REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

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AMADEUS MARKETING PHILIPPINES, INC., Petitioner,	**CTA EB No. 1532** (CTA Case No. 8578)
	Present:
- versus -	**DEL ROSARIO,** P.J., **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** and **MANAHAN,** JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** APR 05 2018 4:25 p.m.

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DECISION

UY, J.:

Before the Court *En Banc* is a *Petition for Review* filed by Amadeus Marketing Philippines, Inc. on October 28, 2016, praying for the setting aside of the Decision dated June 21, 2016[1] and the Resolution dated September 26, 2016[2] of the Third Division of the Court (Court in Division) in CTA Case No. 8578 entitled "*Amadeus Marketing Philippines, Inc., Petitioner, versus Commissioner of Internal Revenue, Respondent*", the dispositive portions of which respectively read as follows:

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[1] EB Docket, pp. 71 to 88.
[2] EB Docket, pp. 64 to 70.

Decision dated June 21, 2016:

> "**WHEREFORE**, the instant Petition for Review filed on November 26, 2012 by Amadeus Marketing Philippines, Inc., is hereby **DENIED,** for lack of merit.
>
> **SO ORDERED.**"

Resolution dated September 26, 2016:

> "**WHEREFORE**, the Motion for Reconsideration/New Trial filed by petitioner Amadeus Marketing Philippines, Inc. on July 12, 2016, is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

THE FACTS

Petitioner is a domestic corporation, with office address at 36th Floor, LKG Tower, 6801 Ayala Avenue, Makati city. It is registered with the Securities and Exchange Commission (SEC) with Company Registration No. A1997-11194. It also a VAT registered entity with Taxpayer's Identification Number (TIN) 005-374-900-000 and Certificate of Registration No. OCN9RC0000133815 dated January 1, 1998.

Per its Article of Incorporation, petitioner's primary purpose is to market an automated computerized reservations system, "Amadeus Global Travel Distribution", which incorporates a software package which performs various functions, including real-line airlines seat reservations, schedules booking for a variety of air, boat, train, package tours, car rental and hotel services, automatic ticketing, and fare pricing displays in the Philippines.

Respondent, on the other hand, is the Commissioner of Internal Revenue (CIR), authorized to act on claims for refund or issuance of tax credit certificate in accordance with the law. He holds office at the Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Diliman, Quezon City.

Petitioner alleges that during the 2nd, 3rd and 4th quarters of 2010, it entered into several transactions and consequently incurred input taxes which were reported in its value-added tax (VAT) returns.

Its sales/receipts for the 2nd, 3rd and 4th quarters of 2010 include only small amounts subject to 12% VAT and a substantial portion of the input taxes incurred on purchases are attributable to the zero-rated sales/receipts. Thus, the input taxes attributable to its zero-rated sales/receipts were not fully utilized in the same quarter and were not used against its output taxes in the subsequent periods.

Petitioner, through the Electronic Filing and Payment System (EFPS), filed its Quarterly VAT Returns for the 2nd, 3rd and 4th quarters of taxable year 2010 on the following dates:

Period Covered (2010)	**VAT Return**	**Date Filed**
Second Quarter	Original	July 22, 2010
	Amended	August 17, 2010
Third Quarter	Original	October 19, 2010
Fourth Quarter	Original	January 26, 2011

On June 29, 2012, petitioner filed with the BIR Revenue District Office (RDO) No. 50 in Makati City an *Application for Tax Refund* with all its supporting documents allegedly representing its unutilized input VAT for the 2nd, 3rd and 4th quarters of taxable year 2010.

On November 26, 2012, petitioner filed a *Petition for Review* with the Court in Division of this Court, citing as ground respondent's inaction on its administrative claim for refund. The case was docketed as CTA Case No. 8578.

On February 11, 2013, respondent posted his *Answer* in said case, alleging, among others, that it is petitioner's burden to substantiate its claim for refund with sufficient evidence and to comply with all the legal requisites for its alleged entitlement. Failure to discharge the said burden is allegedly fatal to petitioner's claim. And in view of the doctrine that taxes are the lifeblood of the nation, the law frowns against exemptions from taxation and statutes granting tax exemptions are thus construed *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority.

After the Pre-Trial Conference held on June 20, 2013, the parties filed their *Joint Stipulation of Facts and Issues* on July 25, 2013, which the Court approved on August 8, 2013.

In support of its case, petitioner presented its Finance Officers, Rosaldo Andales and Romanelle Silungan Aguila; and the Court-commissioned Independent Certified Public Accountant Joseph Cedric Calica, as witnesses.

On May 4, 2015, respondent manifested that he would no longer present any evidence and would only file a *Memorandum* to support his position. However, respondent did not file the said *Memorandum*.[3] On the other hand, petitioner filed its *Memorandum* on July 3, 2015.[4] Subsequently, CTA Case No. 8578 was submitted for decision on July 22, 2015.[5]

On June 21, 2016, the Court in Division issued the assailed Decision denying the *Petition for Review* for lack of merit.[6] The Court in Division found that Amadeus IT Group S.A., the recipient of petitioner's services, is doing business in the Philippines in accordance with Section 105 of the National Internal Revenue Code (NIRC) of 1997, and Sections 4.105-1 and 4.105-3 of Revenue Regulations (RR) No. 16-2005. Thus, petitioner failed to satisfy the second requisite for it to be entitled to the refund sought.

Petitioner then filed a *Motion for Reconsideration/New Trial* on July 12, 2016.[7] Despite the opportunity granted, respondent failed to file any comment/opposition thereto.

In the assailed Resolution dated September 26, 2016,[8] the Court in Division denied petitioner's *Motion for Reconsideration/New Trial* for lack of merit.

On October 17, 2016, petitioner filed with the Court *En Banc* a *Motion for Extension of Time To File Petition for Review*,[9] which was granted per Minute Resolution dated October 19, 2016,[10] giving

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[3] Records Verification dated July 14, 2015 issued by the Judicial Records Division of this Court, Division Docket (CTA Case No. 8578) – Vol. 4, p. 1771.
[4] Division Docket (CTA Case No. 8578) – Vol. 4, pp. 1752 to 1769.
[5] Resolution dated July 22, 2015, Division Docket (CTA Case No. 8578) – Vol. 4, p. 1773.
[6] EB Docket, pp. 71 to 88; Division Docket (CTA Case No. 8578) – Vol. 4, pp. 1789 to 1806.
[7] Division Docket (CTA Case No. 8578) – Vol. 4, pp. 1807 to 1861.
[8] EB Docket, pp. 64 to 70; Division Docket (CTA Case No. 8578) – Vol. 4, pp. 1866 to 1872.
[9] EB Docket, pp. 1 to 5.
[10] EB Docket, p. 7.

petitioner a final and non-extendible period of fifteen (15) days from October 18, 2016 or until November 2, 2016, within which to file its *Petition for Review.*

On October 28, 2016, petitioner filed the instant *Petition for Review.*[11]

In the Resolution dated November 28, 2016,[12] the Court ordered respondent to file his *Comment* on the instant *Petition for Review* within ten (10) days from receipt thereof. However, respondent failed to do so.[13] Thus, in the Resolution dated February 2, 2017,[14] the Court *En Banc*, resolved to require the parties to submit their Memoranda, within a non-extendible period of thirty (30) days from receipt thereof. Petitioner filed its *Memorandum* on March 15, 2017.[15] For his part, respondent failed to file his *Memorandum.*[16] In the Resolution dated May 2, 2017,[17] the Court *En Banc* deemed the instant case submitted for decision.

Hence, this Decision.

THE ISSUES

Petitioner raises the following issues for the Court *En Banc*'s resolution, to wit:

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> "Whether or not Petitioner is entitled to the refund of the amount of Php 23,355,841.61 representing its unutilized input VAT attributable to its zero-rated sales for 2nd, 3rd and 4th quarters of calendar year 2010.
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> II
>
> Whether or not the petitioner's Motion for New Trial for presentation of additional evidence to prove that 'Amadeus Global Travel Distribution S.A.' and 'Amadeus

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[11] EB Docket, pp. 8 to 59.
[12] EB Docket, pp. 90 to 91.
[13] Records Verification dated January 18, 2017 issued by the Judicial Records Division of this Court, EB Docket, p. 92.
[14] EB Docket, pp. 94 to 95.
[15] EB Docket, pp. 96 to 146.
[16] Records Verification dated March 29, 2017 issued by the Judicial Records Division of this Court, EB Docket, p. 149.
[17] EB Docket, pp. 151 to 152.

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IT Group S.A.' are one and the same entity would not change or alter the findings of the Court."

Petitioner's arguments:

Petitioner primarily argues that it is entitled to the refund of the amount of ₱23,355,841.61, representing its unutilized input VAT attributable to its zero-rated sales for the 2nd, 3rd and 4th quarters of calendar year 2010.

According to petitioner, the Court in Division erred in using the presumption that a non-resident foreign person is deemed being "in the course of trade or business", notwithstanding the rule of regularity to be liable for VAT for purposes of determining whether a foreign corporation is "doing business" in the Philippines. Petitioner is of the view that the presumption under Section 105 of the Tax Code that a non-resident foreign person is deemed being "in the course of trade or business", notwithstanding the rule of regularity, is only a presumption or legal fiction for the sole purpose of determining VAT liability; and that the true and proper test in determining whether a foreign corporation is "doing business" in the Philippines remains to be that established by law and jurisprudence.

Moreover, petitioner avers that the Court in Division erred in concluding that Amadeus IT Group, S.A., which merely collects royalties from petitioner, is "doing business" in the Philippines. In this connection, petitioner points out the following:

1. The input taxes or VAT withheld, considered by the Court in Division as an indication that Amadeus IT Group, S.A. is "doing business" in the Philippines, actually pertain to petitioner's royalty payments to Amadeus IT Group, S.A.;
2. The subject royalty payments are merely passive income;
3. Applying the statutory and jurisprudential definition of what constitutes "doing business", there is no showing that Amadeus IT Group, S.A. is "doing business" in the Philippines. Amadeus IT Group, S.A., by merely collecting royalties, cannot be considered as "doing business" in the Philippines;
4. The case of *Commissioner of Internal Revenue vs. British Overseas Airways Corporation and Court of Tax Appeals* was misapplied in the instant case;
5. The case of *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.* is not applicable to the instant case.

Furthermore, petitioner contends that the Monthly Remittance Returns of Final Income Taxes Withheld (BIR Form 1601F) also proves that Amadeus IT Group, S.A. is not "doing business" in the Philippines.

Assuming arguendo that it is "doing business" in the Philippines, the Court in Division erred in concluding that, in order that the supply for services by petitioner will qualify as VAT zero-rated under Section 108(B)(2) of the NIRC of 1997, as amended, the recipient of such services must be "engaged in business conducted outside the Philippines", and, at the same time, must not be engaged in business conducted in the Philippines.

Lastly, petitioner emphasizes that its *Motion for New Trial* for the presentation of additional documents to prove that "Amadeus Global Travel Distribution S.A." and "Amadeus IT Group S.A." are one and the same entity would substantially change the outcome of the case.

THE COURT *EN BANC*'S RULING

We find no merit in the instant *Petition for Review*.

Amadeus IT Group S.A. is doing business in the Philippines. Thus, petitioner's sales cannot be treated as subject to the zero percent (0%) VAT.

The crux of the instant controversy rests on the determination whether Amadeus IT Group S.A., to whom petitioner rendered services, is doing business in the Philippines.

Since the services rendered by petitioner to Amadeus IT Group S.A. is other than the processing, manufacturing or repacking of goods, the said determination is anchored on Section 108(B)(2) of the NIRC of 1997, as amended, which identifies, *inter alia*, the transactions subject to the zero percent (0%) VAT rate. For easy reference, Section 108(B)(1) and (2) of the same law provides as follows, to wit:

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties. –*

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> xxx xxx xxx
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> (B) *Transactions Subject to Zero Percent (0%) Rate.* – The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:
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> (1) Processing, manufacturing or repacking goods for other persons doing business outside the Philippines which goods are subsequently exported, where the services are paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);
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> (2) **Services other than those mentioned in the preceding paragraph rendered to a person engaged in business conducted outside the Philippines or to a nonresident person not engaged in business who is outside the Philippines when the services are performed**, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);" *(Emphasis supplied)*

Based on the foregoing provisions, in order for a sale of service transaction to be subject to the 0% VAT rate, it is required, *inter alia*, that the services were *"rendered to a person engaged in business outside the Philippines or to a nonresident person not engaged in business who is outside the Philippines when the services are performed"*.

The Supreme Court, in the case of *Accenture, Inc. vs. Commissioner of Internal Revenue* ("*Accenture* case"),[18] ruled that it is not enough that the recipient of the service be shown to be a foreign corporation, it must likewise be established that the said recipient is a *"nonresident foreign corporation"*. In the said case, the High Court declared:

> "The evidence presented by Accenture may have established that its clients are foreign. This fact does not automatically mean, however, that these clients were doing business outside the Philippines. After all, the Tax Code itself has provisions for a foreign corporation

[18] G.R. No. 190102, July 11, 2012.

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engaged in business within the Philippines and vice versa, to wit:

> SEC. 22. *Definitions* – When used in this Title:
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> xxx xxx xxx
>
> (H) The term *'resident foreign corporation'* applies to a foreign corporation engaged in trade or business within the Philippines.
>
> (I) **The term *'nonresident foreign corporation'* applies to a foreign corporation not engaged in trade or business within the Philippines.** (Emphasis in the original)

Consequently, to come within the purview of Section 108(B)(2), it is not enough that the recipient of the service be proven to be a foreign corporation; <u>rather, it must be specifically proven to be a nonresident foreign corporation</u>.

There is no specific criterion as to what constitutes 'doing' or 'engaging in' or 'transacting' business. We ruled thus in *Commissioner of Internal Revenue v. British Overseas Airways Corporation*:[19]

> x x x. There is no specific criterion as to what constitutes 'doing' or 'engaging in' or 'transacting' business. Each case must be judged in the light of its peculiar environmental circumstances. The term implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain or for the purpose and object of the business organization. 'In order that a foreign corporation may be regarded as doing business within a State, there must be continuity of conduct and intention to establish a continuous business, such as the

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[19] 233 Phil. 406 (1987).

> appointment of a local agent, and not one of a temporary character.'" *(Emphases and underscoring supplied)*

In addition, it is noteworthy that the Supreme Court, in *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*,[20] declared that **the service-recipient must also be not doing business in the Philippines**. Otherwise, the transaction will be subject to the VAT at the then rate of 10%,[21] and **not** at the 0% VAT rate. Thus:

> "In this case, the payer-recipient of respondent's services is the Consortium which is a joint-venture doing business in the Philippines. While the Consortium's principal members are non-resident foreign corporations, **the Consortium itself is doing business in the Philippines.** This is shown clearly in BIR Ruling No. 023-95 which states that the contract between the Consortium and NAPOCOR is for a **15-year term**, thus:
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>> This refers to your letter dated January 14,1994 requesting for a clarification of the tax implications of a contract between a consortium composed of Burmeister & Wain Scandinavian Contractor A/S ('BWSC'), Mitsui Engineering & Shipbuilding, Ltd. (MES), and Mitsui & Co., Ltd. ('MITSUI'), all referred to hereinafter as the 'Consortium', and the National Power Corporation ('NAPOCOR') **for the operation and maintenance of two 100-Megawatt power barges ('Power Barges') acquired by NAPOCOR for a 15-year term.** (Emphasis supplied)
>
> Considering this length of time, the Consortium's operation and maintenance of NAPOCOR's power barges cannot be classified as a single or isolated transaction. The Consortium does not fall under Section 102(b)(2)[22] which requires that the recipient of the services must be a person doing business outside the Philippines. Therefore, respondent's services to the Consortium, not

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[20] G.R. No. 153205, January 22, 2007.

[21] Now the VAT rate is 12%. Refer to Revenue Memorandum Circular No. 7-2006 dated January 31, 2006.

[22] Now Section 108(B)(2) of the NIRC of 1997, as amended by RA No. 9337.

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> being supplied to a person doing business outside the Philippines, cannot legally qualify for 0% VAT." *(Underscoring supplied)*

The rationale therefor is when the provider and recipient of services are **both** doing business in the Philippines, their transaction falls squarely under Section 108(A) governing **domestic** sale or exchange of services. Indeed, this is a purely local sale or exchange of services subject to the regular VAT, unless of course the transaction falls under the other provisions of Section 108(B) of the NIRC of 1997, as amended.[23] Hence, the Court in Division was not in error when it ruled to that effect.

Parenthetically, the above-stated pronouncements in *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*, being an interpretation of the Supreme Court of Section 108(B) of the NIRC of 1997, as amended, and thus, forms part of the legal system in the Philippines,[24] is applicable to the case at bar.

Thus, based on Section 108(B)(1) and (2) of the NIRC of 1997, as amended, vis-à-vis the above-quoted judicial pronouncements, petitioner should have proved in the proceedings *a quo* and shown in the instant case that in the year 2010, Amadeus IT Group S.A.: (1) is engaged in business conducted outside the Philippines, and (2) is not doing business in the Philippines.

During trial of the case, petitioner was able to prove that Amadeus IT Group S.A. was engaged in business conducted outside the Philippines,[25] by virtue of the Authenticated Certification/Articles of Association, and 2010 Auditor's Annual Report,[26] of Amadeus IT Group S.A. However, petitioner failed to show that Amadeus IT Group S.A. is not doing business in the Philippines and thus, We agree with the ruling of the Court in Division, using as basis Section 105 of the NIRC of 1997, and Sections 4.105-1 and 4.105-3 of RR No. 16-2005.

Nevertheless, petitioner is of the view that the presumption

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[23] *Commissioner of Internal Revenue vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*, G.R. No. 153205, January 22, 2007.
[24] Article 8, Civil Code of the Philippines (Republic Act No. 386).
[25] Exhibit "J", Division Docket (CTA Case No. 8578) – Vol. 3, pp. 1000 to 1012.
[26] Exhibit "K", Division Docket (CTA Case No. 8578) – Vol. 3, pp. 1013 to 1253.

under Section 105 of the Tax Code that a non-resident foreign person is deemed being "in the course of trade or business", notwithstanding the rule of regularity, is only a presumption or legal fiction for the sole purpose of determining VAT liability.

We disagree with petitioner.

For easy reference, Section 105 of the NIRC of 1997 is reproduced hereunder:

> "SEC. 105. *Persons liable.* – Any person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 to 108 of this Code.
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> xxx xxx xxx
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> The phrase 'in the course of trade or business' means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a nonstock, nonprofit private organization (irrespective of the disposition of its net income and whether or not it sells exclusively to members or their guests), or government entity.
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> **The rule of regularity, to the contrary notwithstanding, services as defined in this Code rendered in the Philippines by nonresident foreign persons shall be considered as being rendered in the course of trade or business.**" *(Emphasis supplied)*

A careful reading of the foregoing provision would reveal that nowhere therein is it stated, nor was it implied, that the supposed "presumption or legal fiction" is only for the sole purpose of determining VAT liability. As a corollary, the said provision does not qualify, in any way, that the rule that *"services as defined in this Code rendered in the Philippines by nonresident foreign persons shall be considered as being rendered in the course of trade or business"* under the above-quoted Section 105 shall not be used in determining whether a foreign corporation is not "doing business" in the Philippines, for purposes of Section 108(B)(2) of the NIRC of 1997,

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as amended. It is basic in statutory construction that where the law does not distinguish, We should not distinguish.[27]

But even granting that the last paragraph of Section 105 of the NIRC of 1997 should not indeed be used in determining whether a foreign corporation is not "doing business" in the Philippines, for purposes of Section 108(B)(2) of the NIRC of 1997, as amended, there is a showing that Amadeus IT Group S.A. is doing business in the Philippines.

In *MR Holdings, Ltd. vs. Sheriff Carlos P. Bajar, et al.* ("*MR Holdings* case"),[28] the Supreme Court made the following pronouncements as to what constitutes "doing business in the Philippines" on the part of a foreign corporation, to wit:

> "xxx. The question whether or not a foreign corporation is doing business is dependent principally upon the facts and circumstances of each particular case, considered in the light of the purposes and language of the pertinent statute or statutes involved and of the general principles governing the jurisdictional authority of the state over such corporations.
>
> Batas Pambansa Blg. 68, otherwise known as 'The Corporation Code of the Philippines,' is silent as to what constitutes 'doing' or 'transacting' business in the Philippines. Fortunately, jurisprudence has supplied the deficiency and has held that the term 'implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of, the purpose and object for which the corporation was organized.' In *Mentholatum Co. Inc., vs. Mangaliman*,[29] this Court laid down the test to determine whether a foreign company is 'doing business,' thus:
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> > ' x x x **The true test, however, seems to be whether the foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether**

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[27] *Ty-Delgado vs. House of Representatives Electoral Tribunal, et al.*, G.R. No. 219603, January 26, 2016.
[28] G.R. No. 138104, April 11, 2002.
[29] 72 Phil. 524 (1941).

> **it has substantially retired from it and turned it over to another.** (*Traction Cos. vs. Collectors of Int. Revenue* [C.C.A., Ohio], 223 F. 984,987.) x x x.'

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

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

Likewise, Section 1 of Republic Act No. 5455,[30] provides that:

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[30] An Act to Require that the Making of Investments and the Doing of Business Within the Philippines by Foreigners or Business Organizations Owned in Whole or in Part by Foreigners Should Contribute to the Sound and Balanced Development of the National Economy on a Self-Sustaining Basis, and for Other Purposes, Enacted Without executive approval, September 30, 1968 (65 O.G. No. 29, p. 7410).

> '**SECTION. 1**. *Definition and scope of this Act.* - (1) x x x the phrase 'doing business' shall include soliciting orders, purchases, service contracts, opening offices, whether called 'liaison' offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totaling one hundred eighty days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines; and **any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization.**'

There are other statutes[31] defining the term 'doing business' in the same tenor as those above-quoted, and as may be observed, <u>one common denominator among them all is the concept of 'continuity.'</u>" *(Underscoring supplied)*

In addition, as quoted in the *Accenture* case, the Supreme Court held, in *Commissioner of Internal Revenue vs. British Overseas Airways Corporation, et al.*,[32] as follows:

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[31] Article 65 of Presidential Decree No. 1789 ("A Decree to Revise, Amend, and Codify the Investment, Agricultural and Export Incentives Acts to be Known as the Omnibus Investment Code"), which took effect on January 16, 1981, defines "doing business" to include soliciting orders, purchases, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totaling one hundred eighty (180) days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines, and **any other act or acts that imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization.**
See also Article 44 of the Omnibus Investments Code of 1987 (Executive Order No. 226, effective July 16, 1987).

[32] G.R. Nos. L-65773-74, April 30, 1987.

> "xxx. **'In order that a foreign corporation may be regarded as doing business within a State, there must be continuity of conduct and intention to establish a continuous business, <u>such as the appointment of a local agent</u>, and not one of a temporary character.'**"[33] *(Emphasis supplied)*

Simply put, in order that a foreign corporation may be considered engaged in trade or business, its business transaction must be continuous.[34] And such continuity may be shown by *"the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain or for the purpose and object of the business organization"* and is exemplified by *"the appointment of a local agent*".

In this case, by entering into the ACO Agreement dated August 13, 1997 with petitioner,[35] Amadeus IT Group S.A. clearly intended to establish a continuous business in the Philippines.

Pertinent provisions of the said ACO Agreement (wherein petitioner was designated as "AMADEUS ACO", while Amadeus IT Group S.A. was referred to as "AMADEUS") read:

> "R E C I T A L S
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> xxx xxx xxx
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> **Whereas**, AMADEUS, within the AMADEUS Group structure, is responsible for, among other marketing and commercial activities, the widespread availability of the computerised information, products and services stored in the AMADEUS Global Core;
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> **Whereas**, AMADEUS contracts with airlines and other Providers of travel related services for display and sale of their information, products and services through the AMADEUS System;

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[33] Refer also to *Commissioner of Internal Revenue vs. Japan Air Lines, Inc., et al.*, G.R. No. 60714, October 4, 1991; *The Mentholatum Co., Inc., et al. vs. Anacleto Mangaliman, et al.*, 72 Phil. 523 (1941); and *Pacific Micronesian Line, Inc. vs. Del Rosario and Peligon*, 96 Phil. 23.
[34] *N.V. Reederij "Amsterdam" and Royal Interocean Lines vs. Commissioner of Internal Revenue*, G.R. No. L-46029, June 23, 1988.
[35] Exhibit "D", Division Docket (CTA Case No. 8578) – Vol. 3, pp. 968 to 986.

Whereas, AMADEUS ACO is willing to market, promote, offer and distribute the AMADEUS System in the Philippines and will be engaged on a commission basis, to negotiate contracts relative to the Amadeus System with the custody of which the former has no concern for all AMADEUS participants and subscribers under this agreement;

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1. DEFINITIONS

1.1 **Definitions.** The following definitions shall apply to the terms used in this Agreement unless the context otherwise requires:

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'AMADEUS Global Core' means the computer database and the central processing facility or facilities operated or controlled by the AMADEUS Group.

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'AMADEUS System' means the reliable, flexible, neutral, and unbiased computerised travel and travel-related information, sales and distribution hardware and software system developed, operated, and distributed by the AMADEUS Group.

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2. PURPOSE OF THE AGREEMENT

2.1 For the term and subject to the terms and conditions set forth in this Agreement, AMADEUS hereby authorizes AMADEUS ACO, and AMADEUS ACO hereby undertakes to market, offer and promote the AMADEUS System to Subscribers, by means of the AMADEUS products, and to carry out the necessary actions in the AMADEUS ACO Territory in order to give appropriate access to the Subscribers, to the AMADEUS Global Core, or to other computer

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databases offered or to be offered by AMADEUS under license from a third party.

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4. GEOGRAPHIC AREA

AMADEUS ACO acknowledges and agrees that the rights granted under this Agreement shall not be deemed to include in any manner whatsoever the distribution of the AMADEUS products to Affiliate Offices in the AMADEUS ACO Territory or to general sales agents of airlines shareholders in a company belonging to the AMADEUS Group or in an ACO[36].

5. AMADEUS PRODUCTS LICENSED FROM THIRD PARTIES

AMADEUS may provide AMADEUS products pursuant to licenses from third parties. In such a case, AMADEUS ACO will, in accordance with terms to be set forth in a Supplemental Agreement to this Agreement agreed to by the Parties, honour within the AMADEUS ACO Territory any obligation undertaken by AMADEUS to the third-party licensor, including obligations with respect to the marketing, offering and promotion of, and technical and other support for, the licensed AMADEUS Product.

xxx xxx xxx

6. FEES PAYMENT TERMS AND CONDITIONS

6.1 Subject to the terms and conditions of this Agreement, AMADEUS shall pay to AMADEUS ACO a Distribution Fee which shall be considered as a commission fee for the marketing, offering and promoting Amadeus Products as provided in Appendix A hereto.

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[36] **"Amadeus Commercial Organization"** or **"ACO"** means a company (i) of which the principal object and business is the marketing, offering and promoting of the AMADEUS products; and (ii) that has entered into a contract similar to this Agreement with the AMADEUS Group whereby it undertakes the obligation, among other things, to market, promote and offer on a commission, AMADEUS products in a defined territory. (Paragraph 1.1, ACO Agreement)

xxx xxx xxx

9. AGREEMENTS WITH SUBSCRIBERS

9.1 **Subscriber Contracts.** AMADEUS ACO shall be responsible for marketing, offering and promoting AMADEUS products with Subscribers in the AMADEUS ACO Territory in order to facilitate them access to the information, products and services stored in the AMADEUS Global Core, and shall use best efforts to promote all of the AMADEUS products available in accordance with the respective Supplemental Agreements, with the AMADEUS ACO Territory.

xxx xxx xxx

9.3 **Abuse.** If it appears to AMADEUS that a Subscriber is abusing the AMADEUS System, either by excessive use in relation to the number of Bookings generated by the Subscriber or otherwise, (a) AMADEUS may require the Subscriber to stop such misuse and/or (b) exercise its right to terminate the agreement with the Subscriber on account of such abuse and/or (c) in the case that such abuse consists of excessive use in relation to the number of Bookings generated or of such other abuse as can reasonably be ameliorated by payment of financial compensation, require the Subscriber to pay a fee for such use.

9.4 **Multinational Subscribers.** Notwithstanding any provision herein to the contrary, AMADEUS ACO shall not have any exclusive distribution rights with respect to Multinational Subscribers, whether any such Multinational Subscriber is based within or outside of the AMADEUS ACO Territory. AMADEUS shall contract directly with Multinational Subscribers that have their headquarters or Branches in the AMADEUS ACO Territory and AMADEUS ACO, for its promotion of the AMADEUS products shall be entitled to receive Distribution Fees or commission for Bookings made by such Multinational Subscribers in the AMADEUS ACO Territory, as provided in Appendix B hereto.

9.5 **AMADEUS On-line and Corporate Products.** Notwithstanding any provision herein to the contrary, AMADEUS ACO shall not have exclusive distribution rights with respect to Subscribers offering or wishing to make use of CRS services through AMADEUS on-line and corporate products. AMADEUS reserves the right to contract with such Subscribers within the AMADEUS ACO Territory for this purpose. AMADEUS may request AMADEUS ACO to provide support and services in connection therewith and the Parties shall enter into a Supplemental Agreement for AMADEUS Corporate Products distribution and for the provision of such services. AMADEUS ACO shall receive the corresponding Distribution Fee for any such Booking made through AMADEUS Corporate Products.

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11. <u>OBLIGATIONS OF AMADEUS</u>

Without prejudice to any other obligations of AMADEUS contained in this Agreement, AMADEUS shall have the following obligations:

11.1 AMADEUS shall provide, at its own cost and expense, the following services to facilitate the introduction of the AMADEUS products that may be introduced from time to time:

11.1.1 AMADEUS shall conduct, at no extra cost to AMADEUS ACO, a basic training program for AMADEUS ACO personnel covering the use of the AMADEUS products for marketing, offering and promoting purposes. The training program shall be conducted at such location and time as AMADEUS may designate and shall be provided at no charge to AMADEUS ACO for a number of persons to be mutually agreed by AMADEUS and AMADEUS ACO. The cost of such training shall be borne by AMADEUS, except for travel, lodging, meals and other living expenses incurred by AMADEUS ACO's personnel in attending the

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program, which shall be borne and paid for by AMADEUS ACO.

11.1.2 AMADEUS shall make available to AMADEUS ACO initial training materials, including but not limited to software, data and materials for on-site training, and tools for e-learning, if available. Such materials shall at all times remain the property of AMADEUS.

xxx xxx xxx."

On the basis of the "true test" referred to in the *MR Holdings* case, citing the case of *Mentholatum Co. Inc., vs. Mangaliman*, vis-à-vis the ACO Agreement dated August 13, 1997 with petitioner, Amadeus IT Group S.A. is continuing the body or substance of the business or enterprise for which it was organized.

Under the said ACO Agreement, one of the purpose or object of Amadeus IT Group S.A., *i.e.*, *"the widespread availability of the computerised information, products and services stored in the AMADEUS Global Core"*, is further advanced in the AMADEUS ACO Territory, which is the Philippines, by petitioner's marketing, offering and promoting of the AMADEUS System to Subscribers therein. In effect, Amadeus IT Group S.A. appointed petitioner as its local agent.

In addition, Amadeus IT Group S.A.'s active participation in the pursuit of the same purpose or object is shown in the following undertaking under the same ACO Agreement, to wit:

1. Amadeus IT Group S.A. can undertake any obligation with a third-party licensor, including obligations with respect to the marketing, offering and promotion of, and technical and other support for, the licensed AMADEUS Product; and petitioner is required to honor any of such undertaking within the Philippines (Par. 5, ACO Agreement);
2. In case of abuse of the AMADEUS System by Subscriber in the Philippines, Amadeus IT Group S.A. may: (a) require the Subscriber to stop such misuse, and/or, (b) exercise its right to terminate the agreement with the same Subscriber on account of such abuse, and/or (c) in the case that such abuse consists of excessive use in relation to the number of Bookings generated or of such other abuse as can reasonably be

ameliorated by payment of financial compensation, require the Subscriber to pay a fee for such use (Par. 9.3, ACO Agreement);

3. Amadeus IT Group S.A. shall contract directly to Multinational Subscribers that have their headquarters or Branches in the Philippines (Par. 9.4, ACO Agreement);
4. Amadeus IT Group S.A. has the right to contract with Subscribers within the Philippines relative to the CRS services through AMADEUS on-line and corporate products (Par. 9.4, ACO Agreement); and
5. Amadeus IT Group S.A. undertakes to provide basic training program covering the use of the AMADEUS products for marketing, offering and promoting purposes, and initial training materials, to petitioner to facilitate the introduction of the same products (Par. 11.1, ACO Agreement).

Thus, on the basis of the ACO Agreement alone, the inevitable conclusion is that Amadeus IT Group S.A. is doing business in the Philippines. Correspondingly, the services rendered by petitioner to Amadeus IT Group S.A. cannot be treated as subject to the zero percent (0%) VAT rate under Section 108(B)(2) of the NIRC of 1997, as amended.

The Distribution Agreement bolster the finding that Amadeus IT Group, S.A. is doing business in the Philippines.

Petitioner further avers that the Court in Division erred in concluding that Amadeus IT Group, S.A., which merely collects royalties from petitioner, is "doing business" in the Philippines. Relative thereto, petitioner points out that the input taxes or VAT withheld, considered by the Court in Division as an indication that Amadeus IT Group, S.A. is "doing business" in the Philippines, actually pertain to petitioner's royalty payments to Amadeus IT Group, S.A.; that the subject royalty payments are merely passive income; and that applying the statutory and jurisprudential definition of what constitutes "doing business", there is no showing that Amadeus IT Group, S.A. is "doing business" in the Philippines.

These arguments, however, is untenable.

As We have already stated, the ACO Agreement dated August

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13, 1997 entered into by Amadeus IT Group S.A. and petitioner is already a clear indication that the former is doing business in the Philippines.

In any event, to support its argument that the subject payments are royalties paid to Amadeus IT Group S.A., petitioner points to the Distribution Agreement dated January 1, 2001 entered into by and between petitioner and Amadeus Global Travel Distribution S.A.,[37] claiming, in effect, that the latter and Amadeus IT Group S.A. are one and same corporate entity.

However, during trial, no evidence whatsoever was presented by petitioner to establish the fact that Amadeus Global Travel Distribution S.A. and Amadeus IT Group S.A. are one and the same. Nevertheless, even granting that We ought to consider that the said fact is true, the same will even bolster the finding that Amadeus IT Group S.A. was doing business in the Philippines.

To reiterate, in order that a foreign corporation may be considered engaged in trade or business, its business transaction must be continuous,[38] and such continuity is exemplified by **the appointment of a local agent**.

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

> "The Main Agreement Definitions are applicable under this Agreement.
>
> ***'Subscriber'*** means any travel agent or other entity which has entered into a Subscriber Agreement with AMADEUS NMC for access to the AMADEUS System, and enters into a License Agreement with AMADEUS NMC pursuant to Article 2 below;
>
> xxx xxx xxx

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[37] Exhibit "V", Division Docket (CTA Case No. 8578) – Vol. 3, pp. 1310 to 1342.
[38] *N.V. Reederij "Amsterdam" and Royal Interocean Lines vs. Commissioner of Internal Revenue*, supra.

'Product' means any software and service described in Appendix A hereto, and any related Documentation, as updated from time to time by AMADEUS, distributed by AMADEUS NMC pursuant to this Agreement;

xxx xxx xxx

'Documentation' means technical data and printed materials related to the Product, and any user or operator manuals provided to AMADEUS NMC for use with the Product;

xxx xxx xxx

2.1 AMADEUS appoints AMADEUS NMC as its sole distributor of the Product to Subscribers in the Territory defined under Article 3 below.

2.2 AMADEUS NMC shall be responsible for marketing the Product to Subscribers located in AMADEUS NMC Territory.

2.3 Subject to the terms and conditions of this Agreement, AMADEUS hereby authorizes AMADEUS NMC to grant to Subscribers, non-exclusive, non-transferable licenses to use the Product for the purpose of facilitating the provision of reservation functions and related services, and to interface with agreed upon travel agency third party software. AMADEUS NMC shall enter into a License Agreement substantially in the form of Appendix C attached hereto, with each Subscriber.

On a case by case basis, AMADEUS NMC may be authorized by AMADEUS to enter into such License Agreements with providers headquartered in the AMADEUS-NMC Territory.

2.4 Subject to the prior written consent of AMADEUS, which consent shall not be unreasonably withheld, AMADEUS NMC may be authorized to grant such non-exclusive, non-transferable licenses to affiliate offices owned by shareholders of AMADEUS NMC.

xxx xxx xxx

3.1 AMADEUS NMC is granted the following Territory:

> PHILIPPINES
>
> xxx xxx xxx
>
> 12.1 Except as provided in Section 4.4, AMADEUS NMC agrees and acknowledges that AMADEUS has and shall retain all title, copyright and other proprietary rights in and to the Product and that AMADEUS NMC shall obtain only such rights to use or market the Product as are expressly provided in this Agreement."

Based on the foregoing, while it may be shown that Amadeus Global Travel Distribution S.A. designated petitioner as its "sole distributor" in the Philippines, the former has, in effect, appointed petitioner as its agent in the Philippines.

By the contract of agency, a person binds himself to render some service or to do something in representation or on behalf of another, with the consent or authority of the latter.[39]

In this case, petitioner acts as representative of Amadeus Global Travel Distribution S.A. in that while the latter retains all title, copyright and other proprietary rights in and to the subject Product, petitioner has been authorized to grant to Subscribers, non-exclusive, non-transferable licenses to use the same. In other words, instead of Amadeus Global Travel Distribution S.A. itself granting licenses to Subscribers, as owner of the said Product, it is being done by petitioner on behalf of the former in the Philippines. Thus, there can be no doubt that petitioner is constituted as local agent of Amadeus Global Travel Distribution S.A. in the Philippines.

Correspondingly, with petitioner acting as an agent of Amadeus Global Travel Distribution S.A., and granting that the latter is one and the same entity as Amadeus IT Group S.A., the finding that Amadeus IT Group S.A. is doing business in the Philippines will even be bolstered, if not, strengthened.

Royalty payments are not necessarily passive income.

In arguing that royalty payments are passive income, relative to

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[39] Article 1868 of the Civil Code of the Philippines (Republic Act No. 386).

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its position that Amadeus IT Group S.A. is not doing business in the Philippines, petitioner cites portions of decisions of American courts[40], and the supposed same treatment under Sections 24(B)(1) and Section 27(D)(1) of the NIRC of 1997, as amended, to wit:

> "SEC. 24. *Income Tax Rates.* –
>
> (A) *Rates of Income Tax on Individual Citizen and Individual Resident Alien of the Philippines.* –
>
> xxx xxx xxx
>
> (B) ***Rates of Tax on Certain Passive Income.*** –
>
> (1) *Interest, Royalties, Prizes, and Other Winnings.* –
>
> A final tax at the rate of twenty percent (20%) is hereby imposed upon the amount of ...**royalties**, except on books, as well as other literary works and musical compositions, which shall be imposed a final tax of ten percent (10%): xxx."
>
> "SEC. 27. *Rates of Income Tax on Domestic Corporations.* –
>
> xxx xxx xxx
>
> (D) ***Rates of Tax on Certain Passive Income.*** –
>
> (1) *Interest from Deposits and Yield or any other Monetary Benefit from Deposit Substitutes and from Trust Funds and Similar Arrangements, and Royalties.* – A final tax at the rate of twenty percent (20%) is hereby imposed upon the amount of ...**royalties**, derived from sources within the Philippines: xxx."

We do not agree with petitioner's argument.

Without doubt, Philippine tax laws were based on the federal tax laws of the United States. And in accord with established rules of statutory construction, the decisions of American courts construing

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[40] *Sierra Club, Inc. vs. Commissioner of Internal Revenue*, 86 F. 3d (9th Cir. 1996); *Pinson vs. Commissioner of Internal Revenue Service*, T.C. Memo. 2000-208, July 28, 2000; and *American Air Liquide vs. Commissioner of Internal Revenue*, 116 T.C. No. 23, July 16, 2001.

the federal tax code are entitled to great weight in the interpretation of our own tax laws.[41]

Nevertheless, the persuasiveness of the said decisions or interpretation of American courts is dependent on whether what the issue before the Court involves "parallel tax laws", in accordance with the jurisprudential pronouncement by the Supreme Court, in the case of *Bañas, Jr. vs. Court of Appeals, et al.*,[42] to wit:

> "Since our income tax laws are of American origin, interpretations by American courts on **our <u>parallel</u> tax laws** have persuasive effect on the interpretation of these laws." *(Emphasis and underscoring supplied)*

In this case, it was never established that the American decisions cited by petitioner involved or interpreted parallel tax laws of the Philippines. Thus, the said decisions cannot have any persuasive effect or great weight in disposing the instant case.

More importantly, We do not agree with petitioner's stance that the NIRC of 1997, as amended, consistently treated royalties as a passive income source.

While it may be true that the aforequoted Sections 24(B)(1) and 27(D)(1) of the NIRC of 1997, as amended, treat royalties as passive income, the same applies only to those received as such by individual citizens, resident alien of the Philippines, and domestic corporations.

As for nonresident aliens, and foreign corporations like Amadeus IT Group S.A., Sections 25(A)(2), 28(A)(7)(a), and 28(B)(1), of the NIRC of 1997, as amended, respectively apply, viz.:

> "SEC. 25. ***Tax on Nonresident Alien Individual***. –
>
> (A) *Nonresident Alien Engaged in Trade or Business Within the Philippines.* –
>
> xxx xxx xxx
>
> (2) *Cash and/or Property Dividends from a*

[41] *Commissioner of Internal Revenue vs. Court of Appeals, et al.*, G.R. No. 123206, March 22, 2000.
[42] G.R. No. 102967, February 10, 2000.

> *Domestic Corporation or Joint Stock Company, or Insurance or Mutual Fund Company or Regional Operating Headquarters of a Multinational Company, or Share in the Distributable Net Income of a Partnership (Except a General Professional Partnership), Joint Account, Joint Venture Taxable as a Corporation or Association, Interests, **Royalties**, Prizes, and Other Winnings.* – ...**royalties (in any form)**...shall be subject to an income tax of twenty percent (20%) on the total amount thereof: *Provided, however*, That **royalties on books as well as other literary works**, and **royalties on musical compositions** shall be subject to a final tax of ten percent (10%) on the total amount thereof: xxx." *(Emphases supplied)*
>
> "SEC. 28. ***Rates of Income Tax on Foreign Corporations.*** –
>
> (A) *Tax on Resident Foreign Corporations.* –
>
> xxx xxx xxx
>
> (7) ***Tax on Certain Incomes Received by a Resident Foreign Corporation.*** –
>
> (a) *Interest from Deposits and Yield or any other Monetary Benefit from Deposit Substitutes, Trust Funds and Similar Arrangements and **Royalties**.* – ...**royalties**, derived from sources within the Philippines shall be subject to a final income tax at the rate of twenty percent (20%) ...: xxx.
>
> xxx xxx xxx
>
> (B) ***Tax on Nonresident Foreign Corporations.*** –
>
> (1) *In General.* – Except as otherwise provided in this Code, a foreign corporation not engaged in trade or business in the Philippines shall pay a tax equal to thirty-five percent (35%) of the gross income received during each taxable year from all sources within the Philippines, such as...**royalties** ...: xxx." *(Emphases supplied)*

A cursory reading of the foregoing provisions would reveal that the same do not make a distinction whether a royalty payment is passive or not, unlike under Sections 24(B)(1) and 27(D)(1) of the

NIRC of 1997, as amended, which specifically treat royalties as only passive. Thus, if the legislature made a qualification as to the said latter provisions, and provided no distinction under Sections 25(A)(2), 28(A)(7)(a), and 28(B)(1), of the NIRC of 1997, as amended, then it can be concluded that, under the law, royalty payments may either be passive or otherwise.

Such being the case, contrary to petitioner's stance, it is *non-sequitur* that when a foreign corporation, such as Amadeus IT Group S.A., is merely receiving royalties, it can already be deemed that it is not doing business in the Philippines.

The grant or denial of motions for new trial is discretionary on the part of the Court in Division. In any event, even when petitioner will be able to establish the oneness of "Amadeus Global Travel Distribution S.A." and "Amadeus IT Group S.A.", the same will not work in petitioner's favor.

Lastly, petitioner emphasizes that its *Motion for New Trial* for the presentation of additional documents to prove that "Amadeus Global Travel Distribution S.A." and "Amadeus IT Group S.A." are one and the same entity would substantially change the outcome of the case.

Again, We disagree.

In *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*,[43] the Supreme Court said:

> "The rule that the grant or denial of motions for new trial rests on the discretion of the trial court, may likewise be extended to the CTA. When the denial of the motion rests upon the discretion of a lower court, **this Court will not interfere with its exercise, unless there is proof of grave abuse thereof.** " *(Emphasis supplied)*

Thus, in the absence of grave abuse of discretion, the ruling of the Court in Division denying petitioner's *Motion for New Trial* will not

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[43] G.R. Nos. 141104 & 148763, June 8, 2007.

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be interfered with by the Court *En Banc*. In this case, petitioner failed to show such grave abuse. We therefore see no reason to reverse the said ruling.

Nonetheless, even granting that petitioner's *Motion for New Trial* was granted by the Court in Division and petitioner was able to establish that "Amadeus Global Travel Distribution S.A." and "Amadeus IT Group S.A." are one and the same entity, it will not change the outcome of the case.

In fine, considering that petitioner's services do not qualify as zero-rated for VAT purposes, it is not entitled to claim a refund of input VAT for the 2nd, 3rd and 4th quarters of taxable year 2010.

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is **DENIED** for lack of merit. The Decision dated June 21, 2016 and Resolution dated September 26, 2016 rendered by the Court in Division in CTA Case No. 8578 are hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(With Dissenting Opinion)
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 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.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

AMADEUS MARKETING PHILIPPINES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA *EB* NO. 1532
(CTA Case No. 8578)

Present:

DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

Promulgated:

APR 05 2018 4:25 p.m.

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DISSENTING OPINION

MANAHAN, *J.*:

The majority of my esteemed colleagues denied the instant claim for refund of input taxes on the ground that petitioner's services do not qualify as zero-rated for VAT purposes under Section 108 (B) (1) (2) of the National Internal Revenue Code of 1997 (NIRC of 1997).

The main rationale for the denial of the claim for refund is that petitioner failed to prove that the recipient of its services, Amadeus IT Group S.A. (Amadeus S.A.), is not doing business in the Philippines, hence not fulfilling one of the conditions for VAT zero rating under the said Section 108 (B) (2) of the NIRC of 1997.

It is well-settled that in order for a sale of service to be zero-rated under the aforesaid provision of law, the services must be rendered to a nonresident person *not engaged in business who is outside the Philippines when the services were performed.*

The analysis of the facts as presented in the instant case led the majority to conclude that the foreign recipient of the services was doing business in the Philippines.

It is in this conclusion that I hold a contrary view.

I humbly believe that the activities of Amadeus IT Group S.A. pertaining to the subject transaction is not considered doing business in the Philippines as there are clear indications to prove the contrary and I specify as follows:

1. Payment made to Amadeus S.A., the foreign recipient of services, was in the form of royalties.

I find that petitioner sufficiently established its contention that the payments from which VAT was withheld are mere "royalty payments" stemming from the arrangement that the petitioner was given the right to use the intellectual property belonging to Amadeus S.A.

Under the terms of the ACO Agreement[1], Amadeus S.A., the foreign principal, grants petitioner the right to use the proprietary marks connected with Amadeus products for the duration of the Agreement. The relationship between the petitioner and its foreign principal is two-pronged and is revealed by the provisions of the Distribution Agreement and the aforementioned ACO Agreement.

A careful analysis of the provisions of the Distribution Agreement discloses that it is a contract where the Amadeus Group designates petitioner to be the distributor or marketing agent of the so-called "Amadeus Global Travel Distribution System". Portions of the Distribution Agreement are quoted below: *cm*

[1] Exhibit "D', pp. 968-978, Court Docket

"Recitals

WHEREAS, the Amadeus group of companies has developed a fully automated reservation and distribution system known as the Amadeus Global Travel Distribution System which is marketed by Amadeus NMC according to the terms and conditions of the Amadeus Marketing- NMC Agreement executed as of the 1st of July, 1997 (the "Main Agreement").

WHEREAS, the Amadeus group of companies has, and will further develop, a Travel Agency Management System (hereinafter referred to as "the Product") that interacts and is compatible with the Amadeus Global Travel Distribution System".

Other pertinent terms of the Distribution Agreement are likewise quoted as follows:

2. General Terms of Agreement

2.1 Amadeus appoints Amadeus NMC as its *sole distributor* of the Product to its subscribers in the Territory defined under Article 3 below.

2.2 Amadeus NMC shall be responsible for *marketing the Product to Subscribers* located in Amadeus NMC Territory. (italics ours). [2]

The term "Subscribers" in the Agreement would mean the "customers" or purchasers of such System who are the end users of the system marketed and distributed by petitioner as seen by the provisions quoted below:

2.3 Subject to the terms and conditions of this Agreement, Amadeus hereby authorizes Amadeus NMC to grant to Subscribers, non-exclusive, non-transferable licenses to use the Product for the purpose of facilitating the provision of reservation functions and related services, and to interface with agreed upon travel agency third party software. Amadeus shall enter into a License Agreement substantially in the form of Appendix C attached hereto with each Subscriber.

In order for petitioner to be able to grant its Subscribers the license to use the products under the Distribution

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[2] Note that Amadeus NMC refers to petitioner Amadeus Marketing Philippines, Inc.

Agreement, it is imperative that it be authorized by Amadeus S.A., the owner of the software and other proprietary marks. The ACO Agreement between petitioner and Amadeus S.A. grants such authority and I quote Section 3.1 of said ACO Agreement, thus:

> 3.3. Amadeus grants Amadeus ACO[3] the right to use certain Proprietary Marks connected with Amadeus products as long as this Agreement is in force. The Proprietary Marks include, but are not limited to, those registered or which may become registered with the International Trademark Office, the Spanish Trademark authorities or other National Trademark offices.

To prove that the income payments made to Amadeus S.A. are royalty payments, petitioner presented, among others, its Monthly Remittance Returns of VAT and Other Percentage Taxes Withheld (BIR Form No. 1600) covering the period second to fourth quarters of 2010.[4]

A close perusal of these monthly withholding tax remittance returns reveals that petitioner used the ATC Code "WV050" in remitting the VAT withheld from its income payments.

In Revenue Memorandum Order (RMO) No. 09-07 issued on May 30 2007, the Alphanumeric Tax Code (ATC) No. "WV050" is designated to be the code for VAT withheld on the "Lease or use of properties or property rights owned by non-residents" which would cover the royalty payments allegedly made by petitioner to its principal Amadeus SA.

As a general rule, royalties are considered as passive income as they do not originate from the active pursuit of the recipient's business but merely from its assets such as software, trademarks, designs, etc. The Supreme Court, in the case of *Chamber of Real Estate and Builders Association Inc. vs. Romulo*[5] cited the definition of "passive income" used by the BIR as follows:

> "Section 57 (A) expressly states that final tax can be imposed on certain kinds of income and enumerate these

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[3] Note that Amadeus ACO refers to petitioner Amadeus Marketing Philippines, Inc.
[4] Exhibits BB-448, BB-518, BB-631, BB-819, BB-901, BB-1137, BB-1343.
[5] G.R. No. 160756, March 9, 2010.

as passive income. The BIR defines passive income by stating what it is not:

> "....if the income is generated in the active pursuit and performance of the corporation's primary purpose, the same is not passive income...."

2. The relationship between petitioner and Amadeus S.A. and the transactions under the Distribution Agreement and the ACO Agreement do not constitute "doing business in the Philippines".

I agree with the argument of petitioner that the payments made to Amadeus S.A. are mere royalties hence represent passive investments that do not constitute any active or direct participation in the business here in the Philippines.

Article 12 (3) of the RP- Spain defines "royalties as follows:

> "Article 12
>
> (3) *The term "royalties"* as used in this Article *means payments of any kind received as a consideration for the use of, or the right to use, any* copyright of literary, artistic or scientific works, any patent, trademark, *design or model,* plan, secret formula *or process,* or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience, and includes payments of any kind in respect of motion picture films and works on films or videotapes for use in connection with television. 4. The provisions of paragraphs 1 and 2 shall not apply if the recipient of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State professional services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply." (italics ours)

The mere acceptance of royalties for the use of a property right in the instant case is not constitutive of doing business in the Philippines as the foreign counterpart does not play an active role in the business of petitioner.

Amadeus S.A. is merely a passive player as can be seen from the terms of both Agreements.

The Supreme Court in one case[6] has described the "essence" of royalty as follows:

> "It is the essence of a royalty that it is paid in consideration of an existing right. In its ordinary acceptation, royalties refer to payments made to the owner for permitting another to use his property."

Additionally, the existence of a PE is determinative of the right of the Philippine government to tax a foreign entity as doing business locally. Under the Treaty as culled from Article 5 of the OECD Convention, the term "permanent establishment" is generally defined as a "fixed place of business through which the business of an enterprise is wholly or partially carried on".[7] It will also refer to paragraph 5 of the said Article which provides as follows:

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[6] Golden Diamond, Inc. vs. The Court of Appeals and Lawrence Cheng, G.R. No. 131436, May 31, 2000.

[7] Article 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term "permanent establishment" includes especially: a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop, and f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.
4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include: a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise; b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery; c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise; d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise; e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character; f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
5. Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised

"Article 5

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph."

Applying the foregoing guidelines to the case at hand, I agree with petitioner's assertions that its role *vis a vis* its principal (Amadeus S.A.) is one of distributor and that the use of proprietary marks of the latter is a "contract for royalties", hence cannot be construed as "doing business in the Philippines".

Viewed from another perspective, Amadeus S.A. cannot be considered as having a PE in the Philippines as petitioner merely acts as a distributor of the product, i.e., automated reservations and distribution system of Amadeus S.A. Paragraph 6 of Article 5 of the OECD Model Convention is instructive, thus:

"Article 5

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business."

The concept of PE under a tax treaty perspective is intimately linked with the issue of "doing business" such that the absence of a PE in a particular territory is likely to be concluded as not doing business therein. cm

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through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph. xxx xxx xxx

A reading of the provisions of the aforequoted paragraph 5 of Article 5 of the RP-Spain Tax Treaty in relation to paragraphs 5 and 6 of the OECD Model Convention, a *dependent agent* hired by a foreign principal may be deemed to be a PE if said agent fits into the description provided under paragraph 5 of Article 5 of the OECD Model Convention quoted earlier.

In short, an agent is deemed to be dependent if it acts on behalf of an enterprise and habitually exercises an authority to conclude contracts on behalf of the principal. Such dependent relationship belies any claim that the principal is not doing business in the Philippines as the relationship between the agent and principal is symbiotic at best.

In contrast, an agent of *independent status* is described in paragraph 6 of the OECD Model Convention as follows:

> "6. An enterprise *shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status,* provided that such persons are acting in the ordinary course of their business." (italics ours)

Certainly, the above provisions are ripe for judicial interpretation as there is a fine line separating a dependent agent from an independent one but a telltale sign that is characteristic of a dependent status is the capacity or authority of the agent to conclude contracts on behalf of its principal.

In the instant case, petitioner is a distributor of the products of Amadeus S.A. as seen by the provisions of the Distribution Agreement and it does not have the authority to conclude contracts on behalf of either Amadeus S.A. or the Amadeus Group. The following provisions of the ACO agreement attest to the independent status of petitioner, thus :

> "2. Purpose of the Agreement
>
> 2.1 For the term and subject to the terms and conditions set forth in this Agreement, AMADEUS* hereby authorizes Amadeus ACO**, and Amadeus ACO hereby undertakes to

market, offer and promote the Amadeus System to Subscribers, by means of the Amadeus Products and to carry out the necessary actions in the Amadeus ACO territory in order to give appropriate access to the Subscribers, to the Amadeus Global Core, or to other computer databases offered or to be offered by AMADEUS under license from a third party.

2.2 *Nothing in this Agreement shall constitute a license by AMADEUS to Amadeus ACO to use or sub-license the Amadeus System software* which runs the Amadeus Global Core or any other sales and information database under license to the Amadeus Group." (italics ours).

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9. Agreements with Subscribers

9.4 Multinational Subscribers . Notwithstanding any provision to the contrary, *Amadeus ACO shall not have any exclusive distribution rights with respect to Multinational Subscribers* whether any such Multinational Subscriber is based within or outside of the Amadeus ACO Territory. *AMADEUS shall contract directly with Multinational Subscribers* that have their headquarters or branches in the Amadeus ACO territory and Amadeus ACO for its promotion of the Amadeus products shall be entitled to receive Distribution Fees or commission for Bookings made by such Multinational Subscribers in the Amadeus ACO Territory, as provided in Appendix B hereto." (italics ours)

9.5 Amadeus On-Line and Corporate Products. Notwithstanding any provision herein to the contrary, *Amadeus ACO shall not have exclusive distribution rights with respect to Subscribers offering or wishing to make use of CRS services through Amadeus on-line and corporate products. Amadeus reserves the right to contract with Subscribers within the Amadeus ACO territory for this purpose.* xxx xxx xxx (italics ours)

* AMADEUS refers to Amadeus S.A.
**Amadeus ACO refers to Amadeus Marketing Philippines, Inc.

The Supreme Court in one case[8] elaborated on the differences between a dependent agent and an agent with an independent status as they relate to the establishment of a PE and I quote:

[8] Air Canada vs. CIR, G.R. No. 169507, January 11, 2016.

> "Even though there is no fixed place of business, an enterprise of a Contracting State is deemed to have a permanent establishment in the other Contracting State if under certain conditions there is a person acting for it.
>
> Specifically, Article V(4) of the Republic of the Philippines-Canada Tax Treaty states that "[a] person acting in a Contracting State on behalf of an enterprise of the other Contracting State (other than an agent of independent status to whom paragraph 6 applies) shall be deemed to be a permanent establishment in the first-mentioned State if . . . he has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for that enterprise." The provision seems to refer to one who would be considered an agent under Article 186883 of the Civil Code of the Philippines.
>
> On the other hand, Article V(6) provides that "[a]n enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business.
>
> Considering Article XV of the same Treaty, which covers dependent personal services, the term "dependent" would imply a relationship between the principal and the agent that is akin to an employer-employee relationship.
>
> Thus, an agent may be considered to be *dependent* on the principal where the latter exercises comprehensive control and detailed instructions over the means and results of the activities of the agent."

Based on the terms of the ACO Agreement and the Distribution Agreement, I believe that petitioner may be categorized as an agent of an independent status, thus, not deemed to be doing business in the Philippines.

The mere appointment of a distributor or a representative domiciled in the Philippines does not necessarily constitute "doing business" in the Philippines as enunciated in Section 3 (d) of R.A. 7042 (Foreign Investments Act) and I quote:

"Section 3.

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

The Supreme Court in the case entitled *Steelcase, Inc. vs. Design International Solutions, Inc.*[9], in reference to the aforecited provisions of the Foreign Investments Act, ruled as follows:

> "From the preceding citations, the appointment of a distributor in the Philippines is not sufficient to constitute doing business unless it is under the full control of the foreign corporation. On the other hand, if the distributor is an independent entity which buys and distributes products, other than those of the foreign corporation, for its own name and its own account, the latter cannot be considered to be doing business in the Philippines. It should be kept in mind that the determination of whether a foreign corporation is doing business in the Philippines must be judged in light of the attendant circumstances."

Under the terms of Paragraph 6.1 of the ACO Agreement, petitioner will be given a distribution fee or a commission fee for marketing, offering and promoting the products of its principal, thus:

> "6.1 Subject to the terms and condition of this Agreement, Amadeus shall pay to Amadeus ACO, a Distribution Fee which shall be considered as a commission fee for the marketing,

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[9] G.R. No. 171995, April 18, 2012

offering and promoting Amadeus Products provided in Appendix A hereto."

In conclusion, based on the evidence on record and a careful perusal of the Agreements entered into between petitioner and its principal, Amadeus S.A., I find that petitioner sufficiently established that its principal (Amadeus S.A.) is not doing business in the Philippines.

In view of the foregoing, I respectfully submit that petitioner has a legal basis to claim a refund of input VAT for the 2nd ,3rd and 4th quarters of taxable year 2010 and I vote that this case be remanded to the Court in Division to determine the amount of refund that was actually proven during trial.

Catherine T. Manahan

CATHERINE T. MANAHAN
Associate Justice