REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC
****

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

LUZVIMINDA LAND HOLDINGS, INC.,
Respondent.

CTA EB No. 2486
(CTA Case No. 10035)

Present:

DEL ROSARIO, *P.J.*,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO,
CUI-DAVID, and
FERRER-FLORES, *JJ.*

Promulgated:

FEB 08 2023 4:25 p.m.

x - x

RESOLUTION

UY, *J.*:

For resolution is petitioner's *Motion for Reconsideration (of the Decision dated 21 September 2022)*[1] filed on October 6, 2022, with respondent's *Comment/Opposition (on Petitioner's Motion for Reconsideration dated October 6, 2022)*[2] filed on November 14, 2022.

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[1] EB Docket, pp. 151 to 166.
[2] EB Docket, pp. 172 to 180.

In the said *Motion*, petitioner prays that the Court *En Banc*: 1) reconsider, reverse and set aside the *Decision* dated September 21, 2022; and 2) render another one dismissing the *Petition for Review* filed by respondent in CTA Case No. 10035 for lack of merit. The dispositive portion of the assailed *Decision* reads:

***Decision* dated September 21, 2022:**

> "**WHEREFORE**, in light of the foregoing considerations, the instant *Petition for Review* is **DENIED** for lack of merit. The *Decision* dated December 3, 2020, and the *Resolution* dated May 20, 2021, by the Second Division of this Court in CTA Case No. 10035 are hereby **AFFIRMED**.
>
> **SO ORDERED.**"

Petitioner's arguments:

In his *Motion*, petitioner asserts that respondent's failure to prove compliance with Sections 204(C) and 229 of the National Internal Revenue Code (NIRC) of 1997, as amended, on the prescriptive period for claiming tax refund/tax credit is fatal to its claim for refund.

Moreover, petitioner argues that the merger between respondent and Marangal Properties, Inc. (MPI) does not qualify as a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended. Allegedly, the merger cannot be considered a *bona fide* business transaction because after respondent and MPI effected the merger, respondent eventually sold the parcel of land located in Ipil Road, Dasmariñas Village, Makati City (Ipil Property) to IPILRD Marketing, Inc. (IPILRD). Petitioner claims that the merger was an attempt and/or preliminary action on the part of respondent to escape the burden of taxation. Likewise, given that respondent owned 60% of MPI's outstanding capital stock, petitioner insists that the merger is an upstream merger between a parent and a subsidiary, where there will be no issuance of shares in exchange for the assets to be transferred.

Allegedly, the transfer of the Ipil Property from MPI to respondent is subject to documentary stamp tax (DST) because the merger failed to meet the elements of a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended.

In addition, petitioner claims that a Bureau of Internal Revenue (BIR) ruling is a condition *sine qua non* for the availment of the non-recognition of gain resulting from a merger transaction.

Petitioner also stresses that in a merger or dissolution, a corporation is required to secure a certificate of tax clearance from the BIR which will have to be submitted to the Securities and Exchange Commission (SEC) before the SEC can issue a certificate of dissolution or reorganization. In this case, however, respondent and MPI were able to secure a Certificate of Filing of the Articles and Plan of Merger with the SEC despite the absence of a tax clearance from the BIR.

Further, citing the Dissenting Opinion to the assailed *Decision*, petitioner claims that the taxes subject of the refund are the taxes paid on the transfer of the Ipil Property from respondent to IPILRD (second transfer), and not on the transfer of the Ipil Property from MPI to respondent (first transfer). Thus, respondent's claim does not fall under Section 204(C) in relation to Section 229 of the NIRC of 1997, as amended, because the taxes on the transfer of the Ipil Property from respondent to IPILRD were correctly paid under the law.

Finally, petitioner argues that tax-free exchange transactions partake of the nature of tax exemptions; hence, strictly construed against the taxpayer and liberally in favor of the state.

Respondent's counter-arguments:

Respondent counter-argues that the taxes subject of the claim for refund pertain to the first transfer of the Ipil Property from MPI to respondent. A cursory review of BIR Form Nos. 1606 and 2000-OT would show that the withholding tax and DST amounting to ₱26,411,464.00 and ₱6,640,366.00, respectively, paid by respondent clearly referred to the first transfer. As stated in the BIR Forms, the buyer/transferee is respondent, while the seller/transferor is MPI, who are the parties to the first transfer (merger).

Moreover, respondent maintains that the merger between respondent and MPI qualifies as a tax-free merger under Section 40(C)(2) of the NIRC of 1997, as amended, because the merger was a legal merger entered into for a *bona fide* purpose.

Respondent also avers that the merger between respondent and MPI cannot be considered an upstream merger considering that MPI is not a wholly-owned subsidiary of respondent.

Further, respondent explains that the transfer of the Ipil Property to respondent is not subject to withholding tax and DST. The transfer of the Ipil Property to respondent pursuant to a merger is a tax-free exchange. Consequently, the same is exempt from income tax; thus, there is no basis for the imposition of withholding tax. Likewise, the transfer of the Ipil Property is exempt from DST pursuant to Section 199(m) of the NIRC of 1997, as amended.

Allegedly, a BIR ruling is not a condition *sine qua non* in order for respondent to enjoy tax exemption relative to the transfer of the Ipil Property.

Finally, respondent claims that it is entitled to a refund or issuance of tax credit certificate of erroneously paid or illegally collected withholding tax and DST, including surcharges, interests and penalties, considering that it has fully substantiated its claim.

THE COURT *EN BANC*'S RULING

Petitioner's *Motion* lacks merit.

After a careful examination and consideration of petitioner's arguments in his *Motion*, We note that the same are mere reiteration of matters which have already been considered, weighed and resolved in the assailed *Decision*, except for the argument which cites the Dissenting Opinion to the assailed *Decision*. Thus, We shall no longer belabor, in this *Resolution*, the disquisitions made therein.

Respondent timely filed both its administrative and judicial claims for refund within the period provided under Sections 204(C) and 229 of the NIRC of 1997, as amended.

The pertinent dates in relation to the filing of respondent's Request for Refund or Issuance of Tax Credit Certificate,[3] together with

[3] Exhibit "P-18", Division Docket (CTA Case No. 10035), pp. 322 to 330.

its Application for Tax Credits/Refunds (BIR Form No. 1914),[4] and its *Petition for Review* in CTA Case No. 10035, are as follows:

Tax Type	Date of Payment	Date of Filing of Administrative Claim	Date of Filing of Judicial Claim	Date of Prescription
Withholding Tax	February 27, 2017[5]	May 21, 2018	February 26, 2019	February 27, 2019
DST				

Clearly, respondent was able to comply with the two (2)-year prescriptive period provided under Sections 204(C) and 229 of the NIRC of 1997, as amended, for filing of claims for tax refund/credit.

The merger between respondent and MPI qualifies as a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended.

The requisites for non-recognition of gain in an exchange of property under Section 40(C)(2)(a) in relation to Section 40(C)(6)(b) of the NIRC of 1997, as amended, are as follows:

(1) There must be a legal merger or consolidation, or acquisition by a corporation of all or substantially all the properties of another corporation solely for stock; and

(2) The merger or consolidation was undertaken for a *bona fide* business purpose.

As extensively discussed in the assailed *Decision*, the merger between respondent and MPI satisfied both conditions.

First, the merger was a legal merger which complied with the pertinent provision of the Corporation Code. The merger between respondent and MPI became effective on May 27, 2009 when the SEC issued the Certificate of Filing of the Articles and Plan of Merger.[6]

[4] Exhibit "P-19", Division Docket (CTA Case No. 10035), p. 331; Exhibit "P-20", Division Docket (CTA Case No. 10035), p. 332.
[5] Exhibit "P-8", Division Docket (CTA Case No. 10035), p. 303; Exhibit "P-11", Division Docket (CTA Case No. 10035), p. 306.
[6] Exhibit "P-3", Division Docket (CTA Case No. 10035), p. 273.

Second, the merger between respondent and MPI was undertaken for a *bona fide* business purpose, which was to promote and accomplish efficiencies and economies which will serve to reduce costs in all aspects of their business.[7] Said reason, together with the fact that respondent still continues to operate to this day, leads to the logical conclusion that that the merger between respondent and MPI was undertaken for a *bona fide* business purpose and not solely for the purpose of escaping the burden of taxation. It is of no moment that respondent sold the Ipil Property to IPILRD **after more than 7 years** from the date of the merger. Respondent, as the owner of the Ipil Property, has the right to dispose of the same.

Moreover, the merger between respondent and MPI is not an upstream merger. In an upstream merger, the parties are the parent company (the surviving entity) and its **wholly-owned** subsidiary. In this type of merger, the parent company **does not issue shares in exchange for the assets of its wholly-owned subsidiary** in order to avoid the shares from becoming treasury shares because it would essentially be issuing shares to itself.[8]

Here, MPI is not a wholly-owned subsidiary of respondent. MPI is 60% owned by respondent and 40% owned by Coca-Cola Bottlers Philippines, Inc. (now Coca-Cola Beverages Philippines, Inc.) (CCBPI). In the Plan of Merger, in exchange for the 40% share of CCBPI in MPI's net assets, respondent will issue 1,092,708 common shares to CCBPI for the amount of ₱39,337,488.00.[9] As such, the merger between respondent and MPI was not an upstream merger.

Given that the merger between respondent and MPI was a legal merger undertaken for a *bona fide* business purpose, and also not an upstream merger, the same qualifies as a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended.

The transfer of the Ipil Property from MPI to respondent is not subject to DST.

[7] Page 6, paragraph 2 of the *Memorandum (for the Petitioner)*, Division Docket (CTA Case No. 10035), p. 358; Paragraph 14 of the *Comment and Opposition (RE: Respondent's Motion for Reconsideration of the Decision dated 03 December 2020)*, Division Docket (CTA Case No. 10035), p. 472; Page 3, paragraph 15 of the *Comment (to the Petitioner's Petition for Review dated 09 July 2021)*, EB Docket, p. 71.
[8] DOF Opinion No. 012-18, November 19, 2018.
[9] Exhibit "P-2", Division Docket (CTA Case No. 10035), p. 270.

As discussed above and in the assailed *Decision*, the merger between respondent and MPI qualifies as a tax-free exchange transaction under Section 40(C)(2) of the NIRC of 1997, as amended. Consequently, the transfer of the Ipil Property from MPI to respondent is not subject to DST pursuant to Section 199(m) of the NIRC of 1997, as amended, which provides that transfer of property pursuant to Section 40(C)(2) of the NIRC of 1997, as amended, is exempt from DST.

A BIR ruling is not a condition sine qua non for availment of the non-recognition of gain resulting from a merger transaction under Section 40(C)(2) of the NIRC of 1997, as amended.

A reading of Section 40(C)(2), in relation to Section 40(C)(6)(b) of the NIRC of 1997, as amended, reveals that nowhere in said provisions is it stated that a prior BIR ruling validating an exchange transaction as tax-free is required before a taxpayer may avail of the benefits under said provisions.

Petitioner cannot impose additional requirements in order for respondent to claim a tax refund/credit of its erroneously paid and/or illegally collected withholding tax and DST. Petitioner may not enlarge, alter or restrict the provisions of the law it administers; it cannot engraft additional requirements not contemplated by legislature.[10] To do so constitutes lawmaking, which is generally reserved for Congress.[11]

The taxes subject of the refund are the taxes paid on the transfer of the Ipil Property from MPI to respondent pursuant to the merger, and not on the transfer of the Ipil Property from respondent and CCBPI to IPILRD.

Petitioner claims that the taxes subject of the refund are the taxes paid on the transfer of the Ipil Property from respondent and CCBPI to IPILRD, and not on the transfer of the Ipil Property from MPI to

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[10] *Commissioner of Internal Revenue v. Central Luzon Drug Corporation*, G.R. No. 159647, April 15, 2005.
[11] *Jaime N. Soriano, et al. v. Secretary of Finance and the Commissioner of Internal Revenue*, G.R. No. 184450, January 24, 2017.

respondent. As such, respondent's claim does not fall under Section 204(C) in relation with Section 229 of the NIRC of 1997, as amended, because the taxes on the transfer of the Ipil Property from respondent and CCBPI to IPILRD were correctly paid under the law.

Petitioner is mistaken.

In respondent's Request for Refund or Issuance of Tax Credit Certificate,[12] it is stated that it was constrained to pay the withholding tax and DST, inclusive of interest and surcharges, relative to the transfer of the Ipil Property from MPI to respondent, as follows:

> "To obtain the Certificate Authorizing Registration (CAR) which is a requisite t\o effect the transfer of the aforementioned sale of the property from LLHI to IPILRD, on February 27, 2017, **LLHI was constrained to first pay and in fact actually paid withholding tax and documentary stamp tax amounting to P26,411,464.00 and P6,640,366.00, respectively, inclusive of interests and surcharges, <u>pertinent to the transfer of the property from MPI to LLHI</u>.** The tax payment was made upon the advice of then Revenue District Officer, Ms. Rosita U. Meniano of RDO No. 50 – South Makati which has territorial jurisdiction over the IPIL PROPERTY since the requested tax-exempt ruling has not yet been issued by the BIR. Copies of Certificate Authorizing Registration (CAR) issued on April 3, 2017, duly filed BIR Form 1606, Metrobank Payment Slip dated February 27, 2017 (Payment of Withholding Tax), duly filed BIR Form 2000-OT, and Metrobank Payment Slip dated February 27, 2017 (Payment of DST) are hereto attached as **ANNEXES "G", "H", "I", "J"** and **"K"**, respectively." *(Emphasis and underscoring supplied)*

Moreover, in respondent's Withholding Tax Remittance Return (BIR Form No. 1606),[13] it is indicated that the **buyer is respondent** (Line 9), while the **seller is MPI** (Line 10). The gross selling price is ₱158,804,000.00 (Line 28A) and the tax required to be withheld is ₱9,528,240.00 (Line 32).[14] The total amount paid by respondent was ₱26,411,464.00 (Line 36), considering that it was held liable for surcharge, interest and compromise penalty in the amounts of

[12] Exhibit "P-18", Division Docket (CTA Case No. 10035), pp. 322 to 330.
[13] Exhibit "P-8", Division Docket (CTA Case No. 10035), p. 303.
[14] ₱158,804,000.00 x 6% = ₱9,528,240.00.

₱2,382,060.00 (Line 35A), ₱14,451,164.00 (Line 35B) and ₱50,000.00 (Line 35C), respectively.

Meanwhile, in respondent's Documentary Stamp Tax Declaration/Return (ONE - TIME TRANSACTIONS) (BIR Form 2000-OT)[15] it is indicated that the **seller/transferor is MPI** (Line 11B), while the **buyer/transferee is respondent** (Line 11C). The selling price is ₱158,804,000.00 (Line 12E) and the tax due is ₱2,382,060.00 (Line 16).[16] The total amount paid by respondent was ₱6,640,366.00 (Line 20), considering that it was held liable for surcharge, interest and compromise penalty in the amounts of ₱595,515.00 (Line 19A), ₱3,612,791.00 (Line 19B) and ₱50,000.00 (Line 19C), respectively.

On the other hand, in the Deed of Absolute Sale[17] notarized on July 1, 2016, respondent and CCBPI sold the Ipil Property to IPILRD for ₱488,888,888.00, inclusive of value-added tax (VAT), while the 6% withholding tax is ₱26,190,476.14[18] (₱20,833,333.29 to respondent, ₱5,357,142.86 to CCBPI).

To summarize:

	Transfer from MPI to respondent	**Transfer from respondent and CCBPI to IPILRD**
Selling Price	₱ 158,804,000.00	₱ 488,888,888.00 (inclusive of VAT)
6% Withholding Tax	₱ 9,528,240.00	₱ 26,190,476.14
Interest, Surcharge, Compromise Penalty	₱ 16,883,224.00	N/A
Amount Due	**₱ 26,411.464.00**	**₱ 26,190,476.14**

From the foregoing, it is evident that the taxes subject of the refund claim (withholding tax amounting to ₱26,411,464.00[19] and DST amounting to ₱6,640,366.00,[20] inclusive of surcharge, interest, and compromise penalty) are the taxes paid on the transfer of the Ipil Property **from MPI to respondent pursuant to the merger**, and not on the transfer of the Ipil Property from respondent to IPILRD.

Accordingly, the Court *En Banc* finds no compelling reason to reconsider, modify, or reverse the assailed *Decision*.

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[15] Exhibit "P-11", Division Docket (CTA Case No. 10035), p. 306.
[16] (₱158,804,000.00/₱1,000.00) x ₱15.00 = ₱2,382,060.00.
[17] Exhibit "P-6", Division Docket (CTA Case No. 10035), pp. 281 to 284.
[18] (₱488,888,888.00/1.12) x 6% = ₱26,190,476.14.
[19] Exhibit "P-19", Division Docket (CTA Case No. 10035), p. 331.
[20] Exhibit "P-20", Division Docket (CTA Case No. 10035), p. 332.

WHEREFORE, in light of the foregoing considerations, the instant *Motion for Reconsideration* is **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

(With due respect, I reiterate my Dissenting Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
Associate Justice

CORAZON G. FERRER-FLORES
Associate Justice