REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA *EB* NO. 2094** *(CTA Case No. 9006)*
-versus-	Present: **DEL ROSARIO, P.J., CASTAÑEDA, JR., UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA,** *and* **MODESTO-SAN PEDRO,** *JJ.*
CE CASECNAN WATER AND ENERGY COMPANY, INC., *Respondent.*	Promulgated: FEB 1 8 2021 4:05 pm

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RESOLUTION

MODESTO-SAN PEDRO, J.:

Before this Court *En Banc* is petitioner's Motion for Reconsideration (Re: Decision promulgated 21 July 2020) ("Motion for Reconsideration"), filed by petitioner through registered mail on 27 August 2020,[1] with respondent's Comment/Opposition (Re: Petitioner's Motion for Reconsideration dated August 25, 2020) ("Comment"), filed on 26 October 2020.[2]

In the Motion for Reconsideration,[3] petitioner alleges that:

1. He disagrees with the ruling by this Honorable Court that it cannot take into consideration his argument that respondent is not entitled to a refund of the alleged excess and unutilized input taxes as the right to seek the same belongs to its suppliers of goods and/or services, or the persons and/or entities from which the input taxes originated. For

[1] Records, pp. 145-159.
[2] *Id.*, pp. 164-178.
[3] *Id.*, pp. 146-154.

petitioner, as the present case is an appeal, the records of the case may be opened for review.

2. ***Section 112 of the Tax Code*** provides that only "creditable input taxes" that are "directly attributable" may be refunded. No attributability was established between the input tax on purchases *vis-à-vis* the zero-rated sales of respondent. Moreover, there is no proof adduced that the input taxes being claimed for refund was "creditable," *i.e.,* that it was part of a purchase of goods or service that formed part of the finished product of the taxpayer or directly used in the chain of production. Hence, respondent is not entitled to any input tax refund.

3. ***Section 15 (g) of Republic Act No. 9513 ("RA 9513")*** provides that all Renewable Energy Developers ("RE Developers") are entitled to zero-rated valued added tax ("VAT") on its purchases of local supply of goods, properties, and services needed for the development, construction, and installation of its plant facilities, which also includes the whole process of exploring and developing renewable energy sources up to its conversion into power, including but not limited to the services performed by subcontractors and/or contractors. As such, no VAT should be passed on to RE Developers such as respondent. Conversely, no VAT shall be paid by RE Developers, including respondent, on its purchase transactions. There being no input VAT to be paid by RE Developers, it necessarily follows that they are not entitled to refund from said purchase transactions. Considering that respondent is engaged in the production of power from renewable sources, the input VAT from its local supply of goods, properties, and services needed for the development, construction, and installation of its plant facilities, as well as the whole process of exploring and developing renewable energy sources up to its conversion into power, are also zero-rated in accordance with ***Sections 106 (A) (2) (c) and 108 (B) (3) of the Tax Code*** in relation to ***Section 15 (g) of RA 9513***.

In its Comment,[4] respondent counter-argues as follows:

1. Petitioner is precluded from raising new arguments on the ground of estoppel.

2. Respondent sufficiently established that it is entitled to the refund and/or issuance of TCC application for unutilized input VAT attributable to its zero-rated sales for the four (4) quarters of 2013.

[4] Id., pp. 166-175.

3. ***Section 15 of RA 9513*** is not applicable to respondent as it neither registered as an RE Developer nor underwent the process of registration with the Department of Energy ("DOE") as an RE Developer under the terms and conditions of ***RA 9513***.

We deny the Motion for Reconsideration. The arguments raised therein have already been sufficiently discussed in the Decision dated 21 July 2020. On this note alone, this Motion for Reconsideration deserves scant consideration. At any rate, the Court shall take on petitioner's argument, albeit in a condensed manner.

Issues, arguments or points of law cannot be raised for the first time on appeal.

Petitioner argues that since the present case is an appeal, the record of the case may be opened for review. Consequently, for petitioner, his argument (that respondent is not entitled to a refund of the alleged excess and unutilized input taxes as the right to seek the same belongs to its suppliers of goods and/or services, or the persons and/or entities from which the input taxes originated) can still be considered by this Court *En Banc* on appeal. This is misplaced.

Basic is the rule that "Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived."[5] This ensures compliance with the rule on fair play, justice, and due process.[6] Hence, "issues that were not alleged or proved before the lower court cannot be decided for the first time on appeal. This rule ensures fairness in proceedings."[7]

As duly found by this Court *En Banc*, petitioner's arguments were raised for the first time in his Motion for Partial Reconsideration to the Decision dated 19 October 2018[8] and simply repeated in his Motion for Partial Reconsideration to the Amended Decision dated 22 February 2019.[9] As such, petitioner's arguments cannot be entertained by this Court *En Banc* considering that the same were belatedly raised.

[5] Rule 9, Section 1 of the Rules of Court.
[6] Sps. Delfino v. St. James Hospital, Inc., G.R. No. 166735, 23 November 2007.
[7] Chinatrust (Phils.) Commercial Bank v. Philip Turner, G.R. No. 191458, 3 July 2017.
[8] See Amended Decision, Records, p. 80.
[9] See Resolution, dated 17 June 2019, Records, p. 68.

<u>Section 112 of the Tax Code does not absolutely require that input VAT subject of a refund/TCC claim be directly attributable to zero-rated sales.</u>

Petitioner further argues that ***Section 112 of the Tax Code*** requires that the creditable input VAT subject of a refund claim be "directly attributable" to a taxpayer's zero-rated sales. As respondent failed to present evidence on such, it is not entitled to the input VAT refund granted. Again, this is erroneous.

It is well settled that ***Section 112 of the Tax Code*** does not require absolute direct attribution of the input VAT subject of a refund claim to a taxpayer's zero-rated sales. In fact, the said provision allows the allocation of input VAT that cannot be directly attributed to any of the taxpayer's sales (*i.e.,* zero-rated sales, taxable sales or exempt sales), to wit:

> **"SEC. 112.** ***Refunds or Tax Credits of Input Tax. -***
> **(A)** ***Zero-Rated or Effectively Zero-Rated Sales.***- any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): **<u>Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.</u>** Provided, finally, That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales."
> (Emphasis and Underscoring, Ours)

Indeed, absolute direct attribution of the input VAT sought to be refunded to a taxpayer's zero-rated sales is unnecessary for a claim for input tax refund to prosper.

<u>Section 15 (g) of RA 9513 is inapplicable to the present Petition.</u>

With respect to petitioner's insistence that petitioner, as an RE Developer, is entitled to VAT zero-rating of its local purchases pursuant to ***Section 15 (g) of RA 9513***, and as such cannot claim input VAT refund as no input VAT should have been passed on its purchases in the first place, the same is equally mistaken.

The incentives provided under ***Section 15 (g) of RA 9513*** are inapplicable to respondent:

> **"CHAPTER VII**
> **GENERAL INCENTIVES**
>
> **Section 15. Incentives for Renewable Energy Projects and Activities.** - RE developers of renewable energy facilities, including hybrid systems, in proportion to and to the extent of the RE component, for both power and non-power applications, **<u>as duly certified by the DOE, in consultation with the BOI,</u>** shall be entitled to the following incentives:
>
> xxx xxx xxx
>
> (g) Zero Percent Value-Added Tax Rate. - The sale of fuel or power generated from renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy and other emerging energy sources using technologies such as fuel cells and hydrogen fuels, shall be subject to zero percent (0%) value-added tax (VAT), pursuant to the National Internal Revenue Code (NIRC) of 1997, as amended by Republic Act No. 9337.
>
> **<u>All RE Developers shall be entitled to zero-rated value added tax on its purchases of local supply of goods, properties and services needed for the development, construction and installation of its plant facilities.</u>**
>
> **<u>This provision shall also apply to the whole process of exploring and developing renewable energy sources up to its conversion into power, including but not limited to the services performed by subcontractors and/or contractors."</u>**
> (Emphasis and Underscoring, Ours)

In relation thereto, ***Section 25 of RA 9513*** provides, as follows:

> **Section 25.** ***Registration of RE Developers and local manufacturers, fabricators and suppliers of locally-produced renewable energy equipment.*** - **<u>RE Developers</u>** and local manufacturers, fabricators and suppliers of locally-produced renewable

> energy equipment **shall register with the Department of Energy, through the Renewable Energy Management Bureau. Upon registration, a certification shall be issued to each RE Developer** and local manufacturer, fabricator and supplier of locally-produced renewable energy equipment **to serve as the basis of their entitlement to incentives provided under Chapter VII of this Act.**
> (Emphasis and underscoring, Ours)

Implementing the foregoing provisions are Sections 18 (A) (1) and 39 of Department of Energy ("DOE") Circular No. 2009-05-0008,[10] Sections 4 (b) (ii) and 14 of DOE Circular No. 2009-07-0011,[11] to wit:

> "SEC. 18. ***Conditions for Availment of Incentives and Other Privileges***. –
>
> *A. **Registration/Accreditation with the DOE***
>
> **For purposes of entitlement to the incentives and privileges under the Act, existing and new RE Developers, and manufacturers, fabricators, and suppliers of locally-produced RE equipment shall register with the DOE, through the Renewable Energy Management Bureau (REMB).** The following certifications shall be issued:
>
> *(1)* ***DOE Certification of Registration*** – issued to an RE Developer holding a valid RE Service/Operating Contract.
>
> For existing RE projects, the new RE Service/Operating Contract shall pre-terminate and replace the existing Service Contract that the RE Developer has executed with the DOE subject to the Transitory Provisions in Rule 13, Section 39.
>
> **The DOE Certificate of Registration shall be issued immediately upon award of an RE Service/Operating Contract covering an existing or new RE project or upon approval of additional investment.**
>
> Any investment added to existing RE projects shall be subject to prior approval by the DOE."
>
> (Emphasis and Underscoring, Ours)
>
> "SEC. 39. **Transitory Provisions**
>
> Benefits or incentives extended to RE Developers, and manufacturers, fabricators, and suppliers of locally-produced RE equipment under existing laws not amended or withdrawn under this Act shall remain in full force and effect. No provision of the Act shall be taken as to diminish any right vested by virtue of existing laws, contracts, or agreements. However, **in order to qualify for the availment of the incentives provided under Chapter VII of the Act and this IRR, the RE Developer, and manufacturers, fabricators, and suppliers of**

[10] 25 May 2009.
[11] 12 July 2009.

locally-produced RE equipment shall be required to secure a certificate of registration or accreditation with the DOE.

The fiscal incentives granted under Section 15 of the Act shall apply to all RE capacities upon the effectivity of the Act.

Pending the issuance of other necessary guidelines, the grant of provisional certificates of registration by the DOE shall be valid and effective."
(Emphasis and Underscoring, Ours)

"**SEC. 4. Nature of RE Contract.** – xxx

xxx xxx xxx

b. Conversion of RE Contract:

xxx xxx xxx

ii. **From Existing Service Contract/Agreement on RE Resources to RE Contracts under the Act and this Circular – For an existing RE project, the contract holder may elect to convert its Service Contract/Agreement under applicable laws by applying for an RE Contract under the Act and this Circular. The approval of such application shall be carried out on the basis of its prior rights over the contract area.**

Any individual or juridical entity with a valid and existing service or development contracts and agreements with the DOE/Government for the exploration, development or utilization of RE resource shall be deemed provisionally registered as an RE Developer under the Act, which registration shall subsist until the issuance of DOE Certificate of Registration provided for under Section 18 of the IRR. For this purpose, the DOE shall issue the corresponding provisional certificate of registration, pursuant to Section 39 of the IRR, upon receipt of the RE Developer's letter of intent for conversion to RE Contract."
(Emphasis and Underscoring, Ours)

"**SEC. 14. Registration as an RE Developer.** – The DOE shall issue the Certificate of Registration to the RE Developer immediately upon the effectivity of the RE Contract whether during Pre-Development or Development/Commercial Stage.

Holders of valid and existing contracts or agreements on renewable energy resources awarded prior to the effectivity of the Act shall be issued a DOE Certificate of Registration as RE Developers only upon conversion of these contracts or agreements to RE Contracts pursuant to Section 4 (b) hereof."
(Emphasis and Underscoring, Ours)

The above-cited provisions mandate that, before an RE Developer can avail of the incentives provided under ***Section 15 (g) of RA 9513***, it must first register itself as such with the DOE, which in turn will issue a Certification certifying that it is an RE Developer entitled to the incentives under ***RA 9513***.

As no proof was adduced showing that herein respondent is registered as an RE Developer with the DOE, respondent is not entitled to the incentives provided under ***RA 9513***. As duly found by this Court *En Banc*, this entitlement to the incentives under ***RA 9513*** was vehemently denied by respondent in its Comment.[12] Due to the foregoing, respondent cannot be classified as an RE Developer under ***RA 9513*** which is entitled to the incentives provided therein. Respondent's local purchases of goods and services are therefore not subject to VAT zero-rating. Thus, petitioner's argument (that instead of petitioner, its local suppliers of goods and services are the ones who have legal standing to file the VAT refund claim) has no basis at all.

WHEREFORE, the Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED.

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

[12] Records, p. 106.

ERLINDA P. UY
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice