REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

INTERNATIONAL CONTAINER TERMINAL SERVICES, INC., *Petitioner,*	**E.B. No. 277** (C.T.A. AC NO. 11)
	Present:
-versus-	**ACOSTA, *P.J.*** **CASTAÑEDA, Jr.,** **BAUTISTA,** **UY,** **CASANOVA, and** **PALANCA-ENRIQUEZ, *JJ*:**
THE CITY OF MANILA, LIBERTY M. TOLEDO, in her capacity as TREASURER OF MANILA and GABRIEL ESPINO, in his capacity as RESIDENT AUDITOR OF MANILA, and the CITY COUNCIL OF MANILA, *Respondents.*	**Promulgated:** SEP 05 2008

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DECISION

ACOSTA, PJ.:

Before this Court is a Petition for Review *En Banc* filed on April 3, 2007, assailing the Decision of this Court's Second Division (Second Division) dated May 17, 2006 and the subsequent Resolution dated February 22, 2007 affirming the assailed Decision.

In the assailed Decision, the Second Division found that there was direct double taxation when respondent imposed the additional local business tax under Section 21(A) of Manila Ordinance No. 7794, as amended by Section 1(G) of Ordinance No. 7807, in addition to the business tax currently being paid by petitioner under Section 18 of Manila Ordinance No. 7794, as amended. Thus, the Second Division ordered respondents to partially refund petitioner the amount of P6,224,250.00, representing the additional business taxes, which was erroneously paid for the first three quarters of taxable year 1999, and desist from further imposing the same on petitioner.

The antecedent facts are as follows:

Petitioner International Container Terminal Services, Inc. (ICTSI) is a corporation duly organized and existing under the laws of the Philippines, with principal place of business at ICTSI Administration Building, Manila International Carrier Terminal (MCIT), MCIT South Access Road, North Harbor, Manila. It is engaged in the business of servicing the stevedoring, arrastre, and warehousing needs of local and international shipping vessels in the Philippines.

Respondent City of Manila is a public corporation, created and existing pursuant to law: Co-respondent City Counsel of Manila is the law-making body of the City of Manila, vested by law with the power and authority to appropriate funds, among others; co-respondent Liberty M. Toledo is the incumbent Treasurer of the City of Manila; and co-respondent Gabriel Espino is the incumbent Resident Auditor of the City of Manila. All of them may be served with the processes of this Court through its counsel of record, the City Legal Officer of Manila, whose office is located at the Second Floor, City Hall of Manila.

Upon renewal of its business license for the year 1999, petitioner was assessed of another business tax, on top of the business tax currently being paid, in the amount of P6,244,250.00 for the year 1999, computed at fifty percent (50%) of one percent (1%) of the gross receipts in 1998, pursuant to Section 21(A) of Manila Ordinance No. 7794, as amended by Section 1(G) of Manila Ordinance No. 7807. Petitioner

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paid the assessment, but protested it in a letter dated July 15, 1999. The protest letter was received by respondents on the same day.

Respondent City Treasurer failed to decide petitioner's protest within sixty (60) days from its filing. Consequently, on September 15, 1999, petitioner filed with the Regional Trial Court (RTC) a *Petition for Certiorari and Prohibition (with Prayer for the Issuance of a Temporary Restraining Order)* under Rule 65 of the Rules of Court.

During the hearing on the application for a *Temporary Restraining Order* on September 17, 1999, petitioner's counsel failed to appear and the City Legal Officer, then present, filed a *Motion to Dismiss* based on the following grounds:

> "(1) that under Section 187 of the Local Government Code of 1991, the time to question the legality of Section 21 (A) of Ordinance No. 7807, as amended by Section 21 (G) of Ordinance No. 7807, should be within 30 days from the effectivity of the tax, and this period had long lapsed; and
>
> (2) that assuming the reglementary period has not yet lapsed, the petition should be dismissed for failure to exhaust administrative remedies since the question of constitutionality should be lodge before the Secretary of Justice."

On the same day, the RTC issued an Order dismissing the *Petition for Certiorari and Prohibition*; relevant portions of the Order read:

> "ORDER
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> Atty. Floreza failed to appear and such failure is fatal to his cause.
>
> The Court gave the floor to both Atty. Monsod, the City Legal Chief and the City Treasurer as well as the resident Auditor Mr. Montalbo and their manifestations are all in the records. They convinced the Court that indeed the petitioner has no cause of action.

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Wherefore, as prayed for them, this case is ordered dismissed, and that the dismissal is final."

The above Order prompted petitioner to file a *Motion for Reconsideration and Clarification* on September 23, 1999. However, on October 1, 1999, the RTC issued an Order dismissing the *Petition for Certiorari and Prohibition* the second time. The Order is quoted as follows:

"ORDER

Submitted for the resolution is a Motion for Clarification of the Order of Dismissal.

A cursory reading of the order readily spells out what it means, which is a dismissal of the case.

The petition is clear that it is to review the actuations of the city Treasurer of Manila in pursuing to collect a tax in obedience to City Ordinance No. 7794 as amended by Ordinance No. 7807 which has not been declared invalid, as well as the actuations of the Resident Auditor in ordering the City Treasurer and his agents and representatives to collect the tax in question.

Atty. Floreza's argument is revolving around one point, that he is suing under Section 187 but is doing so under Section 195 of the Local Government Code, as amended. Section 195 of the Local Government Code, in part, provides that if the Local Treasurer finds the assessment correct, he shall deny the protest and the taxpayer have thirty days from the receipt of denial or from the lapse of sixty (60) day period, to appeal therefrom with a competent court, otherwise the assessment becomes conclusive and unappealable.

As it looks, the petition for certiorari filed by petitioner is premature. There should be an appeal to a competent court which shall first be resolved. Should the appeal be resolved favorably to the City, then no petition for certiorari should ever be filed. Should it be resolved against the City, then the petition is most proper. That is the only time when the competent court can review the actuations of the City Treasurer in pursuing the collection of a tax which had already been resolved to be not due to the city.

It appears on record and from the manifestation of the petitioner's lawyer himself, that the petitioner received a copy of the assessment on July 5, 1999. The records, further, show that the protest

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> against the assessment was filed by the petitioner, as appearing on Annex F attached to the petition, on July 15, 1999; 60 days therefrom would be September 13, 1999, such that the petitioner had a 30-day period from September 13 or up to October 13, 1999 within which to lodge their appeal before the Court and, until and unless said appeal is decided favorably to the petitioner, the present petition would have no leg to stand on.
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> The petition for certiorari is accordingly, dismissed for the second time and this dismissal is final."

Aggrieved, petitioner appealed the Orders of dismissal to the Court of Appeals (CA).

On July 26, 2002, the CA rendered a decision setting aside the Orders of the RTC dated September 17, 1999 and October 1, 1999. It ordered that the case be remanded to the RTC for further proceedings to resolve the issue of petitioner's taxability under Section 21(A) of Manila Ordinance No. 7794, as amended by Section 1(G) of Manila Ordinance No. 7807 which was not properly ventilated due to the hasty dismissal of the *Petition for Certiorari and Prohibition.* For failure of respondents to file a *Motion for Reconsideration* of the CA's decision, the same became final and executory on August 21, 2002.

During the period when the case was remanded to the RTC, petitioner filed an *Amended and Supplemental Petition* on July 11, 2003[1] where it alleged, among others, that since the filing of the petition with the lower court, respondent City Treasurer had been continuously assessing and collecting from petitioner, the additional business taxes under Section 21(A) of Manila Ordinance No. 7794, as amended by Section 1(G) of Manila Ordinance No. 7807. Since the payments of the same were pre-condition to the renewal of petitioner's business permit, petitioner was compelled to pay and has been paying under protest. Petitioner amended its prayer to

[1] Annex "C-1", *Rollo* page 115

include, among others, the refund of the assailed business taxes not only for the first three quarters of 1999, but also the taxes it continuously paid thereafter.

On February 28, 2005, the RTC rendered a Decision dismissing the *Amended and Supplemental Petition*, for the same reason that the earlier original *Petition* was dismissed the second time. Portions of the same are hereby quoted as follows:

> "The main thrust of petitioner's argument is, that respondent City Treasurer and the Resident Auditor of Manila should be prohibited from continuing the further implementation of the provisions of Section 21 (A) of Ordinance No. 7794 as amended on Ordinance No. 7807.
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> xxx
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> The Local Government Code, under Section 195 provides:
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> 'xxx within 60 days from the receipt of the notice of assessment, the taxpayer may file a written protest with the Local Treasurer contesting the assessment; otherwise, the assessment shall become final and executory. The Local Treasurer shall decide the protest within 60 days from the time of its filing xxx. However, if the Local Treasurer finds the assessment to be wholly or partly correct, he shall deny the protest, wholly or partly, with notice to the taxpayer. The taxpayer shall have 30 days from receipt of the denial of the protest or from the lapse of the 60 day period prescribed herein within which to appeal with the court or competent jurisdiction, otherwise the assessment becomes conclusive and unappealable.
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> In this case, the Local Treasurer did not act on the protest but continued to collect. From the actuation of the Local Treasurer, it could be clearly deduced that the protest had been denied and therefore ICTSI had 60 day period from the filing of its protest according to the Local Government code, to interpose an appeal to the competent court. The petitioner did not avail of such a remedy and in its stead, it submitted only a Petition for Certiorari to this Court, which is not proper remedy, and the direct result of the non-appeal is – the assessments of the respondents became conclusive and unappealable. Therefore, whether or not the petitioner is entitled to refund, could no longer be looked into by this court."

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Consequently, petitioner filed a *Petition for Review*[2] before this Court on May 11, 2005, praying that this Court will set aside the above Decision of the RTC; order respondents to refund the local business taxes assessed, demanded and collected by them, and paid by petitioner under protest in the amount of P39,268,772.41 corresponding to the periods from 1999 to the first quarter of 2004, plus any and all subsequent payment of taxes until the case is finally decided; order respondents to desist/stop from imposing and collecting the additional local/business tax; and order respondents to pay petitioner attorney's fees. The case was assigned to the Second Division and was submitted for Decision on October 28, 2005.

The Second Division promulgated a Decision[3] on May 17, 2006, finding that there was direct double taxation. Nonetheless, the Second division ordered the refund of only P6,224,250.00, representing the additional taxes paid under protest for the first three quarters of 1999. Petitioner's claim corresponding to the other periods was denied for its failure to substantiate the same, and for failure to show compliance with the procedural requirements laid down under Section 195 of the Local Government Code (LGC), as amended.

The Decision likewise stated that even granting that petitioner filed a protest to the assessments after the first three quarters of 1999, through a letter dated June 17, 2003; the same was never submitted to the Court. Accordingly, there was no way of verifying the total amount of taxes and the taxing period covered in said letter protest. The dispositive portion of the said Decision reads:

> "**IN VIEW OF THE FOREGOING,** the assailed Decision of the Regional Trial Court, Branch 49 dated February 28, 2005 is hereby **SET ASIDE** and the claim for refund is **PARTIALLY GRANTED.**
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> Accordingly, respondents are hereby: (a) **ORDERED TO REFUND** to petitioner the reduced amount of P6,224,250.00

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[2] Annex "C", *Rollo,* page 83
[3] Annex "A", *Rollo,* page 50

representing the local business taxes erroneously paid in the third quarter of 1999; and (b) **ORDERED TO DESIST** from further imposing the additional taxes under Section 21 (A) of the Manila Ordinance No. 7794, as amended by Section 1 (G) of Ordinance No. 7807, on petitioner.

Petitioner's prayer for the award of attorney's fees and interest is **DENIED**.

SO ORDERED."

Petitioner filed a *Motion for Partial Reconsideration*[4] on June 13, 2006. It argued, among others, that the assessment issued by respondents for the first three quarters of 1999 is a deficiency tax assessment since it covered back taxes. The applicable remedy therefore is Section 195 of the LGC which applies to deficiency business taxes. On the other hand, the additional business taxes paid by petitioner subsequent to the first three quarters of 1999, all pertained to taxes for the then current taxable periods and not to deficiency taxes. What the Second Division should have applied is Section 196 of the LGC on claims for refund of erroneously or illegally collected taxes.

Petitioner continued that with respect to the requirement of a *written claim* under Section 196, the same was complied with when it filed its June 17, 2003 letter. Further, it maintained that as regards the denial of its claim for failure to submit the June 17, 2003 letter, petitioner asserted that the Second Division should have ordered the elevation of records from the RTC where the said letter is part of its evidence. Nevertheless, petitioner attached the said letter as Annex "A" to the Motion.

For their part, respondents also filed a *Motion for Reconsideration* via registered mail on June 14, 2006 and received on June 21, 2006.

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[4] Annex "D", *Rollo*, page 146

On August 11, 2006, the Second Division issued a Resolution directing the Branch Clerk of Court of the RTC to forward all the records of the case. In compliance, the entire records of the case were forwarded on August 29, 2006.

On February 22, 2007[5], the parties' Motions were denied. The Second Division was not persuaded by petitioner's argument that Section 196 should be applied to its claim subsequent to the first three quarters of 1999, *for being raised for the first time on appeal*. The Second Division reiterated that petitioner's failure to file a written protest for each and every assessment embodied in the Mayor's Permit after the first three quarters of 1999 rendered such assessment final and executory.

After being granted a 15-day extension period, petitioner filed the instant *Petition for Review with Prayer for Temporary Restraining Order and/or Preliminary Injunction* with this Court sitting *En Banc* on April 3, 2007, raising the following errors:

> "1. The 2nd Division of the Honorable court erred in ruling that petitioner can no longer avail of the remedy of refund under Section 196 of the Local Government Code for the payments made by petitioner subsequent to the third quarter of 1999 under Section 21 (A) of the Manila Revenue Ordinance;
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> 2. The 2nd Division of this Honorable Court erred in not ordering the refund of all the taxes paid under Section 21(A) of the Manila Revenue Ordinance."

The Court issued a Resolution on May 3, 2007, ordering respondents to file their Comment on the above-stated Petition and in the meantime, the action on the prayer for *Temporary Restraining Order and/or Preliminary Injunction* was held in abeyance.

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[5] Resolution issued by the Second Division, Annex "B", *Rollo*, page 73

Petitioner filed an *Urgent Motion to Suspend Collection*[6] on June 22, 2007 as a result of respondents' refusal to desist from collecting the additional local business taxes despite the Second Division's Decision ordering respondents to cease and desist from collecting the taxes. In a Resolution dated July 13, 2007[7], the Court *En Banc* granted the urgent motion but only to preserve the *status quo* and subject to the filing by petitioner of a surety bond. Petitioner complied with the surety bond requirement.

On July 31, 2007, respondents filed a *Motion for Reconsideration*[8] of the said Resolution. On September 14, 2007[9], the Court denied respondents' *Motion for Reconsideration* for lack of merit and the instant *Petition for Review En Banc* was submitted for Decision.

The Court will now resolve the issues raised by petitioner *in seriatim.*

The Second Division of this Court erred in ruling that petitioner can no longer avail of the remedy of refund under Section 196 of the Local Government Code for the payments made by petitioner subsequent to the Third Quarter of 1999 under Section 21(A) of the Manila Revenue Ordinance

Petitioner maintains that it previously raised the issue of claiming its refund in accordance with Section 196 of the Local Government Code, as amended, before the City Treasurer and the Regional Trial Court, and not for the first time on appeal. In support, petitioner presented quoted portions of its protest letter dated July 15, 1999; the original *Petition* filed with the RTC on September 15, 1999; *Amended and Supplemental Petition*; and its written claim for refund dated June 17, 2003.

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[6] *Rollo*, page 224
[7] *Rollo*, page 245
[8] *Rollo*, page 269
[9] *Rollo*, page 315

A review of the records of the case would show that the theory of petitioner before the RTC and the Second Division was different from that of the present petition.

To recall, in petitioner's *Amended and Supplemental Petition* filed before the RTC, petitioner **made it clear that the nature of its petition before the RTC** is a *Petition for Certiorari and Prohibition* under Rule 65 of the 1997 Rules of Civil Procedures to ***annul*** **the assessment and collection of the additional local business tax**; relevant portions thereof read:

> **"III – NATURE OF PETITION**
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> 19 – This is a petition for certiorari and prohibition under Rule 65 of the 1997 Rules of Civil Procedures, there being no plain, speedy and adequate remedy in the ordinary course of law, to **annul** the assessment and collection of the additional local business tax under Section 21(A) of Manila Ordinance No. 7794, as amended by Manila Ordinance No. 7807 in the amount of P6,224,250.00 for the first three (3) quarters of 1999 and the additional assessments paid under protest for the subsequent quarters/years; xxx"

Apparently petitioner's aim was to seek the annulment of respondents' assessments for the first three quarters of 1999 and the subsequent years. This means that petitioner chose to *protest the assessment* as provided under Section 195 in contrast to the alternative remedy of refund under Section 196 of the LGC.

In addition, petitioner's discussion focused on the propriety and impropriety of respondents' act in imposing the additional local business tax in order to *support its intent to annul the assessment.* Clearly, petitioner had been consistent in the remedy chosen, that is, to protest the assessment under Section 195 of the LGC.

Petitioner never mentioned the issue and never argued that its action is based on Section 195 and 196 of the LGC; Section 195 with respect to its claim for the first

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three quarters of 1999 and Section 196, with respect to its claim for refund of taxes paid after the first three quarters of 1999.

If it is petitioner's stand to support its claim for refund after the first three quarters of 1999 with Section 196 of the LGC, it would have been easy for petitioner to include such argument in its *Amended and Supplemental Petition* bearing in mind that ***it was given the chance to amend its original Petition.*** Rather, it chose to present arguments to protest the assessment, confirming that the intended remedy by petitioner since the start was Section 195 of the LGC.

Petitioner admitted that it failed to cite Section 196 in the original *Petition* filed before the RTC. However, petitioner submits that such failure is inconsequential because the reglementary period of two (2) years to file a claim for refund provided under Section 196 is much longer than the reglementary period of sixty (60) days to protest a deficiency tax assessment required under Section 195. In other words, by complying with the reglementary period for protesting an assessment under Section 195, petitioner necessarily complied with the 2-year period prescribed under Section 196.

The Court does not subscribe to petitioner's view.

Section 195 and 196 of the LGC are quoted as follows:

> "***SECTION 195. Protest of Assessment.*** – When the local treasurer or his duly authorized representative finds that correct taxes, fees, or charges have not been paid, he shall issue a notice of assessment stating the nature of the tax, fee, or charge, the amount of deficiency, the surcharges, interests and penalties. Within sixty (60) days from receipt of the notice of assessment, the taxpayer may file a written protest with the local treasurer contesting the assessment; otherwise, the assessment shall become final and executory. The local treasurer shall decide the protest within sixty (60) days from the time of its filing. If the local treasurer finds the protest to be wholly or pertly meritorious, he shall issue a notice canceling wholly or partially

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> the assessment. However, if the local treasurer finds the assessment to be wholly or partly correct, he shall deny the protest wholly or partly with notice to the taxpayer. The taxpayer shall have thirty (30) days from the receipt of the denial of the protest or from the lapse of the sixty-day period prescribed herein within which to appeal with the court of competent jurisdiction otherwise the assessment becomes conclusive and unappealable.
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> SECTION 196. ***Claim for Refund of Tax Credit.*** – No case or proceeding shall be maintained in any court for the recovery of any tax, fee, or charge erroneously or illegally collected until a written claim for refund or credit has been filed with the local treasurer. No case or proceeding shall be entertained in any court after the expiration of two (2) years from the date of the payment of such tax, fee, or charge, or from the date the taxpayer is entitled to a refund or credit."

Under Section 195 an assessment should first be issued. If the taxpayer disagrees thereto, he may protest or appeal the same, and the requirements to question the assessment are laid down in Section 195.

The taxpayer may, instead of filing a written protest, opt to pay the tax, fee or charge and then seek a refund thereof within the 2-year statute of limitation. The payment, if an assessment is therefore issued, must be made before the lapse of the 60-day period from receipt hereof; otherwise, the assessment becomes final and executory and it may no longer thus be disputed[10].

Unmistakably, Section 195 and Section 196 of the LGC are two separate and diverse remedies granted to taxpayers, calling for different requirements and conditions for their application. Considering so, petitioner should have been clear on the basis of its action. It cannot be allowed to resort to an *all-encompassing remedy* so that in case it is disqualified under one, it can immediately shift to the other.

When petitioner appealed to the Second Division, the following issues were raised:

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[10] Tax Law and Jurisprudence by Justices Jose Vitug and Ernesto Acosta, Second Edition,, pages 463-464

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1. Whether or not the Petition of petitioner were prematurely filed, or, whether or not the said petition is the "appeal" contemplated in Section 195 of the Local Government Code.

2. Whether or not petitioner is taxable under Section 21(A) of Manila Ordinance No. 7794, as amended by Manila Ordinance No. 7807, given the fact that it is already taxed as a contractor under Section 18 of the same ordinance.

Again, a cursory reading of the above as well as the arguments, discussions and theories in the *Petition for Review* and *Memorandum* filed before the Second Division shows that petitioner's argument/theory on the applicability of Section 196 to its claim after the first three quarters of 1999 was not ascertainable. In contrast, the petition is enclosed with supporting arguments on petitioner's protest to the imposition of the additional local business tax. There was no mention or discussion of Section 196.

From the RTC until the filing of a petition before the Second Division, **emphasis** had been given on petitioner's arguments questioning the assessment.

Petitioner insists that its repetitive assertion that it is seeking the refund of the amount it paid subsequent to the first three quarters of 1999 would show beyond contention that it has been consistently invoking the remedy of refund under Section 196. Furthermore, it maintained that the refund of P6,224,250.00 covered by the deficiency tax assessment and the refund of the taxes paid thereafter are separate causes of action which petitioner joined together through the *Amended and Supplemental Petition* in accordance with Rule 2 of the 1997 Rules of Civil Procedure, which allows the joinder of causes of action.

This Court is of the opinion that since petitioner had already paid the taxes under the questioned assessment; it is now seeking the refund of these taxes on the assumption that the assessment was wrong. The claim for refund is understood as the

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logical and necessary consequence of the alleged improper assessment. In other words, if the assessment is cancelled, petitioner claims to refund those taxes paid. It should not be understood as a claim for refund under Section 196 which is entirely different from Section 195.

Petitioner further asseverates that its initial reliance on Section 195 does not preclude the application of Section 196 to the refund of taxes voluntarily paid by petitioner after the initial deficiency tax assessment.

It is uncontested that the applicability of Section 195 does not preclude the availability of Section 196 as a remedy, but such is beyond the point in discussion. The fact remains that petitioner had been unfailing in arguing its protest to respondents' assessment without being clear that it intended to claim refund under Section 196 with respect to the taxes paid after the first three quarters of 1999.

A party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court will not be permitted to change theory on appeal[11]. *Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as they cannot be raised for the first time at that late stage. Basic considerations of due process impel this rule*[12]. *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 trial court.*[13]

Consequently, when a party deliberately adopts a certain theory, and the case is tried and decided upon that theory in the court below, he will not be permitted to

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[11] Philippine Ports Authority vs. City of Iloilo, G.R. No.109791, July 14, 2003
[12] Del Rosario vs. Bonga, G. R. No. 136308, January 23, 2001
[13] China Airlines Ltd. vs. CA et al., 185 SCRA 449 (1990)

change his theory on appeal because, to permit him to do so, would be unfair to the adverse party.[14]

Therefore, in denying petitioner's *Motion for Partial Reconsideration*, the Second Division was correct in saying that:

> "It is quite late at this stage of the proceeding for petitioner to now take a different posture and argue that Section 196 of the Local Government Code of 1991 ought to be applied for its claim for refund on additional local business taxes it paid for the 4th quarter of 1999 up to the 1st quarter of 2004.
>
> Petitioner is obviously trying to convince this Court that Section 196 should be applied with respect to its claim for refund of additional local business taxes it paid subsequent to the first three (3) quarters of 1999 because it is well aware that it can no longer recover under Section 195 of the Local Government Code when it failed to make a timely written protest of the assessments made against it."

The Second Division of this Court erred in not ordering the refund of all the taxes paid under Section 21(A) of the Manila Revenue Ordinance.

Petitioner maintains that it is entitled to a refund of its claim corresponding to the period after the first three quarters of 1999 when it filed its letter dated June 17, 2003, given that such complied with the requirements for the refund of erroneously paid local business taxes under Section 196 of the LGC, namely:

1. a written claim for refund be filed with the local treasurer; and
2. the judicial claim must be filed within two years from the date of payment or from the date the taxpayer is entitled to a refund or credit,

With respect to the taxes paid after the filing of the written claim for refund, petitioner submits that there was no necessity to make another written claim. It posits that to file a written claim for refund would be an exercise in futility because it would

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[14] Atkins, Kroll & Co., Inc. vs. Chu Hian Tek, 102 Phil 948

be based on the same grounds cited by petitioner in its June 17, 2003 letter and it would eventually be denied or similarly not acted upon by respondents. Nevertheless, it filed a written claim for refund dated August 18, 2005 and January 10, 2007, attached as Annexes "J" and "L", respectively to the instant Petition.

As discussed earlier, the applicability of Section 196 of the LGC can no longer be entertained by this Court for being belatedly raised. Instead, the Court agrees with the Second Division in denying in part, petitioner's claim for failure to comply with the procedural requirements of Section 195.

Thus, in resolving petitioner's *Motion for Partial Reconsideration* and respondents' *Motion for Reconsideration*, the Second Division aptly ruled:

> "To reiterate, petitioner should have filed a written protest within sixty (60) days from receipt of each and every assessment made by respondent embodied in the Mayor's Permit it regularly procured as a pre-condition for the operation of its business. This is regardless of its belief that filing a written protest thereto is a futile exercise because the Local City Treasurer would nevertheless deny it on the same grounds anyway. Whatever its personal belief and stand, petitioner should have followed the procedures provided in Section 195 in order that it could protest the assessment and eventually. If sustained, recover the additional local business taxes it paid.
>
> A taxpayer is given every remedy in law to protect itself against possible abuses that a taxing authority may commit and these remedies should not be ignored or taken lightly but should be taken advantaged of. Under Section 195, petitioner had sixty days (60) days from receipt of the notice of assessment to file a written protest with the local treasurer citing the fact and laws it uses as basis to challenge the assessment. An administrative protest is an integral part of the remedies given to a taxpayer in challenging the legality or validity of the assessment. The phrase 'paid under protest' it wrote on the face of Municipal License Receipt Nos. SML-A-151150 and SML-A-177276 upon payment of the taxes due thereon is not the administrative protest contemplated by law. "

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To reiterate, Section 195 of the LGC is clear. When a taxpayer is assessed and disagrees with the same, it must file a written protest for each and every assessment, for the purpose of contesting the assessment within sixty (60) days from receipt of the notice of assessment. Without a protest the assessment becomes final and executory. Petitioner filed a written protest for the assessment with respect to the first three quarters of 1999 but failed to file to do so for each and every assessment issued thereafter. Thus, the assessments became final and executory and can no longer be questioned.

WHEREFORE, finding no reversible error in the assailed Decision promulgated on May 17, 2006 and Resolution dated February 22, 2007, the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

We Concur:

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

(With Concurring and Dissenting Opinion)
CAESAR A. CASANOVA
Associate Justice

(With Separate Concurring and Dissenting Opinion)
OLGA PALANCA-ENRIQUEZ
Associate Justice

C E R T I F I C A T I O N

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

ERNESTO D. ACOSTA
Presiding Justice

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

INTERNATIONAL CONTAINER TERMINAL SERVICES, INC.,
Petitioner,

E.B. CASE NO. 277
(A.C. No. 11)

- versus -

THE CITY OF MANILA, LIBERTY M. TOLEDO, in her capacity as **TREASURER OF MANILA, and GABRIEL ESPINO,** in his capacity as **RESIDENT AUDITOR OF MANILA,** and the **CITY COUNCIL OF MANILA,**
Respondents.

Present:

ACOSTA, PJ,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, *and*
PALANCA-ENRIQUEZ, JJ.

Promulgated:
SEP 05 2008

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CONCURRING AND DISSENTING OPINION

With due respect to my esteemed colleagues, I am hereby rendering this concurring and dissenting opinion to be discussed in detail as follows:

Petitioner submits the following assigned errors in support of the instant petition:

I. THE *SECOND DIVISION* OF THIS HONORABLE COURT ERRED IN RULING THAT PETITIONER CAN NO LONGER AVAIL OF THE REMEDY OF REFUND UNDER SECTION 196 OF THE LOCAL GOVERNMENT CODE FOR THE PAYMENTS MADE BY PETITIONER SUBSEQUENT TO THE THIRD QUARTER OF 1999 UNDER SECTION 21(A) OF THE MANILA REVENUE ORDINANCE.

II. THE *SECOND DIVISION* OF THIS HONORABLE COURT ERRED IN NOT ORDERING THE REFUND OF ALL THE TAXES PAID UNDER SECTION 21(A) OF THE MANILA REVENUE ORDINANCE.

It is petitioner-ICTSI's primary contention that Section 196 of the Local Government Code (LGC) should have been applied by the *Second Division* in the assailed Decision for its alleged payments done subsequent to the third quarter of 1999 up to the present. ICTSI concluded that applying Section 196 of the LGC would result to the allowance of its claim for refund covering the said period.

It argued that its initial reliance on Section 195 of the LGC does not preclude the application of Section 196 and that Section 195 is not a remedy to recover illegally paid taxes. Furthermore, resort to Section 195 of the LGC is not a condition *sine qua non* to a valid availment of the remedy of refund under Section 196.

ICTSI pointed out that the additional business taxes it paid after the deficiency tax assessment of P6,224,250.00 or after the 3rd Quarter of 1999, all pertained to taxes that were to become due in the next deadlines for payment of local business taxes, not to deficiency or back taxes. In other words, the so-called assessments paid by ICTSI upon renewal of its business permit after the initial deficiency tax assessment for P6,224,250.00 were mere computations of the taxes for the ensuing taxable periods in order to ensure the continued renewal of ICTSI's business permit. It further argued that these computations are statements of accounts or billings for taxes to be paid as a condition for the issuance of the business permit, not deficiency tax assessments which, under Section 195 respondent City Treasurer will cancel upon finding the taxpayer's protest meritorious. ICTSI added that respondent would not have issued a business license which would have exposed ICTSI to the risk of closure of business if this advance payments were not made, therefore, ICTSI allegedly was constrained to pay the so-called assessments, albeit under protest.

Hence, ICTSI is now claiming before the Court *En Banc* that Section 196 of the LGC be applied and prays that all its subsequent payments after the 3rd quarter of 1999 up to the present be refunded to its favor.

It is of my opinion that the instant petition is partly meritorious.

Sections 195 and 196 of the Local Government Code are hereby quoted hereunder for easy reference, to wit:

> "SEC. 195. *Protest of Assessment.* – When the local treasurer or his duly authorized representative finds that correct taxes, fees, or charges have not been paid, he shall issue a notice of assessment stating the nature of the tax, fee or charge, the amount of deficiency, the surcharges, interests and penalties. Within sixty (60) days from the receipt of the notice of assessment the taxpayer may file a written protest with the local treasurer contesting the assessment otherwise, the assessment shall become final and executory. The local treasurer shall decide the protest within sixty (60) days from the time of its filing. If the local treasurer finds the protest to be wholly or partly meritorious, he shall issue a notice cancelling wholly or partly the assessment. However, if the local treasurer finds the assessment to be wholly or partly correct, he shall deny the protest wholly of partly with notice to the taxpayer. The taxpayer shall have thirty (30) days from the receipt of the denial of the protest or from the lapse of the sixty-day period prescribed herein within which to appeal with the court of competent jurisdiction otherwise the assessment becomes conclusive and unappealable." *(Underscoring supplied)*

> "SEC. 196. *Claim for Refund of Tax Credit.* – No case or proceeding shall be maintained in any court for the recovery of any tax, fee or charge erroneously or illegally collected until a written claim for refund or credit has been filed with the local treasurer. No case or proceeding shall be entertained in any court after the expiration of two (2) years from the date of the payment of such tax, fee, or charge, or from the date the taxpayer is entitled to a refund or credit." *(Underscoring supplied)*

The nature of the notice of assessment referred to in Section 195 of the LGC is the same as that of the notice of assessment under Section 228 of the 1997 National Internal Revenue Code. It must be written and shall state the legal basis and nature of the tax, fee or charge, the amount of deficiency, surcharges, interests and penalties.

As briefly discussed by the Supreme Court in the case of *Luz R. Yamane vs. BA Lepanto Condominium Corporation*[1], to wit:

> "Ostensibly, the notice of assessment, which stands as the first instance the taxpayer is officially made aware of the pending tax liability, should be sufficiently informative to apprise the taxpayer the legal basis of the tax. Section 195 of the Local Government Code does not go as far as to expressly require that the notice of assessment specifically cite the provision of the ordinance involved but it does require that it state the nature of the tax, fee or charge, the amount of deficiency, surcharges, interests and penalties. In this case, the notice of assessment sent to the Corporation did state that the assessment was for business taxes, as well as the amount of the assessment. x x x" *(Underscoring supplied)*

In order to apply Section 195 of the LGC, there is a need for the issuance of a notice of assessment stating the nature of the tax, fee or charge, the amount of deficiency, the surcharges, interests and penalties. It is only upon receipt of this notice of assessment that a taxpayer is required to file a protest within sixty (60) days from receipt thereof.

Given the nature of a notice of assessment, it is my opinion that no notice pertaining to deficiency taxes for the periods subsequent to the 3rd Quarter of 1999 up to the present were ever issued or sent by respondents to ICTSI.

In ICTSI's case, as correctly found by the *Second Division*, viz:

> "Records disclose in the instant case that petitioner filed a protest pursuant to Section 195 of the LGC only with respect to the assessment of the amount of P6,224,250.00, which covers the [first three quarters] of 1999. Petitioner protested the said assessment on July 15, 1999 and paid the same amount under protest. This is not controverted by the respondents."

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[1] *Luz R. Yamane, in her capacity as the City Treasurer of Makati City, petitioner vs. BA Lepanto Condominium Corporation, respondent, (G.R. No. 154993, October 25, 2005.).*

Hence, Section 195 of the LGC cannot apply to the period subsequent to the 3rd Quarter of 1999 because ICTSI did not receive any notice of assessment thereafter that states the nature of the tax amount of deficiency and charges.

I will now discuss whether Section 196 of the LGC may apply in the case at bar.

Since ICTSI has been paying taxes under both Sections 18 and 21(A) of Ordinance No. 7794[2], I concur with the findings of the *Second Division* on the existence of double taxation, hence, an illegal collection was done by respondents, to wit:

> "We look into the provisions of Section 18 and Section 21 (A) of Ordinance No. 7794. Section 18 provides:
>
> > 'Section 18. Tax on Contractors. — A percentage tax is hereby imposed on contractors and other independent contractors, in accordance with the following schedule:
> >
> > xxx xxx xxx.'
>
> On the other hand, Section 21 (A) reads:
>
> > 'SECTION 21. Tax on Businesses Subject to the Excise, Value-Added or Percentage Taxes Under the NIRC. — On any of the following businesses and articles of commerce subject to the excise, value-added or percentage taxes under the National Internal Revenue Code hereinafter referred to as NIRC, as amended, a tax of three percent (3%) per annum on the gross sales or receipts of the preceding calendar year is hereby imposed:
> >
> > A) On persons who sell goods and services in the course of trade or business; and those who import goods whether for business or otherwise, as provided for in Sections 100 to 103 of the NIRC as administered and determined by the Bureau of Internal Revenue pursuant to the pertinent provisions of the said code.
>
> Because of strong protests from taxpayers, the City Council of Manila enacted an amendatory ordinance, Ordinance No. 7807, which

[2] *The Revenue Code of the City of Manila, effective July 1, 1993.*

reduced the tax rates from three percent (3%) to Fifty Percent of One Percent (50% of 1%). Thus, Section 21 (A), as amended, provides as follows:

> 'Sec. 21. Tax on Businesses Subject to the Excise, Value-Added or Percentage Taxes Under the NIRC — On any of the following businesses and articles of commerce subject to the excise, value-added or percentage taxes under the National Internal Revenue Code hereinafter referred to as NIRC, as amended, a tax of FIFTY PERCENT (50%) OF ONE PERCENT (1%) per annum on the gross sales or receipts of the preceding calendar year is hereby imposed:
>
> A) On persons who sell goods and services in the course of trade or business; and those who import goods whether for business or otherwise, as provided for in Sections 100 to 103 of the NIRC as administered and determined by the Bureau of Internal Revenue pursuant to the pertinent provisions of the said Code.'

From the foregoing, it is apparent that Section 18 is a tax on contractors while Section 21 (A) is a business tax on persons who sell goods and services in the course of trade or business, and those who import goods whether for business or otherwise. A "contractor" as defined under Section 4 (h) of Ordinance No. 7794 is as follows:

> "SECTION 4. Words and Phrases. — When used in this Ordinance:
>
> h)"Contractor" — includes persons, natural or juridical, not subject to professional tax under Section 11 of said ordinance, whose activity consists essentially of the sale of all kinds of services for a fee, regardless of whether or not the performance of the service calls for the exercise or use of the physical mental faculties of such contractor or his employees.
>
> As used in this Section, the term 'contractor' shall include arrastre proprietors or operators; . . ." (Emphasis supplied)

Based on the aforequoted definition, a contractor is a natural or juridical person that essentially sells all kinds of services for a fee and it includes one engaged in arrastre services such as petitioner. And as a contractor, petitioner was taxed under Section 18 of the subject Manila

> Ordinance. Additionally, it was also held liable to pay business tax under Section 21 (A) for selling services in the course of its business. Evidently, the taxes under Section 18 and Section 21 (A) similarly tax persons, natural or juridical, engaged in the sale of services in the course of its business, which is a clear case of double taxation.
>
> In its strict sense (referred to as direct duplicate taxation or direct double taxation), double taxation means — (a) taxing twice, (b) by the same taxing authority, (c) within the same jurisdiction or taxing district, (d) for the same purpose, (e) in the same year [taxing period], (f) some of the property in the territory. Clearly, all these requisites are present in the case at bench.
>
> Although to a limited extent, there is merit in respondents' claim that double taxation is not prohibited, even the Supreme Court declared that although double taxation in general is not forbidden by our Constitution (since we have not adopted as part thereof the injunction against double taxation found in the Constitution of the United States and some states of the Union), the Highest Tribunal also settled that double taxation becomes "obnoxious" where the taxpayer is taxed twice for the benefit of the same governmental entity or by the same jurisdiction for the same purpose.
>
> As a general rule, the tax powers of local government units are to be liberally construed pursuant to Section 5 (a) of the Local Government Code, but a doubt on the application of a tax ordinance shall be construed strictly against the local government unit except tax exemptions, incentive or relief which shall be construed strictly against the grantee as provided under Section 5 (b) of the same Code."[3](Underscoring supplied)

Given the existence of double taxation, Section 196 of the LGC provides for the remedy of refund or credit. Said section requires that the claim for refund or credit should be filed before the court within two (2) years from the date of payment of such tax, fee or charge or from the date the taxpayer is entitled to a refund or credit. It is also required by the same section that no case or proceeding shall be maintained in any court for the recovery of any tax, fee, or charge erroneously or illegally collected until a written claim for refund or credit has been filed with the local treasurer.

[3] *Page 17 to 20 of May 17, 2006 Decision of Second Division.*

In other words, both the claim for refund before the local treasurer and the court must be done within two (2) years from the payment of such tax, fee, or charge or from the date the taxpayer is entitled to a refund or credit.

ICTSI complied with the 2-year requirement, albeit not with the whole amount of its claim. For the first 3 quarters of 1999, it duly filed a protest, that also claimed for a refund of P6,224,250.00 before the treasurer of Manila on July 15, 1999. Subsequently, ICTSI filed a case before the RTC on September 15, 1999. The same amount was correctly allowed to be refunded by the *Second Division* in the aforementioned decision.

As for the remaining amount being claimed, it is my humble opinion that petitioner has complied with the 2-year requirement but only from the 3rd quarter of 2001 up to the 4th quarter of 2006. Below is the summary of ICTSI's payments subsequent to the 3rd Quarter of 1999 until the 2nd Quarter of 2007 under Section 21(A) of the aforementioned ordinance, *viz*:

	Reference	Taxable Period	License Receipt Number		Taxes Paid per Section 21	Date Paid	Deadlines on Refund
Exhibit	B	4th quarter of 1999	SML-A-177276	P	2,074,750.00	October 19, 1999	October 19, 2001
Exhibit	C	1st quarter of 2000	L-A-110239		2,605,000.00	January 13, 2000	January 13, 2002
Exhibit	D	2nd quarter of 2000	SML-B-020564		2,605,000.00	April 19, 2000	April 19, 2002
Exhibit	E	3rd quarter of 2000	SML-B-072598		2,606,000.00	July 19, 2000	July 19, 2002
Exhibit	F	4th quarter of 2000	SML-B-141877		2,605,000.00	October 19, 2000	October 19, 2002
Exhibit	G	1st quarter of 2001	L-A-142856		1,521,988.95	January 16, 2001	January 16, 2003
Exhibit	H	2nd quarter of 2001	SML-B-206857		1,521,988.95	April 19, 2001	April 19, 2003
Exhibit	I	3rd quarter of 2001	SML-B-191566		1,521,988.95	July 18, 2001	July 18, 2003
Exhibit	J	4th quarter of 2001	SML-B-209945		1,521,988.95	October 18, 2001	October 18, 2003
Exhibit	K	1st quarter of 2002	MLA(b) 0039562		1,440,211.30	January 18, 2002	January 18, 2004
Exhibit	L	2nd quarter of 2002	MLAs 0004165		1,440,211.30	April 17, 2002	April 17, 2004
Exhibit	M	3rd quarter of 2002	MLAs 0037389		1,440,211.30	July 18, 2002	July 18, 2004
Exhibit	N	4th quarter of 2002	MLAs 0052594		1,440,211.30	October 16, 2002	October 16, 2004
Exhibit	O	1st quarter of 2003	MLAs 0092841		1,728,561.43	January 17, 2003	January 17, 2005
Exhibit	P	2nd quarter of 2003	MLAs 0065867		1,728,561.93	April 21, 2003	April 21, 2005
Exhibit	Q	3rd quarter of 2003	MLAs 0084721		1,728,561.93	July 17, 2003	July 17, 2005
Exhibit	R	4th quarter of 2003	MLAs 0103475		1,728,561.93	October 20, 2003	October 20, 2005
Exhibit	S	1st quarter of 2004	MLA(b) 0121746		1,786,724.17	January 16, 2004	January 16, 2006

Annex	D*	2nd quarter of 2004	MLA(s) 0106453	1,786,724.17	April 20, 2004	April 20, 2006
Annex	E*	3rd quarter of 2004	MLA(s) 0147940	1,786,724.17	July 16, 2004	July 16, 2006
Annex	F*	4th quarter of 2004	MLA(s) 0147656	1,786,724.17	October 15, 2004	October 15, 2006
Annex	G*	1st quarter of 2005	O.R. No. 0004871	1,793,036.16	January 20, 2005	January 20, 2007
Annex	H*	2nd quarter of 2005	O.R. No. 0043668	1,793,036.16	April 19, 2005	April 19, 2007
Annex	I*	3rd quarter of 2005	O.R. No. 0050624	1,793,036.16	July 18, 2005	July 18, 2007
Annex	J*	4th quarter of 2005	O.R. No. 0079522	1,793,036.16	October 19, 2005	October 19, 2007
Annex	K*	1st quarter of 2006	O.R. No. 0079486	1,968,022.01	January 19, 2006	January 19, 2008
Annex	L*	2nd quarter of 2006	O.R. No. 0121362	1,968,022.01	April 19, 2006	April 19, 2008
Annex	G**	3rd quarter of 2006	O.R. No. 0149699	1,968,022.01	July 20, 2006	July 20, 2008
Annex	H**	4th quarter of 2006	O.R. No. 0162138	1,968,022.01	October 19, 2006	October 19, 2008
Annex	I**	1st quarter of 2007	O.R. No. 0178297	2,207,987.05	January 18, 2007	January 18, 2009
Annex	D***	2nd quarter of 2007	O.R. No. 0208250	2,207,987.05	April 19, 2007	April 19, 2009
	TOTAL payments made by ICTSI under Section 21			**57,865,901.68**		

* Annexes of ICTSI's Motion for Partial Reconsideration

** Annexes of Petition for Review - CTA En Banc

*** Annex to ICTSI's Manifestation and Motion for Extension of Time to File Comment

For ICTSI's payments after the 3rd Quarter of 1999, records disclosed that, aside from the July 15, 1999 protest filed before the treasurer of Manila pertaining to the first three (3) quarters of 1999, ICTSI's next claims for refund filed before the said officer were on June 17, 2003[4], August 19, 2005[5] and January 11, 2007[6].

On July 11, 2003, ICTSI filed its judicial claim for refund when it filed its Amended and Supplemental Petition[7] before the Regional Trial Court, invoking Section 196 of the LGC therein, for its payments made to respondents subsequent to the 3rd Quarter of 1999 "plus any and all subsequent payments of

[4] *E.B. Rollo. pp. 183-185.*
[5] *E.B. Rollo. pp. 203-204.*
[6] *E.B. Rollo. p. 207.*
[7] *E.B. Rollo. pp. 115-134.*

taxes under Section 21(A) of Manila Ordinance No. 7794, as amended, made by petitioner from the time of filing of this Petition until this case is finally decided xxx".

However, applying the two-year requirement as mentioned in Section 196 of the LGC, ICTSI's payments to respondents from October 19, 1999 to April 19, 2001, totaling P15,539,727.90, cannot be allowed to be refunded due to prescription. The same are computed and detailed as follows:

	Reference	Taxable Period	License Receipt Number		Taxes Paid per Section 21	Date Paid	Deadlines on Refund
Exhibit	B	4th quarter of 1999	SML-A-177276	P	2,074,750.00	October 19,1999	October 19, 2001
Exhibit	C	1st quarter of 2000	L-A-110239		2,605,000.00	January 13, 2000	January 13, 2002
Exhibit	D	2nd quarter of 2000	SML-B-020564		2,605,000.00	April 19, 2000	April 19, 2002
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Exhibit	F	4th quarter of 2000	SML-B-141877		2,605,000.00	October 19, 2000	October 19, 2002
Exhibit	G	1st quarter of 2001	L-A-142856		1,521,988.95	January 16, 2001	January 16, 2003
Exhibit	H	2nd quarter of 2001	SML-B-206857		1,521,988.95	April 19, 2001	April 19, 2003
	TOTAL payments made by ICTSI under Section 21 that cannot be recovered due to prescription.				**15,539,727.90**		

In addition, with regard to petitioner's claim for refund for the period of the 1st and 2nd quarters of 2007, the same cannot be allowed since ICTSI did not comply with the administrative requirement of filing for a claim for refund with the Office of the City Treasurer of Manila.

	Reference	Taxable Period	License Receipt Number	Taxes Paid per Section 21	Date Paid	Deadlines on Refund
Annex	I	1st quarter of 2007	O.R. No. 0178297	2,207,987.05	January 18, 2007	January 18, 2009
Annex	D	2nd quarter of 2007	O.R. No. 0208250	2,207,987.05	April 19, 2007	April 19, 2009
	TOTAL			**4,415,974.10**		

As to the remaining amount being claimed for refund by ICTSI for the 3rd quarter of 2001 up to the 4th quarter of 2006, petitioner properly complied with the administrative and judicial requirements set forth under Section 196 of the LGC, as discussed and illustrated above entitling ICTSI to a partial claim.

In addition to the compliance set forth in the LGC, the *Second Division* ruled on the existence of double taxation, hence, it is but proper and equitable for this Court to order the refund of petitioner's claim, but only on a reduced amount of P44,134,449.68, computed as follows:

Total Claim for refund as of to date:		P	57,865,901.68
Less:	Amount that cannot be refunded due to prescription		15,539,727.90
	Amount that cannot be refunded due to non-compliance with administrative reqmt.		4,415,974.10
Amount to be refunded		P	37,910,199.68
Plus:	Amount allowed by the Second Division		6,224,250.00
Total Amount to be refunded		P	44,134,449.68

WHEREFORE, premises considered, I vote that the instant Petition for Review be **PARTIALLY GRANTED**. The Decision and Resolution of the *Second Division* dated May 17, 2006 and February 22, 2007, respectively, be modified. Accordingly, respondents are **ORDERED** to refund in favor of petitioner the amount of **FOURTY FOUR MILLION ONE HUNDRED THIRTY FOUR THOUSAND FOUR HUNDRED FORTY NINE and 68/100 pesos** (P44,139,449.68) representing illegally paid local business taxes.

CAESAR A. CASANOVA
Associate Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

INTERNATIONAL CONTAINER TERMINAL SERVICES, INC.,
Petitioner,

-versus-

THE CITY OF MANILA, LIBERTY M. TOLEDO, in her capacity as the TREASURER OF MANILA and GABRIEL ESPINO, in his capacity as RESIDENT AUDITOR OF MANILA, and the CITY COUNCIL OF MANILA,
Respondents.

C.T.A. EB NO. 277
(C.T.A. AC NO. 11)

Present:

ACOSTA, Presiding Justice,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, JJ.

Promulgated:

SEP 05 2008

x -- x

CONCURRING AND DISSENTING OPINION

PALANCA-ENRIQUEZ, J.:

Concurring

I concur with the *Ponente* in ruling that the petitioner is not entitled to refund of the taxes paid after the first three quarters of 1999 for failing to comply with the procedural requirements of *Section 195 of the Local Government Code ("LGC").* A taxpayer availing of the remedy under

Section 195 must protest the assessment, within 60 days from the receipt of the notice of assessment. Otherwise, the assessment shall become final and executory. Once the assessment had become final and executory, the assessment can no longer be questioned.

Further, I am of the same view with the *Ponente* that *Sections 195 and 196 of the LGC* are two separate and distinct remedies granted to taxpayers, which have their respective prescribed conditions and requirements for their application. Thus, a taxpayer availing under any of said remedies must specify the basis of its action, whether under *Section 195 or 196.* A taxpayer cannot be allowed to resort to an all-encompassing remedy so that in case it is disqualified under one remedy, it can immediately shift to the other.

Dissenting

However, with due respect to the Majority, after taking a second hard look at the pertinent facts of the case, in relation to applicable laws and jurisprudence, and consistent with my Dissenting Opinions in the cases of *Liberty M. Toledo, in her Capacity as The Treasurer of the City of Manila vs. Unilever Philippines, Inc., C.T.A. AC No. 21,* promulgated on May 10, 2007; *Unilever Philippines, Inc. vs. The Treasurer of the City of Manila, C.T.A. AC No. 25,* promulgated on June 18, 2007; and *Treasurer of the City of Manila vs. Alcan Packaging Corporation (formerly Starpack Philippines Corporation), C.T.A. EB No. 261* promulgated on July 30, 2007; I cannot agree with the *Ponente* to affirm the decision of the Second Division partially granting to petitioner the amount of P6,224,250.00, representing the additional business taxes, for the reason that there is no direct double taxation in the case at bench.

The Taxes Imposed By *Sections 18 and 21 of the Revenue Code of Manila* are Two Different and Distinct Taxes, as they Embrace Two Different Subject Matters

Section 18 of Ordinance No. 7794 provides:

> "SEC. 18. *Tax on Contractors.* – A percentage tax is hereby imposed on contractors and other independent contractors, in accordance with the following schedule:
>
> xxx xxx."

The above provision imposes a percentage tax on contractors with the gross sales or receipts for the preceding calendar year in the schedule provided therein. In other words, in *Section 18* the tax is imposed on the construction business.

arl

On the other hand, *Section 21 of Ordinance No. 7794*, as amended by *Ordinance No. 7807,* provides:

> "SEC. 21. – Tax on Businesses Subject to the Excise, Value Added or Percentage Taxes under the NIRC – On any of the following businesses and articles of commerce subject to the excise, value added or percentage taxes under the National Internal Revenue Code hereinafter referred to as the NIRC, as amended, a tax of fifty percent (50%) of one percent (1%) per annum on the gross sales or receipts of the preceding calendar year is hereby imposed:
>
> A) On persons who sell goods and services in the course of trade or business; and those who import goods whether for business or otherwise, as provided for in Sections 100 to 103 of the NIRC as administered and determined by the Bureau of Internal Revenue pursuant to the pertinent provisions of the said code.
>
> B) On the gross receipts of keepers of garages, cars for rent or hire driven by the lessee, transportation contractors, persons who transport passengers or freight for hire, and common carriers by land, air or water, except owners of bancas and owners of animal-drawn two-wheel vehicle.
>
> C) On the amount paid on every overseas dispatch, message or conversation transmitted from the Philippines by telephone, telegraph, telewriter exchange, wireless and other communication equipment services, except amounts paid by the government, its political subdivisions or instrumentalities; diplomatic services; public international organizations or any of their agencies based in the Philippines; and news services.

The tax shall be payable by the person paying for the services rendered and shall be paid to the person rendering the services who is required to collect and pay the tax within twenty (20) days after the end of each quarter.

D) Excisable goods subject to VAT

(1) Distilled spirits
(2) Wines
(3) Tobacco products (other than cigarettes, cigars and chewing tobacco)
(4) Tobacco specially prepared for chewing
(5) Fireworks
(6) Cinematographic films
(7) Saccharine
(8) Coal and coke
(9) Fermented liquor, brewers' wholesale price, excluding the ad valorem tax
(10) Automobiles, manufacturers or importers selling price
(11) Non-essential goods based on wholesale price, net of excise tax and VAT

(a) Jewelry, whether real and imitation, pearls, precious and semi-precious stones and imitations thereof; goods made of, or ornamented, mounted or fitted with precious metals or imitations thereof or ivory (not including surgical and dental instruments, silver-plated wares, frames or mountings for spectacles or eyeglasses and dental gold or gold alloys and other precious metals used in filling, mounting or fitting of the teeth.)

(b) Perfumes and toilet waters.

(c) Yachts and other vessels intended for pleasure sports.

(12) Mineral products, based on actual market value of the annual gross output at the time of removal.

E) Excisable goods not subject to VAT.

(1) Naptha when used as raw materials for production of petro-chemical products.

(2) Asphalt

xxx xxx."

Pursuant to the above provision, the tax under *Section 21(A)* is imposed on businesses subject to excise, value-added or percentage taxes under the NIRC. Therefore, a contractor whose business is not subject to value added tax is beyond the contemplation of *Section 21*. To illustrate, a contractor whose gross receipts do not exceed P550,000.00 under the *NIRC of 1997, as amended,* or P1,500,000.00 under *RA 9337* is VAT exempt. Applying *Section 21*, it is not subject to local business tax thereunder. However, such contractor may be liable to pay the local business tax under *Section 18*.

Further, *Section 21* is not a direct tax on persons who sell goods and services in the course of trade or business, and those who import goods whether for business or otherwise, but a tax payable by the persons paying for the services rendered by the petitioner, in view of the modifying paragraph of *Section 21,* which states that "the tax shall be payable by the person paying for the services rendered and shall be paid to the person rendering the services who is required to collect and pay the tax, within twenty (20) days after the end of each quarter". Petitioner merely acts as the withholding or collecting agent of the tax paid by the persons paying for or availing of the construction services of the petitioner.

A careful examination and scrutiny of *Section 21 of Ordinance No. 7794, as amended by Ordinance No. 7807,* clearly shows that the qualifying provision on who is required to pay the tax applies to *subsections A, B and C,* as shown by the fact that *subsections A, B and C* enumerate business establishments that are subject to tax. The succeeding *subsections D and E* already classify the goods that are subject and not subject to Value Added Tax.

The fact that said qualifying provision applies to *subsections A, B, and C of Section 21* is clear from *Section 21* itself considering that said qualifying provision was embodied and incorporated in *Section 21,* as a separate and concluding paragraph for business establishments enumerated in *subsections A, B and C of Section 21.* It is bolstered by the fact that said modifying provision provides a period when to pay the tax, to wit, "within twenty (20) days after the end of each quarter", which is applicable to all consumers/end-users of business establishments enumerated in *subsections A, B and C of Section 21,* including those who sell services, like petitioner.

It is clear, categorical, and needs no further interpretation or construction. Settled is the rule in statutory construction that "when the law is clear, the function of the courts is simple application" *(Woodridge School, Inc. vs. ARB Construction Co., Inc., 516 SCRA 185).*

Considering that *Section 21* was not declared invalid, the above-quoted modifying provision is also presumed valid. After all, such proviso transgresses no inherent and constitutional provisions. Neither is it antithetical to any of the fundamental principles of local taxation under

Section 130 of the LCG. A *fortiori*, the local business tax is a tax on end user, thereby negating the presence of direct double taxation.

Elements of
Double Taxation

Double taxation is sometimes known as "duplicate" taxation. Duplicate taxation may be direct or indirect. Direct duplicate taxation or double taxation in the objectionable or prohibited sense (also known as obnoxious) means that the same property is taxed twice when it should be taxed only once; and that both taxes are imposed on the same property or subject matter for the same purpose, by the same State, Government, or taxing authority within the same jurisdiction or taxing district during the same taxing period and covering the same kind or character of tax (*Villanueva vs. City of Iloilo, 26 SCRA 594*).

On the other hand, indirect duplicate taxation is permissible double taxation. This is allowed if the taxes are of different nature or character, imposed by different taxing authorities (*Tax Principles and Remedies by Japar B. Dimaampao, 2nd ed., p. 122*).

The elements of direct double taxation are as follows:

1) taxing twice;

2) same person/property or subject matter;

3) by the same taxing authority;

4) within the same jurisdiction or taxing district;

5) for the same purpose; and

6) in the same year or taxing period.

No Double Taxation

These elements do not obtain in the case of *Sections 18 and 21(A) of Ordinance No. 7794,* as amended by *Ordinance No. 7807.*

First, these two (2) taxes are of two (2) different kinds or characters. The tax imposed upon petitioner under *Section 18* is a tax on contractors. It is classified as a direct tax, which is demanded from the petitioner primarily burdened to pay the same, in contrast to *Section 21,* which is payable not by the petitioner itself, but by the persons availing of the construction services of the petitioner, akin to an indirect tax. Petitioner only acts as the withholding or collecting agent of the City of Manila of the tax imposed on its customers.

Second, the taxes in *Sections 18 and 21* are payable by two entirely different and distinct entities. *Section 18* is payable by the petitioner, as a construction business. On the other hand, *Section 21* is payable by petitioner's customers, or the persons availing of petitioner's services.

Third, although the two taxes deal on one activity, the construction activity, *Sections 18 and 21* are imposed on different subject matters. The subject matter of *Section 18* is the privilege on engaging in the construction business. The tax is imposed for the business of operating a construction establishment. On the other hand, *Section 21* is imposed on establishments subject to excise, value-added or percentage taxes under the NIRC, which may not be subject to *Section 21*, if said business establishment is exempt from excise, value-added or percentage taxes under the NIRC, as previously illustrated. It is payable by the persons availing of the services of such business establishments.

Evidently, a tax on petitioner, as a contractor, is different from the tax imposed on businesses subject to excise, value added or percentage tax, payable by their customers. Under *Section 21*, petitioner merely acts as the withholding or collecting agent of the City of Manila, while the ones actually paying the tax are its customers/end-users.

In sum, there is no double taxation, because there is no taxing twice, on the same person *(Procter & Gamble Philippines Manufacturing Corp., vs. Municipality of Jagna, 94 SCRA 903)*, or the same subject matter, by the same taxing authority, within the same jurisdiction, in different taxing periods, some of the property in the territory.

Considering that the taxes sought to be refunded herein were imposed under *Section 21 of Ordinance No. 7794,* the original ordinance, *as amended* by the first amendatory *Ordinance No. 7807*, which still both subsist, and considering further that the ruling in the *Coca-Cola Bottlers Phils., Inc. vs. City of Manila, et al., 493 SCRA 291*, declared null and void *Ordinance Nos. 7988 and 8011* only, I reiterate that petitioner is covered by *Section 21.* Petitioner cannot, therefore, be exempted from the imposition of *Section 21.*

It has always been the rule that those seeking tax refunds or credits bear the burden of proving the factual bases of their claims and of showing, by words too plain to be mistaken, that the legislature intended to entitle them to such claims [*Commissioner of Internal Revenue vs. Seagate*

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Technology (Philippines), 451 SCRA 152; Atlas Consolidated Mining and Development Corporation, 518 SCRA 428].

Considering that there is no double taxation, petitioner is not entitled to a refund. Being not entitled to a refund, I, therefore, vote to **DENY** petitioner's claim for refund in C.T.A. AC No. 11 and to **DISMISS** the present Petition For Review in C.T.A. EB No. 277.

OLGA PALANCA-ENRIQUEZ
Associate Justice