REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PILIPINAS SHELL PETROLEUM CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 6477

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
APR 30 2003

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DECISION

This case involves a claim for refund or issuance of a tax credit certificate in the amount of P22,101,407.64, allegedly representing erroneously paid documentary stamp tax ("DST") for the taxable year 2000, in connection with the transfer of real properties from Shell Philippines Petroleum Corporation (SPPC) to petitioner.

The facts based on the parties' Joint Stipulation of Facts and Issues are as follows:

1. Petitioner is a corporation organized and existing under the laws of the Philippines with office address at Shell House, 156 Valero Street, Salcedo Village, 1227 Makati City.

2. Respondent is the duly appointed Commissioner of Internal Revenue who holds office at the BIR National Office Building located at Agham Road, Diliman, Quezon City.

3. Petitioner is a corporation organized and existing under the laws of the Philippines and was incorporated "[t]o construct, operate and maintain petroleum refineries, works, plant machinery, equipment, dock and harbor facilities and auxiliary works and other facilities of

all kinds used in or in connection with the manufacture of products of all kinds which are wholly or partly derived from crude oil."

4. On April 27, 1999, petitioner entered into a Plan of Merger with its affiliate, Shell Philippine Petroleum Corporation ("SPPC"), a corporation organized and existing under the laws of the Philippines, whereby the entire assets and liabilities of SPPC will be transferred to, and absorbed by, petitioner as the surviving entity.

5. The Securities and Exchange Commission approved the merger on July 1, 1999.

6. Petitioner paid to the BIR on August 10, 1999 documentary stamp tax (DST) amounting to P524,316.00 on the original issuance of shares of stock of petitioner in exchange for the surrendered SPPC shares pursuant to Section 175 of the National Internal Revenue Code of 1997 ("1997 NIRC").

7. Confirming the tax-free nature of the merger between petitioner and SPPC, the Bureau of Internal Revenue (BIR), in a ruling dated October 4, 1999, ruled that pursuant to Section 40(C)(2) and (6)(b) of the 1997 NIRC, no gain or loss shall be recognized, if, in pursuance of a plan of merger or consolidation, a shareholder exchanges stock in a corporation which is a party to a merger or consolidation solely for the stock of another corporation also a party to the merger or consolidation.

8. Accordingly, the BIR ruled, among others, that "no gain or loss shall be recognized by the stockholders of SPPC on the exchange of their shares of stock of SPPC solely for shares of stock (of petitioner) pursuant to the Plan of Merger."

9. The BIR, however, stated in the Ruling that –

> "3. The issuance by PSPC of its own shares of stock to the shareholders of SPPC in exchange for the surrendered certificates of stock of SPPC shall be subject to documentary stamp tax (DST) at the rate of Two Pesos (P2.00) on each Two Hundred Pesos (P200.00), or fractional part thereof, based on the total par value of the PSPC shares of stock issued pursuant to Section 175 of the Tax Code of 1997.

"x x x

"6. The exchange of land and improvement by SPPC to PSPC for the latter's shares of stock shall be subject to documentary stamp tax imposed under Section 196 of the Tax Code of 1997, based on the consideration contracted to be paid for such realty or its fair market value determined in accordance with Section 6(E) of the said Code, whichever is higher."

10. Petitioner paid to the BIR on May 10, 2000 the amount of P22,101,407.64 representing DST on the transfer of real property from SPPC to petitioner.

11. Believing that it erroneously paid DST on its absorption of real property owned by SPPC, petitioner filed with respondent on September 18, 2000 a formal claim for refund or tax credit of the DST in the amount of P22,101,407.64.

12. Up to this date, however, petitioner's claim for refund or tax credit remains unacted upon by respondent.

Hence, the subject petition for review was filed on May 8, 2002 in order to suspend the running of the two-year prescriptive period under the law and to preserve its right to judicially claim for tax refund.

In his Answer filed on June 11, 2002, respondent countered by raising the following Special and Affirmative Defenses:

"4. Petitioner's alleged claim for refund is subject to administrative routinary investigation by the BIR;

5. Petitioner miserably failed to demonstrate that the tax subject of the case at bar was erroneously or illegally collected;

6. The amount of P22,101,407.64 being claimed by petitioner as alleged erroneously paid DST for taxable year 2000 was not properly documented;

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

8. In an action for refund the burden of proof is on the taxpayer to establish its right to refund, and failure to sustain the burden is fatal to the claim for refund/credit;

9. It is incumbent upon petitioner to show that it has complied with the provisions of Sections 204 (C) and 229 of the Tax Code on the prescriptive period for claiming tax refund/credit;

10. The act of entering into a plan of merger involves the voluntary act of the parties. This could be validated in the case of Koppers Coal & Transportation Co. vs. United States 107 F.2d 706, where the Court has held that:

    "The transfer of the stock from Koppers Coal & Transportation Company to C.C.B. Smokeless Coal Company was not "wholly by operation of law" since the voluntary act and participation of the constituent company was required in order to effect the merger or consolidation."

11. In the recent case of **Philippine Home Assurance Corporation et. al. vs. Court of Appeals**, G.R. No. 119446, January 21, 1999, the Court made a categorical pronouncement that the documentary stamp tax is not intended to be a tax on the document alone. The law taxes the document because of the transaction so that the tax becomes due and payable at the time the transaction is had or accomplished, in this case, at the time of the issuance of the document.

12. The BIR has consistently ruled that in tax-deferred exchanges, DST is imposed. This has been affirmed in **BIR Ruling No. 2-2001** dated February 2, 2001, to wit:

    "In view of all the foregoing, it is the opinion of this office, as we hereby hold, that the tax-deferred exchange of properties of a corporation, which is a party to a merger of consolidation, solely for shares of stock in a corporation, which is also a party to the merger or consolidation, is subject to the documentary stamp tax under section 176 if the properties to be transferred are shares of stock or even

certificates of obligation, and also to the documentary stamp tax under Section 196, if the properties to be transferred are real properties. Finally, it may be worth mentioning that the original issuance of shares of stock of the surviving corporation in favor of the stockholders of the absorbed corporation as a result of the merger, is subject to the documentary stamp tax under Section 175 of the Tax Code of 1997 (BIR Ruling No. S-40-220-2000, December 21, 2000)."

13. Well-settled is the rule that claims for tax refund/credit are construed in *strictissimi juris* against the taxpayer as they partake the nature of exemption from tax, and it is incumbent upon the petitioner to show that it is entitled thereto under the law.

The parties likewise stipulated the issue to be resolved by this court, namely:

Whether or not petitioner erroneously paid the amount of P22,101,407.64 representing DST on the absorption by petitioner of real property of SPPC as a legal consequence of the statutory merger between the two companies.

Merger is a form of corporate re-organization of two or more corporations whereby they merge into one or single corporation, which is one of the constituent corporations, one disappearing or dissolving and the other surviving. *(Ruben E. Agpalo, Comments on the Corporation Code, 1993 ed., pp.323-324, cited on p. 459, Agpalo's Legal Words and Phrases, 1997 ed.)*

Section 80 of the Corporation Code sets forth the effects of merger, thus:

Sec. 80. ***Effects of merger or consolidation.*** - The merger or consolidation shall have the following effects:

> 1. The constituent corporations shall become a single corporation which, in case of merger, shall be the surviving corporation designated in the plan of merger; and, in case of consolidation, shall be the consolidated corporation designated in the plan of consolidation;
>
> 2. The separate existence of the constituent corporations shall cease, except that of the surviving or the consolidated corporation;
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> 3. The surviving or the consolidated corporation shall possess all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Code;
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> 4. The surviving or the consolidated corporation shall thereupon and thereafter possess all the rights, privileges, immunities and franchises of each of the constituent corporations; and all property, real or personal, and all receivables due on whatever account, including subscriptions to shares and other choses in action, and all and every other interest of, or belonging to, or due to each constituent corporation, shall be deemed transferred to and vested in such surviving or consolidated corporation without further act or deed; and
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> 5. The surviving or consolidated corporation shall be responsible and liable for all the liabilities and obligations of each of the constituent corporations in the same manner as if such surviving or consolidated corporation had itself incurred such liabilities or obligations; and any pending claim, action or proceeding brought by or against any of such constituent corporations may be prosecuted by or against the surviving or consolidated corporation. The rights of creditors or liens upon the property of any of such constituent corporations shall not be impaired by such merger or consolidation.

Based on the foregoing, it is evident that the transfer of real property from the absorbed corporation to the surviving or consolidated corporation pursuant to a merger or consolidation **occurs by operation of law** inasmuch as the real property is deemed transferred **without further act or deed.** In the case at bar, the petitioner's theory is that DST on the transfer of real property does not apply to a "statutory merger" where real property of the absorbed corporation is deemed automatically vested in the surviving corporation by operation of law, i.e., without any further act of deed.

To support its contention that the subject transfer of real property is not subject to DST, petitioner cited the case of ***Commissioner of Internal Revenue vs. Heald Lumber Co.***, *10 SCRA 372*, where the Supreme Court held that "(a) documentary stamp tax is in the nature of an excise tax. It is not imposed upon the business transacted but is an excise tax upon the **privilege, opportunity or facility offered at exchanges for the transaction of the business**. It is an excise tax upon the facilities used in the transaction of the business separate and apart from the business itself."

Indeed, the aforequoted jurisprudence points to the conclusion that the obligation to pay DST is based on the voluntary action of the person performing the act or engaging in the activity which is subject to DST. Therefore, the DST imposed on the transfer of real property should not apply to a statutory merger where real property of the absorbed corporation is automatically vested in the surviving corporation by operation of law, without any further act or deed, rather than by some voluntary act or deed on the part of the taxpayer concerned.

The petitioner correctly pointed out that this conclusion is consistent with BIR Rulings dated October 24, 1954 and May 14, 1973, where the BIR ruled that the transfer of certificates of stock by operation of law is not subject to DST. The BIR Ruling of May 14, 1973 cited the case of ***U.S. vs. Seattle-First National Bank***, *321 U.S. 583 (1944)*, where the U.S. Supreme Court held that the transfer of title to stocks owned by a bank or held by it as a fiduciary, and **of title to real estate**, as a result of the consolidation of banks under the U.S. National Banking Act, is one "by operation of law" and, therefore, not subject to DST. The U.S. Supreme Court gave the following ratiocination in support of its conclusion, to wit:

> "**Here the actual transfer to respondent of the legal and beneficial title to the securities owned by the state bank was not effected by or dependent on any of the voluntary acts relating to the consolidation agreement or ratification or approval thereof. Nor was any voluntary deed, conveyance, assignment or other instrument utilized. Rather, the transfer occurred solely and automatically by virtue of Section 3 of the National Banking Act.** This provides in pertinent part: (1) upon consolidation, the corporate existence of each of the constituent banks shall be merged and continued in the consolidated national banking association, **which shall be deemed to be the same corporation as the constituent banks; (2) all the rights, franchises and interests of each constituent banks in and to every species of property, real, personal and mixed, and choses in action thereto belonging, 'shall be deemed to be transferred to and vested in' the consolidated association without any deed or other transfer;** (3) the consolidated association, by virtue of such consolidation and without any order or other action by any court or otherwise, shall hold and enjoy the same and all rights of property, franchises and interests (including fiduciary interests) in the same manner and to the same extent as held and enjoyed by the constituent banks.
>
> "Thus it is the National Banking Act that is the mechanism by which the transfer of securities is made effective. No voluntary act by the parties is necessary. It follows that the transfer occurred 'wholly by operation of law.' The mere fact that the parties here saw fit to include in their consolidation agreement a provision that all assets of each constituent bank 'shall pass to and vest in the consolidated association' does not make the transfer any less than one 'wholly by operation of law.' This was merely an agreement that the assets would be transferred in the future and did not purport to be a present, effective conveyance. The transfer of the securities to which the state bank held legal and beneficial title was therefore exempt from the stamp tax under Articles 34(r) and 35 (r).

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> "Third. The **transfer of the real property** owned by the state bank is likewise, in our opinion, **exempt from the stamp tax.**
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> "Section 800, Schedule A-8, of the Revenue Act of 1926, as amended, placed a stamp tax on 'Conveyances: **Deed, instrument, or writing**, delivered ... whereby any lands, tenements, or other realty **sold** shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, **the purchaser or purchasers...' It is clear, however, from Section 3 of the National Banking Act that the state bank's realty was not conveyed to or vested in respondent by means of any deed, instrument or writing. There was a complete absence of any of the formal instruments or writings upon which the stamp tax is laid. Nor can the realty be said to have been 'sold' or vested in a 'purchaser or purchasers' within the ordinary meanings of those terms.** Only by straining the realities of the statutory consolidation process can respondent be said to have 'bought' or 'purchased' the real property. That we are unable to do."

As correctly observed by petitioner, the provision on imposition of stamp tax on conveyance of real property cited in Seattle-First National Bank is identical to Section 196 of the 1997 National Internal Revenue Code *(Stamp Tax on Deeds of Sale and Conveyances of Real Property).* Thus, applying the U.S. Supreme Court's ruling in Seattle-First National Bank to petitioner's case, the transfer of real property from SPPC to petitioner was not effected by or dependent on any voluntary act or deed of the parties to the merger. Nor was any voluntary deed, conveyance, assignment or other instrument utilized or necessary. Upon the effective date of the merger, the real properties were automatically transferred to and vested in petitioner without further act or deed. The transfer occurred solely and automatically by virtue of Section 80(4) of the Corporation Code. In short, title to real property passed to and vested in petitioner by operation of law pursuant to the merger. There was, in effect, only absorption by the surviving corporation (petitioner), by operation of law, of real property of the absorbed corporation (SPPC).

In the case of ***Commissioner of Internal Revenue vs. Court of Appeals, Court of Tax Appeals and Josefina P. Pajonar***, *G.R. No. 123206, March 22, 2000,* the Highest Tribunal, citing the case of *Carolina Industries, Inc. vs. CMS Stock Brokerage, Inc., 97 SCRA 734 (1980)*, re-affirmed the legal principle that decisions of American courts construing the Federal Tax Code should be accorded great weight in the interpretation of our own tax laws. We agree with the petitioner that inasmuch as the provisions on DST found in the 1997 NIRC were lifted from the American Federal Tax Code, the U.S. Supreme Court's decision in Seattle-First National Bank applying the same should be influential in the interpretation of the subject provisions on DST under our Tax Code.

To reiterate, since the transfer of real property of SPPC to petitioner was not effected by or dependent on any voluntary act or deed of the parties to the merger, DST, therefore, should not attach to the same.

In imposing the DST, the BIR cited Section 196 of the 1997 Tax Code as basis of its ruling, thus:

> "**Section 196.** ***Stamp Tax on Deeds of Sale and Conveyances of Real Property.*** – On all **conveyances, deeds, instruments, or writings,** other than grants, patents or original certificates of adjudication issued by the Government, whereby any land, tenement or other realty **sold** shall be granted, assigned, transferred or otherwise conveyed **to the purchaser or purchasers**, or to any other person or persons designated by such purchaser or purchasers, there shall be collected a documentary stamp tax, at the rates herein below prescribed, **based on the consideration**

> **contracted to be paid for such realty or on its fair market value determined in accordance with Section 6(E) of this Code, whichever is higher**: *Provided*, that when one of the contracting parties is the Government, the tax herein imposed shall be based on the actual consideration." (*Emphasis supplied*)

A perusal of the above-cited provision would reveal that the DST is imposed only on all conveyances, deeds, instruments, or writings where realty sold shall be conveyed to purchaser or purchasers. Clearly, in case of merger, as in the case at bar, only by straining the imagination can the transferee be said to have "bought" or "purchased" real property from the transferor. The absorption by petitioner of real property of SPPC as an inherent legal consequence of the merger is not a sale or other conveyance of real property for a consideration in money or money's worth.

As correctly pointed out by the petitioner, SPPC's real property was not conveyed to or vested in petitioner by means of any deed, instrument or writing, considering that real properties were automatically vested in petitioner without "further act or deed". There was a complete absence of any formal instrument or writing upon which DST may be imposed. Nor can the realty be said to have been "sold" or vested in a "purchaser or purchasers" within the ordinary meanings of those terms.

Section 185 of Revenue Regulations No. 26, otherwise known as the DST regulations, supports this finding. Section 185 provides as follows:

> "**Section 185. Conveyances without consideration.** – Conveyances of realty, **not in connection with a sale**, to trustees or other persons **without consideration** are not taxable." (*Emphasis supplied*)

Moreover, under Revenue Memorandum Circular No. 44-86 dated December 4, 1986, which outlines the procedure in the determination and collection of stamp tax on instruments of sale or conveyance of real property, it is clear that the DST applies only if the instrument is a sale or other conveyance of real property for a consideration in money or money's worth.

Finally, the absorption by petitioner of real property of SPPC by operation of law pursuant to the merger is part and parcel of a single and continuing transaction. Accordingly, the same should not be subject to DST as if it constituted a separate and distinct transaction.

As earlier stated, DST is in the nature of an excise tax because it is really imposed on the privilege to enter into a transaction. Its imposition, therefore, should be only once. And in a statutory merger, there is only one transaction, i.e., the issuance by the surviving corporation of its own shares of stock to the stockholders of the absorbed corporation in exchange for the shares surrendered by the shareholders of the absorbed corporation. All other transactions which are an integral and inherent part of the merger, such as the absorption of real property, should no longer be subject to another round of DST. In other words, all the integral parts of the merger (e.g., surrender of shares in exchange for shares, transfer of assets, assumption of liabilities, etc.) should be treated as a single and continuing transaction subject only to one DST. The transfer of real property is not a transaction separate and distinct from the merger but an integral part or a mere continuation of the initial transaction which was previously consummated.

Applying the same in petitioner's case, the absorption by petitioner of real property of SPPC is not a transaction separate and distinct from the merger, wherein petitioner issued its own shares to SPPC shareholders in exchange for the latter's shares in SPPC, the absorbed entity, but a mere continuation of the initial transaction which was previously consummated, and for which the required DST was already paid.

Hence, considering that petitioner already paid the DST on the original issuance of shares, the automatic vesting in petitioner, by operation of law, of real properties owned by SPPC prior to the merger, should no longer be subject to DST.

WHEREFORE, in view of the foregoing, the instant Petition for Review is hereby **GRANTED**. Accordingly, respondent is hereby **ORDERED** to **REFUND** or in the alternative **ISSUE** a **TAX CREDIT CERTIFICATE** in favor of the petitioner in the amount of P22,101,407.64 representing the latter's erroneously paid documentary stamp tax for the taxable year 2000.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Judge

LOVELL R. BAUTISTA
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge