REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE *Petitioner,*	CTA EB CASE No. 1150 (CTA CASE No. 8501)
	Present: DEL ROSARIO, P.J, CASTAÑEDA, JR., BAUTISTA,
-versus-	UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS, and
DAKUDAO & SONS, INCORPORATED, *Respondent.*	RINGPIS-LIBAN, *JJ.* Promulgated: OCT 14 2015 2:20 p.m.

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RESOLUTION

MINDARO-GRULLA, J.:

Before the Court *En Banc* is a Motion for Reconsideration[1] filed by the Commissioner of Internal Revenue (CIR) seeking to set aside this Court's Decision promulgated on May 12, 2015,[2] the dispositive portion of which reads:

> "**WHEREFORE**, the petition is **DENIED**. The Decision dated January 13, 2014, rendered by the Second Division of this Court in CTA Case No. 8501, and its Resolution dated March 21, 2014 are **AFFIRMED**. No pronouncement as to costs.

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[1] Filed on June 04, 2015.
[2] *En Banc* Docket, pp. 136-150.

SO ORDERED."

In her motion, CIR insists that since Dakudao & Sons, Inc. (Dakudao) did not secure a BIR Ruling qualifying the exchange of property for the shares of stocks as a tax-free exchange, the said transaction is subject to Value-Added Tax (VAT). Moreover, Section 4.106-8(b) of Revenue Regulation (RR) No. 16-2005,[3] as amended by RR No. 04-2007, which is the basis of Dakudao's refund, was already repealed by RR No. 010-11 at the time of payment of VAT.

In its Comment/Opposition,[4] Dakudao upholds its same arguments that this Court has jurisdiction over the case, that securing a BIR Ruling is not a *condition sine qua non* for its claim for refund, that the transaction is one of those exempt transactions enumerated under Section 109 of the National Internal Revenue Code (NIRC) of 1997, and that the exchange of property took place prior to the effectivity of RR No. 010-11.

The main thrust of CIR's argument lies on the subsequent repeal of Section 4.106-8(b) of RR No. 16-2005, as amended by RR No. 04-2007, making the exchange of property for the shares of stocks taxable.

The motion is bereft of merit.

The transaction herein took place on April 30, 2011. On the other hand, RR No. 010-11 took effect on July 01, 2011. Thus, any transfer or exchange of property for shares of stock, making the transferor in control of the corporation before July 01, 2011, the specific transaction in this case included, is considered non-taxable.

Clearly, at the time of transfer of property, there is no obligation on the part of Dakudao to pay VAT. Thus, when it paid VAT, the payment is erroneous because it was pursuant to a transfer or exchange of property that transpired before the effectivity of the repealing revenue regulation. It must be noted that the VAT is imposed on the transfer, and at the

[3] Revenue Regulation (RR) No. 16-2005.
[4] Filed on August 03, 2015.

time of the transfer of property to Metro Star Davao Property Corporation, there is no VAT to be imposed, as stated in Section 4.106-8(b) of RR No. 16-2005, as amended by RR No. 04-2007. RR No. 010-11 was approved only on July 01, 2011 by the CIR, hence, the taxability of the transfer or exchange of property for the shares of stock commenced effectively only from that date.

If the case would be as presented by the CIR, i.e., at the time of transfer, the exchange was not subject to VAT pursuant to a Revenue Regulation, and then thereafter, such Revenue Regulation was repealed by another Revenue Regulation, and then made the taxpayer pay for VAT for the transaction covered by the previous regulation, then there is retroactive application of the repealing Revenue Regulation.

The retroactive application of RR No. 010-11 would violate Section 246[5] of the 1997 NIRC, which mandates the non-retroactivity of regulations issued by the Commissioner of Internal Revenue that would operate to prejudice the taxpayer. Further, there is no showing of the existence of any of the exceptions enumerated in Section 246 of the Tax Code for the retroactive application of such repeal. Obviously, such repeal cannot be given retroactive effect to the assailed transaction herein so that it may now be considered taxable.

In fact, this argument before this Court is being raised for the first time on appeal when the CIR could easily raise it before the administrative level since she is fully aware of the existence of RR No. 010-11, which is effective since July 01,

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[5] SECTION 246. Non-Retroactivity of Rulings. - Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers, except in the following cases:

"(a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;

"(b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or

"(c) Where the taxpayer acted in bad faith.

2011. CIR did not argue straight away in her Answer before the Court in Division the repeal of Section 4.106-8(b) of RR No. 16-2005, as amended by RR No. 04-2007. She passed up the opportunity to raise the same defense during the trial of this case. She neglected another opportunity to present the said defense before this Court through her Petition for Review. CIR had to wait until this Court has already rendered the assailed Decision, before asserting in her Motion for Reconsideration that Section 4.106-8(b) of RR No. 16-2005, as amended by RR No. 04-2007 has been repealed as of July 01, 2011.

Not having raised it in the administrative level, CIR cannot raise the same for the first time on appeal.[6] It is axiomatic in pleadings and practice that no new issue in a case can be raised in a pleading which by due diligence could have been raised in previous pleadings.[7] As the Supreme Court[8] emphasized:

> "The settled rule is that defenses not pleaded in the answer may not be raised for the first time on appeal. A party cannot, on appeal, change fundamentally the nature of the issue in the case. When a party deliberately adopts a certain theory and the case is decided upon that theory in the court below, he will not be permitted to change the same on appeal, because to permit him to do so would be unfair to the adverse party."

Time and again, this Court has ruled that litigants cannot raise an issue for the first time on appeal as this would contravene the basic rules of fair play and justice.[9] The general rule is that appeals can only raise questions of law or fact that (a) were raised in the court below, and (b) are within the issues framed by the parties therein. An issue which was neither averred in the pleadings nor raised during trial in the court below cannot be raised for the first time on appeal.[10] ∠

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[6] Aguinaldo Industries Corp. vs. Commissioner of Internal Revenue, 112 SCRA 136.
[7] Toshiba Information Equipment (Phils.), Inc. vs. Commissioner of Internal Revenue, G.R. No. 157594, March 9, 2010.
[8] Carantes v. Court of Appeals, G.R. No. L-33360, 25 April 1977, 76 SCRA 514, 521.
[9] Commissioner of Internal Revenue vs. Eastern Telecommunications, G.R. No. 163835, July 07, 2010.
[10] Commissioner of Internal Revenue vs. Negros Consolidated Farmers Multi-Purpose Cooperative, C.T.A. EB CASE NO. 992. March 5, 2014.

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

SO ORDERED.

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

WE CONCUR:

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

ESPERANZA R. FABON-VICTORINO
Associate Justice

(On Leave)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen
MA. BELEN M. RINGPIS-LIBAN
Associate Justice