REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1533** **(CTA Case No. 8268)**
	Present:
-versus-	Del Rosario, *P.J.*, Castañeda, Jr., Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, *and* Manahan, *JJ.*
PHILIPPINE NATIONAL BANK, Respondent.	Promulgated: AUG 23 2018 4:30pm

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RESOLUTION

CASTAÑEDA, JR., J.:

This resolves petitioner's Motion for Reconsideration (Re: Decision promulgated on 23 April 2018) filed on May 15, 2018[1] with respondent's Comment [To Petitioner's Motion for Reconsideration dated 15 May 2018] filed on July 9, 2018.[2]

Petitioner Commissioner of Internal Revenue (CIR) moves for the Court to set aside the April 23, 2018 Decision on the grounds that:[3]

1. The Court of Tax Appeals Special First Division failed to scrutinize the substance and contents of the report of the Independent Certified Public Accountant (ICPA); and,

[1] Rollo, pp. 111-121.
[2] Rollo, pp. 126-127 and 130; from receipt of the Court's Resolution on June 28, 2018, respondent had ten days or until July 8, 2018, Sunday, to file their Comment.
[3] Rollo, p. 111.

2. Proof of actual remittance to the Bureau of Internal Revenue (BIR) of withholding tax is a condition *sine qua non* before it can be refunded to the taxpayer.

The motion is bereft of merit.

As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court, will not be permitted to change theory on appeal. Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. It would be unfair to the adverse party who would have no opportunity to present further evidence material to the new theory, which it could have done had it been aware of it at the time of the hearing before the trial court.[4]

This rule must be applied in this case.

As discussed by the Court *a quo* in its September 27, 2016 Resolution,[5] petitioner relied solely upon a single legal issue on the taxpayer's non-exhaustion of administrative remedies without raising therein any factual questions concerning the Supplemental ICPA Report submitted after the reopening of the trial, thus:

> "<u>In assailing the Amended Decision, respondent anchors his arguments on the sole ground that this Court erred in ordering respondent to refund or to issue a tax credit certificate (TCC) in favor of petitioner representing the excess and unutilized creditable withholding taxes for taxable year 2008</u>.
>
> <u>It is respondent's contention that petitioner failed to exhaust administrative remedies, hence, the judicial claim is premature</u>. Respondent alleges that petitioner failed to discharge the burden of proving its entitlement to a refund which deprives the former the opportunity to fully exercise his function to decide claims for refund, correct, modify or affirm the findings of his subordinates. Respondent cites the ruling of the Supreme Court in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue* (*Atlas* case) that a taxpayer must not only show its entitlement to substantive law to the grant of its claims, but also it satisfied all the documentary and evidentiary requirements for an administrative claim for refund. According to respondent, the taxpayer is required to submit complete documents in support of the application filed with the Bureau of Internal Revenue (BIR) before the one hundred twenty (120)-day audit period shall apply, and before the taxpayer could avail the judicial remedies provided for in the law.

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[4] *Maxicare PCIB Cigna Healthcare (now Maxicare Healthcare Corporation) et al. v. Marian Brigitte A. Contreras, M.D.*, G.R. No. 194352, January 30, 2013.
[5] Rollo, pp. 28-39.

> Respondent further cites the ruling in the case of *Jesus A. Jariol, et al. vs. The Commission on Elections, et al.* (*Jariol* case) where the Supreme Court held that a party must not merely initiate the prescribed administrative procedure to obtain relief, the party concerned must pursue this relief until the appropriate conclusion takes place before seeking judicial intervention in order to give the administrative body an opportunity to decide the matter itself correctly and prevent unnecessary and premature resort to the court. Thus, when petitioner failed to substantiate its claim for refund/issuance of TCC at the administrative and judicial levels, it failed to discharge its burden of proving its entitlement to a refund.
>
> On the other hand, petitioner posits that respondent's arguments are mere rehash and the same have already been ruled upon by this Court in the Decision dated December 10, 2013 and Amended Decision dated May 6, 2016. It maintains that it presented sufficient evidence to prove its entitlement to a refund or issuance of TCC." (*Underscoring supplied*)

This issue, which was sufficiently addressed by the Court *a quo* in its September 27, 2016 Resolution, was likewise the *only* issue raised before this Court in the Petition for Review.[6]

Accordingly, petitioner CIR is barred from raising the foregoing factual issues when it failed to set up the same at any time during trial especially after the taxpayer rested its case. In fact, petitioner CIR failed to present any evidence adverse to the taxpayer's claim during the trial[7] and even during the reopening thereof when the Supplemental ICPA Report was offered in evidence. On appeal before the Court, petitioner had again left out these issues in the petition and, in fact, opted not to file a memorandum to support its position.[8] It is only now, at the tail end of the appeal, that petitioner would ask the Court to review the Supplemental ICPA report which became the basis of the May 6, 2016 Amended Decision.

In *Commissioner of Internal Revenue v. Puregold Duty Free, Inc.*,[9] the Supreme Court rejected the new allegation of the CIR which were never raised during the trial:

> "<u>In her petition, the CIR has introduced an entirely new matter, i.e., based on its Articles of Incorporation, Puregold's principal place of business is in Metro Manila for which reason it cannot avail itself of the benefits extended by RA 9399</u>.
>
> <u>It is well settled that matters that were neither alleged in the pleadings nor raised during the proceedings below cannot be ventilated for the first time on appeal and are barred by estoppel. To allow the contrary would constitute a violation of the other party's right to due process, and is</u>

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[6] Rollo, pp. 10-12.

[7] During the initial presentation of respondent CIR's evidence on January 31, 2013, respondent's counsel manifested that the case has no report of investigation and that respondent would not be presenting evidence; please refer to the December 10, 2013 Decision, p. 7.

[8] May 5, 2017 Records Verification, Rollo, p. 86.

[9] G.R. No. 202789, June 22, 2015.

> contrary to the principle of fair play. In *Ayala Land Incorporation v. Castillo*, this Court held that:
>
> > 'It is well established that issues raised for the first time on appeal and not raised in the proceedings in the lower court are barred by estoppel. Points of law, theories, issues, and arguments not brought to the attention of the trial court ought not to be considered by a reviewing court, as these cannot be raised for the first time on appeal. To consider the alleged facts and arguments belatedly raised would amount to trampling on the basic principles of fair play, justice, and due process.'
>
> During the proceedings in the CTA, the CIR never challenged Puregold's eligibility to avail of the tax amnesty under RA 9399 on the ground that its principal place of business, per its Articles of Incorporation, is in Metro Manila and not in Clark Field, Pampanga. Neither did the CIR present the supposed Articles of Incorporation nor formally offer the same in evidence for the purpose of proving that Puregold was not entitled to the tax amnesty under RA 9399. Hence, this Court cannot take cognizance, much less consider, this argument as a ground to divest Puregold of its right to avail of the benefits of RA 9399." (*Underscoring supplied; citations omitted*)

Finally, the Court notes that petitioner CIR failed to inform the Court of the date of receipt of the Notice of Decision as required therein.[10] The Notice of Decision, however, bears the proof of petitioner's receipt in the form of Bureau of Internal Revenue BIR-NOB-Litigation Division stamp mark dated April 27, 2018.[11] On the basis of this date, petitioner, therefore had fifteen (15) days from April 27, 2018 or until May 12, 2018 within which to file the Motion for Reconsideration.[12] Since May 12, 2018 fell on a Saturday the last day to file a Motion for Reconsideration of the Decision was on Monday, May 14, 2018, which was declared a special non-working holiday for the Barangay and Sangguniang Kabataan elections.[13] Clearly, the Motion for Reconsideration (Re: Decision promulgated on 23 April 2018) was timely filed on May 15, 2018.[14]

In any event, we find no cogent reason to disturb the conclusions reached in the April 23, 2018 Decision.

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[10] Rollo, p. 90.
[11] *Id.*
[12] Rule 16, Section 1 in relation to Rule 15, Section 1 of the Revised Rules of the Court of Tax Appeals.
[13] Proclamation No. 479 dated May 2, 2018.
[14] Rollo, pp. 111-121.

WHEREFORE the Motion for Reconsideration (Re: Decision promulgated on 23 April 2018) is **DENIED** for lack of merit.

SO ORDERED.

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

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

Took no part
CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice