REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

AMADEUS MARKETING PHILIPPINES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1483
(CTA Case No. 8628)

Present:

Del Rosario, *P.J.,*
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban, *and*
Manahan, *JJ.*

Promulgated:

OCT 09 2017 2:25 p.m.

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DECISION

RINGPIS-LIBAN, J.:

Before the Court *En Banc* is a Petition for Review filed by petitioner Amadeus Marketing Philippines, Inc. (AMPI) seeking nullification of the Decision[1] dated January 22, 2016, and the Resolution[2] dated June 22, 2016 of the First Division of the Court (Court in Division).

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[1] Rollo, CTA EB Case No. 1483, pp. 79-107.
[2] Rollo pp. 67-77.

THE FACTS

The facts as stated in the Court in Division's Decision are as follows:

"Petitioner Amadeus Marketing Philippines, Inc. is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with office address at 36th Floor, LKG Tower, 6801 Ayala Avenue, Makati City. It is principally engaged in the business of marketing the automated computerized reservations system "Amadeus Global Travel Distribution", which incorporates a software package that performs various functions, including real-line airlines seat reservations, schedule bookings for a variety of air, boat, train, package tours, car rental and hotel services, automatic ticketing and fare pricing displays in the Philippines. Petitioner is duly registered with the Bureau of Internal Revenue (BIR) with Certificate of Registration No. OCN 9RC0000133815 and Taxpayer's Identification (TIN) No. 005-374-900-000.

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue vested with Authority, among others, to act upon and approve claims for refund or tax credit of overpaid or erroneously paid internal revenue taxes. Respondent holds office at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

On August 13, 1997, petitioner and Amadeus IT Group S.A., a duly registered corporation under the laws of Spain, entered into an ACO (Amadeus Commercial Organization) Agreement.

Petitioner, through the Electronic Filing and Payment System (EFPS), filed its Quarterly VAT Returns for CY 2011 on the following dates:

PERIOD COVERED	VAT RETURN	DATE FILED
First Quarter	Original Amended	April 20, 2011 October 24, 2011 June 26, 2012 June 29, 2012
Second Quarter	Original	July 20, 2011
	Amended	June 26, 2012
		July 25, 2013
		November 27, 2012
Third Quarter	Original Amended	October 21, 2011 October 24, 2011 June 26, 2012

		July 25, 2012
Fourth Quarter	Original	January 19, 2012
	Amended	June 26, 2012
		July 25, 2012
		November 27, 2012

On November 29, 2012, petitioner filed its claim for refund before the BIR Revenue District Office No. 50 for its alleged unutilized input VAT for the first to fourth quarters of CY 2011."

On April 10, 2013, AMPI filed a Petition for Review before the Court in Division, which was docketed as CTA Case No. 8628.

On June 7, 2013, respondent Commissioner of Internal Revenue (CIR) filed his Answer,[3] stating as Special and Affirmative Defenses that petitioner failed to demonstrate that the tax subject of this case, was erroneously or illegally collected; that the taxes paid and collected are presumed to be made in accordance with the laws and regulations; that it is incumbent upon petitioner to show that it has complied with the provision of Section 204(C) in relation to Section 229 of the 1997 Tax Code, as amended; and that petitioner's claim for refund or issuance of tax credit certificate in the amount of Php30,118,219.40, as alleged unutilized input VAT paid on purchases of goods and services attributable to its zero-rated sales for the 1st, 2nd, 3rd, and 4th quarters of taxable year 2011 was not fully substantiated by proper documents, such as sales invoices, official receipts and others.

In the Joint Stipulation of Facts and Issues,[4] the parties agreed that the issues to be resolved by the Court in Division are as follows:

> "A. Whether Petitioner is entitled to refund for the unutilized VAT input in the total amount of Thirty Million One Hundred Eighteen Thousand Two Hundred Nineteen & 40/100 (Php30,118,219.40), representing unutilized VAT input taxes for the 1st, 2nd, 3rd, and 4th quarters of the taxable year 2011.
>
> B. Whether Petitioner is engaged in zero-rated or effectively zero-rated sales.
>
> C. Whether the input taxes being claimed are due or paid.

[3] Docket, pp. 55-59.
[4] Ibid. p. 356.

D. Whether the input taxes being claimed have not been applied against taxes during and in the succeeding quarters.

E. Whether the input taxes claimed are attributable to zero-rated or effectively zero-rated sales.

F. Whether the claim is filed within two years after the close of the taxable quarter when such sales were made."

During trial, petitioner presented its documentary and testimonial evidence. On the other hand, respondent manifested that he will not present any evidence and he is instead submitting the case based on the pleadings.[5]

In the Resolution[6] dated November 17, 2014, the parties were ordered to file their respective memorandum. On January 20, 2015,[7] AMPI filed its Memorandum. On January 21, 2015,[8] respondent filed his Memorandum.

The case was submitted for decision on February 4, 2015.[9]

On January 22, 2016, the Court in Division issued the assailed Decision. The dispositive portion thereof reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review filed by Amadeus Marketing Philippines, Inc. is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

On June 22, 2016, the Court in Division issued the assailed Resolution. The dispositive portion thereof reads:

> "**WHEREFORE**, premises considered, petitioner's Motion for Reconsideration/New Trial is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

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[5] Resolution dated September 16, 2014, Docket, pp. 1144-1145.
[6] Docket, pp. 1156-1157.
[7] Ibid. pp. 1167-1186.
[8] Ibid. pp. 1187-1191.
[9] Ibid. p. 647.

Aggrieved, petitioner AMPI filed before the Court *En Banc* this Petition for Review[10].

In the Resolution[11] dated September 5, 2016, respondent CIR was directed by the Court *En Banc* to file his Comment in this case.

On October 7, 2016, the Judicial Records Division of this Court issued a Records Verification Report[12] stating that as of said date, respondent has failed to file a Comment in this case.

Consequently, on November 15, 2016, the Court *En Banc* issued a Resolution[13] submitting the case for decision.

ISSUE

The issue in this case is whether the Court in Division committed reversible error when it denied petitioner's claim for refund representing its unutilized input VAT taxes for the 1st, 2nd, 3rd, and 4th quarters of taxable year 2011.

ARGUMENTS

AMPI argues that the Court in Division erred in ruling that petitioner is not entitled to refund in the amount of P30,118,219.40 representing its unutilized input VAT attributable to its zero-rated sales for the four quarters of calendar year 2011; that in order to be considered as "engaged in business" or 'doing business' in the Philippines, there must still be "continuity," "habituality," or "regularity" – a determining factor which is absent in this case; that the nature of services rendered by petitioner is not in the form of "processing, manufacturing, or repacking of goods" contemplated under Section 108(B)(1) of the NIRC of 1997, as amended, and considering that payment for the service is in foreign currency and that Amadeus IT Group SA is not doing business in the Philippines, petitioner considers the transaction as VAT zero-rated and accordingly, petitioner does not pass output VAT to Amadeus IT Group SA; that based on the Distribution Agreement, Amadeus IT Group, S.A.'s activity is actually that of a contract for royalties; that the mere collection of royalties by Amadeus IT Group SA from the petitioner pursuant to the Distribution Agreement does not in any way constitute 'doing business' in the Philippines; that assuming Amadeus IT Group, S.A. is doing business in the Philippines, the Court in Division erred in concluding that petitioner cannot be regarded as engaged in zero-rated sales just because there are indications from the documents presented that Amadeus IT Group S.A.

[10] Rollo, CTA EB Case No. 1483, pp. 8-65, with Annexes.
[11] Ibid pp.109-110.
[12] Ibid. p. 111.
[13] Ibid. pp. 113-114.

conducted business in the Philippines; and that the Court in Division erred in denying petitioner's Motion for New Trial.

RULING OF THE COURT EN BANC

The instant case arose from the Court in Division's denial of AMPI's Petition for Review for failure of AMPI to prove that it had zero-rated sales for the year 2011.

Timeliness of the Petition

Section 112 of the NIRC of 1997, as amended provides:

"Refunds or Tax Credits of Input Tax. –

(A) Zero-rated or Effectively Zero-rated Sales. – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, **within two (2) years after the close of the taxable quarter when the sales were made,** apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provided, however,* That in the case of zero-rated sales under Section 106 (A)(2)(a)(1), (2) and (b) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas* (BSP): *Provided, further,* That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales: *Provided, finally,* That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

(B) xxx xxx xxx

(C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes **within one hundred twenty (120) days from the date of submission of complete documents** in support

> of the application filed in accordance with Subsection (A) hereof.
>
> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application, within the period prescribed above, the taxpayer affected may, **within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals."** *(Emphasis supplied)*

The instant case involves a claim for refund for the first to fourth quarters of 2011. The close of the taxable quarter and the last day for filing the administrative claim are illustrated below:

PERIOD COVERED	**CLOSE OF THE TAXABLE PERIOD**	**LAST DAY OF THE TWO-YEAR PERIOD**
January to March 2011	March 31, 2011	March 31, 2013
April to June 2011	June 30, 2011	June 30, 2013
July to September 2011	September 30, 2011	September 30, 2013
October to December 2011	December 31, 2011	December 31, 2013

Petitioner AMPI filed its administrative claim with the BIR on November 29, 2012.[14] Hence, AMPI's administrative claim for refund or TCC was seasonably filed with respondent CIR.

In the case of *Commissioner of Internal Revenue vs. San Roque Power Corporation, Taganito Mining Corporation vs. Commissioner of Internal Revenue, Philex Mining Corporation vs. Commissioner of Internal Revenue*[15], the Supreme Court clarified the rule with regard to the application of prescriptive periods under Section 112(A) and (C). Thus:

> "This law is clear, plain, and unequivocal. Following the well-settled *verba legis* doctrine, this law should be applied exactly as worded since it is clear, plain, and unequivocal. As this law states, the taxpayer may, if he wishes, appeal the decision of the Commissioner to the CTA within 30 days from receipt of the Commissioner's decision, or if the Commissioner does not act on the taxpayer's claim within the 120-day period, the taxpayer may appeal to the CTA within 30 days from the expiration of the 120-day period."

[14] Exhibit "P-23 and "P-24".

[15] G.R. No. 187485, February 12, 2013. Citation omitted.

In the instant case, respondent has a period of one hundred twenty (120) days from November 29, 2012 or up to March 29, 2013, within which to act on AMPI's claim. After the lapse thereof, AMPI has thirty (30) days or up to April 28, 2013 within which to file a judicial claim before this Court.

Petitioner AMPI filed before the Court in Division its Petition for Review on April 10, 2013, also within the period required by the rules. Hence, both the administrative and judicial claims were filed on time.

Whether the Court in Division erred in denying AMPI's application for VAT refund

After a review of petitioner's arguments and the records of this case, the Court *En Banc* finds no reason to reverse the Decision and Resolution of the Court in Division. The arguments raised by petitioner in its Motion for Reconsideration before the Court in Division and in the instant Petition for Review are substantially the same and were exhaustively discussed by the Court in Division. The Court in Division did not err in denying petitioner's prayer for refund in the amount of P30,118,219.40 representing its unutilized VAT input taxes for the 1st, 2nd, 3rd, and 4th quarters of taxable year 2011.

The pertinent portions of the assailed Decision[16] are quoted below:

> "Petitioner avers that its sales of services to Amadeus IT Group S.A. for CY 2011 qualify as zero-rated sales under Section 108(B)(2) of the NIRC of 1997, as amended, which reads:
>
> "SEC. 108. Value-added Tax on Sale of Services and Use or Lease of Properties. –
>
> xxx xxx xxx
>
> (B) Transactions Subject to Zero Percent (0%) Rate. – The following services performed in the Philippines by VAT-registered persons shall be subject to zero-percent (0%) rate:
>
> (1) Processing, manufacturing or repacking goods for other persons doing business outside the Philippines which goods are subsequently exported, where the services are paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);

[16] Decision dated January 22, 2016, citations omitted.

(2) Services other than those mentioned in the preceding paragraph rendered to a person engaged in business conducted outside the Philippines or to a nonresident person not engaged in business which is outside the Philippines when the services are performed, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);"

In the case of *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.* the Supreme Court held that in order for the supply of services to be considered VAT zero-rated under Section 108(B)(2) of the NIRC of 1997, as amended, the following requisites must be satisfied:

1. the services by a VAT-registered person must be other than processing, manufacturing or repacking of goods;
2. the payment for such services must be in acceptable foreign currency accounted for in accordance with the BSP rules and regulations; and
3. the recipient of such services is doing business outside the Philippines.

Petitioner is a VAT-registered entity that renders services to its foreign affiliate Amadeus IT Group S.A. for the marketing, promotion and offering in the Philippines of its automated reservations and distribution system, the "Amadeus Global Travel Distribution", that incorporates a software package which performs various functions, including real-line airlines seat reservations, schedules bookings for a variety of air, boat, train package tours, car rental and hotel services, automatic ticketing and fare pricing displays in the Philippines. These services are not under the same category as "processing, manufacturing or repacking of goods'; hence, petitioner complied with the first requisite.

With regard to the third requisite, petitioner offered as evidence the Articles of Association of Amadeus IT Group S.A. and the Certificate of Non-Registration of Amadeus IT Group S.A. duly issued by the Securities and Exchange Commission (SEC).

However, petitioner failed to discharge its burden of complying with the third requisite. As held by the Supreme Court in *Accenture, Inc. vs. Commissioner of Internal Revenue*:

"Consequently, to come within the purview of Section 108(B)(2), it is not enough that the recipient of the service be proven to be a foreign corporation; rather, it must be specifically proven to be a nonresident foreign corporation."

The term "nonresident foreign corporation" applies to a foreign corporation not engaged in trade or business within the Philippines.

While the submitted documents prove that Amadeus IT Group S.A. is a foreign corporation organized and established under the laws of Spain, the records show that Amadeus IT Group S.A conducts business in the Philippines.

As can be gleaned from petitioner's Quarterly VAT returns, petitioner had input VAT on services rendered by foreign entities in the amounts of P3,973,690.80, P4,138,674.76, P4,295,766.62, and P3,538,970.58 for the first, second, third, and fourth quarters of 2011, respectively, or a total of P15,947,102.76. Per the Court-commissioned Independent Certified Public Accountant's (CPA) Schedule of Purchases of Goods and Services and Corresponding Input Tax for the Period of January 1 to December 31, 2011, out of the said reported input taxes, P14,522,179.83 was supported by Monthly Remittance Returns of VAT and Other Percentage Taxes Withheld (BIR Form No. 1600), detailed as follows:

MONTH	NAME OF SUPPLIER	EXHIBIT	AMOUNT
January	Amadeus IT Group S.A.	P-102-567-1	P 1,247,141.65
February	Amadeus IT Group S.A.	P-102-569-1	1,442,997.45
March	Amadeus IT Group S.A.	P-102-740-1	911,258.21
April	Amadeus IT Group S.A.	P-102-785-1	1,421,517.37
May	Amadeus IT Group S.A.	P-102-940-1	1,809,918,72
June	Amadeus IT Group S.A.	P-102-1377-1	1,839,475.13
July	Amadeus IT Group S.A.		774,473.30
August	Amadeus IT Group S.A.	P-102-1980-1	1,664,237.26
September	Amadeus IT Group S.A.	P-102-2085-1; P-102-2258-1 to P-102-2258-6	1,407,834.13
November	Amadeus IT Group S.A.	P-102-2391-1	984,596.35
December	Amadeus IT Group S.A.	P-102-2765	1,018,730.26
TOTAL			**P 14,522,179.83**

Apparently, the foreign corporation that rendered services to petitioner in the Philippines and whose services were subjected to VAT, was also Amadeus IT Group S.A., to whom petitioner claims to have made its zero-rated sales.

Amadeus IT Group S.A. was made liable to VAT being a non-resident person who, in the course of its trade or business, rendered services in the Philippines. This is in accordance with Section 105 of the NIRC of 1997, as amended, and as implemented by Sections 4.105-1 and 4.105-3 of Revenue Regulations (RR) No. 16-2005, to wit:

> "SEC. 105. *Persons Liable.* – Any person who, in the course of trade or business, sells barters, exchanges, lease goods or properties, renders services, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 to 108 of this Code.
>
> The value-added tax is an indirect tax and the amount of tax may be shifted or passed on to the buyer, transferee or lessee of the goods, properties or services. This rule shall likewise apply to existing contracts of sale or lease of goods, properties or services at the time of the effectivity of Republic Act No. 7716.

The phrase *'in the course of trade or business'* means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a non-stock, nonprofit private organization (irrespective of the disposition of its net income and whether or not it sells exclusively to members or their guests), or government entity.

The rule of regularity, to the contrary notwithstanding, services as defined in this Code rendered in the Philippines by non-resident foreign persons shall be considered as being course of trade or business."

> "SECTION 4.105-1. *Persons Liable.* – Any person who, in the course of his trade or business, sells, barters, exchanges or leases goods or properties, or renders services, and any person who imports goods, shall be liable to VAT imposed to Secs. 106 to 108 of the Tax Code.
>
> xxx xxx xxx
>
> *'Person'* refers to any individual, trust, estate, partnership, corporation, joint venture, cooperative or association, joint venture, cooperative or association.

xxx xxx xxx

> SECTION 4.105-31. Meaning of *'In the Course of Trade or Business'*. - xxx
>
> Non-resident persons who perform services in the Philippines are deemed to be making sales in the course of trade or business, even if the performance of services is not regular."
>
> Considering that Amadeus IT Group S.A., the recipient of petitioner's services, is doing business in the Philippines, petitioner failed to comply with the third requisite to qualify for VAT zero-rating. Consequently, the second requisite for the refund or tax credit of input VAT under Section 112(A) of the NIRC of 1997, as amended, was also not satisfied."

AMPI repeatedly argues that Amadeus IT Group S.A. is not doing business in the Philippines because it is merely collecting royalties from petitioner pursuant to the Distribution Agreement. Amadeus IT Group, S.A. performed only a singular act, which is to grant AMPI the permission to use its intellectual property.

The Court *En Banc* finds AMPI's argument unmeritorious. The records of this case contradicted the claim of AMPI that only a single transaction is involved, since the contracts involving petitioner and Amadeus IT Group S.A. are existing for several years already prior to the taxable year in question. The act of petitioner in withholding of payments to Amadeus IT Group S.A. is a sign that there is continuity of commercial dealings. Hence, Amadeus IT Group S.A. is doing business in the Philippines.

The Court *En Banc* reiterates the Court in Division's ruling in its Resolution on AMPI's Motion for Reconsideration that:

> "*Xxx* contrary to petitioner's assertion that its business dealings with Amadeus IT Group S.A. are transactions of an "isolated" nature, it bears stressing that the Amadeus Commercial Organization (ACO) Agreement entered into between petitioner and Amadeus IT Group S.A., which authorizes petitioner to market, promote, offer and distribute the Amadeus System in the Philippines, was executed as early as August 13, 1997, while its Distribution Agreement with Amadeus IT Group S.A. was entered on January 1, 2001, and were both existing for several years."

The Court *En Banc* likewise affirms the ruling of the Court in Division when it denied AMPI's Motion for New Trial. AMPI's argument that the re-opening of the case based on AMPI's plea to introduce additional documents to substantiate its claim that "Amadeus Global Travel Distribution S.A." and "Amadeus IT Group S.A." are one and same, is baseless because it was already established that Amadeus IT Group S.A. is doing business in the Philippines.

In the case of *Accenture, Inc. vs. Commissioner of Internal Revenue,*[17] the Supreme Court said that "[t]here is no specific criterion as to what constitutes "doing" or "engaging in" or "transacting" business. Each case must be judged in the light of its peculiar environmental circumstances. The term implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of functions normally incident to, and in progressive prosecution of commercial gain or for the purpose and object of the business organization."

Well-settled in this jurisdiction is the fact that actions for tax refund, as in this case, are in the nature of a claim for exemption and the law is construed in *strictissimi juris* against the taxpayer. The pieces of evidence presented entitling a taxpayer to an exemption are also *strictissimi* scrutinized and must be duly proven.[18] In this case, AMPI was not able to prove that it is entitled to a refund or issuance of a tax credit certificate for its unutilized input VAT paid for the 1st, 2nd, 3rd, and 4th quarters of 2011.

There being no new matters or issues raised in the Petition for Review before the Court *En Banc* and there being no reversible error committed by the Court in Division, hence, the Court *En Banc* finds no cogent reason to reverse the assailed Decision and Resolution.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED for lack of merit.** Accordingly, the Decision dated January 22, 2016 and Resolution dated June 22, 2016 are hereby affirmed.

SO ORDERED.

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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[17] G.R. No. 190102, July 11, 2012, citing *Commissioner of Internal Revenue v. British Overseas Airways Corporation*, 233 Phil. 406 (1987).
[18] *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.

WE CONCUR:

(With Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(With Concurring and Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(With Dissenting Opinion)
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above 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

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

AMADEUS MARKETING PHILIPPINES, INC., Petitioner,	**CTA EB NO. 1483** (CTA Case No. 8628)
	Present:
- versus -	**DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: OCT 09 2017 2:25 p.m.

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* of my esteemed colleague, the Honorable Associate Justice Ma. Belen M. Ringpis-Liban, which denies the Petition for Review filed by petitioner Amadeus Marketing Philippines, Inc., thereby affirming the Court in Division's Decision dated January 22, 2016 and its Resolution dated June 22, 2016.

The Court in Division denied petitioner's claim for refund of unutilized input VAT for the four (4) quarters of taxable year 2011 on account of petitioner's failure to prove that the input VAT is attributable to petitioner's zero-rated sale of services under Section 108(B)(2) of the National Internal Revenue Code (NIRC) of 1997, amended.

Both the Court in Division and the *ponencia* found that petitoner's sale of services to Amadeus IT Group S.A. could not be regarded as zero-rated under Section 108(B)(2) of the NIRC of 1997, as amended, as evidence show that Amadeus IT Group S.A. is doing business in the Philippines.

Truth to tell, records disclose that Amadeus IT Group S.A.'s transactions or business dealings in the Philippines are not isolated, occassional or casual. The contracts entered into by Amadeus IT Group S.A. and petitioner, consisting of the **Amadeus Commercial Organization (ACO) Agreement executed on August 13, 1997 and the Distribution Agreement executed on January 1, 2001**, indicate continuous commercial dealings and arrangements between them and clearly manifest Amadeus IT Group S.A.'s conduct and intention to pursue its business in the Philippines.

Petitioner argues that the mere fact that Amadeus IT Group S.A. receives royalties from petitioner is not sufficient for the Court to conclude that Amadeus IT Group S.A. is doing business in the Philippines. It insists that Amadeus IT Group S.A. merely grants to petitioner the right to use its property for which it earns royalty, which is a passive income. According to petitioner, in deriving royalty from its transactions in the Philippines, Amadeus IT Group S.A. is not engaged in the active pursuit of any business endeavor in the Philippines. It further avers that the Court should not use the presumption under Section 105 of the NIRC of 1997, as amended, that services rendered in the Philippines by nonresident foreign persons shall be considered as being rendered in the course of trade or business in determining whether a nonresident foreign corporation is doing business or engaged in business within the Philippines for purposes of zero-rating under Section 108(B)(2) of the NIRC of 1997, as amended.

Applying both the "substance test"[1] and the "continuity test"[2] laid down in ***The Mentholatum Co., Inc. vs. Anacleto***

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[1] Substance Test - The true test [for doing business], however, seems to be whether the foreign corporation is continuing the body of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another.

[2] Continuity Test - The term [doing business] implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in the progressive prosecution of, the purpose and object of its organization.

Mangaliman*,**[3] and cited in ***Agilent Technoligies Singapore vs. Integrated Silicon Technology Philippines[4] to the present case, I submit that Amadeus IT Group S.A. is doing business in the Philippines.

In contracting petitioner to render marketing services on its behalf pursuant to the ACO Agreement, Amadeus IT Group S.A. is actively pursuing its business in the Philippines. **The marketing services rendered by petitioner under the ACO Agreement were intended for consumption by Amendeus IT Group S.A. in connection with its business in the Philippines.**

Under the Distribution Agreement, Amadeus IT Group S.A. appointed petitioner as its sole distributor of its products to customers in the Philippines. The **Distribution Agreement states that petitioner shall be responsible for the marketing of the products to customers in the Philippines**, and that petitioner is authorized to grant to Subscribers, non-exclusive, non-transferable licenses, or access rights where applicable to use Amadeus Products and Services. On the other hand, **under the ACO Agreement**, petitioner undertakes to market, offer and promote in the Philippines, the Amadeus System to Subscribers by means of the Amadeus products, and to carry out the necessary actions in the Philippines in order to give Subscribers appropriate access to the Amadeus Global Core, or to other computer database offered or to be offered by Amadeus IT Group S.A. under license from a third party. **The ACO Agreement further provides that Amadeus IT Group S.A. shall pay petitioner a Distribution Fee which shall be considered as a commission fee for marketing, offering and promoting Amadeus Products in the Philippines.**

Sans the ACO Agreement, petitioner may be justified in insisting that Amadeus IT Group S.A. is not engaged in the active conduct or pursuit of its business in the Philippines, as the Distribution Agreement only grants to petitioner the authority to grant to Subscribers, non-exclusive, non-transferable licenses, or access rights where applicable, to use Amadeus Products and Services, for which Amadeus IT Group S.A. collects license fees or royalties. When the ACO Agreement and the Distribution Agreement are, however, taken together, they belie petitioner's proposition that the transactions of Amadeus IT Group S.A. in the Philippines are merely passive, isolated, occasional or casual in

[3] G.R. No. L-47701, June 27, 1941.
[4] G.R. No. 154618, April 14, 2004.

nature. The apparent contradiction in the ACO Agreement and the Distribution Agreement with respect to the marketing of Amadeus IT Group S.A.'s products in the Philippines is noticeable. While the Distribution Agreement says that petitioner is responsible for marketing the Amadeus Products in the Philippines which according to petitioner is indicative that Amadeus IT Group S.A. has no participation on the operations of petitioner's business in the Philippines, **the ACO Agreement clearly states that petitioner has been appointed by Amadeus IT Group S.A. precisely to market, offer and promote Amadeus System, by means of the Amadeus Products, in the Philippines.**

The following terms of the ACO Agreement clearly establish that Amadeus IT Group S.A. actively participates in the operations of petitioner's business in the Philippines - - which means that it actually pursues its business in the Philippines and that petitioner merely acts as its agent: **(i) petitioner shall market, offer and promote the Amadeus System to Subscribers, by means of the Amadeus products**, and to carry out the necessary actions in the Philippines in order to give appropriate access to Subscribers, to the Amadeus Global Core, or to other computer databases offered or to be offered by Amadeus IT Group S.A. from a third party; (ii) **petitioner shall receive from Amadeus IT Group S.A. distribution fee as a commission for each net booking** processed through the Amadeus System by a Subscriber located in the Philippines; (iii) in case a Subscriber abuses the Amadeus System, Amadeus IT Group S.A. **may require the Subscriber to stop the misuse, or terminate the agreement with the Subscriber**, or require the Subscriber to pay a corresponding fee; (iv) **upon termination, petitioner shall immediately discontinue the sale or distribution of all Amadeus Products and the use of the Amadeus System**, all Proprietary Marks, and any names, marks or signs which are confusingly similar thereto, and all other materials which may indicate that petitioner is or was representing or otherwise associated with the Amadeus Group; (v) **upon termination, return to Amadeus IT Group S.A. all equipment supplied to petitioner for marketing, offering and promotion** of Amadeus Products for use in connection with the Amadeus System or other Amadeus Products

Indeed, there is nothing in Section 108 (B) (2) of the NIRC of 1997, as amended, which states that a foreign corporation should not engage in business in the Philippines in order that the sale of services to it by a VAT-registered entity may be regarded as zero-rated sales. What the law specifically requires in order for the sale of services to a foreign corporation to qualify for zero-rating is that **the services must be rendered in connection with the foreign corporation's business outside of the Philippines**, and not to the foreign corporation's business in the Philippines, if any. In other words, the services by the VAT-registered entity **must be destined for consumption by the foreign corporation outside of the Philippines**, that is, in connection with its business conducted outside the Philippine territory.

While petitioner presented evidence to prove that Amadeus IT Group S.A. is doing business outside the Philippines, consisting of its Certificate / Articles of Foreign Incoporation / Association/ Registration, the **provisions of the ACO Agreement and Distribution Agreement clearly establish that the services rendered by petitioner to Amadeus IT Group S.A. are attributable to, and destined for consumption by, Amadeus IT Group S.A.'s business in the Philippines.**

Finally, the Agreements may not have created a permanent establishment for Amadeus IT Group S.A. under the RP-Spain Tax Treaty for income tax purposes but it does not mean that Amadeus IT Group S.A. did not continously conduct business in the Philippines for purposes of determining whether the services rendered by petitioner to Amadeus IT Group S.A. in this case qualify as zero-rated.

As afore-discussed, I find that the services rendered by petitioner in favor of Amadeus IT Group S.A. are:

(a) Services other than those mentioned in Section 108(B)(1) of the NIRC of 1997, as amended;

(b) **Rendered to Amadeus IT Group S.A. in connection with the business that the latter is doing or is engaged within the Philippines**; and,

(c) Paid for in foreign currency and accounted for in accordance with the rules of the Bangko Sentral ng Pilipinas (BSP).

Based on the foregoing, since the services rendered by petitioner to Amadeus IT Group S.A. do not qualify as zero-rated for VAT purposes, petitioner is not entitled to claim a refund of

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input VAT for the four quarters of 2011 which are attributable to its sale of services to Amadeus IT Group S.A.

All told, I VOTE to DENY the Petition for Review filed by Amadeus Marketing Philippines, Inc. and AFFIRM the Court in Division's Decision dated June 29, 2016 and its Resolution dated January 22, 2016.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

AMADEUS MARKETING PHILIPPINES, INC., *Petitioner,*	**CTA *EB* NO. 1483** (CTA Case No. 8628)
- versus -	Members: **DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: OCT 09 2017 2:25p.m.

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CONCURRING AND DISSENTING OPINION

BAUTISTA, J.:

The present case involves the refund of petitioner's unutilized input value-added tax ("VAT") attributable to its zero-rated sales/receipts for the calendar year ("CY") 2011.

I concur with the conclusion reached by my respected colleague as to the timely filing of petitioner's administrative and judicial claims for refund. However, I am reluctant to uphold the Decision by the First Division (the "Assailed Decision"), which was affirmed in the present Decision, with regard to the conclusion that the recipient of petitioner's services, Amadeus IT Group S.A. ("Amadeus IT Group"), is doing business within the Philippines and hence the services rendered by petitioner in favor of Amadeus IT Group does not qualify as a zero-rated transaction.

In the Assailed Decision, the Court in Division ruled that considering Amadeus IT Group is the foreign corporation that rendered services in favor of petitioner and whose services were subjected to VAT, petitioner failed to comply with the third requisite to qualify for zero-rating (*i.e.*, the recipient of such services is doing business outside the Philippines). Further, according to the *ponencia*, petitioner's act of withholding payments to Amadeus IT Group is an indication that there is continuity of commercial dealings; hence, Amadeus IT Group is doing business in the Philippines.

I beg to differ and humbly submit that law and jurisprudence merely requires, among others, that the zero-rated service be rendered in favor of a person engaged in business conducted outside the Philippines or to a non-resident person not engaged in business who is outside the Philippines when the services are performed. The use of the term "or" means it is sufficient if the service is performed in favor of a person engaged in business conducted outside the Philippines, or the service is performed in favor of a non-resident person not engaged in business who is outside the Philippines when the services are performed.

The Court has consistently upheld the entitlement to a VAT refund of Philippine taxpayers for services rendered in favor of entities engaged in business conducted outside the Philippines as evidenced by the latter's consularized incorporation documents and Securities and Exchange Commission ("SEC") negative certification.[1] The incorporation documents will show that the foreign entity is indeed registered and doing business outside the Philippines, while the SEC negative certification will prove that the foreign entity is not registered to do business in the Philippines.

In fact, in *Commissioner of Internal Revenue ("CIR") v. Deutsche Knowledge Services Pte. Ltd.*[2], the Court *En Banc* upheld the Court in

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[1] *CIR v. Deutsche Knowledge Services Pte. Ltd.*, CTA *EB* Nos. 1297 & 1302 (CTA Case No. 8165), May 18, 2017; *General Motors Automobiles Philippines, Inc. v. CIR*, CTA Case No. 8976, May 2, 2017; *Manulife Data Services, Inc. v. CIR*, CTA Case Nos. 8482, 8513, 8560 & 8611, April 19, 2017; *Chartis Technology & Operations Management Corp. (Philippines) v. CIR*, CTA Case Nos. 8432, 8498, 8534 & 8581, February 22, 2017.
[2] CTA *EB* Nos. 1297 & 1302 (CTA Case No. 8165), May 18, 2017.

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Division's ruling that the fact of doing business outside the Philippines should be supported by at least both the incorporation documents and SEC negative certification in this wise:

> As pointed out by the Court in Division, to be considered as non-resident foreign corporation doing business outside the Philippines, each entity must be supported, at the very least, by **both** <u>SEC certificate of non-registration of corporation/partnership</u>, which will show that the recipient of the service has no registered business in the Philippines and <u>certificate/articles of foreign incorporation/association</u>, which will prove that the recipient is indeed foreign.

When the law requires that the zero-rated service be rendered in favor of non-resident foreign corporations doing business outside the Philippines, it does not automatically follow that said entities should likewise not be conducting business in the Philippines. I humbly submit that a foreign entity conducting business outside the Philippines may also conduct business within the Philippines and such act of conducting business within the Philippines does not automatically remove from the Philippine taxpayer/service provider its entitlement to a VAT refund because what *Section 108(B)(2) of the 1997 National Internal Revenue Code, as amended ("1997 NIRC")*[3] merely requires is that the "other services" performed by the Philippine taxpayer be rendered in favor of an entity engaged in business conducted outside the Philippines. The law does not add a qualification that such "other services" be performed in favor of an entity who solely conducts business outside the Philippines, *i.e.*, if it is found that the foreign entity/service recipient engages in business in the Philippines, the Philippine taxpayer/service provider will no longer be entitled to zero-rating. Neither can the definition under *Section 22 of the 1997 NIRC* for income tax be extended to apply to VAT.

The Supreme Court's ruling in *CIR v. American Express International Inc. (the "American Express case")*[4] finds application to the present case. In the *American Express case*, the Philippine taxpayer rendered services in favor of a foreign affiliate. In granting the refund for input VAT, the Supreme Court acknowledged that affiliates may render services in favor of each other; hence, the concept of transfer

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[3] *Republic Act No. 8424*, as amended (1997).
[4] G.R. No. 152609, June 29, 2005, 462 SCRA 197.

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pricing arises. In the case, the Supreme Court could have found the foreign affiliate therein to be engaged in business in the Philippines because it regularly conducted business in the Philippines in pursuit of its main activity. However, the Supreme Court did not deprive the Philippine taxpayer of its input VAT on the zero-rated service it performed in favor of the foreign affiliate notwithstanding that said foreign affiliate may have also rendered services in favor of such Philippine taxpayer. The Supreme Court merely focused on the fact that the Philippine entity rendered services in favor of its foreign affiliate, which was paid for in acceptable foreign currency and accounted for in conformity with law. The Supreme Court discussed, as follows:

> Zero Rating of
> "Other" Services
>
> The law is very clear. Under the last paragraph quoted above, services performed by VAT-registered persons in the Philippines (other than the processing, manufacturing or repacking of goods for persons doing business outside the Philippines), when paid in acceptable foreign currency and accounted for in accordance with the rules and regulations of the BSP, are zero-rated.
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> Respondent is a VAT-registered person that facilitates the collection and payment of receivables belonging to its non-resident foreign client, for which it gets paid in acceptable foreign currency inwardly remitted and accounted for in conformity with BSP rules and regulations. Certainly, the service it renders in the Philippines is not in the same category as "processing, manufacturing or repacking of goods" and should, therefore, be zero-rated. In reply to a query of respondent, the BIR opined in VAT Ruling No. 080-89 that the income respondent earned from its parent company's regional operating centers (ROCs) was automatically zero-rated effective January 1, 1988.
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> Service has been defined as "the art of doing something useful for a person or company for a fee" or "useful labor or work rendered or to be rendered by one person to another." For facilitating in the Philippines the collection and payment of receivables belonging to its Hong Kong-based foreign client, and getting paid for it in duly accounted acceptable foreign currency, respondent renders service falling under the category of zero rating. Pursuant to the Tax Code, a VAT of zero percent should, therefore, be levied upon the supply of

that service.

Branch and Home Office

By designation alone, respondent and the ROCs are operated as branches. This means that each of them is a unit, "an offshoot, lateral extension, or division" located at some distance from the home office of the parent company; carrying separate inventories; incurring their own expenses; and generating their respective incomes. Each may conduct sales operations in any locality as an extension of the principal office.

The extent of accounting activity at any of these branches depends upon company policy, but the financial reports of the entire business enterprise – the credit card company to which they all belong – must always show its financial position, results of operation, and changes in its financial position as a single unit. Reciprocal accounts are reconciled or eliminated, because they lose all significance when the branches and home office are viewed as a single entity. In like manner, intra-company profits or losses must be offset against each other for accounting purposes.

<u>Contrary to petitioner's assertion, respondent can sell its services to another branch of the same parent company</u>. <u>In fact, the business concept of a transfer price allows goods and services to be sold between and among intra-company units at cost or above cost</u>. A branch may be operated as a revenue center, cost center, profit center or investment center, depending upon the policies and accounting system of its parent company. Furthermore, the latter may choose not to make any sale itself, but merely to function as a control center, where most or all of its expenses are allocated to any of its branches.

Gratia argumenti that the sending of drafts and bills by service establishments to respondent is equivalent to the act of sending them directly to its parent company abroad, and that the parent company's subsequent redemption of these drafts and billings of credit card holders is also attributable to respondent, then with greater reason should the service rendered by respondent be zero-rated under our VAT system. The service partakes of the nature of export sales as applied to goods, especially when rendered in the Philippines by a VAT-registered person that gets paid in acceptable foreign currency accounted for in accordance with BSP rules and regulations.

Services Subject to
Zero VAT

As a general rule, the VAT system uses the destination principle as a basis for the jurisdictional reach of the tax. Goods and services are taxed only in the country where they are consumed. Thus, exports are zero-rated, while imports are taxed.

Confusion in zero rating arises because petitioner equates the performance of a particular type of service with the consumption of its output abroad. In the present case, the facilitation of the collection of receivables is different from the utilization or consumption of the outcome of such service. While the facilitation is done in the Philippines, the consumption is not. Respondent renders assistance to its foreign clients – the ROCs outside the country – by receiving the bills of service establishments located here in the country and forwarding them to the ROCs abroad. The consumption contemplated by law, contrary to petitioner's administrative interpretation, does not imply that the service be done abroad in order to be zero-rated.

Consumption is "the use of a thing in a way that thereby exhausts it." Applied to services, the term means the performance or "successful completion of a contractual duty, usually resulting in the performer's release from any past or future liability . . ." The services rendered by respondent are performed or successfully completed upon its sending to its foreign client the drafts and bills it has gathered from service establishments here. Its services, having been performed in the Philippines, are therefore also consumed in the Philippines.

Unlike goods, services cannot be physically used in or bound for a specific place when their destination is determined. Instead, there can only be a "predetermined end of a course" when determining the service "location or position . . . for legal purposes." Respondent's facilitation service has no physical existence, yet takes place upon rendition, and therefore upon consumption, in the Philippines. Under the destination principle, as petitioner asserts, such service is subject to VAT at the rate of 10 percent.

Respondent's Services Exempt
from the Destination Principle

However, the law clearly provides for an exception to

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the destination principle; that is, for a zero percent VAT rate for services that are performed in the Philippines, "paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the [BSP]." Thus, for the supply of service to be zero-rated as an exception, the law merely requires that first, the service be performed in the Philippines; second, the service fall under any of the categories in Section 102(b) of the Tax Code; and, third, it be paid in acceptable foreign currency accounted for in accordance with BSP rules and regulations.

Indeed, these three requirements for exemption from the destination principle are met by respondent. Its facilitation service is performed in the Philippines. It falls under the second category found in Section 102(b) of the Tax Code, because it is a service other than "processing, manufacturing or repacking of goods" as mentioned in the provision. Undisputed is the fact that such service meets the statutory condition that it be paid in acceptable foreign currency duly accounted for in accordance with BSP rules. Thus, it should be zero-rated.

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Tax Situs of a
Zero-Rated Service

The law neither makes a qualification nor adds a condition in determining the tax situs of a zero-rated service. Under this criterion, the place where the service is rendered determines the jurisdiction to impose the VAT. Performed in the Philippines, such service is necessarily subject to its jurisdiction, for the State necessarily has to have "a substantial connection" to it, in order to enforce a zero rate. The place of payment is immaterial; much less is the place where the output of the service will be further or ultimately used.[5]

Applying the Supreme Court's pronouncements in the *American Express case* to the present case, it becomes all the more questionable to rely on petitioner's act of withholding payments to Amadeus IT Group as an indication of continuity of commercial dealings, thereby removing the services rendered by petitioner from the purview of a zero-rated sale. To reiterate, it is not the continuity of commercial dealings or whether the foreign entity/service

[5] Underscoring ours; G.R. No. 152609, June 29, 2005, 462 SCRA 197.

recipient is a non-resident foreign corporation, as defined under the income tax provisions of the *1997 NIRC,* that determines whether the services rendered by a Philippine taxpayer in favor of such foreign entity qualifies as a zero-rated transaction, but whether such service is rendered in favor of a foreign entity conducting business outside the Philippines.

Reliance on *CIR v. Burmeister and Wain Scandinavian Contractor Mindanao*[6] should also be made carefully because the facts of the case show that the service was rendered in favor of a Philippine entity, a consortium, doing business in the Philippines. Considering both the service provider and the service recipient in the said case were doing business in the Philippines, the Supreme Court held that the transaction was considered a domestic sale of services which was subject to VAT.

In contrast, the parties to the zero-rated transaction in the present case are not both located or doing business in the Philippines. The service recipient is alleged to be registered under the laws of Spain.

Furthermore, if it were an additional requirement for claiming a VAT refund that the foreign entity does not engage in business in the Philippines, each Philippine taxpayer seeking to claim a VAT refund for zero-rated sales would be required to verify that each foreign entity it renders services in favor of does not conduct business in the Philippines. How then will that be done? A verification will first be made with the Bureau of Internal Revenue whether a foreign entity/service recipient also receives services from other Philippine entities? An absurd situation will arise when all the law requires is that the service be rendered in favor of an entity engaged in business outside the Philippines.

Finally, it is not unusual then for a Philippine entity to render services in favor of its foreign affiliate and vice versa. This "exchange of services" does not take away from the Philippine entity its entitlement to zero-rating precisely because the law merely requires that the Philippine entity's services be rendered in favor of an entity conducting business outside the Philippines.

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[6] G.R. No. 153205, January 22, 2007, 512 SCRA 124.

To conclude, law and jurisprudence merely require that the service, to qualify for zero-rating, be rendered in favor of an entity conducting business outside the Philippines. As consistently held by the Court, this requirement is complied with when the Philippine taxpayer/service provider presents at least both a consularized incorporation documents and an SEC negative certification for each foreign entity/service recipient. Assuming the other requirements for claiming a refund of unutilized input VAT arising from zero-rated sales are present, the taxpayer is entitled to the same.

In view of the foregoing discussion, I vote to remand the present Petition for Review to the Court in Division for further proceedings to determine the amount refundable to petitioner for its unutilized input VAT attributable to zero-rated sales/receipts for the CY 2011.

LOVELL R. BAUTISTA
Associate Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

AMADEUS MARKETING PHILIPPINES, INC., *Petitioner*,	**CTA *EB* NO. 1483** (CTA Case No. 8628)
	Present:
-versus-	**DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: OCT 09 2017 2:25 p.m.

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Dissenting Opinion

MANAHAN, J.:

The majority found that the transactions between petitioner Amadeus Marketing Philippines, Inc. (AMPI) and Amadeus IT Group S.A. are not single or isolated, *to wit*:

> The Court *En* Banc finds AMPI's argument unmeritorious. The records of this case contradicted the claim of AMPI that only a single transaction is involved, since the contracts affecting petitioner and Amadeus IT Group S.A. are existing for several year already prior to the taxable year in question. The act of petitioner in withholding of payments to Amadeus IT Group S.A. is a sign that there is continuity of commercial dealings. Hence, Amadeus IT Group S.A. is doing business in the Philippines.

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With due respect, I manifest my dissent to the Court *En Banc*'s conclusion that Amadeus IT Group S.A. is doing business in the Philippines.

I agree with AMPI's contention that payments made to Amadeus IT Group S.A., the foreign recipient of services, were royalties stemming from the arrangement that AMPI was given the right to use the intellectual property belonging to Amadeus IT Group S.A.

Under the terms of the ACO (Amadeus Commercial Organization) Agreement, Amadeus IT Group S.A. grants AMPI the right to use the proprietary marks connected with Amadeus products for the duration of the Agreement. The relationship between AMPI and Amadeus IT Group S.A. is two-pronged and is revealed by the provisions of the Distribution Agreement and the ACO Agreement.

An analysis of the provisions of the Distribution Agreement discloses that it is a contract where the Amadeus Group designates AMPI to be the distributor or marketing agent of the so-called "Amadeus Global Travel Distribution System." The pertinent provisions are quoted below:

> WHEREAS, the Amadeus group of companies has developed a fully automated reservation and distribution system known as the Amadeus Global Travel Distribution System which is marketed by Amadeus NMC according to the terms and conditions of the Amadeus Marketing-NMC Agreement executed as of the 1st of July, 1997 (the "Main Agreement").
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> WHEREAS, the Amadeus group of companies has, and will further develop, a Travel Agency Management System (hereinafter referred to as "the Product") that interacts and is compatible with the Amadeus Global Travel Distribution System."
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> 2. General Terms of Agreement
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> 2.1 Amadeus appoints Amadeus NMC as its *sole distributor* of the Product to its subscribers in the Territory defined under Article 3 below.

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> 2.2 Amadeus NMC shall be responsible for *marketing the Product to Subscribers* located in Amadeus NMC Territory.
>
> 2.3 Subject to the terms and conditions of this Agreement, Amadeus hereby authorized Amadeus NMC to grant to Subscribers, non-exclusive, non-transferable licenses to use the Product for the purpose of facilitating the provision of reservation functions and related services, and to interface with agreed upon travel agency third party software. Amadeus shall enter into a License Agreement substantially in the form of Appendix C attached hereto with each Subscriber.

In order for AMPI to be able to grant its Subscribers the license to use the products under the Distribution Agreement, it is imperative that AMPI is authorized by the owner of the software to use certain proprietary marks owned by the Amadeus Group. The ACO Agreement between AMPI and Amadeus IT Group S.A. grants such authority. Section 3.1 of said ACO Agreement provides:

> 3.3 Amadeus grants Amadeus ACO the right to use certain Proprietary Marks connected with Amadeus products as long as this Agreement is in force. The Proprietary Marks include, but are not limited to, those registered or which may become registered with the International Trademark Office, the Spanish Trademark authorities or other National Trademark offices.

To prove that the income payments made to Amadeus IT Group S.A. are royalty payments, AMPI presented, among others, its Monthly Remittance Returns of VAT and Other Percentage Taxes Withheld (BIR Form No. 1600) for the period January 1 to December 31, 2011. A perusal of these monthly remittance returns reveals that AMPI used the ATC Code "WV050" in remitting the VAT withheld from its income payments to Amadeus IT Group S.A.

In Revenue Memorandum Order No. (RMO) 09-07 issued on May 30, 2007, the Alphanumeric Tax Code (ATC) No. "WV050" is designated to be the code for VAT withheld on the "Lease or use of properties or property rights owned by non-residents" which would cover the royalty payments made pay AMPI to its principal Amadeus IT Group S.A.

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As a general rule, royalties are considered as passive income as they do not originate from the active pursuit of the recipient's business but merely from its assets such as software, trademarks, designs, etc. The mere acceptance of royalties for the use of a property right in the instant case is not constitutive of doing business in the Philippines as the foreign counterpart does not play an active role in the pursuit of business. Amadeus IT Group S.A. is merely a passive player earning royalties from the AMPI.

For the foregoing, I vote that the Petition for Review be GRANTED and to REMAND the case to the Court in Division for the determination of the amount to be refunded.

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice