REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1522 (CTA Case No. 8831)**
	Present:
-versus-	Del Rosario, *P.J.,* Castañeda, Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, *and* Manahan, *JJ.*
LUCIO L. CO, SUSAN P. CO, FERDINAND VINCENT P. CO, and PAMELA JUSTINE P. CO, Respondents.	Promulgated: FEB 28 2018 10:23 a.m.

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DECISION

CASTAÑEDA, JR., J.:

Before the Court *En Banc* is a Petition for Review filed by the Commissioner of Internal Revenue (CIR) pursuant to Sections 3(b) and 4(b), Rule 8 of the Revised Rules of the Court of Tax Appeals (RRCTA) in relation to Rule 43 of the Rules of Court seeking the reversal of the following:

1. June 2, 2016 Decision[1] of the CTA Third Division[2] the dispositive portion of which reads:

> "**WHEREFORE,** the instant Petition for Review is hereby **GRANTED.** Accordingly, respondent Commissioner of Internal Revenue is hereby **DIRECTED TO REFUND** in favor of petitioners Lucio Co, Susan Co, Ferdinand Co, and Pamela Co the amounts of ₱659,045,625.00, ₱659,050,632.50,

[1] Annex A, Petition for Review, Rollo, pp. 26-46.
[2] Penned by J. Esperanza R. Fabon-Victorino with the concurrence of J. Lovell R. Bautista. J. Ma. Belen M. Ringpis-Liban was on leave.

₱164,761,860.03, and ₱164,757,172.54, respectively, or a total amount of ₱1,647,615,290.07, representing erroneously paid capital gains tax.

SO ORDERED.”

2. September 1, 2016 Resolution[3] denying, for lack of merit, the petitioner CIR's Motion for Reconsideration.

THE FACTS

The facts, as condensed from the Decision and the records, are as follows:

By law, petitioner CIR is vested with the power to decide, approve, and grant claims for refund or tax credit of erroneously or excessively paid taxes and holds office at the Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Diliman, Quezon City.[4]

The four respondents Lucio L. Co, Susan P. Co, Ferdinand Vincent P. Co, and Pamela Justine P. Co (Cos) are Filipinos, of legal age, with respective addresses at 563 M. De Santos St., Tondo, Manila, at 1414 Union St., Paco, Manila, at Fontana Leisure Park, Pampanga, and at 31 Tayuman St., Tondo, Manila, respectively. However, for purposes of these proceedings, the respondents may be served with processes, notices, and pleadings through their counsel of record.[5]

As of March 2012, the four respondents collectively were the majority shareholders of Kareila Management Corporation (Kareila), a domestic corporation engaged as managers, managing agents, consignor, concessionaire, or supplier of business engaged in the operation of hotels, supermarkets, groceries and the like:[6]

Kareila Management Corporation (Exhibit P-23, Deed of Exchange dated May 11, 2012; Exhibit P-19, Administrative Claim for Refund dated May 20, 2014)		
Shareholder	**No. of Shares Owned**	**Percentage Ownership**
Lucio Co	681,250	40.0000%
Susan Co	681,250	40.0000%
Ferdinand Co	170,312	10.0000%
Pamela Co	170,312	10.0000%
Anthony Sy	1	0.0001%
Total	**1,703,125**	**100.0000%**

[3] Annex B, Petition for Review, Rollo, pp. 48-50.
[4] Section 4, National Internal Revenue Code of 1997 (NIRC), as amended.
[5] Par. 1, Summary of Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), Division Docket, Vol. II, p. 571.
[6] Exhibit P-24, Kareila Management Corporation, General Information Sheet (GIS) for Calendar Year (CY) 2012, Division Docket, Vol. II, pp. 1080-1085.

On March 27, 2012, the Board of Directors of Puregold Price Club, Inc. (Puregold), a corporation organized under Philippine laws and primarily engaged in the wholesale and retail of general merchandise, approved the issuance of 766,406,250 Puregold common shares to the respondents Cos and Anthony Sy in exchange for the transfer to Puregold of the 1,703,125 shares in Kareila.[7]

On May 8, 2012, during the Puregold annual stockholders meeting, this exchange was approved by the stockholders representing two-thirds of Puregold's outstanding capital stock.[8]

As of May 2012, the respondents Cos were collectively the majority shareholders of Puregold:

Puregold Price Club, Inc. (Exhibit P-19, Administrative Claim for Refund dated May 20, 2014; Exhibit P-22, P-22-a, SEC Form 17-A, Annual Report, Business and General Information, Item 11, Division Docket, Vol. II, p. 972)		
Shareholder	**No. of Shares Owned**	**Percentage Ownership**
Lucio Co	724,376,802	36.2188%
Susan Co	539,691,310	26.9846%
Ferdinand Co	33,686,354	1.6843%
Pamela Co	33,686,354	1.6843%
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Total	**2,000,000,000**	**100.0000%**

On May 11, 2012, the respondents Cos and Anthony Sy entered into a Deed of Exchange with Puregold Price Club, Inc. (Puregold) wherein they agreed to transfer all their Kareila shares to Puregold in exchange for Puregold shares.[9]

Under the Deed of Exchange, the respondents Cos and Anthony Sy each would receive four hundred fifty (450) Puregold shares for every one (1) Kareila share that they would transfer to Puregold. Accordingly, Puregold issued to the Cos and Anthony Sy a total of 766,406,250 Puregold shares from the unissued portion of its authorized capital stock in exchange for 1,703,125 Kareila shares:[10]

[7] Exhibit P-28, Securities and Exchange Commission Certificate of Approval of Valuation dated May 28, 2012, Secretary's Certificate, Division Docket, Vol. II, pp. 1066 and 1068.
[8] Exhibit P-28, Securities and Exchange Commission Certificate of Approval of Valuation dated May 28, 2012, Secretary's Certificate, Division Docket, Vol. II, p. 1066.
[9] Exhibits P-23 to P-23h, Division Docket, Vol. II, pp. 1055-1060.
[10] Exhibits P-23 to P-23h, Division Docket, Vol. II, pp. 1055-1060.

Share Swap per Deed of Exchange[11]		
Shareholder	**No. of Kareila Shares Transferred to Puregold**	**No. of Puregold Shares Exchanged for Kareila Shares**
Lucio Co	681,250[12]	306,562,500[13]
Susan Co	681,250[14]	306,562,500[15]
Ferdinand Co	170,312[16]	76,640,400[17]
Pamela Co	170,312[18]	76,640,400[19]
Anthony Sy	1[20]	450[21]
Total	1,703,125	766,406,250

As a result of the share swap under the Deed of Exchange:

1. Puregold acquired majority ownership of Kareila;[22] and,

2. The Cos who, prior to the share swap, already collectively owned 66.5720% of the outstanding capital stock of Puregold consequently increased their stockholdings to 75.8329% after the swap:[23]

Puregold Price Club, Inc.				
	Before the Share Swap[24]		After the Share Swap	
Shareholder	No. of Shares Owned	Percentage Ownership	No. of Shares Owned	Percentage Ownership
Lucio Co	724,376,802	36.2188%	1,030,939,302	37.2664%
Susan Co	539,691,310	26.9846%	846,253,810	30.5904%
Ferdinand Co	33,686,354	1.6843%	110,326,754	3.9881%
Pamela Co	33,686,354	1.6843%	110,326,754	3.9881%
Total	1,311,440,820	65.5720%	2,097,846,620	75.8329%
Total Subscribed Capital	**2,000,000,000**		**2,766,406,250**	

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[11] Par. A19, Amended Judicial Affidavit of Atty. Candy H. Dacanay-Datuon, Exhibit P-48, Division Docket, Vol. II, p. 645; Exhibit P-28, Securities and Exchange Commission Certificate of Approval of Valuation May 28, 2012, Secretary's Certificate, Division Docket, Vol. II, pp. 1065 and 1068.
[12] Exhibit P-40, Kareila Stock Certificate No. 16, Division Docket, Vol. II, p. 1190.
[13] Exhibit P-34, Puregold Stock Certificate No. 37, Division Docket, Vol. II, p. 841.
[14] Exhibit P-41, Kareila Stock Certificate No. 17, Division Docket, Vol. II, p. 1191.
[15] Exhibit P-35, Puregold Stock Certificate No. 38, Division Docket, Vol. II, p. 842.
[16] Exhibit P-42, Kareila Stock Certificate No. 18, Division Docket, Vol. II, p. 1192.
[17] Exhibit P-36, Puregold Stock Certificate No. 39, Division Docket, Vol. II, p. 843.
[18] Exhibit P-43, Kareila Stock Certificate No. 19, Division Docket, Vol. II, p. 1193.
[19] Exhibit P-37, Puregold Stock Certificate No. 40, Division Docket, Vol. II, p. 844.
[20] Exhibit P-44, Kareila Stock Certificate No. 20, Division Docket, Vol. II, p. 1194.
[21] Exhibit P-38, Puregold Stock Certificate No. 41, Division Docket, Vol. II, p. 845.
[22] At 99.9997% of the subscribed shares, see Exhibit P-24, Kareila Management Corporation, GIS for CY 2012, Division Docket, Vol. II, p. 1088.
[23] Par. A29, Exhibit P-48, Amended Judicial Affidavit of Atty. Candy H. Dacanay-Datuon (Dated 21 November 2014), Division Docket, Vol. II, p. 648.
[24] Exhibit P-22-a, Securities and Exchange Commission Form 17-A, Annual Report, Business and General Information, Item 11, Division Docket, Vol. II, p. 972.

On June 26 and 28, 2012, the respondents Cos collectively paid capital gains tax (CGT) including interests and/or compromise penalty on the said transfer pursuant to Section 24(C) of the National Internal Revenue Code of 1997 (NIRC), as amended, detailed as follows:[25]

Taxpayers	**Dates of Payment (2012)**	**Capital Gains Tax**	**Interest**	**Compromise Penalty**	**Total Amounts Paid**
Lucio Co	June 26	₱ 652,291,875.00			₱ 652,291,875.00
	June 28	6,750,000.00	₱ 3,750.00		6,753,750.00
Susan Co	June 26	652,291,875.00			652,291,875.00
	June 28	6,750,000.00	3,757.50	₱ 5,000.00	6,758,757.50
Ferdinand Co	June 26	163,068,740.00			163,068,740.00
	June 28	1,687,495.05	5,624.98		1,693,120.03
Pamela Co	June 26	163,068,740.00			163,068,740.00
	June 28	1,687,495.04	937.50		1,688,432.54
Total		**₱ 1,647,596,220.09**	**₱ 14,069.98**	**₱ 5,000.00**	**₱ 1,647,615,290.07**

Respondents-taxpayers, however, contend that their payments of CGT were erroneous because, under Section 40(C)(2) of the NIRC, their transfer of shares through the Deed of Exchange was a tax-exempt transaction.

Thus, on May 21, 2014, or within the two-year prescriptive period under Section 204(C) of the NIRC of 1997, as amended, the Cos filed their administrative claims for the refund of the CGT including interest and/or compromise penalty with their respective Revenue District Offices (RDO):

- Refund Claims of Lucio Co and Pamela Co, May 20, 2014 Letter addressed to Mr. Petronillo C. Fernando, Revenue District Office No. 29, Intramuros, Manila;[26]

- Refund Claim of Susan Co, May 20, 2014 Letter addressed to Mr. Albino M. Galanza, Revenue District Office No. 34, Intramuros, Manila; and,[27]

- Refund Claim of Ferdinand Co, May 20, 2014 Letter addressed to Mr. Romeo E. Naranjo, Revenue District Office No. 21-A, Angeles City.[28]

[25] Par. 3, Summary of Admitted Facts, JSFI, Division Docket, Vol. II, p. 572; Exhibits P-1 to P-16, Capital Gains Tax Returns (BIR Form No. 1707) and Payment Forms (BIR Form No. 0605), Division Docket, Vol. II, pp. 895-928;
[26] Exhibit P-17, Division Docket, Vol. I, pp. 417-445.
[27] Exhibit P-18, Division Docket, Vol. I, pp. 446-474.
[28] Exhibit P-19, Division Docket, Vol. I, pp. 475-502.

On June 6, 2014, citing inaction by Petitioner CIR on their claims for refund, respondents filed a Petition for Review with the court *a quo*.[29]

In the Answer,[30] the CIR alleged that Revenue Regulations No. 18-2001, Revenue Memorandum Order Nos. 32-2001 and 17-2002 provide that there are certain conditions or requirements which should be complied with in order to avail of the non-recognition of gain under Section 40(C)(2). Specifically, for the share swap transaction to qualify as a tax-free exchange, a *prior* application for a BIR certification or ruling must have been secured. In this case, however, no such *prior* request from the BIR was made. Accordingly, the CIR contended that, since refund claims are construed strictly against the taxpayer-claimant, the refund sought by the Cos should be denied.

In Reply,[31] the taxpayers contend that it was impossible for them to make any prior request for a ruling since they were not aware that their transaction was in fact tax free which, thus, establishes that their CGT payments were erroneously paid. Further, they maintained that Section 40(C)(2) of the NIRC, or any other provision of law or any existing jurisprudence does not impose such condition.

After a Pre-Trial Order[32] was issued, respondents commenced presentation of their witnesses, namely, Mary S. Demetillo, their consultant on accounting of personal financial transactions, and Atty. Candy H. Dacanay-Datuon, the Corporate Secretary of Kareila and Assistant Corporate Secretary of Puregold.

Witness Mary S. Demetillo,[33] testified that she accomplished the accounting and computations of taxes for the share swap and that, furthermore:

1. By virtue of the Deed of Exchange, respondents and Anthony Sy transferred 1,703,125 their Kareila common shares to Puregold. In return, petitioners received 766,406,250 Puregold common shares. At the time of the transaction, the Kareila shares had a par value of ₱100.00[34] per share, while Puregold shares had a value of ₱21.50 per share.

2. Respondents paid CGT of ₱1,647,615,290.07, including interest and penalty, on June 26 and 28, 2012.

[29] Par. 4, Summary of Admitted Facts, JSFI, Division Docket, Vol. II, p. 572.
[30] Answer dated July 18, 2014, Division Docket, Vol. I, pp. 294-297.
[31] Division Docket, Vol. I, pp. 302-308.
[32] Division Docket, Vol. II, pp. 590-598.
[33] Exhibit P-47, Judicial Affidavit of Mrs. Mary S. Demetillo (Dated 18 September 2014), Division Docket, Vol. I, pp. 391-400.
[34] Exhibit P-47, Judicial Affidavit of Mrs. Mary S. Demetillo (Dated 18 September 2014), Division Docket, Vol. I, pp. 395-396.

3. The CGT payments, including interest and penalty were reflected in petitioners' Annual Income Tax Returns (AITRs) for the year 2012.[35]

4. On May 21, 2014, petitioners separately filed administrative claims for refund of the erroneously paid CGT with their respective RDO followed by their filing of BIR Form No. 1914 or the Applications for Tax Credits/Refund, for which she was consulted. She learned about the actual filing of such claims for refund only when she was preparing for her testimony before the Court.

5. The administrative refund claims were not acted upon by the CIR.

Attorney Candy H. Dacanay-Datuon,[36] the Corporate Secretary of Kareila since 2004 and the Assistant Corporate Secretary of Puregold since 2011, testified on the following:

1. She is the custodian of the records of the Kareila and Puregold shares of stocks. She prepares and files the reportorial requirements under the law of both entities.

2. Kareila is a domestic corporation whose primary purpose is to act as managers, managing agents, consignor, concessionaire or supplier of businesses engaged in manufacturing or trading of general merchandise, the operation of resorts, hotels, supermarkets, groceries and the like.

3. Puregold is also a domestic corporation whose primary purpose is to engage in the wholesale and retail of general merchandise.

4. The Cos are shareholders of both Kareila and Puregold.[37]

5. Under a Deed of Exchange dated May 11, 2012, the Cos together with Anthony Sy, transferred and conveyed 100% of their 1,703,125 Kareila common shares to Puregold in exchange for Puregold 766,406,250 common shares.[38]

6. Lucio Co and Susan Co each transferred 681,250 Kareila shares in exchange for 306,562,500 Puregold shares, while Ferdinand Co and Pamela Co each transferred 170,312 Kareila shares for 76,640,400 Puregold shares.

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[35] Exhibits P-29, P-30 and P-31, Division Docket, Vol. II, pp. 1112-1176.
[36] Exhibit P-48, Amended Judicial Affidavit of Atty. Candy H. Dacanay-Datuon (Dated 21 November 2014), Division Docket, Vol. II, pp. 640-652.
[37] Par. A9, Exhibit P-48, Amended Judicial Affidavit of Atty. Candy H. Dacanay-Datuon (Dated 21 November 2014), Division Docket, Vol. II, p. 643.
[38] Par. A12, Exhibit P-48, Amended Judicial Affidavit of Atty. Candy H. Dacanay-Datuon (Dated 21 November 2014), Division Docket, Vol. II, p. 644.

7. The 1,703,125 Kareila shares were valued at ₱16.467 billion or ₱9,668.47 per share,[39] while the 766,406,250 Puregold shares had a subscription price of ₱16,477,734,375.00 or ₱21.50 per share.[40]

8. As a consequence of the share swap, Puregold acquired ownership of all 1,703,125 Kareila shares, while the respondents Cos and Anthony Sy were each given in trust one share or .0001% of Kareila.[41] On the other hand, petitioners collectively owned 1,331,440,820 Puregold shares or 66.55%[42] of the outstanding capital stock of Puregold. After the share swap, petitioners gained further control of Puregold as their collective shareholdings therein increased from 66.55% to 75.83%.[43]

The amount of ₱1,647,615,290.07 CGT was paid for the share swap transaction, including interest and penalty, and this amount is the subject of the instant claim for refund.

Acting on the taxpayers' Formal Offer of Evidence filed on February 13, 2015 with the CIR's Comment [Re: Petitioner's Formal Offer of Evidence] filed on March 13, 2015, the Court in Division admitted all their exhibits and the taxpayers were deemed to have rested their case.[44]

On June 8, 2015, during the CIR's initial presentation of evidence, the counsel manifested that no report of investigation was submitted by the BIR examiners, hence, no evidence was presented.[45]

On July 23, 2015, the taxpayers filed their Memorandum while the CIR filed her Memorandum on July 28, 2015.

On July 30, 2015, the Court in Division issued a Resolution submitting the case for decision.[46]

On August 14, 2015, the taxpayers filed a Motion for Leave to File Reply with attached Reply stating that the CIR's Memorandum raised several new issues not raised in the Answer or during trial, which deserve a clarificatory response and/or further discussion.

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[39] Par. A24, Exhibit P-48, Amended Judicial Affidavit of Atty. Candy H. Dacanay-Datuon (Dated 21 November 2014), Division Docket, Vol. II, p. 647.
[40] Par. A25, Exhibit P-48, Amended Judicial Affidavit of Atty. Candy H. Dacanay-Datuon (Dated 21 November 2014), Division Docket, Vol. II, p. 647.
[41] Exhibit P-24, Kareila Management Corporation, GIS for CY 2012, Division Docket, Vol. II, p. 1088; Par. A20, Exhibit P-48, Amended Judicial Affidavit of Atty. Candy H. Dacanay-Datuon (Dated 21 November 2014), Division Docket, Vol. II, p. 350.
[42] Par. A29, Exhibit P-48, Amended Judicial Affidavit of Atty. Candy H. Dacanay-Datuon (Dated 21 November 2014), Division Docket, Vol. II, p. 648.
[43] Par. A35, Exhibit P-48, Amended Judicial Affidavit of Atty. Candy H. Dacanay-Datuon (Dated 21 November 2014), Division Docket, Vol. II, p. 649.
[44] Resolution dated April 17, 2015, Division Docket, Vol. II, pp. 1200-1201.
[45] Resolution dated June 15, 2015, Division Docket, Vol. II, pp. 1204-1205.
[46] Resolution dated July 30, 2015, Division Docket, Vol. III, p. 1255.

On August 20, 2015, the Court in Division promulgated a resolution which granted the Motion and admitted the Reply as part of the records of the case.[47]

On June 2, 2016, the Court in Division promulgated a Decision granting the claim for refund.

On June 30, 2016, the CIR filed a Motion for Reconsideration (Re: Decision dated 02 June 2016) while the taxpayers filed their Opposition (to Respondent's Motion for Reconsideration of the Decision dated 02 June 2016) on August 10, 2016.

On September 1, 2016, the Court in Division resolved to deny the CIR's motion for lack of merit.

On September 27, 2016, the CIR filed a Motion for Extension of Time to File Petition for Review.[48]

In a Minute Resolution dated September 30, 2016, the Court *En Banc* granted the CIR until October 13, 2016 within which to file his petition.

On October 13, 2016, a Petition for Review was filed before the Court *En Banc*.

In an October 26, 2016 Resolution, the Court *En Banc* ordered the respondents-taxpayers to file their comment within ten (10) days from receipt of the resolution.

On November 21, 2016, the respondents-taxpayers filed their Comment.

In a December 12, 2016 Resolution, the Court *En Banc* gave due course to the Petition for Review and required the parties to file their Memoranda.

On February 9, 2017, the respondents filed their Memorandum. The CIR, however, failed to file his Memorandum.[49]

Accordingly, on March 6, 2017, the Court *En Banc* submitted the case for decision.

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[47] Resolution dated August 20, 2015, Division Docket, Vol. III, p. 1276.
[48] Rollo, pp. 1-3.
[49] Records Verification Report dated February 15, 2017, Rollo, p. 121.

THE ISSUES

To summarize the CIR's assignment of errors, the CIR petitions the Court to deny the CGT refund on the following grounds:

1. The respondents failed to file a valid administrative claim for refund with the CIR before filing the judicial claim in the Court below;

2. The share swap transaction between respondent Cos and Puregold does not qualify as a tax-free exchange under Section 40(C)(2) and 6(c) of the NIRC, as amended, because:

    a. Section 40(C)(2) of the NIRC, as amended, is not applicable when control is already vested in Puregold prior to the exchange; and,

    b. The respondents failed to file a confirmatory ruling pursuant to Section 58(E) of the NIRC, as amended, and Revenue Regulations No. 18-2001.

THIS COURT'S RULING

Preliminary Discussion

Petitioner CIR opposes this refund claim and prays for the denial of the claim granted by the Court in Division. Several legal points were raised supporting the petition and inviting this Court to review and reverse the decision below. But a closer look at the records of the case would reveal that the CIR *failed* to present any evidence during the trial.[50] Specifically, it was manifested that no report of investigation was submitted by the examiners to the CIR's counsels.[51]

Trials are adversarial which is inherent in our judicial system[52] and the system, when properly employed, serves to ferret out and expose the truth. The Court is not, however, vested with assessment powers.[53] That mandate belongs to the CIR.[54]

Accordingly, the Court adjudicates primarily on the basis of evidence presented during trial, *long after the lapse* of the opportunity provided by law for the BIR to initially investigate and then later on assess the business transaction for any taxes that may still be due to the government. The Court notes that the CIR *could have armed* the Court with *facts offered as evidence*

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[50] Resolution dated June 15, 2015, Division Docket, Vol. II, pp. 1204-1205.
[51] *Id.*
[52] *Regala, et al. v. Sandiganbayan et al.*, G.R. No. 105938, September 20, 1996, *En Banc*.
[53] *SMI-ED Philippines Technology, Inc. v. Commissioner of Internal Revenue*, G.R. No. 175410, November 12, 2014.
[54] Section 6, NIRC, as amended.

during trial from his findings from the investigation of the transaction. That would have allowed the Court to hear his side on the more substantive aspects and perhaps a complete picture of the share swap transaction, the basis of the Cos's CGT payments and this refund claim.

Finally, We proceed bearing in mind that, tax refunds, which are in the nature of tax exemptions, are construed in *strictissimi juris* against the taxpayer and liberally in favor of the government. Accordingly, it is a claimant's heavy burden to prove the factual and statutory basis to be entitled to a claim for refund or tax credit.[55]

Respondents filed a valid and timely administrative claim for refund.

The CIR contends that respondents actually failed to file a valid administrative claim on the following grounds:

- The administrative claims were filed by counsels Zambrano and Gruba Law Offices and not the taxpayers themselves;[56]

- The administrative claims do not contain duly executed Applications for Tax Credits/Refunds (BIR Form No. 1914); and,[57]

- The letters filed on August 20, 2014 and September 2, 2014 with attached Special Power of Attorney (SPA) and BIR Form No. 1914 (Exhibits P-32 to P-33-b) were filed beyond the two-year period prescribed in Section 229 of the NIRC, as amended, after the judicial claim was filed on June 6, 2014. In effect, the CIR was allegedly divested of authority to pass upon the propriety of the claim for refund.[58]

First, We note that these points have already been raised below and have been ruled upon by the Court in Division, thus:

> "In this case, petitioners Lucio Co, Susan Co, Ferdinand Co, and Pamela Co timely filed their administrative claims for refund on May 21, 2014 as well as their Petition for Review on June 6, 2014, or within two years from the dates of payment of the subject CGT on June 26 and 28, 2014.
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> Notably, petitioners also filed the letters dated August 19, and 27, 2014 addressed to Revenue District Office Nos. 34 and 21-A, respectively, submitting, among others, the original of the SPA they executed in favor of Zambrano and Gruba Law Offices or any of its lawyers.

[55] *Commissioner of Internal Revenue v. Team Sual Corporation*, G.R. No. 194105, February 5, 2014.
[56] Respondent's (CIR) Memorandum, Division Docket, Vol. III, pp. 1243-1244; Petition for Review, Rollo, pp. 10-11.
[57] Respondent's (CIR) Memorandum, Division Docket, Vol. III, p. 1243; Petition for Review, Rollo, p. 12.
[58] Respondent's (CIR) Memorandum, Division Docket, Vol. III, p. 1245; Petition for Review, Rollo, pp. 12-13.

> Corollary to the foregoing, the presumption in favor of the counsel's authority to appear on behalf of a client is strong. In fact, a lawyer is not even required to present a written authorization from the client for this purpose.
>
> Further, even an unauthorized appearance of an attorney may be ratified by the client either expressly or impliedly. Ratification retroacts to the date of the lawyer's first appearance and validates the action taken by him.
>
> In agency, ratification is the adoption or confirmation by one person of an act performed on his behalf by another without authority. The substance of ratification is the confirmation after the act, amounting to a substitute for a prior authority.
>
> In the subject SPA, petitioners gave Zambrano and Gruba Law Offices the authority to represent them in administrative cases and in any other proceedings in connection with their application and/or claim for tax refund of the CGT they paid as consequence of the share swap transaction. In the same SPA, petitioners also ratified all previous acts done or may lawfully do or cause to be done by the law office, by virtue of the authority granted unto them, thus:
>
> xxx xxx xxx
>
> In fine, Zambrano and Gruba Law Offices had the authority to represent petitioners in their administrative claims for refund filed with respondent even if the SPA was notarized only after its filing. Consequently, the Court properly acquired jurisdiction over the instant Petition." (*Underscoring supplied and citations omissions*)

Second, under Sections 21 and 22, Rule 138 of the Rules of Court, a counsel is presumed to be properly authorized to represent any cause in which he appears.[59] Thus, an act performed by a counsel within the scope of his general or implied authority is, in the eyes of the law, regarded as the act of the client himself.[60]

Third, there can surely be no doubt from the uniform tenors of the administrative claims, filed on May 21, 2014 within the two-year prescription, that they were filed by counsels in behalf of their clients, the taxpayers Cos.

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[59] "**Section 21.** *Authority of attorney to appear.* — an attorney is presumed to be properly authorized to represent any cause in which he appears, and no written power of attorney is required to authorize him to appear in court for his client, but the presiding judge may, on motion of either party and on reasonable grounds therefor being shown, require any attorney who assumes the right to appear in a case to produce or prove the authority under which he appears, and to disclose, whenever pertinent to any issue, the name of the person who employed him, and may thereupon make such order as justice requires. An attorneys wilfully appear in court for a person without being employed, unless by leave of the court, may be punished for contempt as an officer of the court who has misbehaved in his official transactions.

Section 22. *Attorney who appears in lower court presumed to represent client on appeal.* — An attorney who appears *de parte* in a case before a lower court shall be presumed to continue representing his client on appeal, unless he files a formal petition withdrawing his appearance in the appellate court."

[60] *Spouses Ragudo v. Fabella Estate Tenants Association, Inc.*, G.R. No. 146823, August 9, 2005.

We quote the first paragraphs of Exhibits P-17, P-18 and P-19 for ready reference:

> "Sir:
>
> On behalf of our clients, Mr. Lucio L. Co ("**Lucio Co**"), Ms. Susan P. Co ("**Susan Co**"), Mr. Ferdinand Vincent P. Co ("**Ferdinand Co**"), and Ms. Pamela Justine P. Co ("**Pamela Co**") (collectively referred to as the "**Co Family**"), we respectfully request for the refund or issuance of a tax credit certificate in the amount of **PhP1,647,615,290.07** representing erroneously paid capital gains tax, plus interest and/or compromise." (*Underscoring supplied*)[61]

Fourth, the CIR, unfortunately, cites no law or regulation which explicitly prohibits the filing of refund claim by a counsel on behalf of taxpayer. To use the lack of the SPA or even BIR Form No. 1914 as basis for denial of the judicial claim is to adhere to formalities at the expense of substance contrary to the guidelines of the CIR's Revenue Memorandum Ruling No. 01-2001 which govern tax-free exchange.[62] The respondents are correct in stating that the letters representing the administrative claim already disclosed sufficient facts and information about the share-swap transaction for the CIR to act on the claim.

Fifth, the filing of a judicial claim with the CTA does not operate to divest the CIR of authority to process the administrative refund claim.[63]

Finally, where the taxpayer claims a refund before the CTA, the taxpayer is required to prove every minute aspect of the claim.[64] As a court of record[65] the CTA conducts a formal trial or trial *de novo* of the claim filed. Thus, pieces of evidence submitted in the administrative proceeding at the BIR have no evidentiary value unless presented and formally offered before the Court.

For the same reason, incomplete submission of supporting documents in the administrative level is, therefore, *not fatal* to a claim for refund.[66] Judicial claims are decided based on what has been presented and formally offered by the parties during the trial.

[61] Exhibits P-17, P-18 and P-19, Division Docket, Vol. I, pp. 417-502.
[62] "Pursuant to Section 4, in relation to Sections 40(C)(2), (4), (5), (6), 175, 176, and 196, and pertinent provisions of Titles II, IV and VII of the National Internal Revenue Code of 1997 (Tax Code of 1997), this Revenue Memorandum Ruling is issued to consolidate, provide, clarify and harmonize the existing guidelines on the tax consequences of a non-recognition transaction consisting of a tax-free exchange of property for shares of stock under Section 40(C)(2) of the Tax Code of 1997. This Revenue Memorandum Ruling shall apply solely and exclusively to, and may be relied upon only in situations in which the facts are substantially similar to the facts stated below, but subject to the principles of substance over form."
[63] Consolidated cases of *Commissioner of Internal Revenue v. San Roque Power Corporation*, G.R. No. 187485, February 12, 2013.
[64] *Kepco Philippines Corporation v. Commissioner of Internal Revenue*, G.R. No. 179356, December 14, 2009.
[65] Section 8, R.A. 1125, as amended by R.A. 9282 and R.A. 9503.
[66] *Commissioner of Internal Revenue v. Team Sual Corporation (formerly Mirant Sual Corporation)*, G.R. No. 205055, July 18, 2014; *Pilipinas Total Gas, Inc. v. Commissioner of Internal Revenue*, G.R. No. 207112, December 8, 2015.

This Court is not barred from receiving, evaluating and appreciating evidence submitted before it. Once the claim for refund has been elevated to the Court, the admissibility, materiality, relevance, probative value and weight of evidence presented therein become subject to the relevant provisions of the Rules of Court. The question of whether or not the evidence submitted by a party is sufficient to warrant the grant of a claim for refund lies within the sound discretion and judgment of the Court.[67]

The share swap transaction between the Cos and Puregold qualifies as a tax-free exchange under Sections 40(C)(2) and 40(C)(6)(c) of the NIRC, as amended, based on the holding in *Filinvest.*

The four taxpayers and claimants Cos are Filipinos who are residents of the Philippines.[68]

As resident citizens, they are taxable on all income derived from sources within and without the Philippines.[69] Under Section 24(C) of the NIRC, as amended, the passive income of resident citizens from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation is subject to CGT.

The share swap transaction entered by the Cos, for which they paid the CGT subject of this claim, involved the disposition of their Kareila shares, or shares in a domestic corporation,[70] paid for by Puregold, another domestic corporation, with Puregold shares.[71] The exchange resulted in *further control* of Puregold when the Cos increased their ownership from 66.57% to 75.83%.[72]

The CGT refund of the Cos is anchored on Section 229 in relation to Sections 40(C)(2) and 40(C)(6)(c) of the NIRC, as amended, which covers tax-free exchanges:

> "**SEC. 40.** *Determination of Amount and Recognition of Gain or Loss.* –
>
> (A) *Computation of Gain or Loss.* – xxx.

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[67] *Total (Philippines), Incorporated v. Commissioner of Internal Revenue*, CTA EB Case Nos. 1264 and 1295, August 15, 2016.
[68] Par. 1, Summary of Admitted Facts, JSFI, Division Docket, Vol. II, p. 571.
[69] Section 23(A), NIRC, as amended.
[70] Under Section 22(C) of the NIRC, domestic corporations are those which are created or organized in the Philippines or under its laws.
[71] Exhibit P-23, Deed of Exchange, Division Docket, Vol. II, pp. 1055-1058.
[72] Decision, p. 15, Rollo, p. 40.

(B) *Basis for Determining Gain or Loss from Sale or Disposition of Property.* – xxx.

(C) *Exchange of Property.* -

(1) *General Rule.* - Except as herein provided, upon the sale or exchange or 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 also be recognized if property is transferred to a corporation by a person in exchange for stock or unit of participation in such a corporation of which as a result of such exchange said person, alone or together with others, not exceeding four (4) persons, gains control of said corporation: Provided, That stocks issued for services shall not be considered as issued in return for property.

xxx xxx xxx

(6) *Definitions.* -

xxx xxx xxx

(c) The term '***control***', when used in this Section, shall mean ownership of stocks in a corporation possessing at least fifty-one percent (51%) of the total voting power of all classes of stocks entitled to vote.

xxx xxx xxx

SEC. 229. *Recovery of Tax Erroneously or Illegally Collected.* - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, of any sum alleged to have been excessively or in any manner wrongfully 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." (*Underscoring supplied*)

Several revenue issuances were promulgated by the CIR relevant to Section 40(C)(2), foremost of which was Revenue Regulations No. (RR) 18-2001 dated November 13, 2001. RR 18-2001 was promulgated for the purpose of providing guidelines to monitor the basis of the properties transferred and shares received in a tax-free exchange under Section 40(C)(2), thus:

> "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 Thereof.
>
> xxx xxx xxx
>
> SECTION 1. Scope. — Pursuant to Section 244, in relation to Sections 40(C)(2), 58(E), 269, and 275 of the National Internal Revenue Code of 1997 (Tax Code of 1997), <u>these Regulations are hereby promulgated for the purpose of providing the guidelines in the proper monitoring of the basis of properties transferred, and shares received, pursuant to a tax-free exchange under Section 40(C)(2) of the Tax Code of 1997, and to establish the policies governing the imposition of fees for the monitoring thereof</u>." (Underscoring supplied)

In November 29, 2001, CIR Rene G. Bañez issued Revenue Memorandum Ruling No. (RMR) 01-2001 which clarified and harmonized the existing guidelines on the tax consequences of *property for shares exchanges* under Sections 40(C)(2) and 40(C)(6)(c). The provisions relevant to the share swap transaction in this case state:

> "SUBJECT : *Tax Consequences of Tax-Free Exchange of Property for Shares of Stock of a Controlled Corporation Pursuant to Section 40(C)(2) of the National Internal Revenue Code of 1997*
>
> TO : *All Internal Revenue Officers and Others Concerned*
>
> Pursuant to Section 4, in relation to Sections 40(C)(2), (4), (5), (6), 175, 176, and 196, and pertinent provisions of Titles II, IV and VII of the National Internal Revenue Code of 1997 (Tax Code of 1997), <u>this Revenue Memorandum Ruling is issued to consolidate, provide, clarify and harmonize the existing guidelines on the tax consequences of a non-recognition transaction consisting of a **tax-free exchange of property for shares of stock** under **Section 40(C)(2)** of the Tax Code of 1997</u>. <u>This Revenue Memorandum Ruling shall apply solely and exclusively to, and may be relied upon only in situations in which the facts are substantially similar to the facts stated below, but **subject to the principles of substance over form**</u>.
>
> I. FACTS

1. A domestic corporation (the "Transferor") owns certain property, consisting, for example, of the following:

xxx xxx xxx

2. X Corporation (the "Transferee") is a domestic corporation.

3. The Transferor transfers the property to the Transferee. In exchange, the Transferee issues shares to the Transferor out of the unissued portion of its existing authorized capital stock, or, if such existing authorized capital stock is insufficient, out of shares from an increase in the Transferee's authorized capital stock. The Transferor does not receive any money or property other than the aforementioned shares of the transferee.

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7. <u>As a result of the above-mentioned transfer, the Transferor acquires at least 51% of the total outstanding capital stock of the Transferee entitled to vote</u>.

II TAX CONSEQUENCES

1. *Income tax.* <u>The Transferor shall not recognize any gain or loss on the transfer of the property to the Transferee. Consequently, the Transferor will not be subject to capital gains tax, income tax, or to creditable withholding tax on the transfer of such property to the Transferee. Neither may the transferor recognize a loss, if any, incurred on the transfer</u>. The last paragraph of Section 40(C)(2) and (6)(c) of the Tax Code of 1997 state:

> 'No gain or loss shall also be recognized if property is transferred to a corporation by a person in exchange for stock or unit of participation in such 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.'
>
> '(c) The term 'control', when used in this Section, shall mean ownership of stocks in a corporation possessing at least fifty-one percent (51%) of the total voting power of all classes of stocks entitled to vote.'

xxx xxx xxx

III ADDITIONAL FACTS AND VARIATIONS NOT AFFECTING TAX CONSEQUENCES

<u>The following additional facts or variations will **not** affect the tax consequences of the transaction, as described above</u>: yc

1. In no. 1 of "I. Facts" stated above, **if the total number of Transferors does not exceed five persons**, whether such persons are **natural persons** or juridical persons.

2. In no. 7 of "I. Facts" stated above, the tax consequences are **not** affected by whether the Transferor is/was a shareholder prior to the transaction, or that, **prior to the transaction, the Transferor already possessed control of the Transferee by owning 51% or more of the total outstanding capital stock of the Transferee entitled to vote.** In such a case, the Transferor is deemed to have acquired '**further control**' of the Transferee, **which places the transaction within the purview of Section 40(C)(2) of the Tax Code of 1997**.

xxx xxx xxx"
(Emphases and underscoring supplied)

In 2002, the Court of Tax Appeals had an occasion to rule on a case of *further control* similar to the one at bench in *Filinvest Development Corporation et al. v. Commissioner of Internal Revenue.*[73]

In *Filinvest*, the CIR assessed income tax on the alleged gain on the property swap where Filinvest Development Corporation (FDC), a domestic corporation, together with its subsidiary Filinvest Alabang Incorporated (FAI) transferred parcels of land to its subsidiary Filinvest Land Incorporated (FLI), also a domestic corporation, in exchange for FLI shares. Prior to the exchange, FDC owned 80% of FAI and owned 67.42% of FLI. After the exchange, FDC retained 80% ownership of FAI but decreased its direct ownership of FLI to only 61.03%. As a result, FDC together with FAI owned 70.99% of FLI. The CTA cancelled the assessment and ruled that the property-for-share swap was a tax-free exchange under then Section 34(c)(2), now Sections 40(C)(2) and 40(C)(6)(c), where no gain or loss is recognized:

"The first issue which deals mainly with the deficiency income tax assessment against FDC and FAI is based upon the BIR examiners' finding that FDC and FAI failed to reflect in their income tax returns the alleged taxable income resulting from the property swap involving the parcels of land belonging to FDC and FAI and the shares of stock of FLI, and to pay the corresponding income tax due thereon.

However, petitioners aver that the transaction subject of the Deed of Exchange which took place among FDC, FAI and FLI qualified as a tax-free exchange under the then Section 34(c)(2) of the old Tax Code (now Section 40(c)(2) of the 1997 NIRC) for the reason being that the exchange of the parcels of land for the shares of stocks met all the requirements for the non-recognition of taxable gain, and as a result of the exchange, FAI and FDC collectively gained further control of FLI. Herein respondent, on the other hand, posits a contrary view saying that the transfer of property for shares should not be considered as tax-free since FDC's interest in FLI was, in fact eroded after the exchange and the transfer leading to the corporate re-organization did not result in further control for FDC. ge

[73] CTA Case No. 6182, September 10, 2002.

We do not agree with the respondent.

The controversy at bar is one that shall be resolved in the light of the provision of Section 34 (c)(2) of the old Tax code [now Section 40(C)(2)], then applicable when the subject transaction took place, thus:

xxx xxx xxx

As can be inferred from the aforequoted provision, no taxable gain from an exchange of property for shares of stock of a corporation shall be recognized if as a result of the exchange the transferor, alone or together with others, not exceeding four persons, gains control of the corporation. The term "control" as used in the above section shall mean ownership of stocks in a corporation possessing at least fifty-one percent (51%) of the total voting power of all classes of stock entitled to vote (Section 34(c)(6)(c) of the 1993 Tax Code).

xxx xxx xxx

It is significant to note that prior to the exchange FDC held 67.42% of the total voting stocks of FLI while FAI, initially, did not hold any stock at all. After the exchange, new shares of stock were issued and as a result, FDC owned 61.03% and FAI had 9.96% of stockholdings. **Evidently, the exchange of properties between FDC and FAI with FLI resulted in the further control of FDC and FAI as far as stock ownership in FLI is concerned**.

The seeming reduction of the number of shares owned by FDC after the exchange does not affect the so-called control requirement. As correctly pointed out by the petitioners, it is incorrect to isolate the effect of the exchange on FDC's equity in FLI from that of FAI. The transaction of FDC and FAI with FLI should not be treated separate and distinct from each other, but instead they must be viewed together. Section 34(c)(2), as above-quoted, speaks of control being acquired 'alone or together with others, not exceeding four persons.' Clearly the control requirement is sufficiently met when after the transfer, the transferors, not more than four, collectively become the owners of at least 51% of the equity of the transferee, or if already owning 51%, increase their equity further in the transferee corporation. It is not required that each of the several transferors individually gains control or individually increases their interest. What is important is that each of the transferor, numbering not more than four, collectively increases his equity in the transferee corporation by 51% or more.

Numerous BIR rulings were even issued which categorically confirmed the non-recognition of any taxable gain or loss if the exchange resulted in the further control of the transferors in the transferee's stockholdings (*BIR Ruling No.* 132-95, August 29, 1995; *BIR Ruling No.* 109-94, May 31, 1994; *BIR Ruling No.* 244-82, September 7, 1983; *BIR Ruling No.* 506-93, December 22, 1993; *BIR Ruling No.* 06-93, January 14, 1993; and *BIR Ruling No.* 149-94, September 29, 1994). All these rulings involved situations where the transferors were more than one but not more than four and gained control of the transferee by collectively owning at least 51% of the latter's capital stock. While it is true that rulings, which merely embody administrative opinions on queries, do not have the force and effect of laws (*Alexander Howden & Co., Ltd. vs. Collector of Internal Revenue*, 13 SCRA 601, April 14, 1965), courts may uphold the same especially where there is no showing that they are contrary to law (*Commissioner of Internal Revenue vs. Ledesma*, L-17509, January 30, 1970)." (*Underscoring and emphasis supplied; citations omitted*)

In 2011, the Supreme Court *En Banc* in *Commissioner of Internal Revenue v. Filinvest Development Corporation*[74] upheld the CTA's cancellation of the income tax assessment on the alleged gain recognized from the transfer of parcels of land by FDC. The Supreme Court decided in favor of FDC and stated that the properties-for-shares transfer qualified as a tax-free exchange under then Section 34(c)(2) of the NIRC, now Sections 40(C)(2) and 40(C)(6)(c). The decision reads in pertinent part:

"In G.R. No. 167689, we also find a dearth of merit in the CIR's insistence on the imposition of deficiency income taxes on the transfer FDC and FAI effected in exchange for the shares of stock of FLI. With respect to the Deed of Exchange executed between FDC, FAI and FLI, Section 34 (c) (2) of the 1993 NIRC pertinently provides as follows:

Sec. 34. Determination of amount of and recognition of gain or loss. —

xxx xxx xxx

(c) Exception — . . .

No gain or loss shall also be recognized if property is transferred to a corporation by a person in exchange for shares of stock in such corporation of which as a result of such exchange said person, alone or together with others, not exceeding four persons, gains control of said corporation; **Provided**, *That stocks issued for services shall not be considered as issued in return of property.*

As even admitted in the 14 February 2001 Stipulation of Facts submitted by the parties, the requisites for the non-recognition of gain or loss under the foregoing provision are as follows: (a) the transferee is a corporation; (b) the transferee exchanges its shares of stock for property/ies of the transferor; (c) the transfer is made by a person, acting alone or together with others, not exceeding four persons; and, (d) as a result of the exchange the transferor, alone or together with others, not exceeding four, gains control of the transferee. Acting on the 13 January 1997 request filed by FLI, the BIR had, in fact, acknowledged the concurrence of the foregoing requisites in the Deed of Exchange the former executed with FDC and FAI by issuing BIR Ruling No. S-34-046-97. With the BIR's reiteration of said ruling upon the request for clarification filed by FLI, there is also no dispute that said transferee and transferors subsequently complied with the requirements provided for the non-recognition of gain or loss from the

[74] Consolidated cases of G.R. No. 163653 and G.R. No. 167689, July 19, 2011.

exchange of property for tax, as provided under Section 34 (c) (2) of the 1993 NIRC.

Then as now, the CIR argues that taxable gain should be recognized for the exchange considering that FDC's controlling interest in FLI was actually decreased as a result thereof. For said purpose, the CIR calls attention to the fact that, prior to the exchange, FDC owned 2,537,358,000 or 67.42% of FLI's 3,763,535,000 outstanding capital stock. Upon the issuance of 443,094,000 additional FLI shares as a consequence of the exchange and with only 42,217,000 thereof accruing in favor of FDC for a total of 2,579,575,000 shares, said corporation's controlling interest was supposedly reduced to 61%.03* when reckoned from the transferee's aggregate 4,226,629,000 outstanding shares. Without owning a share from FLI's initial 3,763,535,000 outstanding shares, on the other hand, FAI's acquisition of 420,877,000 FLI shares as a result of the exchange purportedly resulted in its control of only 9.96% of said transferee corporation's 4,226,629,000 outstanding shares. On the principle that the transaction did not qualify as a tax-free exchange under Section 34 (c) (2) of the 1993 NIRC, the CIR asseverates that taxable gain in the sum of P263,386,921.00 should be recognized on the part of FDC and in the sum of P3,088,711,367.00 on the part of FAI.

The paucity of merit in the CIR's position is, however, evident from the categorical language of Section 34 (c) (2) of the 1993 NIRC which provides that gain or loss will not be recognized in case the exchange of property for stocks results in the control of the transferee by the transferor, alone or with other transferors not exceeding four persons. Rather than isolating the same as proposed by the CIR, FDC's 2,579,575,000 shares or 61.03% control of FLI's 4,226,629,000 outstanding shares should, therefore, be appreciated in combination with the 420,877,000 new shares issued to FAI which represents 9.96% control of said transferee corporation. Together FDC's 2,579,575,000 shares (61.03%) and FAI's 420,877,000 shares (9.96%) clearly add up to 3,000,452,000 shares or 70.99% of FLI's 4,226,629,000 shares. Since the term 'control' is clearly defined as 'ownership of stocks in a corporation possessing at least fifty-one percent of the total voting power of classes of stocks entitled to one vote' under Section 34 (c) (6) [c] of the 1993 NIRC, the exchange of property for stocks between FDC FAI and FLI clearly qualify as a tax-free transaction under paragraph 34 (c) (2) of the same provision.

Against the clear tenor of Section 34 (c) (2) of the 1993 NIRC, the CIR cites then Supreme Court Justice Jose Vitug and CTA Justice Ernesto D. Acosta who, in their book Tax Law and Jurisprudence, opined that said provision could be inapplicable if control is already vested in the exchangor prior to exchange. Aside from the fact that that the 10 September 2002 Decision in CTA Case No. 6182 upholding the tax-exempt status of the exchange between FDC, FAI and FLI was penned by no less than Justice Acosta himself, FDC and FAI significantly point out that said authors have acknowledged that the position taken by the BIR is to the effect that 'the law would apply even when the exchangor already has control of the corporation at the time of the exchange.' This was confirmed when, apprised in FLI's request for clarification about the change of percentage of ownership of its outstanding capital stock, the BIR opined as follows:

> Please be informed that regardless of the foregoing, the transferors, Filinvest Development Corp. and Filinvest

> Alabang, Inc. still gained control of Filinvest Land, Inc. The term 'control' shall mean ownership of stocks in a corporation by possessing at least 51% of the total voting power of all classes of stocks entitled to vote. Control is determined by the amount of stocks received, i.e., total subscribed, whether for property or for services by the transferor or transferors. In determining the 51% stock ownership, only those persons who transferred property for stocks in the same transaction may be counted up to the maximum of five (BIR Ruling No. 547-93 dated December 29, 1993.)

At any rate, it also appears that the supposed reduction of FDC's shares in FLI posited by the CIR is more apparent than real. As the uncontested owner of 80% of the outstanding shares of FAI, it cannot be gainsaid that FDC ideally controls the same percentage of the 420,877,000 shares issued to its said co-transferor which, by itself, represents 7.968% of the outstanding shares of FLI. Considered alongside FDC's 61.03% control of FLI as a consequence of the 29 November 1996 Deed of Transfer, said 7.968% add up to an aggregate of 68.998% of said transferee corporation's outstanding shares of stock which is evidently still greater than the 67.42% FDC initially held prior to the exchange. This much was admitted by the parties in the 14 February 2001 Stipulation of Facts, Documents and Issues they submitted to the CTA. Inasmuch as the combined ownership of FDC and FAI of FLI's outstanding capital stock adds up to a total of 70.99%, it stands to reason that neither of said transferors can be held liable for deficiency income taxes the CIR assessed on the supposed gain which resulted from the subject transfer. (*Underscoring supplied and citations omitted*)

Based on the holding in *Filinvest*, therefore, the CIR has no basis to assert that the tax exemption in Sections 40(C)(2) and 40(C)(6)(c) does not cover the share swap transaction insofar as the control of Puregold was already vested in the four Cos even *prior* to the exchange.

What is clear in *Filinvest* is that Sections 40(C)(2) and 40(C)(6)(c) cover instances of *further control*, when, as a result of the tax-free exchange the transferors (Cos) collectively increase their control of the transferee corporation (Puregold), i.e. 66.5720% to 75.8329%.

Sections 40(C)(2) and 40(C)(6)(c) speak of control being acquired 'alone or together with others, not exceeding four persons.' The control requirement is sufficiently met when after the transfer, the transferors, not more than five, *collectively* become the owners of at least 51% of the equity of the transferee, or if already owning 51%, increase their equity further in the transferee corporation. It is *not* required that *each* of the several transferors individually *gains* control or individually increases his/her interest. What is important is that each of the transferors, numbering *not* more than five, *collectively* increases their equity in the transferee corporation by 51% or more. *jv*

A confirmatory ruling under RR 18-2001 is not a condition *sine qua non* for the availment of a tax exemption.

Another ground which the CIR invokes for the denial of the refund claim is the failure of the respondents Cos to obtain a confirmatory BIR ruling on the tax-free nature of their share swap transaction.

In 2015, the CTA *En Banc* in *Commissioner of Internal Revenue v. Dakudao & Sons, Incorporated*[75] affirmed the refund claim of Dakudao, a domestic corporation, for the VAT paid on its assignment of two parcels of land to Metro South Davao Property Corporation (MSDPC), a domestic corporation, in exchange for MSDPC shares. In the case, it was stated that as a result of the exchange, Dakudao gained 75% control of the MSDPC. This Court then held that a prior confirmatory ruling from the BIR under RR 18-2001 is not a condition *sine qua non* for the tax exemption of the property-for -share transaction:

> "Furthermore, RR No. 18-2001 which petitioner relies on for the denial of the claim for refund by respondent merely provides for guidelines in the monitoring of the properties as well as shares of stocks, which are involved in a tax-free exchange under Section 40 (C) (2) of the NIRC. The Revenue Regulations does not deal with a requirement to apply for a ruling as a prerequisite for the entitlement of the exemption. RR No. 18-2001 shows nothing therein explicitly requiring a party, in exchanging property for shares of stocks, to first secure a BIR confirmatory certification or tax ruling before it can avail itself of **tax exemption** or **tax refund**.
>
> Such can be readily seen from the RR itself.
>
> '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 Thereof.
>
> xxx xxx xxx
>
> Section 1. Scope. — Pursuant to Section 244, in relation to Sections 40(C)(2), 58(E), 269, and 275 of the National Internal Revenue Code of 1997 (Tax Code of 1997), these Regulations are hereby promulgated for the purpose of providing the guidelines in the proper monitoring of the basis of properties transferred, and shares received, pursuant to a tax-free exchange under Section 40(C)(2) of the Tax Code of 1997, and to establish the policies governing the imposition of fees for the monitoring thereof.'

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[75] CTA EB No. 1150, May 12, 2015, CTA Case No. 8501.

These being considered, the Court is of the position that securing a BIR ruling under RR No. 18-2001 is not a condition *sine qua non* for the availment of tax exemption." (*Underscoring supplied*)

Thus, contrary to the position taken by the CIR, RR No. 18-2001 merely provides for guidelines in monitoring tax-free exchange of property. The BIR ruling required thereon serves to monitor the tax-free properties in order that in cases of subsequent sales of said properties, they shall be taxed accordingly. Stated differently, the BIR ruling/certification required under RR No. 18-2001 is for determining gain or loss on a subsequent sale or disposition of property subject of the tax-free exchange, and not as a precondition for availment of a tax exemption.

As final word, substantial justice dictates that the government should not keep money that does not belong to it at the expense of its citizens.[76] Considering the foregoing discussion, respondents have sufficiently proven that there was indeed an erroneous payment of CGT.

WHEREFORE the Petition for Review is **DENIED** for lack of merit. Accordingly, the June 2, 2016 Decision and the September 1, 2016 Resolution are hereby **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

(See Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

[76] *BPI-Family Savings Bank, Inc. v. Court of Appeals, et al.*, G.R. No. 122480, April 12, 2000.

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
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,

- versus -

LUCIO L. CO, SUSAN P. CO, FERDINAND VINCENT P. CO, and PAMELA JUSTINE P. CO.
Respondents.

CTA EB NO. 1522
(CTA Case No. 8831)

Present:

DEL ROSARIO, *PJ*,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, *JJ.*

Promulgated:

FEB 28 2018 10:23 a.m.

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the well-written *ponencia* of my learned colleague, the Honorable Associate Justice Juanito C. Castañeda, Jr., which denies the Petition for Review filed by petitioner Commissioner of Internal Revenue (CIR) for lack of merit, thereby affirming the assailed Decision and Resolution of the Court in Division.

I wish, however, to expound on the issue raised by petitioner anent the relevance of obtaining a ruling from the Bureau of Internal Revenue (BIR) which confirms the tax-free nature of the property in exchange for share transaction pursuant to Section 40(C)(2) of the National Internal Revenue Code (NIRC) of 1997, as amended, and the necessity of complying with all the documentary and reportorial requirements laid down in Revenue Regulations (RR) No. 18-01.

Petitioner insists that *sans* a BIR confirmatory ruling and compliance with the requirements set forth in RR No. 18-01, the exchange of property for share transaction entered into by respondents and Puregold Price Club, Inc. (Puregold) would not qualify as tax-free under Section 40(C)(2) of the NIRC of 1997, as amended.

Petitioner's contention is bereft of merit.

There is nothing in Section 40(C) of the NIRC of 1997, as amended, and in RR No. 18-01, which explicitly requires a taxpayer to secure a BIR confirmatory ruling and comply with the documentary and other reportorial requirements set forth therein before it can avail of its provisions relative to non-recognition of gain or loss arising from an exchange of property for share transaction

RR No. 18-01 was issued pursuant to Section 40(C)(6)(d) of the NIRC of 1997, as amended, **to ensure the proper and effective implementation of the provisions of Section 40 of the NIRC of 1997, as amended**. The main objective is **to provide guidelines in the proper <u>monitoring</u> of the basis of properties transferred, and shares received, pursuant to an exchange of property for share transaction under Section 40(C)(2) of the NIRC of 1997, as amended**. Section 10 of RR No. 18-01 provides for penalties in case of non-compliance, *viz.*:

> "SECTION 10. Penalties. — Every official, agent, or employee of the Registry of Deeds who is guilty of failing to annotate the information stated in Section 5 hereof shall, upon conviction for each omission, be punished by a fine of not less than Fifty Thousand Pesos (P50,000.00) but not more than One Hundred Thousand Pesos (P100,000.00) and suffer imprisonment of not less than ten (10) years but not more than fifteen (15) years and shall likewise suffer an additional penalty of perpetual disqualification to hold public office, to vote, and to participate in any public election pursuant to Section 58(E) in relation to Section 269 of the Tax Code of 1997.
>
> Every Corporate Secretary or the duly authorized officer of the corporation who is guilty of failing to annotate the information stated above shall, upon conviction for each omission, be punished by a fine of not more than One Thousand Pesos (P1,000.00), or suffer imprisonment of not more than six (6) months, or both pursuant to Section 275 of the Tax Code of 1997.
>
> Any other violation of the provisions of these Regulations by any of the parties to the exchange transaction or by any

> responsible public officer, shall be subject to the appropriate penalties provided under the Tax Code of 1997, and/or the Revised Penal Code."

Section 10 of RR No. 18-01 specifies the penalties to be imposed in the event of non-compliance with the requisites enumerated therein, but it does not state that any non-compliance will render the exchange of property for share transaction taxable or that taxable gain or loss would have to be recognized by the parties thereon.

While a BIR confirmatory ruling will facilitate the issuance of a certificate authorizing registration (CAR) and tax clearance (TCL) covering the properties transferred to the transferee corporation, and the compliance with the documentary and reportorial requirements will make it easy for the BIR to track the substituted basis of the properties transferred and shares issued for purposes of determining any taxable gain or loss on a subsequent disposition of said properties or share, failure, however, to secure the BIR confirmatory ruling or comply with the documentary and reportorial requirements will not *ipso facto* remove an otherwise tax-free exchange of property for share transaction from the ambit of Section 40(C)(2) of the NIRC of 1997, as amended, for as long as the requisites enumerated in ***Commissioner of Internal Revenue vs. Filinvest Development Corporation***[1] ***and Commissioner of Internal Revenue vs. Filinvest Development Corporation***[2] are met, *viz.*:

i) The transferee is a corporation;

ii) The transferee exchanges its shares of stock for property/ies of the transferor;

iii) The transfer is made by a person, acting alone or together with others, not exceeding four (4) persons; and,

iv) As a result of the exchange, the transferor, alone or together with others, not exceeding four, gains control of the transferee.

As discussed in detail in the *ponencia*, evidence presented by respondents sufficiently established that after the transfer of their Kareila Management Corporation (Kareila) shares to Puregold, in exchange for Puregold shares, the four (4) respondents, together with Anthony Sy, gained further control of Puregold. Respondents

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[1] G.R. No. 163653, July 19, 2011.
[2] G.R. No. 167689, July 19, 2011.

increased their shareholdings in Puregold from 65.5720% to 75.8329%.

Petitioner's argument that the transaction does not qualify as tax-free under Section 40(C)(2) of the NIRC of 1997, as amended, as respondents had control of Puregold prior to the exchange has no merit. This has been eloquently addressed in the *ponencia* when it cited the pertinent portions of Revenue Memorandum Ruling (RMR) No. 01-01 and the *Filinvest case.* To reiterate, Section 40(C)(2) of the NIRC of 1997, as amended, covers instances when as a result of the exchange, the transferor gains *further control* of the transferee.

When it is beyond dispute that a taxpayer is entitled to the refund sought, the government should not invoke technicalities or impose requirements not provided in the law just to keep the money which does not belong to it. No one, not even the State, should enrich oneself at the expense of another.[3] The sheer magnitude of the amount involved in this case should not prevent the Court from ordering its refund to respondents who have shown by sufficient evidence their entitlement thereto.

All told, I VOTE to DENY the Petition for Review filed by the Commissioner of Internal Revenue for lack of merit.

ROMAN G. DEL ROSARIO
Presiding Justice

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[3] BPI-Family Saving Bank, Inc. vs. Court of Appeals, G.R. No. 122480, April 12, 2000.