REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

CE PHILIPPINES LTD., Petitioner,	**CTA EB No. 770** **(CTA Case No. 7688)**
- versus -	*Present:* **ACOSTA,** *P.J.* **CASTAÑEDA, JR.,** **BAUTISTA,** **UY,** **CASANOVA,** **PALANCA-ENRIQUEZ,** **FABON-VICTORINO,** **MINDARO-GRULLA,** *and* **COTANGCO-MANALASTAS,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** ampolinario SEP 2 0 2012 10:08 a.m.

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DECISION

UY, *J*.:

In this Petition for Review filed on May 18, 2011, petitioner, CE Philippines Ltd., prays for the reversal and setting aside of the Decision dated December 23, 2010 and the Resolution dated April 14, 2011,[1] both rendered by the Second Division of this Court in CTA Case No. 7688, entitled *"CE Philippines Ltd., Petitioner, vs. Commissioner of Internal Revenue, Respondent"*. In the assailed

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[1] Both penned by Associate Justice Cielito N. Mindaro-Grulla, and concurred by Associate Justice Juanito C. Castañeda, Jr. and Associate Justice Caesar A. Casanova. Docket, pp. 53 to 89.

Decision, the court *a quo* denied the Petition for Review filed therein, while the assailed Resolution, denied petitioner's motion for the reconsideration of said Decision.

THE FACTS

Petitioner, CE Philippines Ltd., is a non-resident foreign corporation duly organized and existing under and by virtue of the laws of Bermuda, with principal place of business at Clarendon House, Church St., Hamilton, Bermuda.

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), empowered to perform the duties of said office including, among others, the duty to act upon and approve claims for refunds or tax credits as provided by law. Respondent holds office at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

On October 22, 1999, CEP II was incorporated and registered with the Securities and Exchange Commission (SEC) primarily to acquire, hold, own and use for investment or otherwise, and to sell or dispose of, any and all properties of every kind and description and wherever situated, to the extent permitted by law. CEP II had an authorized capital stock of ₱ 80,000.00, divided into 40,000 common shares and 40,000 Series A preferred shares, both with a par value of ₱ 1.00 each.

On April 23, 2001, the SEC approved the increase of CEP II's capital stock from ₱ 80,000.00 to ₱ 11,647,948.00, divided into 2,840,000 common shares and 8,807,948 Series A preferred shares, both with a par value of ₱ 1.00 per share. The entire amount of increase in the capital stock of CEP II (₱ 1,567,948.00, divided into 2,800,000 common shares and 8,767,948 Series A preferred shares, both with a par value of ₱ 1.00 per share) was subscribed by petitioner and paid for, by way of assignment of 100,000 common shares and 313,141 Series A preferred shares of CE Cebu Geothermal Power Company, Inc. (CE Cebu), which were valued at allegedly US$65,210,000.00 in favor of CEP II.

On March 25, 2004, CEP II obtained approval from the SEC to use the US dollar as its functional currency in presenting its financial statements pursuant to SEC Memorandum Circular No. 14, Series of 2003. Consequently, the financial statements of CEP II were presented in US dollars beginning the taxable year 2003.

On September 15, 2005, CEP II's management, with the approval of the Board of Directors, effected the redemption of 1,113,260 Series A preferred shares at a redemption price of US$8.59, or a total redemption amount of US$9,562,903.40. The cost per share of the Series A preferred shares is US$5.63. Thus, computing the capital gains based on the functional currency (by deducting the U.S. dollar cost from the U.S. dollar redemption price of the Series A preferred shares), petitioner realized a capital gain upon redemption of US$2.96 per share, or a total of US$3,295,249.60, computed as follows:

Capital Gain on the Redemption – in U.S. dollars:

Redemption value per share	US$ 8.59
Cost per share	5.63
Capital gain per share – in U.S. dollars	US$ 2.96
Number of shares redeemed	1,113,260
Capital gain – in U.S. dollars	US$ 3,295,249.60

However, for purposes of computing the capital gains and paying the capital gains tax due, petitioner used the peso equivalent of the redemption price (based on the Philippine Dealing System's closing rate on the redemption date) and the peso equivalent of the cost per share (which was translated based on historical rate), resulting in a capital gain of ₱ 370,729,950.66, computed as follows:

Redemption Value per share in Philippine Pesos:

Redemption price per share in US$	US$ 8.59	
Multiply by PDS closing rate – September 15, 2005	₱ 55.925	₱ 480.39
Less: Cost per share in Philippine Pesos		
Paid-up Capital per Philippine Peso Books	₱ 1,707,864,702.00	
Divide by number of shares outstanding	11,587,948	147.38
Capital Gain per share		₱ 333.01
Multiply by Number of shares redeemed		1,113,260
Capital gain		₱ 370,729,950.66

Based on the above computation, petitioner filed its Capital Gains Tax Return (BIR Form No. 1707) on October 17, 2005, and paid the capital gains tax in the amount of ₱ 37,067,995.07, computed as follows:

Peso Equivalent of US Dollar Capital Gain	Rate	Capital Gains Tax
₱ 100,000.00	at 5%	₱ 5,000.00
370,629,950.66	at 10%	37,062,992.07
₱ 370,729,950.66		₱ 37,067,995.07

On October 17, 2007, CEP II's management, with the approval of its Board of Directors, effected the redemption of 662,290 Series A preferred shares at a redemption price of US$8.59, or a total redemption amount of US$5,689,071.10. The cost per share of the Series A preferred shares is US$5.63. Thus, computing the capital gains by deducting from the redemption price in US dollars the original cost which is also in US dollars, petitioner realized a capital gain upon redemption of $2.96 per share or a total of $1,960,378.40, computed as follows:

Capital Gain on the Redemption – in U.S. dollars:

Redemption value per share	US$ 8.59
Cost per share	5.63
Capital gain per share – in U.S. dollars	US$ 2.96
Number of shares redeemed	662,290
Capital gain – in U.S. dollars	US$ 1,960,378.40

However, for purposes of computing the capital gain and paying the capital gains tax due, petitioner again used the peso equivalent of the redemption price (based on the Philippine Dealing System's closing rate on the redemption date) and the peso equivalent of the cost per share (which was translated based on historical rate), resulting in a capital gain of ₱ 220,010,657.50, computed as follows:

Redemption Value per share in Philippine Pesos:

Redemption price per share in US$	US$ 8.59	
Multiply by PDS closing rate – October 17, 2005	₱ 55.83	₱ 479.58
Less: Cost per share in Philippine Pesos		
Paid-up Capital per Philippine Peso Books	₱ 1,707,864,702.00	
Divide by number of shares outstanding	11,587,948	147.38
Capital Gain per share		₱ 332.20
Multiply by Number of shares redeemed		662,290
Capital gain		₱ 220,010,657.50

Based on the above computation, petitioner filed its Capital Gains Tax (BIR Form No. 1707) on November 16, 2005, and paid the capital gains tax in the amount of ₱ 21,996,065.75, computed as follows:

Peso Equivalent of US Dollar Capital Gain	Rate	Capital Gains Tax
₱ 100,000.00	at 5%	₱ 5,000.00
219,910,657.50	at 10%	21,991,065.75
₱ 220,010,657.50		₱ 21,996,065.75

On October 5, 2007, petitioner filed an administrative claim for refund with the BIR Large Taxpayers District Office No. 122, requesting for a refund of the amount of ₱ 18,664,311.68 and ₱ 11,056,273.14, representing the alleged excess capital gains tax paid on the gain realized from the redemption by CEP II of its Series A preferred shares owned by petitioner on September 15, 2005 and October 17, 2005, respectively.

The above administrative claim for refund by petitioner was computed based on the following:

A. <u>September 15, 2005 capital gain on redemption</u>:

Redemption value per share - in US dollars	8.59
Cost per share – in US dollars	5.63
Capital gain per share	2.96
Number of shares redeemed	1,113,260
Capital gain – in US dollars	$ 3,295,249.60
PDS closing rate – September 15, 2005	55.925
Capital Gain – in Philippine peso	₱ 184,286,833.88

Capital Gains Tax due

Capital gain	Rate	Capital Gains Tax
₱ 100,000.00	at 5%	₱ 5,000.00
184,186,833.88	at 10%	18,418,683.39
₱ 184,286,833.39		₱ 18,423,683.39

Excess Capital Gains Tax Paid

Capital Gains Tax Paid	₱ 37,067,995.07
Capital Gains Tax due	18,423,683.39
Excess Capital Gains Tax Paid	₱ 18,644,311.68

B. <u>October 17, 2005 capital gain on redemption</u>:

Redemption value per share - in US dollars	8.59
Cost per share – in US dollars	5.63
Capital gain per share	2.96
Number of shares redeemed	662,290
Capital gain – in US dollars	$ 1,960,378.40
PDS closing rate – September 15, 2005	55.83
Capital Gain – in Philippine peso	₱ 109,447,926.07

Capital Gains Tax due

Capital gain	Rate	Capital Gains Tax
₱ 100,000.00	at 5%	₱ 5,000.00
109,347,926.07	at 10%	10,934,792.61
₱ 109,447,926.07		₱ 10,939,792.61

Excess Capital Gains Tax Paid

Capital Gains Tax Paid	₱ 21,996,065.75
Capital Gains Tax due	10,939,792.61
Excess Capital Gains Tax Paid	₱ 11,056,273.14

On October 17, 2007, petitioner filed a Petition for Review with the Court in Division docketed as CTA Case No. 7688.

In her Answer thereto filed on December 27, 2007[2], respondent interposed Special and Affirmative Defenses, alleging, among others, that the claim for refund of petitioner therein was still subject to investigation by the Bureau of Internal Revenue, that petitioner had no legal capacity to sue; and that it was incumbent upon said petitioner to show compliance with the provisions of Section 204 (C) in relation to Section 229 of the 1997 Tax Code, as amended.

Subsequently on March 17, 2008, respondent filed a Motion to Dismiss in said case, on the ground that petitioner lacks the legal capacity to sue. The Court in Division denied said motion in its Resolution dated May 14, 2008.

During trial, petitioner presented its sole witness, Trinity Gatuz, CEP II's Vice President, who testified by way of Judicial Affidavits dated May 23, 2008, June 25, 2008, August 1, 2008, November 19, 2008, and February 18, 2009 to prove petitioner's case. On the other hand, respondent filed a Manifestation on September 11, 2009, stating that as of date, there was still no report of

[2] CTA Case No. 7688 Docket, pp. 64-67

investigation on petitioner's claim for refund, and therefore, respondent was submitting the case for resolution based on available records.

Thus, the parties were directed to file their respective memorandum in the Order dated September 17, 2009. Subsequently on January 13, 2010, the case was submitted for decision, taking into consideration petitioner's Memorandum filed on December 16, 2009, sans respondent's Memorandum.

On December 23, 2010, the Court in Division promulgated the assailed Decision, denying the Petition for Review, for failure of petitioner to establish the factual basis of its claim for refund. The dispositive portion thereof reads:

> " **WHEREFORE,** the instant Petition for Review is hereby **DENIED**.
>
> **SO ORDERED**."

On January 12, 2011, petitioner filed a Motion for Reconsideration of the said Decision. In the Resolution dated April 14, 2011, the Court in Division denied the said Motion for Reconsideration. The dispositive portion thereof reads:

> " **WHEREFORE**, premises considered, petitioner's 'Motion for Reconsideration' is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

Hence, this Petition for Review filed before the Court *En Banc* on May 18, 2011. In the Resolution dated June 1, 2011,[3] the Court *En Banc* directed respondent to file a Comment on the said Petition for Review within ten (10) days from receipt thereof. However, respondent failed to file the required Comment as per *En Banc* Records Verification Form dated July 1, 2011 stating that as of

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[3] Docket, pp. 91 to 92.

Date, respondent failed to file Comment to the Petition for Review.[4]

Nevertheless, considering the issues raised in this Petition for Review, the Court *En Banc*, in its Resolution dated August 18, 2011[5], resolved to give due course to the instant case. The parties were required to submit their respective memorandum within thirty (30) days from receipt of the said Resolution.

Petitioner filed its Memorandum on October 17, 2011 within the extension period granted for the filing of the same[6], while respondent failed to file her Memorandum despite notice. Thus, this case was deemed submitted for decision in the Resolution dated November 15, 2011.[7]

Hence, this Decision.

THE ISSUE

A sole issue is raised by petitioner for the Court *En Banc's* resolution, to wit:

> "WHETHER OR NOT PETITIONER'S INVESTMENT IN CEP II'S SERIES A PREFERRED SHARES WAS MADE IN U.S. DOLLARS, THEREBY ALLOWING PETITIONER TO USE THE FUNCTIONAL CURRENCY (U.S. DOLLARS) IN COMPUTING THE GAIN IT REALIZED FROM REDEMPTION BY CEP II OF ITS SERIES A PREFERRED SHARES (*I.E.*, BY DEDUCTING THE U.S. DOLLAR REDEMPTION PRICE OF THE SERIES A PREFERRED SHARES), IN ACCORDANCE WITH SECTION 12, RR NO. 6-2006."[8]

Petitioner's Arguments

Petitioner presents the following arguments in support of the instant

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[4] Docket, p. 93.
[5] Docket, pp. 95 to 96.
[6] Minute Resolution dated October 6, 2011, Docket, p. 100.
[7] Docket, pp. 146 to 147.
[8] Docket, p. 17

Petition for Review, to wit:

"(i) The CTA-Division failed to recognize that petitioner's investment in CEP II was made in US Dollars. The mere fact that the capital stock of CEP II and CE Cebu are denominated in Philippine Pesos does not necessarily mean that the investment was made in Philippine Pesos because the SEC requires that par values of shares of all domestic corporations to be expressed in Philippine Pesos even if the consideration therefor was paid in foreign currency;

(ii) The CTA-Division did not consider the other evidence submitted by petitioner [*i.e.*, Articles of Incorporation of CE Cebu (*Exhibit "HH"*), Certificate of Inward Remittance in Favor of CE Cebu – US$15,590,081.73 (*Exhibit "HH-1"*), BSP Certificate of Registration (*Exhibit "FF"*), Schedule of Foreign Equity Investment in CE Cebu (*Exhibit "GG-1"*, etc.] which indubitably show that the original investment of petitioner in CEP II was made in US Dollars, because the CE Cebu shares that were assigned to CEP II, in exchange for and as full payment for the CEP II shares, were paid for in US Dollars;

(iii) The CTA-Division failed to consider Section 12 of RR No. 6-2006 which clearly provides that the 'non-resident stockholders of an investee company where such investee company in the Philippines uses a functional currency other than the Philippine peso for its financial statements' can compute its gain or loss from the sale of said investment using the functional currency;

(iv) The CTA-Division erred in its conclusion that the capital gains should be computed in Philippine Peso because the amounts shown in Section 24(C) [Section 28(B)(c)], Tax Code are in Philippine Pesos;

(vi) The Decision of the Former Second Division of this Court in *CE Philippines Ltd. vs. CIR* (CTA Case No. 7641, September 23, 2010) is subject of a separate Petition for Review with this Court *En Banc* and is, therefore, not yet final and executory; and

(vii) The CTA-Division failed to consider that the respondent has issued a confirmatory ruling (BIR Ruling No. 2-2009, *Exhibit 'PP'*) which explicitly states that the gain realized by the petitioner from the redemption by CEP II of its Series A Preferred Shares should be computed on the basis of the functional currency (US Dollars) using the conversion rate at the date of redemption."[9]

[9] Docket, pp. 113 to 114. See also Docket, pp. 17 to 18.

THE COURT EN BANC'S RULING

Section 28(B)(5)(c) of the National Internal Revenue Code (NIRC) of 1997 reads:

"SEC. 28. *Rates of Income Tax on Foreign Corporations.*—

xxx xxx xxx

(B) *Tax on Nonresident Foreign Corporation.*—

xxx xxx xxx

(c) *Capital Gains from Sale of Shares of Stock not Traded in the Stock Exchange.*— A final tax at the rates prescribed below is hereby imposed upon the net capital gains realized during the taxable year from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation, except shares sold, or disposed of through the stock exchange:

Not over P100,000..5%

On any amount in excess of P100,000.................. 10%"

In relation thereto, Section 12 of Revenue Regulations No. (RR) 6-2006[10] provides as follows:

"**SEC. 12. Treatment of Gain or Loss on Sale of Investment under Functional Currency.** — <u>An investor which invests in functional currency (other than Philippine peso) securities can compute its gain or loss from the sale of said investment using the functional currency</u>.

For example, if Company A invests in a US dollar bond at US$100,000 when the US$:P US$1:40 and sells the same investment at US$102,000 when the US$:P rate was US$1:50, the computation of the capital gain shall be as follows:

	USD	**Pesos**
Selling price	102,000	5,100,000
Cost	100,000	4,000,000
Taxable Gain	2,000	

[10] SUBJECT: Regulating the Use of Functional Currency Other than the Philippine Peso in Financial Statements that will be Submitted and in the Books of Accounts that will be Maintained for Internal Revenue Tax Purposes.

> In the above illustration, the taxable gain that should be reported is only $ 2,000. Thus, in reporting for tax purposes of the $ 2,000 gain in equivalent or converted Philippine peso denomination, the equivalent peso denomination is the peso equivalent of 2,000 U.S. dollars using the conversion rate on the date of the consummation of the transaction.
>
> The above rule shall also apply to non-resident stockholders of an investee company where such investee company in the Philippines uses a functional currency other than the Philippine peso for its financial statements.
>
> However, if an investor makes an investment in Philippine peso, then it shall compute the gain or loss from sale of said investment using the Philippine peso cost and Philippine peso selling price." *(Underscoring supplied)*

Based on the foregoing, to be entitled to the computation of the gain or loss from the sale of an investment of a non-resident stockholder using a functional currency other than the Philippine peso, the following elements must be present, to wit:

1. such non-resident stockholder made the said investment in such functional currency, and not in Philippine peso; and
2. the investee company in the Philippines uses a functional currency other than the Philippine peso for its financial statements.

As a corollary, if the investor, whether resident or nonresident, made the investment in Philippine peso, then it shall compute the gain or loss from sale of said investment using the Philippine peso cost and Philippine peso selling price.

Indubitably, petitioner was able to prove that the investee company involved in this case, *i.e.*, CEP II, uses the US dollar as its functional currency in its financial statements.[11] However, as We see it, the crux of the present

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[11] Exhibits "C" and "Q", CTA Case No. 7688, Docket, pp. 312 and 415, respectively.

controversy pertains to whether or not petitioner was able to establish before the Court in Division that the investment it made in CEP II in the form of shareholdings (which was later redeemed), was in functional currency, other than Philippine peso, particularly in US dollars.

The Court in Division found that petitioner was not able to do so.

We agree with the Court in Division.

According to petitioner, the following documents allegedly established that its investment in CEP II was made in US dollars, to wit: Articles of Incorporation of CE Cebu (*Exhibit "HH"*), Certificate of Inward Remittance in Favor of CE Cebu – US$15,590,081.73 (*Exhibit "HH-1"*), BSP Certificate of Registration (*Exhibit "FF"*), and Schedule of Foreign Equity Investment in CE Cebu (*Exhibit "GG-1"*). Particularly, petitioner advances the argument that these evidence *"indubitably show that the original investment of petitioner in CEP II was made in US Dollars, because the CE Cebu shares that were assigned to CEP II, in exchange for and as full payment for the CEP II shares, were paid for in US Dollars"*.

In other words, petitioner is of the view that since its investment in the form of shares of stocks in CE Cebu, was made in US dollars, it follows that the assignment of such shares of stocks to CEP II in exchange for the latter corporation's shares of stocks, makes its investment in CEP II, also in US dollar, or in functional currency, other than Philippine peso. Petitioner anchors this stance on Section 40 (C) (5) (a) of the NIRC of 1997, and Section 2 of R R 18-01[12], which respectively provide as follows, viz:

[12] SUBJECT: Guidelines on the Monitoring of the Basis of Property Transferred and Shares Received, Pursuant to a Tax-Free Exchange of Property for Shares under Section 40(C)(2) of the National Internal Revenue Code of 1997, Prescribing the Penalties for Failure to Comply with such Guidelines, and Authorizing the Imposition of Fees for the Monitoring.

"SEC. 40. *Determination of Amount and Recognition of Gain or Loss.-*

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(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 —

xxx xxx xxx

No gain or loss shall 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.

xxx xxx xxx

(5) *Basis.* —

(a) The basis of the stock or securities received by the transferor upon the exchange specified in the above exception shall be the same as the basis of the property, stock or securities exchanged, decreased by (1) the money received, and (2) the fair market value of the other property received, and increased by (a) the amount treated as dividend of the shareholder and (b) the amount of any gain that was recognized on the exchange: *Provided*, That the property received as 'boot' shall have as basis its fair market value: *Provided, further*, That if as part of the consideration to the transferor, the transferee of property assumes a liability of the transferor or acquires from the latter property subject to a liability, such assumption or acquisition (in the amount of the liability) shall, for purposes of this paragraph, be treated as money received by the transferor on the exchange: *Provided, finally*, That if the transferor receives several kinds of stock or securities, the Commissioner is hereby authorized to allocate the basis among the several classes of stocks or securities." *(Underscoring supplied)*

"*SECTION 2. Basis.— A. Substituted Basis of Stock or Securities Received by the Transferor.* The substituted basis of the stock or securities received by the transferor on a tax-free exchange shall be as follows:

1. The original basis of the property, stock or securities to be transferred;
2. Less: (a) money received, if any, and
(b) the fair market value of the other property received, if any;
3. Plus: (a) the amount treated as dividend of the shareholder, if any, and
(b) the amount of any gain that was recognized on the exchange, if any.

xxx xxx xxx

C. The Original Basis of Property to be Transferred. The original basis of the property shall be the following, as may be appropriate:

(a) The cost of the property, if acquired by purchase on or after March 1, 1913;

xxx xxx xxx." *(Underscoring supplied)*

We do not subscribe to petitioner's reasoning.

Section 40(C)(5)(a) of the NIRC of 1997, and Section 2 of RR 18-01, as the epigraph of the former provision states, are plainly concerned with the determination of the amount and recognition of gain or loss from the sale or other disposition of property, and do not address the issue regarding its effects on the subject investment which was made in a specific functional currency. Particularly, Section 2(D) of RR 18-01 states the significance of the term "substituted basis" as used in the law and regulations, to wit:

"*D. Basis for Determining Gain or Loss on a Subsequent Sale of Disposition of Property Subject of the Tax-free Exchange.*

The substituted basis as defined in Section 40(C)(5) of the Tax Code of 1997, and implemented in Section 2.A and 2.B above, shall be the basis for determining gain or loss on a subsequent sale or disposition of property subject of the tax-free exchange."

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Thus, while the provisions being invoked by petitioner pertain to the determination of gain or loss in the sale or disposition of property, said provisions will come into play only when there is no issue pertaining to the consequences of the use of the functional currency, as involved in this case.

As a corollary, unlike Section 12 of RR 6 - 2006, the aforequoted provisions do not contemplate the consequences upon an investment made in functional currency, other than Philippine peso, or in Philippine peso for that matter.

But even granting for the sake of argument that this Court would agree with petitioner that since the CE Cebu shares assigned to CEP II were paid for in US Dollars, the CEP II shares issued to petitioner in exchange for the CE Cebu shares, are also to be considered paid for in US Dollars on the basis of Section 40(C)(5)(a) of the NIRC of 1997 in relation to Section 2 of RR 18-01, the Court *En Banc* however, nevertheless finds that petitioner failed to establish before the court *a quo* that the assignment of shares between petitioner and CEP II was made pursuant to a tax-free exchange under the said provisions.

It must be noted that petitioner never presented any evidence that it has applied for and has been issued a certification or ruling by the BIR confirming that the said assignment is indeed a tax-free exchange. In this connection, suffice it to state that the Court does not rule on allegations which are manifestly conjectural, as these may not exist at all.[13]

But even if We further assume that petitioner was able to show that it has been issued a certification or ruling by the BIR confirming that the said

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[13] *ABAKADA GURO PARTY LIST OFFICERS vs. Ermita, et al.*, G.R. Nos. 168056, 168207, 168461, 168463, and 168730, September 1, 2005.

assignment is indeed a tax-free exchange, petitioner still failed to prove that the CE Cebu shares that were assigned to CEP II, in exchange for and as full payment for the CEP II shares, were paid for in US Dollars. As will be shown forthwith, the evidence being pointed to by petitioner do not in any way corroborate its allegation that the CE Cebu shares were paid for in US Dollars.

The Articles of Incorporation of CE Cebu (*Exhibit "HH"*)[14] is bereft of any indication that the payment on the shares of capital stock for which petitioner has subscribed was made in US Dollars. In fact, it is clearly indicated that the payment is in Philippine Peso, in the amount of ₱ 7,391,888.00.[15]

Moreover, the Certificate of Inward Remittance (*Exhibit "HH-1"*)[16] in Favor of CE Cebu in the amount of US$15,590,081.73 has the following contents, viz:

"December 21, 1993

BANGKO SENTRAL NG PILIPINAS
Malate, Manila

SUBJECT : INWARD DOLLAR REMITTANCES IN FAVOR OF CE CEBU GEOTHERMAL POWER CORPORATION

Gentlemen:

We are pleased to certify that we have received the following incoming remittances totaling to US DOLLARS FIVE HUNDRED FIFTY SIX THOUSAND NINE HUNDRED FORTY AND 45/100 ONLY (US$556,940.45) **converted** to PHILIPPINE PESOS FIFTEEN MILLION FIVE HUNDRED NINETY THOUSAND EIGHTY ONE AND 73/100 ONLY (PHP15,590,081.73) from Bank of America San Francisco. This amount was credited to the account of CE Cebu Geothermal Power Corporation.

DATE	US DOLLAR AMT	FX RATE	PESO EQUIVALENT
10DEC93	$ 100,250.63	27.93	2,800,000.00
16DEC93	442,541.04	28.02	12,400,000.00
21DEC93	14,148.78	27.57	390,081.73
	$ 556,940.45		15,590,081.73

We trust this certification serves your purpose.

[14] Division Docket, pp. 532 to 544.
[15] See Division Docket, pp. 541 to 542.
[16] Division Docket, p. 545.

Very truly yours,

(signed)
RAINIER S. GONZALES
Assistant Vice President
Commercial Services Group" *(Emphasis supplied)*

It is clear from the foregoing that the remittances came *"from Bank of America San Francisco"*, without mentioning whatsoever that it was really petitioner, which remitted the said amount, or used the facilities of the said bank in remitting the same. Thus, We cannot say with certainty that said remittances were indeed from petitioner.

Nevertheless, even if We assume that it came from petitioner, it is likewise clear that the same remittances were already "converted" to Philippine Pesos. The phrase *"(t)his amount was credited to the account of CE Cebu Geothermal Power Corporation"* may be read to mean that the said peso amount was the amount credited to the account of CE Cebu.

Furthermore, the BSP Certificate of Registration (*Exhibit "FF"*)[17] is to the effect that what has been registered was the *"equity investment of Calenergy International, Inc."* and not that of petitioner, to wit:

"April 24, 1998

CE CEBU GEOTHERMAL POWER COMPANY, INC.
c/o SGV & Company
6760 Ayala Avenue
1220 Makati City
Attention:

Re: Registration of US$55.5 Million **representing foreign equity investment of Calenergy International, Inc.** for the development of a 125 MW geothermal power plant in the Upper Mahiao Sector of the Greater Tongonan area of Leyte

Gentlemen:

Please be advised that we have registered under Reg. No. BSP-(FI)98-002 **the equity investment of Calenergy International, Inc. (CII), USA in CE Cebu**

[17] CTA Case No. 7688 Docket, p. 521.

> **Geothermal Power Company, Inc. (CE Cebu)** in the amount of US$55,460,000.00 representing additional capital contribution in CE Cebu.
>
> Foreign exchange requirements to service remittances on profits and repatriation of capital under captioned foreign investment shall be sourced from foreign exchange receipts from PNOC-Energy Development Board (PNOC-EDC). In the event that foreign exchange receipts from PNOC-EDC will not be sufficient to cover remittances to Calenergy International, Inc., the balance of funding requirements may be sourced from the banking system subject to prior BSP approval.
>
> It is understood that payments shall be serviced at the exchange rate prevailing at the time of remittance subject to the applicable tax provisions of the National Internal Revenue Code, as amended.
>
> The above-cited reference number shall be indicated in all letters/reports to the Bangko Sentral ng Pilipinas pertaining to this particular transaction.
>
> Very truly yours,
>
> *(signed)*
> EDGARDO P. ZIALCITA
> Deputy Governor"[18]
> *(Emphases supplied)*

Absent any corroborating evidence that said equity investment in CE Cebu was made by Calenergy International, Inc. for and in behalf of petitioner, We cannot treat the same equity investment as pertaining to petitioner. Correspondingly, the Schedule of Foreign Equity Investment in CE Cebu (*Exhibit "GG-1"*)[19] confirms nothing.

As regards the contention of petitioner that it has been issued a confirmatory ruling to the effect that the gain realized from the redemption by CEP II of its Series A Preferred Shares should be computed on the basis of the functional currency (US Dollars) using the conversion rate at the date of redemption, as embodied in BIR Ruling No. 2-2009, which was issued by then Commissioner Sixto Esquivias IV, the same is of no moment.

This must be so because, unlike the assailed Decision and Resolution, which were rendered by the Court *a quo* after conducting trial on the merits in

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[18] Division Docket, p. 521.
[19] Division Docket, p. 531.

accordance with the provisions of the Revised Rules of the Court of Tax Appeals, BIR Ruling No. 2-2009 was issued merely on the basis of limited representations made by CEP II.

Furthermore, as can be gleaned from the said representations, nothing has been said about the fact that the consideration in acquiring the pertinent CEP II shares by petitioner was the assignment of the latter's CE Cebu shares, without payment of any money in whatever currency. Hence, We cannot give weight and due consideration to BIR Ruling No. 2-2009 in disposing this case.

It must be emphasized that this Court is a court of record[20] and as such it is required to conduct a formal trial (trial *de novo*) where the parties must present their evidence accordingly if they desire the Court to take such evidence into consideration."[21] Furthermore, as cases filed before this Court are litigated *de novo*, party-litigants are required to prove every minute aspect of their cases,[22] before the Court in Division of this Court.

In fine, We reiterate our consistent ruling that actions for tax refund, as in the instant case, are in the nature of a claim for exemption and the law is not only construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence presented entitling a taxpayer to an exemption is *strictissimi* scrutinized and must be duly proven.[23]

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED**. The assailed Decision promulgated on December 23, 2010 and

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[20] Section 8, Republic Act No. 1125 (AN ACT CREATING THE COURT OF TAX APPEALS).
[21] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue,* G.R. No. 145526, March 16, 2007; and *Commissioner of Internal Revenue vs. Manila Mining Corporation,* G.R. No. 153204, August 31, 2005.
[22] *Dizon vs. Court of Tax Appeals, et al.,* G.R. No. 140944, April 30, 2008.
[23] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.

Resolution dated April 14, 2011 rendered by the Second Division of this Court, are hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice