REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

SMI-ED PHILIPPINES TECHNOLOGY, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 99
(C.T.A. Case No. 6532)

Present:

Acosta, P.J.
Castañeda, Jr.
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, JJ.

Promulgated:
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DECISION

BAUTISTA, J.:

Sought to be annulled and set aside in this Petition for Review are the December 29, 2004 Decision and June 15, 2005 Resolution of the Second Division of this Court in CTA Case No. 6532 which denied petitioner's claim for refund in the amount of P44,677,500.00 allegedly representing the erroneously paid five percent (5%) final tax on the sale of petitioner's factory and other buildings including the machinery and equipment installed therein pursuant to Republic Act (R.A.) No. 7916.

The material antecedents as borne from the records are as follows:

Petitioner is a corporation duly organized and existing under Philippine laws, with principal office address at First Philippine Industrial Park, Barangay Sta. Anastacia, Sto. Tomas, Batangas and is registered with the Securities and Exchange Commission.

On June 29, 1998, petitioner was registered with the Philippine Economic Zone Authority ("PEZA") as an Ecozone Export Enterprise under Republic Act No. 7916 to engage in the business of manufacturing ultra high-density microprocessor unit package, i.e. "C4 Olga" *(page 200, CTA Records).*

Petitioner constructed a factory and other buildings within the office premises, and purchased/imported machineries and equipment to be installed therein at a total cost of P3,150,925,917.00 as of December 31, 1999. However, it failed to commence operations since petitioner's Board of Directors initially approved the temporary closure of its factory effective October 15, 1999, due to the last Asian financial crisis. Eventually, its dissolution was finally approved by its directors and stockholders effective November 30, 2000.

In preparation for its closure and dissolution, a Deed of Absolute Sale dated August 1, 2000 was executed and entered into by and between the petitioner and Ibiden Philippines, Inc., an unrelated PEZA-registered company, involving the subject factory and other buildings including certain machinery and equipment installed therein, for the total consideration of ¥2,100,000,000.00

(equivalent to P893,550,000.00). On September 13, 2000, petitioner filed its quarterly income tax return for the third quarter of calendar year 2000 and subjected the entire gross sales of the abovementioned transaction to the five percent (5%) final tax and paid the tax of P44,677,500.00.

Subsequently, petitioner requested for the cancellation of its registration as an Ecozone Export Enterprise from PEZA, which was eventually granted effective September 20, 2000.

On January 18, 2001, petitioner filed with the Securities and Exchange Commission an application to amend its Articles of Incorporation to shorten its corporate term.

On February 2, 2001, petitioner filed with the Large Taxpayers Division or LTD (now Large Taxpayers District Office or LTDO) of the Bureau of Internal Revenue (BIR) its administrative claim for refund in the amount of P44,677,500.00 representing the alleged erroneously paid 5% final tax.

Furthermore, on March 1, 2001, petitioner filed its final income tax return for the 11-month period ending November 30, 2000, indicating an alleged net loss of P2,233,464,538.00 and an alleged refundable amount of P44,677,500.00 for the erroneously paid 5% tax *(Petitioner's Exhibit "F", CTA Records).*

Due to respondent's inaction on petitioner's claim for refund and in order to toll the running of the two-year prescriptive period, petitioner filed a Petition for Review with this Court on September 9, 2002.

In his Answer, respondent advanced the following Special and Affirmative Defenses:

"4. Petitioner's alleged claim for refund/tax credit is subject to administrative routinary examination/investigation by the respondent's Bureau;

5. Petitioner failed miserably to show that the total amount of P44,677,500.00 claimed as erroneously paid tax was erroneously or illegally collected or that the same was properly documented;

6. Taxes paid and collected are presumed to have been paid in accordance with law; hence, not refundable;

7. In an action for tax refund/credit, the taxpayer has the burden to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund; and

SECTION 2. It is incumbent upon petitioner to show that it has complied with the provisions of Section 204I in relation to Section 229 of the Tax Code."

After trial on the merits, the Second Division of this Court rendered the assailed decision on December 29, 2004, denying petitioner's claim for refund of the erroneously paid 5% final tax.

Not satisfied, petitioner moved for a reconsideration of the decision rendered on December 29, 2004, which was likewise denied in its Resolution dated June 15, 2005.

Thus the present recourse, with petitioner ascribing to the Second Division of this Court the following errors:

"A. The Honorable Second Division erroneously assessed the six percent (6%) capital gains tax on the sale of factory equipment. As clearly indicated in the National Internal Revenue Code of 1997 (hereinafter referred to as the "Tax Code" and the revenue issuances of the BIR, only <u>lands and buildings</u> are subject to the six percent (6%) capital gains tax.

SECTION 2. The Honorable Second Division erroneously resolved that this issue was passed upon in the original decision. Petitioner manifests, however, that the original decision merely focused on assessing <u>both</u> the sale of the equipment and the building to the six percent (6%) capital gains tax without necessarily making a decision on the different treatment afforded buildings and equipment by the Tax Code and the revenue issuances of the BIR.

C. The Honorable Second Division erroneously assessed the six percent (6%) capital gains tax on the sale of the factory building when the same is an ordinary asset not subject to the six percent (6%) capital gains tax.

D. Petitioner manifests, however, that the more grievous error is that it is not within the jurisdiction of the Honorable Second Division to make an assessment for the first time for a tax <u>which was not assessed</u> by the Respondent BIR.

E. Even if the Honorable Second Division has the authority to make the assessment, the right to make an assessment for the first time has already prescribed.

F. Moreover, even if the Honorable Second Division has the authority to make an assessment, Petitioner already has the right to the refund since the refund has become due and demandable in the absence of a Motion for Reconsideration filed by the Respondent. Given that the assessment is still being contested by the Petitioner, the assessment has not yet become due and demandable. As such, there can be no offsetting between the right of the Petitioner to Refund as against the assessment since the assessment is not yet due and demandable. Justice and fair play entitles Petitioner to the refund."

For an orderly discussion of the issues in the instant Petition, We shall synthesize them into the following: First, whether at the time of the subject sale, petitioner was entitled to the tax incentives under its PEZA registration. Second, whether the sale of the petitioner's factory building, equipment and machinery is subject to capital gains tax or the ordinary income tax of domestic corporations. Third, whether the Court has the authority to make a tax assessment. Lastly, whether there can be an offsetting between the right of petitioner to the refund and the capital gains tax found to be due by the Court's Second Division.

Anent the first issue, We rule in the negative.

Section 23 of R.A. No. 7916, also known as "The Special Economic Zone Act of 1995," as implemented by Rule XIII, Section 5 of the Implementing Rules and Regulations of R.A. No. 7916 provides that fiscal incentives granted to PEZA-registered enterprises shall apply only to registered **operations** of the said Enterprises and only during the period of its registration with PEZA.

Based on the Certification issued by the PEZA on September 8, 1999 *(page 9-10, CTA Records)* the available incentives to petitioner as a PEZA-registered Ecozone Export Enterprise, are as follows:

"1. Incentives under Book VI of EO 226 which include the following:

a. Corporate income tax holiday (ITH) for four (4) years for original project **effective on the date of start of commercial operation**....
b. Tax and duty free importation of merchandise which include raw materials, capital equipment, machineries and spare parts;
c. Exemption from wharfage dues and export tax, impost or fees;

xxx xxx xxx

2. After the lapse of ITH, the following incentives shall apply:

a. Exemption from national and local taxes, in lieu thereof payment of 5% final tax on gross taxable income as provided in Section 24 of R.A. 7916 and Rule XX of the Rules and Regulations to implement R.A. 7916;

xxx xxx xxx

3. Non-fiscal incentives shall include the following:

a. Permanent resident status within the ecozone for foreign investors with initial investment of at least US%150,000.00;

xxx xxx xxx

> Availment of the foregoing incentives in favor of SPTI is subject to all evaluation and/or processing requirements and procedures prescribed under PEZA Rules, pertinent circulars and directives...."

According to the Court's Second Division, petitioner cannot avail of the foregoing incentives since it did not commence operations. It ratiocinated as follows:

> "From the above-quoted provisions, it is likewise clear that in order for the PEZA registered company, business establishment or firm to avail of such benefits and incentives granted therein, the PEZA registered company, business establishment or firm should have already commenced its "operation". By the term "operation", it refers to the operation of the business, the nature of which is clearly defined in its certificate *(Exhibit B)* issued by the PEZA. With this premise, the Court will now look into the status of petitioner in resolving the third stipulated issue.
>
> A careful review of the evidence on record discloses that petitioner was able to prove that it has not commenced its operation since it became a PEZA registered enterprise on June 29, 1998 *(Exhibit B)*. Hence, it shall not be entitled to the benefits and incentives granted under the law, including the Income Tax Holiday (ITH) and the 5% preferential tax, among others. In effect, petitioner shall be subject to taxes, both local and national."

We agree with the aforementioned reasoning of the Second Division. In addition, it is likewise clear from the abovementioned Certification issued by the PEZA which was requested by petitioner, that the corporate ITH for 4 years for original project shall be effective on the date of the start of commercial operation. Admittedly, petitioner never began operations since its incorporation, hence, it cannot avail of the ITH at the time of the sale of the subject properties. The sale took place on August 1, 2000, which is a little over two (2) years from June 29, 1998, the date of petitioner's registration with PEZA.

On the second issue of what regular income tax rate will apply to the income realized from the sale of the subject properties, We quote with approval the conclusion reached by the Court's Second Division that the subject properties are subject to the 6% capital gains tax, to wit:

> "Prescinding from the above, it can be undeniably established that the subject properties sold by petitioner to Ibiden Philippines, Inc. are considered capital assets for the following reasons:
>
> 1) The factory, buildings, machineries and equipment attached thereto are properties which **do not include** stock in trade of the taxpayer or other properties of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year;
>
> 2) The factory, buildings, machineries and equipment attached thereto are properties held by the taxpayer **not primarily for sale** to customers in the ordinary course of his trade or business;
>
> **SECTION 2.** The factory, buildings, machineries and equipment attached thereto are properties **not yet used** in the trade or business, of a character which is subject to the allowance for depreciation provided in Subsection (F) of Section 34; and
>
> 4) The factory, buildings, machineries and equipment attached thereto are real properties **not yet used** in trade or business of the taxpayer.
>
> By force of logic, the subject properties sold by petitioner to Ibiden Philippines, Inc. are classified as real properties not excluded by the definition of "capital assets" provided for under Section 39(A)(1) of the 1997 NIRC. *(Emphasis supplied)*
>
> To reiterate, "the option to buy or sell property is regarded a capital asset if the optioned property constitutes, or if acquired would constitute, a capital asset in the hands of the taxpayer. x x x Property held for the production of income but not used in the trade or business of the taxpayer, is included in the term `capital assets' All those properties specifically excluded are considered ordinary assets and the profits realized therefrom must necessarily have to be treated as ordinary gains". ***(Gonzales and Robledo-Gonzales on NIRC, 2001 Ed., p. 239)***

The subject properties having been indubitably established as capital assets, as such, the same are not subject to corporate income tax but to capital gains tax.

Section 27(D)(5) of the 1997 NIRC explicitly provides:

> **SEC. 27. Rates of Income Tax on Domestic Corporations.**
> Xxx xxx xxx
>
> **(D) Rates of Tax on Certain Passive Incomes. —**
>
> xxx xxx xxx
>
> **SECTION 2. Capital Gains Realized from the Sale, Exchange or Disposition of Lands and/or Buildings.** — A final tax of six percent (6%) is hereby imposed on the gain presumed to have been realized on the sale, exchange, or disposition of lands and/or buildings which are **not actually used in the business of a corporation and are treated as capital assets, based on the gross selling price or fair market value as determined in accordance with Section 6(E) of this Code, whichever is higher, of such lands and/or buildings.** *(Emphasis and underscoring supplied)*

In addition, Section 2 of Revenue Regulations No. 8-98 provides, that:

> **SECTION 2. Final Tax on Sales, Exchanges or Transfers of Real Properties Classified as Capital Assets.** — The rate of six percent (6%) shall be imposed on capital gains presumed to have been realized by the seller from the sale, exchange or other disposition of real properties located in the Philippines, classified as capital assets, including pacto de retro sales and other forms of conditional sales **based on the gross selling price or fair market value as determined in accordance with Section 6(E) of the Code (i.e. the authority of the Commissioner to prescribe the real property values), whichever is higher** x x x *(Emphasis and underscoring supplied)*

From the foregoing and considering the above provisions, this Court hereby concludes that the properties sold by petitioner consisting of the factory, other buildings, machineries and equipment attached therein, which We have already classified as capital assets as defined under Section 39(A)(1) of the 1997 National Internal Revenue Code, are not subject to the corporate income tax. It is however subject to capital gains tax as provided for under Section 27(D)(5) of the same Code.

Xxx xxx xxx"

As regards the third issue, petitioner contends that it is not within the jurisdiction of the Honorable Second Division to make an assessment for the first time for a tax which was not assessed by the BIR. This issue was adequately addressed by the Court's Second Division in its assailed Resolution dated June 15, 2005, to wit:

> "At this juncture, We would like to clarify that this Court did not make any assessment as argued by petitioner. What the Court did was only to determine whether or not the petitioner under the facts as duly established, is entitled to its claimed refund and in the process, the Court, by necessity, has to determine the nature and character of the properties subject of this case in relation to the transaction entered into by the petitioner and whether or not it paid the correct taxes. Undeniably, this is an inherent function of this Court.
>
> Xxx xxx xxx
>
> We never ruled that the case falls under disputed assessment as to be under the jurisdiction of the Court. We acquired jurisdiction over the case because petitioner filed a judicial claim for refund. Nevertheless, the said capital gains tax liability is still beyond question as covered by this Court's jurisdiction, it being under the classification of "other matters" under Section 7 of R.A. No. 1125.
>
> Thus,
>
> > "Conformably with the principle of *ejusdem eneric*, the term 'other matters' as regards the CTA's jurisdiction could be those cases which do not necessarily involve disputed assessments or refunds in the case of the BIR or those related to Customs protest or forfeiture cases but <u>controversies which are still within the functions of the BIR</u> and Customs.
> >
> > Xxx xxx xxx
> >
> > It might also be possible that 'other matters' in the CTA's jurisdiction could also include questions relative to the propriety of tax collection xxx ***(Aban, Law on Basic Taxation, 1994 Ed., p.223)***.*" (Underscoring Ours)*

Moreover, in an analogous case, the Supreme Court has maintained its position on the matter, enunciating:

> "Respondent judge has no jurisdiction to take cognizance of the case because the subject matter thereof clearly falls within the scope of cases now *exclusively* within the jurisdiction of the Court of Tax Appeals. Section 7 of Republic Act No. 1125, enacted June 16, 1954, granted the Court of Tax Appeals *exclusive appellate jurisdiction* to review by appeal, among others, decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or <u>other matters arising under the National Internal Revenue Code or other law or part of law administered by the Bureau of Internal Revenue.</u> The law transferred to the Court of Tax Appeals jurisdiction over all cases involving said assessments previously cognizable by courts of first instance, and even those already pending in said courts. <u>The question of whether or not to impose a deficiency tax assessment on Meralco Securities Corporation undoubtedly comes within the purview of the word 'disputed assessments' or of 'other matters arising under the National Internal Revenue Code...'</u> x x x ***(Meralco Securities Corporation [now First Philippine Holdings Corporation] vs. Hon. Victorino Savellano and Asuncion Baron Vda. De Maniago, et.al., No. L-36748, October 23, 1982).****"* *(Underscoring Ours)*

As a consequence thereof, the argument raised by petitioner that there can be no offsetting between a claim for refund and a deficiency tax assessment if both are not yet due and demandable, citing the case of Domingo vs. Garlitos (8 SCRA 443), has become moot and academic."

In relation to the foregoing ratiocination and with regard to the last issue in this case, the tax liability of petitioner has become overdue and demandable as well as fully liquidated. Hence, We agree with the ruling of the Court's Second Division in its assailed Resolution that compensation in this case takes place by operation of law, in accordance with the provisions of Article 1279 of the New Civil Code.

WHEREFORE, finding no reversible error to reverse the assailed Decision promulgated on December 29, 2004 and the Resolution dated June 15, 2005, the instant petition for review is hereby DISMISSED. Accordingly, the assailed Decision and Resolution are hereby **AFFIRMED**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

Concurring and Dissenting Opinion
ERNESTO D. ACOSTA
Presiding Justice

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

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ERNESTO D. ACOSTA
Presiding Justice

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(CTA Case No. 6532)

Members:

Acosta, ***P.J.***
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, ***JJ.***

Promulgated:

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Concurring and Dissenting Opinion

I agree with my distinguished colleagues that due to the failure of petitioner to commence its business operations, it cannot be entitled to the tax incentives provided under its PEZA registration since under the law, such fiscal incentives apply only to registered **operations** of the said enterprise. I likewise concur with the conclusion reached by the majority that in view of such non-entitlement to the PEZA law incentives, petitioner is liable to regular income tax realized from the sale of its properties. However, I take exception to the imposition of the 6% final capital gains tax by the majority on the entire consideration of the sale and manifest that the capital gains tax on corporations must be applied only on sale of its land and/or buildings, thus, the Court must afford the different tax treatment which the law provides on the sale of its machineries and equipments.

The facts of the case are summed up as follows:

Petitioner SMI-ED Philippines is a domestic corporation organized under the laws of the Philippines and registered with the Philippine Economic Zone Authority (PEZA) as an Ecozone Enterprise under Republic Act No. 7916. It constructed a factory and buildings and purchased machineries and equipment to be installed thereon, allegedly at a total cost of P3,150,925,917.00, as of December 31, 1999. However, it failed to commence business operations.

Petitioner then sold its factory, other buildings, machineries and equipment to Ibiden Philippines for a total consideration of P893,550,000.00 and subjected the entire gross sales to five percent (5%) final tax, and consequently paid P44,677,500.00, pursuant to Republic Act No. 7916.

It filed its final income tax return for the period involved, declaring a net loss of P2,233,464,538.00 and a refundable amount of P44,677,500.00, representing the erroneously paid 5% final tax.[1]

Petitioner timely filed both its administrative and judicial claims for refund. Alleging inaction on the part of the respondent, petitioner filed a Petition for Review with this Court on September 9, 2002, docketed as CTA Case No. 6532 and raffled to the 2nd Division.

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[1] *Exhibit "F" (Rollo, pages 220-230) in relation Exhibit " C" (Rollo, pages 202-211)*

On December 29, 2004, the Second Division rendered its Decision denying the claim for refund on the following grounds:

> - Since petitioner failed to commence business operations, it cannot avail of the benefits granted to a PEZA registered entity, including the Income Tax Holiday (ITH) and the 5% preferential tax among others. And therefore, it is subject to taxes both national and local. Corollary to this, the Second Division found that the records show that petitioner mistakenly subjected the amount of P893,550,000 to 5% preferential tax available to PEZA registered companies doing business as such, and therefore the amount of P44,677,500 was erroneously paid; and
>
> - The properties sold by petitioner are capital assets and therefore subject to capital gains tax of 6% under Section 27 (D)(5) of the National Internal Revenue Code. Using gross selling price as basis, this amounts to P53,616,000.00 (P893,550,000 x 6%). Having paid the amount of P44,677,500, there is still a deficiency amounting to P8,935,500.

With the denial of its Motion for Reconsideration on June 15, 2005, petitioner elevated the case to the Court *En Banc* on July 18, 2005.

One of petitioner's arguments before the Court *En Banc* is that the Second Division erroneously assessed the 6% capital gains tax on the sale of the factory building and of the equipment without differentiating the tax treatment afforded to buildings and equipment by the Tax Code.

On capital gains tax of ***domestic corporations***, Section 27 (D)(5) of the National Internal Revenue Code provides:

> *(5) Capital Gains Realized from the Sale, Exchange or Disposition of Lands and/or Buildings*.- A final tax of six percent (6%) is hereby imposed on the ***gain presumed to have been realized on the sale, exchange or disposition of lands and/or buildings*** which are not actually used in the business of a corporation and are treated as capital assets, based on the gross selling price or fair market value as determined in accordance with Section 6(E) of this Code, whichever is higher, of such lands and/or buildings. (*Emphasis supplied*)

Petitioner correctly pointed out that the Tax Code provides for different tax treatments of the sale of land and/or buildings which are capital assets vis-à-vis other real properties of corporations which were sold such as machineries and equipment.

This is highlighted by the different wordings of the Tax Code with the regard to the capital gains tax liability of ***individuals*** in Section. 24 (D)(1) which reads:

> *(D) Capital Gains from Sale of Real Property. —*
>
> (1) In General. — The provisions of Section 39(B) notwithstanding, a final tax of six percent (6%) based on the gross selling price or current fair market value as determined in accordance with Section 6(E) of this Code, whichever is higher, is hereby imposed upon capital ***gains presumed to have been realized from the sale, exchange, or other disposition of real property*** located in the Philippines, classified as capital assets, including pacto de retro sales and other forms of conditional sales, by individuals, including estates and trusts: Provided, That the tax liability, if any, on gains from sales or other dispositions of real property to the government or any of its political subdivisions or agencies or to government-owned or -controlled corporations shall be determined either under Section 24(A) or under this Subsection, at the option of the taxpayer; xxx" (*Emphasis supplied*)

Based on the afore-quoted provision, when the case involves a domestic corporation, final capital gains tax shall be imposed only with regard to the sale or disposition of land and/or buildings classified as capital assets. The law makes a distinction on the sale of other capital assets, such as machineries and equipment as far as domestic corporations are concerned. Therefore there is merit in petitioner's claim that the sale of its machineries and equipment should not be subjected to capital gains tax, instead subject to ordinary income tax (to be computed together with the other income during the filing of the corporate income tax return).

With the above adverse consequences on the part of the petitioner, it is with due respect, that I manifest that it was an error on the part of the majority to uphold the Second Division and compute the final capital gains tax liability of petitioner in the amount of P53,613,000 based on the total consideration of the sale in the amount of Php893,550,000, which also includes the selling price of the machineries and equipment.

Records show that the total selling price of the disposed properties is JPY 2,100,000,000 (equivalent to P893,550,000). Of the total consideration, JPY400,000,000 (P170,200,000) is the consideration for the structural improvements (including factory and other buildings but excluding the machineries and equipment), while the balance amount of JPY1,700,000,000 (P723,350,000) is the consideration for the machineries and equipment.[2] Thus, the final capital gains tax liability of petitioner is only P10,212,000 (P170,200,000 consideration for the sale of the building multiplied by 6%).

Deducting the above-computed capital gains tax liability of P10,212,000 from petitioner's erroneously paid final tax of P44,677,500, there still exists a balance and/or over-payment of P34,465,500.

As declared by the Supreme Court in *Paseo Realty & Development Corporation vs. Court of Appeals et.al*,[3] the grant of a refund is founded on the assumption that the tax return is valid, *i.e.*, that the facts stated therein are true and correct.[4] Without the tax return, it is an error to grant a refund since it would be virtually impossible to determine whether the proper taxes have been assessed and paid. Conversely in this case, by submitting its Income Tax Return, petitioner sufficiently established that it incurred a loss, in the absence of contrary evidence.

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[2] *Exhibit "D", paragraph 3, Supplemental Joint Stipulation of Facts*
[3] *440 SCRA 235*
[4] *(citing Commissioner of Internal Revenue v. Court of Tax Appeals, G.R. No. 106611, July 21, 1994, 234 SCRA 348)*

Moreover, in *AB Leasing and Finance Corp., vs. Commissioner of Internal Revenue*,[5] this Court held that declarations made by the taxpayer in his income tax return are for all intents and purposes made in good faith and are true and correct having been made under the penalty of perjury. Thus, ***in the absence of any evidence that will taint the reliability, sufficiency and competency of the said returns, there is no cogent reason why this Court should not give due credence on these documents which were prepared by the petitioner under penalties of perjury***.[6]

Given the fact that petitioner's final income tax return for the period involved shown a net loss in the amount of P2,233,464,538 and that respondent has not issued any deficiency assessment against petitioner nor did respondent do anything to defeat the prima facie legitimacy accorded to the entries made in petitioner's income tax return[7] it is my opinion that the refund should be granted in the reduced amount of P34,465,500 representing the overpayment of petitioner.

To reiterate, as law distinctively states that capital gains tax on corporations shall be applied only on sale of land and/or buildings which are capital assets. The Court must, in the same way, afford the buildings and machineries the different tax treatment which the law provides. For well-settled is the legal principle that if a statute is clear and unequivocal, the law must be taken to mean what it says and applied without attempted interpretation.[8]

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[5] *C.T.A. CASE NO. 6085. November 19, 2001*

[6] *Banco Filipino Savings and Mortgage Bank, vs. Commissioner of Internal Revenue, C.T.A. CASE NO. 5611. October 5, 1999*

[7] *Commissioner of Internal Revenue, vs. Hopewell Tileman Power Systems, Inc., CA-G.R. SP No. 60898. March 13, 2002,; see also Commissioner of Internal Revenue vs. Pepsi Cola Products, Phil., CA-GR. SP No. 60132, March 29,2004 (citing Ropali Trading Corp. vs. NLRC, 296 SCRA 309)*

[8] *IBAAEU vs. Inciong, 132 SCRA 663*

With regard to the other matters raised, it is my opinion that they were sufficiently discussed and threshed out in the assailed Decision and Resolution of the Second Division as well as in the subject majority opinion.

Accordingly, I manifest my disagreement with regard to the denial of petitioner's claim for refund and maintain that the claim should be granted in the reduced amount of P34,465,500.00.

ERNESTO D. ACOSTA
Presiding Justice