REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

CHINA STATE PHILIPPINES CONSTRUCTION CORPORATION (Formerly: China State (Phils.) Construction Engineering Corporation),
Respondent.

CTA *EB* NO. 1558
(CTA Case No. 8522)

Present:
DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

Promulgated:
FEB 08 2018 1:49p.m.

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DECISION

BAUTISTA, J.:

The Case

This Petition for Review[1] filed under *Section 3(b)*[2], *Rule 8 of the Revised Rules of the Court of Tax Appeals ("RRCTA")*[3] seeks the Court

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[1] *Rollo, CTA EB No. 1558, Petition for Review ("PFR")*, pp. 7-56, with annexes.

[2] SECTION 3. *Who May Appeal; Period to File Petition.* — xxx

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(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an

En Banc to recall the Decision[4] dated June 17, 2016 and the Resolution[5] dated November 16, 2016, both rendered by the Second Division of the Court of Tax Appeals ("CTA") ("Court in Division"), and to issue a new one ordering China State Philippines Construction Corporation [formerly China State (Phils.) Construction Engineering Corporation] ("CSPCC") to pay deficiency income tax ("IT"), value-added tax ("VAT"), and expanded withholding tax ("EWT") in the aggregate amount of Seven Hundred Eighty-One Million Four Hundred Ninety-Eight Thousand Five Hundred Fourteen Pesos and Fifty-Three Centavos (Php781,498,514.53) for taxable years ("TY") 2003 to 2006.[6]

The Parties[7]

Petitioner is the Commissioner of Internal Revenue ("CIR")[8], duly appointed to perform the duties of his office, including, *inter alia,* the power to decide disputed assessments, subject to the exclusive appellate jurisdiction of the CTA pursuant to *Section 4 of the 1997 National Internal Revenue Code*[9]*, as amended ("1997 NIRC").*

Respondent CSPCC is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines with Securities and Exchange Commission ("SEC") Registration No. 167002, and with business address at Unit 1202 Summit One Tower, Shaw Blvd., Mandaluyong City.

The Facts

As stated in the Decision[10] promulgated on June 17, 2016, the factual antecedents of this case are as follows:

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additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

[3] *A.M. No. 05-11-07-CTA,* November 22, 2005.

[4] *Records, CTA Case No. 8522, Vol. 5, Decision,* pp. 2390-2416; penned by Associate Justice Caesar A. Casanova, with Associate Justice Juanito C. Castañeda, Jr. concurring and Associate Justice Amelia R. Cotangco-Manalastas on leave.

[5] *Id., Resolution,* pp. 2457-2463; penned by Associate Justice Caesar A. Casanova, with Associate Justice Juanito C. Castañeda, Jr. concurring.

[6] *Rollo, PFR, Prayer,* p. 13.

[7] *Records, Vol. 5, Decision,* p. 2391.

[8] Formerly her Honorable Commissioner of Internal Revenue ("CIR") Kim S. Jacinto-Henares, now his Honorable CIR Ceasar R. Dulay.

[9] *Republic Act No. 8424,* January 1, 1998.

[10] *Records, Vol. 5, Decision,* pp. 2391-2403.

China State Construction Engineering Corporation [("CSCEC")] is a foreign state-owned corporation organized and established under the laws of the People's Republic of China.

On July 7, 1989, CSCEC was granted by the Board of Investments Certificate of Authority No. 1969, authorizing it to "establish a domestic subsidiary under the name of CHINA STATE (PHILS.) CONSTRUCTION ENGINEERING CORPORATION to engage in business as a contractor and supplier for public works projects funded or financed by the International Monetary Fund, World Bank, International Bank for Rural Reconstruction, Asian Development Bank and other international and regional lending institutions of which the People's Republic of China is a member state."

Pursuant thereto, [CSPCC] was incorporated as a domestic subsidiary of CSCEC and registered with the SEC on August 14, 1989 with total authorized capital stock [("ACS")] of Eighty Million Pesos ([Php]80,000,000.00) consisting of 800,000 common shares with par value of [Php]100.00 per share, of which 200,000 were issued and outstanding. At the time of its incorporation, CSCEC owned 199,992 shares or 99% of [CSPCC].

Thereafter, CSCEC was awarded several contracts for internationally-funded public works project by the Philippine Government. Allegedly, as a wholly-owned subsidiary of CSCEC, [CSPCC] assumed the responsibility of completing the projects awarded to CSCEC from August 14, 1989 to January 2006, since CSCEC was a non-resident foreign corporation without any branch in the Philippines.

Subsequently, the remaining [ACS] of 600,000 common shares of [CSPCC] were subscribed by Filipino stockholders, reducing CSCEC's ownership over [CSPCC] to 40% and finally to 25%.

On January 12, 2006, CSCEC was granted a license to transact business in the Philippines and to establish a branch office with SEC License To Transact Business in the Philippines under Company Reg. No. FS200521059.

[CSPCC] was only able to independently obtain and was awarded contracts under its own name beginning July 2006. Thus, allegedly, for [TY] 2006, [CSPCC] merely continued to undertake the completion of contracts awarded

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to CSCEC that it has begun to carry out in 2005 prior to the establishment of CSCEC's branch office.

On November 16, 2007, [CSPCC] received a copy of the Letter of Authority [("LOA")] No. 21730 authorizing Revenue Officers Roberto J. delos Santos, Arlene F. Grageda, and Leandro E. Gabriel under the supervision of Jose Edimar P. Jaen to investigate and ascertain the internal revenue taxes of [CSPCC] for [TY] 2006 and unverified prior years.

On May 25, 2011, [CSPCC] received an undated Preliminary Assessment Notice, assessing it [for] deficiency [IT], [VAT] and [EWT] for [TYs] 2003 to 2006.

On October 3, 2011, [CSPCC] received the Formal Letter of Demand [("FLD")] with attached Details of Discrepancies and Formal Assessment Notices [("FAN")] dated June 28, 2009 which sought to assess [CSPCC] for [TYs] 2003 to 2006 the aggregate amount of Seven Hundred Eight-One Million Four Hundred Ninety-Eight Thousand Five Hundred Fourteen and 53/100 ([Php]781,498,514.53) broken down as follows:

Taxable Year	Total Deficiency [IT]	Total Deficiency VAT	Total Deficiency EWT	Total
2003	[Php] 27,767,620.90		[Php] 14,615,022.24	[Php] 42,382,643.14
2004	45,884,171.83	[Php] 194,713,071.24	17,751,123.94	258,348,367.01
2005	39,094,785.68	173,392,313.42	16,487,224.66	228,974,323.76
2006	16,854,873.06	223,867,786.89	11,070,520.67	251,793,180.62
TOTAL	**[Php] 129,601,451.47**	**[Php] 591,973,171.55**	**[Php] 59,923,891.51**	**[Php] 781,498,514.53**

The attached Details of Discrepancies merely provided for the following:

1. Disallowed Creditable Withholding Tax [("CWT")] - All the 2% and 5% [CWTs] were disallowed for failure to support the same and for the reason that your company is not the actual income recipient of the tax certificates. The Withholding Tax Certificates were issued in favor of [CSCEC], a sister company who is the prime contractor of [the Department of Public Works and Highways].

2. [EWT] - Being under the category of "Top 10,000 Corporations", you are hereby mandated under *Revenue Regulations No. 17-[20]03* to withhold and remit taxes in income payments made to supplier of goods and services.

On November 2, 2011, [CSPCC] filed an administrative protest against the FAN by submitting to [the CIR] a Protest Letter dated November 2, 2011. Thereafter, on January 2, 2012, [CSPCC] submitted all the documents in support of its protest in a Letter dated January 2, 2012.

In view of [the CIR]'s inaction on [CSPCC]'s administrative protest, [CSPCC] filed the [] Petition for Review on July 30, 2012.

Within the extended time granted by the Court [in Division], [the CIR] filed h[is] Answer on October 4, 2012, and interposed the following special and affirmative defenses:

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The case was set for Pre-Trial Conference on October 25, 2012. Accordingly, [the CIR]'s Pre-Trial Brief was filed on October 18, 2012, while [CSPCC]'s Pre-Trial Brief was filed on October 22, 2012.

Trial ensued and, thereafter, the case was submitted for decision on July 20, 2015.

The dispositive portion[11] of the Decision reads as follows:

WHEREFORE, premises considered, the instant Petition for Review is **GRANTED**. Considering that [the CIR] had no valid authority to assess [CSPCC] for [TYs] 2003, 2004, and 2005 and h[is] right to assess [CSPCC] for [TY] 2006 has already prescribed, the assessment against [CSPCC] dated June 28, 2009 for deficiency [IT], VAT and [EWT] in the aggregate amount of Seven Hundred Eighty-One Million Four Hundred Ninety-Eight Thousand Five Hundred Fourteen and 53/100 ([Php]781,498,514.53) for [TYs] 2003 to 2006 is **CANCELLED** and deemed **WITHDRAWN.**

SO ORDERED.[12]

Not satisfied with the Decision, the CIR filed his Motion for Reconsideration (Re: Decision Promulgated 17 June 2016)[13] ("Motion for Reconsideration") on July 7, 2016, to which CSPCC filed its

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[11] *Records, Vol. 5, Decision, Dispositive Portion,* p. 2415.
[12] Emphases retained.
[13] *Records, Vol. 5, Motion for Reconsideration (Re: Decision Promulgated 17 June 2016),* pp. 2418-2426.

Comment (Re: Respondent's Motion for Reconsideration dated 7 July 2016)[14] on August 15, 2016 after being granted an extension.[15]

On November 11, 2016, the Court in Division resolved[16] the CIR's Motion for Reconsideration in the following manner:

> **WHEREFORE,** premises considered, [the CIR]'s **Motion for Reconsideration (Re: Decision Promulgated 17 June 2016)** is **DENIED** for lack of merit.
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> **SO ORDERED.**[17]

After being granted an extension,[18] the CIR raised the instant case to the Court *En Banc* when he filed a Petition for Review[19] on December 15, 2016, to which CSPCC filed its Comment (Re: Petition for Review dated 16 December 2016)[20] on February 2, 2017 *via* registered mail and received by the Court on February 15, 2017.

On February 28, 2017 the Court *En Banc* gave due course to the Petition for Review, and required the parties to submit their respective memoranda within thirty (30) days from notice.[21]

On April 6, 2017, CSPCC filed its Memorandum[22]; while the CIR failed to file his memorandum *per* Records Verification Report[23] issued by the Judicial Records Division on April 26, 2017.

On May 22, 2017, the Court *En Banc* promulgated a Resolution[24] submitting the case for decision; hence, this Decision.

The Issue[25]

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[14] *Records, Vol. 5, Comment (Re: Respondent's Motion for Reconsideration dated 7 July 2016)*, pp. 2435-2456.
[15] *Id., Order*, p. 2434.
[16] *Id., Resolution, Dispositive Portion*, p. 2463.
[17] Emphases retained.
[18] *Rollo*, pp. 1-6.
[19] *Id., PFR*, pp. 7-56, with annexes.
[20] *Id., Comment (Re: Petition for Review dated 16 December 2016)*, pp. 60-71.
[21] *Id., Resolution*, pp. 73-74.
[22] *Id., Memorandum (Re: Petition for Review dated 16 December 2016)*, pp. 75-96.
[23] *Id., Records Verification Report*, p. 97.
[24] *Rollo, Resolution*, pp. 99-100.
[25] *Id., PFR, Issue*, p. 11.

WHETHER THE COURT IN DIVISION ERRED IN GRANTING CSPCC'S PETITION FOR REVIEW, AND CANCELLING AND WITHDRAWING THE CIR'S ASSESSMENT FOR DEFICIENCY IT, VAT, AND EWT IN THE AGGREGATE AMOUNT OF SEVEN HUNDRED EIGHTY-ONE MILLION FOUR HUNDRED NINETY-EIGHT THOUSAND FIVE HUNDRED FOURTEEN PESOS AND FIFTY-THREE CENTAVOS (Php781,498,514.53) FOR TYS 2003 TO 2006.

The CIR's Arguments[26]

The CIR avers that the Court in Division erroneously brushed aside his argument in his Motion for Reconsideration that CSPCC filed a false return because it was not alleged in the pleadings nor raised during the proceedings before the Court in Division. The CIR claims that a motion for reconsideration is not an appeal; and thus, the Court in Division cannot simply disregard and not rule on the same.

The CIR alleges that CSPCC filed a false return when it used the CWT certificates of CSCEC, its parent company, as credit against its taxes due, despite knowledge that it cannot use the certificates. For knowingly filing a false return, even without intent to evade taxes, the CIR posits that the ten (10)-year period to assess under *Section 222(a)*[27] *of the 1997 NIRC* is applicable to CSPCC's case. Accordingly, the CIR claims that the assessment against CSPCC for deficiency taxes for TYs 2003 to 2006 should be upheld.

CSPCC's Counter-Arguments[28]

CSPCC posits that the present Petition for Review merely argues that the returns it filed are false; in which case, the ten (10)-

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[26] *Rollo, PFR, Argument/Discussion,* pp. 11-13.

[27] SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* -

(a) In the case of a false or fraudulent return with intent to evade tax or failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided,* That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

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[28] *Rollo, respondent's Memorandum, Discussion,* pp. 81-93.

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year prescriptive period under *Section 222(a) of the 1997 NIRC* is applicable. It does not however, according to CSPCC, question the Court in Division's finding on *(1)* the invalidity of LOA No. 21730; and *(2)* the failure of the CIR to prove that the returns filed by CSPCC for TY 2006 are fraudulent. Accordingly, CSPCC claims that these findings have already attained finality.

Anent the allegation of filing of false returns, CSPCC counters that the CIR cannot raise this new argument at this late stage in the proceedings without violating its right to due process. This argument is, according to CSPCC, in actuality a last ditch effort and mere afterthought on the part of the CIR to sway the Court *En Banc* to side in his favor. CSPCC avers that the CIR's position has always been tax fraud. The issue on false returns was raised by the CIR for the first time in his Motion for Reconsideration and after the Court in Division ruled that *Section 222(a) of the 1997 NIRC* is inapplicable because the CIR failed to substantiate his allegation that CSPCC filed fraudulent returns for TY 2006. Thus, to allow the CIR to propound a new argument or change the theory of the case would be, according to CSPCC, offensive to the basic rule of fair play and justice, and would violate its constitutional right to due process.

Even assuming that the CIR may raise the argument that it filed false returns, CSPCC asserts that the CIR, in his Petition, failed to substantiate said allegation by presenting clear and convincing evidence. CSPCC continues that the allegation of falsity, if found to be true, will only affect the assessment for deficiency IT, and not VAT and EWT since CWT certificates have no effect on his VAT or EWT liability. CSPCC adds that even if fraud was committed, or a false return was filed, it does not detract from the fact that LOA No. 21730 is void for having been issued in violation of *Section C(3)*[29] *of Revenue Memorandum Order ("RMO") No. 43-1990*[30]. Consequently, the assessment resulting therefrom is likewise void.

Finally, CSPCC stresses that the law on prescription should be liberally construed in order to protect the taxpayers, and that, as a

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[29] C. Other policies for issuance of L/As.

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> 3. A Letter of Authority should cover a taxable period not exceeding one taxable year. The practice of issuing L/As covering audit of "unverified prior years" is hereby prohibited. If the audit of a taxpayer shall include more than one taxable period, the other periods or years shall be specifically indicated in the LA.

[30] Amendment of Revenue Memorandum Order No. 37-90 Prescribing Revised Policy Guidelines for Examination of Returns and Issuances of Letters of Authority to Audit, September 20, 1990.

corollary, exceptions to the law on prescription should be strictly enforced.

The Ruling of the Court En Banc

In the Decision of the Court in Division, it found that LOA No. 21730 is not valid in so far as the assessment against CSPCC for deficiency IT, VAT, and EWT for TYs 2003, 2004 and 2005 are concerned. The Court in Division observed that LOA No. 21730 allowed the CIR to investigate and ascertain the internal revenue taxes of CSPCC "for the period from [TYs] 2006 [and] [unverified prior years]," which is a clear violation of *Section C(3) of RMO No. 43-1990* prohibiting the audit of unverified prior years.

Anent TY 2006, the Court in Division found that the CIR's right to assess CSPCC for deficiency taxes has already prescribed. The Court noted that the FLD/FAN was served to CSPCC only on October 3, 2011. Applying *Section 203*[31] *of the 1997 NIRC,* the last day for the CIR to issue an assessment against CSPCC for TY 2006 was on April 15, 2010 for IT, on July 25, 2010 at the latest for VAT, and on January 15, 2010 at the latest for EWT. The Court in Division ruled that, clearly, the CIR's right to assess CSPCC for any internal revenue taxes for TY 2006 has prescribed.

The Court in Division went on to say that *Section 222(a) of the 1997 NIRC* is not applicable to CSPCC's case for failure of the CIR to present any evidence to substantiate his claim that the returns filed by CSPCC for TY 2006 are fraudulent returns. The Court in Division ruled that the CIR failed to prove that CSPCC and CSCEC are sister companies, that CSPCC is not allowed to use the CWT certificates of CSCEC, or that the act of CSPCC in using the said CWT certificates shows an intent to evade tax. Accordingly, the three (3)-year prescriptive period under *Section 203 of the 1997 NIRC* is not extended. Thus, the assessment issued against CSPCC for TY 2006 is void for being issued beyond the said three (3)-year period.

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[31] SEC. 203. *Period of Limitation Upon Assessment and Collection.* - Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided,* That in case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

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In the assailed Resolution[32], the Court in Division reiterated that the issuance of LOA covering "unverified prior years" is a prohibited practice under *Section C(3) of RMO No. 43-1990*. The Court in Division likewise restates that for failure of the CIR to substantiate its claim that CSPCC filed fraudulent returns, the ten (10)-year prescriptive period under *Section 222(a) of the 1997 NIRC* cannot be made to apply. Accordingly, the assessments for TYs 2003 to 2006 are void. As to the averment that CSPCC filed false returns, the Court in Division ruled that the same cannot be considered without violating CSPCC's right to due process because said argument was never raised by the CIR in any of his previous pleadings and raised only for the first time in his Motion for Reconsideration.

The Court *En Banc* will now resolve the CIR's Petition for Review, and finds no merit therein.

At the outset, it must be emphasized that the lone argument raised by the CIR in his Petition for Review was raised for the first time in his Motion for Reconsideration filed before the Court in Division, which the latter denied for lack of merit. The other matters ruled upon by the Court in Division in the assailed Decision and Resolution is not being questioned in the present Petition. In any case, the Court *En Banc* will discuss the issues raised before the Court in Division, if only to reinforce the ruling made therein.

The assessment for deficiency taxes for TYs 2003, 2004, and 2005 is void for lack of a valid LOA.

In the assailed Decision and Resolution, the Court in Division ruled that LOA No. 21730 is void, in so far as it authorizes the conduct of audit investigation of CSPCC's books of accounts and accounting records for TYs 2003, 2004, and 2005 for having been issued in violation of *Section C(3) of RMO No. 43-1990*. Accordingly, the assessment for deficiency taxes in said TYs is likewise void. The Court *En Banc* agrees.

[32] *Records, Vol. 5, Resolution*, pp. 2457-2463.

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In *Commissioner of Internal Revenue v. De La Salle University, Inc.*[33] *("DLSU")*, the Supreme Court reiterated the prohibition on the practice of issuing LOAs covering audit of "unverified prior years;" and mandates to specify the TY covered by the LOA, to wit:

> The relevant provision is *Section C of RMO No. 43-90*, the pertinent portion of which reads:
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> > 3. A Letter of Authority [LOA] should cover a taxable period not exceeding one taxable year. The practice of issuing [LOAs] covering audit of unverified prior years is hereby prohibited. If the audit of a taxpayer shall include more than one taxable period, the other periods or years shall be specifically indicated in the [LOA].
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> What this provision clearly prohibits is the practice of issuing LOAs covering audit of unverified prior years. *RMO 43-90* does not say that a LOA which contains unverified prior years is void. It merely prescribes that if the audit includes more than one taxable period, the other periods or years must be specified. The provision read as a whole requires that if a taxpayer is audited for more than one taxable year, the BIR must specify each taxable year or taxable period on separate LOAs.
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> Read in this light, the requirement to specify the taxable period covered by the LOA is simply to inform the taxpayer of the extent of the audit and the scope of the revenue officer's authority. Without this rule, a revenue officer can unduly burden the taxpayer by demanding random accounting records from random unverified years, which may include documents from as far back as ten years in cases of fraud audit.
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> In the present case, the LOA issued to DLSU is for Fiscal Year Ending 2003 and Unverified Prior Years. The LOA does not strictly comply with RMO 43-90 because it includes unverified prior years. This does not mean, however, that the entire LOA is void.
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> As the CTA correctly held, the assessment for taxable year 2003 is valid because this taxable period is specified in the LOA. DLSU was fully apprised that it was being audited for taxable year 2003. [Corollary], the assessments for taxable

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[33] G.R. Nos. 196596, 198841 & 198941, November 9, 2016.

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> years 2001 and 2002 are void for having been unspecified on separate LOAs as required under *RMO No. 43-90*.[34]

In the present case, LOA No. 21730[35] authorizes the audit investigation of CSPCC's books not only of TY 2006 but of "unverified prior years," a clear violation of *Section C(3) of RMO No. 43-1990*. The pertinent portion of the LOA reads as follows:

> The bearer(s) hereof, Rev. Officers Roberto J. delos Santos, Arlene F. Grageda, and Leandro E. Gabriel under the supervision of JOSE EDIMAR P. JAEN of the National Investigation Division is/are authorized to examine your books of accounts and other accounting records for All Internal Revenue Taxes for the period from Taxable years 2006 & [unverified prior years]..."[36]

Therefore, the LOA is valid only in so far as it authorizes the examination of CSPCC's books for TY 2006 because this taxable period is specified in the LOA. With respect to TYs 2003, 2004, and 2005, since these were not stipulated on the LOA as required under *RMO No. 43-1990*, but instead referred as "unverified prior years," the LOA is void with respect to TYs 2003 to 2005. Accordingly, the assessment resulting therefrom is likewise void.

The assessment for deficiency taxes for TY 2006 is void for being issued beyond the three (3)-year prescriptive period.

While LOA No. 21730 was issued in accordance with *Section C(3) of RMO No. 43-1990* in so far as TY 2006 is concerned, the Court in Division ruled that the assessment which resulted therefrom is still void because the LOA was served to CSPCC beyond the three (3)-year period prescribed under *Section 203 of the 1997 NIRC*, which reads:

> SEC. 203. *Period of Limitation Upon Assessment and Collection.* – Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the

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[34] Underscoring ours.
[35] *Respondent's Formal Offer of Evidence ("FOE"), Exhibit "C4," Letter of Authority No. 21730.*
[36] Emphases retained.

> last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided,* That in case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.[37]

The Court *En Banc* finds no cogent reason to deviate from the findings of the Court in Division.

Records reveal CSPCC filed its pertinent tax returns for TY 2006 on the following dates:

TAX TYPE	TAXABLE PERIOD	DATE FILED
IT	TY 2006	April 13, 2007[38]
VAT	1st Quarter (Original)	April 24, 2006[39]
	1st Quarter (Amended)	July 25, 2007[40]
	2nd Quarter (Original)	July 25, 2006[41]
	2nd Quarter (Amended)	July 25, 2007[42]
	3rd Quarter	October 25, 2006[43]
	4th Quarter (Original)	January 25, 2007[44]
	4th Quarter (Amended)	March 20, 2007[45]
EWT	January 2006	February 10, 2006[46]
	February 2006	March 10, 2006[47]
	March 2006	April 10, 2006[48]
	April 2006	May 10, 2006[49]
	May 2006	June 13, 2006[50]
	June 2006	July 10, 2006[51]
	July 2006	August 10, 2006[52]
	August 2006	September 11, 2006[53]

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[37] Underscoring ours.
[38] *Respondent's FOE, Exhibit "I-2," Date of filing of 2006 Annual Income Tax Return.*
[39] *Id., Exhibit "U-2," Date of filing of 1st Quarter Value-Added Tax ("VAT") Return (Original).*
[40] *Id., Exhibit "V-2," Date of filing of 1st Quarter VAT Return (Amended).*
[41] *Id., Exhibit "W-2," Date of filing of 2nd Quarter VAT Return (Original).*
[42] *Id., Exhibit "X-2," Date of filing of 2nd Quarter VAT Return (Amended).*
[43] *Id., Exhibit "Y-2," Date of filing of 3rd Quarter VAT Return.*
[44] *Respondent's FOE, Exhibit "Z-2," Date of filing of 4th Quarter VAT Return (Original).*
[45] *Id., Exhibit "AA-2," Date of filing of 4th Quarter VAT Return (Amended).*
[46] *Id., Exhibit "OOO-2," Date of filing of January Expanded Withholding Tax ("EWT") Return.*
[47] *Id., Exhibit "PPP-2," Date of filing of February EWT Return.*
[48] *Id., Exhibit "QQQ-2," Date of filing of March EWT Return.*
[49] *Id., Exhibit "RRR-2," Date of filing of April EWT Return.*
[50] *Respondent's FOE, Exhibit "SSS-2," Date of filing of May EWT Return.*
[51] *Id., Exhibit "TTT-2," Date of filing of June EWT Return.*
[52] *Id., Exhibit "UUU-2," Date of filing of July EWT Return.*

	September 2006	October 10, 2006[54]
	October 2006	November 10, 2006[55]
	November 2006	December 11, 2006[56]
	December 2006	January 15, 2007[57]

Thus, the CIR had only until April 15, 2010 to issue an assessment for deficiency IT, until March 20, 2010 at the latest for VAT, and until January 15, 2010 at the latest for EWT. On the other hand, the FLD/FAN[58] dated June 28, 2009 was personally served to CSPCC on October 3, 2011[59]. Clearly, when the FLD/FAN was issued to CSPCC on October 3, 2011, the three (3)-year prescriptive period for all the foregoing taxes already lapsed. Consequently, the CIR's right to assess CSPCC for deficiency IT, VAT, and EWT for TY 2006 has prescribed.

The CIR insists that the ten (10)-year prescriptive period under *Section 222(a) of the 1997 NIRC* should be applied because the returns filed by CSPCC are fraudulent returns. Nevertheless, as aptly found by the Court in Division, the CIR failed to substantiate said claim by presenting clear and convincing evidence. The CIR failed to show proof that there was intent on the part of CSPCC to evade tax when it used the CWT certificates of CSCEC; or that the returns filed by CSPCC are indeed fraudulent. It must be remembered that fraud cannot be presumed nor justified by mere speculation; it must be proven by competent evidence.[60]

The CIR cannot raise, for the first time on appeal, a new argument that the returns filed by CSPCC are false returns.

The CIR now argues that the Court in Division should not have barred him from raising the matter of false returns in his Motion for Reconsideration; and that should the Court in Division allowed him to do so, then his right to assess CSPCC for deficiency taxes for TYs 2003 to 2006 have not yet prescribed.

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[53] *Respondent's FOE, Exhibit "VVV-2," Date of filing of August EWT Return.*
[54] *Id., Respondent's FOE, Exhibit "WWW-2," Date of filing of September EWT Return.*
[55] *Id., Exhibit "XXX-2," Date of filing of October EWT Return.*
[56] *Id., Exhibit "YYY-2," Date of filing of November EWT Return.*
[57] *Id., Exhibit "ZZZ-2," Date of filing of December EWT Return.*
[58] *Id., Exhibits "A," and "17," Formal Letter of Demand/Final Assessment Notices ("FLD/FAN").*
[59] *Respondent's FOE, Exhibit "A-1," Date of receipt of FLD/FAN.*
[60] *Commissioner of Internal Revenue v. Fitness by Design, Inc.*, G.R. No. 215957, November 9, 2016.

The Court *En Banc* is not persuaded.

As found by the Court in Division in the assailed Resolution, and after a careful perusal of the records, the Court *En Banc* notes that this new argument of the CIR was never presented nor discussed during the trial stage.

The practice of changing a theory of the case on appeal has consistently been rejected for being unfair and offensive to the basic rules of fair play, justice, and due process. In *Philippine Ports Authority v. City of Iloilo*[61], the High Court explained:

> As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court will not be permitted to change theory on appeal. Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. Basic considerations of due process underlie this rule. It would be unfair to the adverse party who would have no opportunity to present further evidence material to the new theory, which it could have done had it been aware of it at the time of the hearing before the trial court. To permit petitioner in this case to change its theory on appeal would thus be unfair to respondent, and offend the basic rules of fair play, justice and due process.[62]

Similarly, in *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.)*[63], the Supreme Court 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 –
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> xxx xxx xxx

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[61] G.R. No. 109791, July 14, 2003, 406 SCRA 88.
[62] Citations omitted, underscoring ours.
[63] G.R. No. 159593, October 16, 2006, 504 SCRA 484.

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."[64]

Further, *Section 5(a), Rule 6 of the RRCTA* provides as follows:

> SEC. 5. *Answer* -
>
> (a) *Time for filing and contents.* - Within fifteen days after service of summons, the respondent or the defendant shall file an answer to the petition or complaint which shall include all defenses in law and the specific provisions of law and applicable jurisprudence and grounds for dismissal of the petition or complaint, or which shall prevent and bar recovery.

In the present case, the CIR consistently claimed in his Answer[65] filed before the Court in Division that CSPCC's case involves fraud, in which case, the ten (10)-year period prescribed under *Section 222(a) of the 1997 NIRC* is applicable. It is only when the Court in Division ruled against the allegation of fraud that the CIR raised the issue on false returns.

To the mind of this Court, this shift in new theory is nothing but a mere afterthought and a last ditch effort in the hope of a favorable result, which has consistently been rejected. Needless to say, to entertain the CIR's new theory is not only unfair to CSPCC, who would have no opportunity to present evidence to refute the new theory which it could have been aware of at the time of the hearing before the Court in Division, but more so, is offensive to the rudimentary rules of fair play, justice and due process. Besides, if the CIR sincerely believes that the returns filed by CSPCC are false returns, he could have raised the same at the earliest opportunity

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[64] Underscoring ours.
[65] *Records, Vol. 1, Answer, pars. 9 and 10,* p. 128.

when he filed his Answer before the Court in Division. The CIR did not do so.

It cannot be emphasized enough that 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.[66] Moreover, it has been a long standing rule that a party cannot change his theory of the case on appeal.[67]

Accordingly, the Court *En Banc* holds that the Court in Division committed no error in not applying the ten (10)-year prescriptive period under *Section 222(a) of the 1997 NIRC* on the ground that the returns filed by CSPCC are false returns.

All told, the Court *En Banc* holds that the cancellation of the assessment against CSPCC for deficiency taxes for TYs 2003, 2004, 2005, and 2006 is therefore warranted.

WHEREFORE, on the basis of the foregoing considerations, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the Decision dated July 17, 2016, and the Resolution dated November 11, 2016, both promulgated by the Second Division of the Court of Tax Appeals, are hereby **AFFIRMED**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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[66] *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.),* G.R. No. 159593, October 16, 2006, 504 SCRA 484.
[67] *Id.*

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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