REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIP G. BRODETT, Petitioner,	C.T.A. EB No. 543 (C.T.A. CASE NO. 7049)
- versus -	Members: ACOSTA, *PJ* CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA, and COTANGCO-MANALASTAS, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: DEC 0 8 2010

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DECISION

FABON-VICTORINO, J.:

Subject of this appeal are the Decision of January 09, 2009 and the Resolution of September 04, 2009, both rendered by the Second Division of the Court, the decretal portions of which read as follows:

> WHEREFORE, the instant *Petition for Review* is hereby **PARTIALLY GRANTED**. The Final Assessment Notice dated April 22, 2004 finding petitioner liable for deficiency Documentary Stamp Tax for the year 1996 in the amount of

P143,437.50 is hereby **CANCELLED**. However, the Final Assessment Notice also dated April 22, 2004, finding petitioner liable for deficiency Capital Gains Tax and Documentary Stamp Tax for the year 1997 is hereby **AFFIRMED**.

Accordingly, petitioner is hereby **ORDERED TO PAY EIGHT MILLION SIXTY NINE THOUSAND FIVE HUNDRED EIGHTY FOUR PESOS and 13/100 (P8,069, 584.13)** for deficiency Capital Gains Tax and **ONE HUNDRED THIRTY TWO THOUSAND ONE HUNDRED FORTY THREE PESOS and 84/100 (P132,143.84)** for deficiency Documentary Stamp Tax for the year 1997. Said amounts are broken down as follows:

Deficiency Capital Gains Tax		
Net Capital Gain Tax Realized		P11,500,000.00
Computation of Basic Tax	100,000.00x10%	P 10,000.00
	1,400,000.00x20%	2,280,000.00
Basic Tax Due		P 2,290,000.00
Add: Surcharge (50%)		1,145,000.00
Interest 08-26-97 to 05-24-04		4,634,584.13
TOTAL		**P 8,069,584.13**
Deficiency Documentary Stamp Tax		
Par value of shares		P 5,000,000.00
Computation of Basic Tax	5,000,000.00x200/1.50	P 37,500.00
Basic Tax Due		P 37,500.00
Add: 50% Surcharge		18,750.00
Interest 08-26-97 to 05-24-04		75,893.84
TOTAL		**P 132,143.84**

In addition, petitioner is **ORDERED TO PAY** respondent twenty percent (20%) delinquency interest *per annum* on the amounts of **P8,069,584.13** and **P132,143.84**, computed from September 5, 2004 until the amount is fully paid.

SO ORDERED.

WHEREFORE, all the foregoing considered, petitioner's *Motion for Partial Reconsideration* is hereby DENIED for lack of merit.

SO ORDERED.

Petitioner Philip G. Brodett alleges that he is an individual taxpayer and at all times relevant to this case, the Vice-President of Liberty Mines, Inc., presently known as Philcomsat Holdings Corporation (Philcomsat).

Respondent Commissioner of Internal Revenue, on the other hand, is duly authorized, among others, to cancel the disputed assessments for deficiency Capital Gains Tax (CGT) and Documentary Stamp Tax (DST).

Sometime in 1996, Jose Ma. Ozamiz, Fernando P. Jacinto Jr., Winston A. Lee, Ma. Melizza Mendoza del Rosario, Jose Ma. G. Santos, and Grace Saulog, collectively referred to as the Beneficial Owners, requested him to purchase in their behalf shares of stocks of Liberty Mines, Inc. He contacted Prudencio C. Somera Jr., a business associate, and informed him about such request and his intention to oblige. Somera however wanted to deal solely with him as the stocks would be derived from his own allocation of shares. In view thereof, he and Somera executed a *Declaration of Trust with Assignment* on July 24, 1996, with him as trustor and Somera as trustee of the stocks to be acquired for the Beneficial Owners.

On even date, Somera subscribed 500 million shares of Liberty Mines, Inc. at P.01 per share in the amount of Five Million Pesos (P5,000,000.00) payable as follows:

1. 25% of subscription price or P1,250,000.00 as down payment
2. the balance of 75% upon call made by the Board of Directors of the company

Using his own funds, he paid Somera the stipulated down payment on the same day.

A year later or in July of 1997, the Beneficial Owners individually executed a *Declaration of Trust with Assignment* naming him as their trustee over the following shares, to wit:

TRUSTOR	NUMBER OF SHARES	DATE OF DEED
Grace Saulog	12,500,000	July 28, 1997
Melizza Mendoza	75,000,000	July 25, 1997
Winston Lee	75,000,000	July 25, 1997
	50,000,000	July 25, 1997
Fernando Jacinto	250,000,000	July 25, 1997
Jose Ma. Santos	12,500,000	July 25, 1997
Jose Ma. Ozamiz	25,000,000	July 25, 1997
Total	500,000,000	

On July 28, 1997, he acknowledged receipt of the following payments from the Beneficial Owners for the foregoing shares of stocks, inclusive of the incidental costs of the subscription, thus:

PAYOR	AMOUNT	
Grace Saulog	P	250,000.00
Melizza Del Rosario		1,500,000.00
Winston Lee		2,000,000.00
Fernando Jacinto		2,000,000.00
Jose Ma. Santos		250,000.00
Total	P	6,000,000.00

Of the amount received, he paid Somera the remaining balance equivalent to 75% of the subscription price or in the amount of Php3,750,000.00, which the latter in turn paid to Liberty Mines, Inc. on August 04, 1997. On August 30, 1997, seven Certificates of Stocks for the 500 million shares were issued in the name of Somera.

On April 26, 2004, he received two Formal Assessment Notices (FANs) both dated April 22, 2004 from the BIR Revenue Region No. 8, Makati - one for alleged deficiency DST for taxable year 1996 and the other for deficiency CGT and DST for taxable year 1997 computed as follows:

Deficiency Documentary Stamp Tax (1996)

Par value of shares		P5,000,000.00
Computation of Basic Tax	5,000,000.00x1.50/200	37,500.00
Basic Tax Due		37,500.00
Add: Surcharge (50%)		18,750.00
Interest 08-25-96 to -5-24-04		87,187.50
TOTAL AMOUNT DUE		**P143,437.50**

Deficiency Capital Gains Tax (1997)

Net Capital Gains Tax Realized		P11,500,000.00
Computation of Basic Tax	100,000,000.00 x 10%	10,000.00
	11,000,000.00 x 20%	2,280,000.00
Basic Tax Due		2,290,000.00
Add: Surcharge (50%)		1,145,000.00
Interest 08-26-97 to 05-24-04		4,634,584.13
TOTAL AMOUNT DUE		**P8,069,584.13**

Deficiency Documentary Stamp Tax (1997)

Par value of shares		P5,000,000.00
Computation of Basic Tax	5,000,000.00 x 1.50/200	37,500.00
Basic Tax Due		37,500.00
Add: Surcharge (50%)		18,750.00
Interest 08-26-97 to 05-24-04		75,893.84
TOTAL AMOUNT DUE		**P132,143.84**

In response, he filed with the BIR two letters of protest both dated May 24, 2004, on the ground that the assessments had no factual and legal bases.

Respondent denied his protest in the Final Decision on the Disputed Assessment (FDDA) dated August 6, 2004, reiterating the FANs both dated April 22, 2004 for deficiency DST for taxable year 1996 and deficiency CGT and DST for taxable year 1997.

On September 3, 2004, he assailed the FDDA before this Court in C.T.A. Case No. 7049.

On January 16, 2009, the Court in Division partially granted his Petition for Review directing the cancellation of FAN dated April

22, 2004 for deficiency DST for taxable year 1996 but sustained the FAN of even date on deficiency CGT and DST for taxable year 1997.

On February 2, 2009, he filed a Motion for Partial Reconsideration reiterating that the transactions between him and the Beneficial Owners were not sales but trusts as indicated in the two Declarations of Trust with Assignment executed by the parties therein. Assuming that they were sales, the CGT should be based on the book and not the market value of the subject shares as they were not listed in the Philippine Stock Exchange (PSE) for trading. Moreover, only 325 million and not 500 million shares were actually sold to the Beneficial Owners. Finally, the assessments were void as the BIR investigation was conducted beyond the examiner's authority.

On September 4, 2009, his Motion for Partial Reconsideration was denied. He received a copy of the assailed Resolution on September 10, 2009.

Hence, this appeal claiming that the Court in Division erred:

> IN RULING THAT THE SUBJECT TRANSACTIONS ARE IN THE NATURE OF CONTRACTS OF SALE AND NOT TRUST AGREEMENTS
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> ASSUMING THAT THE SUBJECT TRANSACTIONS ARE CONTRACTS OF SALE, IN RULING THAT PETITIONER FAILED TO PROVE THAT THE SUBJECT SHARES ARE NOT LISTED IN THE STOCK EXCHANGE AT THE TIME THE SUBJECT TRANSACTIONS OCCURRED
>
> ASSUMING THAT THE SUBJECT TRANSACTIONS ARE INDEED CONTRACTS OF SALE, IN RULING THAT THE MARKET VALUE PER SHARE, INSTEAD

> OF BOOK VALUE AS OF DECEMER 31, 1996, SHOULD BE USED IN COMPUTING FOR CAPITAL GAINS TAXES
>
> ASSUMING THAT THE SUBJECT TRANSACTIONS ARE INDEED CONTRACTS OF SALE, IN FAILING TO RULE THAT ONLY 325 MILLION SHARES, INSTEAD OF 500 MILLION SHARES, WERE ACTUALLY THE SUBJECT OF THE SALE
>
> ASSUMING THAT THE SUBJECT TRANSACTIONS ARE INDEED CONSTRACTS OF SALE, IN RULING THAT THE NEAREST VALUATION DATE FOR COMPUTING CAPITAL GAINS TAXES IS DECEMBER 31, 1997 AND NOT DECEMBER 31, 1996
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> IN REFUSING TO RULE UPON THE AUTHORITY OF THE BIR EXAMINER TO INVESTIGATE DOCUMENTARY STAMP TAXES

Apart from seeking partial reversal of the assailed Decision and Resolution of January 9, and September 4, 2009, respectively, petitioner also asks the Court *En Banc* to admit on appeal several documents attached to his Petition for Review as Annexes F, E, G, H, and I, namely, the Affidavit of Attorney Delfin P. Angcao dated September 11, 2009, the 1997 Annual Report, financial statements for the years 2001 and 2000, 2002 and 2001, 2003 and 2002, all of PHILCOMSAT HOLDINGS CORPORATION, a Subsidiary of Philippine Communications Satellite Corporation.

On December 21, 2009, petitioner filed his Memorandum.

On January 19, 2010, the instant appeal was deemed submitted for decision *sans* any pleading from respondent, who failed to file any despite directive from the Court *En Banc.*

To be sure, there is nothing new in the issues raised by petitioner in his Memorandum on appeal. All have been ruled and passed upon by the Court in Division in the assailed Decision of January 9, 2009 and Resolution of September 4, 2009.

Petitioner still insists that the transactions between him and the Beneficial Owners were trust agreements and not of sales as indicated in his Judicial Affidavit dated June 09, 2005, which was never contradicted by respondent.

The statement to the contrary by Beneficial Owner Jose Ma. Ozamiz should not be given weight or credence as he was not presented in court for cross examination depriving petitioner of his day in court. Thus, his statement before the revenue examiners was hearsay bereft of any probative value. The failure of respondent to present him during the trial also raises the presumption that his testimony was willfully suppressed and would be adverse to respondent if produced.

Assuming *in gratia argumenti* that Mr. Ozamiz' statement was admissible in evidence, his declaration that the transfers of shares of stocks from him to the Beneficial Owners were sales and not trusts should apply only to him and not affect his transactions with the other Beneficial Owners. Under the principle of *res inter alios acta* in Section 28, Rule 30 of the Rules of Court, the rights of a party cannot be prejudiced by an act, declaration, or omission of another.

Further, the conclusion that sales were implied there being no documents showing that the Beneficial Owners requested him to subscribe for them shares of stocks from Liberty Mines is negated by the two Declarations of Trust with Assignment between him and Somera and later between him and the Beneficial Owners, both of which were presented during the trial. The fact that the latter document was executed by the Beneficial Owners in his favor a year after the subscription was by no means an implication that the transactions were sales and not trust agreements. Besides, an oral trust agreement was created in July 1996 when the Beneficial Owners requested him to purchase for them shares of stocks from Liberty Mines, Inc.

As to his payment of the required down payment for subscription using his own funds, suffice it to say that there is no law preventing him as trustee from doing so. There is likewise no legal obstacle in the issuance by the Beneficial Owners of manager's checks in his name and not in Somera's in payment of the subscription. He directly dealt with the latter, thus he had the obligation to turn over to him the subscription price. The same also facilitated the reimbursement for his expenses in the establishment of the two trust agreements.

And since his availment of Voluntary Assessment and Abatement Program (VAAP) and corresponding payment of the assessed CGT and DST on February 03, 2003 for the 25,000,000 shares of stocks belonging to Mr. Ozamiz were at the instance of the latter, it cannot be considered an implied admission on his part that the questioned transactions were sales.

Assuming that the transactions were sales, the tax base for CGT, pursuant to Revenue Regulations No. 2-82, should be the book at Php.0025 and not the market value or trading price at Php.033, which respondent used in computing the alleged deficiencies. This is due to the fact that the 500 million subscribed shares were never listed or subsequently delisted in the Philippine

Stock Exchange (PSE). To strengthen this proposition, he is submitting to the Court *En Banc* on appeal the documents appended to his Petition for Review. Purposely, he did not submit the Financial Statement of the Corporation as of December 31, 1997 for it was not relevant in computing the book value of the subject shares of stocks.

Contrary to respondents contention, he received only Php6,000,000.00 from the Beneficial Owners and not Php10,000,000.00 or the total amount indicated in the eight (8) acknowledgment receipts that bear his signature. Only those issued in the name of the Beneficial Owners in the total amount of Php6,000,000.00 should be considered in the assessment of his tax liabilities. Those that were not, or issued twice in the name of Jose Ma. Santos, or a mere duplicate should be disregarded.

Even if the transactions were sales, no gain was derived from them subject to CGT. Out of the Php6,000,000.00 received from the Beneficial Owners, he paid Somera Php5,000,000.00 for the total subscription and the excess of P1,000,000.00 was the reimbursement for his advances in connection with the execution of the two Declarations of Trust with Assignment including his own fees as a trustee.

After admitting receipt of the P6,000,000.00 for the 500 million shares subscribed by Somera, petitioner takes a 180 degrees turn and claims that only to 325 million shares were actually sold to the Beneficial Owners. With a book value of Php0.0025 per share, the cost of 325 million shares actually sold would only be Php812,500.00. Since the amount actually paid for the subscription was greater than the total value of the shares per book value, the actual consideration should be the tax base in computing the CGT, as indicated below:

Actual consideration	P6,000,000.00
Cost of the shares sold 325 million x P0.01	P3,250,000.00
Net capital gains	**P2,750,000.00**

Stretching his theory to the limits, petitioner offers a computation for deficiency CGT as follows:

Deficiency Capital Gains Tax (1997)

Net Capital Gains		P2,750,000.00
Computation of Basic Tax	100,000.00 x 10%	10,000.00
	2,650,000.00 x 20%	530,000.00
Basic Tax Due		**P540,000.00**

On the surcharges, petitioner opines that it should be computed from August 26, 1997 to May 24, 2004 only at 25% of the basic tax due. The surcharges and accrued interest should be excluded from the interest as provided under Revenue Regulations No. 12-99 and Revenue Memorandum Circular No. 46-99.

Still on the assumption that the transactions were sales, the nearest valuation date of the stocks for purposes of CGT should be December 31, 1996, the date of the latest audited financial statements available at the time of the transactions and not December 31, 1997, as erroneously ruled by the Court in Division.

Finally, petitioner still maintains that the subject assessments lack legal basis hence void, since the authority to conduct investigation of Revenue Officer Efren Clemente by virtue of Tax Verification Notice (TVN) No. 2001-00091901 covered only CGT to the exclusion of DST. Under Revenue Memorandum Order (RMO) No. 33-99, a TVN cannot vest authority to conduct assessments for DST. The transfer of investigation to Loida Ladignon by virtue of Memorandum dated November 03, 2003, did not save the day for respondent as it was just the continuation of the investigation conducted by Clemente.

The Ruling of the Court

The transactions between
petitioner and the Beneficial
Owners were Sales.

Section 8 of RA 1125 describes the Court of Tax Appeals (CTA) as a court of record. Cases instituted for its determination are litigated *de novo* where party-litigants prove every minute aspect of their cases.[1] The burden of proof is always upon the taxpayer contesting the validity or correctness of an assessment. He must establish to the satisfaction of the Court that not only that the Commissioner of Internal Revenue is wrong but that he is right,[2] lest the presumption in favor of the correctness of tax assessment stands.[3] The burden of proving the illegality of the assessment lies upon petitioner alleging it to be so.[4] It is unfortunate however that petitioner failed to discharge this burden.

Petitioner theorizes that the transfers of the 500 million shares of stocks of Liberty Mines, Inc. - from him to the different Beneficial Owners - were in the nature of trust and not sales which is diametrically opposed to the finding of the Court in Division.

The Court cannot give credit to the statement of Jose Ma. Ozamiz that the transaction between him and petitioner was actually a sale and not a trust agreement as he was not presented as a witness in the case.

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[1] Dizon vs. CTA and CIR, G.R. No. 140944, April 30, 2008.
[2] Tan Guan vs. Court of Tax Appeals, No. L23676, April 27, 1967, 19 SCRA 903.
[3] Sy Po v. CTA, 164 SCRA 524.
[4] CIR vs. Hantex Trading, G.R. No. 136975. March 31, 2005.

Indeed, Mr. Ozamiz was never placed on the witness stand. He was not presented in court as a witness for examination-in-chief, which could have given rise to petitioner's right to cross examination. His statement, if there was any, was not a part of the evidence for respondent, hence could not have been considered by the Court in Division in deciding the case. Courts rest their findings of fact and judgments only and strictly upon evidence presented and formally offered by the parties at the trial.[5]

From respondent's evidence, it was just by twist of faith that the BIR learned about the subject transactions between petitioner and the Beneficial Owners. The Pandora's Box was opened when Mr. Ozamiz formally inquired with BIR about his own tax liability for the transfer in his name of the Certificates of Stocks purchased from petitioner. In effect, he was the whistle blower who unknowingly spilled the beans regarding the real nature of the subject transactions.

The information and documents gathered from Mr. Ozamiz triggered the investigation on petitioner's CGT return for the relevant years. And it was the result of this investigation that caused the issuance of the assailed assessments for deficiencies in

[5] Heirs of Pedro Pasag v. Parocha, 522 SCRA 410.

CGT and DST due on the transactions. In fine, neither the presence nor the testimony of Mr. Ozamiz was necessary or warranted for respondent to proceed with her defense. Contrary to petitioner's assertion, it was the positive and categorical testimonies of respondent's revenue examiners, supported as they were by sufficient documents, that pinned him down and not the report of Mr. Ozamiz to the BIR.

On the nature of the subject transactions, it was clearly established that all the essential elements of a contract of sale concur, to wit, (1) consent or the meeting of the minds of the parties; (2) determinate subject matter; and (3) price certain in money or its equivalent.[6]

Petitioner admits that on July 24, 1996, he was able to secure from Somera 500 million shares of stocks of Liberty Mines, Inc., for Php5,000.000.00, which the latter held in trust for him under a Declaration of Trust with Assignment. The document palpably shows that petitioner was the trustor who owned the subject subscriptions and paid the stipulated down payment for it with his own funds. A year later, or in July 1997, the Beneficial Owners paid a price certain for the shares of stocks through manager's checks

[6] GSIS vs. Lopez, G.R. No. 165568, July 13, 2009; Sanchez v. Mapalad Realty Corporation, 541 SCRA 397.

they respectively issued in the name of petitioner in full and one-time settlement of the acquired 500 million shares. Petitioner formally acknowledged receipt of such payments and delivered to the Beneficial Owners the corresponding Certificates of Stocks pertaining to their respective shares punctuating the sale transactions between them. From the horse's mouth and consistent with the documentary evidence presented, 500 million shares were sold to the Beneficial Owners and not 325 million professed later by petitioner obviously to reduce his tax liabilities.

As found by the Court in Division, the payment made by the Beneficial Owners solely in favor of petitioner in the total amount of Ph9,000.000.00 was substantially in excess of the subscription cost, which was only Php5,000,000.00. The excess payments, all supported by acknowledgment receipts bearing petitioner's signature, negate petitioner's assertion that the transfers of stocks from him to the Beneficial Owners were without monetary consideration. The details of such payments are summarized as follows:[7]

Payor	Manager's Check No.	Bank	Amount	Corresponding Shares	Payee
Wilson Lee	12573	FEBTC	Php 1,000,000.00	125,000,000	P. Brodett
	0163	Metrobank	1,000,000.00		P. Brodett
Fernando Jacinto	41907	BPI	2,000,000.00	100,000,000	P. Brodett

[7] BIR Records, pp. 77-84.

Mary Rose Ezpeleta	41906	BPI	1,000,000.00	50,000,000	P. Brodett
Jose Ma. Jacinto	74479	PCIBank	2,000,000.00	100,000,000	P. Brodett
Grace Saulog	41911	BPI	150,000.00	12,500,000	P. Brodett
	037385	PCIBank	100,000.00		P. Brodett
Melissa Del Rosario	2282	PCIBank	1,250,000.00	75,000,000	P. Brodett
	13278	FEBTC	250,000.00		P. Brodett
Jose Ma. Santos	190978	Prudential	250,000.00	12,500,000	P. Brodett
Total			Php 9,000,000.00	475,000,000	

Notwithstanding proof to the contrary, petitioner still holds that no gain was derived from the transactions as he only received Php6,000,000.00 from the Beneficial Owners. Out of the amount, he paid Somera Php 5,000,000.00 in settlement of the subscription. Allegedly, the excess of Php1,000,00.00 was the reimbursement for his expenses incident to the transactions including legal and notarial fees, stock and transfer agent fees, and his own fees as trustee.

Obviously petitioner failed to recall his earlier admission that he already paid with his own funds 25% of the subscription cost on July 24, 1996. Thus, when he received the payments from the Beneficial Owners a year after, he only needed to pay the remaining balance of 75% equivalent to Php3,750,000.00 and not Php5,000,000.00.

As to the alleged reimbursement, the record is bereft of any concrete proof justifying the same. Neither accounting record showing the details of the alleged expenses nor receipts of payments therefor were presented to substantiate this self-serving representation. As stated by the Court in Division – "whatever petitioner received substantially above the cost of subscription is sufficient consideration, or to put it in another way, income for petitioner" subject to corresponding tax.

Petitioner tries to play down his availment of the Voluntary Assessment and Abatement Program (VAAP) on February 03, 2003 and payment of CGT and DST on the transaction between him and Mr. Ozamiz, saying that it was just upon the latter's insistence and not an implication that the transaction between them was a sale. But petitioner appears to be an astute businessman of considerable experience and acumen who would not just dole out an amount, significant at that, to pay taxes for which he was not liable.

Similarly, petitioner cannot invoke Revenue Regulations No. 2-82 which provides that unlisted shares shall be priced at their book and not market value. The pieces of evidence presented strongly suggest that the subject shares of stocks were listed in the PSE for trading, hence the market and not the book value should be used in computing the tax base for the CGT. Petitioner cannot find solace on the documents he appended to his Petition for Review, to wit:

(1) Affidavit of Atty. Angcao dated September 11, 2009
(2) 1997 Annual Report of Philcomsat Holdings, Corp.
(3) financial statements for the years 2001 and 2000
(4) financial statements for the years 2002 and 2001
(5) financial statements for the years 2003 and 2002,

to disprove the finding that the subject shares of stocks were listed in the PSE.

Admittedly, the foregoing documents were not presented during petitioner's presentation of evidence in chief. There is no pretension or indication that they were not available or could not have been produced, despite efforts, during the trial on the merits. They were not even reserved for presentation, if the circumstances so warrant later. Evidently, their submission on appeal is a mere afterthought to salvage a waning proposition. Significantly, petitioner is no tyro in transactions of this nature, thus deemed familiar with the documents that will protect his interest and they would be first in his mind.

Further, petitioner had long terminated presentation of his evidence and rested his case. As the party holding the affirmative of an issue, petitioner was bound to present all of the evidence on the case in chief before the close of the proof, and should not be permitted to add to it when the presentation of evidence had been closed and a decision been rendered as in this case. A piecemeal presentation of evidence is not in accord with orderly justice.[8]

Petitioner cannot invoke deprivation of opportunity to prove his case to shore up his position. He had his day in court. As a party complainant he is also deemed to have secured all supporting documents and have assessed his case before running to the court. Besides, there was a prior BIR investigation and evaluation of his tax liabilities where he submitted all the necessary documents in support of his claim that no taxes were due on the subject transactions.

Moreover, under Section 34, Rule 132 of the Rules of Court, only evidence marked and formally offered in evidence may be admitted and considered by the Court in the resolution of the case or incident. The documents proposed for admission were neither identified, nor marked and formally offered in evidence, hence, they cannot be considered by the *Court En Banc* in the resolution of his appeal.[9] A formal offer of evidence is necessary, since judges are required to base their findings of fact and their judgment solely and strictly upon the evidence offered by the parties at the trial. Evidence which were not formally offered cannot in any manner be

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[8] Jacot vs. Dal, G.R. No. 179848, November 27, 2008.
[9] Heirs of Zamora vs. Multiwood International, G.R. No. 146428, January 19, 2009.

treated as evidence.[10] To allow the litigants to improvidently attach any document to their pleadings expecting that they will be considered as evidence *sans* the required formal offer and admission will foment disorder in court proceedings and trigger unwarranted consequences.

Also to admit these documents on appeal is to deprive respondent of her right to scrutinize the documents and interpose objections thereto. The right to present evidence that will controvert these documents and air-tight her defense will also be removed from respondent. The appellate court on the other hand will have difficulty reviewing these documents not previously scrutinized and considered by the court below.[11]

In a relatively recent case, the Supreme Court reiterated that documents submitted for the first time on appeal cannot be admitted and given probative value, thus:

> "We find no error in the Court of Appeals' refusal to give any probative value to the alleged birth certificate of Guevarra and the affidavit of Benjamin dela Cruz, Sr. Petitioners belatedly attached these documents to their appellee's brief. Petitioners could easily have offered these documents during the proceedings before the trial court. Instead, petitioners presented these documents for the first time on appeal without any explanation. For reasons of their

[10] Tandog v. Macapagal, 532 SCRA 550.
[11] Fideldia vs. Sps. Mulato, G.R. No. 149189, September 3, 2008.

> own, petitioners did not formally offer in evidence these documents before the trial court as required by Section 34, Rule 132 of the Rules of Court. To admit these documents now is contrary to due process, as it deprives respondents of the opportunity to examine and controvert them."[12]

Noteworthy, after the assailed Decision was rendered, the Court in Division, in utmost display of liberality and leniency, allowed and admitted additional pieces of evidence presented by petitioner in support of his contention that the subject shares of stocks were not listed in the PSE justifying the use of their book and not the market value for purposes of computing the tax base for the CGT. This notwithstanding, petitioner still failed to convince the Court in Division of his position resulting in the denial of his Motion for Partial Reconsideration in this wise:

> We agree with petitioner's submission that in computing the net capital gain or loss, unlisted shares shall be valued based on its book value nearest the valuation date. However, a careful review of the records show that the Annual Report for 1996 of Liberty Mines, Inc., which reflects the Audited Financial Statements for the year ending December 31, 1996, indicates that the Securities and Exchange Commission approved its increase in capital stocks on November 13, 1996 and that it is listed in the Philippine Stock Exchange without any notation nor distinction as to the volume of the shares that are listed or not.

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[12] Manongsong vs. Estimo, G.R. No. 136773, June 25, 2003.

In any event, the additional documents proposed for admission are not that significant as to change the Court's ruling. The affidavit of Attorney Angcao dated September 11, 2009, merely clarifies that only 6 billion shares of the Liberty Mines, Inc. were listed in the PSE. The same information appears in the financial statements for the years 2001 and 2000, 2002 and 2001, and 2003 and 2002. There is no categorical pronouncement in any of the documents that the Annual Report for 1996 of Liberty Mines, Inc. - which states that the SEC approved the Company's increased in capital stocks on November 13, 1996 and that it was listed in the PSE - was incorrect. Neither was there any indication that the 500 million shares transferred to the Beneficial Owners were not among those listed for trading. In fact, the 1997 Annual Report of Philcomsat Holdings, Corporation states that the capital stocks of Philcomsat are listed in the PSE.

Anent petitioner's proposition that the nearest valuation date of the stocks for purposes of CGT should be December 31, 1996 and not December 31, 1997, suffice to say that the subject transactions took place in July 1997 or within the second half of that year. Logically, the nearest reliable valuation date would be December 31, 1997.

As regards petitioner's claim that he should be charged interest only from the period beginning August 26, 1997 to May 24, 2004, the same clearly lacks factual and legal bases. Section 249 (C) of the NIRC of 1997 provides, thus:

> **SEC. 249. Interest. –**
>
> xxx xxx xxx
>
> **(C) Delinquency Interest. – In case of failure to pay:**
>
> (1) The amount of the tax due on any return required to be filed, or
>
> (2) The amount of the tax due for which no return is required, or
>
> (3) <u>A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and collected on the unpaid amount, interest shall form part of the tax.</u> (*Emphasis ours*)

The Supreme Court in the case of *Philippine Refining Company (now known as "Unilever Philippines [PRC], Inc.") vs. Court of Appeals, et al.*[13], clarified that delinquency interest should still be imposed from the time demand was made by the Bureau of Internal Revenue even if the assessment was appealed to this Court. The pertinent portion of the ruling reads as follows:

[13] G.R. No. 118794, May 8, 1996.

> "As correctly pointed out by the Solicitor General, the deficiency tax assessment in this case, which was the subject of the demand letter of respondent Commissioner dated April 11, 1989, should have been paid within thirty (30) days from receipt thereof. By reason of petitioner's default thereon, the delinquency penalties of 25% surcharge and interest of 20% accrued from April 11, 1989. The fact that petitioner appealed the assessment to the CTA and that the same was modified does not relieve petitioner of the penalties incident to delinquency."

Undeniably, petitioner failed to pay the corresponding deficiencies in CGT and DST on time. In accord with the above-quoted jurisprudence and Section 249(C)(3) of the NIRC of 1997, petitioner must pay delinquency interest of 20% computed from September 5, 2004 until his tax liabilities are paid in full.

In his last ditch effort to invalidate the assailed assessments, petitioner impugns the authority of the revenue examiners to conduct investigation on his tax deficiencies. But clear from the Sworn Statement of Efren Clemente dated October 31, 2006 that under TVN No. 2001-00091901 dated August 30, 2002, he was authorized to examine and verify the supporting documents and/or pertinent records relative to petitioner's Capital Gains Tax Return. Obviously, the authority covered all entries in the return, related incidents, supporting documents, as well as information from other sources. This authority was merely transferred to Loida Ladignon by virtue of Memorandum dated November 3, 2003.

More importantly, petitioner never raised this issue before the Court in Division. In fact, it was not included in the Joint Stipulation of Facts and Issues dated March 07, 2005, in which the parties delimited themselves to the following issues:

> 1. Whether or not the conveyance or transfer of Liberty Mines, Inc. shares from Philip Brodett to Jose Ma. Ozamis, et. al. was actually a sale.
>
> 2. Whether or not petitioner is liable for deficiency documentary stamp tax in the amount of P143,437.50 in 1996 and deficiency capital gains tax and documentary stamp tax in the amount of P8,069,584.13 and P132,143.84 respectively for taxable year 1997 for the supposed transfer of the subject shares of stock to Mr. Jose Ma. Ozamis, et al.
>
> 3. Assuming a taxable sale between Petitioner and Beneficial Owners, whether or not the subject Liberty mines, Inc. shares (which are not listed nor traded through the stock exchange), should be valued at the market value of P0.33 per share, as claimed by the Respondent, or at the book value thereof nearest the valuation date, which is P.0025 per share, for purposes of the capital gains tax.

It has been ruled that the determination of issues during the pre-trial conference bars the consideration of other questions, whether during trial or on appeal.[14] Petitioner is bound by the issues that the parties agreed upon during the pre-trial.[15] It is of no consequence that the matter was touched during the trial when

[14] Villanueva vs. Court of Appeals, G.R. No. 143286. April 14, 2004
[15] Id.

respondent's witness testified as a timely objection thereto was made by respondent.

Verily, petitioner is now estopped and can no longer challenge on appeal the same authority he was deemed to have accepted at the administrative level.[16] This is based on the principle that no issue may be raised on appeal unless it has been brought before the lower tribunal for its consideration.[17] Theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by the reviewing court, as they cannot be raised for the first time at that late stage of the proceeding. Basic considerations of due process impel this rule.[18] Much more a party is bound by the theory he adopts and by the cause of action he stands on and cannot be permitted after having lost thereon to repudiate his theory and cause of action and adopt another and seek to re-litigate the matter anew either in the same forum or on appeal. This is in essence putting petitioners in estoppel to question the judgment.[19] Precisely the Court in Division did not resolve this issue after the assailed Decision has been rendered.

[16] Exhibit "A".
[17] Sesbreño vs. Central Board of Assessment Appeals, G.R. No. 106588, March 24, 1997.
[18] Del Rosario vs. Bonga, G.R. No. 136308, January 23, 2001.
[19] Sps. Tinio vs. Manzano, G.R. No. 132102, May 19, 1999.

All said, there is no justifiable reason for the Court *En Banc* to modify or reverse the finding and decision of the Court in Division.

WHEREFORE, the Petition for Review dated September 11, 2009, is hereby DISMISSED for lack of merit. Accordingly, the assailed Decision dated January 09, 2009 and Resolution dated September 04, 2009 issued by the Second Division of this Court in C.T.A. Case No. 7049 are AFFIRMED *in toto*.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice