REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

FSM CINEMA, INCORPORATED,
Respondent.

CTA EB No. 1084
(CTA CASE NO. 7525)

Present:

DEL ROSARIO, *PJ*;
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS and
RINGPIS-LIBAN, JJ.

Promulgated:

JAN 23 2015
4:29 p.m.

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DECISION

FABON-VICTORINO, J.:

In this Petition for Review, petitioner Commissioner of Internal Revenue (CIR) prays to set aside the Amended Decision[1] dated July 4, 2013 and the Resolution[2] dated November 5, 2013 rendered by the Court in Division in CTA Case No. 7525 entitled *FSM Cinemas, Inc. vs. CIR,* and another one be issued directing respondent to pay in full the assessed deficiency expanded withholding tax (EWT) and

[1] *Id.*, pp. 26-34.
[2] *Id.*, pp. 36-41.

final withholding tax (FWT), in the amounts of Php2,299,339.35 and Php2,360,097.90, respectively, for taxable year 2000, plus the accrued interest and twenty-five percent (25%) surcharge pursuant to Sections 248 and 249 of the National Internal Revenue Code (NIRC) of 1997.

THE FACTS AND THE CASE

Petitioner is the Commissioner of Internal Revenue, with authority to assess and collect all internal revenue taxes, fees and other charges, and to enforce all forfeitures, penalties, and fines connected therewith, with office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

Respondent, on the other hand, is a Philippine corporation, with principal office at the 4th Floor, Festival Supermall, Filinvest Corporate City, Alabang, Muntinlupa City, Metro Manila.

On August 22, 2002, respondent received BIR Form No. 1920 (Audit Notice) dated August 2, 2002, with OCN 9AN0000004800, issued by Makati Revenue Regional Office, authorizing the examination of its books of account and accounting records for all internal revenue taxes for the period January 1 to December 31, 2000.

On January 3, 2006, respondent received the Formal Assessment Notices (FANs) Nos. IT-4800-00-05-0452,[3] 2 VT-4800-00-05-0452,[4] WE-4800-00-05-0452,[5] WF-4800-00-05-0452[6], all dated December 23, 2005 at its business address at the 4th level, Festival Supermall, Inc. Filinvest Corporate City, Alabang, City of Muntinlupa, indicating that it has deficiency income tax, value added tax, expanded and final withholding tax in the total amount of P66,882,432.93[7].

On January 23, 2006, respondent filed a protest against such assessments.

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[3] Exhibit 3.
[4] Exhibit 4.
[5] Exhibit 5.
[6] Exhibit 6.
[7] Exhibit 7.

On October 2, 2006, respondent filed with the Court in Division a Petition for Review[8] grounded on alleged inaction on the part of petitioner and praying for the cancellation and termination of the assessments issued by petitioner for deficiency IT, VAT, EWT and FWT, in the total amount of P66,952,432.93 for taxable year ending December 2000, docketed as CTA Case No. 7525.

On December 12, 2005, petitioner filed her Answer[9] with special and affirmative defenses.

On August 13, 2008, respondent filed a Motion to Declare the Alleged Deficiency Income Tax and Value-Added Tax Assessments Extinguished under Republic Act (R.A.) No. 9480[10], due to its alleged availment of the benefits under the Tax Amnesty Law, otherwise known as R.A. No. 9480.

In the Resolutions dated October 9, 2008[11] and January 26, 2009[12], the Court treated the incident as a motion to withdraw the Petition for Review insofar as the assessments covered by the tax amnesty.

On May 25, 2012, the Court in Division dismissed the Petition for Review for lack of jurisdiction[13]. Aggrieved, respondent timely moved for partial reconsideration[14], which was granted in the assailed Amended Decision[15] of July 4, 2013, in this wise:

> WHEREFORE, the assailed Decision promulgated on May 25, 2012 is SET ASIDE and the instant Petition for Review filed on October 2, 2006 is hereby GRANTED. Accordingly, Assessment Notice No. WE-4800-00-05-0452 for deficiency expanded withholding tax in the amount of

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[8] Division docket, vol. 1, pp. 1-10.
[9] *Id.*, pp. 36-38.
[10] Division docket, vol. I, pp. 169-172.
[11] *Id.*, pp. 190-191.
[12] *Id.*, pp. 200-203.
[13] Division docket, vol. II, pp. 585-596.
[14] *Id.*, pp. 599-607.
[15] *Supra*, Note 2.

> P2,299,339.35 and Assessment Notice No. WF-4800-00-05-0452 for deficiency final withholding tax in the amount of P2,360,097.90, both for taxable year 2000, are hereby CANCELLED and SET ASIDE.
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> SO ORDERED.

The foregoing decision was effectively affirmed when the Court in Division denied petitioner's Motion for Partial Reconsideration for lack of merit in the similarly assailed Resolution of November 5, 2013.

Hence, this Petition for Review raising the following issues:

I.

WHETHER OR NOT THE DEFICIENCY EXPANDED WITHHOLDING TAX ASSESSMENT ISSUED BY PETITIONER CIR TO HEREIN RESPONDENT FOR TAXABLE YEAR 2000 HAS PRESCRIBED.

II.

WHETHER OR NOT THE DEFICIENCY FINAL WITHHOLDING TAX ASSESSMENT ISSUED BY PETITIONER CIR TO HEREIN RESPONDENT FOR TAXABLE YEAR 2000 WAS ERRONEOUS.

III.

WHETHER OR NOT RESPONDENT IS LIABLE TO PAY THE ASSESSED DEFICIENCY EXPANDED WITHHOLDING TAX AND FINAL WITHHOLDING ASSESSMENTS IN THE AMOUNTS OF Php2,299,339.35 and Php2,360,097.90, RESPECTIVELY, FOR TAXABLE YEAR 2000.

Petitioner claims that she was able to prove that respondent filed false expanded withholding tax returns for the period January to December 31, 2000, hence, the 10-year prescriptive period under Section 222(a) of the NIRC of 1997 shall apply. Consequently, the disputed FAN No. WE-4800-00-05-0452 dated December 23, 2005 was issued within the 10-year prescriptive period, thus, the assessment has not yet prescribed.

Petitioner further claims that to be spared from tax imposed on inter-corporate dividend, the taxpayer must prove that the dividend was recorded in the books of both the issuing and the recipient stockholders, as provided under BIR Ruling No. DA-583-99,[16] and as held in the case of *Engtek Philippines, Inc. vs. Commissioner of Internal Revenue*[17].

Lastly, absent any proof to the contrary, the tax assessments should be given full weight and credit as they are presumed correct and made in good faith. In the absence of proof of any irregularities in the performance of duties, which burden lies on the taxpayer, an assessment duly made by a BIR examiner and approved by his senior officers should not be disturbed.[18]

In rejecting the arguments, respondent counters that petitioner's assessment for alleged deficiency expanded withholding tax was made beyond the 3-year prescriptive period. And since no false return was filed, the ten-year prescriptive period invoked by petitioner is not applicable.

Moreover, petitioner's assessment for deficiency final withholding tax is erroneous because the inter-corporate dividends it issued are exempt from final withholding tax pursuant to Section 27(D) of the NIRC of 1997, as shown in the evidence it presented.

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[16] October 6, 1999.
[17] CTA EB No. 89 (CTA Case No. 6644), June 14, 2006.
[18] *Interprovincial Autobus Co., Inc. vs. Commissioner of Internal Revenue*, 98 Phil. 290; *Sy Po vs. Court of Tax Appeals, et. al.*, G.R. No 81446, August 18, 1998; *Dayrit et. al. vs. Cruz, et. al.*, L-39910, September 26, 1988, August 18, 1988.

RULING OF THE COURT *EN BANC*

To be sure, petitioner's arguments in her Petition for Review are not new. She merely restated her arguments in her previous pleadings which were already considered and correctly ruled upon by the Court in Division in the assailed Amended Decision and Resolution of July 4, 2013 and November 5, 2013, respectively. Thus, the Court *En Banc* sees no compelling reason to deviate from the findings of the Court in Division that the assessment for deficiency expanded withholding tax issued by petitioner against respondent was made beyond the 3-year prescriptive period, therefore, void; and the assessment for deficiency final withholding tax was erroneous as cash dividends issued by respondent to another domestic corporation are tax-exempt.

As held in the assailed Amended Decision, the period to assess internal revenue taxes is three (3) years after the last day prescribed by law for the filing of the return, or three (3) years from the day the return was filed, when filed beyond the period prescribed by law, as provided in Section 203 of the NIRC of 1997, to wit:

> "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 a 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."

In relation to the foregoing provision, Section 2.58(A)(2)(a) of Revenue Regulations (RR) No. 2-98 requires that the withholding tax return, whether creditable or final, shall be filed and payments shall be made within ten (10) days after the end of each month except for taxes withheld for December which shall be filed on or before January 25 of the following year.

Applying the foregoing provisions to the instant case, the Court in Division correctly ruled that the return must be filed and the payment must be made within ten (10) days after the end of each month, except for taxes withheld for the month of December of each year, which shall be filed on or before January 25 of the following year. Thus, the last day of the statute of limitations for each month covering the period from January to December 2000 are summarized as follows:

Period	Date filed	Reckoning date of the 3-year period to assess	Last day to assess
January 2000	February 8, 2000	February 10, 2000	February 10, 2003
February 2000	March 9, 2000	March 10, 2000	March 10, 2003
March 2000	April 10, 2000	April 10, 2000	April 10, 2003
April 2000	May 10, 2000	May 10, 2000	May 10, 2003
May 2000	June 8, 2000	June 10, 2000	June 10, 2003
June 2000	July 7, 2000	July 10, 2000	July 10, 2003
July 2000	August 10, 2000	August 10, 2000	August 10, 2003
August 2000	September 8, 2000	September 10, 2000	September 10, 2003
September 2000	October 9, 2000	October 10, 2000	October 10, 2003
October 2000	November 10, 2000	November 10, 2000	November 10, 2003
November 2000	December 11, 2000	December 11, 2000	December 11, 2003
December 2000	January 10, 2001	January 25, 2001	January 25, 2004

A review of the record reveals that petitioner received the FAN No. WE-4800-00-05-0452 dated December 23, 2005 on January 2, 2006. Hence, the assessment for deficiency expanded withholding tax was made beyond the 3-year prescriptive period provided by law, therefore, it is void.

However, to justify its belated assessment petitioner argues that respondent's expanded withholding tax returns filed for the period January to December 31, 2000 were false returns, hence, the 10-year prescriptive period under Section 222 (a) of the NIRC of 1997 applies.

The Court *En Banc* is not persuaded.

As observed by the Court in Division, petitioner raised the issue of the applicability of the 10-year prescriptive period due to petitioner's alleged filing of a false return only in her Motion for Reconsideration to the Amended Decision of July 4, 2013. To quote:

> "Section 222 (a) of the National Internal Revenue Code of 1997, as amended, provides that in the case of a false or fraudulent return with intent to evade tax or of 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.
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> Indeed, the Supreme Court, in the case of *Aznar vs. Court of Tax Appeals, et al.*, defined that a false return implies deviation from the truth, whether intentional or not.
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> Also, basic is the rule in evidence that the burden of proof lies on the party who makes the allegations— *ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum negantis probatio nulla sit.* Evidently, it is respondent's burden to prove

that petitioner willfully filed false returns; thus, validating the former's right to assess the latter's taxes within ten years after the discovery of the falsity, as an exception to the statute of limitation on the assessment of taxes.

However, the Court notes that the issue on false returns is only raised in the instant motion. A scrutiny of the records reveals that in the Details of Discrepancies, attached to the Formal Assessment Notice, it was indicated that the assessment was due to petitioner's failure to withhold and remit the expanded withholding tax due on income payments. Further, respondent's witness, Renato Balmores, testified that the deficiency withholding tax on compensation was assessed because some payments were not subjected to expanded withholding tax.

In sum, there was neither allegation nor evidence presented by respondent to show that petitioner's Monthly Remittance Returns of Creditable Income Taxes Withheld (Expanded) are false returns. In fact, respondent disallowed petitioner's expenses on the ground of non-withholding of petitioner's income payments. But then, failure to withhold does not automatically imply falsity.

The aforesaid issue is raised only now for the purpose of placing the instant case within the exception to the rule limiting the period to assess and collect taxes, or only when this Court found that respondent's right to assess petitioner on its deficiency for expanded withholding taxes had already prescribed. Noteworthy is that such scenario is not availing in the Aznar case for the then Collector of Internal Revenue had alleged in his assessment the falsity of the return and

> had already charged Aznar with fraud penalty.
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> For the purpose of safeguarding taxpayers from any unreasonable examination, investigation or assessment, our tax law provides a statute of limitations in the collection of taxes. Thus, the law on prescription, being a remedial measure, should be liberally construed in order to afford such protection. As a corollary, the exceptions to the law on prescription should perforce be strictly construed."

Well-settled is the rule that issues not raised during trial cannot be raised for the first time on appeal, more especially in a motion for reconsideration.[19]

The Supreme Court, in cases more than one, had consistently ruled that no question will be entertained on appeal unless it has been raised in the proceedings below. Points of law, theories, issues and arguments not brought to the attention of the lower court, administrative agency or quasi-judicial body, need not be considered by the viewing court, as they cannot be raised for the first time at that late stage. Basic considerations of fairness and due process impel this rule. Any issue raised for the first time on appeal is barred by estoppel."[20]

Anent the deficiency assessment for final withholding tax issued by petitioner against respondent, again, the Court *En Banc* agrees with the findings of the Court in Division that the cash dividends issued by respondent to another domestic corporation is exempt from payment of tax as provided under Section 27(D)(4) of the NIRC of 1997, which reads as follows:

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[19] *Jesus Cuenco vs. Talisay Tourist Sports Complex, Incorporated and Matias B. Aznar III*, G.R. No. 174154, July 30, 2009.

[20] *S.C. Megaworld Construction and Development Corporation, vs. Engr. Luis U. Parada, represented by Engr. Leonardo A. Parada of Genlite Industries*, G.R. No. 18380 4, September 11, 2013, citing *Besana v. Mayor*, G.R. No. 153837, July 21, 2010, 625 SCRA 203, 214, *Jacot v. Dal,* G.R. No. 179848, November 27, 2008, 572 SCRA 295, 311, and *Villaranda v. Villaranda*, 467 Phil. 1089, 1098(2004).

> "SEC. 27. **Rates of Income Tax on Domestic Corporations**. -
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> xxx xxx xxx
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> (D) *Rate of Tax on Certain Passive Incomes*. -
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> xxx xxx xxx
>
> (4) *Intercorporate Dividends*. - Dividends received by a domestic corporation from another domestic corporation shall not be subject to tax."

As provided above, dividends received by a domestic corporation from another domestic corporation are not subject to tax.

The Court *En Banc* cannot as well subscribe to petitioner's argument that for an inter-corporate dividend to be spared from tax, the taxpayer must prove that the dividend was recorded in the books of both the issuing corporation and the recipient stockholders, as required under BIR Ruling No. DA-583-99, and held in the case of *Engtek Philippines, Inc. vs. Commissioner of Internal Revenue.*

On the contrary, the Court *En Banc* quotes with approval the disquisition of the Court in Division on the matter, to wit:

> "xxx. Nowhere is it provided that there is a need to record the dividends in the respective books of the issuing corporation and the recipient corporate stockholders in order for an inter-corporate dividends to be exempted from taxation.
>
> xxx xxx xxx

The following differences between the Engtek case and the instant case are noteworthy:

Engtek case	**FSM case**
1. Petitioner is not a domestic corporation.	1. Petitioner is a domestic corporation
2. It issued cash dividends to 99.99% foreign corporation as petitioner is owned by Engtek Teknologi Holdings BHd, which is registered and existing under the laws of Malaysia.	2. It issued cash dividends to 99.99% domestic corporation as petitioner is collectively owned 99.99% by Festival Supermall, Inc. and Cinema Services Chain Corporation, which are both domestic corporations registered under the Securities and Exchange Commission (SEC).
3. There was reversal of the cash dividends	3. There was no reversal of the same
4. Petitioner did not offer in evidence its accounting records such as its audited financial statements for the year 2000 to prove its financial position at the time the cash dividends were declared.	4. Petitioner presented and formally offered its audited financial statements for taxable year 2000 and statements of income and retained earnings for taxable year 2000 and the same were admitted in evidence.

Clearly, the *Engtek* case is not applicable in the case at bar.

> The purpose of the dividend exclusion is that it is a device for reducing extra or double taxation of distributed earnings. Since a corporation cannot deduct from its gross income the amount of dividends distributed to its shareholders during the taxable year, any distributed earnings are necessarily taxed twice, initially, at the corporate level when they are included in the corporation's taxable income, and again, at the corporation-shareholder level when they are received as dividend. Thus, without exclusion, the successive taxation of the dividend as it passes from corporation to corporation would result in repeated taxation of the same income and would leave very little for the ultimate shareholder.
>
> Thus, subjecting petitioner to deficiency final withholding tax will defeat the purpose of Section 27 (D) (4) of the National Internal Revenue Code (NIRC) of 1997."

Finally, the prima facie correctness of a tax assessment does not apply upon proof that it is utterly without foundation - meaning it is arbitrary and capricious.[21]

In order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption. Hence, assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be.[22]

Considering the above findings that the assessment for deficiency expanded withholding tax issued by petitioner against respondent was made beyond the 3-year

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[21] *Commissioner of Internal Revenue vs. Hantex Trading Co., Inc.*, G.R. No. 136975, March 31, 2005.

[22] *Commissioner of Internal Revenue vs. Island Garment Manufacturing Corporation and the Court of Tax Appeals*, G.R. No. L-46644, September 11, 1987, citing *Commissioner of Internal Revenue vs. Alberto D. Benipayo*, G.R. No. L-13656, January 31, 1962.

prescriptive period, therefore, void and the assessment for deficiency final withholding tax was erroneous considering that the cash dividends issued by respondent to another domestic corporation is tax-exempt, the Court cannot sustain petitioner's position that respondent is subject to expanded withholding tax and final withholding tax.

Finding the ruling of the Court in Division within the ambit of what the law and jurisprudence provide, the same must be sustained and not disturbed.

WHEREFORE, the Petition for Review filed by petitioner Commissioner of Internal Revenue on December 11, 2013 is hereby **DENIED** for lack of merit. Accordingly, the assailed Amended Decision dated July 4, 2013, and the assailed Resolution dated November 5, 2013, are hereby **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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

(On Official Business)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

(On Official Business)
MA. BELEN RINGPIS-LIBAN
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 among the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court *En Banc*.

ROMAN G. DEL ROSARIO
Presiding Justice