REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 1397** (CTA Case No. 7393)
	Present:
- versus -	**DEL ROSARIO**, *P.J.*, **CASTAÑEDA, JR.**, **BAUTISTA**, **UY**, **CASANOVA**, **FABON-VICTORINO**, **MINDARO-GRULLA**, **RINGPIS-LIBAN**, and **MANAHAN**, *JJ.*
CE LUZON GEOTHERMAL POWER COMPANY, INC., Respondent.	**Promulgated:** JAN 15 2018 4:05 p.m.

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RESOLUTION

UY, *J.*:

For resolution is petitioner's **"MOTION FOR PARTIAL RECONSIDERATION"** filed on July 4, 2017 with respondent's **"COMMENT (Re: Petitioner's Motion for Partial Reconsideration dated July 4, 2017)"** filed on August 31, 2017, praying for the reconsideration and setting aside of the Court *En Banc's* Decision promulgated on June 7, 2017, the dispositive portion of which reads:

> "**WHEREFORE**, all the foregoing considered, the instant *Petition for Review* is **DENIED** for lack of merit. Accordingly, the Amended Decision dated July 27, 2015 and the Resolution dated December 1, 2015, both rendered by the Court in Division in CTA Case No. 7393 are hereby **AFFIRMED**.

SO ORDERED."

Petitioner's arguments

In his *Motion for Partial Reconsideration*, petitioner argues that the Honorable Court erred in ruling that respondent is entitled to the refund of the alleged unutilized input VAT for the 2nd, 3rd, and 4th quarters of 2004 in the amount of ₱11,319,226.01. He likewise claims that respondent is not the proper party to seek the refund.

Citing Sections 4(q) and 15 of Republic Act (RA) No. 9513, otherwise known as *"An Act Promoting the Development, Utilization and Commercialization of Renewable Energy resources and for other Purposes"* as basis, petitioner contends that since respondent is engaged in the production of power from renewable sources, the said law is applicable to the instant case. Therefore, according to petitioner, respondent's purchase of local supply of goods, properties and services needed for the development, construction and installation of its plant facilities, as well as the whole process of exploring and developing renewable energy sources up to its conversion into power, are zero-rated. And in relation thereto, petitioner invokes the Supreme Court case of *Coral Bay Nickel Corporation vs. Commissioner of Internal Revenue, ("Coral Bay case")*[1], arguing that it is the respondent's suppliers who are the proper party to seek the tax refund.

Petitioner likewise claims that respondent's failure to submit complete documents amounts to a non-exhaustion of administrative remedies. Lastly, respondent argues that tax refund is in the nature of a tax exemption which must be construed *strictissimi juris* against the taxpayer and that it must present convincing evidence to substantiate a claim for refund.

Respondent's counter-arguments:

On the other, in its *Comment*, respondent counter-argues that petitioner is barred from questioning the sufficiency of respondent's evidence submitted in support of its administrative claim for refund of unutilized input VAT. Furthermore, respondent submits that this Court has explicitly determined in its Decision that respondent submitted complete documents at the administrative level.

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[1] G.R. No. 190506, June 13, 2016.

Respondent likewise claims that contrary to petitioner's argument, RA No. 9513 is not applicable to its claim for tax refund in the present case. According to respondent, its claim for tax refund covers excess input taxes generated in taxable year 2004. On the other hand, RA No. 9513 took effect in the year 2008. Respondent submits that under Article 4 of the Civil Code, it states that *"laws shall have no retroactive effect, unless the contrary is provided."* Hence, the general rule is that laws shall have prospective application.

In addition, respondent contends that its administrative and judicial claims for refund of unutilized input tax were filed in 2005, prior to the effectivity of RA No. 9513. Allegedly, respondent is not a registered RE developer and as such, it is not governed by RA No. 9135 or its regulations, with respect to the fiscal incentives available to registered RE developers.

Moreover, respondent points out that this is the first time that petitioner is presenting the argument that respondent is not the proper party to seek the refund of input VAT. In any event, respondent argues that the standing of respondent to seek refund of input VAT is premised on Section 112(A) of the Tax Code.

Finally, respondent stresses that applying *Coral Bay case* by analogy would be ignoring the distinct and legal factual dynamics of a claim for refund involving a Philippine Economic Zone Authority registered entity. Unlike in the Coral Bay case, the provision on zero-rating applicable to the sale of suppliers to RE developers does not apply to it considering that it is not a registered RE developer.

THE COURT'S RULING

We find no merit in the instant *Motion for Partial Reconsideration.*

The issue on the applicability of Sections 4(q) and 15 of RA No. 9513 was never raised before the Court in Division. Thus, We cannot rule on this matter now.

It is a settled rule that issues not raised below cannot be pleaded for the first time on appeal because a party is not allowed to change his theory on appeal; to do so would be unfair to the other party and offensive to rules of fair play, justice and due process.[2]

Furthermore, it is axiomatic in pleadings and practice that no new issue in a case can be raised in a pleading which by due diligence could have been raised in previous pleadings.[3] Thus, petitioner should have raised the said issue at the onset before the Court in Division; not at this stage of the proceedings, wherein the case has already undergone a number of appeals, including an appeal to the Supreme Court.

As to the rest of petitioner's averments, a careful perusal of the *Motion for Partial Reconsideration* would show that these are mere reiteration of matters which have already been considered, weighed and resolved in the assailed Decision. Hence, the Court *En Banc* finds no compelling reason to reconsider, modify or reverse the assailed Decision, and We shall no longer belabor, in this Resolution, to repeat the disquisitions made therein.

WHEREFORE, in light of the foregoing considerations, the instant *Motion for Partial Reconsideration* is hereby **DENIED** for lack of merit.

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

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[2] *Edison (Bataan) Cogeneration Corporation vs. Commissioner of Internal Revenue, et seq.*, G.R. Nos. 201665 and 201668, August 30, 2017.
[3] *Toshiba Information Equipment (Phils.), Inc. vs. Commissioner of Internal Revenue,* G.R. No. 157594, March 9, 2010.

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice