REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

C.T.A. EB NO. 92
(C.T.A. Case No. 6188)

Present:

-versus-

Acosta, P.J.
Castañeda, Jr.
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, JJ.

MACQUARIE SECURITIES (PHILIPPINES), INC. *(formerly ING Barings Securities Philippines Inc.)*
Respondent.

Promulgated:
OCT 11 2006 GAApolinario

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D E C I S I O N

BAUTISTA, J.:

Before Us is a Petition for Review filed by the Commissioner of Internal Revenue praying for the reversal of the Decision of the Court's Second Division in C.T.A. Case

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No. 6188 promulgated on January 14, 2005 and its Resolution dated May 3, 2005 resolving the Motion for Partial Reconsideration, with regard to that portion cancelling the assessments for deficiency income tax and reducing the assessments for deficiency value-added tax (VAT) for the years 1996 and 1997 issued against herein respondent.

Antecedent facts to set us on a proper perspective are those lucidly set out by the Court *a quo*:

> "Petitioner is a domestic corporation duly organized and existing under the laws of the Philippines with principal office at the 20th Floor Tower I, Ayala Triangle, Makati City. It is engaged primarily, among others, "in the business of stock and sharebrokers, dealers in securities in all transactions relating to the sale, transfer, exchange, of every description of stock, shares, debentures, bonds, obligations, commodities and other debt or equity securities, and all transactions and negotiations on commission or otherwise relating to such business and to do all activities directly or indirectly connected therewith or incidental thereto" *(page 30, BIR records).*
>
> On the other hand, respondent Commissioner of Internal Revenue is the government official empowered to perform the duties of the Bureau of Internal Revenue, including, among others, the power to cancel disputed assessments, with office address at BIR National Office Building, Diliman, Quezon City.
>
> It appears that for the calendar years 1996 and 1997, petitioner seasonably filed its Annual Corporation Returns on April 14, 1997 with Equitable Bank Ayala Triangle Branch, Makati City *(Exhibit "K", inclusive of submarkings)*, and on April 15, 1998 with Traders Royal Bank, Atrium Branch, Makati City *(Exhibit "L", inclusive of submarkings)*, respectively.
>
> Likewise for the same period, the following returns were timely filed, to wit:

Quarterly VAT Returns:

	1996		1997	
	Exh.	Date Filed	Exh.	Date Filed
1st Quarter	M	04-22-96	Q	04-18-97
2nd Quarter	N	07-17-96	R	07-18-97
3rd Quarter	O	10-18-96	S	10-16-97
4th Quarter	P	01-20-97	T	01-19-98

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Monthly Remittance Returns of Income Taxes Withheld:

	1996		1997	
	Exh.	Date Filed	Exh.	Date Filed
January	KK	02-12-96	WW	02-11-97
February	LL	03-11-96	XX	03-10-97
March	MM	04-10-96	YY	04-10-97
April	NN	05-20-96	ZZ	05-13-97
May	OO	06-10-96	AAA	06-10-97
June	PP	07-10-96	BBB	07-10-97
July	QQ	08-09-96	CCC	08-11-97
August	RR	09-10-96	DDD	09-10-97
September	SS	10-10-96	EEE	10-10-97
October	TT	11-11-96	FFF	11-10-97
November	UU	12-10-96	GGG	12-10-97
December	VV	01-10-97	HHH	01-09-98

On September 10, 1998, petitioner received Letter of Authority No. 000019164 authorizing the Special Team created pursuant to RSO 673-98 composed of Revenue Officers E. Gesmundo, W. Gopez, R. Calo, JR Bungabong, R. Suba & R. Canido, to be supervised by Group Head JC Simpao, to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for the period from 1997 and unverified prior years *(page 1, BIR records).*

On January 17, 2000, petitioner received the Final Notice with Details of Discrepancies and six (6) Assessment Notices, all dated December 29, 1999, issued by the Enforcement Service of the Bureau of Internal Revenue through its Assistant Commissioner Percival T. Salazar *(Exhibits "A" to "G", inclusive of submarkings)*, covering the following deficiency tax assessments:

	Basic Tax	Interest	Compromise	Total
Deficiency Income Tax				
1997 (ST-Income-97-0090-2000)	P32,180,202.40	P11,527,563.14	P25,000.00	P43,732,765.55
1996 (ST-Income-96-0089-2000)	13,268,656.54	7,406,817.51	25,000.00	20,700,474.05
Deficiency Value-Added Tax				
1997 (ST-VAT-97-0088-2000)	16,361,018.99	5,816,005.21	25,0000.00	22,202,024.20
1996 (ST-VAT-96-0087-2000)	14,641,534.79	8,133,070.96	25,000.00	22,799,605.75
Deficiency Expanded				
Withholding Tax				
1997 (ST-EWT-97-0086-2000)	231,740.07	95,235.62	16,000.00	342,975.69
1996 (ST-EWT-96-0085-2000)	182,114.37	109,268.62	16,000.00	307,382.99
Totals	P76,865,267.16	P33,087,961.06	P132,000.00	110,085,228.23

On February 15, 2000, petitioner through its tax counsel, Laya Mananghaya & Co., filed its protest requesting the reinvestigation and cancellation of the above deficiency tax assessments *(Exhibit "H", inclusive of submarkings).*

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On March 30, 2000, petitioner submitted the relevant documentary evidence in support of its protest pursuant to Section 228 of the 1997 Tax Code *(Exhibits "J" and "J-2").*

There being no action on the protest, petitioner filed the instant Petition for Review on October 26, 2000, the thirtieth day from the lapse of one hundred eighty (180) day (i.e., September 26, 2000) period provided by law for respondent to decide on the protest reckoned from March 30, 2000, the day when petitioner submitted its supporting documents pursuant to Section 228 of the 1997 Tax Code."

On January 14, 2005, the Court rendered a Decision partially granting petitioner's Petition for Review, the dispositive portion of which is quoted hereunder:

"**WHEREFORE**, in view of the foregoing considerations, the Petition for Review is hereby ***PARTIALLY GRANTED***. The assessments for deficiency income tax for the years 1996 and 1997 and deficiency expanded withholding tax for the year 1996 are hereby **CANCELLED** and **WITHDRAWN** for lack of merit.

However, the assessments for 1996 and 1997 deficiency value added tax and for 1997 deficiency expanded withholding tax are hereby **UPHELD** in the following amounts:

	1996	1997
Deficiency Value-Added Tax		
Basic	P445,381.00	P64,545.45
Interest	244,959.55	22,590.90
Sub Total	P690,340.55	P87,136.35
Deficiency Expanded Withholding Tax		
Basic	P -	P231,744.06
Interest	-	95,235.62
Sub Total	P -	P326,979.68
T O T A L S	P690,340.55	P414,116.03

Accordingly, petitioner is ***ORDERED*** to ***PAY*** the respondent the aggregate amount of P1,104,456.58, plus 20% delinquency interest per annum from February 17, 2000 until fully paid, pursuant to Section 249(C) of the 1997 Tax Code.

SO ORDERED."

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On February 9, 2005, petitioner filed a Motion for Partial Reconsideration of the abovementioned Decision which was denied for lack of merit in a Resolution dated May 3, 2005.

Dissatisfied, petitioner has come to this Court on errors assigned in its Petition for Review, to wit:

1. The Second Division erred in allowing the deduction of the amount of P24,454,212.00 as expense for the year 1996, considering that respondent claimed said amount not as an expense but as a loss which is unsupported;

2. The Second Division erred in disallowing the imputation of the respective amounts of P13,456,234.82 and P91,943,434.73 as additional commission income for the years 1996 and 1997, respectively, for income tax and VAT purposes, considering that respondent failed to justify with convincing proof why it charged a commission rate for its transactions with its affiliate, ING Barings Hongkong Ltd., lower than the rate it charged for similar transactions with other foreign clients; and

3. The Second Division erred in holding that the commission income in the amount of P136,457,599.60 for the year 1996 and in the amount of P76,556,749.72 for the year 1997, earned by respondent from sales transactions on various securities with ING Barings Hongkong Ltd., is subject to VAT at 0% considering that there is no showing that said commission income was accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP).

An examination of the instant Petition for Review revealed that the issues raised by petitioner have been discussed at length and directly ruled upon in the assailed Decision and in the subsequent Resolution. Nonetheless, We shall delve into the issues for further disquisition.

Anent the first assigned error, petitioner posits that when respondent claimed the deduction as a loss in the administrative level, it cannot claim the same as an expense for the first time on appeal to the Court of Tax Appeals. Petitioner also avers that when respondent changed its position, petitioner was not given prior opportunity to decide the controversy within his competence in the administrative level, in violation of the requirement of prior exhaustion of administrative remedies, citing the case of *Aguinaldo Industries Corporation vs. Commissioner of Internal Revenue (CIR)*[1]. Petitioner further insists that respondent failed to prove its claimed loss since it changed the claimed loss to an expense.

The contentions of petitioner are devoid of merit.

Under Section 29(a)(1)(A) of the 1977 Tax Code as amended[2] *(the law in force in 1996)*, all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business shall be allowed as deductions in computing taxable income subject to tax. Under Section 29(d)(2) of the same Code, all losses actually sustained by a corporation and charged off within the taxable year and not compensated for by insurance or otherwise, are also allowed as deductions from gross income.

We agree with the ruling of the Court *a quo* that the change from loss to expense as an item of deduction from gross income is not a ground in disallowing the same. We have held in the past that while a particular item of deduction under one of the different subsections of the Tax Code does not satisfy the requisites for that item, it may still be allowed if it meets the requirements of another category of deduction under a different subsection. The case in point is *Connell Brothers v. CIR*[3] , wherein the Court of Tax Appeals then found that while the deduction as bad debt could not be allowed, it nonetheless ruled that the said amount is an ordinary and necessary business expense.

The case of *Aguinaldo*[4] cannot be used by petitioner as basis to support its arguments. As correctly resolved by the Second Division, the attendant facts in the said case are not on all fours with the instant case. In the said case, the petitioner admitted in

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[1] G.R. No. L-29790, February 25, 1982.
[2] Now Section 34 (A) of the 1997 Tax Code.
[3] Connell Brothers v. Commissioner of Internal Revenue, C.T.A. Case Nos. 411 and 610, April 30, 1966
[4] ibid.

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the administrative level that its income was taxable then later on changed its position, claiming that it was tax-exempt. In this case, respondent did not change its position. From the time petitioner filed its protest until the filing of the Opposition to petitioner's Motion for Partial Reconsideration, the loss is being claimed as a deduction from gross income. The change from loss as an item of deduction to expense is not a change in position since both categories of deduction still fall under the same portion of the Tax Code on allowable deductions to gross income. Logically, if the deduction is allowed, it will result in the same taxable net income.

For an expense to be deductible from gross income, the Supreme Court has ruled that it must satisfy four requirements, to wit:

(1) the expense must be both ordinary and necessary;

(2) the expense must be paid or incurred within the taxable year;

(3) the expense must be incurred in carrying on a trade, business or profession; and

(4) the expense must be supported by receipts, records or other pertinent papers showing the amount of the expense being deducted and the direct connection or relation of the expense being deducted to the development, management, operation and/or conduct of the trade or business.[5]

In this case, respondent avers that the expenses were incurred to purchase stocks to avoid possible litigation for non-delivery of stocks to its buying clients. It appears that in the years 1994 and 1995, there was a boom in the stock market which

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[5] Zamora v. Collector, L-15280, May 31, 1952; Visayan Cebu Terminal v. Collector, L-12798, May 30, 1960; Commissioner of Internal Revenue v. Atlas Consolidated Mining and Development Corporation and Court of Tax Appeals, G.R. L-26911 and L-26924, January 27, 1981; Esso Standard Eastern, Inc. v. Commissioner of Internal Revenue, G.R. Nos. 28508-9, July 7, 1989.

resulted in increased trading activity. During those years, respondent claims that its records were unable to keep track of the increased level of activity since its transactions were recorded manually. Eventually, this inefficient system led to an inventory shortfall wherein the total physical certificates were less than the actual certificates on record. To avoid possible lawsuit and loss of reputation, respondent purchased certain stocks to cover the inventory shortage since its clients demanded the delivery of their stock certificates. The stock certificates were subsequently delivered to the clients as testified to by respondent's witnesses.

We rule that respondent's expenses in the amount of P 24,454,212.00 in 1996 to purchase stocks to avoid possible litigation for non-delivery of stocks to its buying clients should be allowed as a legitimate business expense. In an earlier case, We have held that expenses incurred to avoid a protracted litigation is a necessary expense and as such deductible from gross income.[6]

The custody of shares on behalf of its clients is indeed part of the business of respondent as a stockbroker. The shortfall of inventory and the subsequent acquisition of shares to address the shortage were all related and necessary to its business operations. Respondent was able to submit sufficient documents to substantiate its claimed deduction i.e. contract notes, delivery receipts and the ABC report, which is a daily transaction record of the Philippine Stock Exchange on the dates the said shares were purchased.

In addition, We find no reason to disturb the factual findings of the Court *a quo* which properly conducted its own verification, to wit:

> "To prove that the expense was necessary and ordinary business expense..., petitioner presented various documents comprising of samples of Demand Letters from its clients *(Exhibit "HH")*, Schedule of

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[6] Philippine Paper Products v. Misael Vera, C.T.A. Case No. 1706, March 31, 1969.

Loss per Income Tax Return *(Exhibits "II", "II-1" and "II-2")*, Summary of Shares Purchased-1996 *(Exhibit "JJ", inclusive of submarkings)*, Daily Transaction Report-Form ABC *(Exhibits "MMM" to "PPP" and "TTT")* and Contract Notes *(Exhibits "VVV-1" to "VVV-24")*.

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....We find the documents submitted by petitioner substantial and relevant to prove its claimed "losses" during the year 1996. From the said evidence, We can trace, among others, the amount of discrepancy of stocks, the date when petitioner purchased shares to cover the inventory shortfall and their subsequent delivery to various clients.

The commissioned independent CPA, Mr. Wilfredo Z. Palad, in his report dated January 31, 2002, likewise concluded that:

"Conclusion

Based on the review performed and the information provided to us, we noted that a deficit existed between the stock position per books and the physical inventory. The purchases were supported by the contract notes, a pre-numbered continuous document registered with the BIR to support the transactions entered by the broker in behalf of its customers *(Exhibit "SSS")*."

Thus, the Court finds the documents presented by petitioner adequate to substantiate the necessity of the expense and correspondingly finds respondent's denial of the same improper. The expense is deductible from gross income."

On the second assignment of error, petitioner argues that since respondent charged a different commission rate to ING Barings Hongkong Ltd. (ING Hongkong), its foreign affiliate, compared with its other foreign clients, the Commissioner, pursuant to Section 43 of the 1977 Tax Code as amended, is automatically authorized to impute additional income to respondent, consisting of the difference between the commission rate charged to its foreign affiliate (0.03%) and the rate charged to its other foreign clients (0.05%), or 0.02%. Such allocation of income is necessary to prevent tax evasion or to clearly reflect the income of the taxpayer. Under the "comparable uncontrolled price (CUP) method" in Revenue Audit Memorandum Order (RAMO) No. 1-98, the pricing rate between respondent and its foreign affiliate (controlled sale) is equal to the price paid in comparable transactions between respondent and its other foreign clients (uncontrolled sale).

Petitioner avers that respondent has not submitted convincing evidence to show that the transactions for which respondent charged commissions to its foreign affiliate were different from the transactions for which it charged commissions to its other foreign clients.

Petitioner's arguments are untenable.

We agree with the respondent's argument in its Memorandum[7] that petitioner did not mention the conditions and circumstances under which the CUP method should be applied. Section 3.1.2(a) of RAMO 1-98 states that the CUP method evaluates the arm's length by reference to the amount charged in a comparable uncontrolled transaction. The RAMO also provides that in evaluating comparability, the following may be taken into consideration:

- trademark;
- product differences;
- geographical differences; and
- extraordinary market conditions.

Respondent, using the Organization for Economic Cooperation and Development (OECD) Transfer Pricing Guidelines, explains that the CUP method compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances. If there is any discrepancy between the two prices, this may indicate that the conditions of the commercial and financial relations of the associated

[7] Memorandum for Respondent, October 7, 2005, pages 21 to 29.

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enterprises are not arm's length, and as such, the price in the uncontrolled transaction may need to be substituted for the price in the controlled transaction. An uncontrolled transaction is similar to a controlled transaction, thus "comparable" when either one of these two requisites is met:

1. None of the difference (if any) between the transactions being compared or between the enterprises undertaking those transactions could materially affect the price in the open market; or
2. Reasonably accurate adjustments could be made to eliminate the material effects of such differences.

From the foregoing, the utilization of the CUP method requires first and foremost that there is no difference between the transactions being compared which could materially affect the price. In addition, all the aforequoted factors must be evaluated before the Commissioner may exercise his authority to allocate and impute income.

In this case, there is a difference. Petitioner compared transactions which were not similarly situated. The evidence presented showed that from January to October 1996, respondent had other foreign clients and the rates charged to ING Hongkong were similar to the rates charged to other foreign clients. However, in November 1996, respondent streamlined its operations and centralized all its foreign trades with ING Hongkong. In addition, there was stiff competition from the other big brokers in the foreign trade market at that time. Consequently, respondent had to reduce its commission rate charged to ING Hongkong from 0.05 to 0.03 in order to deal with the reduced work and to remain competitive. We are convinced that the timeframe within which the petitioner is making the comparison is different and the situation changed in November 1996, hence, an adjustment in the pricing was called for. Thus, there is no basis for the imputation of additional income by the respondent.

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In the same vein, in its assailed Decision, the Court in Division ratiocinated as follows:

> "We are not convinced that the manner of imposing "imaginary" income against petitioner is justifiable under the present situation. As correctly explained by petitioner, there are factors to be considered in determining the application of arm's length pricing.
>
> In the case of Cyanamid[8], *supra*, this Court had the occasion to rule in this wise:
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>> "[U]ncontrolled sales are considered comparable to controlled sales if the physical property and circumstances involved in the uncontrolled sales are identical to the physical property and circumstances involved in the controlled sales, or if such properties and circumstances are so nearly identical that any differences either have no effect on price, or such differences can be reflected by a reasonable number of adjustments to the price of uncontrolled sales. . . . Some of the differences which may affect the price of property are differences in the quality of the product, terms of sale, intangible property associated with the sale, time of sale, and the level of the market and the geographic market in which the sale takes place."
>
> Petitioner expounds that the difference in the commission charged was a business decision. It has to course through ING Barings Hongkong all its foreign transactions to simplify procedures for administration. This has been elucidated by petitioner's witness, Mr. Custodio, in his rebuttal testimony:
>
> "ATTY. IMON:
> Q. Mr. Witness, are you aware of the testimony given by Mr. Bungabong, BIR Revenue Examiner on January 9, 2003 with respect to this matter?
>
> MR. CUSTODIO:
> A. Yes, I was able to read the testimony of the BIR Examiner.
>
> ATTY. IMON:
> Q. Did you recall, Mr. Witness, that in his testimony said witness stated that the basis of their assessment for the non-arms length related part transaction arises from the Schedule of Foreign Commissions given by petitioner which I am showing to you and compared to foreign trades the commission for ING

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[8] Cyanamid Philippines, Inc. v. The Commissioner of Internal Revenue, CTA Case No. 4724 dated August 28, 1995.

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Hongkong was still lower. Mr. Witness, I am showing to you Exhibit "12" for the respondent, how would you explain that?

MR. CUSTODIO:

A. Well, I've seen actually the document which you've given to me. The difference on the commission for the foreign trades from the ING Securities Hongkong rates was basically due to the fact that ING Barings based in Hongkong limited actually was performing other duties for Manila office in terms of marketing, research and execution of the transactions. Actually, if you look at the schedules of the transactions, from January to October 1996 you will notice that a lot of foreign trades transactions were recorded in the book directly in the foreign clients name or the foreign clients account. As I have previously mentioned this source of transactions and the activity in the market we decided to extreme (sic) line the operation and decided that in coordination with ING Barings Hongkong Limited to actually booked (sic) all of these foreign trades under the name of ING Barings Hongkong Limited. This would obviously result in ING Barings Hongkong Limited from a lot of administrative functions from the Manila office. And therefore, on these basis (sic) we are therefore able to match the commission rates in terms of the foreign clients compared to Ing Barings Hongkong Limited because of these administrative functions that they are given (sic) to us. Also, I recall, during that time in line with the extreme (sic) lining of the operations, we actually produced a new computer system in Ing Barings Manila. And actually this computer system was developed in Hongkong and was rolled (sic) out in Manila office involving to the on-going transactions. So, the fact that we make them work for us, providing us the systems also necessitated an adjustment in the commission that we have to charge in trades." *(TSN, pp. 8-11, April 20, 2004).*

Clearly, there was no similarity of facts to conclude that the foreign clients and petitioner's affiliate should have the same rate of commission. Respondent cannot create an additional income without examining meticulously the circumstances surrounding the disparity of the commission rate. Inasmuch as the standing of petitioner's affiliate and that of its foreign affiliate is not comparable, then We are satisfied that the lower rate of commission income charged by petitioner to its affiliate in Hongkong is justifiable."

Furthermore, in the assailed Resolution, the Court in Division correctly pointed out that the revenue examiners simply assessed the respondent for arm's length pricing

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without factual basis. They simply acted on their belief that the foreign clients and respondent's affiliate should be treated equally. They failed to investigate the circumstances which would justify the difference in the commission rates.

Thus, We see no reason to disturb the factual findings of the Court's Second Division which had the opportunity to observe the demeanor of the witnesses as well as to evaluate first hand all the relevant documentary evidence on this matter.

Finally, in its third assignment of error, petitioner posits that the commission income in the amount of P136,457,599.60 for the year 1996 and in the amount of P76,556,749.72 for the year 1997, earned by the respondent from sales transactions on various securities with ING Hongkong, should be subject to ten percent (10%) VAT, and not zero percent (0%), since there was no showing that the consideration therefor was accounted for in accordance with the rules and regulations of the BSP.

We note that in the proceedings in the Court *a quo*, petitioner was of the position that the subject transactions cannot be considered zero-rated since there was no inward remittance of foreign currency as provided for under the Tax Code. The Details of Discrepancies *(pages 14-15, CTA Records)* attached to the Final Assessment Notices (FANs) state:

> "Commission from Sale – 1997 (P76,556,749.72); 1996 (P136,457,599.60)
>
> The amount represents commission on sale transaction on various securities accounted for by ING Hongkong (Affiliate) for its clients which were treated as zero-rated sales. However, upon verification this commission were (sic) not inwardly remitted."

Moreover, it was admitted in item No. 13 of the Joint Stipulation of Facts *(pages 63-68,CTA Records)* that the commission on sales transactions on various securities with ING Hongkong are zero-rated were it not for the fact that there was no inward remittance.

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Under Section 108 (B) of the Tax Code as amended by Republic Act No. 7616 (EVAT Law)[9], commissions paid by a non-resident for services rendered in the Philippines are subject to VAT at 0%. Said Section provides as follows:

> "(b) Transactions subject to zero-rate. --- The following services performed in the Philippines by VAT-registered persons shall be subject to 0%:
>
> (1) xxx
>
> (2) Services other than those mentioned in the preceding sub-paragraph, 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)."

The former VAT law, Executive Order No. 273 dated July 25, 1987 requires three conditions in order to be subject to VAT at 0%:

> "(2) Services other than those mentioned in the preceding sub-paragraph, the consideration for which is paid for in acceptable foreign currency which is remitted inwardly to the Philippines and accounted for in accordance with the rules and regulations of the Central Bank of the Philippines."

However, under the EVAT law which is the law applicable to the subject transaction, the inward remittance of foreign currency as a condition to qualify the transaction as subject to VAT at 0%, is no longer required. The EVAT law requires only that:

1) The consideration is paid for by a non-resident in acceptable foreign currency; and
2) The consideration is accounted for in accordance with the rules and regulations of the BSP.

[9] Date of effectivity is January 1, 1996.

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The Court *a quo* correctly ruled that since the requirement that the acceptable foreign currency be remitted inwardly was deleted, the assessment of petitioner has no basis in law.

In its Motion for Partial Reconsideration, petitioner contends that the requirement that the consideration is accounted for in accordance with the rules and regulations of the BSP presupposes that the same is inwardly remitted. In other words, the deletion of the requirement that the payment of acceptable foreign currency should be inwardly remitted did not change the essence of the law.

The Court *a quo* in its assailed Resolution disagreed with petitioner's stand and ruled that the reason behind the repeal was because at the time of the enactment of R.A. No. 7716, the Foreign Exchange Deregulation under C.B. Circular No. 1389, dated April 13, 1993, was already in effect.

In the instant Petition, petitioner alleges that while it agrees with the Court's Second Division that the requirement for inward remittance was deleted in the law, it believes that in order to be considered zero-rated, the sales transaction must still be "accounted for in accordance with BSP rules and regulations."

Petitioner's argument is not well-taken.

Based on the Details of Discrepancies and the Joint Stipulation of Facts, petitioner clearly based its assessment on the premise that respondent's sales should not be considered as zero-rated only because the proceeds thereof were not inwardly remitted. Petitioner's contention that the sales transaction must still be accounted for in accordance with BSP rules and regulations is a new issue which is raised for the first time on appeal. There was no mention of disposition of foreign exchange in the said assessment. This omission is fatal to petitioner's cause. It is well-settled that matters, theories or arguments not brought out in the proceedings below will ordinarily not be

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considered by a reviewing court, since they cannot be raised for the first time on appeal.[10] A party is not allowed to change his theory of the case or his cause of action on appeal.[11] In this case, we find no cogent reason to deviate from this well-entrenched principle.

In sum, We are not convinced by petitioner's arguments on the assigned errors to justify a reversal of the questioned Decision and Resolution.

WHEREFORE, the instant petition is hereby **DISMISSED.** Accordingly, the assailed Decision and Resolution promulgated on January 14, 2005 and May 3, 2005, respectively, are hereby **AFFIRMED**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

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

ERLINDA P. UY
Associate Justice

[10] Salafranca v. Philamlife (Pamplona) Village Homeowners Association, 360 Phil. 652 (1988).
[11] Bernas v. Court of Appeals, G.R. No. 85841, August 5, 1993.

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CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

C E R T I F I C A T I O N

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ERNESTO D. ACOSTA
Presiding Justice

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