REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

DAKUDAO & SONS, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8501

Members:

CASTAÑEDA, JR., *Chairperson*
CASANOVA, and
COTANGCO-MANALASTAS, *JJ.*

Promulgated: JAN 13 2014
3:40 p.m.

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DECISION

CASTAÑEDA, JR., *J.*:

THE CASE

This is a claim for refund in the amount of One Hundred Twelve Million One Hundred Forty Thousand Pesos (₱112,140,000.00) allegedly representing erroneously paid value-added tax (VAT) of Dakudao & Sons, Incorporated during the fourth (4th) quarter of taxable year 2011.

THE FACTS

Petitioner Dakudao & Sons, Incorporated is a domestic corporation duly registered with the Securities and Exchange Commission (SEC), with principal office address at Km. 6, Lanang, Davao City.[1] It is a VAT-registered entity as evidenced by Bureau of Internal Revenue (BIR) Certificate of Registration No. 2RC0000539221 and Taxpayer's Identification Number (TIN) 000-264-631-000.[2] Petitioner is engaged in

[1] Par. 3, Summary of Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 196.
[2] Par. 4, Summary of Admitted Facts, JSFI, docket, p. 196; Exhibit "A".

real estate dealings, primarily to construct, develop, build, improve, and/or use subdivisions, road lots, commercial or residential buildings, hotels, condotels, service apartments, and to subdivide, develop, sell, lease, exchange and hold for investment purposes or otherwise, real estate properties or shares of stock.[3]

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue, vested with authority to carry out all the functions, duties and responsibilities of said office, including, *inter alia*, the power to decide, approve, and grant refunds or tax credits of overpaid or erroneously paid or collected internal revenue taxes. She holds office at the BIR National Office Building, Diliman, Quezon City.

Petitioner owned two (2) parcels of land located in Davao City, namely: Lot 2, Pcs-11-004637 consisting of 20,098 square meters, with Transfer Certificate of Title (TCT) No. T-428359[4]; and Lot 5-A, PSD-11-111425, being a portion of Lot 5, Pcs-11-004637 consisting of 42,202 square meters and covered by TCT No. 146-2010009680[5], both issued by the Register of Deeds of Davao City.

On March 24, 2011, Metro South Davao Property Corporation (MSDPC) was registered with the SEC[6] as a domestic corporation with an authorized capital stock divided into 20,000 shares; it is likewise engaged in real estate dealings.[7] After MSDPC's incorporation, there were still 15,000 unsubscribed shares[8] remaining, which petitioner bought. In April 1, 2011, to accommodate petitioner's additional subscription, MSDPC's authorized capital stock was amended from 20,000 shares to 4,984,000 shares or a total increase of 4,964,000 shares[9] that the SEC approved on May 6, 2011.[10]

As consideration for said subscription, petitioner executed a Deed of Assignment[11] in favor of MSDPC on April 30, 2011, assigning all its rights and interest over the two (2) parcels of land in favor of MSDPC.

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[3] Exhibit "B".
[4] Exhibit "C".
[5] Exhibit "C-1".
[6] Exhibit "D".
[7] Exhibit "E".
[8] *Ibid.* p. 4.
[9] Exhibit "V", Q36.
[10] Exhibit "G".
[11] Exhibit "I".

On December 20, 2011, petitioner paid the BIR the amount of ₱112,140,000.00 for the VAT of said transfer.[12]

Petitioner however alleged that since the transfer of the subject parcels of land was made in exchange for shares of stock to a controlled corporation, its payment of VAT was erroneous and/or excessive. Thus, on May 2, 2012, petitioner filed an administrative claim for VAT refund[13] with the BIR Revenue Region No. 19, Revenue District Office (RDO) No. 113, Davao City.

On June 11, 2012, petitioner filed the instant Petition for Review pursuant to Sections 204(C) and 229 of the National Internal Revenue Code (NIRC) of 1997, as amended.

In her Answer[14] filed on August 10, 2012, respondent raised the following special and affirmative defenses:

> "4. She reiterates and repleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses.
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> 5. Taxes collected are presumed to be in accordance with laws and regulations.
>
> 6. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue. A claim for refund is not *ipso facto* granted because respondent CIR still has to investigate and ascertain the validity of the claim.
>
> 7. Petitioner's basis to support its claim for refund or issuance of tax credit is Section 204 of the National Internal Revenue Code, hereunder quoted for reference:
>
> > 'Section 204. Authority of the Commissioner to Compromise, Abate or Refund or Credit Taxes. -
> >
> > xxx xxx xxx

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[12] Exhibits "J" and "K".
[13] Exhibits "L" and "M".
[14] Docket, pp. 148-162.

> (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 refund within two (2) years after the payment of the tax or penalty: Provided, however, That a refund filed showing an overpayment shall be considered as a written claim for refund. xxx' (Emphasis and underscoring supplied)'
>
> Corollary thereto, Section 229 of the NIRC provides:
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> '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 for any penalty claimed to have been 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, 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 and underscoring supplied)'

Noteworthy, the requirements under Section 229 for refund claims are as follows: *gr*

1. A written claim for refund or tax credit must be filed by the taxpayer with the Commissioner;

2. The claim for refund must be a categorical demand for reimbursement;

3. The claim for refund or tax credit must be filed, or the suit or proceeding therefor must be commenced in court within two (2) years from date of payment of the tax or penalty regardless of any supervening cause. (Commissioner of Internal Revenue vs. Rosemarie Acosta, G.R. No. 154068, August 3, 2007 citing Aban, Law of Basic Taxation in the Philippines)

Petitioner has the burden to prove that the requirements provided therein are complied with. And in connection thereto, it has the heavy burden to prove that there is a statutory basis for its claim for refund.

8. In an action for refund, the burden of proof is on the taxpayer who claims the exemption and he must justify his claim by the **clearest grant under the Constitutional or statutory law** and cannot be permitted by vague implications (BPI Leasing Corporation vs. Honorable Court of Appeals, G.R. 127624, November 18, 2003) The taxpayer is charged with the heavy burden of proving that he has complied with and satisfied all the statutory and administrative requirements to be entitled to the tax refund. (Commissioner of Internal Revenue vs. Eastern Telecommunications Philippines, Inc., G.R. 163835, July 7, 2010)

While Section 229 of the National Internal Revenue Code allows the recovery of tax erroneously or illegally collected, the Supreme Court had an occasion to rule that there is erroneous payment of taxes when a taxpayer pays under a mistake of fact, as when he is not aware of an existing exemption in his favor at the time the payment was made (CIR vs. Acesite Hotel Corporation, G.R. No. 147295, Feb. 16, 2007). An erroneous or illegal tax is defined as one levied without statutory authority or upon property not subject to taxation or by some officer having no authority to levy the tax, or one which is some other similar respect is illegal. (Black's Law Dictionary, page 486) In this case, petitioner failed to identify specific provision of the NIRC which categorically vest exemption to it as a juridical entity; instead it merely relied on Revenue Regulations (RR) No. 16-05, as amended by RR 04-07 which refers to change or cessation of status as VAT-registered person. Nowhere in the said provision downright provides that petitioner is exempted from the payment of value-added tax. Thus, the alleged tax exemption is hinged on vague proposition.

Worthy of emphasis is the fact that under Section 105 of the NIRC, it provides:

> '**Section 105.** *Persons Liable.* - Any person who, in the course of trade or business, sells barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 to 108 of this Code.
>
> The value-added tax is an indirect tax and the amount of tax may be shifted or passed on to the buyer, transferee or lessee of the goods, properties or services. This rule shall likewise apply to existing contracts of sale or lease of goods, properties or services at the time of the effectivity of Republic Act No. 7716.
>
> The phrase 'in the course of trade or business' means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a nonstock, nonprofit private organization (irrespective of the disposition of its net income and whether or not it sells exclusively to members or their guests), or government entity.
>
> The rule of regularity, to the contrary notwithstanding, services as defined in this Code rendered in the Philippines by nonresident foreign

persons shall be considered as being course of trade or business.'

Section 109 of the NIRC sufficiently provides for exempt transactions and perusal of the foregoing provision would reveal that there's nothing therein which explicitly provide that sale of real property in exchange of controlling shares of stock is exempt. Thus, a manifest intention of the legislature to subject such transaction to value-added tax. The tax was levied with statutory authority by virtue of Section 105 of the NIRC and thus, it is by no means erroneously or illegally collected.

9. *Assuming Arguendo* that there is a statutory basis for petitioner's claim for refund, it is incumbent upon the petitioner to secure a tax ruling granting exemption in case of transfer of real property in exchange of shares of stock prior to actual transfer. This is a condition sine qua non pursuant to Section 40 (C) (2) under Tax-free exchange of property for shares and implemented by Revenue Regulations No. 18-2001 which provides:

'**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 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 –

(a) A corporation, which is a party to a merger or consolidation, exchanges property solely for stock in a corporation, which is a party to the merger or consolidation; or

(b) A shareholder exchanges stock in a corporation, which is a party to the merger or consolidation, solely for the stock of another corporation also a party to the merger or consolidation; or

(c) A security holder of a corporation, which is a party to the merger or consolidation, exchanges his securities in such corporation, solely for stock or securities in such corporation, a party to the merger or consolidation.

No gain or loss shall also be recognized if property is transferred to a corporation by a person in exchange for stock or unit of participation in such a corporation of which as a result of such exchange said person, alone or together with others, not exceeding four (4) persons, gains control of said corporation: Provided, That stocks issued for services shall not be considered as issued in return for property.'

Revenue Regulations 18-2001 provides:

xxx xxx xxx

'SECTION 3. Submission of Information on the Basis of Properties. – The parties to a tax-free exchange of property for shares under Section 40(C)(2) of the Tax Code of 1997 who are applying for confirmation that the transaction is indeed a tax-free exchange shall, together with such information as the Commissioner of Internal Revenue may require, submit the following:

(a) A sworn certification on the basis of the property to be transferred pursuant to such exchange. The basis of each real property/share of stock or other property transferred must be itemized in the certification in order to enable the BIR to determine the basis for subsequent disposition and to make it possible for the Register of Deeds or the corporate secretary, as the case may be, to annotate the information on such basis for each property/share of stock on the reverse side of the Transfer Certificate of Title/Condominium Certificate of Title of the real property involved, or of Certificate of Stock. The sworn declaration must be executed by the transferor himself, or in case the transferor is a juridical entity, by an official with rank of no less than the Chief Financial Officer or his equivalent. The Commissioner of Internal Revenue is authorized to prescribe the form in which such sworn declaration shall appear.

(b) Certified true copies of the Transfer Certificates of Title and/or Condominium Certificates of Title of the real properties to be transferred;

(c) Certified true copies of the corresponding latest Tax Declaration of the real properties to be transferred. It is understood that any improvement is separately declared and therefore, covered by Tax Declaration distinct from the Tax Declaration on the land. Further, if the tax declaration was issued three (3) or more years prior to the exchange transaction, the Transferor shall include in the certification by the local government unit's Assessor that such tax declaration is the latest tax declaration covering the real property;

(d) Certified true copies of the certificates of stocks evidencing shares of stock to be transferred; and

(e) Certified true copy of the inventory of other property/ies to be transferred.

No certification/ruling will be issued by the Bureau of Internal Revenue unless the foregoing requirements, in addition to such other documents that the

> Commissioner of Internal Revenue may require, are submitted.
>
> SECTION 4. Information to be Contained in Certification/Ruling by the Bureau of Internal Revenue. – All Certifications or rulings issued by the Bureau of Internal Revenue confirming that an exchange of property for shares complies with the provisions of Section 40(C)(2) of the Tax Code of 1997 shall include a statement on the substituted basis of the property transferred'

It bears stressing that there is no definite grant of tax-exemption to petitioner, either statutory or constitutional. It merely relied on the 'illustration' provided under a Revenue Regulation. It then becomes imperative that petitioner can clear-cut demonstrate that the factual milieu exemplified in the regulation are on all fours with their case. Ergo, a BIR confirmation/ruling substantiating that such transaction is tax-exempt is indispensable. It is in this regard that petitioner utterly failed to obtain.

The option to secure a BIR ruling to evaluate the tax exemption being averred is available to the petitioner. This is mainly to afford the respondent to gauge whether the transaction is exempt or not. This is an administrative machinery which petitioner failed to utilized. The doctrine of exhaustion of administrative remedies ensures an orderly procedure which favors a preliminary sifting process, particularly with respect to matters peculiarly within the competence of the administrative agency. After this sifting process comes the availability of judicial review of administrative decisions such as that exercised by the Honorable Court herein. Judicial review of administrative decisions entails the Court to examine the method in which the decision was arrived at, and finding no error, lets the administrative decision stand. This is precisely because, as previously stated, these are matters peculiarly within the competence of the administrative agency.

Well-settled is the rule that exhaustion of available administrative remedies is a condition sine qua non before taking a judicial action. The Honorable Supreme Court, in a long line of cases, has consistently held that if a remedy within the administrative machinery can still be resorted to by giving the administrative officer every opportunity to decide on a matter that comes within his jurisdiction, then such remedy must be exhausted first before the court's power of judicial review can be sought (Province of Zamboanga del Norte vs. Court of Appeals, 342 SCRA 549, 557 [2000]; Zabat vs. Court of Appeals, 338 SCRA 551, 560 [2000]; Diamonon vs. Department of Labor and Employment, 327 SCRA 283, 291 [2000]; Social Security System Employees Association vs. Bathan-Velasco, 313 SCRA 250, 252 [1999]; Paat vs. Court of Appeals, 266 SCRA 167, 175 [1997]).

Moreso, the Honorable Supreme Court had the occasion to rule that where a remedy is available within the administrative machinery, this should be resorted to before resort can be made to courts, not only to give the administrative agency the opportunity to decide the matter by itself correctly, but also to prevent unnecessary and premature resort to courts. Thus, the party with an administrative remedy must not merely initiate the prescribed administrative procedure to obtain relief but also pursue it to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter itself correctly and prevent unnecessary and premature resort to the court. The doctrine of exhaustion of administrative remedies has practical and legal reasons. Resort to administrative remedies entails lesser expenses and provides for speedier disposition of controversies. Thus, for reasons of comity and convenience, courts will shy away from a dispute until the system of administrative redress has been completed and complied with so as to give the administrative agency every opportunity to correct its error and to dispose of the case. The underlying principle of the rule rests on the presumption that the administrative agency, if afforded a complete chance to pass upon the matter, will decide the same correctly ***(Gorospe vs. Vinzons-Chato, G.R. No. 132228, January 21, 2003).***

From the foregoing, it is evident that petitioner's cause of action is founded on its failure to avail of the administrative remedies. Since regulations mandate that a ruling or confirmation is necessary prior to a supposed tax-exempt transaction which petitioner failed to obtain, the resort to this judicial action then becomes a remedy for its lapses. And this should not be countenanced.

In view of that, the tax collected was not erroneous or illegal as there is no law or ruling confirming of such fact. Petitioner's claim of tax exemption is merely based on its own interpretation of a revenue regulation.

10. Assuming for the sake of argument that there is a statutory basis for the claim for refund, petitioner must still prove compliance with the following in order to be entitled to the claim for refund:

> (a) That the alleged value-added tax was erroneously or illegally collected.
>
> (b) That it has complied with the governing rules and regulations with regard to recovery of taxes erroneously or illegally collected/received as provided in Sections 204 and 229 of the National Internal Revenue Code (NIRC) of 1997, as amended.
>
> (c) Submission of complete documents in support of the administrative claim for refund otherwise there would be no compliance with regard to the filing of administrative claim for tax credit/refund which is a condition sine qua non prior to the filing of a judicial claim in accordance with Section 229 of the NIRC of 1997, as amended.

It must be stressed that in claiming a refund, a claimant must first file a written claim for refund, categorically demanding recovery of overpaid taxes with the Commissioner of Internal Revenue, before resorting to an action in court, first, to afford the CIR an opportunity to correct the action of the subordinate officers; and second to notify the government that such taxes have questioned, and the notice should then be borne in mind in estimating the revenue available for expenditure **(CIR vs. Rosemarie Acosta, G.R. No. 154068,**

Aug. 3, 2007) If there was no such decision of the Commissioner because she was not even given such opportunity to do so, the taxpayer cannot seek refuge under the cloak of having filed the action within the two (2) year prescriptive period on the ground that the Commissioner has not yet acted upon said claim for tax refund or tax credit. To allow the taxpayer to file his claim for refund will be creating a dangerous precedent. It would not be long that the courts will be dealing with monstrous clogging of dockets which could have been otherwise solved in the administrative level had taxpayer filed his claim for refund at the earliest opportunity. **(Geodetic and Construction Survey, Ltd vs. Commissioner of Internal Revenue, CTA Case No. 4526, June 1993)** In this case, it should be noted that the administrative claim for refund was alleged to have been filed on May 2, 2012 while this petitioner was filed on June 11, 2012. Although, petitioner is not legally proscribed to file this present petition, the intendment of the law in affording opportunity to the government will not be served.

11. Taxes are essential to the government's very existence; **(CIR v. Solidbank Corporation, G.R. No. 148191, November 25, 2003)** hence, the dictum that 'taxes are the lifeblood of the government.' For this reason, the right of taxation cannot easily be surrendered; statutes granting tax exemptions are considered as a derogation of the sovereign authority. **(CIR vs. Fortune Tobacco Corporation, G.R. Nos. 167274-75, July 21, 2008)** Since tax refunds are regarded as tax exemptions and these are to be construed in ***strictissimi juris*** against the person or entity claiming the exemption **(Philippine Phosphate Fertilizer Corporation vs. Commissioner of Internal Revenue GR No. 141973, June 28, 2005)**

12. In an action for refund, the **<u>burden of proof is on the taxpayer who claims the exemption</u>** and he must justify his claim by the clearest grant under the Constitutional or statutory law and cannot be permitted by vague implications **(BPI Leasing Corporation vs. Honorable Court of Appeals, G.R. 127624, November 18, 2003)** The taxpayer is charged with the heavy burden of proving that he has complied with and satisfied all the statutory and administrative requirements to be entitled to the tax refund **(Commissioner**

of Internal Revenue vs. Eastern Telecommunications Philippines, Inc., G.R. 163835 July 7, 2010)

13. The amount of One Hundred Twelve Million, One Hundred Forty Thousand Pesos (P112,140,000.00) being claimed by petitioner arising from alleged erroneous payment of value-added tax (VAT) incurred for the fourth quarter of 2011 is not properly documented.

14. Following the premise above-mentioned, petitioner has the burden of proving that the right to such tax refund indubitably exists and well-founded doubt is fatal to the claim."

On August 14, 2012, this Court issued a Notice of Pre-Trial Conference[15], informing the parties that the case is set for pre-trial conference on September 13, 2012.

Respondent submitted her Respondent's Pre-Trial Brief[16] on August 28, 2012; while petitioner submitted its Pre-Trial Brief[17] on September 10, 2012.

Thereafter, both petitioner and respondent submitted their Joint Stipulation of Facts and Issues[18] on September 28, 2012, which this Court approved in its October 3, 2012 Resolution[19]. Accordingly, the Court declared the pre-trial terminated and ordered petitioner to proceed with the initial presentation of its evidence.

On February 1, 2013, petitioner filed its Formal Offer of Evidence[20], offering Exhibits "A" to "TT-1", inclusive of sub-markings. In response, respondent filed a Motion to Admit Attached Comment (Re: Petitioner's Formal Offer of Evidence) with Manifestation[21] on February 12, 2013, praying that her attached comment be admitted despite being a day late in filing and further manifesting that she will no longer present her evidence.

[15] Docket, p. 164.
[16] Docket, pp. 165-169.
[17] Docket, pp. 174-187.
[18] Docket, pp. 195-200.
[19] Docket, p. 201.
[20] Docket, pp. 281-293.
[21] Docket, pp. 471-478.

In the Resolution[22] dated March 1, 2013, this Court granted respondent's Motion and admitted the attached Comment thereto; her manifestation was also noted. Likewise, this Court admitted the exhibits formally offered by petitioner except Exhibits "W" to "NN", for its failure to have said exhibits identified in court.

On March 20, 2013, petitioner filed a Motion for Partial Reconsideration (On Petitioner's Formal Offer of Evidence)[23], praying that the Court would reconsider its Resolution or in the alternative, allow the recall of petitioner's witness, Ms. Visminda B. Canque, to identify the documents denied. Conversely, in her Comment [To petitioner's Motion for Partial Reconsideration (On Petitioner's Formal Offer of Evidence)][24], respondent opposed the motion and maintained the correctness of the Court's ruling in accordance with Section 20[25] of Rule 132 of the Rules of Court. Consequently, this Court in its June 4, 2013 Resolution[26] ordered the recall of petitioner's witness for the identification of Exhibits "W" to "NN" and held the determination of petitioner's Motion for Reconsideration in abeyance.

Meanwhile, on February 28, 2013, petitioner filed an Omnibus Motion to Reopen the Case with Motion for issuance of *Subpoena Ad Testificandum*[27] claiming that since respondent will no longer be presenting any witness, it is therefore wise to have the revenue officer who signed and authorized the imposition of the subject VAT appear before the court. Petitioner prayed that a *Subpoena Ad Testificandum* be issued to Revenue Officer Abilia S. Bentulan of RDO No. 132, Revenue Region No. 19, Davao City, directing her to appear before the Court as adverse witness. In response, respondent filed her Comment (To Petitioner's Omnibus Motion to Reopen the Case with Motion for Issuance of *Subpoena Ad Testificandum*)[28] on March 21, 2013, opposing petitioner's motion on the ground that the requested Revenue Officer is not one of the witnesses named in petitioner's Pre-Trial Brief, and that it did not make any reservation to present said Revenue District Officer. Then on April 5, 2013, petitioner filed a Reply (To Respondent's Comment to Petitioner's Omnibus Motion to Reopen the Case with Motion for Issuance of *Subpoena Ad*

[22] Docket, pp. 491-492.
[23] Docket, pp. 506-512.
[24] Filed on April 15, 2013, docket, pp. 527-531.
[25] SEC. 20. *Proof of private document.* - Before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either:
(a) By anyone who saw the document executed or written; or
(b) By evidence of the genuineness of the signature or handwriting of the maker.
Any other private document need only be identified as that which it is claimed to be.
[26] Docket, pp. 540-541.
[27] Docket, pp. 482-488.
[28] Docket, pp. 501-504.

Testificandum)[29], emphasizing that the Joint Stipulation of Facts and Issues signed by both parties stated that both parties reserved the right to present additional witnesses when the need arises.

Accordingly, in its May 10, 2013 Resolution[30], this Court denied petitioner's Omnibus Motion for lack of merit stating that a party who has the burden of proof must introduce, at the first instance, all the evidence he relies upon and such evidence cannot be given piecemeal. Further, this Court likewise held that petitioner's additional evidence is neither rebuttal nor newly discovered. Thereafter, petitioner posted on June 4, 2013 its Motion for Reconsideration[31], claiming the necessity of reopening the case and the presentation of the Revenue Officer's testimony in the interest of justice.

During the June 19, 2013 hearing, as earlier ordered, petitioner's witness, Ms. Visminda B. Canque, was recalled and identified the previously denied exhibits; resulting in the admittance of Exhibits "W" to "NN" as petitioner's evidence. Moreover, this Court denied petitioner's Motion for Reconsideration for utter lack of merit and gave both parties a period of thirty (30) days within which to submit their respective Memorandum.

The case was submitted for decision on September 19, 2013,[32] considering respondent's Memorandum[33] filed on July 19, 2013 and petitioner's Memorandum[34] filed on September 17, 2013.

THE ISSUES

The parties submitted the following issues[35] for this Court's resolution:

> "1. Whether the alleged transfer of Petitioner's parcels of land to MSDPC in exchange for the latter's shares of stock is subject to Value Added Tax (VAT);
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> 2. Whether Petitioner's alleged payment of the VAT to Respondent in the total amount of **Php112,140,000.00** was erroneous;

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[29] Docket, pp. 516-519.
[30] Docket, pp. 534-538.
[31] Docket, pp. 546-551.
[32] Docket, p. 638.
[33] Docket, pp. 573-592.
[34] Docket, pp. 620-637.
[35] Proposed Issues to be Resolved, JSFI, docket, pp. 196-197.

3. Whether Petitioner's claim for refund was filed within the period prescribed by law.

4. Whether Petitioner is entitled to a refund in the amount of **Php112,140,000.00** representing alleged erroneous payment of Value Added Tax (VAT) in the fourth (4th) quarter of 2011.

5. Whether Petitioner has complied with the governing rules and regulations with regard to recovery of taxes collected/received as provided in the National Internal Revenue Code (NIRC) of 1997, as amended.

6. Whether petitioner has complied with the submission of complete documents in support of its administrative claim for refund."

The above-enumerated issues can be summarized as follows:

"Whether petitioner's transfer of its parcels of land to Metro South Davao Property Corporation in exchange for the latter's shares of stock is subject to VAT."

THE COURT'S RULING

Petitioner's claim is mainly anchored in Section 4.106-8 of Revenue Regulations (RR) No. 16-2005, as amended by RR No. 04-2007 and in Sections 204(C) and 229 of the NIRC of 1997, as amended; asserting that revenue regulations or administrative issuances have the force of law and are entitled to great weight.

On the other hand, in her Memorandum, respondent lengthily reproduced Revenue Regulations No. 18-2001 in relation to Section 40(C)(2) of the NIRC of 1997, arguing that since petitioner failed to apply for a BIR ruling to confirm that the exchange of property for shares of stock is exempted from payment of VAT as mandated by said Revenue Regulation, it therefore correctly paid the VAT due on the transfer of its parcels of land. Furthermore, she asserts that the exchange of petitioner's parcels of land with shares of stocks of MSDPC is not one of the exempt transactions enumerated under Section 109 of the NIRC of 1997, as amended. Respondent likewise points out petitioner's failure to submit the required documents provided in Revenue Memorandum Order (RMO) No. 53-98[36] for it to be entitled to refund.

Sections 204(C) and 229 of the NIRC of 1997 provide the period within which to file a refund claim for erroneous payment or illegal collection of internal revenue taxes, to wit:

> "SEC. 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." *(Emphasis supplied)*
>
> "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, 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. *jr*

[36] Issued on June 1, 1998, prescribes the documents required for submission by a taxpayer upon audit of his tax liabilities per type of tax, as well as the different mandatory audit reporting requirements to be prepared, submitted and attached to a tax audit docket by a Revenue Officer.

> **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)*

Pursuant to Sections 204(C) and 229, and as held in several cases, a taxpayer is given a period of two (2) years from payment of tax within which to file a refund, regardless of any supervening cause that may arise.

In the instant case, petitioner remitted its VAT Payment Form (BIR Form No. 0605)[37] together with the BTR-BIR Payment Slip[38] in the amount of ₱112,140,000.00 on December 20, 2011. Counting the two-year period from the date of payment of the tax, petitioner had until December 20, 2013 within which to pursue its claim in both administrative and judicial levels. Perusal of the case records shows that petitioner filed its administrative claim[39] for VAT refund on May 2, 2012, and its judicial claim *via* Petition for Review on June 11, 2012. Accordingly, both claims fall squarely within the period prescribed by law.

The Court will now proceed to determine whether petitioner erroneously paid VAT as to warrant a refund.

As earlier stated, petitioner based its claim for refund on Section 4.106-8(b) of Revenue Regulations No. 16-2005[40], as amended by RR No. 04-2007[41]. The pertinent parts of the provision are quoted as follows:

> "SECTION 4.106-8. *Change or Cessation of Status as VAT-registered Person.* –
>
> xxx xxx xxx

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[37] Exhibit "J".
[38] Exhibit "K".
[39] Exhibit "L".
[40] Dated September 1, 2005, otherwise known as "Consolidated Value-Added Tax Regulations of 2005".
[41] Dated February 7, 2007, entitled "Amending Certain Provisions of Revenue Regulations No. 16-2005, as amended, otherwise known as the Consolidated Value-Added Tax Regulations of 2005".

(b) Not subject to output tax

The VAT shall not apply to goods or properties existing as of the occurrence of the following:

(1) Change of control of a corporation by the acquisition of the controlling interest of such corporation by another stockholder or group of stockholders. The goods or properties used in business or those comprising the stock-in-trade of the corporation, having a change in corporate control, will not be considered sold, bartered or exchanged despite the change in the ownership interest in the said corporation.

Illustration: Abel Corporation is a merchandising concern and has an inventory of goods for sale amounting to Php1 million. Nel Corporation, a real estate developer, exchanged its real estate properties for the shares of stocks of Abel Corporation resulting to the acquisition of corporate control. The inventory of goods owned by Abel Corporation (Php1 million worth) is not subject to output tax despite the change in corporate control because the same corporation still owns them. This is in recognition of the separate and distinct personality of the corporation from its stockholders. However, the exchange of real estate properties held for sale or for lease, for shares of stocks, whether resulting to corporate control or not, is subject to VAT, subject to exceptions provided under Section 4.106-3 hereof. On the other hand, if the transferee of the transferred real property by a real estate dealer is another real estate dealer, in an exchange where the transferor gains control of the transferee-corporation, no output VAT is imposable on the said transfer.

(2) Change in the trade or corporate name of the business;

(3) Merger or consolidation of corporations. The unused input tax of the dissolved corporation, as of the date of merger or consolidation, shall be absorbed by the surviving or new corporation." *gr*

The illustration above shows that transfer of properties between two real estate dealers, in an exchange where the transferor gains control of the transferee-corporation, shall not be subject to output VAT.

Going back to the instant case, the respective Articles of Incorporation[42] of petitioner and of MSDPC indicate the purpose for which they were incorporated; *viz.*, the construction, development, improvement of all properties, including but not limited to real estate. While a "Real estate dealer", on the other hand, includes any person engaged in the business of buying, developing, selling, exchanging real properties as principal and holding himself out as a full or part-time dealer in real estate.[43] Thus, based on the Articles of Incorporation and the definition of "Real estate dealer" as provided under RR No. 16-2005, both petitioner and MSDPC are considered as real estate dealers.

It bears stressing that petitioner subscribed 4,964,000 shares of capital stock of MSDPC (or 75% of the total subscribed capital stock), and as payment to the subscription, petitioner assigned two parcels of land to MSDPC. The assignment resulted to petitioner having controlling interest over MSDPC.[44] Thus, the VAT on the transfer of the shares of stock and parcels of land is erroneously imposed pursuant to Section 4.106-8(b) of Revenue Regulations 16-2005, as amended by RR No. 04-2007, justifying a tax refund.

Respondent asserts that petitioner correctly paid its VAT liability based on two grounds, first, it failed to apply for a ruling with the BIR confirming that the exchange of property for shares of stock is exempted from payment of VAT, as required by said revenue regulation;[45] and second, said exchange is not one of the exempt transactions enumerated under Section 109[46] of the NIRC of 1997, as amended. However, said assertions are misplaced.

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[42] Exhibit "B", Dakudao & Sons Incorporated's Amended Articles of Incorporation; Exhibit "E", Metro South Davao Property Corporation's Articles of Incorporation; Exhibit "H", Metro South Davao Property Corporation's Amended Articles of Incorporation.

[43] SEC. 4.106-3, Revenue Regulations No. 16-2005.

[44] See Exhibits "I", "T" & "U".

[45] Revenue Regulations No. 18-2001.

[46] SEC. 109. *Exempt Transactions.* - (1) Subject to the provisions of Subsection (2) hereof, the following transactions shall be exempt from the value-added tax:
(A) Sale or importation of agricultural and marine food products in their original state, livestock and poultry of a kind generally used as, or yielding or producing foods for human consumption; and breeding stock and genetic materials therefore.
Products classified under this paragraph shall be considered in their original state even if they have undergone the simple processes of preparation or preservation for the market, such as freezing, drying, salting, broiling, roasting, smoking or stripping. Polished and/or husked rice, corn grits, raw cane sugar and molasses, ordinary salt, and copra shall be considered in their original state;

(B) Sale or importation of fertilizers; seeds, seedlings and fingerlings; fish, prawn, livestock and poultry feeds, including ingredients, whether locally produced or imported, used in the manufacture of finished feeds (except specialty feeds for race horses, fighting cocks, aquarium fish, zoo animals and other animals generally considered as pets);
(C) Importation of personal and household effects belonging to the residents of the Philippines returning from abroad and non-resident citizens coming to resettle in the Philippines: *Provided*, That such goods are exempt from customs duties under the Tariff and Customs Code of the Philippines;
(D) Importation of professional instruments and implements, wearing apparel, domestic animals, and personal household effects (except any vehicle, vessel, aircraft, machinery, other goods for use in the manufacture and merchandise of any kind in commercial quantity) belonging to persons coming to settle in the Philippines, for their own use and not for sale, barter or exchange, accompanying such persons, or arriving within ninety (90) days before or after their arrival, upon the production of evidence satisfactory to the Commissioner, that such persons are actually coming to settle in the Philippines and that the change of residence is *bona fide*;
(E) Services subject to percentage tax under Title V;
(F) Services by agricultural contract growers and milling for others of palay into rice, corn into grits and sugar cane into raw sugar;
(G) Medical, dental, hospital and veterinary services except those rendered by professionals;
(H) Educational services rendered by private educational institutions, duly accredited by the Department of Education (DEPED), the Commission on Higher Education (CHED), the Technical Education and Skills Development Authority (TESDA) and those rendered by government educational institutions;
(I) Services rendered by individuals pursuant to an employer-employee relationship;
(J) Services rendered by regional or area headquarters established in the Philippines by multinational corporations which act as supervisory, communications and coordinating centers for their affiliates, subsidiaries or branches in the Asia-Pacific Region and do not earn or derive income from the Philippines;
(K) Transactions which are exempt under international agreements to which the Philippines is a signatory or under special laws, except those under Presidential Decree No. 529;
(L) Sales by agricultural cooperatives duly registered with the Cooperative Development Authority to their members as well as sale of their produce, whether in its original state or processed form, to non-members; their importation of direct farm inputs, machineries and equipment, including spare parts thereof, to be used directly and exclusively in the production and/or processing of their produce;
(M) Gross receipts from lending activities by credit or multi-purpose cooperatives duly registered with the Cooperative Development Authority;
(N) Sales by non-agricultural, non-electric and non-credit cooperatives duly registered with the Cooperative Development Authority: *Provided*, That the share capital contribution of each member does not exceed Fifteen Thousand Pesos (P15,000) and regardless of the aggregate capital and net surplus ratably distributed among the members;
(O) Export sales by persons who are not VAT-registered;
(P) Sale of real properties not primarily held for sale to customers or held for lease in the ordinary course of trade or business, or real property utilized for low-cost and socialized housing as defined by Republic Act No. 7279, otherwise known as the Urban Development and Housing Act of 1992, and other related laws, residential lot valued at One million five hundred thousand pesos (P1,500,000) and below, house and lot, and other residential dwellings valued at Two million five hundred thousand pesos (P2,500,000) and below: *Provided*, That not later than January 31, 2009 and every three (3) years thereafter, the amounts herein stated shall be adjusted to their present values using the Consumer Price Index, as published by the National Statistics Office (NSO);
(Q) Lease of a residential unit with a monthly rental not exceeding Ten thousand pesos (P10,000) *Provided*, That not later than January 31, 2009 and every three (3) years thereafter, the amount herein stated shall be adjusted to its present value using the Consumer Price Index as published by the National Statistics Office (NSO);
(R) Sale, importation, printing or publication of books and any newspaper, magazine, review or bulletin which appears at regular intervals with fixed prices for subscription and sale and which is not devoted principally to the publication of paid advertisements;
(S) Sale, importation or lease of passenger or cargo vessels and aircraft, including engine, equipment and spare parts thereof for domestic or international transport operations;
(T) Importation of fuel, goods and supplies by persons engaged in international shipping or air transport operations;
(U) Services of banks, non-bank financial intermediaries performing quasi-banking functions, and other non-bank financial intermediaries; and

Revenue Regulations No. 18-2001[47] speaks of guidelines for Tax-Free Exchange of Property for Shares under Section 40(C)(2) of the National Internal Revenue Code of 1997. Section 1 thereof provided for the scope of said Revenue Regulation, to wit:

> "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."

As gleaned above, the Revenue Regulation that respondent relied on to justify petitioner's payment of VAT, was enacted pursuant to Section 40(C)(2) of the NIRC of 1997, as amended; which falls under Title II of the Tax Code, more specifically described as Tax on Income. It speaks of exchange of property for the purpose of determining gain or loss; it does not deal with value-added tax, which is found under Title IV of the same Code. Moreover, RR No. 18-2001 merely provides for guidelines in monitoring tax-free exchange of property. The BIR ruling required thereon is for the monitoring of 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.

Anent respondent's contention that it is imperative for petitioner to show proof of compliance with the checklist of requirements to be submitted involving a claim for VAT refund/tax credit in accordance with the requirements set forth under RMO No. 53-98, this Court agrees with

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(V) Sale or lease of goods or properties or the performance of services other than the transactions mentioned in the preceding paragraphs, the gross annual sales and/or receipts do not exceed the amount of One million five hundred thousand pesos (P1,500,000): *Provided*, That not later than January 31, 2009 and every three (3) years thereafter, the amount herein stated shall be adjusted to its present value using the Consumer Price Index as published by the National Statistics Office (NSO);
(2) A VAT-registered person may elect that Subsection (1) not apply to its sale of goods or properties or services: *Provided*, That an election made under this Subsection shall be irrevocable for a period of three (3) years from the quarter the election was made."

[47] Dated November 13, 2001, otherwise known as "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."

petitioner that said RMO is for tax audit investigation and not for refund of erroneously paid VAT. The same is explicit in its objective, which is to "identify the documents to be required from a taxpayer *during audit*".[48]

However, assuming *arguendo* that petitioner failed to submit the complete documents listed in RMO No. 53-98, this Court has consistently held that the term "complete documents" should be understood to refer to those documents that are necessary to support the application for refund or tax credit certificate, as determined by the taxpayer. The BIR examiner can require the taxpayer to submit additional documents but the examiner cannot demand what type of supporting documents should be submitted. Otherwise, the taxpayer will be at the mercy of the examiner, who may require the production of documents that the taxpayer cannot submit. Moreover, it is basic that respondent ought to know the tax records of all taxpayers.[49]

Substantial justice dictates that the government should not keep money that does not belong to it at the expense of citizens.[50] Taking all these circumstances together, petitioner sufficiently proved that there was indeed an erroneous payment of value-added tax.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** in favor of petitioner the amount of **₱112,140,000.00**, representing petitioner's erroneously paid VAT for the fourth quarter of taxable year 2011.

SO ORDERED.

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

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[48] SUBJECT: Checklist of Documents to be Submitted by a Taxpayer **upon Audit** of his Tax Liabilities as well as of the Mandatory Reporting Requirements to be Prepared by a Revenue Officer, all of which Comprise a Complete Tax Docket.

[49] *Diageo Philippines, Inc. vs. Commissioner of Internal Revenue*, CTA Case Nos. 7846 and 7865, January 16, 2012, citing *BPI-Family Savings Bank, Inc. vs. Court of Appeals, et. al.*, G.R. No. 122480, April 12, 2000, and *Commissioner of Internal Revenue vs. Ironcon Builders and Development Corporation*, G.R. No. 180042, February 8, 2010.

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

WE CONCUR:

CAESAR A. CASANOVA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinión of the Court's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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