REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

PHILIPPINE COMMUNICATIONS SATELLITE CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 9219

Members:

CASTAÑEDA, JR., *Chairperson,*
MINDARO-GRULLA, *and*
BACORRO-VILLENA, *JJ.*

Promulgated:

DEC 06 2019 9:25 am

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RESOLUTION

CASTAÑEDA, JR., J.:

Before this Court is respondent's **Motion for Reconsideration** filed on September 27, 2019, with petitioner's **Comment (Re: Respondent's Motion for Reconsideration)** filed on November 18, 2019.

In his Motion, respondent moves that the Decision promulgated on September 11, 2019, be reconsidered in cancelling his value added tax (VAT) assessment due to prescription, the dispositive portion of which reads as follows:

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **GRANTED**. Consequently, respondent's deficiency value-added tax (VAT) assessment in the amount of ₱7,336,587.85, inclusive of surcharge and interest, for calendar year 2007 is **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED**."

Respondent assails the above decision, primarily arguing that his right to assess petitioner for deficiency VAT on the sale of its Transport Maintenance Center ("TMC property") has not yet prescribed. He insists that the ten (10) year prescriptive period to assess under section 222(A) of the National Internal Revenue Code of 1997, as amended, should apply considering that petitioner made false declaration in its VAT return.

He also asserts that the TMC property is subject to VAT under Section 106 of the same Tax Code, as implemented by 4.109-1(B)(1)(P) of Revenue Regulations (RR) No. 16-2005, as amended. Respondent insists that petitioner cannot hide behind the documents issued by Revenue District Office (RDO) No. 41 – Mandaluyong City, namely, the One-Time Tax Team's (ONNET) Computation Sheet[1], Certificate Authorizing Registration[2] dated July 2, 2007, and Tax Clearance Certificate[3] dated July 3, 2007, for any subsequent deficiency tax audit. He stresses that the said documents only pertain to a one-time transaction which examines only the documents presented to the RDO for that particular transaction, while, conversely, the Letter of Authority (LOA) No. 0028530[4] dated August 8, 2008 by RDO No. 49 – Makati City was issued for an audit examination of all national internal revenue taxes in a given year.

Lastly, respondent claims that considering the Sworn Statement of the security guard Mr. Felsar Amaro Bohol is the only evidence presented by petitioner as direct proof that the TMC property was no longer used as ordinary asset, the same, however, should be disregarded for being self-serving.

On the other hand, in its comment, petitioner questions respondent's sudden change of defense. Petitioner points out that in his Answer filed on March 2, 2015, respondent then believes that the 10-year prescriptive period shall apply since petitioner allegedly failed to file its VAT return for the sale of the TMX property. Now, in his Motion, respondent counters himself and insists that petitioner made a false declaration in its VAT return, so as to be able to justify the application of the 10-year period. Therefore, petitioner asserts that to invoke a new defense at this late stage of the proceedings violates its right to due process of law.

Petitioner further reiterates that the sale of its TMC property is not subject to VAT for being a capital asset. It insists that at the time of the jc

[1] Exhibit "P-4".
[2] Exhibit "P-7-2".
[3] Exhibit "P-7-1".
[4] Exhibits "R-1" and "R-1-a".

said sale, the TMC property was no longer considered as ordinary asset. Contrary to respondent's allegations, petitioner's chief accountant, its financial statements, and the court-commissioned independent certified public accountant (ICPA) steadily show that prior to its sale on June 29, 2007, the TMC property was no longer used for business by petitioner for more than two (2) years. Petitioner cites Section 3(3) of RR No. 07-03, and the case of *Tomas Calasanz, et al. v. The Commissioner of Internal Revenue, et al.,*[5] to bolster its claim.

After due consideration, this Court finds no merit in respondent's Motion for Reconsideration.

With regard to respondent's application of the 10-year prescriptive period, this Court finds that the same has no leg to stand on. As correctly pointed out by petitioner, respondent is changing his defense by alleging that the basis of the 10-year period is petitioner's falsity in the declaration of its VAT return. Such cannot be countenanced by this Court.

As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided, will not be permitted anymore to change its theory. Points of law, theories, issues and arguments not brought to the attention of the court need not be, and ordinarily will not be, considered in a subsequent review thereof, as these cannot be raised for the first time at such late stage. It would be unfair to the adverse party who would have no opportunity to present further evidence material to the new theory, which it could have done had it been aware of it at the time of the hearing before the court. In fact, it has been held that changing the defense on appeal is an indication of desperation on the part of the party-appellant, due to the seeming inadequacy of his defense adopted in the first instance.

Notably, in his Answer[6] filed on March 2, 2015, respondent interposed as one of his special and affirmative defenses that:

> "3. x x x, the ten (10) year prescriptive period will apply to the Value-Added Tax assessment pursuant to Section 222(A) of the Tax Code, which states that 'In case of false or fraudulent return with the 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

[5] G.R. No. L-26284, October 9, 1986.
[6] Docket (vol. I), pp. 164-166.

any time within ten (10) years after the discovery of the falsity, fraud or **omission**.'"

Accordingly, to permit respondent in this case to change its theory at this stage, would be unfair to petitioner, and would offend the basic rules of fair play, justice and due process.

As to respondent's other argument that the TMC property is subject to VAT since there was no direct and sufficient evidence presented by petitioner that tends to prove that the TMC property was no longer used as an ordinary asset, this Court does not agree.

In the case of *Antonio Tuason, Jr. v. Jose B. Lingad,*[7] the Supreme Court held that, "[c]onsequently, it is the taxpayer's burden to bring himself clearly and squarely within the terms of a tax-exempting statutory provision, otherwise, all fair doubts will be resolved against him. It bears emphasis nonetheless that in the determination of whether a piece of property is a capital asset or an ordinary asset, a careful examination and weighing of all circumstances revealed in each case must be made."

As educed in the present case, petitioner offered as testimonial evidence the judicial affidavits of its witnesses, petitioner's Chief Accountant, Ms. Zenaida A. Alcantra[8], and the court-commissioned ICPA, Atty. Arminda Acyatan-Guerrero[9]. They were further corroborated by petitioner's documentary evidence, namely, the Audited Financial Statement for year 2007-2008[10]; annual income tax returns for 2004 to 2007[11]; Establishment Termination Reports submitted to the Department of Labor and Employment (DOLE)[12]; and, the independent certified public accountant (ICPA) report.

Careful examination and weighing of the abovementioned evidence prove the financial loss that petitioner underwent which gave rise to the TMC property being idle and abandoned, thereby converting the property from ordinary to capital asset.

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[7] G.R. No. L-24248, July 31, 1974.
[8] Exhibits "P-22" and "P-22-a"; Sworn Statement of Ms. Zenaida A. Alcantra dated May 5, 2016, docket (vol. I), pp. 540-565.
[9] Exhibits "P-50" and "P-50-a"; Sworn Statement of Ms. Arminda Acyatan-Guerrero dated November 2016, docket (vol. II), pp. 839-852.
[10] Exhibit "P-20".
[11] Exhibits "P-23" to "P-26".
[12] Exhibits "P-27-1" to "P-27-11".

More so, it is also worth mentioning that in the case of *Danilo Hernandez v. Court of Appeals, et al.,*[13] the Supreme Court had the occasion to rule on what is self-serving statements in this wise, *viz.*:

> "The common objection known as 'self-serving' is not correct because almost all testimonies are self-serving. The proper basis for objection is 'hearsay' (Wenke, Making and Meeting Objections, 69).
>
> Petitioner fails to take into account the distinction between self-serving statements and testimonies made in court. Self-serving statements are those made by a party out of court advocating his own interest; they do not include a party's testimony as a witness in court (National Development Co. v. Workmen's Compensation Commission, 19 SCRA 861 [1967]).
>
> Self-serving statements are inadmissible because the adverse party is not given the opportunity for cross-examination, and their admission would encourage fabrication of testimony. This cannot be said of a party's testimony in court made under oath, with full opportunity on the part of the opposing party for cross-examination."

Henceforth, in view of the foregoing, this Court finds no cogent reason to merit any modification or reversal of the assailed Decision dated September 11, 2019.

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

SO ORDERED.

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

We Concur:

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

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

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[13] G.R. No. 104874, December 14, 1993.