Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

LACSON & LACSON INSURANCE BROKERS, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 1272
(CTA Case No. 8203)

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

Promulgated:
MAR 17 2017 4:05 p.m.

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RESOLUTION

MINDARO-GRULLA, J.:

This resolves petitioner's "Motion for Reconsideration" of the Decision dated October 4, 2016 of this Court en banc, the dispositive portion of which states:

> *"**WHEREFORE** premises considered, the petition is **DENIED** for lack of merit. The Decision of the Second Division of this Court in CTA Case No. 8203, promulgated on October 10, 2014 and its Resolution, promulgated on January 30, 2015, are hereby **AFFIRMED**. No pronouncement as to costs.*
>
> ***SO ORDERED**."*

In assailing this Court's Decision, petitioner raised the following issues:

"I.

THE ASSESSMENT HAS NO FACTUAL AND LEGAL BASIS.

II.

MERE FALSITY OF RETURNS DOES NOT WARRANT AUTOMATIC APPLICATION OF THE TEN YEAR PRESCRIPTIVE PERIOD.

III.

THE WINTERNITZ ASSOCIATES INSURANCE BROKERS CORP. SHOULD HAVE BEEN APPLIED IN THIS CASE.

IV.

THE IMPOSITION OF FIFTY PERCENT (50%) IS LEGALLY AND FACTUALLY BASELESS.

Except for the first issue which was raised for the first time on appeal, petitioner rehashed the issues and maintains its arguments previously raised before the Division of this Court and the Court en banc.

On November 24, 2016, petitioner filed a "Supplement to Motion for Reconsideration dated 2 November 2016". Petitioner for the first time on appeal, questions the imposition of 20% deficiency interest. Citing this Court's Division decision[1], petitioner argued that deficiency interest may be imposed only in instances where deficiency on the tax due is defined in the Code, i.e. income tax, estate tax and donor's tax.

We resolve to deny the motion.

After a careful examination of petitioner's "Motion for Reconsideration", the Court finds that the issues and arguments raised in said motion had already been sufficiently passed upon and fully discussed not only by the Second Division's Decision dated October 10, 2014 and its Resolution, dated January 30, 2015 but also by this Court en banc's Decision dated October 4, 2016.

As to the imposition of 20% deficiency interest and that the assessment lacks factual and legal basis, these issues are raised for the first time on appeal. Petitioner could have easily raised the same before the administrative level. But

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[1] Ace/Saatchi & Saatchi Advertising, Inc. vs The Honorable Commissioner of Internal Revenue, CTA Case No. 8439, December 9, 2015. (First Division)

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did not. Petitioner passed up the opportunity to raise the same defense during the trial of this case. Petitioner neglected another opportunity to present the said defense during the Motion Reconsideration before the Division. Petitioner neglected another opportunity to present the same defense in the petition before this Court *En banc*. Petitioner had to wait until it can file a motion for reconsideration before this Court *En banc* to assert a new argument.

Not having raised it in the administrative level, neither in the petition before this Court's Division nor the petition before this Court *En banc*, movant-petitioner cannot raise the same here for the first time. As a rule, no question will be entertained on appeal unless it has been raised in the court below. Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be considered by a reviewing court, as they cannot be raised for the first time at that late stage. Basic consideration of due process impels this rule.[2]

In sum, We found no substantial argument was raised to merit reconsideration of our Decision promulgated on October 4, 2016.

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

SO ORDERED.

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

WE CONCUR:

(Inhibited)
ROMAN G. DEL ROSARIO
Presiding Justice

[2] ELAINE A. DEL ROSARIO vs. MELINDA F. BONGA, G.R. No. 136308, January 23, 2001(350 SCRA 108).

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(I maintain my Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(No Part)
ESPERANZA R. FABON-VICTORINO
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(With Dissenting Opinion)
CATHERINE T. MANAHAN
Associate Justice

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	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: MAR 17 2017 2:05 p.m.

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Dissenting Opinion

MANAHAN, J.:

With due respect to the majority, I dissent on the application of the ten-year prescriptive period for the assessment of deficiency VAT against petitioner.

The Court *En Banc*, affirming the Court in Division, finds the falsity in petitioner's returns due to substantial under-declaration of sales for taxable year 2006. Said under-declaration was arrived at by computerized matching conducted by the Bureau of Internal Revenue (BIR) on data provided by third-party sources (purchases submitted by petitioner's customers) per the Reconciliation of Listing for Enforcement (RELIEF) and Third Party Matching-BOC Data Program as against petitioner's declared sales per VAT returns.[1]

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[1] *Rollo*, CTA EB No. 1272, Division Decision dated October 10, 2014, p. 54.

The Court in Division laid out the last days for respondent to issue its assessments for deficiency Value-Added Tax (VAT), as April 25, 2009, July 25, 2009, October 25, 2009, and January 31, 2010, for the first to fourth quarters of taxable year 2006, respectively.[2] Thus, the assessment dated March 29, 2010, and received by petitioner on April 21, 2010[3], has prescribed.

However, the Court finds justification for applying the ten-year prescriptive period on the basis of the alleged substantial under-declaration of sales.

I reiterate my position in other cases[4] that the ten-year period does not apply to every "false" return and that the definition of a "false" return should be revisited.

The differentiation of "fraudulent" return from "false" return was elucidated in the Supreme Court case of Aznar v. Court of Tax Appeals (Aznar)[5]. In Aznar, the taxpayer was assessed with deficiency income tax for six consecutive taxable years due to his gross under-declaration of taxable income. These substantial under-declarations were noted by the Supreme Court and were made the *indicia* of the falsity of income tax returns. The Supreme Court went on to state that the "very substantial under-declarations of income for six consecutive years eloquently demonstrate the falsity or fraudulence of the income tax returns with an intent to evade the payment of tax." Furthermore, the Supreme Court expounded on the concept of false returns as being distinct from fraudulent returns with intent to evade taxes, as follows:

> We believe that the proper and reasonable interpretation of said provision should be that <u>in the three different cases of (1) false return, (2) fraudulent return with intent to evade tax, (3) failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within ten years</u> after the discovery of the (1) falsity, (2) fraud, (3) omission. <u>Our stand that the law should be interpreted to mean a separation of the three different situations of false</u>

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[2] *Rollo*, Division Decision dated October 10, 2014, p. 51.
[3] *Id.*
[4] McDonald's Philippines Realty Corp. v. Commissioner of Internal Revenue, CTA EB Nos. 1283 and 1284, February 9, 2017; and Ithiel Corporation v. Commissioner of Internal Revenue, CTA Case No. 8872, February 23, 2017.
[5] G.R. No. L-20569, August 23, 1974.

> return, fraudulent return with intent to evade tax, and failure to file a return is strengthened immeasurably by the last portion of the provision which segregates the situations into three different classes, namely – 'falsity,' 'fraud[,]' and 'omission.' That there is a difference between 'false return' and 'fraudulent return' cannot be denied. While the first merely implies deviation from the truth, whether intentional or not, the second implies intentional or deceitful entry with intent to evade the taxes due. (Underscoring supplied)

Based on this decision, the Supreme Court and the Court of Tax Appeals (CTA) have categorized wrongful entries, intentional or unintentional, or mistakes made, whether in good faith or in bad faith, appearing on the face of tax returns, as "falsity" which constitutes a legal ground for the imposition of the ten-year prescriptive period.

Almost 25 years later, the Supreme Court promulgated Commissioner of Internal Revenue v. B.F. Goodrich Phils. Inc. (Goodrich)[6], which shows a softening of the Supreme Court's stance on the scope and coverage of "false return" as compared to the position in Aznar.

In Goodrich, the taxpayer sold a piece of real property at a price which was lower than its declared fair market value. The BIR insisted that "falsity" was committed thereby justifying the issuance of the assessment beyond the normal three-year prescriptive period. In finding that the assessment had prescribed, the Supreme Court commented on the issue of falsity, as follows:

> Petitioner insists that private respondent committed "falsity" when it sold the property for a price lesser than its declared fair market value. This fact alone did not constitute a false return which contains wrong information due to mistake, carelessness or ignorance. It is possible that real property may be sold for less than adequate consideration for a *bona fide* business purpose; in such event, the sale remains an "arm's length" transaction. In the present case, the private respondent was compelled to sell the property even at a price less than its fair market value, because it would have lost all ownership rights over it upon the expiration of the parity agreement. xxx

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[6] G.R. No. 104171, February 24, 1999.

> Furthermore, the fact that private respondent sold its real property for a price less than its declared fair market value did not by itself justify a finding of false return. Indeed, private respondent declared the sale in its 1974 return submitted to the BIR. Within the five-year prescriptive period [now, three-year prescriptive period], the BIR could have issued the questioned assessment, because the declared fair market value of the said property was of public record. This it did not do, however, during all those five years. Moreover, the BIR failed to prove that respondent's 1974 return had been filed fraudulently. Equally significant was its failure to prove respondent's intent to evade the payment of the correct amount of tax. (Underscoring supplied)

While Aznar and Goodrich have radically different factual circumstances, both these cases impacted on how "false returns" are defined. From the broad Aznar definition that a false return is any deviation from the truth, Goodrich provided an instance wherein a "deviation" from the truth, as found by the BIR, did not automatically render the return as a "false return" which would justify the application of the ten-year prescriptive period.

Furthermore, in Goodrich, the Supreme Court required that the BIR prove the presence of fraudulent intent or intent to evade payment of the correct amount of tax on the part of the taxpayer. The Supreme Court also found that the BIR could have issued the assessment within the ordinary prescriptive period considering that the declared fair market value was in the public record. In Goodrich, the "deviation" did not put the BIR at a disadvantage in issuing its assessment, as opposed to the situation in Aznar which involved exorbitant under-declarations for six consecutive years which could not have been easily traced from the returns itself.

This is consistent with the statement in Aznar:

> The ordinary period of prescription of 5 years within which to assess tax liabilities under Sec. 331 of the NIRC should be applicable in normal circumstances, but whenever the government is placed at a disadvantage so as to prevent its lawful agents from proper assessment of tax liabilities due to false returns, fraudulent returns intended to evade payment of tax or failure to file returns, the period of ten years...from the time of discovery of the falsity, fraud or

> omission...should be the one enforced. (Underscoring supplied)

Thus, as early as Aznar, a qualification had been made that there should be a disadvantage to the government agents resulting from falsity, fraud or omission, which would prevent said agents from assessing the tax within the ordinary period of prescription. Without such disadvantage, the normal three-year prescriptive period should apply.

It is interesting to note that even prior to Goodrich, the CTA, in 1995, had also recognized this limitation in Aznar, to wit:

> Respondent also contends in the alternative, that petitioner's omission of its sales of bottled and tetra-packed milk from its sales tax return rendered said returns "false" within the meaning of Section 223 of the Tax Code. In support of this, reliance is placed on the ruling in the case of Aznar vs. Court of Tax Appeals (58 SCRA 519), wherein it was held that the term "false return" merely implied a deviation from truth, irrespective of whether such omission is intentional or not. Thus, respondent argues, since petitioner's sales tax returns did not disclose the "truth" regarding its sales of bottled and tetra-packed milk to outlets other than the Armed Forces of the Philippines Commissary and Exchange Services (AFPCES) and the US Military Installations (USMI), such omission rendered said returns "false" within the contemplation of Section 223 of the Tax Code.
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> We find respondent's reliance on Aznar misplaced. There is nothing in the said case which establishes a hard and fast rule that every "deviation" from the truth necessarily brings a particular return under the coverage of Section 223 of the Tax Code. As pointed out by the petitioner, it is only where the falsity or "deviation" would place the government at a disadvantage so as to prevent the assessment and collection of the correct amount of taxes that the ordinary prescriptive period...should not be applied.[7] (Underscoring supplied)

[7] San Miguel Corporation v. Commissioner of Internal Revenue, CTA Case No. 4675, January 6, 1995.

The application of Aznar and Goodrich must always be in light of the purpose and rationale for providing a prescriptive period: to give taxpayers peace of mind and to safeguard them from unreasonable examination, investigation, or assessment. The law on prescription, being a remedial measure, should be liberally construed in order to afford such protection. As a corollary, the exceptions to the law on prescription should perforce be strictly construed.[8]

Guided by the foregoing, the application of Aznar should not be one of unbridled discretion.[9] This is especially true considering that taxes are self-assessed, as discussed by the Supreme Court:

> Taxes are generally self-assessed. They are initially computed and voluntarily paid by the taxpayer. The government does not have to demand it. If the tax payments are correct, the BIR need not make an assessment.
>
> The self-assessing and voluntarily paying taxpayer, however, may later find that he or she has erroneously paid taxes.[10]

Upon finding that a tax has been paid erroneously, the taxpayer is allowed to file a claim for refund. On the reverse side, should the taxpayer find that there is an error on its return, the taxpayer may file an amended return, or should the BIR be the one to detect the error, then an assessment shall be issued.

The very meaning of deficiency assessment is that there was an error or omission on the part of the taxpayer in the preparation of its return or the payment of its tax. But each and every error, as discussed previously, does not and should not result to the operation of the ten-year prescriptive period. Otherwise, on the strength of the Aznar doctrine, BIR examiners conducting regular tax audits, who, logically as a matter of course, would always come up with tax findings of either under-declarations of income or over-declaration of deductions, or both, could mercilessly and arbitrarily raise the

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[8] Commissioner of Internal Revenue v. Standard Chartered Bank, G.R. No. 192173, July 29, 2015, citing CIR v. B.F. Goodrich Phils. Inc.
[9] Ayala Hotels, Inc. v. Commissioner of Internal Revenue, CTA Case No. 6002, January 10, 2002.
[10] SMI-ED Phils. Technology, Inc. v. Commissioner of Internal Revenue, G.R. No. 175410, November 12, 2014.

argument of false return giving rise to the ten-year prescriptive period. The result would be a lackadaisical implementation of the statutory principle that the statute of limitations is a remedial measure and should be strictly construed against the taxing authority and liberally in favor of the taxpayer. This situation was considered by the Court of Appeals in Commissioner of Internal Revenue v. Ayala Hotels, Inc.[11], where it described the effect of a sweeping application of Aznar, as follows:

> Reliance on the Aznar Case with regard to the issue of prescription is misplaced. Although in the said case, the Supreme Court ruled that a "false return" merely implies a deviation from the truth, whether intentional or not, <u>such pronouncement should not be given a sweeping application in all cases where a mistake in ITR entries are made by taxpayers</u>. <u>Otherwise, any mistake, however slight, in a return filed by a taxpayer in good faith would justify the application of the ten-year prescriptive period for assessment</u>. Consequently, the protection provided for under Section 203 of the 1997 NIRC is rendered nugatory. <u>Logically therefore, not all "false returns" would call for an application of Section 222 of the 1997 NIRC</u>. <u>Only "false returns" which are filed by a taxpayer with intent to evade tax should warrant an application of the ten-year prescriptive period</u>.
>
> <u>In order to render a return made by a taxpayer a "false return" within the meaning of Section 222, of the Tax Code, there must appear, a design to mislead or deceive on the part of the taxpayer</u>, or at least culpable negligence. A mistake, not culpable in respect of its value would not constitute a false return. (Underscoring supplied)

Notwithstanding, there is sufficient basis provided by Aznar and Goodrich to limit the application of the ten-year period to certain factual circumstances.

Thus, in the instant case, (1) there was no design to mislead or deceive on the part of the petitioner, since during the taxable year involved, the "discrepancy" in its declared income and third-party data came from the erroneous practice of its clients which claimed input VAT against petitioner, instead of from petitioner's clients, which were the insurance

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[11] CA-G.R. SP No. 70025, April 19, 2004.

companies;[12] (2) there was no intentional mistake or omission so as to put the BIR at a disadvantage in the investigation since the BIR was not prevented from issuing a deficiency VAT assessment, especially considering that as early as October 15, 2007, respondent already conducted the computerized matching which revealed the alleged discrepancy and informed petitioner of the same through Letter Notice No. 049-AS-06-00-00025;[13] and (3) there was no fraudulent intent or intent to evade the payment of the correct amount of tax, since as repeatedly argued by petitioner, and admitted by the BIR, the alleged discrepancy arose from the erroneous claiming of input VAT by petitioner's clients.

Considering the foregoing circumstances, the application of the ten-year prescriptive period is devoid of legal and factual basis.

Wherefore, I vote to grant the Motion for Reconsideration, on the ground that the assessment has prescribed.

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

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[12] *Rollo*, Petition for Review, p. 22.
[13] *Rollo*, Division Decision dated October 14, 2014, p. 40.