REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

LEO MARIO CELDRAN, *Petitioner,*	**CTA CASE NO. 8722**
- *versus* -	Members: **BAUTISTA,** *Chairperson* **FABON-VICTORINO, and RINGPIS-LIBAN,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Promulgated:** SEP 20 2016 10:15 a.m.

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RESOLUTION

For resolution is respondent's Motion for Reconsideration (Re: Decision Promulgated on 21 July 2016) ("Motion for Reconsideration") filed on August 10, 2016; with petitioner's Comment to Respondent's Motion for Reconsideration (Re: Decision promulgated on 21 July 2016) ("Comment") filed by registered mail on August 30, 2016.

On July 21, 2016, the Court rendered a Decision, the dispositive portion of which reads as follows:

> **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.**

As found by the Court, in view of petitioner's purchase of parcels of land from Star Asset Management ROPOAS, Inc. ("SAMRI"), petitioner was initially assessed deficiency Creditable Withholding Tax ("CWT")/Expanded Withholding Tax ("EWT") using the rate of

3% and the tax base of Php1,775,100.00, leading to the amount of Php53,253.00, which he paid. However, when petitioner requested the processing of the Certificate Authorizing Registration ("CAR"), he was refused due to an alleged deficiency CWT/EWT since the assessment was revised and the rate was increased to 6%. Hence, petitioner was constrained to pay under protest the additional Php53,253.00 (another 3%) and interest in the amount of Php17,152.76, or the total amount of Php70,405.76, which is the subject of the present claim for refund.

The Court explained that 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 Revenue Regulations ("RR") No.* 2-98, the taxpayer should be *(1)* a bank, in which case, it is considered as not habitually engaged in real estate business; or *(2)* an entity engaged in the real estate business; and that, if the non-bank taxpayer is engaged in real estate business, the rates of 1.5%, 3% and 5% shall instead apply. Hence, there was a need to determine whether SAMRI is *(1)* a bank, and *(2)* engaged in the business of real estate.

Based on evidence, it was found that respondent presumed that SAMRI is a bank merely on the fact that it is a Special Purpose Vehicle ("SPV"). However, the Court stated that not all SPVs are banks and that the presumption of regularity of an assessment cannot be based on another presumption. To determine whether SAMRI is indeed a bank, the Court referred to *Section 3 of Republic Act ("RA") No. 8791,* in relation *to Section 22(V) of the 1997 National Internal Revenue Code ("NIRC"),* which defines banks as "entities engaged in the lending of funds obtained in the form of deposits," which SAMRI is not. Hence, the Court found that SAMRI is not a bank.

As to whether SAMRI is engaged in real estate, the Court referred to *Section 2.57.2(J) of RR No. 2-98,* which expressly provides that registration with the HLURB or HUDCC shall be sufficient for a seller/transferor to be considered as habitually engaged in real estate business. Records reveal that petitioner presented such confirmation from the HLURB, hence, SAMRI is engaged in the real estate business.

Applying the foregoing, the Court concluded that since the tax basis is Php1,775,100.00 (more than Php500,000.00 but not more than Php2,000,000.00), *Section 2.57.2(J)(B) of RR No. 2-98* applies and the applicable rate is 3%. Consequently, the Court ruled that a refund of the Php70,405.76 paid by petitioner is in order.

In his Motion for Reconsideration, respondent avers that the real estate transaction entered into by petitioner and SAMRI is subject to 6% EWT; that SAMRI is an SPV, hence, it is not among those taxpayers habitually engaged in the real estate business but with personality akin to banking and financial institutions; that SAMRI is engaged in activities auxiliary to financial institutions, and falls under the broad definition of financial institution; that the sale of foreclosed properties by banks is subject to CWT of 6% because they are not considered as habitually engaged in real estate business and properties acquired by them through foreclosure sales are considered as ordinary assets pursuant to *RR No. 7-2003*; that there is no erroneous payment of EWT by petitioner; that petitioner's voluntary payment of the deficiency 3% EWT implies his abandonment or waiver of the right to question the validity of the deficiency tax; and that claims for refund are construed strictly against the taxpayer and in favor of the Government.

In his Comment, petitioner counters that the Motion for Reconsideration ought to be denied for being interposed merely for delay as it contains inconsequential arguments that respondent cannot belatedly use or are mere repetitions that have been passed upon and considered by the Court in its Decision; that respondent cannot raise the argument that SAMRI is a bank or a financial institution since this was not raised as an issue; that issues, points of law, theories or arguments not raised in the trial cannot be raised for the first time on appeal or on a motion for reconsideration; that respondent did not present any evidence that SAMRI is indeed a bank or a financial institution; that respondent never denied that SAMRI is an entity habitually engaged in real estate business, which was in fact proven by petitioner through evidence; that petitioner even filed a Motion for Judgement on the Pleadings prior to pre-trial to show the Court that respondent's Answer failed to tender an issue, hence, respondent was deemed to have admitted the material allegations in petitioner's Petition for Review relating to SAMRI being habitually engaged in real estate business; that petitioner paid the deficiency amount under protest and was only compelled to pay to facilitate the issuance of the CAR; and that the lifeblood theory applies only to legally and correctly assessed taxes.

The Court finds no merit in respondent's Motion for Reconsideration.

It must be noted that the additional claims of respondent in his Motion for Reconsideration are contrary to the facts, as found by the Court. Moreover, a perusal of the contents of respondent's Motion for

Reconsideration show that the grounds raised therein relate to or are the exact same ones found in his Memorandum. Reproduced hereunder are respondent's arguments in his Memorandum, as appearing in the Decision dated July 21, 2016:

> ***Respondent's counter-arguments***
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> Respondent maintains that the real estate transaction entered into by petitioner and SAMRI is subject to 6%; 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 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 [G]overnment; and that petitioner's judicial claim deserves no merit and shall fail for his failure to clearly and convincingly establish his entitlement thereto.

These arguments have been comprehensively passed upon and refuted in the Decision dated July 21, 2016. Hence, the Court finds no cogent reason to reverse its Decision.

WHEREFORE, respondent's Motion for Reconsideration (Re: Decision Promulgated on 21 July 2016) is hereby **DENIED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice