REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

AMADEUS MARKETING PHILIPPINES,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8869

Members:

CASTAÑEDA, JR., *Chairperson,*
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:
APR 03 2018 4:26 pm

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RESOLUTION

CASANOVA, *J.*:

For resolution is petitioner's **Motion for Reconsideration (Re: Decision Promulgated November 27, 2017)**, filed on December 13, 2017, without respondent's comment as per Records Verification dated February 14, 2018.

Petitioner moves for the reconsideration of the Court's Decision dated November 27, 2017 (assailed Decision), the dispositive portion of which reads:

> "**WHEREFORE,** premises considered, the instant Petition for Review is **DENIED** for lack of merit.
>
> **SO ORDERED.**"

Petitioner argues that Section 108(B)(2) of the 1997 National Internal Revenue Code, as amended (Tax Code), 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. Petitioner contends that the requirement that the recipient of petitioner's services must not be doing business in the Philippines is absent in the said provision as well as in the case of *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*[1] which the Court cited in the assailed Decision.

Petitioner also argues that appointing a distributor domiciled in the Philippines which transacts business in the distributor's own name and account is not deemed as "doing business" in the Philippines pursuant to the Foreign Investments Act of 1991 and its Implementing Rules and Regulations (IRR).

After careful consideration, the Court finds petitioner's contentions bereft of merit.

Section 108 (B)(2) of the Tax Code provides as follows:

> "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. –*
>
> xxx xxx xxx
>
> (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 who 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

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[1] G.R. No. 153205, January 22, 2007.

the rules and regulations of the Bangko Sentral ng Pilipinas (BSP)"; *(Underscoring supplied)*

Hence, in order for a transaction to be subject to zero percent VAT rate, services other than those mentioned in Section 108(B)(1) must have been rendered to a person engaged in business conducted outside the Philippines.

Petitioner argues that the Tax Code does not add a qualification that the service recipient must solely be conducting business outside the Philippines. Otherwise worded, petitioner contends that the provision does not bar Amadeus IT Group S.A. from conducting business in the Philippines, in addition to those conducted by it outside the Philippines. Hence, it avers that the Securities and Exchange Commission (SEC) Certificate of Non-Registration of Corporation/Partnership and Certificate/Articles of Foreign Incorporation/Association/Registration of Amadeus IT Group S.A. are sufficient to prove that the latter is a non-resident foreign corporation doing business outside the Philippines.

Petitioner is mistaken.

In the Burmeister case, the Supreme Court clearly ruled that to qualify for VAT zero-rating under Section 108(B)(2), the recipient of the services must have been doing business outside the Philippines, otherwise, the transaction falls squarely under Section 102(a) governing domestic sale or exchange of services.

The Supreme Court ruled, *viz:*

"xxx. If the provider and recipient of the 'other services' are both doing business in the Philippines, the payment of foreign currency is irrelevant. Otherwise, those subject to the regular VAT under Section 102(a) can avoid paying the VAT by simply stipulating payment in foreign currency inwardly remitted by the recipient of services. <u>To interpret Section 102(b)(2) to apply to a payer-recipient of services doing business in the Philippines is to make the payment of the regular VAT under Section 102(a) dependent on the generosity of the taxpayer.</u> The provider of services can choose to pay the regular VAT or avoid it by stipulating payment in foreign currency inwardly remitted by the payer-recipient. Such interpretation removes

> Section 102(a) as a tax measure in the Tax Code, an interpretation this Court cannot sanction. A tax is a mandatory exaction, not a voluntary contribution.
>
> xxx xxx xxx
>
> Further, when the provider and recipient of services are both doing business in the Philippines, their transaction falls squarely under Section 102(a) governing domestic sale or exchange of services. <u>Indeed, this is a purely local sale or exchange of services subject to the regular VAT</u>, unless of course the transaction falls under the other provisions of Section 102(b)." *(Citations omitted and underscoring supplied)*

As succinctly pointed out by Presiding Justice Roman G. Del Rosario in his Concurring Opinion in a similar case[2], while there is nothing in Section 108 (B)(2) of the Tax Code 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, the law requires 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 the cases cited by petitioner in its motion, the Court has indeed consistently said that to be considered a non-resident foreign corporation doing business outside the Philippines, the entity must be supported **at the very least** by the Certification of Non-Registration of Corporation/Partnership duly issued by the SEC and proof of incorporation or registration in a foreign country or any other equivalent document. Evidently, the Court can require additional evidence from taxpayer-claimants to prove their claims.

It is well to remember that tax refunds are in the nature of tax exemptions and are to be construed *strictissimi juris* against the entity claiming the same.[3] The burden of proof rests upon the party claiming exemption to prove that it is, in fact, covered by the exemption so claimed.[4]

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[2] *Amadeus Marketing Philippines, Inc. vs. Commissioner of Internal Revenue*, CTA EB No. 1483 (CTA Case No. 8628), October 9, 2017.
[3] *Philippine Geothermal, Inc. vs. The Commissioner of Internal Revenue*, G.R. No. 154028, July 29, 2005.
[4] *National Power Corporation vs. Province of Isabela*, G.R. No. 165827, June 16, 2006.

As to petitioner's second argument, it claims that pursuant to Republic Act No. 7042 or the Foreign Investments Act of 1991 (FIA), Amadeus IT Group S.A. is not considered as doing business in the Philippines, as petitioner transacts business in its own name and for its own account. The term "doing business" is defined therein as:

> "d) The phrase 'doing business' shall include soliciting orders, service contracts, opening offices, whether called 'liaison' offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totaling one hundred eighty (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization: *Provided, however,* That the phrase 'doing business': shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor; nor having a nominee director or officer to represent its interests in such corporation; nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account;"

In the case of *Agilent Technologies Singapore (PTE) Ltd. vs. Integrated Silicon Technology Philippines Corp.*[5], the Supreme Court elaborated on what the term "doing business" constitutes, to wit:

> "Jurisprudence has it, however, that 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 the functions normally incident to or in progressive prosecution of the purpose and subject of its organization.'

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[5] G.R. No. 154618, April 14, 2004.

In *Mentholatum*, this Court discoursed on the two general tests to determine whether or not a foreign corporation can be considered as "doing business" in the Philippines. The first of these is the substance test, thus:

> 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.

The second test is the continuity test, expressed thus:

> 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.

Although each case must be judged in light of its attendant circumstances, jurisprudence has evolved several guiding principles for the application of these tests. For instance, considering that it transacted with its Philippine counterpart for seven years, engaging in futures contracts, this Court concluded that the foreign corporation in *Merrill Lynch Futures, Inc. v. Court of Appeals and Spouses Lara*, was doing business in the Philippines. In *Commissioner of Internal Revenue v. Japan Airlines* ('JAL'), the Court held that JAL was doing business in the Philippines, *i.e.*, its commercial dealings in the country were continuous – despite the fact that no JAL aircraft landed in the country – as it sold tickets in the Philippines through a general sales agent, and opened a promotions office here as well.

In *General Corp. of the Phils. v. Union Insurance Society of Canton and Fireman's Fund Insurance*, a foreign insurance corporation was held to be doing business in the Philippines, as it appointed a settling agent here, and issued marine insurance policies. We held that these transactions were not isolated or casual, but manifested the continuity of the foreign corporation's conduct and its intent to establish a continuous business in the country. In *Eriks PTE Ltd. v. Court of Appeals and Enriquez*, the foreign corporation sold its products to a Filipino buyer who ordered the goods 16 times within an eight-month period. Accordingly, this Court ruled that the corporation was doing business in the Philippines, as there was a clear intention on its part to continue the body of its business here, despite the relatively short span of time involved. *Communications Materials and Design, Inc. et al. v. Court of Appeals, ITEC, et al.* and *Top-Weld Manufacturing v. ECED, IRTI, et al.* both involved the License and Technical Agreement and Distributor Agreement of foreign corporations with their respective local counterparts that were the primary bases for the Court's ruling that the foreign corporations were doing business in the Philippines. In particular, the Court cited the highly restrictive nature of certain provisions involved, such that, as stated in Communication Materials, the Philippine entity is reduced to a mere extension or instrument of the foreign corporation. For example, in Communication Materials, the Court deemed the 'No Competing Product' provision of the Representative Agreement therein restrictive." *(Citations omitted and underscoring supplied)*

In this case, it bears reiterating that although the Distribution Agreement appointed petitioner as Amadeus IT Group S.A.'s sole distributor, for which petitioner is responsible in marketing the products in the Philippines, the following terms of the Amadeus Commercial Organization Agreement clearly establish that Amadeus IT Group S.A. actively participates in the operations of petitioner's business in the Philippines:

(a) 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;

(b) 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;

(c) 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;

(d) 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;

(e) 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.

Based on the provisions above, Amadeus IT Group S.A. actually pursues its business in the Philippines and petitioner merely acts as its agent. Clearly, petitioner does not do business in its own name and for its own account, contrary to its contentions.

In view of the foregoing, the Court finds no compelling reason to modify or amend the assailed Decision.

WHEREFORE, finding no cogent reason to reverse the ruling in the assailed Decision, petitioner's **Motion for Reconsideration (Re: Decision Promulgated November 27, 2017)** is **DENIED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(With due respect, I maintain my Dissenting Opinion dated Nov. 27, 2017.)
CATHERINE T. MANAHAN
Associate Justice