REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	CTA EB No. 1336 (CTA Case No. 8411)
-versus-	Present: DEL ROSARIO, *PJ*; CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ*.
AB CAPITAL AND INVESTMENT CORPORATION, Respondent.	Promulgated: DEC 07 2017 4:02 p.m.

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RESOLUTION

Fabon-Victorino, J.:

Impugned in this *Motion for Reconsideration* filed by petitioner is the Court *En Banc*'s Decision dated May 12, 2017, the *fallo* of which reads as follows:

> **WHEREFORE**, the Petition for Review dated August 7, 2015 filed by the Commissioner of Internal Revenue is hereby **DENIED**, for lack of merit.
>
> Consequently, the Decision dated April 30, 2015 and the Resolution dated June 30, 2015 both rendered by the Court in Division, are **AFFIRMED**.

SO ORDERED.[1]

The impugned Decision affirmed the finding of the Court in Division cancelling respondent's alleged deficiency income tax, percentage tax and compromise penalty amounting to P16,835,114.25, P953,435.15 and P168,000.00, respectively, all covering taxable year (TY) 2008. Respondent was however directed to pay deficiency withholding tax on compensation (WTC), expanded withholding tax (EWT), fringe benefit tax (FBT), final withholding tax (FWT) and documentary stamp tax (DST) of even year, plus surcharge in the aggregate amount of P829,040.64, exclusive of deficiency and delinquency interests.

Petitioner maintains that his right to assess WTC, EWT and FWT is imprescriptible. He argues that the assessments for WTC, EWT and FWT spring from respondent's breach of duty to withhold and remit the taxes in favor of the government. Precisely, the resulting assessments are penalties and not taxes. That being the case, the statute of limitations for assessment of taxes under Section 203 of the National Internal Revenue Code (NIRC) does not find application in the given controversy. It follows that he can assess respondent for WTC, EWT and FWT at any given period. Therefore, petitioner seasonably handed out the subject assessments for WTC, EWT and FWT against respondent.

Petitioner complains that the Court *En Banc* erred in partly cancelling the WTC assessment up to the extent of P249,031.00.[2] He explains that respondent's failure to present the alphabetical list (alphalist) of employees subjected to withholding tax justifies the imposition of the WTC assessment. Further, his EWT assessment was a product of respondent's failure to withhold and remit a portion of the income payments it made to its directors. Hence, there are legal and factual bases to his conclusion that respondent must pay the assessed WTC and EWT.

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[1] *Rollo*, p. 248.

[2] The amount of P56,502.18 pertains to respondent's remitted fringe benefit tax while the P192,528.30 relates to employer's share in SSS, Philhealth and PAG-IBIG which are exempt from WTC (P192,528.30+P56,502.18= P249,031.00).

Petitioner further states that respondent was adequately appraised of its assessed income tax due arising from undeclared income in the total amount of P3,211,693.00,[3] as well as the deficiency DST resulting from undeclared gross receipts of P516,857,971.70, all for TY 2008. The factual and legal bases contained in his Final Decision on Disputed Assessment (FDDA) against respondent reveal that he faithfully complied with the due process requirement for issuance of assessment under Section 228 of the NIRC, as amended. Consequently, the subject cited assessments should be sustained by the Court.

Petitioner faults respondent in its alleged failure to prove that the depreciation expense of the vios car not assigned to a particular employee was subjected to FBT. Hence, his assessment for FBT on the subject expense under Section 33(A) of the NIRC, as amended is in order.

Petitioner concedes that the assessment for percentage taxes for TY 2008 was issued beyond the three (3)-year prescriptive period under Section 203 of the NIRC, as amended. However, he readily counters that the extraordinary ten (10)-year prescriptive period should apply since respondent's percentage tax returns were tainted with falsity due to non-declaration of its gross receipts. Hence, the assessment for the subject percentage tax was timely issued on October 28, 2011, or within ten-year period under Section 222(a) of the same Code.

Finally, petitioner points out that respondent's intention to utilize the Net Operating Loss Carry-Over (NOLCO) for the succeeding taxable years operates as a waiver of its right to NOLCO for TY 2008. Since the losses are but a part of NOLCO, the disallowance of the said deduction for TY 2008 is correct. That being the case, petitioner correctly converted the subject losses as part of respondent's income for the year in question.

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[3] The amount of P3,180,712.40 is alleged undeclared income after comparing respondent's summary list of sales with summary list of withholding taxes while the amount of P30,980.20 arose from tax reconciliation system (TRS) of the BIR, or for the total amount of P3,211,692.60 (P3,180,712.40+P30,980.20).

Despite notice, respondent failed to file its comment/opposition.

Petitioner's plea for reconsideration is denied.

On whether petitioner's assessments for FWT, EWT and WTC are imprescriptible for being penalties, the matter has been laid to rest in the impugned Decision of May 2, 2017, specifically in pages 12 to 15 thereof.

By the same token, petitioner's position on the issue of prescription in his percentage tax assessment for TY 2008 along with his tax treatment of respondent's NOLCO were likewise weighed and found wanting as shown in pages 15 to 24 of the same Decision. To reinvent on what has been decreed upon is certainly a waste of time and resources of the Court.

Neither does the Court *En Banc* find any reason to declare respondent accountable for the deficiency income tax, DST, WTC, FWT, EWT and FBT, all for TY 2008 as claimed by petitioner in the instant motion. The issues on the enumerated items of taxes were not raised in his Petition for Review. He raised the issues for the first time in the instant motion, precluding the Court *En Banc* from ruling on the matter.

Well-settled is the rule that higher courts are precluded from taking cognizance of issues, arguments or points of law only raised for the first time in a motion for reconsideration or on appeal.[4] This last ditch effort to shift to a new theory and raise a new matter in the hope of a favorable result is a pernicious practice that has consistently been rejected.[5]

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[4] See *Mendoza vs. Bautista, et al.*, G.R. No. 143666, March 18, 2005.
[5] *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue*, G.R. No. 168498, April 24, 2007 (Resolution on Motion for Reconsideration).

WHEREFORE, the Motion for Reconsideration dated May 25, 2017, filed by petitioner Commissioner of Internal Revenue is **DENIED**, for lack of merit. The impugned Decision dated May 12, 2017 is **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

(I reiterate my Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice