REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

BURMEISTER AND WAIN SCANDINAVIAN CONTRACTOR MINDANAO, INC.,
Respondent.

C.T.A. EB No. 487
(C.T.A. CASE No. 6220)

Present:
Acosta, *P.J.*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, *JJ.*

Promulgated:

AUG 13 2009

x--x

DECISION

CASTAÑEDA, JR., J.:

This is a Petition for Review filed before the Court of Tax Appeals *en banc* assailing the Decision dated September 17, 2008 and the Resolution dated April 13, 2009 issued by the First Division of this Court in the case entitled, *"Burmeister and Wain Scandinavian Contractor Mindanao, Inc. vs. Commissioner of Internal Revenue"*, docketed as CTA Case No. 6220.

The assailed Decision PARTIALLY GRANTED the petition seeking the refund or issuance of tax credit certificate representing unutilized input VAT attributable to zero-rated sales of services for the fourth quarter of taxable year 1998.

THE FACTS

The facts of the case as found by the Court in First Division are as follows:

> Petitioner is a Filipino corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippine, with principal business address at Daruma Building, Jose P. Laurel Avenue, Lanang, Davao City. It was incorporated on November 23, 1993, primarily to construct, erect, assemble, commission, operate, maintain, rehabilitate and manage industrial and power-generating plants and related facilities for the conversion into electricity of coal distillate, and other fuel provided by and under contract with the Philippine Government, or any government-owned and controlled corporations, or other entities engaged in the development, supply or distribution of electricity.
>
> Records disclose that a consortium of non-resident foreign corporations (Consortium) composed of Burmeister and Wain Scandinavian Contractor A/S (BWSC Denmark), Mitsui Engineering and Shipbuilding, Ltd., and Mitsui Co., Ltd. entered into an Operations and Maintenance (O&M) Agreement with the National Power Corporation (NAPOCOR) for the operation and maintenance of the latter's two 100-Megawatt power barges. As the appointed Coordination Manager of the Consortium, BWC Denmark established herein petitioner Burmeister and Wain Scandinavian Contractor, Mindanao, Inc. (BWSCMI) to subcontract the actual operation and maintenance of the two power barges and to perform the duties and acts which necessarily have to be done in the Philippines. In consideration for the services rendered by petitioner, the Consortium shall compensate and remunerate, by way of fees paid by inward remittance to petitioner in convertible foreign currency, the equivalent of all reasonable and legitimate expenses incurred by petitioner plus a certain fee. The subcontract agreement shall terminate on the date the power barges are returned to NAPOCOR under the O&M Agreement.

On February 14, 1995, petitioner was issued BIR Ruling No. 023-95 which stated that:

> "3. BWSC-Mindanao, being a duly registered corporation engaged in trade or business in the Philippines, is subject to ordinary Philippine corporate income tax. Its gross receipts from the services it renders to the Consortium shall, however, be subject to VAT even if it fails to register as a VAT taxpayer. On the other hand, if it chooses to register as such, and the consideration for such services is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas, the aforesaid services shall be subject to zero-rate. (VAT Ruling No. 96-90 dated April 10, 1990)."

On May 26, 1995, petitioner registered as a value-added tax (VAT) taxpayer and was issued a Certificate of Registration bearing RDO Control No. 95-113-007556.

On January 7, 1999, the Bureau of Internal Revenue (BIR) reconfirmed BIR Ruling No. 023-95 in its VAT Review Committee Ruling No. 003-99, declaring that: "(o)n this basis, BIR Ruling No. 023-95 dated February 14, 1995 is expressly reconfirmed insofar as it held that the services being rendered by BWSCMI is subject to zero percent (0%) VAT."

On January 21, 1999, petitioner filed its Quarterly VAT Return for the fourth quarter of 1998, reflecting zero-rated sales of P68,761,361.50 and input VAT of P1,834,388.55 paid on its domestic purchases of goods and services for the said quarter.

Believing that its sales of services to the Consortium are VAT zero-rated, on July 21, 1999, petitioner filed an Application for Tax Credit/Refund of Value-Added Tax Paid for the period of July to December 1998 in the amount of P4,154,969.51.

Since respondent did not act on the aforesaid claim, petitioner filed the instant Petition for Review with this Court on January 9, 2001, praying for the refund or issuance of tax credit certificate in the amount of P1,834,388.55 representing alleged unutilized input VAT payment for the fourth quarter of 1998.

After trial on the merits, this Court rendered a Decision dated January 29, 2003, denying the Petition for Review due to insufficiency of evidence for petitioner's failure to submit the supplier's invoices and official receipts verified by the Court-commissioned auditing firm, Punongbayan and Araullo.

On February 26, 2003, petitioner filed its Motion for Reconsideration of the Decision dated January 29, 2003, with prayer to admit the attached copies of suppliers' invoices and official receipts.

On August 26, 2003, this Court issued a Resolution denying petitioner's Motion for Reconsideration for lack of merit and upholding the January 29, 2003 Decision.

On October 3, 2003, petitioner filed a Petition for Review with the Court of Appeals (CA), docketed as CA-G.R. SP No. 79272, questioning the January 29, 2003 Decision and August 26, 2003 Resolution of this Court. In that Petition for Review, petitioner prayed that judgment be rendered either admitting in evidence the supplier's invoices and official receipts subject of the commissioned independent CPA's report or allowing the formal presentation of said evidence.

Respondent filed his Motion to Admit Comment dated May 5, 2004. After which, petitioner filed its Reply on October 25, 2004.

In line with the Supreme Court's ruling in the case of BPI-FAMILY SAVINGS BANK, Inc. vs. COURT OF APPEALS, COURT OF TAX APPEALS and the COMMISSIONER OF INTERNAL REVENUE, the CA rendered a Decision dated April 19, 2005, remanding the case to this Court for the determination of petitioner's claim for refund and ordering that the VAT invoices and receipts attached to petitioner's Motion for Reconsideration be allowed and considered by this Court.

In compliance with the Decision of the CA, further proceedings in this case were performed for the presentation of the supplier's official receipts and invoices.

On September 21, 2007, this case was submitted for decision after considering petitioner's Memorandum filed on July 6, 2007, sans respondent's Memorandum.

xxx xxx xxx

Acting on the Petition, the First Division of this Court issued a Decision on September 17, 2008 which is now the subject of appeal. The said Decision partially granted the petition granting the refund or issuance of tax credit certificate in favor of petitioner in the reduced amount. The dispositive portion of the said Decision reads, as follows:

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED to REFUND or ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **ONE MILLION FIVE HUNDRED FIFTY SIX THOUSAND NINE HUNDRED THIRTEEN PESOS AND 68/100 (P1,556,913.68)**, representing unutilized input taxes which are attributable to zero-rated sales of services for the fourth quarter of 1998."

On October 7, 2008, the Commissioner of Internal Revenue filed a Motion for Reconsideration of the Decision dated September 17, 2008. In a Resolution dated April 13, 2009, the First Division denied the Motion for lack of merit.

Hence, this Petition for Review *en banc.*

In a Resolution dated May 29, 2009, the Court *en banc* ordered the respondent to file its comment to the petition to which the latter complied on July 3, 2009.

THE ISSUE

The sole issue in this case is whether or not the respondent is entitled to a refund in the amount of P1,556,913.68 representing unutilized input taxes attributable to zero-rated sales of services for the fourth quarter of 1998.

PETITIONER'S ARGUMENT

Petitioner contends that the filing by respondent of its petition for review on January 9, 2001 was made after the jurisdictional period provided by law, hence, the Court of Tax Appeals (CTA) is bereft of jurisdiction to hear and decide the respondent's claim for refund and/or issuance of tax credit certificate representing unutilized input tax attributable to its zero-rated sales of services. According to petitioner, the applicable provisions of the law that shall apply and govern on this case are found under Title IV of the National Internal Revenue Code (NIRC) of 1997, as amended, comprising Sections 105 to 115.

Petitioner claims that under Section 112 of NIRC of 1997, respondent's application for refund with the former must be made only within two (2) years after the close of the taxable quarter when the importation or purchases were made. After the filing of administrative claim for refund, petitioner is given an opportunity to act on the application within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed. Thereafter, within thirty (30) days from receipt of the decision denying the claim or after the expiration of 120 days, respondent may appeal the case with the CTA.

Further, petitioner avers that respondent failed to comply with the period under Section 112 of NIRC of 1997. From the time the administrative claim for refund was filed on July 21, 1999, petitioner has 120 days or until November 18, 1999 within which to act on the application and should he fail to do so, respondent has the right to elevate the case before the CTA within 30 days from November 18, 1999 or until December 18, 1999. The judicial claim was filed on January 9, 2001 after the lapse of the 30-day period to appeal petitioner's denial by inaction.

Petitioner argues that the 30-day period under Section 112 of NIRC of 1997 is jurisdictional, failing to comply thereto, the CTA cannot acquire jurisdiction over the instant case. Hence, the petition for review filed before the CTA First Division by herein respondent should have been dismissed for lack of jurisdiction.

RESPONDENT'S ARGUMENT

According to respondent, petitioner is arguing for the first time on appeal that the Petition for Review filed by the former before the CTA First Division was filed out of time under Section 112 of NIRC of 1997. Respondent points out that in petitioner's Answer[1] before the CTA First Division, the latter requires the former to show compliance with the provisions of Sections 204[c] and 229 of the NIRC of 1997 with respect to the period for filing an application for refund of unutilized input tax. This runs counter to what is being claimed now by the petitioner that the applicable provision should have been Section 112(D) [2] of the NIRC of 1997.

[1] Division Docket, pp. 23-27.
[2] Now Section 112 (C) of the NIRC of 1997, as amended by Republic Act No. 9337.

This defense was never alleged by the petitioner in his Answer and was not put in issue before the CTA First Division, hence, he should not be allowed to change his theory or position during the appellate stage just because his earlier arguments did not succeed.

THIS COURT'S RULING

The petition is without merit.

The Court *en banc* agrees with the observation made by the respondent that for the first time on appeal, petitioner raises the issue of prescription in the filing of the judicial claim for refund of respondent's unutilized input tax attributable to its zero-rated sales for the fourth quarter of taxable year 1998. According to petitioner, the respondent's judicial claim was filed out of time invoking Section 112 of NIRC of 1997 which contravenes the former's initial position in his Answer that respondent must show compliance with the provisions of Sections 204[c] and 229 of the NIRC of 1997.

It is to be noted that when the respondent's judicial claim for refund was filed with the CTA, a Decision dated January 29, 2003 was promulgated denying the Petition for Review due to insufficiency of evidence and ruled in favor of herein petitioner. Subsequently, respondent's Motion for Reconsideration was denied upholding the January 29, 2003 Decision. When respondent filed a Petition for Review with the Court of Appeals, the petitioner participated in the same proceeding and filed his Comment [3] without raising the issue of prescription. Eventually the CA reversed and set aside the January 29, 2009 Decision and remanded the case to the CTA.

In a Decision dated September 17, 2008, the CTA First Division partially granted the judicial claim for refund. Herein petitioner filed his Motion for Reconsideration of the said Decision and was denied for lack of merit. In all of these proceedings, the issue of prescription was never raised and in fact was questioned only at the CTA *en banc* level after an adverse judgment was issued against the petitioner.

In the case of *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue*, [4] the Supreme Court reiterated in a Resolution that the issue of prescription when raised for the first time in a motion for reconsideration need not be considered by the reviewing court as they 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. We quote hereunder the pertinent portion of the said Resolution:

> Lastly, we note that petitioner is raising the issue of prescription for the first time in the instant motion for reconsideration. Although the same was raised in the petition for review, it was dismissed for late filing. No

[3] Division Docket, pp. 1137 – 1163.
[4] G.R. No. 168498, April 24, 2007, 522 SCRA 144.

> motion for reconsideration was filed hence the disputed assessment became final, demandable and executory. Thereafter, petitioner filed with the Court of Tax Appeals a petition for relief from judgment. However, it failed to raise the issue of prescription therein. After its petition for relief from judgment was denied by the Court of Tax Appeals for lack of merit, petitioner filed a petition for review before this Court without raising the issue of prescription. It is only in the instant motion for reconsideration that petitioner raised the issue of prescription which is not allowed. The rule is well-settled that points of law, theories, issues and arguments not adequately brought to the attention of the lower court need not be considered by the reviewing court as they cannot be raised for the first time on appeal, much more in a motion for reconsideration as in this case, because this would be offensive to the basic rules of fair play, justice and due process. 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.

Moreover, in an earlier Decision in the case of *Multi-Realty Development Corporation vs. Makati Tuscany Condominium Corporation*,[5] the Supreme Court stressed that when prescription was not alleged as an affirmative defense and was not raised throughout the proceeding, it need not be considered by the reviewing court as they cannot be raised for the first time on appeal. It ruled:

> On the first issue, we sustain petitioner's contention that the CA erred in dismissing its appeal solely on its finding that when petitioner filed its complaint below in 1990, the action had already prescribed. It bears stressing that in respondent's answer to petitioner's complaint, prescription was not alleged as an affirmative defense. Respondent did not raise the issue throughout the

[5] G.R. No. 146726, June 16, 2006, 491 SCRA 9.

> proceedings in the RTC. Indeed, the trial court did not base its ruling on the prescription of petitioner's action; neither was this matter assigned by respondent as an error of the RTC in its brief as defendant-appellant in the CA.
>
> Settled is the rule that no questions will be entertained on appeal unless they have been raised below. Points of law, theories, issues and arguments not adequately brought to the attention of the lower court need not be considered by the reviewing court as they cannot be raised for the first time on appeal. Basic considerations of due process impel this rule.

Thus, the rule is well settled that no question will be considered by the appellate court which has not been raised in the court below. When a party deliberately adopts a certain theory, and the case is tried and decided upon the theory in the court below, he will not be permitted to change his theory on appeal, because to permit him to do so would be unfair to the adverse party. [6]

Similarly, the above cited doctrine was enunciated by the Supreme Court in the case of *Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.)* [7] when it held:

> It is already well-settled in this jurisdiction that a party may not change his theory of the case on appeal. Such a rule has been expressly adopted in Rule 44, Section 15 of the 1997 Rules of Civil Procedure, which provides-

---

[6] *Ferrer vs. Commissioner of Internal Revenue*, No. L-16021, August 31, 1962, 5 SCRA 1022 citing the cases of *Northern Motors, Inc. v. Prince Line, et al.*, G.R. No. L-13884, February 29, 1960 citing *Toribio v. Decasa*, 55 Phil. 461; *San Agustin v. Barrios*, 68 Phil. 475; *Molina v. Somes*, 24 Phil. 49; and *Agoncillo and Mariño v. Javier*, 38 Phil. 424.

[7] G.R. No. 159593, October 16, 2006, 504 SCRA 484.

> "SEC. 15. *Questions that may be raised on appeal.*- Whether or not the appellant has filed a motion for new trial in the court below, he may include in his assignment of errors any question of law or fact that has been raised in the court below and which is within the issues framed by the parties."

Thus, in *Carantes v. Court of Appeals*, this Court emphasized that-

> "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."

Applying the above doctrine to the instant case, herein petitioner is barred from raising the issue of prescription for the first time on appeal. It is worthy to note that the present case was remanded from the CA to the CTA ordering the latter to admit and consider the VAT receipts and invoices attached to respondent's Motion for Reconsideration to determine respondent's claim for refund. During the proceedings before CA until this case was remanded to the CTA, petitioner never questioned the period within which the respondent's judicial claim for refund was filed. When the CTA First Division partially granted respondent's judicial claim for refund, petitioner immediately filed his Motion for Reconsideration to which he neither mentioned nor raised the issue of prescription. More than eight years have lapsed before the petitioner brought the issue of prescription and was questioned only now at the CTA *en banc* level after an unfavorable judgment was issued against him.

Hence, failure to assert a question within a reasonable time warrants a presumption that the party entitled to assert it either has abandoned or declined to assert it.[8] Moreover, it has been a long standing rule that a party cannot change his theory of the case on appeal. [9]

WHEREFORE, on the basis of the foregoing considerations, the Petition for Review *en banc* is **DISMISSED** for lack of merit. Accordingly, the Decision dated September 17, 2008 and the Resolution dated April 13, 2009 issued by the First Division are **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

[8] *Supra,* note 7.
[9] *Ibid.*

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *en banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice