REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

LEO MARIO CELDRAN,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8722

Members:
Bautista, *Chairperson*
Fabon-Victorino, *and*
Ringpis-Liban, JJ.

Promulgated:
JUL 21 2016
11:48 a.m.

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DECISION

BAUTISTA, J:

The Case

This Petition for Review filed on October 17, 2013, pursuant to *Section 229*[1] *of the 1997 National Internal Revenue Code,* as amended, ("NIRC")[2] and *Section 7(a)(1)*[3] *of Republic Act* ("RA") *No. 1125,* as

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[1] SECTION 229. *Recovery of Tax Erroneously or Illegally Collected.* — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

[2] Records, CTA Case No. 8722, Petition for Review, p. 7.

[3] Sec. 7. *Jurisdiction.* - The CTA shall exercise:

a. Exclusive appellate jurisdiction to review by appeal, as herein provided:

1. Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue;

amended by *RA No. 9282* and *RA No. 9503*, seeks for the Court to render judgment ordering respondent to pay the following:[4]

1. Tax refund in the amount of Php70,405.76 for deficiency expanded (creditable) withholding tax on property paid under protest, plus applicable interest charges at the legal rate of 12%;

2. Attorney's fees of Php30,000.00 and appearance fee of Php5,000.00 *per* appearance, cost of plane fare, transportation costs in Manila, meals and hotel accommodation amounting to no less than Php10.000.00 *per* hearing; and

3. Litigation expenses of no less than Php30,000.00.

The Parties

Petitioner Leo Mario Celdran is a Filipino, of legal age, single, and residing at D403 Kiener Hills Condominium, Matumbo St., Pusok, Lau-lapu City, Cebu, Philippines.[5]

Respondent Commissioner of Internal Revenue ("CIR") is the head of the Bureau of Internal Revenue ("BIR") holding office at the BIR National Office Building, Diliman, Quezon City.[6]

The Facts

On March 12, 2008, the Housing and Land Use Regulatory Board ("HLURB") issued a letter to Atty. Suzette L. Legislador-Lopez in relation to her letter dated January 15, 2008, requesting for confirmation that Star Group Companies, which includes Star Asset Management Ropoas, Inc. ("SAMRI"), is habitually engaged in the business of real estate.[7] It is represented that SAMRI was duly

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2. Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relations thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial; xxx"

[4] *Records, CTA Case No. 8722, Petition for Review*, pp. 7, 12.

[5] *Id., Exhibit "P-19," Judicial Affidavit ("JA") of Mr. Leo Mario Celdran*, p. 145.

[6] *Id., Pre-Trial Order*, p. 237.

[7] *Id., Exhibit "P-8," HLURB Letter*, pp. 35-36; *BIR Records*, pp. 2-3.

organized and existing under and by virtue of the laws of the Philippines, and its purpose, among others and as indicated in its Articles of Incorporation, is to transfer and sell such real properties acquired from financial institutions; that its principal business is asset management, mainly acquiring portfolios of non-performing assets such as foreclosed real properties owned or acquired ("ROPOAs") from financial institutions.; that SAMRI acquired ROPOAs all over the country, with the intention of selling them to third parties at competitive prices; and that, on average, each member of the Star Group Companies has sold more than six (6) properties during the past year of operations.[8] Based on these submissions, the HLURB Director of the Legal Services Group, confirmed that SAMRI is habitually engaged in the business of selling real estate.[9]

On January 11, 2010, petitioner filed its Withholding Tax Remittance Return or BIR Form No. 1606 for a transaction dated July 6, 2010 using a tax base of Php206,001.00 and the rate of one point five percent (1.5%)[10] as CGT[11], with SAMRI paying Php3,090.02.[12]

On February 11, 2010, SAMRI entered into a Contract to Sell with petitioner wherein the former contracted to sell to the latter four (4) parcels of land (the "Property") located in Cecilia Homes, Brgy. Basak, Lapu-lapu City containing a total area of Three Hundred Sixty-Six (366) square meters and covered by four (4) Transfer Certificates of Title ("TCT") registered under the name of Unimark Investment (SPV-AMC) Corporation ("Unimark") but already purchased by SAMRI.[13] The sale of the Property shall be in consideration of Two Hundred Six Thousand One Pesos (Php206,001.00) inclusive of Value-added Tax ("VAT"); with Php20,600.10 as down payment already paid on November 5, 2009,[14] Php144,200.90 as additional down payment paid on December 1, 2009,[15] and the balance of Php41,200.00 to be paid upon the presentation of titles in SAMRI's name.[16] Titles to the Property shall remain in the name of SAMRI until full payment.[17] With regard to taxes, the parties agreed that petitioner shall be liable for Creditable

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[8] *Records, Exhibit "P-8," HLURB Letter,* p. 35; *BIR Records,* p. 3.
[9] *Id., Exhibit "P-8-A," HLURB Letter,* p. 36; *BIR Records,* p. 2.
[10] *Id., Exhibit "P-5," BIR Form No. 1606,* p. 26; *BIR Records,* p. 42.
[11] *Id., Exhibit "P-19," JA of Mr. Leo Mario Celdran, QAs 13 and 14,* p. 146.
[12] *Id., Exhibit "P-5-A," BIR Tax Payment Deposit Slip,* p. 254-a; *BIR Records,* p. 41; SAMRI paid this amount as seller. Further, this was not shouldered by petitioner *per* Contract to Sell, see *Records, Exhibit "P-1-B,"* p. 3 of Contract to Sell, p. 21; *BIR Records,* p. 23.
[13] *Id., Exhibit "P-1," p. 1 of Contract to Sell,* p. 17; *BIR Records,* p. 25.
[14] *BIR Records,* Official Receipt No. 1094, p. 20.
[15] *Id.,* Official Receipt No. 1204, p. 20.
[16] *Records, Exhibit "P-1-A," p. 2 of Contract to Sell,* p. 18; *BIR Records,* p. 24.
[17] *Id., Exhibit "P-1-C," p. 4 of Contract to Sell,* p. 20; *BIR Records,* p. 22.

Withholding Tax ("CWT") in excess of the selling price, Documentary Stamp Tax ("DST"), and local transfer tax.[18] The Contract was duly notarized on February 2, 2010 in Cebu City[19], and on February 11, 2010 in Makati City[20].

Thereafter, petitioner went to BIR Mandaue Cebu RDO to have the Capital Gains Tax ("CGT") and DST computed.[21] Prepared for him was a One-Time Transactions ("ONETT") Computation Sheet[22] for Expanded Withholding Tax ("EWT"/CWT) and DST on the sale of real property classified as ordinary asset, computed by an ONETT Officer and approved by BIR Mandaue Cebu RDO, Evangeline S. Abanilla ("RDO Abanilla") and with payment later verified by an ONETT Member[23], provided therein is a computation of the taxes on account of the transaction dated February 11, 2010, in the following manner:[24]

COMPUTATION DETAILS				*PER* **AUDIT**	*PER* **REVIEW**
EXPANDED WITHHOLDING TAX					
TAX DUE					
Legal Basis: RR No. 2-98/RP No. 6-2001 (CTRP) NIRC					
P 1,775,100.00 (Tax Base)	x	3% (Applicable Rate)	P	**53,253.00**	
xxx		xxx		xxx	
DOCUMENTARY STAMP TAX					
TAX DUE					
Legal Basis: Section 196 (CTRP) NIRC					
P 1,775,100.00 (Tax Base)	x	P15.00 for every P1,000.00 of a fraction thereof	P	**26,640.00**	
xxx		xxx		xxx	

On November 25, 2010, TCT Nos. 110-2011000214, 110-2011000215, 110-2011000216 and 110-2011000217 were issued with SAMRI as the new registered owner and cancelling the TCTs under the name of Unimark.[25]

On February 17, 2011, petitioner paid SAMRI the balance of Php41,200.00, hence, the Property was fully paid.[26]

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[18] *Records, Exhibit "P-1-B," p. 3 of Contract to Sell,* p. 21; *BIR Records,* p. 23.
[19] *Id., Exhibit "P-1-D," p. 5 of Contract to Sell,* p. 21; *BIR Records,* p. 21.
[20] *Id., Exhibit "P-1-E," p. 6 of Contract to Sell,* p. 22; *BIR Records,* p. 20.
[21] *Id., Exhibit "P-19," JA of Mr. Leo Mario Celdran, A6,* p. 146.
[22] The copy of the ONETT Computation Sheet in the records (docket in the present case) does not include the Payment Verification while the one in the BIR Records includes this. It appears to have been signed by petitioner on March 21, 2011, after payments and verification were made.
[23] *BIR Records, ONETT Computation Sheet,* p. 50.
[24] *Records, Exhibit "P-2," ONETT Computation Sheet,* p. 23; *BIR Records,* p. 50.
[25] *BIR Records, Transfer Certificates of Title ("TCT"),* pp. 4-11.
[26] *Id., Official Receipt No. 3134,* p. 37.

Having complied with the conditions of the sale, SAMRI and petitioner entered into an undated Deed of Absolute Sale[27] duly notarized on March 2, 2011 in Cebu City[28], and on March 16, 2011 in Makati City[29].

Based on the ONETT Computation and on March 4, 2010, petitioner filed its Withholding Tax Remittance Return or BIR Form No. 1606 for the above-stated transaction declaring the Property's Fair Market Value ("FMV") *per* latest tax declaration at Php32,940.00, FMV as determined by the BIR Commissioner at Php1,775,100.00, and gross selling price at Php206,001.00; and remitting[30] a total amount of Php53,253.00 based on Php1,775,100.00 and the tax rate of three percent (3%) as EWT.[31] Further, on March 10, 2010, petitioner filed its Documentary Stamp Tax Declaration/Return (One-Time Transactions) or BIR Form No. 2000-OT also for the said transaction, paying the amount of Php26,640.00 based on Php1,775,100.00 and the effective tax rate of one point five percent (1.5%).[32] These payments were not refunded by SAMRI *per* stipulation in the Contract to Sell that petitioner will shoulder CWT and DST.[33]

On March 21, 2011, RDO Abanilla issued a Memorandum of Assignment No. ONETT080-03-2011-01761 to Revenue Officer Misael M. Cadavero ("RO Cadavero") for the audit/verification of the CGT of SAMRI for the February 11, 2010 transaction.[34]

Around the same time, petitioner went to RDO Abanilla to file the necessary documents for the processing of the Certificate Authorizing Registration ("CAR").[35] Upon follow up, RDO Abanilla refused to issue the CAR due to an alleged deficiency in the computation of the CGT, using the rate of 6% instead of the 3% paid by petitioner.[36] RDO Abanilla then informed him that she is elevating the issue to the BIR Cebu Regional Office Legal Division for a ruling

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[27] *Records, Exhibit "P-6," p. 1 of Deed of Absolute Sale,* p. 255; *BIR Records,* p. 29.
[28] *Id., Exhibit "P-6-C," p. 4 of Deed of Absolute Sale,* p. 258; *BIR Records,* p. 26.
[29] *Id.*
[30] *BIR Records, BIR Tax Payment Deposit Slip,* p. 45.
[31] *Records, Exhibit "P-3," BIR Form No. 1606,* p. 24; *BIR Records,* p. 44.
[32] *Id., Exhibit "P-4," BIR Form No. 2000-OT,* p. 25; *BIR Records,* p. 40; the rate of 1.5% was arrived at by dividing Php15.00 by Php1,000.00.
[33] *Id., Exhibit "P-1-B," p. 3 of Contract to Sell,* p. 21; *BIR Records,* p. 23.
[34] *BIR Records, Memorandum of Assignment,* p. 52.
[35] *Records, Exhibit "P-19," JA of Mr. Leo Mario Celdran, A19,* p. 147; *TSN Folder, October 27, 2014 Hearing,* p. 16.
[36] *Id., Exhibit "P-19," JA of Mr. Leo Mario Celdran, A19,* p. 147; *TSN Folder, October 27, 2014 Hearing,* p. 16.

therein on the correct rate; and that petitioner can pay the deficiency under protest for the issuance of the CAR.[37]

Based on the recommendation of RDO Abanilla, on October 21, 2011, petitioner filed its Payment Form or BIR Form No. 0605 for "Withholding Tax - Others (One-time transaction not subject to capital gains tax) [Sale/transfer or exchange of real properties other than capital assets];" and paid[38] under protest the basic CWT of Php53,253.00 representing the alleged deficiency of 3% (6% due, less 3% already paid) and interest of Php17,152.76 or a total amount of Php70,405.76.[39] *Per* agreement, this additional sum was likewise not refunded by SAMRI.[40]

On October 27, 2011, CAR 201100048722 was issued certifying that transfer of Property from SAMRI to petitioner are subject to CWT at 3% and DST, and the following were paid in this regard:[41]

KIND OF TAX	DATE OF PAYMENT	BASIC TAX	PENALTIES	TOTAL
Capital Gains Tax (EWT)	1/11/2010	3,090.02		3,090.02
Creditable Withholding Tax (EWT)	10/21/2011	53,253.00	17,152.76	70,405.76
Final Withholding Tax (EWT)	3/10/2010	53,253.00		53,253.00
Documentary Stamp Tax	3/10/2010	26,640.00		26,640.00
Certification Fee	10/27/2011	100.00		100.00

On the same date, a Tax Clearance Certificate ("TCC") with OCN 2TA0000396069 was issued by RDO Abanilla certifying that following were paid in connection with the transfer of Property from SAMRI to petitioner:[42]

KIND OF TAX	DATE OF PAYMENT	TOTAL
Withholding Tax	1/11/2010	3,090.02
Withholding Tax	10/21/2011	70,405.76
Withholding Tax	3/10/2010	53,253.00
Documentary Stamp Tax	3/10/2010	26,640.00
Certification Fee	10/27/2011	100.00

[37] *Records, Exhibit "P-19," JA of Mr. Leo Mario Celdran, A20,* p. 147; the letter of RDO Abanilla cannot be found in the records, although this fact was never controverted by respondent.
[38] *Id., Exhibit "P-11-A," BIR Tax Payment Deposit Slip,* p. 42; *BIR Records,* p. 47.
[39] *Id., Exhibit "P-11," BIR Form No. 0605,* p. 41; *BIR Records,* p. 48.
[40] *TSN Folder, October 27, 2014 Hearing,* pp. 10-11; see *Records, Exhibit "P-1-B," p. 3 of Contract to Sell,* p. 21; *BIR Records,* p. 23.
[41] *Records, Exhibit "P-12," Certificate Authorizing Registration ("CAR"),* p. 43; *BIR Records,* p. 35; despite the tax type indicated as CGT, CWT and FWT; the payment of SAMRI for CGT and the EWT payments of petitioner totaling 6% were all marked as EWT.
[42] *BIR Records, Tax Clearance Certificate ("TCC"),* pp. 30-34; CGT and EWT payments were all classified as "Withholding Tax."

Thereafter, the titles over the Property were transferred to petitioner.[43]

On August 2, 2012, petitioner filed with RDO Abanilla, a follow up letter on the ruling of the CIR regarding its query on the correct rate.[44]

On October 29, 2012, RDO Abanilla wrote a letter to the Chief of the Legal Division of RR No. 13, Cebu City, stating that SAMRI is akin to a bank or financial institution paying percentage tax on gross income, with the applicable rate of 6% for CWT; and that if the legal opinion is for applying the graduated rate of 1.5%, 3% & 5%, petitioner will request for a refund, if it is for applying the 6% rate, the issue will be put to rest.[45]

On October 30, 2012, petitioner's request, for issuance of a ruling or legal opinion on the CGT (should be EWT) paid on the transaction, was forwarded to the Legal Division of RR No. 13.[46]

On December 26, 2012, the resolution on the issue regarding the rate to be used was forwarded to the CIR.[47]

On September 6, 2013, petitioner filed with RDO Abanilla, his request for refund of erroneously and wrongfully assessed deficiency CGT (should be EWT) in the amount of Php70,405.76 paid under protest plus interest, claiming that the related transaction is subject only to the graduated rate of 3% since SAMRI is an entity habitually engaged in real estate business and/or has more than six (6) real estate transactions *per* year; and that the transaction was, instead, wrongfully subjected to a rate of 6%.[48]

On September 26, 2013, OIC-RD Hermeno A. Palamine ("OIC-RD Palamine") wrote a letter to petitioner stating that his request for refund cannot be processed by OIC-RD Palamine's office and was forwarded to the Legal Service of the BIR National Office.[49] On even

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[43] *Records, Exhibit "P-19," JA of Mr. Leo Mario Celdran, QA27,* p. 148.
[44] *Id., Exhibit "P-13," Follow-up Letter,* p. 44; *Exhibit "P-19," JA of Mr. Leo Mario Celdran, A31,* p. 149.
[45] *BIR Records, Opinion of RDO Abanilla,* pp. 58-59
[46] *Records, Exhibit "P-14," 1st Indorsement,* p. 45; *BIR Records,* p. 57.
[47] *Id., Exhibit "P-15," 2nd Indorsement,* p. 263; *BIR Records,* p. 56.
[48] *Id., Exhibit "P-16," Refund Letter to RDO,* pp. 49-50, with annex.
[49] *Id., Exhibit "P-18," Forwarding Letter,* p. 184.

date, he forwarded to the CIR the letter of petitioner, for consolidation with the previous indorsement dated December 26, 2012.[50]

On October 8, 2013 and by registered mail, petitioner filed his request for refund with the CIR of the assessed EWT/CWT paid under protest.[51]

On October 17, 2013, petitioner filed by registered mail with the Honorable Court the present Petition for Review, claiming a tax refund for his payment for deficiency EWT/CWT erroneously or excessively assessed.[52]

On November 26, 2013, OIC-RDO Rhodora V. Lagnada forwarded to the RD the letter of GS Cadavero to Assistant RD Manuel V. Mapoy.[53] The said letter states that GS Cadavero cannot act on the request pending the issuance of a resolution from the ACIR, Legal Office of the National Office on the correct tax rate applicable.[54]

On February 25, 2014, respondent filed her Answer,[55] interposing the following Special and Affirmative Defenses:[56]

> **SPECIAL AND AFFIRMATIVE DEFENSES**
>
> 4. She reiterates and re-pleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses.
>
> ***The instant claim for tax refund is tainted with procedural infirmity due to petitioner's failure to submit complete documents in support of its administrative claim for refund.***
>
> 5. Basic as a hornbook principle is that, **taxes are the lifeblood of the nation through which the government**

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[50] *Records, Exhibit "P-18-A," 2nd Indorsement,* p. 185.
[51] *Id., Exhibit "P-17," Refund Letter to CIR,* p. 52.
[52] *Id., Petition for Review,* pp. 7-54, with annexes.
[53] *BIR Records, 1st Indorsement,* p. 53.
[54] *Id., Letter from GS Cadavero,* p. 54.
[55] *Records, Answer,* pp. 76-87.
[56] *Id.,* pp. 76-84; emphases retained.

agencies continue to operate and with which the State effects its functions for the welfare of its constituents. Hence, tax refunds are in the nature of tax exemptions and are to be interpreted in the strictest manner. Considering that tax refunds consist of monetary amounts which are currently in the hands of the government, the validity of petitioner's claim should be meticulously verified. With these, to claim for a refund, petitioner should adduce every single document that will prove its entitlement to its claim. It is imperative to prove therefore every minute aspect of its case.

6. Hence, in order to be entitled to the refund being sought, petitioner must satisfactorily comply with the following requisites:

1. The claim must be filed with the CIR within the two-year period from the date of payment of the tax;

2. It must be shown on the return that the income received was declared as part of the gross income, and

3. The fact of withholding must be established by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of the tax withheld; [and]

4. That petitioner has not opt to carry-over its excess tax credit to the following taxable period.

7. However, compliance with the afore-quoted requirements will not suffice if petitioner failed to comply with the prescribed checklist of requirements to be submitted involving claims for unutilized creditable withholding tax pursuant to **Revenue Memorandum Order (RMO) No. 53-98** (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). To be sure, RMO No. 53-98 was issued to identify the documents required from a taxpayer during audit of the application for refund. In obedience to the provisions of RMO No. 53-98, the following documents must be submitted by the taxpayer:

xxx xxx xxx

8. Further, **Revenue Regulations [No.] 2-2006** [Mandatory Attachments of the Summary Alpha list of Withholding Agents of income Payments Subjected to Tax Withheld at Source (SAWT) to Tax Returns With Claimed Tax Credits due to Creditable Tax Withheld At Source and of the Monthly Alphalist of Payees (MAP) whose income received have been subjected to Withholding Tax to the Withholding Tax Remittance Return Filed by the Withholding Agent/Payor of Income Payments] provides:

xxx xxx xxx

9. Simply put, petitioner must prove compliance with **R[MO No.] 53-98** and **[RR No.] 2-2006**, to give support to the validity of its claim for excess creditable withholding tax for taxable year 2010. Verily, administrative issuances have the force and effect of law. They benefit from the same presumption of validity and constitutionality enjoyed by statutes. Failure of the petitioner to prove compliance with the above-mentioned requirements in the administrative level will likely render its Petition for Review vulnerable and shows the weakness of its claim.

10. Likewise, failure on the part of the taxpayer to submit relevant documents in the administrative level, such as in the instant case, makes the administrative claim for tax refund or credit pro-forma and shall be construed as if no administrative claim was filed at all.

11. In the case at bar, although petitioner submitted some supporting documents relevant to its claim for tax credit before this Honorable Court, it miserably failed to substantiate its administrative claim for refund filed with respondent, it failed to submit the complete list of requirements mandated under RMO No. 53-98. There is no record of petitioner ever submitting all the required documents to substantiate its administrative claim for refund. This is a requirement established by law and jurisprudence.

12. In cases such as this, before judicial inquiry into the issue of whether taxpayers, in general, are entitled to a refund/tax credit under substantive law may be considered, they have an initial burden to discharge. <u>They must prove that they complied with all the administrative requirements continuing up to judicial review.</u> In other words, before *trial de novo* proceeds and disposes of the issue of refund entitlement under substantive law, it must first be proved that there was

procedural compliance in pursuing the administrative claim leading to the appellate proceedings.

13. The Supreme Court in **Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, GR. No. 145526, March 16, 2007)** held that:

> "xxx a judicial claim for refund or tax credit in the CTA is by no means an original action but rather an appeal by way of petition for review of a previous, unsuccessful administrative claim. **Therefore, as in every appeal or petition for review, a petitioner has to convince the appellate court that the quasi-judicial agency a quo did not have any reason to deny its claims.** In this case, it was necessary for petitioner to show the CTA not only that it was entitled under substantive law to the grant of its claims but also **that it satisfied all the documentary and evidentiary requirements for an administrative claim for refund or tax credit.** Second, cases filed in the CTA are litigated de novo. Thus, a respondent should prove every minute aspect of its case by presenting, formally offering and submitting its evidence to the CTA. Since it is crucial for a petitioner in a judicial claim for refund or tax credit to show that its administrative claim should have been granted in the first place, part of the evidence to be submitted to the CTA must necessarily include whatever is required for the successful prosecution of an administrative claim." (Emphasis Supplied)
>
> x x x"

14. Clearly, the necessity for petitioner to submit all relevant documents to substantiate its administrative claim for refund is imperative. Absent these circumstances, the judicial claim merely becomes an attempt by the taxpayer to circumvent the role and duties of the Commissioner in evaluating taxpayer's claim for refund. Had petitioner submitted all relevant documents to substantiate its claim for tax credit, respondent would have the opportunity to determine the veracity of its claim and might refund or issue a tax credit certificate for the claimed amount. Again, petitioner undermines the respondent's administrative duty under the tax code by its failure to submit relevant documents, therefore depriving the respondent of the opportunity and time to study petitioner's claim for refund and to fully exercise its function.

Petitioner miserably failed to exhaust administrative remedies before elevating the case to the Honorable Court[.]

15. Well settled is the rule that, **the party aggrieved by a decision of an administrative official should first apply for review of such decision by higher administrative authority before seeking judicial relief, otherwise his court suit may be dismissed for prematurity or lack of cause of action.**

16. In **Jariol v COMELEC, 80 SCAD 910, 270 SCRA (1997)**, the Highest Tribunal had occasion to rule the following:

x x x

"The aggrieved party must not merely initiate the prescribed administrative procedure to obtain relief **but must also pursue it to its appropriate conclusion before seeking judicial intervention in order to give that administrative agency an opportunity to decide the matter by itself correctly and prevent unnecessary and premature resort to the court.**" (emphasis supplied)

x x x

17. Although in the instant case, it may be gleaned that the administrative claim for the issuance of a tax credit certificate was filed with the Bureau of Internal Revenue on **08 October 2013** and the Petition for Review was filed with the Court of Tax Appeals on **17 October 2013**. The respondent was not given sufficient facts to evaluate the administrative claim. Respondent humbly submits that failure on the part of petitioner to submit the required complete supporting documents would render the instant petition with this Honorable Court to have been prematurely filed.

18. In **Ampil, Jr. vs. COMELEC**, the Supreme Court has repeatedly pronounced the following:

"xxx on a long line of cases, this Court has held consistently that before a party is allowed to seek the intervention of the Court, it is a pre-condition that he should have availed of all the means of administrative processes afforded him. Hence, if a

> remedy within the administrative machinery can still be resorted to by giving the administrative officer concerned every opportunity to decide on a matter that comes within his jurisdiction, then such remedy should be exhausted first before the court's judicial power can be sought. The premature invocation of court's intervention is fatal to one's cause of action"

x x x

19. Petitioner's claim for refund is subject to administrative investigation/examination by respondent. Pending the closure of this investigation, no grant of refund may be given to petitioner based on the filed claim. It has been held by the Supreme Court that a claim for refund is not *ipso facto* granted because the Commissioner of Internal Revenue still has to investigate and ascertain the veracity of the claim.

20. The purpose of requiring submission of supporting documents relevant to a claim for tax credit is to give the administrative agency the opportunity to ascertain the veracity and validity of the claim. This is the very essence, the very substance of the doctrine of exhaustion of administrative remedies. The doctrine rests upon the presumption that the administrative body, board, or officer, if given the chance to correct its mistake or error, may amend its decision on a given matter and decide it properly. Thus, non-compliance with a condition precedent renders the petition for review filed by petitioner dismissible.

21. Additionally, 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. 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.

22. It is noteworthy to state that it is only before this Honorable Court that petitioner submitted and presented various pieces of evidence allegedly supporting its claim for refund. It is well-settled that matters not raised in the

administrative level cannot be raised for the first time on appeal.

23. It is a sound rule in tax laws, that the taxpayer who feels aggrieved by the actions taken by tax authorities may not seek redress in the courts of justice without first exhausting available administrative remedies, except for certain well-recognized exceptions. It is the policy of the law and good practice to discourage court litigations and encourage resort to administrative action whenever the latter is feasible, adequate, and speedy. Another thing, the respect and consideration due to each branch of the government demand that the judicial department abstain, whenever possible from interfering in the acts of the other departments except when the latter transcend their respective shares of action and suitable remedies cannot be obtained by them. Of prime importance therefore is the requirement for petitioner to submit all relevant documents to substantiate its administrative claim for refund. The filing of the petition for review to this Honorable Court must be due to the denial by respondent of petitioner's claim or respondent's inaction which is tantamount to a denial of the said petitioner's claim. Absent these circumstances, the judicial claim merely becomes an attempt by the taxpayer to circumvent the role and duties of the Commissioner in evaluating taxpayer's claim for refund.

Claims for refund are construed strictly against the taxpayer and in favor of the Government.

24. Time and again, it has been held that the right of taxation cannot easily be surrendered, statutes granting tax exemptions are considered as a derogation of the sovereign authority. Statutes that grant tax exemptions are construed *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority. The general rule is that claimants of tax refunds bear the burden of proving the factual basis of their claims. Again, taxes are the lifeblood of the nation. Therefore, statutes that allow exemptions are construed strictly against the grantee and liberally in favor of the government.

25. In **Asiatic Petroleum Co.** v **Llanes**, the Honorable Supreme Court held that:

> "When exemption is claimed, it must be shown indubitably to exist. At the outset, every presumption is against it. A well-founded doubt is

> fatal to the claim. It is only when the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported."

On September 29, 2014, the parties filed their Joint Stipulation of Fact and Issue ("JSFI")[57], which was approved by the Court on October 16, 2014 when it promulgated a Pre-trial Order[58] to this effect.

Trial ensued, then, on November 4, 2014, Petitioner's Formal Offer of Exhibits ("FOE")[59] was filed by registered mail. This was resolved by the Court on August 24, 2015, admitting *Exhibits* "P-1" and sub-markings, "P-2" to "P-5," "P-5-A," "P-6" and sub-markings, "P-7" and submarkings, "P-8" and sub-markings, "P-11," "P-11-A," "P-12" to "P-15," "P-16" and sub-markings, "P-17," "P-18" and sub-markings, and "P-19" and sub-markings; and denying *Exhibits* "P-14-A" and "P-14-B" for failure to submit originals for comparison.[60]

On September 28, 2015, in open court, counsel for respondent manifested that no report of investigation was submitted to her by the BIR examiners, hence, she will no longer present any evidence.[61] Thus, the parties were given a period of thirty (30) days to file their respective memoranda.[62]

On October 23, 2015, petitioner filed his Memorandum for Petitioner by registered mail,[63] while respondent filed her Memorandum on November 23, 2015.[64] Thus, on November 27, 2015, the Court promulgated a Resolution submitting the case for decision,[65] hence, this Decision.

The Issues

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[57] *Records, Joint Stipulation of Fact and Issue ("JSFI"),* pp. 207-212.
[58] *Id., Pre-Trial Order ("PTO"),* pp. 227-231.
[59] *Id., Petitioner's Formal Offer of Evidence ("FOE"),* pp. 249-254.
[60] *Id., Resolution on Petitioner's FOE,* pp. 379-381.
[61] *Id., September 28, 2015 Hearing,* p. 382; as confirmed in a Resolution dated October 7, 2015, p. 384.
[62] *Id.*
[63] *Id., Memorandum for Petitioner,* pp. 389-398.
[64] *Records, Memorandum,* pp. 401-411.
[65] *Id., November 27, 2015 Resolution,* p. 413.

Based on the Pre-Trial Order[66] the sole issue to be resolved in the present case is:[67]

> WHETHER PETITIONER IS ENTITLED TO A REFUND IN THE AMOUNT OF SEVENTY THOUSAND FOUR HUNDRED FIVE AND 76/100 PESOS (PHP70,405.76) REPRESENTING ALLEGED ERRONEOUS/EXCESSIVE ASSESSED DEFICIENCY EXPANDED (CREDITABLE) WITHHOLDING TAX.

Petitioner's arguments[68]

Petitioner avers that pursuant to *BIR Revenue Regulations ("RR") No. 2-98*, as amended, his transaction with SAMRI is subject to EWT of 3% since the latter is habitually engaged in the real estate business, as evidenced by a certification from the HLURB and the fact that the subject Property is classified as an ordinary asset; that according to *Mamalateo*, a legal expert in the Philippines, registration with the HLURB or HUDCC as a real estate dealer or developer shall be sufficient proof of habitually engaging in the sale of real estate; that respondent does not dispute the fact that SAMRI is an entity habitually engaged in real estate business; that he seeks to recover the erroneous or excessive tax paid under protest invoking *Section 229 of the 1997 NIRC*[69]; and that due to the BIR's unreasonable insistence on its erroneous or excessive assessment, it is only fair that it be ordered to pay interest, attorney's fees, and litigation expenses under *Article 2208 of the New Civil Code*.

Respondent's counter-arguments[70]

Respondent maintains that the real estate transaction entered into by petitioner and SAMRI is subject to 6% EWT; that since SAMRI is an SPV, it is not habitually engaged in real estate business but rather is akin to banking and financial institutions, while the Property is still considered an ordinary asset; that *RR No. 7-2003* defines who are habitually engaged in real estate business as those whose primary purpose is to engage in real estate or whose primary purpose in its

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[66] *Records, PTO*, pp. 227-231.
[67] *Id., PTO*, p. 227.
[68] *Id., Memorandum for Petitioner*, pp. 383-395.
[69] *Republic Act No. 8424*, An Act Amending the National Internal Revenue Code, as Amended, and for Other Purposes, dated December 11, 1997, effective January 1, 1998.
[70] *Records, Memorandum*, pp. 402-408.

Articles of Incorporation states the same; that *RR No. 7-2003* defines real estate dealers, real estate developers and real estate lessors; that *Section 3 of RR No. 6-2001* in relation to *Section 2 of RR No. 7-2003* provides that 6% applies to sellers who are not habitually engaged in real estate business, which includes banks; that refunds are construed strictly in favor of the government; and that petitioner's judicial claim deserves no merit and should fail for his failure to clearly and convincingly establish his entitlement thereto.

The Ruling of the Court

The Court finds merit in the Petition for Review.

Petitioner's administrative and judicial claims for refund were timely filed.

At the outset, the Court finds the need to rule on the issue of prescription, pertinent thereto are *Sections 204 and 229 of the 1997 NIRC*, to wit:[71]

> SECTION 204. *Authority of the Commissioner to Compromise, Abate, and Refund or Credit Taxes.* – The Commissioner may –
>
> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: *Provided,* however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund.
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> xxx xxx xxx

[71] Underscoring ours.

> SECTION. 229. *Recovery of Tax Erroneously or Illegally Collected.* - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, 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.

From the foregoing, it is clear that in order for a taxpayer to be entitled to a tax refund or tax credit for erroneous payment, it must prove not only that the taxes paid were illegally or erroneously collected but also that both the administrative claim with the CIR and the judicial claim with the Court were instituted within two (2) years from the date of payment of the tax or penalty.

Records reveal that on October 21, 2011, petitioner paid under protest[72] the deficiency 3% (6% less 3% already paid) EWT of Php53,253.00 and interest of Php17,152.76 or a total amount of Php70,405.76[73]. Counting two (2) years therefrom, he had until October 21, 2013 to file both his administrative and judicial claims for refund. Therefore, his request for refund of erroneously paid tax with the CIR on October 8, 2013[74] and the present Petition for Review filed on October 17, 2013[75] were timely filed.

To quickly pass upon the issue of personality, petitioner, as withholding agent of SAMRI on the latter's CWT on sale of real estate,

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[72] *Records, Exhibit "P-11-A," BIR Tax Payment Deposit Slip,* p. 42.
[73] *Id., Exhibit "P-11," BIR Form No. 0605,* p. 41.
[74] *Id., Exhibit "P-17," Refund Letter to CIR,* p. 52.
[75] *Id., Petition for Review,* pp. 7-54, with annexes.

is entitled to claim for a refund of excess withholding taxes erroneously paid.

The withholding agent is constituted the agent of both the Government and the taxpayer: as to the collection and/or withholding of tax, he is the Government's agent, but with regard to the filing of the necessary return and the payment of the tax to the Government, he is the agent of the taxpayer.[76]

To compel the withholding agent to withhold the tax under all circumstances, the law sets no condition for the personal liability of the withholding agent to attach.[77] The withholding agent has such direct and independent liability under the withholding tax system, that in the event of non-payment of the tax, the tax shall be collected from the withholding agent. With such burden to pay tax not withheld, the withholding agent has the same personality to claim for refund in the event of overpayment.

SAMRI is not a "bank" within the definition of law.

The Court sees no reason to look into the issue of whether the Property is a capital asset or an ordinary asset since the claimed erroneous payment[78] pertains merely to the additional 3% deficiency assessment due to the BIR's finding that the sale should be subject to 6% EWT instead of the 3% already paid by petitioner.

While the parties agree that *Section 2.57.2(J) of RR No. 2-98* is applicable, they have conflicting claims on the correct tax rate applicable. To prove erroneous payment, petitioner must prove that he paid an excess 3%.

Section 57(B) of the 1997 NIRC, is the foundation for the imposition of EWT/CWT on the sale of real property, *viz.:*[79]

SECTION 57. *Withholding of Tax at Source.* —

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[76] *Commissioner of Internal Revenue v. Smart Communication, Inc.,* G.R. Nos. 179045-46, August 25, 2010, 629 SCRA 342.
[77] *Id.*
[78] *Records, Exhibit "P-17," Refund Letter to CIR,* p. 52; *Petition for Review,* pp. 7-54, with annexes.
[79] Underscoring ours.

xxx xxx xxx

(B) *Withholding of Creditable Tax at Source.* — The Secretary of Finance may, upon the recommendation of the Commissioner, require the withholding of a tax on the items of income payable to natural or juridical persons, residing in the Philippines, by payor-corporation/persons as provided for by law, at the rate of not less than one percent (1%) but not more than thirty-two percent (32%) thereof, which shall be credited against the income tax liability of the taxpayer for the taxable year.

xxx xxx xxx

To implement the above, *RR No. 2-98*[80], as amended, was issued. *Section 2.57.2(J)* thereof imposes the following EWT/CWT in relation to sales of real property:[81]

SECTION 2.57.2. *Income Payment Subject to Creditable Withholding Tax and Rates Prescribed Thereon.*

Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:

xxx xxx xxx

(J) *Gross selling price or total amount of consideration or its equivalent paid to the seller/owner for the sale, exchange or transfer of real property classified as ordinary asset.* — A creditable withholding tax based on gross selling price/total amount of consideration or the fair market value determined in accordance with Section 6(E) of the Code, whichever is higher, paid to the seller/owner for the sale, transfer or exchange of real property, other than capital assets, shall be imposed upon the withholding agent/buyer, in accordance with the following schedule:

A. Where the seller/transferor is exempt from creditable withholding tax in accordance with Sec 2.57.5 of these regulations	Exempt

[80] Consolidated Withholding Tax Regulations, pursuant to Section 244 of the 1997 NIRC in relation to Section 57, among others.
[81] Underscoring ours.

B.	Upon the following values of real property, where the seller/transferor is habitually engaged in the real estate business:	
	With a selling price of Five Hundred Thousand Pesos ([Php]500,000.00) or less	1.5%
	With a selling price of more than Five Hundred Thousand Pesos ([Php]500,000.00) but not more than Two Million Pesos ([Php]2,000,000.00)	3%
	With a selling price of more than Two Million Pesos ([Php]2,000,000.00)	5%
C.	Where the seller/transferor is not habitually engaged in the real estate business (RR 6-01)	6%

Registration with the HLURB or HUDCC shall be sufficient for a seller/transferor to be considered as habitually engaged in the real estate business. If the seller/transferor is not registered with HLURB or HUDCC, he/it may prove that he/it is engaged in the real estate business by offering other satisfactory evidence (for example, he/it consummated during the preceding year at least six taxable real estate transactions, regardless of amount). Notwithstanding the foregoing, for purposes of these Regulations, banks shall not be considered as habitually engaged in the real estate business.

xxx xxx xxx

Therefore, in order for the rate of 6% EWT/CWT to be imposed on the sale of ordinary assets under *Section 2.57.2(J) of RR No. 2-98*, the taxpayer should either be:

1. A bank, in which case, it is considered as not habitually engaged in the real estate business; or

2. An entity not engaged in the real estate business.

If, however, the non-bank taxpayer is engaged in real estate business, the graduated rates of 1.5%, 3% and 5% shall apply.

Therefore, there is a need to look into whether SAMRI is a bank and/or if SAMRI is engaged in real estate business.

RR No. 2-98 is silent as to the definition of "banks." However, *Section 22 of the 1997 NIRC* refers to *Section 2 of Republic Act No. 337*[82], which has been amended by *RA No. 8791*[83], defining the same, for reference:[84]

1997 NIRC

TITLE II
Tax on Income

CHAPTER I
Definitions

SECTION 22. *Definitions.* — When used in this Title[85]:

xxx xxx xxx

(V) The term 'bank' means every banking institution, as defined in Section 2 of Republic Act No. 337, as amended, otherwise known as the General Banking Act. A bank may either be a commercial bank, a thrift bank, a development bank, a rural bank or a specialized government bank.

RA No. 8791

SECTION 3. *Definition and Classification of Banks.* —

3.1. "Banks" shall refer to entities engaged in the lending of funds obtained in the form of deposits.

Respondent claims that SAMRI is a Special Purpose Vehicle ("SPV"); that the SPV Law was created as a mechanism to help banks and other financial institutions, hence, an SPV company is engaged in activities auxiliary to financial intermediation; and, therefore, SAMRI is liable for CWT as a bank.

This is a classic example of a *non sequitur, i.e.*, the conclusion does not follow the premises.

Considering that the BIR never issued any ruling on petitioner's requests, nor did the CIR present any evidence in the present case to

[82] General Banking Act.
[83] General Banking Law of 2000.
[84] Underscoring ours.
[85] *Title II of the 1997 NIRC* covers *Section 57 of the same Code.*

show the factual bases on which the BIR based its assessment against petitioner for deficiency EWT, the Court is constrained to look into an unsigned Memorandum[86] dated September 15, 2011 by Regional Director Rodita B. Galanto ("RD Galanto") addressed to RDO Abanilla. Respondent's counsel never bothered to question the contents thereof, she merely emphasized that the same is undated and is an internal document for the examiner and not for public consumption.[87] In the said Memorandum are the following antecedent facts, based on the documents submitted and upon verification of GS Cadavero:[88]

- [SAMRI], with principal office located at Units 4 & 5 G/F One Mckinley Place, 26th Street, Fort Bonifacio Global City, Taguig, Metro Manila, is a member company of the Star Group Companies.
- <u>[SAMRI] was created as a Special Purpose Vehicle (SPV) by virtue of Republic Act No. 9182</u> and registered with RDO No. 44-Taguig-Pateros. <u>As an SPV, SAMRI acquires portfolios of Non-Performing Assets (NPAs) consisting of Real and Other Properties Owned and Acquired (ROPOAs), which ROPOAs are eventually sold to third-party buyers.</u> In its Articles of Incorporation with the Securities and Exchange Commission (SEC), <u>its primary purpose is "to invest in, or acquire Non-performing Assets (NPAs) of financial institutions, provided that it shall engage in the business of being a broker/dealer in securities, government securities eligible dealer, investment adviser of an investment company and investment house of a[n] SPV."</u>
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The conclusion that SAMRI is a bank is based merely on the fact that SAMRI is an SPV. However, not all SPVs are banks within the definition set by law. Moreover, SAMRI's primary purpose provided in the said Memorandum (to invest in, or acquire Non-performing Assets of financial institutions, provided that it shall engage in the business of being a broker/dealer in securities, government securities eligible dealer, investment adviser of an investment company and investment house of an SPV) does not translate to "an entity engaged in the lending of funds obtained in the form of deposits," as defined in *RA No. 8791*. Hence, the BIR merely presumed that an SPV is a bank.

[86] *Records, Exhibit "P-7," Unsigned Memorandum*, pp. 32-34; while this is unsigned, it is an internal memorandum which provided the only basis as to why SAMRI was considered by the BIR as an SPV, see *TSN Folder, October 27, 2014 Hearing*, pp. 14-15.
[87] *TSN Folder, October 27, 2014 Hearing*, pp. 9, 11-15.
[88] *Records, Exhibit "P-7," Unsigned Memorandum*, p. 32; underscoring ours.

The Supreme Court, in the case of *Commissioner of Internal Revenue v. Hantex Trading Co., Inc.*[89], explained that the presumption of the regularity of an assessment cannot be based on another presumption, to wit:

> We agree with the contention of the petitioner that, as a general rule, tax assessments by tax examiners are presumed correct and made in good faith. All presumptions are in favor of the correctness of a tax assessment. It is to be presumed, however, that such assessment was based on sufficient evidence. Upon the introduction of the assessment in evidence, a *prima facie* case of liability on the part of the taxpayer is made. If a taxpayer files a petition for review in the CTA and assails the assessment, the *prima facie* presumption is that the assessment made by the BIR is correct, and that in preparing the same, the BIR personnel regularly performed their duties. This rule for tax initiated suits is premised on several factors other than the normal evidentiary rule imposing proof obligation on the petitioner-taxpayer: the presumption of administrative regularity; the likelihood that the taxpayer will have access to the relevant information; and the desirability of bolstering the record-keeping requirements of the NIRC.
>
> However, the *prima facie* correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious. Where the BIR has come out with a naked assessment, *i.e.,* without any foundation character, the determination of the tax due is without rational basis. In such a situation, the U.S. Court of Appeals ruled that the determination of the Commissioner contained in a deficiency notice disappears. Hence, the determination by the CTA must rest on all the evidence introduced and its ultimate determination must find support in credible evidence.

The Court finds that SAMRI is not an entity engaged in the lending of funds obtained in the form of deposits, hence, it is not a bank for the purpose of imposing the 6% rate under *Section 2.57.2(J)(C) of RR No. 2-98.*

SAMRI is habitually engaged in the business of real estate.

[89] G.R. No. 136975, March 31, 2005, 454 SCRA 301.

Having determined that SAMRI is not a bank, the Court will now proceed to settle whether SAMRI is engaged in the real estate business.

Section 2.57.2(J) of Revenue Regulations No. 2-98[90] expressly provides that registration with the HLURB or HUDCC shall be sufficient for a seller/transferor to be considered as habitually engaged in the real estate business.

Records show that petitioner presented a confirmation from the HLURB that SAMRI is habitually engaged in the business of selling real estate.[91]

Petitioner is entitled to a refund for excessively paid EWT.

Based on the conclusion that SAMRI is not a bank and that it is habitually engaged in real estate business, the graduated rates of 1.5%, 3% and 5% shall apply.

As provided in *Section 2.57.2(J)(B) of RR No. 2-98*[92], as amended, the applicable rate is 3% since the tax basis of Php1,775,100.00 is more than Php500,000.00 but not more than Php2,000,000.00.

Finally, the remaining issue for the claim of refund is whether petitioner paid or remitted to the BIR the amount of taxes withheld representing the additional 3% assessed, the Court again rules in the affirmative.

While the fact of payment was never disputed, records will further show that petitioner's payment of the excess 3% EWT was based on its desire for the processing of the CAR;[93] that on October 21, 2011, petitioner actually paid under protest the basic EWT/CWT of Php53,253.00 representing the alleged deficiency of 3% and interest of

[90] Consolidated Withholding Tax Regulations, pursuant to Section 244 of the 1997 NIRC in relation to Section 57, among others.
[91] *Records, Exhibit "P-8," HLURB Letter,* pp. 35-36; *BIR Records,* pp. 2-3.
[92] Consolidated Withholding Tax Regulations, pursuant to *Section 244 of the 1997 NIRC* in relation to *Section 57,* among others.
[93] *Records, Exhibit "P-19," JA of Mr. Leo Mario Celdran, As19&20,* p. 147; *TSN Folder, October 27, 2014 Hearing,* p. 16.

Php17,152.76 or a total amount of Php70,405.76;[94] that, in fact, on October 27, 2011, a TCC with OCN 2TA0000396069 was issued certifying that the payment in the amount of Php70,405.76 was made in connection with the transfer of Property from SAMRI to petitioner;[95] that CAR 201100048722 was issued certifying the said payment;[96] and ultimately, the titles over the Property were transferred to petitioner.[97]

Having adequately ascertained the fact of erroneous payment of EWT/CWT of 6% instead of the correct rate of 3%, it is unwarranted for the Court to deny this valid claim of petitioner, as the former has the duty to act fairly at all times.

Petitioner is not entitled to a refund of attorney's fees, appearance fees, litigation and other expenses.

Finally, the Court shall now resolve the issue of whether respondent is liable for actual damages, in the form of attorney's fees, appearance fees, litigation and other expenses, resulting from the refund claim.

The Court answers in the negative.

As a rule, these expenses cannot be recovered unless, among others, the claimant is compelled to litigate or incur expenses to protect his interest.[98] It must be pointed out that it is respondent's prime duty to collect taxes; that no compelling reason has been offered by petitioner for the award of those expenses; and this Court has consistently disallowed the award of actual damages in tax cases.[99]

In the recent case of *Philko Peroxide Corporation v. CIR*[100], the

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[94] *Records, Exhibit "P-11-A," BIR Tax Payment Deposit Slip*, p. 42; *BIR Records*, p. 47.
[95] *BIR Records, TCC*, pp. 30-34.
[96] *Records, Exhibit "P-12," CAR*, p. 43; *BIR Records*, p. 35; despite the tax type indicated as CGT, CWT and FWT, the payment of SAMRI for CGT and the EWT payments of petitioner totaling 6% were all considered as EWT.
[97] *Id., Exhibit "P-19," JA of Mr. Leo Mario Celdran, QA27*, p. 148.
[98] *"An Act to Ordain and Institute the Civil Code of the Philippines,"* RA No. 386, art. 2208(2) (1950).
[99] *See The City of Makati v. Trans-Asia Power Generation Corporation*, CTA *EB* No. 1086 (CTA AC No. 87), January 21, 2015; *Spouses Estrada v. BIR*, CTA Case No. 7847, November 23, 2015; *Philko Peroxide Corporation v. CIR*, CTA Case No. 8500, August 20, 2015.
[100] CTA Case No. 8500, August 20, 2015.

Court explained the rationale, thus:[101]

> Finally, with respect to petitioner's prayer for attorney's fees, it has been held that an award of attorney's fees is an exception and there must be some compelling legal reason to bring the case within the exception and justify the award. Even when a claimant is compelled to litigate with third persons or to incur expenses to protect his rights, still attorney's fees may not be awarded where no sufficient showing of bad faith could be reflected in a party's persistence in a case other than an erroneous conviction of the righteousness of his cause.
>
> In the present case, petitioner did not present any compelling legal reason to justify the award of attorney's fees. In issuing the subject assessment, the respondent is merely exercising the authority accorded her under the Tax Code to collect taxes, and in so doing, fulfilling her mandated duty as required under the law. For after all, the primary duty of the BIR is to collect taxes, since taxes are the lifeblood of the Government and their prompt and certain availability are imperious needs. In fine, the prayer for attorney's fees is without any legal mooring.

In any case, the Supreme Court has held in *Farolan, Jr. v. CTA*[102] that respondent cannot be made liable for actual damages as respondent is immune from suit following the doctrine of sovereign immunity. The Supreme Court held:[103]

> On the third issue, we opine that the Bureau of Customs cannot be held liable for actual damages that the private respondent sustained with regard to its goods. Otherwise, to permit private respondent's claim to prosper would violate the doctrine of sovereign immunity. Since it demands that the Commissioner of Customs be ordered to pay for actual damages it sustained, for which ultimately liability will fall on the government, it is obvious that this case has been converted technically into a suit against the state.
>
> On this point, the political doctrine that "the state may not be sued without its consent," categorically applies. As an unincorporated government agency without any separate juridical personality of its own, the Bureau of Customs enjoys immunity from suit. Along with the Bureau of Internal

[101] Underscoring ours.
[102] G.R. No. 42204, January 21, 1993, 217 SCRA 298.
[103] Underscoring ours.

> Revenue, it is invested with an inherent power of sovereignty, namely, taxation. As an agency, the Bureau of Customs performs the governmental function of collecting revenues which is definitely not a proprietary function. Thus, private respondent's claim for damages against the Commissioner of Customs must fail.

From the foregoing, it is clear that petitioner is not entitled to actual damages in the form of attorney's fees, appearance fees, litigation and other expenses

WHEREFORE, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the amount of **SEVENTY THOUSAND FOUR HUNDRED FIVE AND 76/100 PESOS (PHP70,405.76)**, representing erroneously paid Expanded Withholding Tax.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ESPERANZA R. FABON-VICTORINO
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
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 opinion of the Court's Division

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to *Section 13 of Article VIII 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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice