REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA *EB* NO. 2209** (CTA Case No. 9219)
	Present:
-versus-	**DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA,** *and* **MODESTO-SAN PEDRO,** *JJ.*
PHILIPPINE COMMUNICATIONS SATELLITE CORPORATION, *Respondent.*	Promulgated: JUL 1 9 2021 1:30pm

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DECISION

MANAHAN, J.:

Before the Court *En Banc* is a Petition for Review[1] assailing the Decision dated September 11, 2019 and Resolution dated December 6, 2019, both of the CTA 2nd Division, which cancelled the deficiency value-added tax (VAT) assessment against Philippine Communications Satellite Corporation (PCSC) for taxable year 2007 in the amount of ₱7,336,587.85 due to prescription.

FACTS

The CTA 2nd Division narrated the facts, as follows:

> Petitioner Philippine Communications Satellite Corporation [now, respondent] is a wholly-owned subsidiary of Philippine Overseas Telecommunications Corporation (POTC) and is an enfranchised and licensed Philippine Public Telecommunications Entity (PTE). It holds office at the 12th

[1] *Rollo*, pp. 6-18.

Floor, Telecoms Plaza Building, 316 Sen. Gil Puyat Avenue, Makati City.

Petitioner is also a VAT-registered taxpayer of the Bureau of Internal Revenue (BIR) with Certificate of Registration No. 9RC0000439597 dated January 19, 1996 with Tax Identification No. 000-165-660.

On the other hand, respondent Commissioner of Internal Revenue (CIR) [now, petitioner] is vested by law with the authority to assess and collect all national internal revenue taxes, fees, and charges. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

For years, petitioner used to maintain a Transport Maintenance Center (hereinafter "TMC property") located at Mariveles Street, Mandaluyong City which served as a garage and repair shop for petitioner's company vehicles.

On June 29, 2007, petitioner sold the TMC property to Fortune Enrichment Resources Holdings and Development Corporation.

On July 2, 2007, the One-Time Tax (ONETT) Team of BIR Revenue Region No. 7, Revenue District Office (RDO) No. 41-Mandaluyong City issued an [ONETT] Computation Sheet for sale of real property considered as ordinary asset, stating the amounts of taxes due on the sale of the TMC property, *viz.*:

i. Expanded Withholding Tax (EWT) – ₱1,556,180.00; and,
ii. Documentary Stamp Tax (DST) – ₱391,545.00.

Later that day, petitioner paid the above EWT in the amount of ₱1,556,180.00 and DST in the amount of ₱391,545.00. Thus, a Certificate Authorizing Registration of even date was issued by BIR RDO No. 41-Mandaluyong City authorizing the registration of the transfer of the TMC property.

Subsequently, a Tax Clearance Certificate dated July 3, 2007 was issued by BIR RDO No. 41-Mandaluyong City, confirming that all internal revenue taxes due for the purpose of transferring the registration of the TMC property have already been settled.

On August 8, 2008, a Letter of Authority (LOA) No. 0028530 was issued to petitioner by OIC-Regional Director

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Ma. Nieva A. Guerrero of RDO No. 49 – Makati City, authorizing Revenue Officers (RO) Alyasah Andig and Maglangit Decampong to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for calendar year 2007.

On December 28, 2010, petitioner received a Preliminary Assessment Notice (PAN) dated December 21, 2010 from respondent, informing petitioner of deficiency VAT assessment for calendar year 2007 in the amount of ₱6,552,210.57 arising from the following:

i. Imposition of VAT on petitioner's sale of the TMC property on June 29, 2007, which the BIR treated as a sale of an ordinary asset subject to VAT under Section 106 of the National Internal Revenue Code of 1997, as amended, and as implemented by Sec. 4.109-1(B)(1)(p) of Revenue Regulations (RR) No. 16-2005, as amended by RR No. 4-2007; and,

ii. Disallowance of excess input tax in the amount of ₱4,266,784.69 that was carried over to the succeeding taxable periods.

Then, on January 10, 2011, petitioner signed a Waiver of the Defense of Prescription Under the Statute of Limitations of the National Internal Revenue Code in favor of respondent with respect to their investigation of petitioner's deficiency VAT liability until and not later than June 30, 2011.

On January 12, 2011, petitioner filed its letter-reply to the PAN, wherein it prayed for the cancellation of the proposed deficiency VAT assessment for calendar year 2007.

Thereafter, on July 1, 2011, petitioner received a Formal Assessment Notice (FAN) with Assessment Notice No. VT-LA28530-07-11-0594 dated June 29, 2011, demanding payment of deficiency VAT in the amount of ₱6,907,497.44.

On July 29, 2011, petitioner filed its letter protest against the FAN, wherein it prayed for the cancellation of the proposed deficiency VAT assessment.

Thus, on March 2, 2012, petitioner received respondent's Final Decision on Disputed Assessment (FDDA) dated March 1, 2012, denying the letter protest dated July 29, 2011 and ordering petitioner to pay the deficiency VAT assessment in the total amount of ₱7,336,587.85, computed as follows:

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In the FDDA dated March 1, 2012, respondent alleged that petitioner sold the TMC property as an ordinary asset without subjecting the same to VAT.

As such, on March 30, 2012, petitioner filed letter re: Administrative Appeal/Motion for Reconsideration of the FDDA dated March 27, 2012, in accordance with Section 3.1.5 of RR No. 12-99, wherein it prayed for the reversal of the FDDA and cancellation of the deficiency VAT assessment for calendar year 2007.

On November 11, 2015, petitioner received respondent's Decision dated October 15, 2015, denying petitioner's administrative appeal and ordering the latter to pay its deficiency VAT assessment.[2]

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On December 11, 2015, PCSC filed a Petition for Review with the Court of Tax Appeals (CTA). After trial, the CTA Division rendered the assailed Decision dated September 11, 2019, the dispositive portion of which states:

> **WHEREFORE**, premises considered, the instant Petition for Review is hereby **GRANTED**. Consequently, respondent's deficiency value-added tax (VAT) assessment in the amount of ₱7,336,587.85, inclusive of surcharge and interest, for calendar year 2007 is **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED**.[3]

The CIR's Motion for Reconsideration was likewise denied in the CTA Division's Resolution dated December 6, 2019.[4]

On January 20, 2020, the Court received the CIR's Petition for Review, filed via registered mail on January 14, 2020. The CIR prays that the Decision and Resolution, dated September 11, 2019 and December 6, 2019, respectively, be reversed and set aside, and that PCSC be held liable for deficiency taxes as found in the FDDA dated March 27, 2012.

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[2] *Rollo*, Decision dated September 11, 2019, pp. 21-24.
[3] *Rollo*, Decision dated September 11, 2019, p. 34.
[4] *Rollo*, pp. 38-42.

On March 9, 2020, within the extended period granted,[5] PCSC filed its *Comment (Re: Petitioner's Petition for Review)*[6] stating at the outset that petitioner's arguments are mere reiterations.

After referral to mediation, the case was returned to the Court due to the parties' refusal to mediate.[7]

On September 22, 2020, the case was deemed submitted for decision.[8]

ISSUES

Petitioner submits the following issues:

I. Whether or not the Court of Tax Appeals (CTA) Second Division erred in granting the respondent's Petition for Review by cancelling and setting aside [the] deficiency VAT assessment in the amount of ₱7,336,587.85?

II. Whether or not the CTA Second Division erred in holding that petitioner's right to assess VAT deficiency has prescribed?

III. Whether or not the CTA Second Division erred in holding that petitioner changed its defense when he filed his Motion for Reconsideration on the Decision promulgated on December 6, 2019?

IV. Whether or not the sale of property is subject to VAT and must be assessed for deficiency VAT?

CIR's arguments

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[5] *Rollo*, respondent's *Motion for Extension of Time to File Comment*, pp. 50-52, in relation to Minute Resolution dated March 2, 2020, p. 53.
[6] *Rollo*, pp. 54-70.
[7] *Rollo*, Resolution dated July 16, 2020, pp. 73-74; parties' No Agreement to Mediate, September 8, 2020, p. 75.
[8] *Rollo*, pp. 77-78.

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The CIR argues that Section 222(A) of the 1997 National Internal Revenue Code, as amended (NIRC) applies, considering that the assessment involves falsity and non-filing of VAT returns. Petitioner failed to declare the subject sale of property as a VATable transaction which was discovered only upon actual audit. The CIR further argues that the falsity was discovered on December 21, 2010 by the issuance of the Preliminary Assessment Notice (PAN), from which the ten (10)-year prescriptive period starts to run. Thus, the Formal Assessment Notice (FAN) dated June 29, 2011 was well within the ten (10)-year prescriptive period.

The CIR also states that he did not change his defense in the motion for reconsideration filed before the Court in Division. He states that his argument underscored that besides committing non-filing of VAT return for the sale of property in issue, respondent had also committed falsity for failing to file the correct VAT returns.

Finally, the CIR reiterates that the sale of property is subject to VAT and must be assessed for deficiency VAT. He states that respondent erred in considering the subject property as a capital asset, and failed to show proof that the same had not been used in business for more than two (2) years prior to the consummation of the sale. Since respondent was still in operation on taxable years 2008 and 2007, the subject properties were still being used in business. The CIR also refers to Exhibit "P-4" (ONETT Computation Sheet, Expanded Withholding Tax (EWT) and Documentary Stamp Tax (DST), Sale of Real Property Considered as Ordinary Asset) as evidence showing that the subject property was considered an ordinary asset.

PCSC's arguments

Respondent PCSC manifests at the outset that the CIR's arguments are mere reiterations of the grounds previously raised, which have been considered and dismissed by the Court in Division.

Respondent states that there is no basis to apply the 10-year prescriptive period since there was no intent to mislead or deceive, or no intent to evade tax, citing *Commissioner of*

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Internal Revenue v. Philippine Daily Inquirer. [9] Respondent states that it did not intend to evade tax as shown by its submission of all sales documents to the ONETT Team of BIR Revenue Region (RR) No. 7, Revenue District Office (RDO) No. 41 – Mandaluyong City, for the computation of all internal revenue taxes due. Respondent also acted in good faith when it relied on the Tax Clearance Certificate issued by respondent, thus, believing that it had paid all the taxes due on the sale of the subject TMC property.

Respondent further questions the CIR's requirement for a waiver, if he had truly believed that the 10-year prescriptive period applied.

Respondent also states that the CIR should not be allowed to change his theory on appeal. In his Answer, the CIR cited the basis for the 10-year prescriptive as "failure to file return", but on motion for reconsideration, the CIR was citing "filing a false return".

Finally, respondent states that the sale of the TMC property is not subject to VAT because it was no longer an ordinary asset at the time of sale; that due to respondent's serious business losses, it downsized its operations in 2003; with the TMC property becoming abandoned and idle. The TMC property was likewise classified as investment property as of December 31, 2004 in its financial statements and accounting books.

RULING OF THE COURT

After careful review of the parties' arguments, evidence, and the conclusions of the Court in Division, this Court finds no reason to reverse the assailed Decision and Resolution, dated September 11, 2019 and December 6, 2019, respectively, issued by the Court in Division.

It must be recalled that the primary argument raised by respondent PCSC, then petitioner in CTA Case No. 9219, is that the assessment made by the CIR for taxable year 2007 has prescribed.

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[9] G.R. No. 213943, March 22, 2017.

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The Court in Division ruled in favor of respondent PCSC, finding that the assessment for deficiency VAT for taxable year 2007 had already prescribed considering that the assessment was received beyond the three (3)-year prescriptive period; that the Waiver of the Defense of Prescription Under the Statute of Limitations of the NIRC (Waiver) extended only the right to assess for the fourth quarter of taxable year 2007, considering that the Waiver was executed after the right to assess for the 1st to 3rd quarters has already prescribed; and, that there was no failure or omission to file a return which would warrant the application of the ten (10)-year prescriptive period.

We affirm. The sale transaction is covered by a Deed of Absolute Sale[10] dated June 29, 2007. Thus, the transaction occurred within the 2nd quarter of taxable year 2007, which closed on June 30, 2007. The applicable VAT return should have been filed, at the latest on July 25, 2007, pursuant to Section 114(A)[11] of the NIRC.

In the instant case, respondent PCSC filed its VAT return for the 2nd quarter of 2007 on July 24, 2007, which is earlier than the last day to file a return on July 25, 2007. Counting three (3) years[12] from July 25, 2007, petitioner CIR had until July 25, 2010 within which to assess deficiency VAT for the 2nd quarter of taxable year 2007. Unfortunately, the subject assessment was received only on July 1, 2011, clearly beyond the 3-year prescriptive period under Section 203 of the NIRC.

As to the application of the 10-year prescriptive period under Section 222 of the NIRC, what is clear from the CIR's Answer in CTA Case No. 9219 is that the basis for his application of the 10-year prescriptive period is the "failure to file a return." Subsequently, in his Motion for Reconsideration and the instant Petition for Review, the CIR asserts that the 10-year prescriptive period applies due to the falsity of the

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[10] Docket, CTA Case No. 9219, Vol. II, Exhibit "P-3", pp. 911-913.

[11] SEC. 114. *Return and Payment of Value-Added Tax.* –

(A) *In General.* – Every person liable to pay the value-added tax imposed under this Title shall file a quarterly return of the amount of his gross sales or receipts within twenty-five (25) days following the close of each taxable quarter prescribed for each taxpayer: xxx

[12] 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, xxx

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return filed, such alleged falsity arising when PCSC did not declare the sale of the TMC Property as a VATable transaction. This falsity was allegedly discovered only upon actual audit by RDO No. 49-Makati.

The Court in Division correctly held that the CIR changed his defense theory by alleging that the basis of the 10-year prescriptive period is PCSC's falsity in the declaration of its VAT return, as opposed to his previous defense that there was failure to file a return.

It is settled jurisprudence that an issue which was neither averred in the complaint nor raised during the trial in the court below cannot be raised for the first time on appeal as it would be offensive to the basic rules of fair play, justice, and due process.[13] Nevertheless, such rule admits of an exception. When the factual bases thereof would not require presentation of any further evidence by the adverse party in order to enable it to properly meet the issue raised in the new theory, the Court may give due course.[14]

However, this case does not fall under the exception. There is no doubt that "failure to file a return" provides an entirely different factual basis from a "false return".

> ... separation of the three different situations of false return, fraudulent return with intent to evade tax, and failure to file a return is strengthened immeasurably by the last portion of the provision which segregates the situations into three difference classes, namely "falsity", "fraud", and "omission."[15]

Thus, we cannot give credence to the CIR's explanation that he is merely underscoring the point that besides the non-filing of VAT return for the sale of the TMC property, PCSC also committed falsity by failing to file the correct VAT returns. Clearly, there cannot be a "failure to file a return" if there is a "false return" or *vice versa,* as the very nature of failure to file a return, resulting in the absence of a return, is diametrically opposed to a "false return" which necessarily implies the existence of a filed return, albeit false.

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[13] *Bote v. Spouses Veloso*, G.R. No. 194270, December 3, 2012, citing *Union Bank of the Philippines v. Court of Appeals*, G.R. No. 134068, June 25, 2001.
[14] *Id.* citing *Canlas v. Tubil*, G.R. No. 184285, September 25, 2009.
[15] *Aznar v. Court of Tax Appeals*, G.R. No. L-20569, August 23, 1974.

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The Court must then consider only the CIR's allegation of "failure to file a return" and not the "filing of a false return" in the application of the 10-year prescriptive period to the case at hand.

The CIR's defense that the 10-year prescriptive period applies due to PCSC's failure to file a return is therefore baseless, as shown by the various returns filed by respondent PCSC for the various filing periods of taxable year 2007.[16] Thus, the 10-year prescriptive period does not apply.

Finally, as to the assertion that the Waiver[17] executed by the parties on January 10, 2011, extended the period to assess for deficiency taxes until June 30, 2011, the same is devoid of factual and legal bases. As pointed out by the Court in Division, the transaction occurred within the second quarter of taxable year 2007. Respondent's VAT return for the second quarter was filed on July 24, 2007. Petitioner had until July 25, 2010 within which to assess respondent for deficiency VAT arising from the transaction. When the Waiver was executed on January 10, 2011, petitioner's right to assess respondent for deficiency VAT for the second quarter of 2007 has already prescribed.

Moreover, the validity period of the Waiver is only until June 30, 2011. Prescription had already set in at the time the FAN/FLD were received on July 1, 2011. Thus, even if the Waiver was valid, the assessment is nonetheless void because it was served beyond the supposedly extended period.[18]

WHEREFORE, the Petition for Review is **DENIED** for lack of merit. The Decision and Resolution of the Court's Second Division, dated September 11, 2019 and December 6, 2019, respectively, are **AFFIRMED**.

SO ORDERED.

Catherine T. Manahan

CATHERINE T. MANAHAN
Associate Justice

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[16] *Rollo*, Division Decision dated September 11, 2019, pp. 33-34.
[17] Docket, Vol. II, Exhibit "P-9", pp. 928-929.
[18] *Commissioner of Internal Revenue v. Transitions Optical Philippines, Inc.*, G.R. No. 227544, November 22, 2017.

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

ERLINDA P. UY
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
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