REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

****

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 2486** (CTA Case No. 10035)
	Present:
- versus -	**DEL ROSARIO,** P.J., **UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO, REYES-FAJARDO,** and **CUI-DAVID,** JJ.
LUZVIMINDA LAND HOLDINGS, INC., Respondent.	***Promulgated:*** SEP 2 1 2022 11:15am

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DECISION

UY, J.:

Before the Court *En Banc* is a *Petition for Review*[1] filed on July 9, 2021 by petitioner, Commissioner of Internal Revenue (CIR), against respondent, Luzviminda Land Holdings, Inc., praying that the *Decision*[2] dated December 3, 2020, and the *Resolution*[3] dated May 20, 2021, both rendered by the Second Division of this Court (Court in Division) in CTA Case No. 10035, entitled *"Luzviminda Land Holdings, Inc., Petitioner, v. Commissioner of Internal Revenue, Respondent"*, be reversed and set aside. The dispositive portions thereof respectively read as follows:

[1] EB Docket, pp. 6 to 28.
[2] EB Docket, pp. 30 to 50.
[3] EB Docket, pp. 51 to 58.

***Decision* dated December 3, 2020:**

"**WHEREFORE**, premises considered, the instant Petition for Review filed by petitioner Luzviminda Land Holdings, Inc. is hereby **GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is **ORDERED TO REFUND or ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner Luzviminda Land Holdings, Inc. the amount of **₱33,051,830.00**, representing petitioner's erroneously paid withholding tax and documentary stamp tax inclusive of surcharges, interests and penalties.

SO ORDERED."

***Resolution* dated May 20, 2021:**

"**WHEREFORE**, premises considered, respondent's Motion for Reconsideration (of the Decision dated 03 December 2020) is **DENIED** for lack of merit.

SO ORDERED."

THE FACTS

Petitioner is the duly appointed CIR empowered to perform the duties of the said office, including, among others, the power to decide, approve and grant tax refunds or tax credits as provided for by law.

On the other hand, respondent is a domestic corporation duly organized and existing under Philippine laws, primarily engaged in the lease of real estate properties. It is registered with the Bureau of Internal Revenue (BIR) with Tax Identification Number (TIN) 005-283-488-000.

On December 18, 2008, the Board of Directors and stockholders of respondent and Marangal Properties, Inc. (MPI) approved the Articles and Plan of Merger of the two corporations, with the former as the surviving corporation.

Prior to the merger, respondent owned 60% of MPI's outstanding capital stock, while Coca-Cola Bottlers Philippines, Inc. (now Coca-Cola Beverages Philippines, Inc.) (CCBPI) held the remaining 40%.

On May 27, 2009, the Securities and Exchange Commission (SEC) issued a Certificate of Filing of the Articles and Plan of Merger, approving the merger of the respondent and MPI.

In exchange for MPI's net assets, respondent issued 1,092,708 commons shares to CCBPI valued at ₱39,337,447.00, corresponding to the latter's 40% share in MPI.

The terms of the merger between respondent and MPI provide that all assets, rights, privileges, immunities, franchises, and all and every interest of, or belonging to, or due to the latter as of December 31, 2008 (cut-off date), shall be taken and deemed transferred to respondent.

Pursuant to the merger, respondent and MPI later executed a Deed of Transfer for each property transferred for purposes of registering the transfer of title of MPI's properties. One of the properties transferred to respondent is a parcel of land located in Ipil Road, Dasmariñas Village, Makati City (Ipil Property).

On December 17, 2009, respondent filed a request for ruling on the tax-exempt status of the merger pursuant to Section 40(C)(2) of the National Internal Revenue Code (NIRC) of 1997, as amended.

Upon follow up with the BIR sometime in 2016, respondent was informed that the docket for the request for ruling was missing. Respondent submitted anew all its documents to the BIR – Law & Legislative Division on October 17, 2016. However, no ruling confirming the exempt-status of the merger was issued.

Meanwhile, respondent agreed to sell the Ipil Property to IPILRD Marketing, Inc. (IPILRD), a corporation organized and existing under the laws of the Philippines. Respondent and IPILRD executed a Deed of Absolute Sale on July 1, 2016.

Subsequently, while respondent was in the process of securing a Certificate Authorizing Registration (CAR) for the transfer of the Ipil

Property to IPILRD, it was informed that it should pay the withholding tax (WT) and documentary stamp tax (DST) amounting to ₱26,411,464.00 and ₱6,640,366.00, respectively, inclusive of surcharges, interests and penalties, relative to the transfer of the Ipil Property from MPI to respondent. Considering that no ruling was issued on the tax-exempt status of the merger between respondent and MPI, and following the advice of Revenue District Officer Rosita U. Meniano, respondent paid the aforesaid amounts on February 27, 2017.

On May 21, 2018, respondent filed an administrative claim for refund or issuance of a tax credit certificate (TCC) of the erroneously paid or illegally collected WT and DST arising from the transfer of the Ipil Property from MPI to respondent.

On February 26, 2019, respondent, without any decision on its claim for refund or issuance of a TCC, filed a *Petition for Review*, docketed as CTA Case No. 10035 entitled *"Luzviminda Land Holdings, Inc. v. Commissioner of Internal Revenue"*. The case was assigned to the Second Division of this Court.

On April 22, 2019, petitioner filed his *Answer (With Special and Affirmative Defenses)* in CTA Case No. 10035, interposing the following, to wit:

(a) The *Petition for Review* states no cause of action. Taxes paid and collected are presumed to be made in accordance with the laws and regulations; hence, not creditable or refundable;

(b) When a parent corporation (respondent) merges with a subsidiary corporation (MPI), the reorganization is considered an upstream merger, where respondent will not be issuing any shares to MPI in exchange for the assets to be transferred by MPI to respondent as a result of the merger. In effect, the transfer partakes of the nature of donation made by a subsidiary to its parent company, contrary to what is contemplated in Section 40(C)(2) of the NIRC of 1997, as amended;

(c) Respondent failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected;

(d) Respondent's claim for refund or issuance of a TCC for the WT and DST alleged to be erroneously or illegally collected and paid for taxable year 2017 was not fully substantiated;

(e) Respondent must show that it has complied with the provisions of Sections 204(C) and 229 of the NIRC of 1997, as amended, on the prescriptive period for claiming tax refund/credit;

(f) A certification or ruling from the BIR to the effect that the transaction qualifies as a tax-free exchange is necessary before a CAR can be issued for the properties involved in the exchange;

(g) DST is not intended to be a tax on the document alone. The law taxes the document because of the transaction so that the tax becomes due and payable at the time the transaction is -- had or accomplished, which in this case, is the time of the issuance of the document; and

(h) Being in the nature of a claim for exemption, refund is construed *strictissimi juris* against the entity claiming the refund and in favor of the taxing power; thus, the claimant must positively show compliance with the statutory requirements provided for under the NIRC of 1997, as amended, in order to successfully pursue one's claim.

Meanwhile, the Pre-Trial Conference was held on May 23, 2019. Thereafter, the parties filed their Joint Stipulation of Facts and Issues on June 19, 2019, which the Court in Division approved and adopted in the *Pre-Trial Order* dated July 3, 2019. Hence, Pre-Trial was terminated accordingly.

During trial, respondent presented its witnesses, namely: (1) Mary Ann Torres, Tax Executive of CCBPI; (2) Atty. Christine F. Bio, respondent's Corporate Secretary; and (3) Atty. Carlito P. Egaña, Partner at A.M. Sison, Jr. & Partners Law Office, who all executed their respective judicial affidavits in lieu of their direct testimony.

After the presentation of its last witness, respondent filed its *Formal Offer of Evidence* on August 13, 2019. In the *Resolution* dated September 23, 2019, the Court in Division admitted all of respondent's exhibits.

On the other hand, petitioner manifested that she will no longer present evidence.

Subsequently, respondent filed its *Memorandum (for the Petitioner)* on October 25, 2019, while petitioner filed her *Memorandum (for the Respondent)* on November 25, 2019.

In the *Resolution* dated December 6, 2019, CTA Case No. 10035 was submitted for decision.

On December 3, 2020, the Court in Division rendered the assailed *Decision*[4] granting respondent's *Petition for Review*, and ordering petitioner to refund or issue a TCC in the amount of ₱33,051,830.00, in favor of respondent, representing respondent's erroneously paid WT and DST, inclusive of surcharges, interests, and penalties.

Dissatisfied with the Court in Division's *Decision*, petitioner filed a *Motion for Reconsideration (of the Decision dated 03 December 2020)*[5] on December 18, 2020, praying that the *Decision* dated December 3, 2020 be reconsidered and set aside, and a new one be rendered denying the *Petition for Review* for lack of merit.

On January 7, 2021, respondent filed a *Motion for Leave of Court to Admit Comment and Opposition (Re: Respondent's Motion for Reconsideration)*[6] with attached *Comment and Opposition (RE: Respondent's Motion for Reconsideration of the Decision dated 03 December 2020).*[7] In the *Resolution*[8] dated January 13, 2021, the Court in Division granted the said *Motion* and admitted respondent's *Comment and Opposition (RE: Respondent's Motion for Reconsideration of the Decision dated 03 December 2020).*

In the assailed *Resolution*[9] dated May 20, 2021, the Court in Division denied petitioner's *Motion for Reconsideration (of the Decision dated 03 December 2020)* for lack of merit.

Thus, on July 9, 2021, petitioner filed the instant *Petition for Review*[10] docketed as CTA EB No. 2486.

On September 23, 2021, respondent filed a *Motion for Leave of Court to Admit Comment (to the Petitioner's Petition for Review dated 09 July 2021)*[11] with attached *Comment (to the Petitioner's Petition for Review dated 09 July 2021).*[12]

[4] EB Docket, pp. 30 to 50; Division Docket (CTA Case No. 10035), pp. 398 to 418.
[5] Division Docket (CTA Case No. 10035), pp. 423 to 442.
[6] Division Docket (CTA Case No. 10035), pp. 445 to 447.
[7] Division Docket (CTA Case No. 10035), pp. 469 to 476.
[8] Division Docket (CTA Case No. 10035), p. 478.
[9] EB Docket, pp. 51 to 58; Division Docket (CTA Case No. 10035), pp. 480 to 487.
[10] EB Docket, pp. 6 to 28.
[11] EB Docket, pp. 64 to 67.
[12] EB Docket, pp. 69 to 76.

In the *Resolution*[13] dated October 27, 2021, the Court *En Banc* ordered respondent to file its *Comment* to the *Petition for Review*.

On November 12, 2021, respondent filed a *Manifestation*[14] stating that it has filed a *Motion for Leave of Court to Admit Comment (to the Petitioner's Petition for Review dated 09 July 2021)* with attached *Comment (to the Petitioner's Petition for Review dated 09 July 2021)* on September 23, 2021.

In the *Resolution*[15] dated February 10, 2022, the Court *En Banc* granted respondent's *Motion for Leave of Court to Admit Comment (to the Petitioner's Petition for Review dated 09 July 2021)* and admitted its *Comment (to the Petitioner's Petition for Review dated 09 July 2021)*, and submitted the instant case for decision.

Hence, this *Decision*.

ISSUES

Petitioner raises the following issues[16] for resolution of the Court *En Banc*, to wit:

a) Whether respondent is entitled to a refund and/or tax credit of erroneously paid and/or illegally collected WT and DST amounting to ₱26,411,464.00 and ₱6,640,366.00, respectively, inclusive of surcharge, interest and penalties.

b) Whether a BIR ruling is a condition *sine qua non* for the availment of the non-recognition of gain resulting from a merger transaction under Section 40(C)(2) of the NIRC of 1997, as amended.

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[13] EB Docket, pp. 80 to 81.
[14] EB Docket, pp. 82 to 84.
[15] EB Docket, pp. 110 to 111.
[16] EB Docket, pp. 10 to 11.

Petitioner's arguments:

Petitioner insists that respondent is not entitled to a refund or issuance of a TCC. According to petitioner, respondent must show that it has complied with the provisions of Sections 204(C) and 229 of the NIRC of 1997, as amended, on the prescriptive period of claiming tax refund/credit. Failure to prove the same is fatal to its claim for refund.

Petitioner also argues that the merger between respondent and MPI does not qualify as a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended. Non-recognition of gain on an exchange transaction rests upon the confluence of two (2) conditions, namely: (1) there must be a legal merger/consolidation, or transfer of all or substantially all of the properties of a corporation for stock of another corporation; and (2) such business restructuring or reorganization must be for a *bona fide* purpose. In the instant case, after respondent and MPI effected the merger transaction, respondent eventually sold the Ipil Property to IPILRD. Thus, the merger between respondent and MPI cannot be considered a *bona fide* business transaction, but rather, an attempt and/or preliminary action on the part of respondent to escape the burden of taxation.

Moreover, petitioner asserts that the merger between respondent and MPI is an upstream merger which does not qualify as a tax-free exchange transaction. Considering that respondent owned 60% of MPI's outstanding capital stock, the former can be considered as a parent company of the latter. As such, the reorganization between the two corporations is considered an upstream merger where respondent will not be issuing any shares to MPI, in exchange for the assets to be transferred by MPI to respondent.

Likewise, petitioner claims that the transfer of the Ipil Property from MPI to respondent is subject to DST because the merger failed to meet the elements of a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended.

Petitioner also argues that a BIR ruling is a condition *sine qua non* for the availment of the non-recognition of gain resulting from a merger transaction. According to petitioner, in order for an exchange transaction to come within the ambit of the definition of a tax-free transaction, all the requisites provided by law must be present; and to confirm the exemption, a tax-free exchange ruling must be secured.

Further, petitioner stresses that in a dissolution or reorganization, a certificate of tax clearance from the BIR is required to be submitted to the SEC before the SEC can issue a certificate of dissolution or reorganization. However, petitioner claims that respondent and MPI were able to secure a Certificate of Filing of the Articles and Plan of Merger with the SEC despite the absence of a tax clearance from the BIR.

Finally, petitioner asserts that tax-free exchange transactions partake of the nature of tax exemptions; hence, are construed strictly against the taxpayer and liberally in favor of the state.

Respondent's counter-arguments:

Preliminarily, respondent points out that the grounds raised by petitioner are mere reiteration of issues already raised before the Court in Division which have been duly considered, squarely addressed, and found to be without merit in the assailed *Decision* dated December 3, 2020.

Respondent counter-argues that its merger with MPI qualifies as a tax-free merger under Section 40(C)(2) of the 1997 NIRC, as amended, because the two (2) conditions, namely: (1) there must be a legal merger/consolidation, or transfer of all or substantially all of the properties of a corporation for stock of another corporation; and (2) such business restructuring or reorganization must be for a *bona fide* purpose, have been met. The merger between respondent and MPI was a legal merger which was done in accordance with the provisions of The Corporation Code of the Philippines (The Corporation Code) and was duly approved by the SEC as evidenced by the Certificate of Filing of the Articles and Plan of Merger dated May 27, 2009 issued by the SEC. Moreover, the merger was undertaken for a *bona fide* purpose, that is, to promote and accomplish efficiencies and economies which will serve to reduce costs in all aspects of business. The fact that respondent continues to operate for years after the merger proves that the merger was for a legitimate business purpose.

Further, respondent asserts that its merger with MPI cannot be considered an upstream merger. In an upstream merger, the parties are the parent company (the surviving corporation) and its wholly-owned subsidiary (the absorbed corporation); thus, the merger does not result in the issuance of shares. In the instant case, MPI is not a wholly-owned subsidiary of respondent. The merger resulted in the issuance of common shares in exchange for the 40% share of CCBPI in the net assets of MPI.

Respondent also states that the transfer of the Ipil Property to it is not subject to WT and DST because the transfer pursuant to a merger is a tax-free exchange transaction.

In addition, respondent emphasizes that a BIR ruling is not a condition *sine qua non* for the availment of a tax-free exchange.

Lastly, respondent claims that it is entitled to a refund or issuance of a TCC for the erroneously paid or illegally collected WT and DST, including surcharges, interests and penalties. Respondent has sufficiently proven that it paid the WT and DST and filed the corresponding WT Return (BIR Form No. 1609) and DST Return (BIR Form No. 2000-OT). Respondent also explains that it timely pursued its claim for refund both in the administrative and judicial levels.

THE COURT *EN BANC*'S RULING

The instant *Petition for Review* is bereft of merit.

Respondent is entitled to a refund or tax credit of erroneously paid and/or illegally collected WT and DST amounting to ₱26,411,464.00 and ₱6,640,366.00, respectively, inclusive of surcharge, interest and penalties.

<u>Respondent was able to file both its administrative and judicial claims for refund within the prescriptive period for claiming tax refund/credit.</u>

Petitioner maintains that respondent must show that it was able to file its claim for tax refund/credit within the period provided under Sections 204(C) and 229 of the NIRC of 1997, as amended, which state:

"SECTION 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 (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.

xxx xxx xxx

SECTION 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)*

In the instant case, respondent filed its Request for Refund or Issuance of Tax Credit Certificate,[17] together with its Application for Tax Credits/Refunds (BIR Form No. 1914),[18] and its *Petition for Review* before the Court in Division, as follows:

Tax Type	Date of Payment	Date of Filing of Administrative Claim	Date of Filing of Judicial Claim	Date of Prescription
WT	February 27, 2017[19]	May 21, 2018	February 26, 2019	February 27, 2019
DST				

Clearly, respondent was able to comply with the two (2)-year prescriptive period provided under Sections 204(C) and 229 of the NIRC of 1997, as amended, for filing of claims for tax refund/credit.

<u>The merger between respondent and MPI qualifies as a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended.</u>

Petitioner insists that the merger between respondent and MPI does not qualify as a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended. Considering that after respondent and MPI effected the merger transaction, respondent eventually sold the Ipil Property to IPILRD, the merger between respondent and MPI cannot be considered a *bona fide* business transaction, but rather, an attempt on the part of respondent to escape the burden of taxation.

Petitioner is mistaken.

Section 40(C)(2)(a) of the NIRC of 1997, as amended, provides that no gain or loss shall be recognized in a plan of merger or consolidation if, among other things, a corporation, which is a party to a merger, exchanges property solely for stock in a corporation, which is likewise a party to the merger, to wit:

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[17] Exhibit "P-18", Division Docket (CTA Case No. 10035), pp. 322 to 330.
[18] Exhibit "P-19", Division Docket (CTA Case No. 10035), p. 331; Exhibit "P-20", Division Docket (CTA Case No. 10035), p. 332.
[19] Exhibit "P-8", Division Docket (CTA Case No. 10035), p. 303; Exhibit "P-11", Division Docket (CTA Case No. 10035), p. 306.

"SECTION 40. *Determination of Amount and Recognition of Gain or Loss.* —

xxx xxx 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

xxx xxx xxx" *(Emphasis supplied)*

Meanwhile, Section 40(C)(6)(b) of the NIRC of 1997, as amended, defines merger or consolidation as follows:

"SECTION 40. *Determination of Amount and Recognition of Gain or Loss.* —

xxx xxx xxx

(C) *Exchange of Property.* —

xxx xxx xxx

(6) *Definitions.* —

xxx xxx xxx

(b) The term ***'merger'*** *or* ***'consolidation'***, when used in this Section, shall be understood to mean: **(i) the ordinary merger or consolidation, or (ii) the acquisition by one corporation of all or substantially all the properties of another corporation solely for stock**: *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: *Provided, finally*, That in determining whether the property transferred constitutes a substantial portion of the property of the transferor, the term *'property'* shall be taken to include the cash assets of the transferor." *(Emphasis supplied)*

From the foregoing, the requisites for the non-recognition of gain in an exchange of property under Section 40(C)(2)(a) in relation to Section 40(C)(6)(b) of the NIRC of the 1997, are as follows:

(1) there must be a legal merger or consolidation, or acquisition by a corporation of all or substantially all the properties of another corporation solely for stock; and

(2) the merger or consolidation was undertaken for a *bona fide* business purpose.

As found by the Court in Division and as borne out by the records, We find that the merger between respondent and MPI satisfied both conditions.

First, the merger was a legal merger which complied with the pertinent provisions of The Corporation Code as follows:

> "Sec. 78. *Articles of merger or consolidation.* — After the approval by the stockholders or members as required by the preceding section, articles of merger or articles of consolidation shall be executed by each of the constituent corporations, to be signed by the president or vice-president and certified by the secretary or assistant secretary of each corporation setting forth:
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> 1. The plan of the merger or the plan of consolidation;

> 2. As to stock corporations, the number of shares outstanding, or in the case of non-stock corporations, the number of members; and
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> 3. As to each corporation, the number of shares or members voting for and against such plan, respectively.
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> Sec. 79. *Effectivity of merger of consolidation.* — The articles of merger or of consolidation, signed and certified as herein above required, shall be submitted to the Securities and Exchange Commission in quadruplicate for its approval: *Provided*, That in the case of merger or consolidation of banks or banking institutions, building and loan associations, trust companies, insurance companies, public utilities, educational institutions and other special corporations governed by special laws, the favorable recommendation of the appropriate government agency shall first be obtained. If the Commission is satisfied that the merger or consolidation of the corporations concerned is not inconsistent with the provisions of this Code and existing laws, it shall issue a certificate of merger or of consolidation, at which time the merger or consolidation shall be effective.
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> If, upon investigation, the Securities and Exchange Commission has reason to believe that the proposed merger or consolidation is contrary to or inconsistent with the provisions of this Code or existing laws, it shall set a hearing to give the corporations concerned the opportunity to be heard. Written notice of the date, time and place of hearing shall be given to each constituent corporation at least two (2) weeks before said hearing. The Commission shall thereafter proceed as provided in this Code."

Pursuant to the foregoing, the merger between respondent and MPI became effective on May 27, 2009 when the SEC issued the Certificate of Filing of the Articles and Plan of Merger.[20]

Second, the merger was undertaken for a *bona fide* business purpose.

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[20] Exhibit "P-3", Division Docket (CTA Case No. 10035), p. 273.

In the case of *Commissioner of Internal Revenue v. Vicente A. Rufino, et al.*,[21] the Supreme Court explained the meaning of *bona fide* business purpose as follows:

> "The basic consideration, of course, is the purpose of the merger, as this would determine whether the exchange of properties involved therein shall be subject or not to the capital gains tax. The criterion laid down by the law is that **the merger "must be undertaken for a *bona fide* business purpose and not solely for the purpose of escaping the burden of taxation."** We must therefore seek and ascertain the **intention of the parties in the light of their conduct contemporaneously with, and especially after, the questioned merger** pursuant to the Deed of Assignment of January 9, 1959.
>
> It has been suggested that **one certain indication of a scheme to evade the capital gains tax is the subsequent dissolution of the new corporation after the transfer to it of the properties of the old corporation and the liquidation of the former soon after**. This highly suspect development is likely to be a mere subterfuge aimed at circumventing the requirements of Section 35 of the Tax Code while seeming to be a valid corporate combination. Speaking of such a device, Justice Sutherland declared for the United States Supreme Court in Helvering v. Gregory:
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>> "When subdivision (b) speaks of a transfer of assets by one corporation to another, it means a transfer made 'in pursuance of a plan of reorganization' (Section 112[g]) of corporate business; and **not a transfer of assets by one corporation to another in pursuance of a plan having no relation to the business of either**, as plainly is the case here. Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose – a mere devise which put on the form of a corporate reorganization as a disguise for concealing its

[21] G.R. Nos. L-33665-68, February 27, 1987.

> real character, and **the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt, a new and valid corporation was created but that corporation was nothing more than a contrivance to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function. When that limited function had been exercised, it immediately was put to death.**
>
> "In these circumstances, the facts speak for themselves and are susceptible of but one interpretation. **The whole undertaking, though conducted according to the terms of subdivision (b), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization and nothing else.** The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose."

We see no such furtive intention in the instant case. It is clear, in fact, that **the purpose of the merger was to continue the business of the Old Corporation, whose corporate life was about to expire, through the New Corporation to which all the assets and obligations of the former had been transferred**. What argues strongly, indeed, for the New Corporation is that **it was not dissolved after the merger agreement in 1959. On the contrary, it continued to operate the places of amusement originally owned by the Old Corporation and transferred to the New Corporation**, particularly the Capitol and Lyric Theaters, in accordance with the Deed of Assignment. **The New Corporation, in fact, continues to do so today after taking over the**

> **business of the Old Corporation twenty-seven years ago.**" *(Emphasis supplied)*

In the instant case, the merger between respondent and MPI was undertaken in order to promote and accomplish efficiencies and economies which will serve to reduce costs in all aspects of their business.[22] Taking the aforestated reason together with the fact that respondent still continues to operate to this day, the logical conclusion is that the merger between respondent and MPI was undertaken for a *bona fide* business purpose and not solely for the purpose of escaping the burden of taxation.

The subsequent sale by respondent of the Ipil Property to IPILRD **after more than 7 years** is of no moment. It does not cast doubt on the legitimacy of the merger considering that as the owner of the Ipil Property, respondent has the right to dispose of the same.

Given that the merger between respondent and MPI was a legal merger undertaken for a *bona fide* business purpose, the same qualifies as a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended.

<u>The merger between respondent and MPI is not an upstream merger.</u>

Petitioner claims that the merger between respondent and MPI is an upstream merger which does not qualify as a tax-free exchange transaction. As respondent owned 60% of MPI's outstanding capital stock, the former can be considered as a parent company of the latter. Thus, respondent will not be issuing any shares to MPI, in exchange for the assets to be transferred by MPI to respondent.

Petitioner's argument is untenable. We affirm the Court in Division's ruling that the merger between respondent and MPI cannot be treated as upstream merger.

In an upstream merger, the parties are the parent company (the surviving entity) and its **wholly-owned** subsidiary. In this type of

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[22] Page 6, paragraph 2 of the *Memorandum (for the Petitioner)*, Division Docket (CTA Case No. 10035), p. 358; Paragraph 14 of the *Comment and Opposition (RE: Respondent's Motion for Reconsideration of the Decision dated 03 December 2020)*, Division Docket (CTA Case No. 10035), p. 472; Page 3, paragraph 15 of the *Comment (to the Petitioner's Petition for Review dated 09 July 2021)*, EB Docket, p. 71.

merger, the parent company **does not issue shares in exchange for the assets of its wholly-owned subsidiary** in order to avoid the shares from becoming treasury shares because it would essentially be issuing shares to itself.[23]

Here, MPI is not a wholly-owned subsidiary of respondent. MPI is 60% owned by respondent and 40% owned by CCBPI. Thus, in the Plan of Merger, in exchange for the 40% share of CCBPI in MPI's net assets, respondent will issue 1,092,708 common shares to CCBPI for the amount of ₱39,337,488.00.[24] As such, the merger between respondent and MPI was not an upstream merger.

<u>The transfer of the Ipil Property from MPI to respondent is not subject to DST.</u>

Petitioner argues that the transfer of the Ipil Property from MPI to respondent is subject to DST because the merger failed to meet the elements of a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended.

Petitioner is once again mistaken.

Section 199(m) of the of the NIRC of 1997, as amended, provides that transfer of property pursuant to Section 40(C)(2) of the NIRC of 1997, as amended, is exempt from DST, to wit:

> "SECTION 199. *Documents and Papers Not Subject to Stamp Tax.* — The provisions of Section 173 to the contrary notwithstanding, the following instruments, documents and papers shall be **exempt from the documentary stamp tax**:
>
> xxx xxx xxx
>
> (m) **Transfer of property pursuant to Section 40(c)(2) of the National Internal Revenue Code of 1997, as amended**." *(Emphasis supplied)*

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[23] DOF Opinion No. 012-18, November 19, 2018.

[24] Exhibit "P-2", Division Docket (CTA Case No. 10035), p. 270.

The reason for the exemption from DST of transfers of properties pursuant to Section 40(C)(2) of the NIRC of 1997, as amended, has been explained by the Supreme Court in *Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation*,[25] to wit:

> "In a merger, the real properties are not deemed "sold" to the surviving corporation and the latter could not be considered as the "purchaser" of realty since the real properties subject of the merger were merely absorbed by the surviving corporation by operation of law and these properties are deemed automatically transferred to and vested in the surviving corporation without further act or deed. Therefore, **the transfer of real properties to the surviving corporation in pursuance of a merger is not subject to documentary stamp tax**. As stated in the outset, documentary stamp tax is imposed only on all conveyances, deeds, instruments or writing where realty sold shall be conveyed to a purchaser or purchasers. The transfer of SPPC's real property to respondent was neither a sale nor was it a conveyance of real property for a consideration contracted to be paid as contemplated under Section 196 of the Tax Code. Hence, Section 196 of the Tax Code is inapplicable and respondent is not liable for documentary stamp tax.
>
> xxx xxx xxx
>
> Furthermore, it should be noted that a documentary stamp tax is in the nature of an excise tax because it is imposed upon the privilege, opportunity or facility offered at exchanges for the transaction of the business. Documentary stamp tax is a tax on documents, instruments, loan agreements, and papers evidencing the acceptance, assignment, or transfer of an obligation, right or property incident thereto. Documentary stamp tax is thus imposed on the exercise of these privileges through the execution of specific instruments, independently of the legal status of the transactions giving rise thereto. Based on the foregoing, the transfer of real properties from SPPC to respondent is not subject to documentary stamp tax considering that the same was not conveyed to or vested in respondent by means of any specific deed, instrument or writing. There was no deed of assignment

[25] G.R. No. 192398, September 29, 2014.

and transfer separately executed by the parties for the conveyance of the real properties. **The conveyance of real properties not being embodied in a separate instrument but is incorporated in the merger plan, thus, respondent is not liable to pay documentary stamp tax.**" *(Emphasis supplied)*

As discussed above, the merger between respondent and MPI qualifies as a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended. Consequently, the transfer of the Ipil Property from MPI to respondent is not subject to DST pursuant to Section 199(m) of the NIRC of 1997, as amended.

Accordingly, from the foregoing disquisition, the inescapable conclusion is that respondent, having paid the subject taxes being claimed for refund, as evidenced by its BIR Form No. 1606[26] and BIR Form No. 2000-OT,[27] is entitled to a refund or tax credit of erroneously paid and/or illegally collected WT and DST amounting to ₱26,411,464.00 and ₱6,640,366.00, respectively, inclusive of surcharge, interest and penalties.

A BIR ruling is not a condition sine qua non for the availment of the non-recognition of gain resulting from a merger transaction under Section 40(C)(2) of the NIRC of 1997, as amended.

Petitioner insists that a BIR ruling is a condition *sine qua non* for the availment of the non-recognition of gain resulting from a merger transaction.

Petitioner's stance is erroneous.

There is nothing in Section 40(C)(2), in relation to Section 40(C)(6)(b) of the NIRC of 1997, as amended, which requires a prior BIR ruling validating an exchange transaction as tax-free before a taxpayer may avail of the benefits under said provisions.

[26] Exhibit "P-8", Division Docket (CTA Case No. 10035), p. 303.
[27] Exhibit "P-11", Division Docket (CTA Case No. 10035), p. 306.

Petitioner cannot impose additional requirements in order for respondent to claim a tax refund/credit of its erroneously paid and/or illegally collected WT and DST. Petitioner may not enlarge, alter or restrict the provisions of the law it administers; it cannot engraft additional requirements not contemplated by legislature.[28] To do so constitutes lawmaking, which is generally reserved for Congress.[29]

In *Commissioner of Internal Revenue v. Lucio L. Co, et al.*,[30] the Supreme Court emphasized that a prior confirmatory ruling is not a requirement in order for a transaction to be considered as a tax-free exchange, to wit:

> "Moreover, as correctly pointed out by the CTA EB, **there is nothing in Section 40(C)(2) of the NIRC of 1997, as amended, which requires the taxpayer to first secure a prior confirmatory ruling before the transaction may be considered as a tax-free exchange. The BIR should not impose additional requirements not provided by law, which would negate the availment of the tax exemption.** Instead of resorting to formalities and technicalities, the BIR should have made its own determination of the merits of respondents' claim for exemption in respondents' administrative application for refund. However, the Court notes that, in this case, the CIR not only failed to act on respondents' administrative claim for refund, it also failed to present any evidence during trial before the CTA to prove that the subject transaction is not covered by the tax exemption." *(Emphasis supplied)*

In view of the foregoing, We find no cogent reason to vacate the assailed *Decision* and *Resolution*.

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is **DENIED** for lack of merit. The *Decision* dated December 3, 2020, and the *Resolution* dated May 20, 2021, by the Second Division of this Court in CTA Case No. 10035 are hereby **AFFIRMED**.

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[28] *Commissioner of Internal Revenue v. Central Luzon Drug Corporation*, G.R. No. 159647, April 15, 2005.
[29] *Jaime N. Soriano, et al. v. Secretary of Finance and the Commissioner of Internal Revenue*, G.R. No. 184450, January 24, 2017.
[30] G.R. No. 241424, February 26, 2020.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

(With Dissenting Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

Marian Ivy F. Reyes-Fajardo

MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 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.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 2486** **(CTA Case No. 10035)**
	Present:
-versus-	DEL ROSARIO, *P.J.*, UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO, REYES-FAJARDO, *and* CUI-DAVID, *JJ.*
LUZVIMINDA LAND HOLDINGS, INC., Respondent.	Promulgated: SEP 21 2022 11:15am

x---x

DISSENTING OPINION

RINGPIS-LIBAN, J.:

The decision affirms the decision of the Second Division which granted the refund claim of the taxpayer Luzviminda Land Holdings, Inc. (LLHI) of Php33,051,830 representing withholding and documentary stamps taxes inclusive of surcharges, interests and penalties *paid* on the transfer of land situated in No. 8 Ipil Road, South Forbes Park Village, Makati City (Ipil property) and originally owned by Marangal Properties, Inc. (MPI), a subsidiary of LLHI that merged with it.

With due respect, I state my *dissenting opinion* below.

There are actually *two (2)* transfers of the same parcel land (Ipil property), in this case.

The *first* transfer of the Ipil property was in 2009, from MPI to LLHI, by virtue of an upstream merger.[1] The *second* transfer happened in 2016, from LLHI

[1] Exhibit P-7, Deed of Transfer, Division Docket, pp. 291-292.

and Coca-Cola Femsa Philippines, Inc., *now* Coca-Cola Beverages Philippines, Inc., (Coca-Cola) to IPILRD Marketing, Inc. (IPILRD), by virtue of an *ordinary sale, a taxable event.*[2]

The *first* transfer may have qualified as a tax-free exchange under Section 40(C)(2) of the National Internal Revenue Code (NIRC), as amended, *but the subsequent transfer did not.*

The facts are not disputed.

A parcel of land situated in No. 8 Ipil Road, South Forbes Park Village, Makati City (Ipil property) was originally owned by MPI, a corporation owned 60-40, by LLHI and Coca-Cola, respectively.

On May 27, 2009, the Securities and Exchange Commission (SEC) approved the merger of LLHI, the parent, and MPI, its partially-owned subsidiary.

Pursuant to the merger, LLHI and MPI executed a Deed of Transfer to convey MPI's properties to LLHI, as surviving corporation. One of the MPI properties transferred to LLHI was the *Ipil property.*[3]

On December 17, 2009, LLHI filed a request for ruling on the tax-exempt status of the merger between LLHI and MPI pursuant to Section 40(C)(2) of the NIRC, as amended.

No ruling was issued, however.

On July 1, 2016, pursuant to a Deed of Absolute Sale, LLHI and Coca-Cola sold the Ipil property to IPILRD for PhP388,888,888 (LLHI) and PhP100,000,000 (Coca-Cola).

Thereafter, on February 27, 2017, while trying to secure a Certificate Authorizing Registration (CAR) for the transfer of the title of the Ipil property to IPILRD, LLHI paid withholding tax of PhP26,411,464.00 and documentary stamps tax of PhP6,640,366.00.[4]

Accordingly, based on the foregoing, the subject of the refund claim by LLHI is *actually* the withholding and the documentary stamps taxes plus surcharges, interests and penalties paid on the transfer of the Ipil property under the *Deed of Absolute Sale* notarized on July 1, 2016.[5] In fact, there is an *unassailable admission* by the parties to the very same deed that the transaction was taxable. Section 1.2 of the Deed of Absolute Sale provides:

[2] Exhibit P-6, Deed of Absolute Sale, *id.*, pp. 281-284.
[3] Exhibit P-7, Deed of Transfer, *id.*, pp. 291-292.
[4] Exhibits P-8, P-9, P-10 and Exhibits P-11, P-12, P-113, *id.*, pp. 303-309.
[5] Exhibit P-6, Deed of Absolute Sale, *id.*, pp. 281-282.

> "The Purchase Price shall be payable upon the execution of this Deed, subject to the deduction of the amounts of ₱20,833,333.29 and ₱5,357,142.86 from the Purchase Price payable to LLHI and CCFPI, respectively, representing the 6% withholding tax imposed under Section 24(D)(1) of the National Internal Revenue on the sale of the PROPERTY, to be withheld by the BUYER and paid to the Bureau of Internal Revenue in accordance with Sections 57(A) and 58(A), respectively, of the same Code."[6] (*Underscoring supplied*)

The taxes *subject of the refund claim* were clearly paid for the second transfer and *not* the first, which occurred in 2009 or more than five years before the payment in 2017. The taxes paid in 2017 can only pertain to the *2016 taxable event* which immediately preceded it, the *sale* of the Ipil property from LLHI and Coca-Cola to IPILRD. More importantly, these taxes were *correctly paid* under the law.

The claim, therefore, does *not* fall under Section 204(C) in connection with Section 229 of the NIRC, as amended, for the recovery of illegally or erroneously paid taxes.

I vote to *grant* the petition and to *reverse* the assailed Decision dated December 3, 2020 and the Resolution dated May 20, 2021.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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[6] *Id.*, p. 282.