REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

AMADEUS MARKETING PHILIPPINES, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA *EB* NO. 2496
(CTA Case No. 9904)

Present:

DEL ROSARIO, *P.J.*,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO,
CUI-DAVID, *and*
FERRER-FLORES, *JJ.*

Promulgated:

SEP 15 2023 1:06 pm

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RESOLUTION

Before the Court *En Banc* is the *Motion for Reconsideration*[1] filed by petitioner on April 3, 2023, assailing the Decision[2] promulgated on March 16, 2023, the dispositive portion of which reads:

> **WHEREFORE**, premises considered, the *Petition for Review* filed by Amadeus Marketing Philippines, Inc. is **DENIED** for lack of merit.
>
> The Decision dated January 15, 2021 and Resolution dated June 15, 2021 rendered by the Court in Division in CTA Case No. 9904 are **AFFIRMED**.
>
> **SO ORDERED.**

[1] *En Banc (EB)* Docket, pp. 99-119.
[2] *EB* Docket, pp. 76-94.

The assailed Decision sustained the ruling of the Court in Division denying petitioner's claim for refund of the amount of ₱16,818,797.89, allegedly representing its unutilized input value-added tax (VAT) for the four (4) quarters of the taxable year 2016.

In its bid for a reconsideration of the adverse Decision, petitioner submits that the Travel Agency Management Agreement System (TAMS) Distribution Agreement may be admitted into evidence as it has formed part of the records with its inclusion in petitioner's *Motion for Reconsideration* filed on February 3, 2021, which respondent allegedly did not oppose. Moreover, petitioner claims that it has presented all available evidence to prove that it is entitled to a VAT refund. To single out the TAMS Distribution Agreement and ignore all other available evidence on record – including the ACO Agreement, would not be in keeping with the Supreme Court's pronouncement "*not to hold Rules of Procedure as ends unto themselves.*"

Petitioner likewise submits that it is not an agent of Amadeus Spain in the Philippines but an independent distributor, considering the TAMS Distribution Agreement and the ACO Agreement. Hence, for petitioner, Amadeus IT Group S.A. (AGSA) is a foreign corporation not doing business in the Philippines.

By way of *Comment/Opposition (Re: Motion for Reconsideration dated 31 March 2023)*[3] posted on May 15, 2023 and received by the Court *En Banc* on May 18, 2023, respondent submits that the Court *En Banc* did not err in affirming the Court in Division's denial of petitioner's claim for refund based on its finding that AGSA, the recipient of petitioner's services, is doing business in the Philippines. Also, respondent adopts the position of *Presiding Justice* Roman G. Del Rosario in his *Concurring Opinion* that petitioner's judicial claim for refund was belatedly filed, rendering the Court in Division bereft of jurisdiction to take cognizance of the case.

Petitioner's *Motion for Reconsideration* deserves scant consideration. It presents no new matters or issues, and its arguments are mere reiterations and amplifications of its previous arguments, which have been considered and rejected,

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[3] *EB* Docket, pp. 119-125.

first by the Court in Division and subsequently on appeal, by the Court *En Banc.*

Worth repeating is our disquisition on the matter. We quote:

> Petitioner believes that by presenting in evidence AGSA's Foreign Articles/Certificate of Association, along with the SEC Certificate of Non-Registration, it had already demonstrated that AGSA is a foreign entity doing business outside of the Philippines.
>
> *We* are not convinced.
>
> Indeed, the Court *En Banc,* in a litany of cases, ruled that the presentation of *both* Foreign Articles/Certificate of Incorporation and SEC Certificate of Non-Registration will ordinarily prove that an entity is a foreign corporation not doing business in the Philippines. However, an exception to this rule is when there is clear and convincing evidence that would prove *otherwise.*
>
> xxx xxx xxx
>
> In this case, petitioner appealed its unsuccessful administrative claim for refund with the BIR. Thus, it is imperative for petitioner to illustrate before this Court not only that it is entitled to a refund, but also that the CIR should not have denied it in the first place.
>
> However, as aptly observed by the Court in Division in the assailed Decision:
>
>> **While notably, petitioner made certain allegations and arguments, in the instant *Petition for Review,* against the findings of the BIR for denying its claim, thereby admitting the existence of the TAMS Distribution Agreement entered into by Amadeus IT Group S.A. referred to the denial letter of the BIR, petitioner never presented or offered any evidence to prove the said allegations.** Needless to state, the basic rule is that mere allegation is not evidence and is not equivalent to proof. Interestingly, despite the admission of petitioner of the existence of the said Distribution Agreement, it did not offer the same in evidence for this Court's examination. This then calls for the application of the presumption "[t]*hat evidence willfully suppressed would be adverse if produced.*"
>>
>> Moreover, **it is noted that the main allegations or arguments of petitioner, in the instant Petition for Review, is that what is being earned by Amadeus IT Group S.A., under the said TAMS Distribution Agreement, are royalties, and that the same are merely "passive income," which is allegedly defined as "separate from general income earned from active**

> **pursuit of business**." Thus, according to petitioner, on the basis thereof, Amadeus IT Group S.A. cannot qualify as doing business in the Philippines. To show that royalties are passive income, petitioner cites, as legal basis, the following provisions of the NIRC of 1997, as amended by RA No. 9337, to wit: xxx (*Boldfacing supplied*)

Indeed, petitioner's failure to present the TAMS Distribution Agreement, which is the basis of the denial of its administrative claim, is fatal to its judicial appeal of an unsuccessful administrative claim for refund. In fact, as the Court in Division correctly ruled, the failure of petitioner to present the TAMS Distribution Agreement effectively deprived the Court to determine whether the finding of respondent or the BIR was erroneous.

Even assuming for the sake of argument that the TAMS Distribution Agreement is considered, as the same was attached in petitioner's *Motion for Reconsideration* of the assailed Decision, the same will only bolster the finding that AGSA is doing business in the Philippines.

Under the said Distribution Agreement (wherein Amadeus Global Travel Distribution S.A. is referred to as "AMADEUS," while petitioner is referred to as "AMADEUS NMC"), the following provisions are found:

> "The Main Agreement Definitions are applicable under this Agreement.
>
> 'Subscriber' means any travel agent or other entity which has entered into a Subscriber Agreement with AMADEUS NMC for access to the AMADEUS System, and enters into a License Agreement with AMADEUS NMC pursuant to Article 2 below;
>
> xxx xxx xxx
>
> 'Product' means any software and service described in Appendix A hereto, and any related Documentation, as updated from time to time by AMADEUS, distributed by AMADEUS NMC pursuant to this Agreement;
>
> xxx xxx xxx
>
> 'Documentation' means technical data and printed materials related to the Product, and any user or operator manuals provided to AMADEUS NMC for use with the Product;
>
> xxx xxx xxx
>
> 2.1 AMADEUS appoints AMADEUS NMC as its <u>**sole distributor**</u> **of the Product to Subscribers in the Territory defined under Article 3 below**.
>
> 2.2 AMADEUS NMC shall be responsible for marketing the Product to Subscribers located in AMADEUS NMC Territory.

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> 2.3 Subject to the terms and conditions of this Agreement, AMADEUS hereby authorizes AMADEUS NMC to grant to Subscribers, non-exclusive, non-transferable licenses to use the Product for the purpose of facilitating the provision of reservation functions and related services, and to interface with agreed upon travel agency third party software. AMADEUS NMC shall enter into a License Agreement substantially in the form of Appendix C attached hereto, with each Subscriber.
>
> On a case by case basis, AMADEUS NMC may be authorized by AMADEUS to enter into such License Agreements with providers headquartered in the AMADEUS-NMC Territory.
>
> 2.4 Subject to the prior written consent of AMADEUS, which consent shall not be unreasonably withheld, AMADEUS NMC may be authorized to grant such non-exclusive, non-transferable licenses to affiliate offices owned by shareholders of AMADEUS NMC.
>
> xxx xxx xxx
>
> 3.1 AMADEUS NMC is granted the following Territory:
>
> THE PHILIPPINES
>
> xxx xxx xxx
>
> 12.1 Except as provided in Section 4.4, AMADEUS NMC agrees and acknowledges that AMADEUS has and shall retain all title, copyright and other proprietary rights in and to the Product and that AMADEUS NMC shall obtain only such rights to use or market the Product as are expressly provided in this Agreement."

Admittedly, Amadeus Global Travel Distribution S.A. and AGSA are the same. Thus, based on the foregoing, while AGSA designated petitioner as its "sole distributor" in the Philippines, the former has, in effect, appointed petitioner as its agent in the Philippines.

By the contract of agency, a person binds himself to render some service or to do something in representation or on behalf of another, with the consent or authority of the latter.

In *MR Holdings, Ltd. vs. Sheriff Carlos P. Bajar et al.* ("MR Holdings case"), the Supreme Court made the following pronouncements as to what constitutes "doing business in the Philippines" on the part of a foreign corporation, to wit:

> ".... The question whether or not a foreign corporation is doing business is dependent principally upon the facts and circumstances of each particular case, considered in the light of the purposes and language of the pertinent statute or statutes involved and of the general principles governing the jurisdictional authority of the state over such corporations.

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Batas Pambansa Blg. 68, otherwise known as 'The Corporation Code of the Philippines,' is silent as to what constitutes 'doing' or 'transacting' business in the Philippines. Fortunately, jurisprudence has supplied the deficiency and has held that the term 'implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of, the purpose and object for which the corporation was organized.' In *Mentholatum Co., Inc. vs. Mangaliman,* this Court laid down the test to determine whether a foreign company is 'doing business,' thus:

> '... **The true test, however, seems to be whether the foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another.** (*Traction Cos. vs. Collectors of Int. Revenue* [C.C.A., Ohio], 223 F. 984,987.) ...'

The traditional case law definition has metamorphosed into a statutory definition, having been adopted with some qualifications in various pieces of legislation in our jurisdiction. For instance, Republic Act No. 7042, otherwise known as the 'Foreign Investment Act of 1991,' defines 'doing business' as follows:

> 'd) The phrase 'doing business' shall include soliciting orders, service contracts, opening offices, whether called 'liaison' offices or branches; **appointing representatives or distributors domiciled in the Philippines** or who in any calendar year stay in the country for a period or periods totaling one hundred eight(y) (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity, or corporation in the Philippines; **and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works; or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization**; Provided, however, That the phrase 'doing business' shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor, nor having a nominee director or officer to represent its interests in such corporation, nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account.' (*Emphasis supplied*)

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> Likewise, Section 1 of Republic Act No. 5455, provides that:
>
>> SECTION 1. Definition and scope of this Act. — (1) x x x the phrase 'doing business' shall include soliciting orders, purchases, service contracts, opening offices, whether called 'liaison' offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totaling one hundred eighty days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines; **and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization**.
>
> There are other statutes defining the term 'doing business' in the same tenor as those above-quoted, and as may be observed, **one common denominator among them all is the concept of 'continuity**.'" (*Boldfacing supplied*)

Likewise, in *Commissioner of Internal Revenue vs. British Overseas Airways Corporation, et al.*, the Supreme Court ruled, thus:

> "... **In order that a foreign corporation may be regarded as doing business within a State, there must be continuity of conduct and intention to establish a continuous business, such as the appointment of a local agent, and not one of a temporary character**. " (*Boldfacing supplied*)

Simply put, so that a foreign corporation may be considered engaged in trade or business, its business transaction must be continuous. And such continuity may be shown by "*the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain or for the purpose and object of the business organization*" and is exemplified by "*the appointment of a local agent.*"

In this case, petitioner acts as the representative of AGSA in that while the latter retains all title, copyright, and other proprietary rights in and to the subject Product, petitioner has been authorized to grant to the Subscribers non-exclusive, nontransferable licenses to use the same. In other words, instead of AGSA itself granting licenses to Subscribers, as the owner of the said Product, it is being done

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> by petitioner on behalf of the former in the Philippines. Thus, there can be no doubt that petitioner is constituted as the local agent of AGSA in the Philippines.
>
> Further, by entering into the TAMS Distribution Agreement dated January 1, 2001 with petitioner, AGSA clearly intended to establish a continuous business in the Philippines.
>
> Correspondingly, with petitioner acting as an agent of AGSA, the finding that AGSA is doing business in the Philippines will even be bolstered, if not strengthened, considering the TAMS Distribution Agreement.

To rule on the same issues again is a waste of time and dwindling resources of the Court.

All told, *We* find no cogent reason to reconsider or modify our Decision promulgated on March 16, 2023.

WHEREFORE, premises considered, petitioner's *Motion for Reconsideration* is **DENIED** for lack of merit.

SO ORDERED.

LANEE S. CUI-DAVID
Associate Justice

We Concur:

(See Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(With due respect, I maintain my opinion that the judicial claim was filed out of time)
CATHERINE T. MANAHAN
Associate Justice

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JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

Marian Ivy F. Reyes - Fajardo
MARIAN IVY F. REYES-FAJARDO
Associate Justice

CORAZON G. FERRER-FLORES
Associate Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

AMADEUS MARKETING PHILIPPINES, INC., Petitioner,	**CTA EB No. 2496** (CTA Case No. 9904)
	Present:
- versus -	**DEL ROSARIO,** *P.J.*, **RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO, REYES-FAJARDO, CUI-DAVID,** and **FERRER-FLORES,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: SEP 1 5 2023 1:06pm

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur in the result.

I am constrained to expound on the position I have taken in my Concurring Opinion on the assailed Decision.

In a number of cases after I issued my Concurring Opinion, I have taken the position that a taxpayer has two (2) options as to when he can interpose an appeal on his administrative claim for refund: (1) await the decision or ruling of the CIR and file a petition for review within thirty (30) days upon receipt of such decision or ruling; or, (2) appeal the inaction within thirty (30) days upon the lapse of the ninety (90)-day period.

On this point, I reiterate the view I expressed in my Dissenting Opinion in *Kurimoto (Philippines) Corporation vs. Commissioner of Internal Revenue*,[1] *viz.*:

> "Prior to the enactment of Republic Act (RA) No. 10963 or the Tax Reform for Acceleration and Inclusion (TRAIN) Law, Section 112(C) of the National Internal Revenue Code (NIRC) of 1997, as amended, reads:
>
> > "Sec. 112. *Refunds or Tax Credits of Input Tax.* - xxx
> >
> > *(C) Period Within Which Refund or Tax Credit of Input Taxes shall be Made.* - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within **one hundred twenty (120) days** from the date of submission of complete documents in support of the application filed in accordance with Subsection (A).
> >
> > In case of full or partial denial of the claim for tax refund or tax credit, **<u>or the failure on the part of the Commissioner to act on the application</u> within the period prescribed above**, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, **appeal the decision or the unacted claim with the Court of Tax Appeals**." *(Boldfacing and underscoring supplied)*
>
> In construing the aforequoted provision, the Supreme Court opined that the thirty (30)-day period within which an appeal may be made commences either from receipt of the **denial** of the claim for refund or tax credit **<u>OR</u>** after the **expiration** of the 120-day period within which the Commissioner of Internal Revenue (CIR) is mandated to act on the claim, whichever comes first. Said the Supreme Court:
>
> > "The judicial claim shall be filed within a period of 30 days after the receipt of respondent's decision or ruling[,] or after the expiration of the 120-day period, **whichever is sooner**."[2] *(Boldfacing supplied)*
>
> With the enactment of the TRAIN Law, Section 112(C) of the NIRC of 1997, as amended, now reads:
>
> > "Sec. 112. Refunds or Tax Credits of Input Tax. - xxx
> >
> > (C) *Period within which Refund of Input Taxes shall be Made.*— In proper cases, the Commissioner shall grant a refund for creditable input taxes within **ninety (90) days** from the date of submission of the official receipts or invoices and other documents in support of the application filed in accordance with Subsections (A) and (B) hereof:

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[1] CTA Case No. 10156, July 18, 2023.

[2] *Silicon Philippines, Inc. (Formerly Intel Philippines Manufacturing, Inc.) vs. Commissioner of Internal Revenue*, G.R. No. 182737, March 2, 2016.

> *Provided*, That should the Commissioner find that the grant of refund is not proper, the Commissioner must state in writing the legal and factual basis for the denial.
>
> In case of full or partial denial of the claim for tax refund, the taxpayer affected may, within thirty (30) days from the **<u>receipt of the decision denying the claim</u>, appeal the decision with the Court of Tax Appeals**: *Provided, however,* That failure on the part of any official, agent, or employee of the BIR to act on the application within [the ninety (90)-day period] shall be punishable under Section 269 of this Code." *(Boldfacing and underscoring supplied)*

At once glaring is the fact that under the TRAIN Law, the reckoning of the thirty (30)-day period within which an appeal to the Court of Tax Appeals (CTA) may be made specifies **only <u>one circumstance</u>**, that is-from receipt of the decision of the CIR denying the claim for tax refund. **The provision, as worded, does not give the taxpayer the privilege to appeal the inaction of the CIR to act on the administrative claim within the prescribed period.**

xxx xxx xxx

I am not unaware of Section 7(a)(2) of RA No. 1125, as amended by RA No. 9282, which reads as follows:

> "Sec. 7. *Jurisdiction*. - The CTA shall exercise:
>
> a. Exclusive appellate jurisdiction to review by appeal, as herein provided:
>
> xxx xxx xxx
>
> 2. **Inaction by the Commissioner of Internal Revenue in cases involving** disputed assessments, **refunds of internal revenue taxes**, fees or other charges, penalties in relations thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, **where the National Internal Revenue Code provides a <u>specific period of action</u>, in which case the inaction shall be <u>deemed a denial</u>**; x x x" *(Boldfacing and underscoring supplied)*

The above-cited provision of RA No. 1125, as amended, grants jurisdiction to the CTA when: (i) there is a "specific period of action" given to the CIR within which to decide an administrative claim for refund; **<u>and</u>**, (ii) the CIR fails to act on the refund claim within the said period. The inaction of the CIR shall be deemed a denial of the refund claim, and the taxpayer may appeal said inaction within the thirty (30)-day period reckoned from the lapse of the specific period.

Section 7(a)(2) of RA No. 1125, as amended, is a **general provision** on modes of appeal applicable to inactions of the CIR, including: (a) refunds of taxes, fees and charges, as provided in

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Section 229 of the NIRC of 1997, as amended; (b) assessment cases under Section 228 of the NIRC of 1997, as amended; and, (c) "other matters" arising from the NIRC of 1997, as amended, and laws administered by the BIR.

On the other hand, the procedure on appeal under **Section 112(C) of the NIRC of 1997**, as amended, is confined solely to cases involving claims for refund of unutilized input VAT attributable to **zero-rated sales**.

In *Department of Energy vs. Court of Tax Appeals*,[3] the Supreme Court elucidated on the difference between a special law and general law, and the interpretative rule when faced with such statutes, *viz.*:

> "The Court has defined a **general law** as 'a law which applies to all of the people of the state or to **all of a particular class** of persons in the state, with equal force and obligation.' x x x [I]t was also described as 'one which embraces a class of subjects or places and does not omit any subject or place naturally belonging to such class.' On the other hand, a **special law** is one which 'applies to particular individuals in the state or to a **particular section** or portion of the state only' and which 'relates to particular persons or things of a class.' As the Court has consistently held, where there are two laws which appear to apply to the same subject and where one law is general and the other special, the law specially designed for the particular subject must prevail over the other. Stated more simply, the special law prevails over the general law. *Generalia specialibus non derogant.*" *(Boldfacing supplied)*

At any rate, even assuming that an appeal upon the expiration of the ninety (90)-day period may be allowed, still, **such legal scenario does not preclude a taxpayer from interposing an appeal from receipt of the decision of the CIR, which is <u>clearly consistent with Section 112(C) of the NIRC of 1997, as amended by the TRAIN Law</u>**." *(Boldfacing and underscoring supplied)*

In this case, petitioner's administrative claim for refund was filed on **March 28, 2018**.[4] From the filing of petitioner's administrative claim, the CIR had ninety (90) days therefrom, or until **June 26, 2018** within which to decide the refund claim. Records reveal that petitioner's administrative claim for refund was denied by the BIR, through Regional Director Glen A. Geraldino, in a VAT Refund/Credit Notice dated June 21, 2018, which was received by petitioner only on **July 9, 2018**.[5]

Considering that the Petition for Review in the Court in Division was filed on **August 8, 2018**, I submit that petitioner's judicial claim for

[3] G.R. No. 260192, August 17, 2022.
[4] Exhibits "P-12" and "P-13", Docket, Vol. II, pp. 581-590.
[5] Exhibit "P-66", Docket, Vol. II, p. 690.

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refund was filed within the thirty (30)-day prescriptive period to appeal and the Court in Division had jurisdiction to take cognizance of the case.

All told, I VOTE to: (i) DENY the Motion for Reconsideration for lack of merit; and, (2) AFFIRM the assailed Decision dated March 16, 2023.

ROMAN G. DEL ROSARIO
Presiding Justice