REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	CTA EB No. 1783 (CTA Case No. 8825)
	Present:
- versus -	DEL ROSARIO, *PJ*, CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, and MODESTO-SAN PEDRO, *JJ.*
PARITY PACKAGING CORPORATION, Respondent.	Promulgated: AUG 30 2019 4:16 p.m.

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RESOLUTION

Fabon-Victorino, J.:

Before the Court *En Banc* is the *Motion for Reconsideration Re: Decision dated 5 March 2019*[1] filed by petitioner on March 25, 2019, assailing the Decision [2] promulgated on March 5, 2019, the dispositive portion of which reads:

> **WHEREFORE**, the instant Petition for Review is hereby **DENIED** for lack of merit. The Decision and Resolution, dated September 19, 2017 and January 22, 2018, respectively are affirmed with respect to the cancellation of deficiency income tax

[1] *En Banc* docket, pp. 138-160.
[2] *En Banc* docket, pp. 117-134.

and the upholding of the basic deficiency taxes for VAT, EWT, and DST.

However, in view of the issuance of Revenue Regulations No. 21-2018 with respect to the computation of deficiency and delinquency interest, the assailed Decision is **MODIFIED** with respect to interests, as follows:

> **WHEREFORE**, in light of the foregoing considerations, the instant *Amended Petition for Review* is **PARTIALLY GRANTED**.
>
> Accordingly, the subject deficiency income tax assessment is hereby **CANCELLED** and **SET ASIDE**.
>
> However, petitioner is **ORDERED TO PAY** the aggregate amount of **Php2,942,655.58** for taxable year 2010, inclusive of the 25% surcharge, 20% deficiency interest and 20% delinquency interest imposed under Sections 248(A)(3), 249(B) and (C) of the NIRC, computed until December 31, 2017, as follows:
>
> xxx xxx xxx
>
> In addition, petitioner is **ORDERED TO PAY** respondent the delinquency interest at the rate of twelve percent (12%) on the total amount of Php1,387,424.28 as of April 30, 2014, as determined above, computed from January 1, 2018 until full payment thereof pursuant to Section 249(C) of the NIRC, as amended by Republic Act No. 10963, also known as Tax Reform for

> Acceleration and Inclusion (TRAIN), and implemented by Revenue Regulations No. 21-2018.
>
> **SO ORDERED.**

The assailed Decision sustained the ruling of the Court in Division ordering the cancellation of the deficiency income tax and upholding, *albeit* partially, the basic deficiency taxes for value-added tax (VAT), expanded withholding tax (EWT), and documentary stamp tax (DST), issued against respondent for taxable year 2010.

In moving for the reconsideration of the assailed Decision, petitioner raises two grounds quoted as follows:

> I. PETITIONER'S RIGHT TO ASSESS RESPONDENT DEFICIENCY VAT FOR THE FIRST QUARTER OF 2010 AND DEFICIENCY EWT FOR JANUARY TO MARCH 2010 HAD NOT PRESCRIBED.
>
> II. THE HONORABLE COURT GRAVELY ERRED IN AFFIRMING THAT THE DEFICIENCY INCOME TAX ASSESSMENT IS CANCELLED AND THE DEFICIENCY VAT, EWT AND DST ASSESSMENTS ARE MODIFIED.

By way of *Comment*[3], respondent contends that the arguments set-forth by petitioner are mere reiterations of his previous submissions, which have all been addressed in the Decision sought to be reconsidered. Nonetheless, respondent is fully convinced that the Court *En Banc* correctly ruled in its favor.

Indeed, all the issues raised in the instant *motion* have already been amply determined and discussed, first by the Court in Division and subsequently on appeal by the Court *En Banc*. A thorough review of petitioner's *Motion for Reconsideration* and the *Comment* thereto filed by respondent reveals that petitioner's *Motion for Reconsideration* is a blinding replica of his Petition for Review filed with the Court *En Banc*. Thus, to discuss them

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[3] *En Banc* docket, pp. 165-174.

anew is surely a waste of time and dwindling resources of the Court.

WHEREFORE, the *Motion for Reconsideration (Re: Decision dated 5 March 2019)* filed by petitioner Commissioner of Internal Revenue is hereby **DENIED**, for lack of merit.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN RINGPIS-LIBAN
Associate Justice

(With Concurring and Dissenting Opinion)
CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

(On Official Business)

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

REPUBLIC OF THE PHILIPPINES
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COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-*versus*-

PARITY PACKAGING CORPORATION,
Respondent.

CTA *EB* NO. 1783
(CTA Case No. 8825)

Present:

DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, *and*
MODESTO-SAN PEDRO, *JJ.*

Promulgated:

AUG 30 2019
4:16 p.m.

x- -x

CONCURRING AND DISSENTING OPINION

MANAHAN, J.:

With due respect to my learned colleague, Justice Ezperanza R. Fabon-Victorino, I hereby reiterate my position that the assailed decision be remanded to the Court in Division for determination of respondent's partial tax liabilities for taxable year 2010.

In the *Motion for Reconsideration,* petitioner Commissioner of Internal Revenue (CIR) argues that his assessment was made within the periods prescribed by law; and that the assessments against respondent have factual and legal bases.

In respondent's *Comment (On the CIR's Motion for Reconsideration)*[1] filed on May 3, 2019, respondent avers that the arguments raised by petitioner CIR are mere reiterations of

[1] *Rollo*, pp. 165-174.

his previous submissions and which have all been addressed by the Honorable Court.

I am aware of my previous position which upheld the tax-free nature of the first exchange transacted by Parity Packaging Corporation (PPC). However, upon another hard look at the facts and circumstances surrounding the alleged tax-free exchanges, I am constrained to reverse my previous position and now declare that the first exchange of property is taxable.

Respondent PPC, together with Fortune Tobacco Corporation, Northern Tobacco Redrying Co. Inc., Dominium Realty and Construction Corporation and Orecla Realty, Inc., transferred properties in exchange for Fortune Landequities Resources, Inc. (FLRI)'s shares of stock.[2]

Respondent PPC transferred its title and ownership over a parcel of land, covered by Transfer Certificate of Title No. 188550, located in Marikina, Metro Manila, as evidenced by a Deed of Transfer.[3] In exchange, respondent PPC's common shares in FLRI increased from 7,380 to 29,522, or by 22,142 shares.[4] Respondent PPC, and the other aforestated transferors, continued to collectively control FLRI after the transfer by owing 99.9995% of FLRI's total voting stock.[5]

Respondent PPC, together with Philip Morris Philippines Manufacturing Inc., Fortune Tobacco Corporation, Northern Tobacco Redrying Co. Inc., and Dominium Realty and Construction Corporation, transferred assets including accounts payables and accrued expenses and syndicated loans to PMFTC, Inc., in exchange for the latter's shares of stocks.[6] In this second exchange, respondent PPC received PMFTC, Inc.'s shares of stock in exchange for PPC's shareholdings in FLRI, including the FLRI shares of stock acquired in the first alleged tax-free exchange. After this second exchange, the transferors continued to collectively control PMFTC, Inc. by owning 99.9989% of its total voting stock.[7]

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[2] *Rollo*, Division Decision dated September 19, 2017, p. 72.
[3] *Rollo*, Division Decision dated September 19, 2017, p. 72.
[4] *Rollo*, Division Decision dated September 19, 2017, p. 74.
[5] *Rollo*, Division Decision dated September 19, 2017, p. 74.
[6] *Rollo*, Division Decision dated September 19, 2017, p. 74.
[7] *Rollo*, Division Decision dated September 19, 2017, p. 75.

Section 40(C)(2) of the 1997 National Internal Revenue Code, as amended (NIRC), provides as follows:

> *Sec. 40. Determination of Amount and Recognition of Gain or Loss. –*
>
> xxx
>
> *(C) Exchange of Property. –*
>
> *(1) General Rule.* – Except as herein provided, upon the sale or exchange of property, the entire amount of the gain or loss, as the case may be, shall be recognized.
>
> *(2) Exception.* – No gain or loss shall be recognized if in pursuance of a plan of merger or consolidation –
>
> > (a) A corporation, which is a party to a merger or consolidation, exchanges property solely for stock in a corporation, which is a party to the merger or consolidation; or
> >
> > (b) A shareholder exchanges stock in a corporation, which is a party to the merger or consolidation, solely for the stock of another corporation also a party to the merger or consolidation; or
> >
> > (c) A security holder of a corporation, which is a party to the merger or consolidation, exchanges his securities in such corporation, solely for stock or securities in another corporation, a party to the merger or consolidation.
>
> No gain or loss shall also be recognized if property is transferred to a corporation by a person in exchange for stock or unit of participation in such a corporation of which as a result of such exchange said person, alone or together with others, not exceeding four (4) persons, gains control of said corporation: *Provided,* That stocks issued for services shall not be considered as issued in return for property.

Based on the foregoing circumstances, the Court in Division found that pursuant to the transfer of property by respondent PPC to FLRI in exchange for shares, respondent PPC and four other transferors maintained control over FLRI. Under these conditions, the transfer of property for FLRI shares appears to qualify as a tax-free exchange under Section 40(C)(2) of the NIRC.

I disagree.

Reference must be made to Section 40(C)(6)(b) of the NIRC, which provides, as follows:

> *Sec. 40. Determination of Amount and Recognition of Gain or Loss. –*
>
> xxx
>
> *(C) Exchange of Property. –*
>
> xxx
>
> (6) *Definitions. –*
>
> xxx
>
> (b) The term '**merger**' or '**consolidation**', when used in this Section, shall be understood to mean: xxx: *Provided,* That for a transaction to be regarded as a merger or consolidation within the purview of this Section, it must be undertaken for a *bona fide* business purpose and not solely for the purpose of escaping the burden of taxation*: Provided, further,* That in determining whether a *bona fide* business purpose exists, each and every step of the transaction shall be considered and the whole transaction or series of transactions shall be treated as a single unit: xxx (*Underscoring ours)*

While the above provision deals with merger and consolidation, the determination that there is a *bona fide* business purpose and that the transaction was not undertaken merely for the purpose of escaping the burden of taxation is equally important for alleged tax-free exchanges arising from transfer of property in exchange for shares of the transferee, wherein the transferors gain control of the latter corporation.

In the instant case, the alleged business purpose for the transfer may be gleaned from Exhibit "P-32",[8] where it was stated:

> To further capitalize and expand its business operations; optimize the use of resources; and increase

[8] Docket, Vol. II, Request for Tax-Free Exchange Ruling of Transfer of Land in Exchange for Shares of Stock, pp. 1109-1117.

> financial strength, the Transferors conveyed and transferred their ownership over the said parcels of land to FLRI as full payment for their existing unpaid subscription of P18,000,000.00 and their additional subscription of FLRI shares of stock amounting to P71,999,500.[9]

While there is an apparent business purpose, the control gained by respondent PPC over FLRI was immediately lost when PPC transferred its FLRI shares to PMFTC in the second alleged tax-free exchange.

The transfer of property to FLRI in exchange for FLRI shares was supported by a Deed of Transfer[10] and a Deed of Absolute Sale[11] both dated February 25, 2010.

However, respondent PPC immediately divested itself of its FLRI shares through the Deed of Transfer[12] to PMFTC, Inc. also dated February 25, 2010. Annex D[13] of said Deed of Transfer clearly shows that the assets transferred by respondent PPC included the full 29522 shares in FLRI.

Based on the foregoing, I find that respondent PPC's allegation of acquiring control over FLRI after the transfer of property thereto was merely for the purpose of escaping the burden of taxation on such transfer. This is bolstered by the fact that respondent PPC immediately disposed of said shareholdings on the same date. This momentary control acquired by virtue of the subject transfer of property in exchange of shares could not have been the circumstance contemplated by Section 40(C)(2) of the NIRC.

The transaction not having qualified as a tax-free exchange under Section 40(C)(2), the same should be considered as an ordinary sale as contained in the Deed of Absolute Sale[14] dated February 25, 2010.

Thus, I vote that the Commissioner of Internal Revenue's Petition for Review be PARTIALLY GRANTED and that this case

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[9] Docket, Vol. II, Request for Tax-Free Exchange Ruling of Transfer of Land in Exchange for Shares of Stock, p. 1111.
[10] Exhibit "P-41-2", Annex IC-70 (V.a), pp. 484-486.
[11] Exhibit "P-41-2", Annex IC-83 (V.a), pp. 557-559.
[12] Exhibit "P-41-2", Annex IC-79 (V.a), pp. 528-538.
[13] Exhibit "P-42-2", Annex IC-79 (V.a), p. 537.
[14] Exhibit "P-41-2", Annex IC-83 (V.a), pp. 557-559.

be further REMANDED to the Court in Division for recomputation of respondent's deficiency tax liabilities for taxable year 2010.

CATHERINE T. MANAHAN
Associate Justice