REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1806** (CTA Case No. 8678)
- versus -	Present: **DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
SABRE TRAVEL NETWORK (Philippines), (formerly) ABACUS DISTRIBUTIONS SYSTEMS PHILIPPINE INC., Respondent.	Promulgated: APR 08 2019 3:32 p.m.

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DECISION

RINGPIS-LIBAN, *J.*:

The Case

Before the Court is a Petition for Review seeking the nullification of the Decision[1] dated July 19, 2017 ("Assailed Decision") and Amended Decision[2] dated February 15, 2018 of the Court of Tax Appeals Second Division ("Second Division"), partially upholding the assessment the Commissioner of Internal Revenue ("CIR") issued against Sabre Travel Network (Philippines) ("STN Philippines") for deficiency taxes for taxable year 2009 amounting to Php19,723,347.92 basic tax, plus deficiency and delinquency interests.

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[1] Penned by Associate Justice Juanito C. Castañeda, Jr., with Associate Justices Caesar A. Casanova and Catherine T. Manahan concurring; Docket, pp. 1478-1549.

[2] Penned by Associate Justice Juanito C. Castañeda, Jr., with Associate Justices Caesar A. Casanova and Catherine T. Manahan concurring; *Id.*, pp. 1757-1775.

The Facts

The facts as found by the Second Division are as follows:

"Petitioner is a corporation duly organized and existing under and by virtue of Philippine laws, with principal office address at 3F Trafalgar Plaza Building, H.V. Dela Costa Street, Salcedo Village, Makati City 1227. It is duly registered with the Bureau of Internal Revenue (BIR) under Revenue District No. 50 with Tax Identification Number 000103491000.

Respondent is the duly appointed Commissioner of Internal Revenue who holds office at the BIR National Office Building located at Diliman, Quezon City.

On May 31, 2010, petitioner received a Letter of Authority (LOA) dated May 14, 2010 from the BIR authorizing the examination of its books of accounts and other financial records for the year ending December 31, 2009. On March 9, 2012, CIR received a Notice of Informal Conference dated February 21, 2012 with attached Summary Findings from the Large Taxpayers Service of the BIR.

On March 27, 2012, petitioner through its president, Demetrio C. Silverio, executed a Waiver of the Defense of Prescription under the Statute of Limitations of the National Internal Revenue Code (NIRC) and agreed to extend the period to conduct audit/investigation until December 31, 2012.

On September 20, 2012, petitioner received a Preliminary Assessment Notice (PAN) dated July 31, 2012, for deficiency Income Tax, VAT, EWT, WTC, FWT, FWT-VAT and DST for the year ending December 31, 2009. petitioner protested the PAN in a letter dated October 3, 2012, which was received by the BIR on October 4, 2012.

On November 29, 2012, petitioner received the Formal Letter of Demand (FLD) with Details of Discrepancies and Final Assessment Notice (FAN) Nos. LTEAD II-IT-09-0003, LTEAD II-VT-09-0002, LTEAD II-WG-09-0004, LTEAD II-WC-09-

0004, LTEAD II-WE-09-0004, LTEAD II-WF-09-0001 and LTEAD II-DS-09-0001 dated November 12, 2012.

On December 20, 2012, petitioner filed a protest against the FAN through a letter dated December 19, 2012.

On June 27, 2013, petitioner received the Final Decision on Disputed Assessment (FDDA) dated May 2, 2013 which denied its protest for lack of factual and legal basis. On July 26, 2013, petitioner filed a Petition for Review with the Court of Tax Appeals under Section 228 of the NIRC of 1997 to appeal the FDDA."[3]

The Ruling of the Second Division

On July 19, 2017, the Second Division promulgated the Assailed Decision partially granting the Petition for Review, the dispositive portion of which reads:

"**WHEREFORE**, the assessment issued by respondent against petitioner for taxable year 2009 covering deficiency WTC in the amount of [Php]162,153.34 is **CANCELLED AND WITHDRAWN**. However, the assessments for deficiency EWT, FWVAT, FWT, income tax, VAT and DST are **PARTIALLY UPHELD**. Accordingly, petitioner is ordered to pay respondent the amount of **THIRTY-ONE MILLION FOUR HUNDRED SIXTY THOUSAND FIVE HUNDRED NINETY-SEVEN PESOS AND 17/100 ([Php]31,460,597.17)** representing basic deficiency EWT, FWVAT, FWT, Income Tax, VAT and DST and the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, computed as follows:

Tax Type	Basic Deficiency	25% Surcharge	Total
EWT	[Php]250,073.83	[Php]62,518.46	[Php]312,592.29
FWVAT	2,485,313.15	621,328.29	3,106,641.43
FWT	6,213,282.86	1,553,320.72	7,766,603.58
INCOME TAX	6,829,783.49	1,707,445.87	8,537,229.36
VAT	9,389,799.41	2,347,449.85	11,737,249.26
DST	225.00	56.25	281.25
Total	**[Php]25,168,477.73**	**[Php]6,292,119.43**	**[Php]31,460,597.17**

In addition, petitioner is liable to pay:

(a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency EWT, FWVAT, FWT,

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3 *Id.*, pp. 1479-1480.

Income Tax, VAT and DST computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended:

Tax Type	Basic Tax Due	20% Deficiency Interest Computed from:
EWT	[Php]250,073.83	15-Jan-10
FWVAT	2,485,313.15	10-Jan-10
FWT	6,213,282.86	15-Jan-10
INCOME TAX	6,829,783.49	15-Apr-10
VAT	9,389,799.41	25-Jan-10
DST	225.00	5-Jan-10
Total	**[Php]25,168,477.73**	

(b) Delinquency interest at the rate of twenty percent (20%) per annum on the total amount of **[Php]31,460,597.17** and on the deficiency interest which have accrued as afore-stated in (a) computed from June 27, 2013 until full payment thereof pursuant to Section 249 (C) of the NIRC of 1997, as amended.

SO ORDERED."[4]

Aggrieved, both CIR and STN Philippines filed their motions for partial reconsideration on August 04, 2017[5]. On February 15, 2018, the Second Division issued an Amended Decision denying CIR's "Motion for Partial Reconsideration Re: Decision promulgated on July 19, 2017" but partially granting STN Philippines' "Motion for Partial Reconsideration of Decision and/or to Reopen the Case for Presentation of Evidence", thus:

"**WHEREFORE**, the assessment issued by respondent against petitioner for taxable year 2009 covering deficiency VAT and WTC in the amounts of [Php]34,050,266.06 and [Php]162,153.34, respectively, are **CANCELLED AND WITHDRAWN**. However, the assessments for deficiency EWT, FWVAT, FWT, income tax, and DST are **PARTIALLY UPHELD**. Accordingly, petitioner is ordered to pay respondent the amount of **NINETEEN MILLION SEVEN HUNDRED TWENTY-THREE THOUSAND THREE HUNDRED FOURTY-SEVEN PESOS AND 92/100 ([Php]19,723,347.92)** representing basic deficiency EWT, FWVAT, FWT, Income Tax, and DST and the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, computed as follows:

[4] *Id.*, pp. 1547-1548.
[5] *Id.*, pp. 1552-1585 and 1708-1717.

Tax Type	Basic Deficiency	25% Surcharge	Total
EWT	[Php]250,073.83	[Php]62,518.46	[Php]312,592.29
FWVAT	2,485,313.15	621,328.29	3,106,641.43
FWT	6,213,282.86	1,553,320.72	7,766,603.58
INCOME TAX	6,829,783.49	1,707,445.87	8,537,229.36
DST	225.00	56.25	281.25
Total	**[Php]15,778,678.33**	**[Php]3,944,669.59**	**[Php]19,723,347.92**

In addition, petitioner is liable to pay:

(c) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency EWT, FWVAT, FWT, Income Tax, and DST computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended:

Tax Type	Basic Tax Due	20% Deficiency Interest Computed from:
EWT	[Php]250,073.83	15-Jan-10
FWVAT	2,485,313.15	10-Jan-10
FWT	6,213,282.86	15-Jan-10
INCOME TAX	6,829,783.49	15-Apr-10
DST	225.00	5-Jan-10
Total	**[Php]15,778,678.33**	

(d) Delinquency interest at the rate of twenty percent (20%) per annum on the total amount of **[Php]19,723,347.92** and on the deficiency interest which have accrued as afore-stated in (a) computed from June 27, 2013 until full payment thereof pursuant to Section 249 (C) of the NIRC of 1997, as amended.

SO ORDERED."[6]

On March 07, 2018, CIR filed a "Motion for Extension of Time to File Petition for Review (Ad Cautelam)"[7], which the Court granted in a Minute Resolution dated March 12, 2018.[8]

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6 *Id.*, pp. 1773-1774.

7 Rollo, pp. 1-5. Record shows that Petitioner received the Amended Decision on February 20, 2018; Docket, p. 1756.

8 *Id.*, p. P-1.

On March 22, 2018, CIR filed the present "Petition for Review"[9] *via* registered mail.

On April 19, 2018, the Court issued a Resolution[10] which ordered STN Philippines to comment on the Petition for Review. Consequently, on May 17, 2018, STN Philippines filed its "Comment/Opposition (To CIR's Petition for Review dated 22 March 2018)"[11].

On June 28, 2018, the Court issued a Resolution[12] which gave due course to the Petition for Review, and submitted the instant case for decision.

The Issues

CIR raises the following grounds in support of its petition:

1) The Second Division erred in holding that STN Philippines' "Other rent" and "Storage Rental" were properly subjected to Expanded Withholding Tax ("EWT");

2) The Second Division erred in cancelling the deficiency assessment for Withholding Tax on Compensation ("WTC");

3) The findings of the Second Division that the remittances received by STN Philippines from Abacus International Pte. Ltd. (AIPL) represent not only booking commissions but also other items, namely promotional and advertising expenses or NMC expenses, fares guarantee and incentives which are not income payments subject to income tax was not supported by any document; and

4) Contrary to the findings of the Second Division, the unaccounted remittances in the amount of Php50,538,076.40, unaccounted source of funds in the amount of Php16,764,878.70 and the unearned income in the amount of Php139,928.50 must be subjected to Value-Added tax ("VAT").[13]

CIR argues that based on audit procedures – the reconciliation of deductions claimed subject to withholding tax against the income payments/total per alphalist, there is resulting deficiency EWT and WTC.

9 *Id.*, pp. 8-18.
10 *Id.*, pp. 117-118.
11 *Id.*, pp. 119-148.
12 *Id.*, pp. 152-153.
13 *Id.*, pp. 11-12.

As for the assessment for deficiency income tax and VAT, CIR claims that the findings of the Independent Certified Public Accountant (ICPA) were merely based on its opinion not supported by concrete evidence. CIR believes that money and other assets in excess of the taxpayer's liabilities (after proper adjustment of non-deductible items) not accounted for in the income tax returns, leads to the inference that part of the taxpayer's income had not been reported. Thus, the unreported income had not been subjected to income tax as well as VAT.

Lastly, CIR maintains that in absence of proof of any irregularities in the performance of duties, all presumptions are in favor of the correctness of tax assessments.

On the other hand, STN Philippines mainly counters that the instant Petition for Review fails to raise any new legal or factual issues to justify or warrant the reversal of the Amended Decision. STN Philippines submits that CIR's arguments are entirely hinged on the flawed presumption that mere findings of discrepancies should automatically translate to taxable income and/or gross receipts.

Additionally, STN Philippines argues that the Court *En Banc* has no jurisdiction over the Petition for Review, for the same was filed without first waiting for a resolution or decision from the Second Division on the motion for partial reconsideration filed by both parties against the Amended Decision.

The Ruling of the Court

The petition will not prosper.

A careful and closer look at the arguments set forth by STN Philippines in its "Comment/Opposition (To CIR's Petition for Review dated 22 March 2018)" readily reveals that the instant Petition for Review was prematurely filed before the Court *En Banc*.

After careful consideration of the entire records of CTA Case No. 8678, it appears that the case is still pending before the Second Division when the **"Petition for Review" was filed on March 22, 2018**. Clearly therefore, said proceedings have not been terminated as the Court *a quo* still continues to hear the case after the issuance of the Amended Decision. Upon verification, these are the subsequent judicial actions and legal incidents, and other succeeding resolutions issued by the Court in Division after the issuance of the Amended Decision on February 15, 2018, to wit:

Action	Date	Nature	Page Number of Division Docket
Motion for Partial Reconsideration and or to Reopen the Case for Presentation of Evidence (Re: Amended Decision Promulgated on 15 February 2018)	March 07, 2018	Filed by STN Philippines	1776-1802
Motion for Partial Reconsideration Re: Amended Decision dated February 15, 2018	March 07, 2018	Filed by CIR	1803-1809
Resolution	March 13, 2018	The parties were given a period of ten (10) days from notice to file their respective comments to their motions for partial reconsiderations; after which, both motions shall be deemed submitted for resolution.	1811
Comment/Opposition (to CIR's Motion for Partial Reconsideration dated 7 March 2018 Re: Amended Decision dated 15 February 2018)	April 02, 2018	Filed by STN Philippines	1812-1823
Urgent Manifestation	April 13, 2018	Filed by STN Philippines	1825-1834
Resolution	April 24, 2018	CIR was directed to file his comment to the Urgent Manifestation within ten (10) days from notice.	1898-1899
Resolution	June 07, 2018	In view of CIR's failure to file his Comment to the Urgent Manifestation within the period set forth, the parties' respective	1902

Action	Date	Nature	Page Number of Division Docket
		motions for partial reconsideration are deemed submitted for resolution.	
Resolution	August 31, 2018	The parties' motions for partial reconsideration were denied for lack of merit.	1904-1916

From the foregoing proceedings, it is readily apparent that CTA Case No. 8678 was still ongoing as CIR have just filed his motion for partial reconsideration to the Amended Decision on March 07, 2018 before the Court *a quo*, when he filed the instant Petition for Review with the Court *En Banc*. Indubitably therefore, the Amended Decision does not finally dispose of the case yet since CIR's motion for partial reconsideration is still to be resolved by the Court in Division. The filing of the present case was premature.

A cursory reading of the instant Petition for Review shows that CIR elevated his case to the Court *En Banc* pursuant to Section 3, paragraph (b), Rule 8 of the Revised Rules of Court of Tax Appeals ("RRCTA") and assailed the Decision dated July 19, 2017 and Amended Decision dated February 15, 2018 of the Court in Division. Section 3(b) of Rule 8 of the RRCTA provides:

> "SEC. 3. *Who may appeal; period to file petition.* —
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> xxx xxx xxx
>
> (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 additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review. (*Rules of Court, Rule 42, sec. 1a*)"

Based on the above-quoted provisions, an appeal from the decision or resolution of the Court in Division on a motion for reconsideration or new trial, falls under the exclusive appellate jurisdiction of the Court *En Banc* pursuant to Section 11[14] of Republic Act ("RA") No. 1125[15], as amended by RA No. 9282[16], in relation to Section 3(b) of Rule 8 of the RRCTA.

It must be noted however that the decision or order which is appealable to the Court *En Banc* is that which has resolved the case with finality, and which, in effect, terminates or finally disposes of a case, as it leaves nothing to be done by the court as the case has finally been decided on the merits.

Considering that CIR's "Motion for Partial Reconsideration Re: Amended Decision dated February 15, 2018" was still pending resolution with the Second Division when CIR filed the instant Petition for Review, there still leaves something to be done by the Court *a quo* and the Amended Decision may not be subject of review under the afore-quoted RRCTA. The Amended Decision had not yet attained finality in view of the filed motion for reconsideration by CIR within the 15-day reglementary period allowed under the RRCTA, to wit:

> **"RULE 15**
> **MOTION FOR RECONSIDERATION OR NEW TRIAL**
>
> SECTION 1. *Who may and when to file motion.* – Any aggrieved party may seek a reconsideration or new trial of any decision, resolution or order of the Court. He shall file a motion for reconsideration or new trial within fifteen days from the date he received notice of the decision, resolution or order of the Court in question. (*RCTA, Rule 13, sec. 1a*)"

Note that under the RRCTA, the effect of the filing of a motion for reconsideration is to suspend the running of the period for the filing of an appeal. In other words, the motion must be resolved first, before an appeal is to be made:

> "SEC. 4. *Effect of filing the motion.* – **The filing of a motion for reconsideration** or new trial **shall <u>suspend the running of the period within which an appeal may be perfected</u>**. (*RCTA, Rule 13, sec. 4a*)"[17]

The proper procedure that CIR should have taken in this case was to wait for the final termination of the proceedings before the Court in Division, prior to the filing of the instant Petition for Review, *i.e.* issuance of a resolution on the motion for partial reconsideration. This rule is founded on considerations of orderly procedure, to forestall useless appeals and avoid undue inconvenience to

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[14] SEC. 18. Appeal to the Court of Tax Appeals En Banc. – xxx A party adversely affected by a resolution of a Division of the CTA on a motion for reconsideration or new trial, may file a petition for review with the CTA en banc. xxx

[15] An Act Creating the Court of Tax Appeals, June 16, 1954.

[16] An Act Expanding the Jurisdiction of the Court of Tax Appeals, March 30 2004.

[17] *Emphasis and underscoring supplied.*

the appealing party by having to assail orders as they are promulgated by the court, when all such orders may be contested in a single appeal.

In fact, this is what CIR did. A perusal of records shows that when the Second Division issued the Resolution dated August 31, 2018 denying its motion for partial reconsideration in CTA Case No. 8678, CIR filed another appeal to this Court on October 05, 2018, docketed as CTA EB 1932, and consolidated with CTA EB 1937.

Which brings us to the second reason why the instant case should be dismissed.

In the instant Petition for Review filed on March 22, 2018, CIR attached a Verification and Certification of Non-Forum Shopping[18] asserting that "**no such similar action or proceeding is pending in the** Supreme Court, the **Court of Tax Appeals**, or any tribunal or agency; and should I thereafter learn that a similar action or proceeding is either pending or may have been terminated, I undertake to report that fact within five (5) days therefrom to this Honorable Court and the agency wherein the other case has been filed."[19]

And yet, as discussed earlier, CIR had just filed his "Motion for Partial Reconsideration Re: Amended Decision dated February 15, 2018" fifteen (15) days earlier, on March 07, 2018. CIR did not inform this Court of such fact, and was only made aware when STN Philippines relayed it on its "Comment/Opposition (To CIR's Petition for Review dated 22 March 2018)".

The Supreme Court case of *Philippine Airlines, Inc. v. Flight Attendants and Stewards Association of the Philippines (FASAP)*[20] categorically ruled that the required certification of non-forum shopping must be valid at the time of filing of the petition. Since CIR knew that at the time he filed the Petition for Review with the Court *En Banc* that his motion for partial reconsideration was still subject to resolution in CTA Case No. 8678, CIR is guilty of forum-shopping.

Section 5[21], Rule 7 of the 1997 Rules of Civil Procedure, as amended ("ROC"), provides that the submission of a false certification on non-forum shopping shall be cause for the dismissal of the case.

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[18] Rollo, p. 18.
[19] *Emphasis supplied.*
[20] G.R. No. 143088, January 24, 2006.
[21] SEC. 5. Certification against forum shopping. —

xxx xxx xxx

Failure to comply with the foregoing requirements shall not be curable by mere amendment of the complaint or other initiatory pleading but shall be cause for the dismissal of the case without prejudice, unless otherwise provided, upon motion and after hearing. The submission of a false certification or non-compliance with any of the undertakings therein shall constitute indirect contempt of court, without prejudice to the corresponding administrative and criminal actions.

However, failure to comply with the non-forum shopping requirements in Section 5 of Rule 7 of the ROC does not automatically warrant the dismissal of the case with prejudice. The Rule states that the dismissal is without prejudice. The dismissal may be with prejudice but only upon motion and after hearing. Additionally, it must be proven that the erring party committed willful and deliberate acts amounting to forum shopping to warrant summary dismissal of the case and imposition of direct contempt.[22]

Since there is no evidence in the instant case that CIR or his counsels who signed the instant Petition for Review with the Court *En Banc*, Atty. Sylvia R. Alma Jose and Atty. Cristina P. Castillo-Lim from the BIR Litigation Division, deliberately committed forum shopping nor there appears a clandestine intent on the part of CIR to violate the rules against forum shopping, CIR's counsels, Atty. Alma Jose and Atty. Castillo-Lim should be sanctioned with severe censure instead. It seems that they were in such haste to file an appeal with this Court that the instant Petition for Review was prematurely filed. In order to make them realize the seriousness of the consequences and implications of their actions, and so that the same action will not be committed again in the future, a severe censure is necessary.

In light of the foregoing considerations, the Court *En Banc* has no recourse but to dismiss this case.

WHEREFORE, premises considered, the Petition for Review is **DISMISSED**.

For violation of the anti-forum shopping rule, CIR's counsels, Atty. Sylvia R. Alma Jose and Atty. Cristina P. Castillo-Lim from the BIR Litigation Division are sanctioned with **SEVERE CENSURE**.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

If the acts of the party or his counsel clearly constitute willful and deliberate forum shopping, the same shall be ground for summary dismissal with prejudice and shall constitute direct contempt, as well as a cause for administrative sanctions.

22 Claudius G. Barroso v. Honorable Francisco S. Ampig, Jr., G.R. No. 138218, March 17, 2000.

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

Catherine T. Manahan
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