INSIGHTS

JANUARY 2019

A monthly digest of significant tax-related court decisions and regulatory issuances (includes BIR, SEC, BSP and various government agencies)

FIRST Issue, Series of 2019

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- A Mission Order is not tantamount to a LOA. *(Builders Steel Corporation vs Hon. Kim S. Jacinto Henares, in her capacity as CIR, Alfredo V. Misajon and Nestor S. Valeroso, in their capacity as OIC-Assistant Commissioner LTS-BIR, CTA Case No. 9050, December 17, 2018).*
- Compliance with the 120-day plus 30-day periods is mandatory for claims for refund. *(Northwind Power Development Corporation vs Commissioner of Internal Revenue, CTA Case No. 9202, December 18, 2018).*
- In waivers, both the date of execution by the taxpayer and date of acceptance by the BIR should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed. *(RCBC Savings Bank, Inc., vs Commissioner of Internal Revenue, CTA Case No. 9001, December 18, 2018).*
- To be considered a non-bank financial intermediary, it is required that a person or entity: 1) is authorized by the BSP to perform quasi-banking activities; 2) has as its principal function "lending, investing or

placement of funds or evidences of indebtedness or equity deposited with them, acquired by them or otherwise coursed through them, either for their own account or for the account of others"; and 3) performs such functions on a regular and recurring and not on an isolated basis. (*City of Davao and Bella Linda N. Tanjili in her official capacity as City Treasurer of Davao City vs. Rock Steel Resources, Inc., CTA EB No. 1703 (CTA AC No. 158), December 19, 2018).*

- **A mere holding company cannot be deemed as included in "banks and other financial institutions" for the purpose of imposing local business taxes under Section 143(f) of the LGC.** *(City of Davao and Bella Linda N. Tanjili in her official capacity as City Treasurer of Davao City vs. Roxas Shares, Inc., CTA EB No. 1663 (CTA AC No. 163), December 19, 2018).*
- **Non-bank financial intermediaries are persons or entities regularly engaged in "lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them or otherwise coursed through them, either for their own account or for the account of others."** *(City of Davao and Bella Linda N. Tanjili in her official capacity as City Treasurer of Davao City vs. San Miguel Officers Corps, Inc., CTA EB No. 1628 (CTA AC No. 161), December 19, 2018).*
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- **RR No. 26-2018, December 27, 2018 –** Clarifies that the 90-day period shall start from the filing of the claim up to the release of the payment of the VAT refund. Also, that an application for refund is only considered filed when the invoices/official receipts are submitted.

- **RMC No. 102-2018, December 11, 2018 -** It extends the deadline for processing of pending claims for VAT refunds from December 14, 2018 to March 29, 2019.

- **RMC No. 2-2019, January 10, 2019 –** It publishes the full text of Joint Administrative Order No. 2-2018 entitled "Implementing Guidelines on the Value-Added Tax (VAT) Exemption of the Sale of Drugs Prescribed for Diabetes, High-Cholesterol and Hypertension under Republic Act No. 8424 Otherwise Known as the National Internal Revenue Code of 1997, as Amended by Republic Act No. 10963".

- **RMC No. 3-2019, January 10, 2019 –** It publishes the full text of Joint Circular No. 001-2018 of the DOF, DBM, BTr, BIR, BOC and COA allocating a fund equivalent to 5% of the total VAT collections from the immediately preceding year to cover for Value-Added Tax Refund Claims.

SEC Opinion

- **SEC-OGC Opinion No. 18-24, December 20, 2018 –** This opinion discusses whether or not the Bidding Agreement dated November 6, 2018 entered into by Udenna Corporation, Chelsea Logistics Holdings Corp., China Telecommunications Corporation, and Mindanao Islamic Telephone Company, Inc. complies with the relevant rules on foreign ownership applicable to the telecommunications business.

Article Written

- **"One day too early: Premature issuance of FAN/FLD is a violation of due process." Business Mirror: Tax Law for Business, December 17, 2018.** This article discusses the effect of premature issuance of a Final Assessment Notice/Formal Letter of Demand on the right to due process of the taxpayer.

COURT DECISIONS

I
Significant Supreme Court Decision

Exemption from the payment of VAT on sales made by agricultural cooperatives to members or to non-members necessarily includes exemption from the payment of "advance VAT."

The BIR imposed against a multi-purpose cooperative an "advance VAT" as a condition before release of their refined sugar from the mill. The cooperative paid the advance VAT under protest.

The Court ruled that the cooperative is a VAT-exempt agricultural cooperative. Exemption from the payment of VAT on sales made by the agricultural cooperatives to members or to non-members necessarily includes exemption from the payment of "advance VAT" upon the withdrawal of the refined sugar from the sugar mill.

While the sale of raw sugar, by express provision of law, is exempt from VAT, the sale of refined sugar, on the other hand, is not so exempted as refined sugar already underwent several refining processes and as such, is no longer considered to be in its original state. However, if the sale of the sugar, whether raw or refined, was made by an agricultural cooperative to its members or non-members, such transaction is still VAT-exempt. *(Commissioner of Internal Revenue vs. Negros Consolidated Farmers Multi-Pupose Cooperative, G.R. No. 212735, December 5, 2018).*

II
Significant Court of Tax Appeals Decisions

Resident citizens employed by foreign governments and/ or international organizations, such as ADB, are subject to the graduated income tax rates under Section 24(A) of the NIRC of 1997, as amended.

The CIR issued on April 12, 2013 RMC No. 31-2013 which provides, among others, that officers and staff of ADB who are not Philippine nationals shall be exempt from Philippine income tax. Following RMC 31-2013, only officers and staff of the ADB who are not Philippine nationals shall be exempt from Philippine income tax. In compliance with the RMC, a taxpayer, Filipino officer at ADB, accordingly paid his income tax due for his compensation income for the period January to December 2012. Thereafter, he sought to refund the income tax allegedly erroneously and illegally collected from him for calendar year 2012.

The Court upheld its earlier decision to grant the claim. The Court recognized the rule that resident citizens employed by ADB are subject to graduated income tax rates pursuant to the reservation by the Republic of the Philippines of its power to tax its nationals that are employed by ADB. However, the Court pointed out that compensation income of Filipino personnel employed by ADB were not subjected to income tax in the past. It was only by the issuance of RMC No. 31-2013 in 2013 that their compensation was subjected to tax. Hence, Filipino employees of ADB should not be prejudiced by the actuations of the BIR prior to the said RMC.

As such, RMC No. 31-2013 should be applied prospectively. By 2013, Filipino personnel employed by ADB had already taken cognizance of the said RMC and are mindful of their obligation to pay their tax liabilities. *(Erwin Casaclang vs. Commissioner of Internal Revenue, CTA Case No. 9091, December 4, 2018).*

Note: *Compare with the case of Edzen Jogie B. Garcia vs. Commissioner of Internal Revenue, CTA EB No. 1674 (CTA Case No. 9075), December 6, 2018. The factual antecedents of both cases are almost identical but the ruling of the Court En Banc in the Garcia case was adverse to the taxpayer seeking the refund.*

In a criminal action for evasion of taxes, civil liability cannot be imposed if there is no formal assessment.

An accused was charged with the crime of attempt to evade or defeat the payment of tax. For his defense, the accused alleged, among others, that the BIR failed to follow the guidelines in the proper audit since no formal investigation was conducted.

The Court acquitted the accused without civil liability. The Court found that even though there was a valid LOA issued and served, the revenue examiners were not able to examine the books of account of the accused and the complaint was based merely on the Integrated Tax System (ITS), the centralized database of the BIR. As such, no proper audit was conducted to support the crime charged.

Anent the civil aspect, the Court ruled that Section 205 of the NIRC, as amended, provides that "the judgment in the criminal case shall not only impose the penalty but shall also order payment of the taxes subject of the criminal case as finally decided by the Commissioner." Thus, it is required that in order to be included in the judgment of said civil liability, it must be the final decision of the CIR. Such final decision refers to the formal assessment. Since there is no formal assessment, civil liability cannot be imposed. *(People of the Philippines vs. Arnel Cortez Manaloto, CTA Crim. Case No. O-454, O-455, O-456, and O-457, December 5, 2018).*

When an administrative agency renders an opinion by means of a circular or memorandum, it merely interprets a pre-existing law.

The CIR issued on April 12, 2013 RMC No. 31-2013 which provides, among others, that officers and staff of ADB who are not Philippine nationals shall be exempt from Philippine income tax. The taxpayer, a Filipino officer at ADB, filed his income tax return for 2012 and paid income tax. He thereafter filed a refund for the income tax paid in 2012 but it was not acted upon by the BIR. The refund was elevated by the taxpayer to the CTA alleging, among others, that RMC No. 31-2013 violated Section 246 of the NIRC on the non-retroactivity of issuances since the RMC was applied on his 2012 income.

The Court En Banc denied the claim. The Court En Banc ruled that when an administrative agency renders an opinion by means of a circular or memorandum, it merely interprets a pre-existing law. RMC No. 32-2013, therefore, was issued merely to construe the existing provisions of the 1997 NIRC in relation to the various existing treaty obligations of the Philippines. The circular was not issued or intended to impose additional tax burdens not otherwise found in the law. *(Edzen Jogie B. Garcia vs. Commissioner of Internal Revenue, CTA EB No. 1674 (CTA Case No. 9075), December 6, 2018).*

Note: *Compare with the case of Erwin Casaclang vs. Commissioner of Internal Revenue, CTA Case No. 9091, December 4, 2018. The factual antecedents of both cases are almost identical but the ruling of the Court in Division in the Casaclang case was in favor of the taxpayer seeking the refund.*

The "income of whatever kind and character" of a charitable institution "from any of its activities conducted for profit, regardless of the disposition made of such income, shall be subject to tax".

The taxpayer was assessed by the BIR for alleged deficiency tax liabilities. The BIR subjected to income tax at preferential rate (Section 27(B) of the NIRC) the revenues from services to paying patients instead of exempting the taxpayer from income tax as provided under Section 30(E) of the NIRC.

The Court ruled that while it is true that the taxpayer does not lose its tax exemption if it earns income from for-profit activities, it failed to controvert by evidence the finding of the BIR that the taxpayer is not operated exclusively for charitable purpose. Even if the charitable institution must be "organized and operated exclusively" for charitable purpose, it is nevertheless allowed to engage in "activities conducted for profit" without losing its tax-exempt status for its not-for-profit activities. However, the "income of whatever kind and character" of a charitable institution "from any of its activities conducted for profit, regardless of the disposition made of such income, shall

be subject to tax". *(Perpetual Succour Hospital of Cebu, Inc., vs. Commissioner of Internal Revenue, CTA Case No. 9166, December 11, 2018).*

Prior filing of a motion for reconsideration/new trial of the Amended Decision is compulsory.

The taxpayer filed a claim for refund of unutilized creditable input tax with the CTA. The Court in Division rendered its Original Decision on August 25, 2015. Both parties moved to reconsider the Original Decision which led the Court in Division to promulgate an Amended Decision dated August 23, 2016. Again, both parties appealed the Amended Decision to the Court En Banc by filing their respective Petitions for Review. The Court En Banc denied both Petitions which prompted both parties to file their respective Motions for Reconsideration.

The Court En Banc denied both motions. The Court En Banc ruled that the proper legal recourse for both parties is to seek reconsideration of the Amended Decision. In order for the CTA En Banc to take cognizance of an appeal via a Petition for Review, a timely motion for reconsideration or new trial must first be filed with the CTA Division. When the Court renders and Amended Decision, it is technically a decision distinct from the original one. Prior filing of a motion for reconsideration/new trial of the Amended Decision is compulsory, lest the Amended Decision shall become final and executory. *(Commissioner of Internal Revenue vs Coral Bay Nickel Corporation, CTA EB No. 1418 (CTA Case No. 8641), December 12, 2018).*

It is incumbent upon the BIR to prove that the mailed assessment notices were indeed received by the taxpayer, or at the very least, by its authorized representative.

The taxpayer was assessed by the BIR for alleged deficiency taxes. For its part, the taxpayer denied having received the corresponding assessment notices. According to the BIR, the assessment notices in question were sent through registered mail.

The Court En Banc denied the motion for reconsideration. The Court En Banc ruled that receipts of registered letters and return receipts do not prove themselves; the presentation of Registry Return Receipts is not sufficient to prove that the taxpayer actually received the PAN and FAN. It must be signed by the addressee or the recipient and must be authenticated to establish that the person who signed the Registry Return Receipt was the duly authorized representative of the taxpayer. It was therefore incumbent upon the BIR to prove that the mailed assessment notices were indeed received by the taxpayer, or at the very least, by its authorized representative. However, the BIR failed to do so. *(Commissioner of Internal Revenue vs G&W Architects, Engineers and Project Consultants Co., CTA EB No. 1606 (CTA Case No. 8617), December 14, 2018).*

Absence of competent proof that the revenue examiners were duly authorized pursuant to a valid LOA, the deficiency tax assessment is void ab initio.

The taxpayer was assessed by the BIR by virtue of a Letter Notice alleging discrepancies as a result of computerized matching conducted by the BIR. The assessment was elevated to the Court wherein the crux of the issue is whether or not the Letter Notice is sufficient to support an assessment.

The Court granted the petition and cancelled the assessment. The Court ruled that in the absence of competent proof that the revenue examiners who conducted the audit and investigation were duly authorized pursuant to a valid LOA, the deficiency tax assessment arising from such audit and investigation is void ab initio. *(MSEI Corporation vs Commissioner of Internal Revenue, CTA Case No. 9167, December 17, 2018).*

A Mission Order is not tantamount to a LOA.

The BIR issued Mission Orders directing revenue officers to conduct an immediate inventory and require the taxpayer to submit accounting records. The taxpayer was thereafter assessed for deficiency taxes. The assessment was elevated to the CTA.

The Court granted the petition and cancelled and set aside the assessment. The Court ruled that a revenue officer must be clothed with authority before he or she may proceed with the examination of the subject taxpayer and subsequently issue and assessment. The said authority must be embodied in a Letter of Authority and not in any

other form. Since the examination and assessment against the taxpayer was made on the basis of Mission Orders and not a validly issued LOA, the ROs who conducted the examination were not validly authorized to do so. The subsequent assessment is void. *(Builders Steel Corporation vs Hon. Kim S. Jacinto Henares, in her capacity as CIR, Alfredo V. Misajon and Nestor S. Valeroso, in their capacity as OIC-Assistant Commissioner LTS-BIR, CTA Case No. 9050, December 17, 2018).*

Compliance with the 120-day plus 30-day periods is mandatory for claims for refund.

The taxpayer filed an administrative claim for refund of unutilized input tax on March 25, 2013. On October 15, 2015, the taxpayer received from the BIR a letter dated September 29, 2015 denying its claim for refund. On November 16, 2015, Petitioner filed the Petition for Review before the Court.

The Court denied the petition for lack of jurisdiction. The Court ruled that in order for It to acquire jurisdiction over an appeal on claims for refund, compliance with the 120-day plus 30-day periods is mandatory. The counting of the 120-day period should have started from March 25, 2013. The BIR had until July 23, 2013 to act on the taxpayer's claim. Thus, the taxpayer should have filed its judicial claim within 30 days from the lapse of the 120-day period or until August 22, 2013. However, the Petition for Review was belatedly filed on November 16, 2015. *(Northwind Power Development Corporation vs Commissioner of Internal Revenue, CTA Case No. 9202, December 18, 2018).*

In waivers, both the date of execution by the taxpayer and date of acceptance by the BIR should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.

In relation to a tax assessment, the taxpayer executed nine (9) Waivers of the Defense of Prescription under the Statute of Limitations to extend the period to assess and collect deficiency taxes for taxable year 2006. The assessment was eventually elevated to the CTA by the Petitioner alleging that the first waiver was null and void for being belatedly accepted by the BIR on April 21, 2010. Further, the taxpayer alleged that due to a null and void waiver, the FAN subsequently received by it was issued beyond the statutory three year period under Section 203 of the NIRC. On the other hand, the BIR contended that his right to assess did not prescribe since the taxpayer executed nine (9) waivers.

The Court ruled to cancel and set aside the assessments. It found that the acceptance of the waiver was made after the expiration of the period to assess. Thus, the first waiver is void and the period to assess was not validly extended. Considering that the first waiver is void, the eight subsequent waivers are also void because there was no period to extend at the time these were all executed. Both the date of execution by the taxpayer and date of acceptance by the BIR should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed. *(RCBC Savings Bank, Inc., vs Commissioner of Internal Revenue, CTA Case No. 9001, December 18, 2018).*

To be considered a non-bank financial intermediary, it is required that a person or entity: 1) is authorized by the BSP to perform quasi-banking activities; 2) has as its principal function "lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them or otherwise coursed through them, either for their own account or for the account of others"; and 3) performs such functions on a regular and recurring and not on an isolated basis.

The taxpayer owns preferred shares of stock in San Miguel Corporation from which it earned dividends and interest. Pursuant to the Revenue Code of Davao City, the local government unit (LGU) collected local business tax based on the gross receipts from dividends and interest from the taxpayer on the assumption that it is a Non-Bank Financial Intermediary. Under Section 143(f) of the LGC, an LGU may impose taxes on the gross receipts of banks and other financial institutions. The taxpayer sought to refund the local business tax but it was not acted upon by the LGU.

The Court En Banc affirmed the Division's decision granting the refund. The Court En Banc ruled that to be considered a non-bank financial intermediary, it is required that a person or entity: 1) is authorized by the BSP to perform quasi-banking activities; 2) has as its principal function "lending, investing or placement of funds or

evidences of indebtedness or equity deposited with them, acquired by them or otherwise coursed through them, either for their own account or for the account of others"; and 3) performs such functions on a regular and recurring and not on an isolated basis. There is no evidence that the taxpayer is a non-bank financial intermediary. Nor is there evidence that it is an investment company under Section 4 RA No. 2629. (*City of Davao and Bella Linda N. Tanjili in her official capacity as City Treasurer of Davao City vs. Rock Steel Resources, Inc., CTA EB No. 1703 (CTA AC No. 158), December 19, 2018).*

A mere holding company cannot be deemed as included in "banks and other financial institutions" for the purpose of imposing local business taxes under Section 143(f) of the LGC.

The taxpayer owns preferred shares of stock in San Miguel Corporation from which it earned dividends and interest. Pursuant to the Revenue Code of Davao City, the local government unit (LGU) collected local business tax based on the gross receipts from dividends and interest from the taxpayer on the assumption that it is a Non-Bank Financial Intermediary. Under Section 143(f) of the LGC, an LGU may impose taxes on the gross receipts of banks and other financial institutions. The taxpayer sought to refund the local business tax but it was not acted upon by the LGU.

The Court En Banc affirmed the Division's decision granting the refund. The Court En Banc ruled that the taxpayer is a holding company which is equivalent to a parent corporation. Thus, its essential feature is that it holds stock. Being a holding company, it is clear that the taxpayer cannot be deemed as included in "banks and other financial institutions" for the purpose of imposing the local business taxes under Section 143(f) of the LGC. *(City of Davao and Bella Linda N. Tanjili in her official capacity as City Treasurer of Davao City vs. Roxas Shares, Inc., CTA EB No. 1663 (CTA AC No. 163), December 19, 2018).*

Non-bank financial intermediaries are persons or entities regularly engaged in "lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them or otherwise coursed through them, either for their own account or for the account of others."

The taxpayer owns preferred shares of stock in San Miguel Corporation from which it earned dividends and interest. Pursuant to the Revenue Code of Davao City, the local government unit (LGU) collected local business tax based on the gross receipts from dividends and interest from the taxpayer on the assumption that it is a Non-Bank Financial Intermediary. Under Section 143(f) of the LGC, an LGU may impose taxes on the gross receipts of banks and other financial institutions. The taxpayer sought to refund the local business tax but it was not acted upon by the LGU.

The Court En Banc affirmed the Division's decision granting the refund. The Court En Banc ruled that non-bank financial intermediaries are persons or entities regularly engaged in "lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them or otherwise coursed through them, either for their own account or for the account of others." The taxpayer is not a non-bank financial intermediary since it is not engaged in the activities of a non-bank financial intermediary. Further, the transaction is isolated since the taxpayer acquired the shares only once after its incorporation and has not bought any shares other than in SMC. *(City of Davao and Bella Linda N. Tanjili in her official capacity as City Treasurer of Davao City vs. San Miguel Officers Corps, Inc., CTA EB No. 1628 (CTA AC No. 161), December 19, 2018).*

Mere reliance on the taxpayer's amended Articles of Incorporation is insufficient to categorize it as a non-bank financial intermediary.

The taxpayer owns preferred shares of stock in San Miguel Corporation from which it earned dividends and interest. Pursuant to the Revenue Code of Davao City, the local government unit (LGU) collected local business tax based on the gross receipts from dividends and interest from the taxpayer on the assumption that it is a Non-Bank Financial Intermediary. Under Section 143(f) of the LGC, an LGU may impose taxes on the gross receipts of banks and other financial institutions. The taxpayer sought to refund the local business tax but it was not acted upon by the LGU.

The Court En Banc affirmed the Division's decision granting the refund. The Court En Banc ruled that apart from the BIR's reliance on the taxpayer's amended Articles of Incorporation, they have nothing to show that the

taxpayer has been categorized as a financial intermediary by competent authority, or that is has habitually and principally held itself in the business of a financial institution/intermediary. *(City of Davao and Bella Linda N. Tanjili in her official capacity as City Treasurer of Davao City vs. ARC Investors, Inc., CTA EB No. 1705 (CTA AC No. 153), December 21, 2018).*

BIR Issuances

RR No. 25-2018, December 27, 2018 - This implements the VAT exemption on the sale of drugs and medicines prescribed for the treatment and/or prevention of diabetes, high cholesterol, and hypertension provided by the TRAIN Law.

This revenue regulation prescribes the regulations implementing the VAT exemption on the sale of drugs and medicines prescribed for the treatment and/or prevention of diabetes, high cholesterol, and hypertension provided by the TRAIN Law. The exemption shall apply to the sale by manufacturers, distributors, wholesalers, and retailers of the said drugs and medicines starting January 1, 2019. However, the importation of the said drugs and medicines shall be subject to VAT under Section 107 of the Tax Code, as amended.

RR No. 26-2018, December 27, 2018 - This revenue regulation Amends certain provisions of RR No. 13-2018 to implement the 90-day processing of claim for VAT refund under Section 112 (C) of the Tax Code of 1997, as amended by RA No. 10963 (TRAIN Law).

This amends Sections 4.106-5, 4.108-5, 4.112-1 and 13 of RR No. 13, 2018. The amended provisions are concerned with the implementation of the 90-day period to process claims for refund of unutilized creditable input. It prescribes that an application for refund is only considered filed when the invoices/official receipts are submitted. Also, the 90-day period shall start from the filing of the claim up to the release of the payment of the VAT refund.

Note: Within the 90-day period, the taxpayer should be able to receive payment of the VAT refund. If no payment is made within the said period, the application for refund can still be processed. Unfortunately, however, the timeline is now open-ended. If within the 90-day period, release of payment for refund is not made, can the taxpayer file an appeal to the CTA?

RMC No. 102-2018, December 11, 2018 - This revenue memorandum circular Amends further RMC No. 17-2018, specifically the deadline for processing of pending VAT refund/credit claims filed prior to effectively of RMC No. 54-2014.

This circular further moves the deadline for processing of pending VAT refund/credit claims filed prior to the effectivity of RMC No. 54-2014 from December 14, 2018 to March 29, 2019.

RMC No. 2-2019, January 10, 2019 – This revenue memorandum circular publishes the full text of Joint Administrative Order No. 2-2018 entitled "Implementing Guidelines on the Value-Added Tax (VAT) Exemption of the Sale of Drugs Prescribed for Diabetes, High-Cholesterol and Hypertension under Republic Act No. 8424 Otherwise Known as the National Internal Revenue Code of 1997, as Amended by Republic Act No. 10963".

This revenue memorandum circular provides for the general guidelines in implementing the VAT exemption of the sale of drugs prescribed for diabetes, high-cholesterol, and hypertension. Under the circular:

1. The sale by manufacturers, distributors, wholesalers and retailers of drugs prescribed for the treatment of diabetes, high-cholesterol and hypertension in its final form shall be exempt from VAT imposed under Section 106 of the National Internal Revenue Code of 1997 , as amended. The importation of the above-described drugs shall be subject to VAT under Section 107 of the National Internal Revenue Code of 1997, as amended; and
2. The sale of drugs not included in the "List of VAT-exempt Diabetes, High-Cholesterol and Hypertension Drugs" published by the FDA shall not be exempt from VAT.

RMC No. 3-2019, January 10, 2019 – This revenue memorandum circular publishes the full text of Joint Circular No. 001-2018 of the DOF, DBM, BTr, BIR, BOC and COA re Value-Added Tax Refund Claims.

This circular acknowledges the provisions of Sections 31 and 33 of RA No. 10963 (TRAIN Law) which provides that the amount equivalent to five percent (5%) of the total VAT collections of the BIR and the BOC from the immediately preceding year shall be treated as trust receipts to cover the payment of VAT refund claims. The circular gives the procedures to transfer the amount from the General Fund to the Trust Account. Further, the circular provides for the guidelines for the withdrawal of deposits from the Bureau of Treasury.

SEC Opinion

SEC-OGC Opinion No. 18-24, December 20, 2018 – This opinion discusses with whether or not the Bidding Agreement dated November 6, 2018 entered into by Udenna Corporation, Chelsea Logistics Holdings Corp., China Telecommunications Corporation, and Mindanao Islamic Telephone Company, Inc. complies with the relevant rules on foreign ownership applicable to the telecommunications business.

Mindanao Islamic Telephone Company (Mislatel) planned to increase its common shares with full voting rights. The shares would be subscribed to by Udenna Corporation (Udenna), Chelsea Logistics Holdings Corp. (Chelsea), and China Telecommunications Corporation (CT). Upon the increase in Mislatel's capitalization, the shareholding structure of Mislatel would be as follows:

Shareholders	SUBSCRIBED		PAID-UP		% Ownership
	No. of shares	Amount	No. of shares	Amount	
Udenna	3,500,000,000	₱3,500,000,000.00	3,500,000,000	₱3,500,000,000.00	34.83%
Chelsea	2,500,000,000	₱2,500,000,000.00	2,500,000,000	₱2,500,000,000.00	24.88%
CT	4,000,000,000	₱4,000,000,000.00	4,000,000,000	₱4,000,000,000.00	39.80%
Other Shareholders	50,003,000	₱50,003,000.00	32,503,000	₱32,503,000.00	0.49%

In determining the nationality of Mislatel under the proposed structure, the nationality of the abovementioned stockholders were first determined. The SEC applied the Control Test absent any indication of doubt.

For Udenna, since its voting shares are 100% owned by Filipino citizens, it is of Filipino nationality which renders its 34.83% direct shareholding in Mislatel as entirely Filipino. With respect to Chelsea, 70% of its interest belongs to Udenna, which is already established as a Philippine national. Udenna's 70% interest in Chelsea is also considered Filipino. Since more than 60% of Chelsea is held by the Filipino investing corporation, then Chelsea is considered as a Philippine national in the absence of doubt. Lastly, the "Other Shareholders", based on records, are 100% owned by Filipino citizens.

Based on the foregoing, since the foreign equity (voting shares), amounting to 39.80%, in Mislatel belongs to CT and the remaining shares, totaling 60.20%, are found to belong Philippine nationals, then the nationality of Mislatel under the Bidding Agreement is considered as Filipino.

The SEC, under the assumption that there exists doubt, also showed Mislatel's nationality using the Grandfather Rule. Under the Grandfather Rule, 60% of Mislatel shares will be directly and indirectly held by Filipinos while 40% will be directly and indirectly held by Non-Filipinos. Hence, the proposed ownership structure in the Bidding Agreement is still compliant with the foreign ownership limitation.

Articles Written

Business Mirror: Tax Law for Business

One day too early: Premature issuance of a FAN/FLD is a violation of due process

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Who would've thought being early could be a bad thing?

In the recent CTA En Banc case of *Commissioner of Internal Revenue vs Pacific Bayview Properties (CTA EB Case No. 1677)*, the BIR learned that being too zealous in issuing assessment notices could result in a violation of the taxpayer's right to due process.

In the said case, the taxpayer received from the BIR a Preliminary Assessment Notice ("PAN") dated January 10, 2011. Consequently, the taxpayer filed its Position Paper/Reply to the PAN on January 25, 2011 which is well within the 15-day period given to the taxpayer to respond to the PAN pursuant to RR No. 12-99. Subsequently, the BIR issued the FAN and the FLD, both dated January 24, 2011, which the taxpayer received on February 2, 2011.

In its appeal, the taxpayer argued that the BIR violated its right to due process when the FAN and the FLD were issued even before the lapse of the 15-day period given to the taxpayer to file its protest to the PAN. It further claimed that the issuance of the FAN without even hearing the side of the taxpayer is anathema to the cardinal principles of due process.

Upon deliberation, the Court En Banc found that the BIR indeed violated the due process requirement when it issued the Final Assessment Notice ("FAN") and Formal Letter of Demand ("FLB") before the expiration of the period to respond to the PAN.

The Court En Banc ruled that the taxpayer has 15 days from receipt of the PAN to file a protest thereto with the BIR. This is pursuant to Section 228 of the NIRC, as amended, in relation to Section 3.1.2 of RR No. 12-99. It held that "[i]f during the said period, the taxpayer failed to file a protest to the PAN, it is only then that the CIR or his duly authorized representative can consider the taxpayer in default, and correspondingly cause the issuance of an FLD and assessment notice, which shall be subsequently be served to the said taxpayer."

Consequently, the Court En Banc is convinced that the BIR is duty bound to wait for the expiration of 15 days from the date of receipt of the PAN before issuing the FLD and FAN. Such a process or procedure is part and parcel of the due process requirement in the issuance of a deficiency tax assessment. Failure of the BIR to strictly comply with the requirements laid down by law and its own rules is a denial of the taxpayer's right to due process.

Even the argument that "taxes are the lifeblood of the government" is not enough to overcome the fatal effect of a violation of the taxpayer's right to due process.

The decision of the Court En Banc appears to be consistent with previous decisions promulgated by the CTA. The doctrine is crystal clear: due process must be observed.

Interestingly, even though the Court En Banc decided in favor of the taxpayer, It did not pass upon one of the more stimulating arguments of the taxpayer: that the right of the taxpayer to answer the PAN carries with it the correlative duty on the part of the BIR to consider the response thereto.

Although the essence of the right to due process is the opportunity to be heard, such opportunity would be wasted if it would fall on deaf ears. The same idea applies to replies or protests to assessments submitted to the BIR but is not taken into consideration. The effort in crafting and explaining in detail the position of the taxpayer would be but an empty and meaningless exercise if the same is not even considered by the BIR.

BDB Law's "Tax Law for Business" appears in the opinion section of Business Mirror every Thursday.

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