,157
Other noncurrent assets – net (Notes 1, 9, 24 and 25)	68,527	78,874
Total Noncurrent Assets	25,631,131	20,402,034
	P34,751,692	24,457,717

There is no dispute that the current assets of Maynilad are not real properties.

The noncurrent assets of Maynilad are composed of deferred tax assets, property and equipment, other noncurrent assets, and service concession assets.

The *deferred tax assets* correspond to deductible temporary differences which Maynilad expects to be reversed after the expiration of the tax holiday period. The *other noncurrent assets* consist of the deferred foreign currency deposit accounts, software development cost, refundable

[27] Exhibit "J".

deposits-Meralco, restoration deposits, miscellaneous deposits, and AFS Investment. The *property and equipment* consist of (1) land – various tracts of land owned and controlled by Maynilad, which are not part of the network assets but may be utilized by the same in connection with its operations; (2) instrumentation, tools and other equipment – saw cutters, pipe wrench and other similar tools used for the maintenance, repair and replacement of existing properties that are owned and controlled by Maynilad, including the equipment and machineries, which are not part of the network assets; (3) office furniture, fixtures and equipment – computer hardware, radio communication equipment, chairs and tables, lockers, air conditioners, and other equipment necessary for conducting office-based operations of Maynilad, which are not part of the network assets; and (4) transportation equipment – vehicles, which are not part of the network assets, owned, controlled and used by Maynilad for its operations.[28]

The Court would now address the nature of the Service Concession Assets.

Whether the Concession Agreement is considered as contract for public works which is an immovable property under Article 415 of the Civil Code

Petitioner opines that the Concession Agreement is not a contract for public works but mainly a contract providing for Maynilad's service obligations to MWSS and its customers. According to it, the term "public works" refers to the construction of infrastructures, funded and built by the government through public funds, for the free use of the general public. The Concession Agreement is essentially a service contract wherein Maynilad is granted "the sole right to manage, operate, repair, decommission and refurbish the Facilities in the Service Area, including the right to bill and collect for water and sewerage services supplied in the Service Area." The services rendered by Maynilad are not paid using public funds but by payments made by private consumers collected by Maynilad in the exercise of its right to bill and collect private consumers as a concessionaire of the MWSS. Likewise, the services rendered by Maynilad are not intended

[28] Judicial Affidavit of Randolph T. Estrellado marked as Exhibit "GG"; Exhibit "J" (Audited Financial Statement of Maynilad).

to benefit the general public but only "consumers with whom Maynilad and MWCI[29] are contractually obliged, within their respective service areas, to provide water, sanitation and sewerage services." On the other hand, in BIR Ruling No. ITAD 102-11, respondent has considered the Concession Agreement as a contract for public works.

Article 415(10) of the Civil Code of the Philippines provides:

> "Art. 415. The following are immovable property:
>
> xxx xxx xxx
>
> (10) Contracts for public works, and servitudes and other real rights over immovable property."

However, as the Civil Code does not define the term public works, we will construe the same with the aid of extrinsic source.

In the case of *Guzman vs. Commission on Elections, et al.*[30], the issue was whether the purchase of the lots for use as a public cemetery constituted *public works* within the context of the prohibition under the Omnibus Election Code. Since the Omnibus Election Code does not define the term "public works", the Supreme Court resorted to extrinsic sources and concluded that term "public works" refer to all fixed works constructed for public use, *to wit*:

> "The *Local Government Code of 1991* considers public works to be the fixed infrastructures and facilities owned and operated by the government for public use and enjoyment. According to the Code, cities have the responsibility of providing infrastructure facilities intended primarily to service the needs of their residents and funded out of city funds, such as, among others, roads and bridges; school buildings and other facilities for public elementary and secondary schools; and clinics, health centers and other health facilities necessary to carry out health services.
>
> Likewise, the Department of Public Works and Highways (DPWH), the engineering and construction arm of the government, associates public works with fixed

[29] Manila Water Company, Inc.
[30] G.R. No. 182380, August 28, 2009.

infrastructures for the public. In the declaration of policy pertinent to the DPWH, Sec. 1, Chapter 1, Title V, Book IV, *Administrative Code of* 1987, states:

> Sec. 1. *Declaration of Policy.* - The State shall maintain an engineering and construction arm and continuously develop its technology, for the purposes of ensuring the safety of all infrastructure facilities and securing for all public works and highways the highest efficiency and the most appropriate quality in construction. The planning, design, construction and maintenance of **infrastructure facilities, especially national highways, flood control and water resources development systems, and other public works in accordance with national development objectives**, shall be the responsibility of such an engineering and construction arm. However, the exercise of this responsibility shall be decentralized to the fullest extent feasible.

The enumeration in Sec. 1, *supra* – "infrastructure facilities, especially national highways, flood control and water resources development systems, and other public works in accordance with national development objectives" – means that **only the fixed public infrastructures for use of the public are regarded as public works**. This construction conforms to the rule of *ejusdem generis,* which Professor Black has restated thuswise:

> It is a general rule of statutory construction that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. But this rule must be discarded where the legislative intention is plain to the contrary.

Accordingly, absent an indication of any contrary legislative intention, the term *public works* as used in Section 261 (v) of the *Omnibus Election Code* is properly construed to refer to any building or structure on land or to structures (such as roads or dams) built by the Government for public use and paid for by public funds. **Public works are clearly works, whether of construction or adaptation undertaken** and carried out by the national, state, or municipal authorities, designed to subserve some purpose of public necessity, use or convenience, such as public buildings, roads, aqueducts, parks, *etc.*; or, in other words, **all *fixed* works constructed for public use**." (Emphasis supplied)

Further, "public works" is defined as "all fixed works contracted for public use, as railways, docks, canals, waterworks, roads, etc."[31]

From the foregoing, "contracts for public works" in Article 415(10) of the Civil Code can be construed as referring to all fixed works constructed for public use or fixed public infrastructures for use of the public. It denotes that there are works conducted, *i.e.*, construction and maintenance of infrastructure facilities such as national highways, flood control, water resources development systems, etc.

It is now incumbent to examine the provisions of the Concession Agreement to determine whether the same is a contract for public works since the real nature of a contract may be determined from the express terms of the agreement and from the contemporaneous and subsequent acts of the parties thereto.[32] The agreement or contract between the parties is the formal expression of the parties' rights, duties and obligations. It is the best evidence of the intention of the parties. Thus, when the terms of an agreement have been reduced to writing, it is considered as containing all the terms agreed upon and there can be no evidence of such terms other than the contents of the written agreement between the parties and their successors in interest.[33]

A reading of the Concession Agreement would show that Maynilad, as concessionaire, was granted the sole right to manage, operate, repair, decommission and refurbish the Facilities in the Service Area, including the right to bill and collect for water and sewerage services supplied in the Service Area. [34] Hence, the said agreement involves (a) making the necessary constructions (repairs, refurbishment, etc.) to the facilities; and (b) operating the same.

The Concession Agreement involved herein is akin to a "rehabilitate-operate-and-transfer" arrangement which is defined as "[a] contractual arrangement whereby an existing facility is turned over to the private sector to refurbish, operate

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[31] Words and Phrases, Permanent Edition, Volume 35 by West Publishing Co.
[32] *Dela Cruz v. Dela Cruz*, G.R. No. 146222, January 15, 2004.
[33] *Norton Resources and Development Corporation vs. All Asia Bank Corporation*, G.R. No. 162523, November 25, 2009.
[34] Exhibit "I-3".

and maintain for a franchise period, at the expiry of which the legal title to the facility is turned over to the government."[35]

Petitioner presented Mr. Manuel P. Quizon, Chief Regulator of the MWSS Regulatory Office, as its witness to prove that the Concession Agreement is not *per se* a contract for public works.

Mr. Manuel P. Quizon testified, among other things, that the main consideration of the Concession Agreement is the service obligations. He likewise stated that the said agreement was entered into pursuant to the provisions of the National Water Crisis Act of 1995 for the purpose of solving the water crisis. That by allowing the involvement or participation of the private sector in any or all segments, operations and/or facilities of the MWSS, the customer base would be better served. According to him, customer base refers to consumers with whom Maynilad and MWCI are contractually obliged, within their respective service areas, to provide water, sanitation and sewerage services. He further explained that the improvements introduced by the concessionaire are merely held in trust for the benefit of MWSS during the term of the Agreement, and any improvements made without prior approval of the MWSS Regulatory Office, the concessionaire will have to shoulder the corresponding expenses and cannot apply for any increase or adjustment in the existing rates to absorb its costs. Moreover, he mentioned that the concession fees are payable by Maynilad to MWSS. It is considered as expenditures of the concessionaires. Under the Concession Agreement, it is supposed to answer for MWSS loan obligations assumed by the concessionaires as well as provide budgetary allocations for MWSS operations.[36]

From all the foregoing and applying the definition of "contracts for public works" stated earlier, this Court finds that the Concession Agreement is a "contract for public works" with respect to its obligation to make the necessary constructions; it is not solely a contract for public works since the concessionaire (Maynilad) is not only required to make the necessary fixed works but is likewise mainly required to perform its service obligations, *i.e.*, water supply services, sewerage services, etc.

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[35] Section 2(i), R.A. No. 7718 or the BOT Law.
[36] Exhibit "X".

The question now is what value would be apportioned to the "contract for public works" aspect of the Concession Agreement, otherwise stated, whether to include the Concession Fees, which is part of the Service Concession Assets, in the immovable property of Maynilad.

Whether the concession fee should be considered as part of the real property interests of Maynilad for purposes of determining the proportion of Maynilad's real properties to its total assets

Petitioner stresses that BIR Ruling No. ITAD 102-11 was erroneous. It explains that the Service Concession Assets of Maynilad is in accordance with International Financial Reporting Interpretations Committee (IFRIC) 12. It is so to the extent that the concessionaire is granted a right or license to charge users of the public service. Likewise, it notes that any new structures or assets introduced by Maynilad (as concessionaire) to the existing structures and system of the MWSS during the term of the Concession Agreement are merely held in trust by Maynilad, by virtue of legal title, for the benefit of MWSS, which remains as the actual and beneficial owner of the assets pertaining to the water, sanitation, and sewerage system of the MWSS. It also argues that respondent's arbitrary classification of concession assets in Maynilad's balance sheet as real property is inconsistent with the applicable accounting principles.

Mr. Randolph T. Estrellado, Chief Finance Officer of Maynilad, testified with respect to Maynilad's assets. He identified each and every composition of Maynilad's Service Concession Assets as of December 31, 2008. He likewise explained and identified the composition of Maynilad's non-current assets.[37]

To attest to the composition of the Service Concession Assets, Mr. Randolf T. Estrellado also executed a Certification[38] showing the following breakdown:

[37] Exhibit "GG".
[38] Exhibit "L".

Concession Fees		P 7,630,672,000
Commencement Fee		80,006,000
MWSS MOE*		250,129,000
Total Concession Assets		P 7,960,807,000
Network Assets		14,275,865,000
Water and Sewer Utility Plant	8,512,489,000	
MWSS Concession Rehabilitated Facilities	2,468,886,000	
Leasehold Improvements	108,613,000	
In Progress Accounts	2,391,149,000	
Unused Materials and Supplies	794,728,000	
Balance per Audit, 12.31.08		**P22,236,673,000**

*Miscellaneous and Other Expenses

Petitioner likewise presented print-outs of the General Ledger (GL) of Maynilad, which is authorized by the BIR to adopt a computerized accounting system[39], to show the December 31, 2008 balances and breakdown of the Service Concession Assets, to wit:

Exhibit	Account Description	Balance as of 12/31/2008
Z	Service Concession Assets – Concession Accounts	P 13,541,723,866.00
BB	Commencement Fee	147,250,000.00
AA	Accum Amort SCA-Concession Accounts	(5,728,166,584.83)
		P 7,960,807,281.20
CC	Service Concession Assets – Completed PPE	P 9,876,034,352.25
DD	Service Concession Assets – In Progress PPE	5,975,065,358.09
EE	Accumulated Amortization Service Concession Assets - PPE	(1,575,234,356.43)
		P 14,275,865,353.90
		P22,236,672,635.10

Petitioner points out that the unissued materials and supplies (P794,728,000.00) and concession assets (P7,960,807,000.00), which comprised of concession fees, commencement fee, and MWSS MOE, are not real or immovable properties as defined in Article 415 of the Civil Code. Assuming that intangible asset model under IFRIC 12 is not applied, the aggregate amount of property and equipment and the real properties (network assets) included in the classification of Service Concession Assets are still less than 50% of the entire assets of Maynilad. Thus, petitioner qualifies for the tax exemption privilege granted under Article 13 of the Philippines-Singapore Tax Treaty.

Respondent denied petitioner's application on the basis that the assets of Maynilad consisted principally of real

[39] Exhibit "Y".

properties. Respondent classified the Service Concession Assets and the Property and Equipment accounts as real properties situated in the Philippines.

There is no question that for accounting purposes, petitioner properly accounted for the Service Concession Assets as intangible assets and presented it separately from property, plant and equipment, in accordance with IFRIC 12[40]. IFRIC 12 provides that the operator shall recognize an intangible asset to the extent that it receives a right (a license) to charge users for the public service. As testified by Ms. Patricia Empleo[41], petitioner's expert witness, since Maynilad is only given the right to bill and collect for water and sewerage services rendered to customers under the Concession Agreement, it was only proper under IFRIC 12 for Maynilad to report and treat its Service Concession Agreements as intangible assets. Moreover, Ms. Empleo is of the opinion that since Service Concession Assets relate only to the exclusive right to bill the users of services provided by a public sector (usually a government corporation), thus, to an accountant, the right does not have any physical existence, and therefore cannot be immediately classified as a movable or immovable. There is therefore a need to examine the breakdown of the Service Concession Assets account to find out its actual components before the same may be classified into movable and immovable.

Property may be classified as tangible/corporeal or intangible/incorporeal, according to its materiality or immateriality.[42]

Intangible asset has been defined as any nonphysical asset or resource that can be amortized or converted to cash, such as patents, goodwill, and computer programs, or a right to something, such as services paid for in advance.[43] Thus, the Service Concession Assets being nonphysical assets, there is a need to determine whether its underlying component pertains to real or personal property.

[40] Exhibit "K".
[41] Exhibit "HH".
[42] Civil Code of the Philippines Annotated, 13th Edition 1994, Volume II, Property by Justice Edgardo L. Paras, p. 3.
[43] Black's Law Dictionary, Eighth Edition, by West.

Therefore, there is a need to examine the composition of the Service Concession Assets.

The Audited Financial Statement[44] (AFS) of Maynilad shows that the amount of Service Concession Assets as of December 31, 2008 is P22,236,673,000. Note 8 of the AFS stated that the "[s]ervice concession assets consist of the present value of total estimated concession fee payments pursuant to the Concession Agreement and the costs of rehabilitation works incurred." Unfortunately, no breakdown was provided.

As shown earlier in the Certification issued by Maynilad and print-outs of Maynilad's GL, the Service Concession Assets account is broken down into Concession Fees/ Concession Accounts (P7,960,807,000) and Network Assets/PPE (P14,275,865,000). The Concession Fees are the fees paid by Maynilad to MWSS pursuant to Paragraph 6.4 of the Concession Agreement, *i.e.*, loans of MWSS becoming due, commencement fee and 50% of the annual budget of MWSS, while the Network Assets are the cost of rehabilitation works.

From the foregoing, only the portion pertaining to Network Assets (P14,275,865,000) should be classified as real property as this relates to the "contract for public works".

With regard to the Property and Equipment account of Maynilad as of December 31, 2008[45], the same is broken down as follows:

	Net Book Value
Land	P 32,733,000.00
Instrumentation, Tools and Other Equipment	122,525,000.00
Office Furniture, Fixtures and Equipment	70,099,000.00
Transportation Equipment	104,911,000.00
Total	**P 330,268,000.00**

To be considered as immovable property, the above accounts should fall under any of the enumeration provided under Article 415 of the Civil Code, *to wit*:

"Art. 415. The following are immovable property:

[44] Exhibit "J".
[45] Note 7 of Maynilad's AFS (Exhibit "J").

(1) Land, buildings, roads and constructions of all kinds adhered to the soil;

xxx xxx xxx

(3) Everything attached to an immovable in a fixed manner, in such a way that it cannot be separated therefrom without breaking the material or deterioration of the object";

xxx xxx xxx

(5) Machinery, receptacles, instruments or implements intended by the owner of the tenement for an industry or works which may be carried on in a building or on a piece of land, and which tend directly to meet the needs of the said industry or works;

xxx xxx xxx"

And as mentioned earlier, the term "immovable property" shall in any case include property accessory to such immovable property.

Land falls under Article 415(1) of the Civil Code.

Instrumentation, Tools and Other Equipment and *Office Furniture, Fixtures and Equipment* may fall under Article 415(3) and (5) of the Civil Code and may also be considered as accessories to immovable properties. The same were considered as immovable properties since it cannot be ascertained from the description[46] of these accounts whether the same should be excluded. After all, in claims for refund, the claimants of those refunds bear the burden of proving the factual basis of their claims.[47]

Transportation Equipment does not fall under any of the above enumeration. Based on the description of this account[48], it is basically composed of motor vehicles, hence, should not be classified as immovable property.

From the foregoing, the percentage of real property interest of Maynilad is computed as follows:

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[46] Annex L of Exhibit "H" and Judicial Affidavit of Randolph T. Estrellado (Exhibit "GG").
[47] *Commissioner of Internal Revenue vs. Seagate Technology*, G.R. No. 153866, 11 February 2005.
[48] Annex L of Exhibit "H" and Judicial Affidavit of Randolph T. Estrellado (Exhibit "GG").

		December 31, 2008 (AFS)
Service Concession Assets - Network Assets		P 14,275,865,000.00
Property and Equipment:		
Land	P 32,733,000.00	
Instrumentation, Tools and Other Equipment	122,525,000.00	
Office Furniture, Fixtures and Equipment	70,099,000.00	225,357,000.00
Total		P 14,501,222,000.00
Total Asset		P 34,751,692,000.00
Percentage of Real Property Interest		**41.73%**

Based on the above table, Maynilad's immovable or real property interest as of December 31, 2008 is 41.73% of its total assets, thereby the assets of Maynilad do not consist principally of immovable property situated in the Philippines. Consequently, capital gains derived by petitioner from the sale of shares of stock of Maynilad are exempt from capital gains tax in the Philippines pursuant to Article 13 of the Philippines-Singapore Tax Treaty.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, respondent is hereby ORDERED to refund in favor of petitioner the amount of P185,003,035.81, representing erroneously paid Capital Gains Tax and interest on its sale of shares of stock in Maynilad Water Services, Inc.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice