REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA *EB* NO. 1558** (CTA Case No. 8522)
-versus-	Present: **DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
CHINA STATE PHILIPPINES CONSTRUCTION CORPORATION (Formerly: China State (Phils.) Construction Engineering Corporation), *Respondent.*	Promulgated: JUL 16 2018 3:01 p.m.

x---x

RESOLUTION

BAUTISTA, J.:

For resolution is petitioner Commissioner of Internal Revenue's ("CIR") Motion for Reconsideration (Re: Decision promulgated on 08 February 2018) ("Motion for Reconsideration") filed on March 9, 2018; with Comment (Re: Petitioner's Motion for Reconsideration dated 7 March 2018) ("Comment") from respondent China State Philippines Construction Corporation ("CSPCC") filed by registered mail on May 8, 2018 and received by the Court on May 17, 2018.

On February 8, 2018, the Court *En Banc* promulgated a Decision[1] ("Assailed Decision"), the dispositive portion of which states:[2]

---

[1] *Rollo, CTA EB No. 1558, Decision,* pp. 102-119.
[2] *Id.,* p. 118.

> **WHEREFORE,** on the basis of the foregoing considerations, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the Decision dated July 17, 2016, and the Resolution dated November 11, 2016, both promulgated by the Second Division of the Court of Tax Appeals, are hereby **AFFIRMED.**
>
> **SO ORDERED.**[3]

In his Motion for Reconsideration, the CIR avers that, contrary to the finding of the Court *En Banc*, the allegation of fraud was not raised for the first time in his Motion for Reconsideration filed with the Second Division of the Court of Tax Appeals ("Court in Division"); and that the same was alleged in his Answer to the Petition for Review. Anent the finding that Letter of Authority ("LOA") No. 21730 is void in so far as taxable years ("TY") 2003, 2004, and 2005 are concerned, the CIR begs to differ, insisting that the issuance of an LOA covering prior or subsequent years is allowed pursuant to *Revenue Memorandum Order ("RMO") No. 27-2010*[4], an amplification of *RMO No. 24-2008*[5], which permits the issuance of an LOA for prior or subsequent years "when necessary." The CIR adds that *Section C(3)*[6] *of RMO No. 24-2008* is not applicable because the instant case is not an ordinary or regular assessment; thus, a thorough audit investigation is imperative.

The CIR insists that the ten (10)-year period provided under *Section 222(a)*[7] *of the 1997 National Internal Revenue Code*[8]*, as amended ("1997 NIRC")* should apply, and not the three (3)-year period under

---

[3] Emphases retained.
[4] Re-invigorating the Run After Tax Evaders (RATE) Program, and Amending Certain Provisions of RMO No. 24-2008, March 15, 2010.
[5] Policies and Guidelines for RATE Cases, May 9, 2008.
[6] 3. A Letter of Authority [LOA] should cover a taxable period not exceeding one taxable year. The practice of issuing [LOAs] covering audit of unverified prior years is hereby prohibited. If the audit of a taxpayer shall include more than one taxable period, the other periods or years shall be specifically indicated in the [LOA].
[7] SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.*
(a) In the case of false or fraudulent return with 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 any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided,* That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.
xxx xxx xxx
[8] *Republic Act No. 8424,* January 1, 1998.

Section 203[9]. According to the CIR, the discrepancy in CSPCC's returns manifests an evident substantial under declaration, which demonstrates the falsity or fraudulence of CSPCC's returns with intent to evade the payment of tax. Further, the CIR points out that *Section 222(a) of the 1997 NIRC* does not distinguish whether the returns filed are false or fraudulent in order for the ten (10)-year period to apply. Accordingly, the CIR submits that his right to assess CSPCC has not yet prescribed.

In its Comment, CSPCC counter-argues that the allegations of the CIR are mere reiterations of his arguments in his Motion for Reconsideration filed with the Court in Division, and in his Petition for Review filed with the Court *En Banc*. In any case, CSPCC avers that the CIR's lone argument that it filed false returns does not merit the reversal of the Assailed Decision because the same was never raised nor alleged in the proceedings before the Court in Division. It is only in his Motion for Reconsideration of the Decision dated July 17, 2016 of the Court in Division that, according to CSPCC, the CIR raised for the first time the issue on false returns. Thus, CSPCC submits that the CIR is already barred by estoppel from raising this new argument.

CSPCC asserts that the CIR should not be allowed to raise the issue on the validity of LOA No. 21730 in so far as TYs 2003, 2004, and 2005 are concerned before the Court *En Banc* because he did not question the same when the Court in Division first resolved against the LOA's validity in its Decision and Resolution. CSPCC adds that the CIR did not appeal the Court in Division's finding that the CIR failed to present any evidence showing that the returns filed by CSPCC for TY 2006 are fraudulent. Accordingly, CSPCC submits that the Court in Division's finding on *(1)* the invalidity of LOA No. 21730; and *(2)* the CIR's failure to prove fraud on CSPCC's returns for TY 2006, have already attained finality.

Even assuming that the CIR may raise the argument that the LOA is valid, CSPCC submits that the same is without legal basis

---

[9] SEC. 203. *Period of Limitation Upon Assessment and Collection.* - Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided,* That in case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

because *Section C(3) of RMO No. 43-1990*[10], prohibiting the issuance of an LOA covering audit of unverified prior years, provided no exception to the rule. The prohibition has, according to CSPCC, been emphasized by the Supreme Court in *Commissioner of Internal Revenue v. Sony Philippines, Inc.*[11] *("Sony Philippines")* and in *Commissioner of Internal Revenue v. De La Salle University, Inc.*[12] *("DLSU")*. Further, even assuming that the CIR may raise the argument that CSPCC filed false returns, CSPCC avers that the CIR again failed to substantiate said contention and merely made general allegations.

Lastly, CSPCC posits that the law on prescription should be liberally construed in order to protect taxpayers; thus, the CIR must not be allowed to bend the law on prescription by resorting to a new or belatedly-thought-of allegation when his initial allegation, for the reason of his assessment, was not recognized by the Court.

The Court *En Banc* will now resolve.

After a careful review of the arguments raised in the Motion for Reconsideration, as well as the Comment filed by CSPCC, the Court *En Banc* finds no new matters or arguments which were not considered in the Assailed Decision. The CIR failed to present any new and/or compelling argument to justify the reversal or modification of the Court *En Banc*'s findings in the Assailed Decision. Consequently, the Court *En Banc* finds the CIR's Motion for Reconsideration devoid of merit.

To reiterate, the issuance of LOAs covering the audit of "unverified prior years" is a prohibited practice. No less than the Supreme Court, in *Sony Philippines* and in the recent case of *DLSU*, has emphasized that assessments for TYs which are not specified in the LOA are void.

> The relevant provision is *Section C of RMO No. 43-[19]90*, the pertinent portion of which reads:
>
> > 3. A Letter of Authority [LOA] should cover a taxable period not exceeding one taxable year. The practice of issuing [LOAs] covering audit of

---

[10] Amendment of Revenue Memorandum Order No. 37-90 Prescribing Revised Policy Guidelines for Examination of Returns and Issuances of Letters of Authority to Audit, September 20, 1990.
[11] G.R. No. 178697, November 17, 2010, 635 SCRA 234.
[12] G.R. Nos. 196596, 198841, and 198941, November 9, 2016.

> unverified prior years is hereby prohibited. If the audit of a taxpayer shall include more than one taxable period, the other periods or years shall be specifically indicated in the [LOA].
>
> What this provision clearly prohibits is the practice of issuing LOAs covering audit of unverified prior years. *RMO 43-[19]90* does not say that a[n] LOA which contains unverified prior years is void. It merely prescribes that if the audit includes more than one taxable period, the other periods or years must be specified. The provision read as a whole requires that if a taxpayer is audited for more than one taxable year, the BIR must specify each taxable year or taxable period on separate LOAs.
>
> Read in this light, the requirement to specify the taxable period covered by the LOA is simply to inform the taxpayer of the extent of the audit and the scope of the revenue officer's authority. Without this rule, a revenue officer can unduly burden the taxpayer by demanding random accounting records from random unverified years, which may include documents from as far back as ten years in cases of fraud audit.
>
> In the present case, the LOA issued to DLSU is for Fiscal Year Ending 2003 and Unverified Prior Years. The LOA does not strictly comply with *RMO [No.] 43-[19]90* because it includes unverified prior years. This does not mean, however, that the entire LOA is void.
>
> As the CTA correctly held, the assessment for taxable year 2003 is valid because this taxable period is specified in the LOA. DLSU was fully apprised that it was being audited for taxable year 2003. Corollarily, the assessments for taxable years 2001 and 2002 are void for having been unspecified on separate LOAs as required under *RMO No. 43-[19]90*.[13]

Considering that TYs 2003, 2004, and 2005 are not specified in separate LOAs and merely incorporated in LOA No. 21730 as "unverified prior years," the assessments resulting therefrom are void.

Anent the applicability of the ten (10)-year period under *Section 222(a) of the 1997 NIRC,* suffice it to say that the arguments proffered

[13] G.R. Nos. 196596, 198841, and 198941, November 9, 2016; underscoring ours.

by the CIR are mere rehashes of those which have been amply discussed by the Court *En Banc* in the Assailed Decision and by the Court in Division in the Decision dated July 17, 2016 and the Resolution dated November 11, 2016. Accordingly, the Court *En Banc* shall no longer belabor, in this Resolution, the disquisitions made therein. To do so is to waste the time and resources of the Court.

Finally, the CIR's averment that CSPCC filed false returns cannot be considered by this Court for being belatedly raised. To allow the CIR to raise a new matter which was not litigated before the Court in Division is a violation of CSPCC's right to due process.

To put the case at hand in its proper factual perspective, a review of the CIR's Answer[14] to the Petition for Review filed before the Court in Division is necessary. Paragraphs 7, 8, 9 and 10 of the Answer to the Petition for Review are relevant:[15]

> 7. [CSPCC] assailed the legality and validity of the [LOA No. 21730]. However, [CSPCC] failed to consider that its case involves <u>tax fraud</u> which is way different from ordinary deficiency assessment. It can be noted that [CSPCC] deliberately and intentionally used the Creditable Withholding Tax Certificates of another taxpayer, China State Construction Engineering Corporation. Such act is a clear showing of tax evasion. In connection thereto, the tax returns filed were <u>fraudulent</u> returns.
>
> 8. [CSPCC] sought to invalidate the LOA issued by taking refuge under the case of *[Sony Philippines]*. Contrary, however, to the claim of [CSPCC], the above-cited case is not applicable in the present case. It can be noted that the case cited by [CSPCC] does not mention of the <u>fraud</u>, which is present in the instant case. [T]here was no commission of <u>fraud</u> but not in the present case.
>
> 9. Assuming without conceding that [the CIR] indeed issued the LOA for [TY] 2006 and unverified prior years, the said LOA is valid since <u>fraud</u> was discovered only in 2006. The rationale why [the CIR] issued the LOA for 2006 and unverified prior years is that [he] discovered the commission of <u>fraud</u> in year 2006 and there was no way for her to ascertain as to the time when the tax <u>fraud</u> started to take place...

---

[14] *Records, CTA Case No. 8522, Vol. 1, Answer*, pp. 119-132.
[15] *Id., pars. 7, 8, 9 and 10*, pp. 127-128.

> 10. Moreover, [CSPCC]'s assertion of prescription pursuant to *Section 203 of the [1997 NIRC]* is manifestly misplaced. It cannot be over emphasized that this case involves <u>fraud</u> and the applicable provision is *Section 222 of the [1997 NIRC]*, which provides:
>
> xxx xxx xxx[16]

Clearly, the CIR's reliance on *Section 222(a) of the 1997 NIRC* has always been founded on its claim that CSPCC filed <u>fraudulent returns</u>. It is only after the Court in Division ruled that the CIR failed to present any evidence to substantiate his claim that the returns filed by CSPCC for TY 2006 are fraudulent that the CIR took a different turn and alleged <u>falsity</u> of the returns. To reiterate, it is only in his Motion for Reconsideration of the Decision of the Court in Division that the CIR raised the issue on <u>false</u> returns. On appeal to the Court *En Banc*, the CIR raised again, but this time as his lone argument, the issue on falsity of returns. However, nowhere was this new argument presented nor alleged during the trial stage.

It cannot be emphasized enough that a party may not change his theory of the case on appeal. This pernicious practice of changing a theory of the case on appeal has consistently been rejected for being unfair and offensive to the basic rules of fair play, justice, and due process. As explained by the Supreme Court in *Philippine Ports Authority v. City of Iloilo*[17]:

> <u>... [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.</u> 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 these cannot be raised for the first time at such late stage. <u>Basic considerations of due process underlie this rule.</u> <u>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.</u> <u>To permit petitioner in this case to change its theory on appeal would thus be unfair to</u>

---

[16] Underscoring ours.
[17] G.R. No. 109791, July 14, 2003, 406 SCRA 88.

<u>respondent, and offend the basic rules of fair play, justice and due process.</u>[18]

Clearly, matters which were not alleged in the pleadings nor raised during the proceedings before the Court in the Division cannot be ventilated for the first time on appeal; and are barred by estoppel. Accordingly, for failure of the CIR to raise before the Court in Division the issue that the returns filed by CSPCC for TY 2006 are false, he can no longer do so before the Court *En Banc.*

Among the ends to which a motion for reconsideration is addressed, is to convince the court that its ruling is erroneous and improper, contrary to the law or the evidence.[19] Thus, having failed to convince the court, the CIR's Motion for Reconsideration must necessarily fail.

WHEREFORE, premises considered, Commissioner of Internal Revenue's Motion for Reconsideration (Re: Decision promulgated on 08 February 2018) is hereby **DENIED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

(On Leave)
ERLINDA P. UY
Associate Justice

---

[18] Citations omitted; underscoring ours.
[19] *Guerra Enterprises Company, Inc. v. Court of First Instance of Lanao del Sur,* G.R. No. L-28310, April 17, 1970, 32 SCRA 314.

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice