REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

CONTEX CORPORATION,
Petitioner,

CTA Case No. 8493

- versus-

Members:

Castañeda, Jr., *Chairperson*
Casanova, and
Cotangco-Manalastas, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

JUN 3 0 2015

4:10 p.m.

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AMENDED DECISION

COTANGCO-MANALASTAS, *J.:*

For resolution is petitioner's *Motion for Partial Reconsideration (with Motion to Present Additional Evidence)* filed on May 11, 2015 with respondent's *Comment* filed on June 8, 2015.

Petitioner prays for the reversal of this Court's Decision, promulgated on April 22, 2015, the dispositive portion of which reads:

> "**WHEREFORE,** premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, the deficiency expanded withholding tax assessment and the compromise penalties for taxable year 2007 are hereby **CANCELLED AND WITHDRAWN**. However, the deficiency income tax, value-added tax, withholding tax on compensation, fringe benefit tax, and final withholding tax assessments for taxable year 2007 are hereby **AFFIRMED**. Accordingly, petitioner is hereby **ORDERED TO PAY** respondent the amount of **₱25,213,292.14** representing deficiency income tax, value-added tax, withholding tax on compensation, fringe benefit tax, and final withholding tax for taxable year 2007, inclusive of the

twenty-five percent (25%) surcharge imposed under Section 248(3) of the NIRC of 1997, as amended, computed as follows:

Deficiency Tax	Basic Tax	25% Surcharge	Total
Income Tax	₱ 361,067.49	₱ 90,266.87	₱ 451,334.36
Value-added Tax	7,377,979.40	1,844,494.85	9,222,474.25
Withholding Tax on Compensation	1,217.10	304.28	1,521.38
Fringe Benefits Tax	149,947.54	37,486.89	187,434.43
Final Withholding Tax	12,280,422.18	3,070,105.55	15,350,527.73
Total	**₱20,170,633.71**	**₱5,042,658.43**	**₱25,213,292.14**

In addition, petitioner is hereby **ORDERED TO PAY**:

a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency income tax, value-added tax, withholding tax on compensation, fringe benefit tax, and final withholding tax computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended;

Tax Type	Basic Tax	Deficiency Interest computed from
Income Tax	₱ 361,067.49	April 15, 2008
Value-added Tax	7,377,979.40	January 25, 2008
Withholding Tax on Compensation	1,217.10	January 15, 2008
Fringe Benefits Tax	149,947.54	January 10, 2008
Final Withholding Tax	12,280,422.18	January 15, 2008

b) Delinquency interest at the rate of 20% per annum on the total amount of ₱25,213,292.14 and on the 20% deficiency interest which have accrued as afore-stated in (a), computed from April 17, 2012 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED."

Petitioner moves for the reconsideration of the Court's Decision on the basis of the following:

i. As borne by the records, respondent's right to assess petitioner's deficiency taxes for calendar year (CY) 2007 has already prescribed pursuant to Section 203, National Internal Revenue Code (NIRC) of 1997;

ii. Respondent's deficiency tax assessments for CY 2007 are null and void because the Revenue Officer (RO) who conducted the audit investigation did not have the requisite authority to do so under the Letter of Authority (LOA) issued by the Regional Director of the Bureau of Internal Revenue (BIR), Revenue Region No. 4;

iii. Even assuming for the sake of argument that the deficiency tax assessments for CY 2007 were issued within the 3-year prescriptive period, petitioner respectfully submits that the deficiency income tax, value-added tax (VAT), withholding tax on compensation (WTC), fringe benefit tax (FBT) and final withholding tax (FWT) for CY 2007 should nevertheless be cancelled for lack of legal and factual basis as shown by the evidence on record.

Petitioner likewise moves for leave of Court to allow the reopening of trial for presentation of additional evidence in the interest of substantial justice and in order to aid the Court in judiciously evaluating the merits of the case.

In her comment, respondent submits that the first two issues were never raised during the pre-trial of the case. It is settled jurisprudence that an issue which was neither averred in the complaint nor raised during the trial in the court below cannot be raised for the first time on appeal as it would be offensive to the basic rules of fair play, justice and due process. A motion for reconsideration is not putting forward a new issue, or presenting new evidence, or changing the theory of the case, but is only seeking for a reconsideration of the judgment or final order based on the same issues, contentions, and evidence either because: (a) the damages awarded are excessive; or (b) the evidence is insufficient to justify the decision or final order; or (c) the decision or final order is contrary to law.

As for the third issue, respondent submits that the Court had already meticulously discussed, passed upon, and considered the arguments raised therein.

Respondent further contends that with its motion to present additional evidence, petitioner is reckoned to have conceded to its failure to refute the presumption of correctness of the subject assessment. Respondent vehemently opposes petitioner's motion to present additional evidence. Petitioner's accounting records and corporate records are not newly discovered nor were omitted through inadvertence or mistake as they are readily available at petitioner's records. Petitioner's motion should not be allowed, as litigation is not a "trial and error" proceeding.

The Court will discuss petitioner's arguments in *seriatim.*

I. Prescription

Petitioner argues that while prescription of the assessment was not specifically raised as an issue in this petition, petitioner submits that the Court has the power to cancel respondent's assessments on the ground of prescription pursuant to Rule 9, Section 1 of the Rules of Court, which states that:

> Section 1. *Defenses and objections not pleaded.* — Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by prior judgment or by the statute of limitations, the court shall dismiss the claim.

Petitioner cited the case of *Bank of the Philippine Islands vs. Commissioner of Internal Revenue*[1], where the Supreme Court held, among others, that if the pleadings or the evidence on record show that the claim is barred by prescription, the court is mandated to dismiss the claim even if prescription is not raised as a defense. To determine prescription, what is essential only is that the facts demonstrating the lapse of the prescriptive period were sufficiently and satisfactorily apparent on the record either in the allegations of the plaintiff's complaint, or otherwise established by the evidence.

The general rule is that defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived, except if the dismissal is based on the following grounds: lack of jurisdiction over the subject matter, *litis pendentia*, *res judicata*, and prescription. However, the

[1] G.R. No. 181836, July 9, 2014.

exception cannot be applied herein because the pleadings and the evidence on record do not sufficiently show that the action is barred by prescription.[2]

Petitioner never raised prescription as a defense in its pleadings. Moreover, the evidences submitted by the parties were not sufficient to support a finding on prescription.

Section 203 of the NIRC of 1997, as amended, provides that the BIR has three (3) years to assess and collect an internal revenue tax, *to wit*:

> SEC. 203. *Period of Limitation Upon Assessment and Collection.* — Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided,* That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

Hence, for the Court to make a proper ruling on prescription, the returns should be presented in evidence to prove the dates of their filing so that the Court will be able to determine when prescription began to run and when it lapsed.

Unfortunately, petitioner did not present in evidence its tax returns for CY 2007. Neither did respondent present in evidence any of petitioner's returns. The Court cannot assume that the returns were filed on or before the last day prescribed by law for purposes of determining if prescription has already set it.

Notably, petitioner belatedly attached copies of its Annual Income Tax Return or BIR Form No. 1702 for CY 2007 (Annex A) and Monthly Remittance Return of Income Taxes Withheld on Compensation or BIR Form No. 1601-C for January to December 2007 (Annexes "B-1" to "B-12") to its motion for reconsideration. However, the Court cannot consider the same because they were not formally offered in evidence pursuant to Section 34, Rule 132 of the Rules of Court, which

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[2] *Philippine National Oil Company vs. The Hon. Court of Appeals, et al.*, G.R. No. 109976, April 26, 2005.

provides that "[t]he court shall consider no evidence which has not been formally offered." Also, as will be discussed later on, the Court cannot allow the presentation of these additional documents.

Petitioner points out that the BIR Records show that petitioner filed its Annual Income Tax Return for CY 2007 on April 15, 2008[3] while Monthly Remittance Return of Income Taxes Withheld on Compensation (BIR Form No. 1601-C) for January to December 2007 were filed on the following dates: February 12, 2007, March 12, 2007, April 10, 2007, May 10, 2007, June 12, 2007, July 10, 2007, August 10, 2007, September 10, 2007, October 11, 2007, November 12, 2007, December 10, 2007, and January 10, 2008[4].

Again, the Court cannot consider the same. As discussed earlier, these returns were not formally offered in evidence. The exception laid down in *Vda. De Oñate vs. the Court of Appeals*[5] cannot likewise apply. In that case, the Supreme Court held that:

> However, in *People v. Napat-a* citing *People v. Mate*, we relaxed the foregoing rule and allowed evidence not formally offered to be admitted and considered by the trial court provided the following requirements are present, *viz.*: first, the same must have been duly identified by testimony duly recorded and, second, the same must have been incorporated in the records of the case.

Being an exception, it may be applied only when there is strict compliance with the requisites mentioned therein.[6]

Although the BIR Records were incorporated in the records of the case by virtue of the transmittal thereof to this Court as mandated by Section 5(b), Rule 6 of the Rules of the Court of Tax Appeals, the returns contained in the BIR Records were not marked nor duly identified by testimony duly recorded.

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[3] BIR Records, pp. 37-39.
[4] BIR Records, pp. 76-127.
[5] G.R. No. 116149, November 23, 1995.
[6] *Rafael Arsenio S. Dizon vs. Court of Tax Appeals, et al.*, G.R. No. 140944, April 30, 2008.

Waiver of the Defense of Prescription

Petitioner submits that the Waiver of the Defense of Prescription is null and void because it failed to comply with the requirements of a valid waiver under Section 222(b), NIRC of 1997 and Revenue Memorandum Order (RMO) No. 20-90, as amended by Revenue Delegation Authority Order No. 05-01. Consequently, the Waiver could not have extended the period for the issuance of respondent's assessments.

However, the issue on the validity of the Waiver was never put in issue. To reiterate, defenses not pleaded are deemed waived. Petitioner's argument as to the nullity of the Waiver was raised for the first time in the instant motion for reconsideration. As will be discussed in detail later on, a motion for reconsideration is not putting forward a new issue, or presenting new evidence, or changing the theory of the case, but is only seeking a reconsideration of the judgment or final order based on the same issues, contentions, and evidence[7].

Moreover, with the resolution of the issue on prescription earlier, the issue on the validity of the Waiver was likewise rendered moot.

II. Revenue Officer's Authority

Petitioner submits that the RO who conducted the audit investigation and who prepared the audit report in this case, RO Gracita D. Agaton, did not have the authority to examine petitioner's books of accounts for CY 2007 because she was not among the ROs named in LOA No. 2007-00013004 dated October 30, 2008.[8]

Petitioner argues that only the ROs designated in the LOA may conduct an audit of the taxpayer's books of accounts. Respondent alleged that RO Agaton was authorized to examine petitioner's books of accounts for CY 2007 pursuant to a Memorandum Referral dated August 17, 2010 (Exhibit "6")[9] stating that in view of the transfer of RO Leilani Arellano to another BIR office, RO Agaton was directed to continue with the examination of petitioner's books of

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[7] *Heirs of Spouses Teofilo M. Reterta and Elisa Reterta vs. Spouses Lorezon Mores and Virginia Lopez*, G.R. No. 159941, August 17, 2011.

[8] BIR Records, in between pp. 51-52.

[9] BIR Records, p. 307. However, respondent's Exhibit "6" is actually Memorandum Referral No. 019-10-015) found on page 305 of the BIR Records.

accounts for CY 2007. However, the Memorandum Referral did not provide RO Agaton sufficient authority to examine petitioner's books of accounts pursuant to Section 13 of the NIRC of 1997.

Again, this matter was never put in issue. Nevertheless, contrary to petitioner's argument, issuance of the "Memorandum Referral" is authorized under RMO No. 8-06[10], which provides for the guidelines and procedures in case the original investigating Revenue Office (RO) and/or the Group Supervisor (GS) has been transferred, resigned or retired. It is specifically provided therein that "[i]n case of reassignment, a memorandum to that effect shall be issued by the head of the investigating office to the concerned taxpayer and the concerned taxpayer and the concerned RO and/or GS." RMO No. 62-10[11], likewise provides that "[a] Memorandum of Assignment (MOA) (Annex "A") with a system-generated number shall be issued through the LAMS under the following instances: 7.1 Reassignment for the continuation of the audit/investigation to another RO due to resignation/retirement/transfer of the original RO; xxx". In this case, a Memorandum of Assignment[12] (using the format prescribed in Annex "A" of RMO 62-10) was issued to RO Agaton referring to her the continuation of the audit/investigation of petitioner's internal revenue taxes for taxable year 2007.

III. Basis of Deficiency Taxes

Petitioner submits that the Court erred in holding that the evidence presented by petition are insufficient to overcome the "presumption of correctness" of respondent's deficiency tax assessments.

A. Income Tax

Telephone Charges

Petitioner argues that the Cost Sharing Agreement[13] clearly shows that the petitioner and its affiliates have agreed

[10] Prescribing Guidelines and Procedures in the Implementation of the Letter of Authority Monitoring System (LAMS).
[11] Supplemental Guidelines on the Electronic Issuance of Letters of Authority and Related Audit Policies and Procedures
[12] BIR Records, p. 307.
[13] Exhibit "O".

to share the cost of operations at the Peninsula Court office, where their business activities are being undertaken. The cost of communication is directly related to petitioner's business operations because this expense represents the petitioner's share in the costs incurred for the operation of the Peninsula Court office, where petitioner's business activities are being undertaken.

The Court is not convinced.

It should be emphasized that to rebut this item of assessment, petitioner only presented in evidence its Cost Sharing Agreement, which to our mind is not sufficient to overcome the presumption of correctness of this item of assessment.

As discussed in the assailed Decision, petitioner failed to offer and submit evidence to prove the direct connection or relation of the said telephone expenses to the development, management, operation and/or conduct of its trade or business. Petitioner did not even explain the nature of the "activities" being undertaken in the Peninsula Court office. The Cost Sharing Agreement only stated in vague terms that "MICL [Medtecs International Corporation Limited] supervises the other parties with regard to their activities at the 7th Floor, The Peninsula Court, 8735 Paseo de Roxas corner Makati Avenue, Makati City" and that "the parties agreed to share in the costs of their activities at The Peninsular Court".

Furthermore, petitioner failed to sufficiently substantiate by evidence its claim that the amount of disallowed telephone expense actually pertains to its affiliate pursuant to a Cost Sharing Agreement; that the said affiliate paid the telecom service provider; and that the said affiliate subsequently billed petitioner.

Depreciation Expense

Petitioner contends that the Journal Voucher dated January 31, 2007[14] and the Schedule of Fixed Assets for CY 2007[15] clearly show that the amount of ₱42,442.63 pertains to the write off of several machineries and equipment in CY 2007.

[14] Exhibit "P".
[15] Exhibit "Q".

Since the write off did not involve any expenses, there is nothing for the respondent to disallow.

However, as found by the Court in the assailed Decision, the journal voucher on the write-off of fully depreciated assets and the Schedule of Fixed Assets-Machinery and Equipment for the year 2007 failed to explain why the amount of ₱42,442.58 formed part of the depreciation expense claimed as deduction to petitioner's gross income. It should be noted that the depreciation claimed per income tax return (₱5,512,207.31) is higher than the amount per audit (₱5,469,764.73), which in turn was derived from petitioner's own schedule[16]. Hence, the Court is not convinced that the write off did not involve any expenses.

B. VAT

Petitioner submits that the Court erred in upholding the deficiency VAT assessment on the ground that "the circumstances under which the transactions (*i.e.*, transactions subjected to VAT by respondent) were made were not supported by evidence."

Petitioner asserts that from respondent's Preliminary Assessment Notice (PAN), Formal Letter of Demand (FLD), Final Decision on Disputed Assessment (FDDA), and Answer, and petitioner's Reply to the PAN, and Protest against the FLD, there is no dispute as to the fact that the transactions subjected to VAT by respondent pertains to petitioner's sales to Unet Distributor Corporation (Unet), a customs territory customer.

Considering that there was an admission from both parties that the sales in the amount of ₱61,483.161.67 pertains to petitioner's sales to Unet (a non-locator), petitioner is no longer required to prove that the transactions being subjected to VAT pertains to sales to Unet in CY 2007. Rule 129, Section 4 of the Revised Rules on Evidence clearly provides that an admission made by a party in the course of the proceedings does not require proof, *viz*:

> Section 4. *Judicial admissions.* — An admission, verbal or written, made by the party in the course of the proceedings in the same case, does not require proof. The

[16] BIR Records, pp. 212-226.

> admission may be contradicted only by showing that it was made through palpable mistake or that no such admission was made.

In view of the foregoing, petitioner argues that it is clear that the issue involved with respect to the deficiency VAT assessment is a pure question of law – particularly, whether or not petitioner, a company registered with Subic Bay Metropolitan Authority as a Freeport enterprise, is liable to pay 12% VAT on its sale to Unet, a customs territory customer.

In this regard, petitioner stresses that Revenue Memorandum Circular (RMC) No. 50-2007 has clarified the tax implications of sales of goods from a Freeport Zone, such as Subic Freeport Zone, to the customs territory, *viz*:

> Q8: *What is the tax treatment of sale, barter or exchange of goods and properties by Freeport Zone-registered enterprises to a buyer from the customs territory? (i.e. from the Freeport Zone into the Customs Territory)*
>
> A8: The sale, barter or exchange shall be treated as a technical importation made by the buyer in the customs territory. The buyer shall be treated as the importer and shall be imposed the corresponding import taxes and duties prior to release of the goods or merchandise from Customs custody. Any unpaid taxes thereon, aside from being the prime liability of the buyer-importer, shall constitute a lien on such goods or merchandise imported from the Freeport Zone.

Hence, petitioner contends that it is not liable to VAT on the "importations" made by Unet in CY 2007. Rather, it is Unet who is the statutory taxpayer for the VAT on the technical importation.

After carefully considering petitioner's above argument, the Court finds that there is no dispute that all the sales of petitioner were made to Unet Distributor Corporation, a customs territory customer or a non-locator.

Both the PAN[17] and FLD[18] stated that "[a]ll sales of the taxpayer were made to Unet Distributor Corporation, a non locator. Evidence as to payment of VAT to support the

[17] Exhibit "A".
[18] Exhibit "E".

transfer of goods to custom territory prior to release were not presented, thus all sales were subjected to Value Added Tax pursuant to the provision of Sections 106 and 113 of the National Internal Revenue Code." The same statement was reiterated in respondent's Answer[19].

Petitioner never disputed the factual findings of respondent but argued in its reply[20] to the PAN, protest[21] to the FLD and petition for review that it is the customs territory customer, and not petitioner, which is liable to remit the VAT on the basis of VAT Ruling No. 118-99 dated December 10, 1999.

Hence, these statements shall be treated as judicial admissions of the parties. Under Section 4, Rule 129 of the Revised Rules of Court, a judicial admission requires no proof.

Likewise, there is no dispute that the sales of articles to the customs territory are subject to VAT. This is evident from the arguments presented by the parties and as clarified in RMC No. 50-2007, *to wit*:

> Q7: *What is the tax treatment for the income of Freeport Zone-registered enterprises derived from sources in the Customs Territory?*
>
> A7: Freeport Zone-registered enterprises may generate income from sources within the Customs Territory of up to thirty percent (30%) of its total income from all sources; provided, that should a Freeport Zone-registered enterprise's income from sources within the Customs Territory exceed thirty percent (30%) of its total income from all sources, then it shall be subject to the income tax laws of the Customs Territory; provided further, that **in any case, customs duties and taxes must be paid with respect to transactions, receipts, income and sales of articles to the Customs Territory and in the Customs Territory.** *(Emphasis supplied)*

So from the foregoing, the issue that remains is who is liable to pay for the VAT?

[19] Docket, pp. 179-187.
[20] Exhibit "D".
[21] Exhibit "F".

Petitioner is insisting that it is the buyer in the customs territory who is liable to pay the VAT. In contrast, respondent is arguing that since no single delivery document (as approved by SBMA and Bureau of Customs) had been presented to support the transfer out of the goods from the Freeport zone that would prove that the buyer paid for the VAT on the goods when it was released to customs territory, then the VAT assessment against petitioner was pursued[22].

Section 47 of the Implementing Rules and Regulations of Republic Act No. 7227[23] treats the removal of articles from the Freeport Zone into customs territory as "ordinary importation", thus:

> SECTION 47. *Articles Removed or Withdrawn from SBF.* — Notwithstanding the above-mentioned tax and duty exemptions, **foreign articles removed, withdrawn or otherwise disposed of from the SBF[24] into the Customs Territory, shall be subject to the payment of customs duties and internal revenue taxes as ordinary importations** in accordance with the provisions of the Tariff and Customs Code of the Philippines, as amended, and the National Internal Revenue Code and other applicable laws.
>
> Articles entered or introduced from the SBF into the Customs Territory will be presumed to be foreign unless there is sufficient evidence presented to satisfy customs officials that they are domestic articles as defined in these Rules.

And as clarified in Q8/A8 of RMC No. 50-2007, quoted earlier, the sale of goods and properties by Freeport Zone-registered enterprises to a buyer from the customs territory shall be treated as a *technical importation* made by the buyer in the customs territory. The buyer shall be treated as the importer and shall be imposed the corresponding import taxes and duties (which includes VAT) prior to release of the goods or merchandise from Customs custody. Any unpaid taxes thereon, aside from being the prime liability of the buyer-importer, shall constitute a lien on such goods or merchandise imported from the Freeport Zone.

In view of the foregoing, the deficiency VAT assessment is cancelled and withdrawn.

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[22] Exhibit "12".
[23] Bases Conversion and Development Act of 1992.
[24] Subic Bay Freeport.

C. WTC

Petitioner argues that its Accounts Payable Voucher No. 2957[25] and the attached BIR Form No. 1604-CF for the year 2007 and Alphalist of Employees as of December 31, 2007 show that the ₱8,114.00 discrepancy between the amount of Salaries and Wages per financial statements and per Alphalist pertains to the 13th month pay of its employee, Mr. Edwin Fernandez. Considering that 13th month pay and other benefits not exceeding ₱30,000.00 per year are exempt from WTC under Section 2.78.1(B)(11) of Revenue Regulations No. 2-98, the ₱8,114.00 discrepancy should not be made subject to WTC.

Again, the Court is not convinced. Since petitioner's argument is a mere reiteration of its previous argument that has already been thoroughly discussed and passed upon by the Court in the assailed Decision, then the Court will no longer address the same.

D. FBT

Petitioner explained that it did not have any managerial or supervisory employees during the year 2007. As testified by petitioner's witness, Ms. Daisy Merino, due to business reverses, petitioner only had one employee in 2007, a driver. Consequently, the expenses incurred by the petitioner for maintenance of staffhouse may not be considered a "fringe benefit" under Section 33(B) of the NIRC of 1997.

As found by the Court in the assailed Decision, petitioner failed to prove by evidence its claim that the staffhouse expense was used by the personnel of its affiliate and not by its officers.

Apart from the testimony of petitioner's witness, there was no other evidence presented by petitioner to prove its claim.

E. FWT

Petitioner stresses that the evidence on records, taken together, clearly show that the dividends declared by petitioner

[25] Exhibit "R".

on October 25, 2007 were made payable to Medtecs-Philippine Branch, *viz*:

a. Journal Voucher (Exhibit "T") which shows the December 31, 2007 book entry for the ₱35,200,000 "dividend payable" in favor of Medtecs-Philippine Branch;

b. Note 1 to petitioner's Audited Financial Statements for CY 2007 (Exhibit "M") which states that "the Company is wholly owned subsidiary of the Philippine Branch of Medtecs International Corporation Limited (the Branch) and the ultimate parent company is Medtecs International Corporation Limited (MICL), a company incorporated in Bermuda and domiciled in the Philippines;

c. Note 10 to petitioner's Audited Financial Statements for CY 2007 (Exhibit "M"), which states that Medtecs-Philippine Branch is petitioner's parent company;

In addition, petitioner attached copies of the following documents to the instant motion which show that the stockholder of records of petitioner is Medtecs-Philippine Branch:

a. Petitioner's Stock Certificate No. 12 issued in favor of Medtecs-Philippine Branch on August 25, 1999, covering 7,162,442 shares in capital stock of petitioner;

b. Audited Financial Statements of Medtecs-Philippine Branch for CY 2006, which shows that the 98.8% equity interest in petitioner is reported as part of the assets of Medtecs-Philippine Branch; and

c. Certification by petitioner's Corporate Secretary on the stockholders of records of petitioner as of December 31, 2006 and as of May 8, 2015.

From the foregoing, petitioner argues that the dividends were declared in favor of Medtecs-Philippine Branch, hence are not subject to income tax under Section 28(A)(7)(d) of the NIRC of 1997.

Even assuming for the sake of argument that the dividends were made payable to Medtecs-Bermuda, petitioner respectfully submits that the 35% FWT rate imposed by the Court is without basis because the cash dividends declared in favor of a non-resident foreign corporation domiciled in Bermuda are subject to 15% FWT as prescribed in Section 28(B)(5)(b) of the NIRC of 1997.

After considering petitioner's lengthy arguments, still, the Court is not persuaded.

As found in the assailed Decision, the Journal Voucher (Exhibit "T") presented by petitioner is a mere voucher not supported by competent evidence; hence, insufficient to prove that the dividends were paid to Medtecs International Corporation Limited–Philippine Branch and not to Medtecs International Corp. Ltd–Bermuda.

Likewise, the audited financial statement cannot be considered as sufficient evidence to prove that the dividends were paid to Medtecs International Corporation Limited–Philippine Branch.

As to the additional documents petitioner attached to the instant motion, the Court cannot consider that same since they were not formally offered in evidence as provided in Section 34, Rule 132 of the Rules of Court.

As to the alternative argument proffered by petitioner that assuming the dividends were made payable to Medtecs-Bermuda, then the FWT rate should only be 15% instead of 35% as prescribed in Section 28(B)(5)(b) of the NIRC of 1997, the Court finds that petitioner cannot pursue an inconsistent theory. Petitioner cannot argue that the dividends were paid to a resident foreign corporation and then change its position that the dividends were paid to a non-resident foreign corporation in the event that it loses on the first theory.

The rule is that a party is bound by the theory he adopts and by the cause of action he stands on. He cannot be permitted after having lost thereon to repudiate his theory and cause of action, and thereafter, adopt another and seek to re-litigate the matter anew either in the same forum or on appeal. Having pursued one theory and lost thereon, petitioner may no longer pursue another inconsistent theory without thereby trifling with court processes and burdening the courts with endless litigation.[26]

Moreover, before the 15% FWT rate can apply, petitioner should present sufficient evidence to prove that indeed it is entitled to the tax sparing credit rule under Section 28(B)(5)(b) of the NIRC of 1997, which petitioner failed to do so.

IV. Motion to Reopen Trial

Petitioner moves for leave of Court to allow the reopening of trial for presentation of additional evidence in the interest of substantial justice and in order to aid the Court in judiciously evaluating the merits of the case.

Unfortunately, the Court cannot grant the same.

Pursuant to Section 1 of Rule 15 of the Revised Rules of the Court of Tax Appeals, any aggrieved party may seek a reconsideration or new trial of any decision of the Court.

In this case, petitioner filed a Motion for Partial Reconsideration (with Motion to Present Additional Evidence).

A motion for reconsideration is not putting forward a new issue, or presenting new evidence, or changing the theory of the case, but is only seeking a reconsideration of the judgment or final order based on the same issues, contentions, and evidence either because: (a) the damages awarded are excessive; or (b) the evidence is insufficient to justify the decision or final order; or (c) the decision or final order is contrary to law.[27]

The very purpose of a motion for reconsideration is to point out the findings and conclusions of the decision which in the movant's view, are not supported by law or the evidence.[28] The movant is, therefore, very often confined to the amplification or further discussion of the same issues already passed upon by the court. Otherwise, his remedy would not be

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[26] *British American Tobacco vs. Camacho, et al.*, G.R. No. 163583, Resolution dated April 15, 2009.

[27] *Heirs of Spouses Teofilo M. Reterta and Elisa Reterta vs. Spouses Lorezon Mores and Virginia Lopez*, G.R. No. 159941, August 17, 2011; Section 1, last paragraph, Rule 37 of the Revised Rules of Court.

[28] *Siy vs. Court of Appeals*, G.R. No. L-39778, September 13, 1985; Section 2, Rule 37 of the Revised Rules of Court.

a reconsideration of the decision but a new trial or some other remedy.[29]

Hence, it is implicitly clear from Rule 37 that a motion for reconsideration cannot be used as a vehicle to introduce new evidence.[30] If petitioner wanted to present further evidence, they should have filed a motion for new trial based on newly discovered evidence. In order that newly discovered evidence may be a ground for allowing a new trial, it must be fairly shown that: (a) the evidence is discovered after the trial; (b) such evidence could not have been discovered and produced at the trial even with the exercise of reasonable diligence; (c) such evidence is material, not merely cumulative, corroborative, or impeaching; and (d) such evidence is of such weight that it would probably change the judgment if admitted.[31]

Even if *We* were to consider petitioner's motion as a motion for new trial based on newly discovered evidence, *We* find that the additional documentary evidence constitute forgotten evidence which petitioner intends to present only after obtaining an unfavorable judgment. Petitioner did not prove that, even with reasonable diligence, it could not produce the additional evidence during trial.

Forgotten evidence refers to evidence already in existence or available before or during a trial; known to and obtainable by the party offering it; and could have been presented and offered in a seasonable manner, were it not for the sheer oversight or forgetfulness of the party or the counsel. Presentation of forgotten evidence is disallowed, because it results in a piecemeal presentation of evidence, a procedure that is not in accord with orderly justice and serves only to delay the proceedings. A contrary ruling may open the floodgates to an endless review of decisions, whether through a motion for reconsideration or for a new trial, in the guise of newly discovered evidence.[32]

Applying the foregoing, petitioner cannot, as it did in this case, put forward a new issue, present additional evidence, or change its theory in its motion for reconsideration.

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[29] *Siy vs. Court of Appeals*, G.R. No. L-39778, September 13, 1985.
[30] *Cansino vs. Court of Appeals*, G.R. No. 125799, August 21, 2003.
[31] *Luzon Hydro Corporation vs. Commissioner of Internal Revenue, G.R. No. 188260, November 13, 2013*; Section 1, paragraph (b), Rule 37 of the Revised Rules of Court.
[32] *Office of the Ombudsman vs. Coronel*, G.R. No. 164460, June 27, 2006.

With the exception of the deficiency VAT assessment, which should be cancelled, the rest of the deficiency tax assessments are reaffirmed.

WHEREFORE, premises considered, petitioner's *Motion for Partial Reconsideration (with Motion to Present Additional Evidence)* is hereby **PARTIALLY GRANTED** and the Court's Decision dated April 22, 2015 is **MODIFIED**. Accordingly, the deficiency value added tax assessment for taxable year 2007 is likewise **CANCELLED AND WITHDRAWN**. However, the deficiency income tax, withholding tax on compensation, fringe benefit tax, and final withholding tax assessments for taxable year 2007 in the total amount of **₱15,990,817.89**, inclusive of surcharge, including the payment of 20% deficiency interest and 20% delinquency interest, is hereby **REAFFIRMED**.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ATTESTATION

I attest that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice