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

## SECOND DIVISION

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| **CENTURY PEAK PROPERTY DEVELOPMENT, INC. and KINGSVILLE INTERNATIONAL RESOURCES, INC.,** Petitioners, | **CTA CASE NO. 9145** |
| | Members: |
| - versus - | **CASTAÑEDA, JR.,** *Chairperson,* **CASANOVA, ,** *and* **MANAHAN,** *JJ.* |
| **THE SECRETARY OF FINANCE and COMMISSIONER OF INTERNAL REVENUE,** Respondents. | Promulgated: JAN 1 5 2018 4:15 PM |

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# RESOLUTION

**CASTAÑEDA, JR., J.:**

For resolution is respondent Secretary of Finance (SOF)'s **Motion for Partial Reconsideration (Re: July 24, 2017 Decision)**, filed through registered mail on August 9, 2017 and received by this Court on August 14, 2017, with petitioners' **Comment and Opposition To the Motion for Partial Reconsideration,** filed on September 4, 2017, respondent SOF's **Reply**, filed on September 14, 2017, and petitioners' **Rejoinder**, filed on October 5, 2017, pursuant to the Resolution dated October 20, 2017.

Respondent SOF seeks reconsideration of the Court's Decision (assailed Decision)[1] promulgated on July 24, 2017, the dispositive portion of which reads:

[1] Docket vol. II, pp. 728-759.

> "**WHEREFORE**, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, the Bureau of Internal Revenue Certification Ruling SN. 014-2012 and the Department of Finance Resolution dated July 14, 2015 are hereby **REVERSED** and **SET ASIDE**.
>
> **SO ORDERED.**"[2]

Respondent SOF moves for the reconsideration of the assailed Decision arguing that petitioners are liable to pay value-added tax by reason of the transfer of the two (2) parcels of land by and between the petitioners through a Deed of Assignment which is considered as "sale, barter or exchange of goods" as contemplated in Section 106 of the National Internal Revenue Code (NIRC) of 1997, as amended.

According to respondent SOF, petitioner Kingsville is a corporation primarily engaged in the real estate business and the two parcels of land were part of its stock in trade primarily for sale or for lease in the course of its trade or business. Hence, the transfer of the two parcels of land through a Deed of Assignment by and between the petitioners is subject to VAT.

Respondent SOF alleges that the nature of the Deed of Assignment as a pre-incorporation subscription contract is unbelievable. He contends that there was a transfer of actual ownership interests over the properties between the petitioners. Hence, respondent argues that petitioner's cannot and should not be allowed to hide the subject Deed of Assignment under the cloak of a pre-incorporation subscription contract to evade tax liabilities.

Finally, respondent SOF contends that it is a well-settled rule that tax statutes must be strictly construed against the taxpayer who is claiming for the exception. He alleges that petitioners have not shown their right to exemption from payment of value-added tax on the subject Deed of Assignment. Thus, respondent SOF argues that the assailed Decision warrants reconsideration.

Petitioners, in their Comment and Opposition, argues that Section 106 of the NIRC of 1997, as amended, does not apply. They claim that to be subject to VAT, transactions should fall under the definition or nature of "sale". Moreover, petitioners contend that only

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[2] Docket vol. II, p. 758.

those transactions deemed sale under Section 105 of the NIRC of 1997, as amended, are subject to VAT. They argue that under the rule of statutory construction, *expressio unius est exclusio alterius,* there is no basis to include pre-incorporation subscription agreement as subject to VAT.

Petitioners aver that the Deed of Assignment of the two parcels of land was a pre-incorporation subscription contract pursuant to Section 61 and 62 of the Corporation Code. They argue that the law clearly allows the use of the two parcels of land of petitioner Kingsville as consideration for its original subscription and contribution to the paid up capital of the corporation-still-to-be-formed petitioner Century Peak.

According to petitioners, the legislature is presumed to know the Corporation Code at the time of the enactment of the NIRC of 1997, as amended. They contend that an interpretation of Section 106 of the NIRC of 1997, as amended must be in line with Sections 61 and 62 of the Corporation Code.

Petitioners claim that the Deed of Assignment is not sale, but property payment in the form of capital of petitioner Kingsville in petitioner Century Peak. They also contend that the Deed of Assignment contemplates a tax-free exchange under Section 40(C)(2) of the NIRC of 1997, as amended.

In his Reply, respondent SOF argues that contrary to petitioners' claim, the subject Deed of Assignment involving the two parcels of land squarely falls within the ambit of the enumeration of sale, barter of exchange of goods or properties for purposes of the imposition of VAT as provided in Section 106 of the NIRC of 1997, as amended.

Moreover, respondent SOF contends that even if for the sake of argument that the subject Deed of Assignment is by nature a pre-incorporation subscription agreement and not included in the enumeration of Section 106 (B) of the NIRC of 1997, as amended, as a transaction deemed sale, it is not also in the enumeration of Section 109 of the NIRC of 1997, as amended or the transactions exempt from VAT. Respondent SOF alleges that petitioners have not shown their right to an exemption from payment of VAT on the subject Deed of Assignment. ge

Petitioners, in their Rejoinder, allege that respondents SOF and Commissioner of Internal Revenue (CIR) are wrong in understanding their position. Petitioners claim that the NIRC of 1997, as amended, does not impose any VAT on pre-incorporation subscription agreements, where real properties are used as consideration in exchange for issuance of shares of stocks where the owner of the real properties become majority shareholder owning more than 90% of the stockholding of the company-to-be-incorporated. They argue that there is no tax law imposing any VAT on subscription agreements, regardless of the form of consideration.

According to petitioners, respondents did not treat subscription agreements using cash payments for the issuance of shares of stocks under Section 62 of the Corporation Code as subject to VAT. They allege that the interpretation and construction of respondents will lead to absurdity where only property payment as consideration for the subscription agreement becomes subject to VAT.

Finally, petitioners contend that BIR Revenue Ruling No. 4-2007 is the controlling interpretation at the time of the execution of the Deed of Assignment. The BIR Ruling declares that if the transferee of the transferred real property by a real estate dealer is another real estate dealer, in an exchange where the transferor gains control of the transferee-corporation, no output VAT is imposable on the said transfer.

The Motion for Partial Reconsideration is bereft of merit.

The arguments raised by respondent SOF in his Motion for Partial Reconsideration are a mere rehash of the allegations previously raised in his Answer[3] and Memorandum[4]. These averments were likewise interposed in respondent CIR's Answer[5] and Memorandum[6]. These arguments have been duly considered and adequately discussed by the Court in the assailed Decision.

As already found by the Court in the assailed Decision, the transaction covered by the Deed of Assignment in the instant case is not subject to VAT since the same cannot be considered a transaction deemed sale as respondents failed to present proof that

[3] Docket vol. I, pp. 178-186.
[4] Docket vol. II, pp. 668-681.
[5] Docket vol. I, pp. 159-166.
[6] Docket vol. II, pp. 713-721.

the two parcels of land were part of petitioner Kingsville's inventory. Moreover, the Court found Deed of Assignment, wherein petitioner Kingsville transferred and conveyed two parcels of land to petitioner Century Peak in consideration of the 450,000 shares of stock, is a pre-incorporation subscription contract pursuant to Sections 61 and Section 62 of the Corporation Code. The transfer of properties was not done in the course of trade or business. Finally, the Court also held that Revenue Regulations No. 4-2007 is not applicable to the present case, since at the time of the transaction, petitioner Century Peak was not yet a corporation with a juridical personality.

While petitioner Kingsville is a corporation primarily engaged in the real estate business, there is no proof that the subject two parcels of land it assigned to petitioner Century Peak in consideration of the 450,000 shares of stock are properties originally intended for sale or for use in the course of business.

As to respondent SOF's argument that pre-incorporation subscription agreement is not included in the enumeration of Section 109 of the NIRC of 1997, as amended or the transactions exempt from VAT, the same could not be given any merit.

Section 109 of the NIRC of 1997, as amended, enumerates the VAT exempt transactions. The exclusive list of transactions in this provisions are transactions which ordinarily in the course of trade or business are liable to VAT but by provision of law are exempted.

To reiterate, the transfer of properties for stocks under the Deed of Assignment in this case is considered a pre-incorporation subscription agreement. Pre-incorporation subscription agreement is indeed not one of the transactions enumerated in Section 109 of the NIRC of 1997, as amended.

However, Section 105 of the NIRC of 1997, as amended, is clear that the VAT is imposed only on a person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, and any person who imports goods. Moreover, Section 105 defines the phrase "in the course of trade or business" as "the regular conduct or pursuit of a commercial or economic activity, including transactions incidental thereto."

In the case of *Fort Bonifacio Development Corporation vs. Commissioner of Internal Revenue, et al.*[7], the Supreme Court held that if the goods or properties are not acquired from a person in the course of trade or business, the transaction would not be subject to VAT under Section 105.

In this case, petitioner Kingsville is engaged in the real estate business. Its transfer and conveyance of two parcels of land to petitioner Century Peak in consideration of the 450,000 shares of stock is a transaction that cannot be construed as being in the course of trade or business of the transferor, or even incidental to such trade or business. Thus, the Deed of Assignment executed on October 13, 2010 is not subject to VAT.

Considering the foregoing, the Court finds no cogent reason to reverse or modify the assailed Decision dated July 24, 2017.

**WHEREFORE**, premises considered, respondent Secretary of Finance's **Motion for Partial Reconsideration (Re: July 24, 2017 Decision)** is **DENIED** for lack of merit.

**SO ORDERED**.

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

WE CONCUR:

**CAESAR A. CASANOVA**
Associate Justice

Catherine T. Manahan
**CATHERINE T. MANAHAN**
Associate Justice

[7] G.R. No. 158885, April 2, 2009.