REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

BATINO REALTY CORPORATION, Petitioner,	CTA EB No. 1885 (CTA Case No. 9542)
	Present:
-versus-	DEL ROSARIO, *PJ*, CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, and MODESTO-SAN PEDRO, *JJ*.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JAN 03 2020 11:21 a.m.

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DECISION

Fabon-Victorino, J.:

In this petition for review dated July 31, 2018,[1] petitioner Batino Realty Corporation seeks to reverse the Decision dated April 18, 2018[2] and Resolution dated June 11, 2018,[3] both rendered by the Court in Division in CTA Case No. 9542, which denied its claim for value-added tax (VAT) refund predicated under Section 112 of the National Internal Revenue Code (NIRC), as amended.

1 *Rollo*, pp. 7-17.
2 Id. at pp. 57-65.
3 Ibid. at pp. 22-24.

Petitioner alleged the following in its initiatory pleading.

Petitioner is a domestic corporation engaged in the business of leasing real estate. It holds office at Calamba Premier International Park, Prinza, Calamba Laguna.

On the other hand, respondent Commissioner of Internal Revenue (CIR) is the head of the Bureau of Internal Revenue (BIR), vested with legal authority to carry out the functions duties and responsibilities of said office including, *inter alia,* the power to decide, approve, and grant claims for refund or tax credit of internal revenue taxes. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

On March 27, 2013, petitioner entered into an agreement with Samsung Electro-Mechanics Philippines Corporation (SEMPHIL), whereby the latter extended a loan in favor of the former amounting to Two Hundred Fourteen Million Eighty Thousand Pesos (₱214,080,000.00). The principal loan was payable in annual installments of Three Million Pesos (₱3,000,000.00) spread over a period of 38 years, the balance of which, would be subject to the parties' renegotiation. On the other hand, the interest thereon was due monthly, based on the outstanding balance of the loan, payable on or before the 25th day of each calendar month.

Petitioner subjected to VAT the interest payments to SEMPHIL.

On September 27, 2016, petitioner filed its Amended Quarterly VAT Returns for the 3rd and 4th quarters of calendar year (CY) 2014, reflecting unutilized input taxes respectively amounting to ₱416,216.18 and ₱419,283.07. Such input taxes stemmed from its payment of interest on a single and isolated loan transaction extended to it by SEMPHIL.

On September 30, 2016, petitioner filed an administrative claim for refund before the BIR.

On February 24, 2017, petitioner filed a Petition for Review[4] before the Court in Division, claiming respondent's inaction on its administrative claim for VAT refund.

During trial, petitioner offered as evidence various documents, as well as the testimonies of its witnesses to justify its claim for refund.[5]

In the Resolution dated August 16, 2017,[6] the Court in Division, save for the testimonies of petitioner's witnesses,[7] denied the admission of all documents formally offered by petitioner[8] for being mere photocopies.

Petitioner moved,[9] but failed[10] to obtain a favorable ruling on its motion for reconsideration to admit the denied exhibits.

Aggrieved, petitioner elevated its case before the Supreme Court via a Petition for Certiorari,[11] a copy of which was received[12] by the Court in Division on December 27, 2017. The Petition for Certiorari is still pending resolution to date.

On the other hand, respondent's counsel manifested in open court that he had no evidence to present.[13]

On April 18, 2018, the Court in Division rendered a Decision,[14] disposing the case in the following fashion:

> **WHEREFORE**, the present Petition for Review is **DENIED** for lack of merit.
>
> **SO ORDERED**.

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4 Docket (CTA Case No. 9542), pp. 10-18.
5 Petitioner's Formal Offer of Exhibits, ibid., at pp. 240-247.
6 Id. at pp. 254-255.
7 Exhibits P-14 to P-17.
8 Exhibits P-1 to P-13.
9 Docket (CTA Case No. 9542), pp. 258-263.
10 Resolution dated September 27, 2017, ibid. at pp. 273-275.
11 Id. at pp. 306-318.
12 Id. at p. 306.
13 Minutes of Hearing dated October 23, 2017, id. at p. 276.
14 See Note 2.

In so ruling, the Court in Division explained that since all of petitioner's documents were denied admission as evidence, no valid proof subsists to convincingly demonstrate that indeed, all the requisites for input VAT refund were complied with, for which reason its refund claim anchored on Section 112 of the NIRC, as amended must be rejected outright. Further, the Court in Division observed that petitioner's averment that it subjected to VAT the interest it paid to an entity not engaged in lending business such as its creditor SEMPHIL, spelled out a case of erroneous payment of VAT which must be pursued under Section 229 of the NIRC, as amended and not under Section 112 of the same Code.

On May 4, 2018, petitioner filed a Motion for Reconsideration[15] of the Decision dated April 18, 2018, but was denied in the similarly impugned Resolution of June 11, 2018.[16] Hence, the present recourse.

Petitioner argues that Section 105 of the NIRC, as amended, subjects to VAT sales done in the ordinary course of trade or business, including transactions incidental thereto. Given that SEMPHIL was into production of microchips used in cellular devices, the loan it extended to it was neither done in the ordinary course of business as it was merely an isolated and singular transaction, nor was it incidental to its manufacturing business. In other words, no VAT shall be due on the interest payments relative to the alleged loan extended by SEMPHIL in its favor.

Invoking Revenue Memorandum Circular (RMC) No. 42-2003, petitioner claims that interest income on loan is only subject to VAT only when the taxpayer is a qualified lending investor, dealer in securities, financial institutions or other entities engaged in similar activities. Since SEMPHIL is not a lending investor, or one regularly engaged in financing activities, the alleged VAT paid by petitioner on account of the interest payments on SEMPHIL was erroneously and/or illegally paid to the BIR, for which reason a refund thereof based on Section 229 of the NIRC, as amended is in order.

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15 Docket (CTA Case No. 9542), pp. 540-546.

16 See Note 3.

On the other hand, respondent failed to file his comment/opposition despite the opportunity granted.[17]

THE RULING OF THE COURT

The instant petition is bereft of merit.

First, the Court *En Banc* notes that petitioner originally sought before the Court in Division for a refund *pivoted on Section 112* of the NIRC, as amended. Realizing its mistake, it now clinches on the observation of the Court in Division that its refund claim was actually for erroneously paid VAT *pursuant to Section 229* of the same Code. By invoking a different provision of law, as well as theories in support thereof at this late stage of the proceeding, petitioner is effectively depriving respondent of adequate opportunity to proffer evidence to counter such point of law and arguments, surely offensive of the basic rules on fair play and due process. This cannot be permitted. On this point, *Philippine Ports Authority vs. City of Iloilo*[18] is *apropos:*

> As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court will not be permitted to change theory on appeal. Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. Basic considerations of due process underlie this rule. It would be unfair to the adverse party who would have no opportunity to present further evidence material to the new theory, which it could have done had it been aware of it at the time of the hearing before the trial court. To permit petitioner in this case to change its theory on appeal would thus be unfair to respondent, and offend the basic rules of fair play, justice and due process.

Thus, the scope of this review is confined only on the matter of petitioner's entitlement to refund anchored on Section 112 of the NIRC, as amended, as initially sought with the Court in Division. Relevant on the matter is

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17 Records verification report dated October 10, 2018, *rollo,* p. 46.
18 G.R. No. 109791, July 14, 2003.

paragraph (A) of Section 112 of the NIRC, as amended, which reads as follows:

> **SEC. 112. Refunds or Tax Credits of Input Tax. –**
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> **(A) Zero-rated or Effectively Zero-rated Sales.** - Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provided, however*, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (b) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided, further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales. *Provided, finally*, That for a person making sales that are zero-rated under Section 108(B) (6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

In *AT & T Communications Services Philippines, Inc. vs. Commissioner of Internal Revenue,*[19] the High Court summarized the mandatory preconditions for a successful prosecution of input VAT refund as follows:

> A taxpayer engaged in zero-rated transactions may apply for tax refund or issuance of tax credit certificate for unutilized input VAT, subject to the following requirements: (1) the taxpayer is engaged in sales which are zero-rated (i.e., export sales) or effectively zero-rated; (2) the taxpayer is VAT-registered; (3) the claim must be filed within two years after the close of the taxable quarter when such sales were made; (4) the creditable input tax due or paid must be attributable to such sales, except the transitional input tax, to the extent that such input tax has not been applied against the output tax; and (5) in case of zero-rated sales under Section 106 (A) (2) (a) (1) and (2), Section 106 (B) and Section 108 (B) (1) and (2), the

19 G.R. No. 182364, August 3, 2010.

> acceptable foreign currency exchange proceeds thereof have been duly accounted for in accordance with BSP rules and regulations.

Note that actions for tax refund, as in the instant case, are in the nature of a claim for exemption and the law is not only construed in *strictissimi juris* against the taxpayer, but also the pieces of evidence presented entitling a taxpayer to an exemption is *strictissimi* scrutinized and must be duly proven.[20]

In this case, petitioner confessed[21] having in its possession the originals of the documents in support of the subject claim for refund. But for reason only known to it, petitioner only formally offered photocopies of the alleged original documents for the admission of the Court in Division. Petitioner also had ample time to check or validate the authenticity of the documents it offered with respondent's record prior to the filing of its Formal Offer of Exhibits on July 10, 2017[22] since the BIR Record was transmitted to the Court as early as June 14, 2017,[23] but failed. In fine, petitioner only had itself to blame for the *faux pas* resulting in the unfavorable ruling of the Court in Division. On this score alone, the subject refund claim is bound to fail for insufficiency of evidence.

Granting *arguendo* that the Court in Division erroneously disallowed admission all of petitioner's documents offered as evidence, still they could not be considered for purposes of appeal. To be sure, the Rules of Court is pregnant with remedies available to petitioner to remedy the situation before it, i.e. Section 40, Rule 132 of the Rules of Court which reads:

> **Section 40.** *Tender of excluded evidence.* — If documents or things offered in evidence are excluded by the court, the offeror may have the same attached to or made part of the

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20 *Commissioner of Internal Revenue vs. Far East Bank & Trust Company (now Bank of the Philippine Islands),* G.R. No. 173854, March 15, 2010, citing *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue,* G.R. No. 159490, February 18, 2008.

21 Paragraph 4, petitioner's Motion for Reconsideration on the Court in Division's Resolution on its Formal Offer of Exhibits. See docket (CTA Case No. 9542), p. 260.

22 Docket (CTA Case No. 9542), p. 240.

23 Ibid. at pp. 144-145.

> record. If the evidence excluded is oral, the offeror may state for the record the name and other personal circumstances of the witness and the substance of the proposed testimony.

Jurisprudence tells us that if an exhibit sought to be presented in evidence is rejected, the party producing it should ask the court's permission to have the exhibit attached to the record.[24] These procedures are known as offer of proof or tender of excluded evidence and are made for purposes of appeal. If an adverse judgment is eventually rendered against the offeror, he may in his appeal assign as error the rejection of the excluded evidence.[25] Conversely, where documentary evidence was rejected by the lower court and the offeror did not move that the same be attached to the record, the same cannot be considered by the appellate court, as documents forming no part of proofs before the appellate court cannot be considered in disposing the case.[26]

On the strength of the above observations, if petitioner was keen on having its denied documentary exhibits be evaluated for whatever they may be worth, it could have easily made an offer of proof or tender of excluded evidence, and prayed that the Court in Division attach the denied documentary exhibits to form part of the record, but it failed. Neither did it assign as error the denial by the Court in Division of its documentary exhibits in its appeal before Court *En Banc*. Since the subject documentary exhibits are not part of the record in the case at bench, it is no longer feasible for the Court *En Banc* to consider, let alone accord evidentiary weight to the same, if any. There being no documents to support petitioner's refund claim, a denial thereof is in order.

WHEREFORE, the Petition for Review dated July 31, 2018 filed by Batino Realty Corporation is **DENIED**. The impugned Decision dated April 18, 2018 and Resolution of

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[24] *Catacutan vs. People of the Philippines,* G.R. No. 175991, August 31, 2011.

[25] *Cruz-Arevalo vs. Judge Querubin-Layosa,* A.M. No. RTJ-06-2005, July 14, 2006.

[26] *Fortune Tobacco Corporation vs. Commissioner of Internal Revenue,* G.R. No. 192024, July 1, 2015, citing *Banez vs. Court of Appeals,* 158 Phil. 16, 32 (1974); and *De Castro vs. Court of Appeals,* 75 Phil. 824, 835 (1945).

June 11, 2018, both rendered by the Court in Division are **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
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