REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC
****

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 1998** (CTA Case No. 7683)
	Present:
- versus -	**DEL ROSARIO,** *P.J.*, **CASTAÑEDA, JR., UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA,** and **MODESTO-SAN PEDRO,** *JJ.*
PROCTER & GAMBLE ASIA PTE. LTD., Respondent.	***Promulgated:*** JAN 0 5 2021 1:47 p.m.

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RESOLUTION

UY, *J.*:

For resolution is petitioner's ***MOTION FOR RECONSIDERATION*** filed on August 24, 2020 and received by the Court *En Banc* on September 4, 2020,[1] with respondent's ***COMMENT/OPPOSITION (RE: PETITIONER'S MOTION FOR RECONSIDERATION FILED ON AUGUST 24, 2020).***[2]

In the said *Motion*, petitioner seeks the reconsideration and setting aside of this Court's Decision promulgated on July 14, 2020, the dispositive portion of which reads:

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[1] EB Docket, pp. 131 to 142.
[2] EB Docket, pp. 160 to 162.

"**WHEREFORE,** in light of the foregoing considerations, the *Petition for Review* is **DENIED** for lack of merit.

Accordingly, the Amended Decision dated September 6, 2018 and the Resolution dated January 3, 2019 rendered by the Court in Division in CTA Case No. 7683, are **AFFIRMED**.

SO ORDERED."

Petitioner's arguments:

In his *Motion for Reconsideration*, petitioner argues that respondent's sales/receipts that do not qualify for VAT zero-rating should be subjected to 12% output VAT. Under the assailed Amended Decision dated September 6, 2018 of the Court in Division, its findings that the amount of ₱145,553,023.38, representing respondent's sales/receipts from P&G Maxfactor Godo Kaisha, P&G KK and P&G GBS De Costa Rica LTDA for the period covering July 1, 2005 to September 30, 2005, and October 1, 2005 to December 30, 2005, do not qualify for VAT zero-rating should be subjected to 12% VAT. Thus, the 12% output VAT thereon would be ₱17,466,362.81.

Allegedly, the determination of respondent's output VAT liability is merely for the purpose of ascertaining respondent's entitlement of its unutilized input VAT claim for refund and not for imposing any deficiency tax as elaborated in the recent case of *Air Canada v. Commissioner of Internal Revenue*[3] which cited the case of *SMI-ED Philippine Technology, Inc. v. Commissioner of Internal Revenue.*[4]

Moreover, respondent's substantiated input VAT should allegedly be further reduced after deducting the corresponding output VAT due on the disqualified zero-rated sales/receipts.

Petitioner further argues that respondent's documentary exhibits (i.e. invoices and official receipts, Certifications of Inward Remittances issued by Citibank N.A. Philippine branch, SEC Certificate of Non-Registration, the Procter and Gamble Company and Subsidiaries Report to the U.S. Securities and Exchange

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[3] G.R. No. 169507, January 11, 2016.
[4] G.R. No. 175410, November 12, 2014.

Commission, Business Service Agreements and Credit Notes) presented as evidence in support of its judicial claim for input VAT refund are "hearsay evidence", hence, these documents are inadmissible and have no probative value.

Lastly, petitioner contends that respondent's instant claim for refund should be construed *strictissimi juris* against it.

Respondent's counter-arguments:

In its *Comment/Opposition*, respondent counter-argues that petitioner failed to raise matters substantially plausible or compellingly persuasive to warrant reconsideration of the Court's Decision dated July 14, 2020.

Moreover, respondent points out that the arguments presented by petitioner are mere rehash of what have been said in his previous pleadings, all of which have been considered and passed upon by the Court.

THE COURT *EN BANC'S* RULING

Petitioner's *Motion for Reconsideration* lacks merit.

In the assailed Decision, the Court in Division partially granted the Petition for Review in CTA Case No. 7683 and ordered herein petitioner to refund or issue a tax credit certificate in favor of herein respondent in the reduced amount of ₱26,066,581.28 representing its unutilized excess input VAT attributable to zero-rated sales/receipts for the periods of July 1, 2005 to September 30, 2005 and October 1, 2005 to December 31, 2005.

On the other hand, the Court in Division disallowed respondent's alleged zero-rated sales/receipts amounting to ₱145,553,023.38 (with equivalent US$2,651,761.83) for the first and second quarters of FY ended June 30, 2006, out of its declared zero-rated sales/receipts in the amount of ₱1,132,160,726.03. In other words, the Court in Division found that only the amount of ₱986,607,702.65 represents petitioner's valid zero-rated sales/receipts.

In the instant motion, petitioner contends that respondent's sales/receipts that do not qualify to VAT zero-rating should be subjected to 12% output VAT.

Petitioner also argues that the determination of respondent's output VAT liability is merely for the purpose of ascertaining respondent's entitlement of its unutilized input VAT claim for refund and not for imposing any deficiency tax. Petitioner invites this Court "to determine the corresponding output VAT liability on the ₱145,553,023.38 representing respondent's sales/receipts for the period covering July 1, 2005 to September 30, 2005 and October 1, 2005 to December 31, 2005, that do not qualify for zero-rating." As basis of his arguments, petitioner cites the case of *Air Canada vs. Commissioner of Internal Revenue (Air Canada* case),[5] which, in turn, cited the earlier case of *SMI-ED Philippines Technology, Inc. vs. Commissioner of Internal Revenue (SMI-ED Philippines* case).[6]

We are not persuaded.

We do not subscribe to petitioner's contention that it is appropriate for this Court to determine the corresponding output VAT liability on the amount representing respondent's sales/receipts that did not qualify for zero-rating for lack of basis.

In the case of *SMI-ED Philippines* cited by petitioner, the Supreme Court explained that in an action for refund of taxes allegedly erroneously paid, the Court may determine whether there are taxes that should have been paid, in lieu of the erroneous taxes paid (or 5% final tax in said case), and that the determination of the proper category of tax that should have been paid (or 6% capital gains tax in said case), is not an assessment, but merely incidental to determining whether there should be a refund.

We quote the pertinent portions of the Supreme Court's discussion in the *SMI-ED Philippines* case, to wit:

> "Taxes are generally self-assessed. They are initially computed and voluntarily paid by the taxpayer. The government does not have to demand it. If the tax payments are correct, the BIR need not make an assessment.

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[5] G.R. No. 169507, January 11, 2016.
[6] G.R. No. 175410, November 12, 2014.

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The self-assessing and voluntarily paying taxpayer, however, may later find that he or she has erroneously paid taxes. **Erroneously paid taxes may come in the form of amounts that should not have been paid.** Thus, a taxpayer may find that he or she has paid more than the amount that should have been paid under the law. **Erroneously paid taxes may also come in the form of tax payments for the wrong category of tax. Thus, a taxpayer may find that he or she has paid a certain kind of tax that he or she is not subject to.**

In these instances, the taxpayer may ask for a refund. If the BIR fails to act on the request for refund, the taxpayer may bring the matter to the Court of Tax Appeals.

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Petitioner argued that the Court of Tax Appeals had no jurisdiction to subject it to 6% capital gains tax or other taxes at the first instance. The Court of Tax Appeals has no power to make an assessment.

As earlier established, the Court of Tax Appeals has no assessment powers. In stating that petitioner's transactions are subject to capital gains tax, however, the Court of Tax Appeals was not making an assessment. It was merely determining the proper category of tax that petitioner should have paid, in view of its claim that it erroneously imposed upon itself and paid the 5% final tax imposed upon PEZA-registered enterprises.

The determination of the proper category of tax that petitioner should have paid is an incidental matter necessary for the resolution of the principal issue, which is whether petitioner was entitled to a refund.

The issue of petitioner's claim for tax refund is intertwined with the issue of the proper taxes that are due from petitioner. A claim for tax refund carries the assumption that the tax returns filed were correct. If the tax return filed was not proper, the correctness of the amount paid, and therefore, the claim for refund becomes questionable. In that case, the court must determine if a

> taxpayer claiming refund of erroneously paid taxes is more properly liable for taxes other than that paid.
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> In *South African Airways v. Commissioner of Internal Revenue,* South African Airways claimed for refund of its erroneously paid 2½% taxes on its gross Philippine billings. This court did not immediately grant South African's claim for refund. This is because although this court found that South African Airways was not subject to the 2 ½% tax on its gross Philippine billings, this Court also found that it was subject to 32% tax on its taxable income.
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> In this case, petitioner's claim that it erroneously paid the 5% final tax is an admission that the quarterly tax return it filed in 2000 was improper. Hence, to determine if petitioner was entitled to the refund being claimed, the Court of Tax Appeals has the duty to determine if petitioner was indeed not liable for the 5% final tax and, instead, liable for taxes other than the 5% final tax. As in *South African Airways,* petitioner's request for refund can neither be granted nor denied outright without such determination.
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> If the taxpayer is found liable for taxes other than the erroneously paid 5% final tax, the amount of the taxpayer's liability should be computed and deducted from the refundable amount." *(Emphasis supplied)* [7]

In the instant case, petitioner implores the Court to adjudge deficiency tax liability (VAT in this case) on the disallowed portion of respondent's refund claim for the same category of tax sought to be refunded, that is, unutilized excess input VAT attributable to zero-rated sales/receipts for the periods of July 1, 2005 to September 30, 2005 and October 1, 2005 to December 31, 2005.

However, it must be noted that the determination of tax deficiency is distinct and should not be intertwined to a taxpayer's entitlement to a refund. To automatically hold respondent liable for the alleged tax deficiencies against the claim for refund pertaining to the same category of tax would be unjust as it would deprive respondent the opportunity to dispute the same in the proper venue, and not afford respondent the defenses available under the law.

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[7] Ibid

Moreover, to stress, the CTA has no assessment power like that of petitioner CIR. It is only empowered to determine whether the proper tax was paid by the taxpayer-claimant, or whether the taxpayer-claimant has paid a certain kind of tax that he or she is not subject to but failed to pay the proper tax that he/she is liable to pay. In such case, the issue of claim for tax refund is intertwined with the issue of proper taxes that are due from the taxpayer.

Lastly, in the same *SMI-ED Philippines* case invoked by petitioner, the Supreme Court further clarified that any tax deficiency liability of a taxpayer-claimant in a refund case may not be collected in the same refund case where the sole issue therein is the taxpayer-claimant's entitlement to refund. We quote as follows:

> **"Any liability in excess of the refundable amount, however, may not be collected in a case involving solely the issue of the taxpayer's entitlement to refund. The question of tax deficiency is distinct and unrelated to the question of petitioner's entitlement to refund. Tax deficiencies should be subject to assessment procedures and the rules of prescription. The court cannot be expected to perform the BIR's duties whenever it fails to do so either through neglect or oversight. Neither can court processes be used as a tool to circumvent laws protecting the rights of taxpayers." *(Emphasis supplied)*[8]**

Hence, petitioner's prayer that the Court adjudge deficiency tax liability (VAT in this case) on the disallowed portion of respondent's refund claim for the same category of tax sought to be refunded must necessarily fail.

Except for the arguments addressed above, the Court *En Banc* finds that the rest of the arguments raised in the instant *Motion for Reconsideration* are mere reiteration of matters alleged in his Petition for Review, which have already been considered, weighed and resolved in the assailed Decision.

In sum, the Court *En Banc* finds no new or substantial matter, or compelling grounds that justifies the reversal or modification of the assailed Decision.

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[8] Ibid

WHEREFORE, in light of the foregoing considerations, petitioner's *Motion for Reconsideration* is **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice