REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

AIG SHARED SERVICES CORPORATION (PHILIPPINES) [FORMERLY: CHARTIS TECHNOLOGY AND OPERATIONS MANAGEMENTS CORPORATION (PHILIPPINES)],
Respondent.

CTA EB No. 2071
(CTA Case No. 9100)

Present:

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, and
MODESTO-SAN PEDRO, *JJ.*

Promulgated:
MAR 16 2021 10:50 am

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RESOLUTION

BACORRO-VILLENA, J.:

Before the Court *En Banc* is petitioner Commissioner of Internal Revenue's (**petitioner's**) Motion for Reconsideration (**MR**) posted on 30 September 2020, with respondent AIG Shared Services Corporation (Philippines)'s (**respondent's/AIG's**) Comment/Opposition thereto filed on 22 December 2020. The MR seeks the reversal of the Court *En Banc*'s Decision promulgated on 07 September 2020 (**assailed Decision**). The dispositive portion of the assailed Decision reads:

> ...
>
> **WHEREFORE**, the foregoing considered, petitioner Commissioner of Internal Revenue's Petition for Review dated 31

May 2019 is **DENIED** for lack of merit. Accordingly, the assailed Decision dated 24 January 2019 and the Resolution of 30 April 2019, respectively, of the Special Third Division in CTA Case No. 9100, *entitled AIG Shared Services Corporation (Philippines) [Formerly: Chartis Technology and Operations Management Corporation (Philippines)] v. Commissioner of Internal Revenue,* are hereby **AFFIRMED.**

SO ORDERED.

...

In his MR, petitioner argues that since the issue of respondent's claim for refund of unutilized input tax is closely related with the issue of proper taxes that are due from it (as a result of its failure to establish that some of the service recipients are non-resident foreign corporations), said portion must accordingly be subjected to 12% value-added tax (**VAT**). According to petitioner, it is more proper and logical to determine the corresponding output tax liability on respondent's sale of services which do not qualify for zero-rating in order to determine if indeed there are excess or unutilized input taxes that are available for refund.

In support thereof, petitioner cites the cases of *Air Canada v. Commissioner of Internal Revenue*[1] (**Air Canada**) and *SMI-ED Philippine Technology, Inc. v. Commissioner of Internal Revenue*[2] (**SMI-ED**). In the said cases, it was commonly ruled that "[i]n an action for the refund of taxes allegedly erroneously paid, the Court of Tax Appeals may determine whether there are taxes that should have been paid in lieu of the taxes paid."

Moreover, petitioner also imputes error on the Court *En Banc*'s holding that the proceedings before it is not to be governed strictly by technical rules of evidence, as the same is contrary to the nature of tax refunds and exemptions which must be strictly construed against the taxpayer.

Relatedly, petitioner reiterates his argument that respondent failed to present any competent witness who could testify on the

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1 G.R. No. 169507, 11 January 2016.
2 G.R. No. 175410, 12 November 2014.

veracity and authenticity of the documents that are required to be presented in order to consider the recipient of its services as non-resident foreign corporation doing business outside the Philippines. Petitioner maintains that respondent's witnesses do not have personal knowledge of the execution of these essential documents, neither did they have a hand in the preparation thereof. Petitioner insists that, despite his failure to timely interpose any objection to the introduction of these testimonial and documentary evidence, it is still not a valid justification for the Court in Division to admit them as evidence.

On the other hand, respondent maintains that the Court *En Banc* correctly applied the procedural rules and properly affirmed the admission of its documentary evidence. According to respondent, petitioner's insistence on the inadmissibility of the former's evidence at this late stage in the proceedings is a poorly veiled attempt for the allowance of his belated objections.

Moreover, respondent contends that *Air Canada* and *SMI-ED* are not applicable in herein case. Aside from the fact that this argument was raised for the first time at this stage, the said cases involve refunds under Section 229 of the National Internal Revenue Code (**NIRC**) of 1997, as amended.

We resolve to deny petitioner's MR.

First, petitioner raised the issue on the need to determine respondent's output tax liability for the first time in this MR.

In *Commissioner of Internal Revenue v. Euro-Philippines Airline Services, Inc.*[3], the Supreme Court ruled:

> ...
>
> In the case of *Aguinaldo Industries Corporation (Fishing Nets Division) vs. Commissioner of Internal Revenue and the Court of Tax Appeals,* this doctrine was explained by this Court as follows:
>
> > To allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level

[3] G.R. No. 222436, 23 July 2018; citations omitted and emphasis supplied.

> would be to sanction a procedure whereby the court — which is supposed to review administrative determinations would not review, but determine and decide for the first time, a question not raised at the administrative forum. This cannot be permitted, for the same reason that underlies the requirement of prior exhaustion of administrative remedies to give administrative authorities the prior opportunity to decide controversies within its competence, and in much the same way that, on the judicial level, issues not raised in the lower court cannot be raised for the first time on appeal.
>
> **Here, it is not disputed that CIR raised the issue** that the alleged failure to present VAT official receipts with the imprinted words "zero rated" adopting the dissent of Justice Del Rosario, **only at the latter stage of the appeal on Motion for Reconsideration of the CTA *En Banc*'s decision. Accordingly, with the doctrine that issues may not be raised for the first time on appeal, CIR should not be allowed by this Court to raise this matter.**
>
> ...

It is a settled rule that issues not raised below cannot be pleaded for the first time on appeal because a party is not allowed to change his theory on appeal. To do so would be unfair to the other party and offensive to rules of fair play, justice and due process.[4]

Second, even if petitioner was able to timely raise the same argument before the Court in Division, the same will not change the outcome of the case. The Supreme Court in *Commissioner of Internal Revenue v. Toledo Power Company*[5] held that:

> ...
>
> But while TPC's sales of electricity to CEBECO, ACMDC, and AFC are not zero-rated, we cannot hold it liable for deficiency VAT by imposing 10% VAT on said sales of electricity as what the CIR wants us to do.
>
> As a rule, taxes cannot be subject to compensation because the government and the taxpayer are not creditors and debtors of each other. However, we are aware that in several cases, we have

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4 *Edison (Bataan) Cogeneration Corporation v. Commissioner of Internal Revenue,* G.R. Nos. 201665 and 201668, 30 August 2017.

5 G.R. Nos. 196415 and 196451, 02 December 2015; citations omitted and emphasis supplied.

allowed the determination of a taxpayer's liability in a refund case, thereby allowing the offsetting of taxes.

In *Commissioner of Internal Revenue v. Court of Tax Appeals*, we allowed offsetting of taxes in a tax refund case because there was an existing deficiency income and business tax assessment against the taxpayer. We said that "[t]o award such refund despite the existence of that deficiency assessment is an absurdity and a polarity in conceptual effects" and that "to grant the refund without determination of the proper assessment and the tax due would inevitably result in multiplicity of proceedings or suits."

Similarly, in *South African Airways v. Commissioner of Internal Revenue*, we permitted offsetting of taxes because the correctness of the return filed by the taxpayer was put in issue.

In the recent case of *SMI-ED Philippines Technology, Inc. v. Commissioner of Internal Revenue*, we also allowed offsetting because there was a need for the court to determine if a taxpayer claiming refund of erroneously paid taxes is more properly liable for taxes other than that paid. We explained that the determination of the proper category of tax that should have been paid is not an assessment but is an incidental issue that must be resolved in order to determine whether there should be a refund. However, we clarified that while offsetting may be allowed, the BIR can no longer assess the taxpayer for deficiency taxes in excess of the amount claimed for refund if prescription has already set in.

But in all these cases, we allowed offsetting of taxes only because the determination of the taxpayer's liability is intertwined with the resolution of the claim for tax refund of erroneously or illegally collected taxes under Section 229 of the NIRC. A situation that is not present in the instant case.

In this case, TPC filed a claim for tax refund or credit under Section 112 of the NIRC, where the issue to be resolved is whether TPC is entitled to a refund or credit of its unutilized input VAT for the taxable year 2002. And since it is not a claim for refund under Section 229 of the NIRC, the correctness of TPC s VAT returns is not an issue. Thus, there is no need for the court to determine whether TPC is liable for deficiency VAT.

Besides, it would be unfair to allow the CIR to use a claim for refund under Section 112 of the NIRC as a means to assess a taxpayer for any deficiency VAT, especially if the period to assess had already prescribed. As we have said, the courts have no assessment powers, and therefore, cannot issue assessments against taxpayers. The courts can only review the assessments issued by the CIR, who under the law is vested

> **with the powers to assess and collect taxes and the duty to issue tax assessments within the prescribed period.**
>
> ...

As the Supreme Court has already categorically ruled that since a claim for tax refund or credit under Section 112 of the NIRC of 1997, as amended, is not a claim for refund under Section 229, the correctness of VAT returns is not an issue and thus there is no need for the court to determine whether the taxpayer is liable for deficiency VAT. Corollary, the cases of *Air Canada* and *SMI-ED* find no application in claims for refund under Section 112 of the NIRC of 1997, as amended, as in this case.

The Court *En Banc* also sees no error in the Court in Division's admission of respondent's documentary evidence. In *Commissioner of Internal Revenue v. De La Salle University, Inc.*[6], the Supreme Court held:

> ...
>
> We uphold the CTA Division's admission of the supplemental evidence on distinct but mutually reinforcing grounds, to wit: (1) *the Commissioner failed to timely object to the formal offer of supplemental evidence*; and (2) *the CTA is not governed strictly by the technical rules of evidence.*
>
> *First*, the failure to object to the offered evidence renders it admissible, and the court cannot, on its own, disregard such evidence.
>
> The Court has held that if a party desires the court to reject the evidence offered, it must so state in the form of a timely objection and it cannot raise the objection to the evidence for the first time on appeal. Because of a party's failure to timely object, the evidence offered becomes part of the evidence in the case. As a consequence, all the parties are considered bound by any outcome arising from the offer of evidence properly presented.
>
> As disclosed by DLSU, the Commissioner did not oppose the supplemental formal offer of evidence despite notice. The Commissioner objected to the admission of the supplemental evidence only when the case was on appeal to the CTA *En Banc*. By the time the Commissioner raised her objection, it was too late; the

6 G.R. Nos. 196596, 198841 and 198941, 09 November 2016; citations omitted, underscoring supplied and boldfacing in the original text.

> ***formal offer, admission*** and ***evaluation*** of the supplemental evidence were all *fait accompli.*
>
> We clarify that while the Commissioner's failure to promptly object had no bearing on the materiality or sufficiency of the supplemental evidence admitted, she was bound by the outcome of the CTA Division's assessment of the evidence.
>
> *Second*, the CTA is not governed strictly by the technical rules of evidence. The CTA Division's admission of the formal offer of supplemental evidence, without prompt objection from the Commissioner, was thus justified.
>
> ...

As held in the aforementioned case which debunks both of petitioner's remaining arguments, the Court in Division properly admitted respondent's documentary evidence since (1) petitioner failed to timely interpose his objection; and, (2) this Court is not governed strictly by the technical rules of evidence.

WHEREFORE, the foregoing considered, petitioner Commissioner of Internal Revenue's Motion for Reconsideration dated 30 September 2020 is **DENIED** for lack of merit.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

WE CONCUR:

ON LEAVE
ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice