TAX Insights

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What's Inside…

INSIGHTS is a monthly publication of BDB LAW to inform, update and provide perspectives to our clients and readers on significant tax-related court decisions and regulatory issuances (*includes BIR, SEC, BSP and various government agencies*).

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- **A revenue officer must be authorized, through an LOA, in order that the said officer may validly examine the books of accounts and other accounting records of a taxpayer. In the absence of an LOA, the tax assessments issued by the BIR against such taxpayer shall be void.** *(Erlinda Abacan. vs. Bureau of Internal Revenue, CTA Case No. 8814, December 3, 2019)*

- **The only BIR officials authorized to issue and sign Letters of Authority are the Regional Directors, the Deputy Commissioners and the Commissioner. For the exigencies of the service, other officials may be authorized to issue and sign Letters of Authority but only upon prior authorization by the Commissioner himself.** *(First Life Financial Co. vs. Commissioner of Internal Revenue, CTA Case No. 9029, December 4, 2019)*

- **Prescription period for violations of tax laws commences either from the day of its commission, or from the discovery thereof.** *(People of the Philippines vs. Juanchito D. Bernardo, Praxedes P. Bernardo and JDBEC, Incorporated CTA Crim Case Nos. O-728, O-730, O-732 and O-734, December 2, 2019)*

- **A criminal case can be instituted independent of a tax assessment. Both remedies are independent from each other.** *(People of the Philippines vs. Rommel Ynion y Salva et. al. CTA Crim Case No. O-313 to 320, December 4, 2019)*

- **The taxpayer cannot be faulted for relying on the ICPA's representation as to the completeness of the evidence the ICPA submitted in Court.** *(Commissioner of Internal Revenue vs. Toledo Power Co. CTA EB 1778 & 1780 (CTA Case No. 8671), December 17, 2019)*

- **The taxpayer must not only prove that the payment is made in acceptable foreign currency. It must also prove that it is accounted for in accordance with BSP rules and regulations to qualify for 0% VAT rate under Section 108(B)(2).** *(Vestas Services Philippines, Inc. vs. Commissioner of Internal Revenue CTA Case No. 9672, December 17, 2019)*

- **Without third-party certifications as to the amounts reflected per the BIR RELIEF System, the assessment must be cancelled for having doubts as to the reliability and correctness of the assessment.** *(First Philippine Holdings Corporation vs. Commissioner of Internal Revenue CTA Case No. 8991, December 17, 2019)*

- **Failure on the part of the CIR to establish that the FAN/FLD was actually received by the taxpayer is fatal and amounts to no assessment at all. As such, it cannot bind the taxpayer and may not be utilized as a foundation of a valid collection against it.** *(Commissioner of Internal Revenue vs. Yusen Logistics Center, Inc., CTA EB No. 1953 (CTA Case No. 9109) December 9, 2019)*

- **The authority of the RTC to exercise either original and/or appellate jurisdiction over local tax under Section 195 of the LGC cases depends not only on the amount of the claim but also in their respective territorial jurisdiction.** *(UCPB Leasing and Finance Corp vs. Cagayan De Oro City, CTA EB No. 1933 (CTA AC No. 170) December 9, 2019)*

Although a municipality may not hire a private lawyer to represent it in litigations, in the interest of substantial justice however, we hold that a municipality may adopt the work already performed in good faith by such private lawyer.

The taxpayer argues that there was grave abuse of discretion, amounting to lack or excess of jurisdiction when the court a quo denied its Motion to Declare Respondents in Default. Petitioner/ Taxpayer claims that the disqualification of the counsel of Municipality of San Simon is the consequence of arbitrarily hiring a private counsel to appear in behalf of a city or municipality. As such, it contends that the pleadings filed or actions conducted by the counsel should be expunged from the records since it was signed without authority.

The Court held that although a municipality may not hire a private lawyer to represent it in litigations, in the interest of substantial justice however, we hold that a municipality may adopt the work already performed in good faith by such private lawyer, which work is beneficial to it (1) provided that no injustice is thereby heaped on the adverse party and (2) provided further that no compensation in any guise is paid therefor by said municipality to the private lawyer. Unless so expressly adopted, the private lawyer's work cannot bind the municipality. ***(San Miguel Foods, Inc. vs. Hon. Lucina Alpaez-Dayaoan, CTA AC No. 203, December 3, 2019)***

To be considered as non-resident foreign corporation doing business outside the Philippines, each entity must be supported, at the very least, by both SEC Certificate of Non-Registration of corporation/ partnership and certificate/ articles of foreign incorporation/ association.

The taxpayer claimed for the issuance of a Tax Credit Certificate representing its alleged excess and unutilized input value-added tax (VAT) attributable to its zero-rated sales for taxable year 2012. The taxpayer posits that its sales to Kerson Investment Limited qualify as zero-rated sales.

The CTA held that the taxpayer failed to meet the third requisite in order to qualify the sale of service to zero percent (0%) VAT rate. While it had proven that the services must be other than processing, manufacturing or repacking of goods and that payment for such services is made in acceptable foreign currency accounted for in accordance with the BSP rules and regulations, however, the taxpayer did not present the SEC Certification of Non-Registration of Kerson Investment Limited. Hence, the taxpayer failed to prove that its client is a non-resident foreign corporation doing business outside the Philippines. ***(M.E.T.R.O. vs. Commissioner of Internal Revenue, CTA EB No. 1820, December 2, 2019)***

For erroneously paid DST be refunded, it must be shown to have been paid or collected, and such payment or collection is erroneous or illegal. There is no provision stating that the fact of payment can only be established through the presentation of the DST Declaration/ Return.

The taxpayer established its fact of payment of DST in the amount of P 2,500,000.00 through the Bank's Deposit Slip which was marked as evidence and was not objected to by the BIR.

The Court held that the taxpayer has clearly established the fact of overpayment of the DST for the subject transaction. To be refunded, it must be shown to have been paid or collected, and such payment or collection is erroneous or illegal. Nothing in law that states or even implies that the fact of payment can only be established through the presentation of DST Declaration/Return. The taxpayer paid and remitted DST of P 2,500,000.00 to the BIR, which was clearly beyond what was actually due for the transaction. The DST due is only P 25,000.00. All said, the Court finds that the taxpayer is entitled to the claim for refund in the amount of P 2,475,000.00 representing erroneously overpaid DST. ***(Commissioner of Internal Revenue vs. Nube Storage Systems, Inc., CTA EB No. 1924, December 4, 2019)***

The BIR Commissioner's authority to compromise can only be exercised under certain circumstances specifically identified by the statutes and is not absolute.

The taxpayer alleges that its payment of P 43,773.71 serves as full settlement of its tax liabilities and a settlement pursuant to a compromise between petitioner and respondent.

The Court held that the compromise agreement is not valid. The discretionary authority to compromise granted to the BIR Commissioner is never meant to be absolute, uncontrolled and unrestrained. A valid compromise requires that: (1) except for financial incapacity, the compromise rate must be equivalent to a minimum of 40% of the basic tax assessed; and (2) in case of a settlement lower than the prescribed minimum, the compromise must be subject to the Evaluation Board's approval. It was found out that given the taxpayer's basic tax liability, the minimum compromise amount should have been capped at P 69,255.54.

Thus, without a valid compromise agreement between the taxpayer and the BIR, the grant of the taxpayer's withdrawal of its petition for review had the effect of rendering BIR's assessment of deficiency for EWT final and executory. ***(ESCA International, Inc. vs. CIR, CTA EB No. 1980, December 4, 2019)***

A revenue officer must be authorized, through an LOA, in order that the said officer may validly examine the books of accounts and other accounting records of a taxpayer. In the absence of an LOA, the tax assessments issued by the BIR against such taxpayer shall be void.

The taxpayer contends that the assessment is void for the revenue officers who examined the books of account and other accounting records of the taxpayer were not vested with proper authority to do so.

The Court held that Section 6 of the Tax Code requires an authority from the Commissioner of Internal Revenue or from his duly authorized representatives before an examination "of a taxpayer" may be made. In the present case, a Memorandum of Assignment was issued for purposes of conducting the reinvestigation filed by the taxpayer. However, the MOA cannot clothe the revenue officers with the requisite authority to examine or conduct a reinvestigation of taxpayer's liability, as the same was merely issued by an OIC-Assistant RDO, who has no power or authority to issue an LOA. ***(Erlinda Abacan. vs. Bureau of Internal Revenue, CTA Case No. 8814, December 3, 2019)***

The Lack of Authority of the concerned RO to make an examination, pursuant to a valid LOA goes into the issue of the validity of the assessment itself. In the absence of such authority, the assessment or examination is a nullity.

The taxpayer questions the authority of the RO to conduct audit investigation. The BIR asserts that a referral memorandum is sufficient in vesting the concerned ROs with authority to continue an audit investigation of a taxpayer.

The CTA held that pursuant to Revenue Memorandum Order (RMO) No. 29-07, there must be a valid grant of authority, through an LOA, issued by the Regional Director or by the Assistant Commissioner/ Head Revenue Executive Assistants, before any RO can conduct a tax audit or examination. However, in case of re-assignment or transfer of cases to another RO at the Large Taxpayers Service, the said RO may be authorized to continue the audit without need for a new LOA, provided, the letter or notice or memorandum re-assigning the case to the said RO was signed by the Assistant Commissioner/ Head Revenue Executive Assistants of the Large Taxpayers Service. In the present case, the referral memorandum was only signed by the Chief of the LT Audit and Investigation Division I. Accordingly, the same is not sufficient to grant an RO the authority to continue the conduct of the audit investigation. ***(Metro Rail Transit Corp. vs. Commissioner of Internal Revenue, CTA Case No. 9016, December 4, 2019)***

The only BIR officials authorized to issue and sign Letters of Authority are the Regional Directors, the Deputy Commissioners and the Commissioner. For the exigencies of the service, other officials may be authorized to issue and sign Letters of Authority but only upon prior authorization by the Commissioner himself.

The taxpayer claims that the revenue officer who continued the examination of its book of accounts and other accounting records and who recommended the issuance of the subject deficiency tax assessments does not have the authority to do so under the LOA. Thus, the taxpayer asserts that the subject tax assessments issued against it should be declared null and void.

The CTA held that the position of Chief of Regular LT Audit Division is not among those duly authorized representatives of the CIR who have been granted with the power to authorize the audit/ examination of taxpayer's books of accounts and other accounting records or to effect any modification or amendment to a previously issued LOA. The subject Memorandum of Assignment cannot validly grant the ROs with the requisite authority to continue the audit commenced by the previous authorized RO. ***(First Life Financial Co. vs. Commissioner of Internal Revenue, CTA Case No. 9029, December 4, 2019)***

Fraud is a question of fact that should be alleged and duly proven. The willful neglect to file the required tax return or the fraudulent intent to evade the payment of taxes, considering that the same is accompanied by legal consequences, cannot be presumed.

During the course of the audit investigation, the taxpayer successively executed three (3) Waivers of the Defense of Prescription under the Statute of Limitations of the NIRC. It was later on contested whether or not the waivers were valid in relation to the running of the prescriptive period

The CIR contends that the three waivers executed are all valid. According to it, assuming without admitting that the waivers are not valid, the assessments are still valid because the 10-year prescriptive period will apply pursuant to Section 222 (A) of the Tax Code. The CTA, however, held that BIR's right to assess the taxpayer was already barred by prescription as the waivers executed were marred by defects, and therefore null and void. As a necessary result, the period within which respondent can assess the taxpayer was not validly extended. ***(Loyola Plans Consolidated, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 9216, December 3, 2019)***

Our Take

Note: The Court's decision in this case, runs in contrary to the Decision of the Supreme Court in the Next Mobile (G.R. 212825, 2015) case, wherein the SC ruled finding the waiver executed by the parties binding though it was executed by the person without authority. The SC decided finding both parties, the

taxpayer and BIR, in pari delicto, hence, it ruled that the subject waiver is valid. However, comparing the same in the instant case, here the Court take notice more of the fault of the BIR, in accepting the waiver without asking for the authority of the person executing the same. Thus, leading the Court to decide invalidating the waiver. The Court in this case, did not rule similar to that of the Next Mobile case, finding both parties at fault.

Failure of the BIR to strictly observe the requirements of RMO No. 19-2007, the amount of compromise penalties paid by the taxpayer is deemed to have been collected without authority.

A mission order was issued directing the officers of BIR to verify the registration and bookkeeping requirements of petitioner/ taxpayer. It was established that after conducting the verification and validation of the BIR, the taxpayer was made to pay compromise penalties in the aggregate amount of P 7,800,000.00, without an assessment notice or demand letter being issued.

The CTA held that in imposing the subject compromise penalties, the BIR did not follow the strict mandate that all amounts of compromise penalties shall be itemized in a separate assessment notice/ demand letter. For the BIR to strictly observe the requirements of RMO No. 19-2007, the amount of compromise penalties paid by petitioner/ taxpayer is deemed to have been collected without authority. Relative thereto, since the pertinent provisions of RMO No. 19-2007 were not strictly observed by the BIR, the payment of compromise penalties by the taxpayer is invalid. Hence, entitling the taxpayer for refund or issuance of a tax credit certificate. ***(Dunlevy Food Corporation vs. Commissioner of Internal Revenue, CTA Case No. 9361, December 11, 2019)***

It is well settled that perfection of an appeal in the manner and within the period laid down by law is not only mandatory but also jurisdictional.

Taxpayer has been issued FLD, FAN and WDL respectively. However, the taxpayer failed to protest the same within the reglementary period. The 30-day period should be reckoned from the date of receipt of the FDDA or WDL or FAN as the case may be. Even on the assumption that the 30-day period should be reckoned from the date of receipt of the FDDA by the taxpayer, which was on June 29, 2016, the filing of the Petition for Review on June 5, 2017 is clearly made beyond the jurisdictional 30-day period. As consequence, this Court is deprived of its jurisdiction to act on the Petition for Review.

The CTA dismissed the case considering the FAN, WDL and FDDA have all attained finality and in view thereof, the Court has no jurisdiction anymore to act upon the Petition for Review. ***(Alphaland SouthgateTower, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 9610, December 13, 2019)***

A lawyer's heavy workload is insufficient reason to justify the relaxation of procedural rules.

For resolution is BIR's Motion for Reconsideration on the Resolution promulgated on September 16, 2019. In the Motion for Reconsideration, BIR alleges that when it filed its Formal Offer of Evidence, it was on the assumption that a comparison of its documentary exhibits had already been done at a Commissioner's Hearing scheduled for that purpose; that it only learned the non-marking of Exhibits "R-1" to "R-9" when he received the Court's Resolution dated September 16, 2019; that the failure of BIR's counsel to mark and compare its evidence is solely due to heavy pressure of work; and that the counsel had no intention to delay the proceedings.

The Court in its decision cited the Supreme Court in saying that a lawyer's heavy workload is insufficient reason to justify the relaxation of procedural rules. After all, heavy workload is relative and often self-serving. While the Court recognized the heavy workload of BIR's counsels, the same cannot be constantly and conveniently used as an excuse for failure to comply with court procedure. ***(Casas + Architects vs. Commissioner of Internal Revenue, CTA Case No. 9705, December 5, 2019)***

Assessments must be based on actual facts and not on mere assumptions or presumptions.

The taxpayer was charged before the Court in Division for alleged wilful failure to file his Income Tax Return (ITR) for taxable year (TY) 2009 and non-payment of the corresponding tax thereon in the amount of P18,667,975.34, exclusive of charges and penalties, in violation of Sections 255, in relation to Sections 24(A)(I)(a), 5I(A)(1)(a) and 74(A) of the National Internal Revenue Code (NIRC) of 1997, as amended.

The Court ruled that the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption. The Court found that the BIR merely assumes that the increase in the net worth of the taxpayer from 2008 to 2009 in the amount of Php58,496,797.94 indicated receipt of unreported income. In fine, BIR merely assumed that income was paid to taxpayer which resulted in a significant increase in his assets. However, presumptions cannot by all measures or standards approximate direct evidence. Obviously, BIR failed to consider that this is a criminal case, in which proof beyond reasonable doubt is required to sustain the indictment. Hence, the Petition filed against the taxpayer is denied. ***(People of the Philippines vs. Prospero A. Pichay, Jr., CTA Crim. Case EB No. 059, December 6, 2019)***

Bare allegations, unsubstantiated by evidence, are not equivalent to proof.

The BIR argues in its Motion for Reconsideration that it found out that there was a carryover of the excess 2012 input tax to the succeeding year 2013 and its utilization as input tax for purchases of goods exceeding one million pesos for the 2nd and 3rd quarters of the same year. The BIR also states that Petitioner/ Taxpayer did not submit complete documents in support of its administrative claim for refund/ tax credit.

On the other hand, in its Comment to BIR's MR, Petitioner argued that it had no output taxes for 2012, as such, there is no way that the input taxes carried over were utilized; that the amount claimed for refund was deducted from the VAT return for the 3rd quarter of taxable year 2013; and that the input vat being claimed is attributable to zero-related sales.

The Court ruled that the BIR did not present any evidence to support the allegations that the input VAT carried over were utilized in 2013, or that the said input VAT was not attributable to effectively zero-rated sales. It is basic in the rule of evidence that bare allegations, unsubstantiated by evidence, are not equivalent to proof. In short, mere allegations are not evidence. Thus, absent proof to the contrary, the findings of the Court in Division will not be disturbed. ***(Commissioner of Internal Revenue vs. Sony Mobile Communications International AB, CTA EB No. 1785, December 5, 2019).***

A Letter of Authority must be issued to a Revenue Officer in order to validly examine the books of the taxpayer. Otherwise, the tax investigation is invalid for lack of authority.

BIR filed its Motion for Reconsideration on the decision of the CTA Division nullifying its tax investigation made to the Taxpayer. It argued that a Memorandum of Assignment is sufficient to give authority to the Revenue Officers in case the audit investigation is reassigned.

CTA En Banc resolves to deny the motion, in relation to Section 13 of the NIRC, as amended. Accordingly, the Regional Director has the power to examine taxpayer's books. In order to delegate such task, there should be issued a valid Letter of Authority. A referral memorandum subsequently issued by the Revenue District Officer is not sufficient to cure such defect.

Here, the motion is denied by the CTA because BIR issued a Memorandum of Assignment issued by the Chief of LTS-RLTAD II is not included under the authorized signatories of an LOA, and therefore invalid for lack of authority. Only the CIR and his duly authorized representatives may issue a new LOA in case of reassignments for investigation and audit. ***(Commissioner of Internal Revenue vs. Orient Overseas Container Line, LTD. CTA EB No. 1956, December 4, 2019)***

Petition for Certiorari is not the proper remedy to an order of the CTA denying a Petition for Relief of Judgment.

BIR assails the dismissal of its Petition for Certiorari by the CTA En Banc pursuant to Rule 41 of the Revised Rules on Civil Procedure. It ratiocinated that no appeal may be taken from an order of denial of Petition for Relief from Judgment. Hence, a Petition for Certiorari must be filed.

CTA En Banc has held that the above-cited Rule is not the proper remedy considering the fact that there is a valid remedy of appeal available from CTA Division to CTA En Banc. The existence and availability of the right to appeal from a decision of CTA Division to the CTA En Banc prohibits the resort to a Petition for Certiorari under Rule 65 of the Rules of Court. ***(Commissioner of Internal Revenue vs. Court of Tax Appeals and Yi Wine Club, Inc. CTA EB No. 2127, December 2, 2019)***

Prescription period for violations of tax laws commences either from the day of its commission, or from the discovery thereof.

The Prosecution filed a Motion for Reconsideration on the decision made by CTA Division insisting that the latter erred in dismissing the former's filed Information on the ground of prescription.

CTA Division resolved the motion, pursuant to Section 281 of the NIRC, as amended. Prescriptive period of tax law violations commences from the time of commission of the violation or, if unknown at the time, from its discovery and initiation of judicial proceedings. It further resolves that the reckoning period of commencement for violations where the commission were unknown be from the discovery thereof. Otherwise, the Taxpayer will always be at the mercy of the Government if the commencement of the prescriptive period should be simultaneous with the institution of judicial proceedings.

Here, the discovery of the violation was made on 22 September 2010 and the Complaint-Affidavit was filed on 23 September 2010. However, the Information was only filed on 18 June 2019. Accordingly, if the tax violation was discovered on 22 September 2010, the prosecution has only until 22 September 2015 to initiate the judicial proceeding. Notably, the Information was only filed on 18 June 2019, or almost four years beyond the prescriptive period. Therefore, the action has already prescribed. ***(People of the Philippines vs. Juanchito D. Bernardo, Praxedes P. Bernardo and JDBEC, Incorporated CTA Crim Case Nos. O-728, O-730, O-732 and O-734, December 2, 2019)***

The authority to conduct tax investigation must be from the CIR and its duly authorized representatives. Otherwise, the tax investigation shall be null and void.

The prosecution filed a Complaint-Affidavit against a taxpayer who defied its order of submission of documents and subpoena duces tecum. The issue in this case is whether the taxpayer is liable for deficiency tax liabilities based on the tax investigation made.

The CTA dismissed the case because of lack of authority from the Revenue Officer to examine the taxpayer's books. Under the NIRC, as amended, the CIR and its duly authorized representatives may authorize the examination of a taxpayer and the assessment of the correct amount of tax. Duly authorized representatives therein pertain to Regional Directors and other tax officials with a rank equivalent to division chief or higher. Hence, the authority must be pursuant to a Letter of Authority from the Regional Director, in order for such examination by the Revenue Officer to be valid.

Here, the LOA issued by the Regional Director refers to Revenue Officer Daytec, But the tax investigation was made by Revenue Officer Estacio. There was no issuance of another LOA to authorize the latter to conduct the tax investigation. Hence, the audit was null and void. ***(Commissioner of Internal Revenue vs. George A. Talamayan, Jr. CTA OC No. O-21, December 3, 2019)***

Dissenting Opinion (J. Bacorro-Villena): The issue of the LOA's validity had already been long foreclosed from judicial review. To entertain the issue of the LOA's absence in a collection case is to reopen and disturb a decision that had long become final and executory. To do such would further reward the inaction of taxpayer and go against the time-honored principle that, "equity aids the vigilant, not those who slumber on their rights." To likewise nullify the final assessment which validity the taxpayer did not attempt to question is putting a premium for his disregard of the administrative processes and rewarding him, in effect, for his delinquency. *(Commissioner of Internal Revenue vs. George A. Talamayan, Jr. CTA OC No. O-21, December 3, 2019)*

A criminal case can be instituted independent of a tax assessment. Both remedies are independent from each other.

BIR, through the DOJ, instituted a criminal case against the taxpayer for allegedly filing a false or fraudulent return and from failure to file return. The taxpayer assailed the case stating that tax assessment must precede a criminal case.

The Court held that in cases where a false or fraudulent return is submitted or in cases of failure to file a return, proceedings in court may be commenced without an assessment. Furthermore, the civil and criminal aspects of the case may be pursued simultaneously. Moreover, the criminal charge need only be supported by a prima facie showing of failure to file a required return. This fact need not be proven in assessment.

Here, the remedy of institution of criminal action is proper. Therefore, the taxpayer's contention that he was denied procedural due process since there was no assessment prior to the filing of the criminal charges is clearly without merit. The filing of the criminal charges should not be confused with the subsequent assessment issued against taxpayer, as the former is for the purpose for prosecution for violation of tax laws and not a demand for payment. ***(People of the Philippines vs. Rommel Ynion y Salva et. al. CTA Crim Case No. O-313 to 320, December 4, 2019)***

The taxpayer cannot be faulted for relying on the ICPA's representation as to the completeness of the evidence the ICPA submitted to the Court.

Both the BIR and taxpayer filed a Motion for Reconsideration on the Decision of the CTA En Banc. The BIR reiterated the arguments it raised in its Petition for Review; while the taxpayer argued that it cannot be faulted for the errors of the ICPA.

The CTA ruled that the arguments raised by the BIR has already been considered and passed upon by the court and there is no cogent reason to deviate from its Decision. With respect to the taxpayer, it cannot be faulted for relying on the ICPA's representation as to the completeness of the evidence the ICPA submitted to the Court. However, the taxpayer has already been given several opportunities to support its claim for refund. Litigation must end at some point. ***(Commissioner of Internal Revenue vs. Toledo Power Co. CTA EB 1778 & 1780 (CTA Case No. 8671), December 17, 2019)***

The taxpayer must not only prove that the payment is made in acceptable foreign currency but also accounted for in accordance with BSP rules and regulations to qualify for 0% VAT rate under Section 108(B)(2).

The taxpayer filed a claim for refund of its unutilized creditable input VAT. The taxpayer argues that its gross receipts were zero-rated considering that it was for general IT services rendered to a person engaged in business conducted outside the Philippines.

The CTA ruled that the taxpayer presented its schedule of sales and the corresponding VAT zero-rated OR proving that it was paid in foreign currency. However, the taxpayer was unable to establish that the foreign currency sales proceeds were duly accounted for in accordance with the BSP rules and regulations. Simply put, the taxpayer failed to fully satisfy the essential element that payments for its services must be in acceptable foreign currency and accounted for in accordance with the BSP rules and regulations. Further, the taxpayer was not able to establish that the subject services were performed in the Philippines. ***(Vestas Services Philippines, Inc. vs. Commissioner of Internal Revenue CTA Case No. 9672, December 17, 2019)***

Tax assessments issued in violation of the due process rights of a taxpayer are null and void, thus when the BIR fails to observe due process, it shall have the effect of rendering the deficiency tax assessment as void, and of no force and effect.

Taxpayer argues that the FDDA was issued in violation of the petitioner's right to due process, considering that it was issued prematurely before the lapse of the 60-day period for the submission of supporting documents. Accordingly, such FDDA is null and void for want of any factual and legal basis. CIR maintains that the taxpayer was not deprived of its constitutionally protected right to due process and that it still is liable for the taxes assessed.

The Court found that the FDDA is indeed null and void. The law is clear that the tax assessment issued by the BIR may be administratively protested by filing a request for reconsideration or reinvestigation, within 30 days from receipt thereof. The said taxpayer is then given a period of sixty (60) days from the filing of the protest to submit "all relevant supporting documents". In this case, the FDDA was issued only after forty-three (43) days from filing of the protest letter. Thus, the subject tax assessment is null and void. ***(Philsaga Mining Corporation v. Commissioner of Internal Revenue, CTA Case No. 9402, December 17, 2019)***

Without third-party certifications as to the amounts reflected per the BIR RELIEF System, the assessment must be cancelled for having doubts as to the reliability and correctness of the assessment.

The taxpayer is being assessed for deficiency income tax due to undeclared sales. The undeclared sales were derived by the BIR based on the difference between Service Income per books against that RELIEF. The taxpayer contends that the BIR should have secured certifications from concerned parties to authenticate the declarations and present such certifications to the taxpayer in order that it can have fair chance to validate the same.

The CTA ruled that the records does not show that the amount per taxpayer's SLS that was received by the BIR was verified by externally sourced data to check its correctness. The BIR did not secure the required certifications or confirmation from the alleged third-party sources to support the integrity of the amounts per RELIEF. Without the confirmation from third parties, the finding casts doubts as to the reliability and correctness of the assessment on the alleged undeclared sales. Accordingly, the assessment cannot be sustained since it was based merely on unverified amounts extracted from BIR's own database. Thus, the imposition of income tax on any discrepancy is not factual but merely a conclusion. Hence, the Court cancelled the assessment. ***(First Philippine Holdings Corporation vs. Commissioner of Internal Revenue CTA Case No. 8991, December 17, 2019)***

Failure on the part of the CIR to establish that the FAN/FLD was actually received by the taxpayer is fatal and amounts to no assessment at all. As such, it cannot bind the taxpayer and may not be utilized as a foundation of a valid collection against it.

CIR alleges that no protest was filed by the taxpayer within the 30 days from receipt of the FLD/FAN. CIR argues that the assessment became undisputed and has now become final and unappealable and is beyond the jurisdiction of the CTA. On the other hand, the taxpayer pointed out that it never received the alleged FAN/FLD.

Per registry return receipt, the name "S/G Javier S." was written with signature. The Certification of the Postmaster also states that the said mail (FLD/FAN) was delivered and received by the security guard S. Jadiel. No proof, however, was presented by CIR to show that the receipt by the security guard can be considered as receipt by the taxpayer. Thus, CIR's failure to prove the actual receipt of the FLD/FAN by the taxpayer or by its authorized representative is fatal as to render the assailed assessment void.

For failure of CIR to prove receipt of the FAN, due process was not complied with. Tax assessments issued in violation of the due process rights of a taxpayer are null and void. ***(Commissioner of Internal Revenue vs. Yusen Logistics Center, Inc., CTA EB No. 1953 (CTA Case No. 9109) December 9, 2019)***

The authority of the RTC to exercise either original and/or appellate jurisdiction over local tax under Section 195 of the LGC cases depends not only on the amount of the claim but also in their respective territorial jurisdiction.

The taxpayer argued that the Court seriously erred in holding that the Regional Trial Court (RTC) of Makati City had no jurisdiction over the case filed by the taxpayer. Petitioner asserts that the relief prayed before the RTC was to issue a decision nullifying the notice of assessment and declaring that it is not liable to pay the business tax under the City Ordinance of Cagayan De Oro City.

In the present case, the taxpayer filed its petition before the RTC of Makati.

The CTA held that, appeal with the "Court of competent jurisdiction" under Sec. 195 of the LGC, in light of the passage of RA No. 9282, is construed that RTC, MTC and MCTC have original jurisdiction to take cognizance if actions assailing the decision or inaction of the local treasurer on local tax protests, depending on the amount and appeal be brought and taken cognizance by the RTC, MTC and MCTC, whose territorial jurisdiction encompasses the place where the facts thereof have originated and which has jurisdiction over the parties sought to be enjoined. Thus, the appeal on the decision or inaction of the City Treasurer of Cagayan de Oro City over Protest be brought to the RTC of Cagayan de Oro City and to the City of Makati. ***(UCPB Leasing and Finance Corp vs. Cagayan De Oro City, CTA EB No. 1933 (CTA AC No. 170) December 9, 2019)***

DOF OPINIONS

- **Department of Finance (DOF) Opinion No. 017-2019 dated 18 December 2019** – This refers to the BIR Ruling subjecting the transfer of the land and common areas of a condominium project to six percent (6%) creditable withholding tax pursuant to Revenue Regulations (RR) No. 2-98, as amended, and non-compliance with Revenue Memorandum Order (RMO) No. 18-2009.

- **Department of Finance (DOF) Opinion No. 018-2019 dated 18 December 2019** – Determines whether or not the tax exemption enjoyed by an inventor pursuant to R.A. 7459 can be extended to a Corporation which produces, manufactures and/or markets the same.

Department of Finance (DOF) Opinion No. 017-2019 dated 18 December 2019 – This refers to the BIR Ruling subjecting the transfer of the land and common areas of a condominium project to six percent (6%) creditable withholding tax pursuant to Revenue Regulations (RR) No. 2-98, as amended, and non-compliance with Revenue Memorandum Order (RMO) No. 18-2009.

Taxpayer filed for a Request for Review to the DOF because BIR subjected it to six percent (6%) creditable withholding tax because of the Taxpayer allegedly did not fall squarely with the provisions of RMO No. 18-2009. A ruling that dispense the requirement of prior ruling before any CAR can be issued by the BIR pertaining to the transfer of land.

Pursuant to R.A. 4726, DOF ruled that the transfer of land and the common areas of the Taxpayer from the Transferor should be tax exempt. First, based on the Articles of Incorporation, the Taxpayer is a condominium corporation organized for the primary purpose of owning or holding title of the common areas of the Condominium, as well as to maintain, administer and manage the said project for the benefit and interest of the unit owners. Second, the transfer was made through a Deed of Conveyance entered into between the Transferor and Taxpayer in compliance with the primary corporate purposes of the Condominium, R.A. 4726, and the Condominium's Master Deeds and Declaration of Restrictions. Lastly, the transfer of the land and the common areas from the Transferor to the Taxpayer was made without consideration.

Further, RMO No. 18-2009 does not provide the requirements for tax exemption. It merely provides that if the facts of the transfer of property are analogous to the facts in previously promulgated BIR Rulings, the requirement of a prior BIR Ruling can already be dispensed with. A taxpayer can still opt to secure a BIR Ruling to confirm the tax exempt status of such transfer.

Hence, BIR erred when it denied the Taxpayer's application for exemption solely based on the RMO and subjected the same to six percent (6%) creditable withholding tax.

Department of Finance (DOF) Opinion No. 018-2019 dated 18 December 2019 – Determines whether or not the tax exemption enjoyed by an inventor pursuant to R.A. 7459 can be extended to a Corporation which produces, manufactures and/or markets the same.

The Corporation filed for a Request for Review to the DOF because the BIR did not allow their tax exemption on inventions. BIR posited that the tax exemption benefits for inventors under R.A. 7459 is exclusive to the inventor himself and cannot extend to entities which produces and distributes the invention. On the other hand, the Corporation posited that it should be exempted from income tax because: (a) the patentee of their inventions are the Corporation and the Inventor, who is a natural person; and (b) the law exempts from taxes the income on the invention.

Pursuant to Section 2 and 6 of R.A. 7459, DOF ruled that the tax incentives provided for by law only applies to the inventor. Moreover, the legislative intent of the framers of the law specifically stated that the entitlement to the tax incentives under the law applies only to the original inventor.

Notably, a Corporation has a separate juridical personality with the inventor, who is a natural person. What the law provides incentive for is the act of invention of the inventor, and it does not attach to the invention itself wherein the latter may be produced, distributed and sold by other person.

Therefore, the Corporation is not entitled to tax exemption.

BIR ISSUANCES

- **Revenue Memorandum Circular (RMC) No. 135-2019 dated 1 December 2019** – This reiterates the procedure in availing of Tax Amnesty and Delinquencies (TAD) and additional clarifications on issues raised relative thereto.

- **Revenue Memorandum Circular (RMC) No. 139-2019 dated 18 December 2019** – This is issued to prescribe the following BIR Forms, which were revised due to the implementation of the TRAIN Law.

- **Revenue Memorandum Circular (RMC) No. 141-2019 dated 20 December 2019** – This provides for the key salient points brought by RMO No. 14-2016 and its repeal of previous rules on execution of the Waiver of the Statutes of Limitations prescribed under Section 222 (b) and (d) of the NIRC.

- **Revenue Memorandum Circular (RMC) No. 142-2019 dated 27 December 2019** – This is issued to all concerned taxpayer-users of the Electronic Documentary Stamp Tax (eDST) System to provide another option for the recovery of erroneously deducted amount of DST from their respective ledger balances in the eDST System.

- **Revenue Memorandum Circular (RMC) No. 143-2019 dated 27 December 2019** – This clarifies the inclusion of taxpayers as Top Withholding Agents who are obliged to remit the 1% and 2% of Creditable Withholding Taxes pursuant to the criteria of RR No. 7-2019.

Revenue Memorandum Circular No. 81-2019, July 16, 2019 – This informs the availability of new payment facility utilizing PESONet.	This was issued to inform the taxpayers, tax practitioners, and others concerned about the availability of the new payment facility utilizing the PESONet Payment sys
Revenue Memorandum Circular (RMC) No. 135-2019 dated 1 December 2019 – This reiterates the procedure in availing of Tax Amnesty and Delinquencies (TAD) and additional clarifications on issues raised relative thereto.	Taxpayer alleges that RR No. 4-2019 limits the coverage of the tax amnesty when it provided for the definition of "delinquent accounts', which particularly excluded "stop-filer" cases and delinquent accounts arising from non-payment of self-declared tax due. The definition is aligned with the provisions RA No. 11213 which expressly provides that the tax amnesty amount shall be based on "basic tax assessed". This simply means that there should be an assessment of tax due made by BIR, which should be final and executory, except in case of unremitted tax withheld and those covered by a pending criminal case. Therefore, a "stop-filer" case merely pertains to failure of the taxpayer to file the required return is not qualified for tax amnesty in the absence of tax assessment. Moreover, tax liabilities arising from failure to pay in full and non-payment of the tax due declared per tax returns are not qualified for tax amnesty unless, prior to 24 April 2019, a letter to the withholding agent or preliminary collection letter demanding remittance/payment of taxes withheld but not remitted, as declared per return, was sent by the BIR.
Revenue Memorandum Circular (RMC) No. 134-2019 dated 4 December 2019 – This prescribe the newly-revised BIR Form No. 1702-EX (Annual Income Tax Return) January 2018.	BIR Form No. 1702-EX (Annual Income Tax Return for Corporation, Partnership and Other Non-Individual Taxpayer exempt under the Tax Code), in relation to the provisions of Sec. 24 (L) of the NIRC, as amended, and implemented by Sec.8 of RR No. 8-2018. The return includes both the Optional Standard Deduction (OSD) and the itemized deductions which are available to be claimed by General Professional Partnerships (GPPs). Note that this revised manual return is already available in the BIR website (www.bir.gov.ph) and in the Offline Electronic BIR Forms (eBIR Forms). However, the form is not yet available in the eFPS.

Revenue Memorandum Circular (RMC) No. 136-2019 dated 2 December 2019 – This publishes the list of additional withholding agents required to deduct and remit the 1% and 2% creditable withholding tax from the income payments to their supplier of goods and services, respectively. The list provided was in pursuance to the previously published RR No. 7-2019, which amends the criteria for top withholding agents.

Any taxpayer who is not included in the updated list of withholding agents is deemed to have been excluded and therefore not required to deduct and remit such creditable withholding taxes.

Revenue Memorandum Circular (RMC) No. 139-2019 dated 18 December 2019 – This is issued to prescribe the following BIR Forms, which were revised due to the implementation of the TRIAN Law.

BIR issued BIR Form No. 1601-EQ – Quarterly Remittance Return of Creditable Income Taxes Withheld (Expanded). This form was revised due to changes in the rate of CWT on MERALCO payments and interest income derived from any other debt instruments not within the coverage of deposit substitutes pursuant to RR No. 1-2019.

On the other hand, BIR issued BIR Form No. 1602Q – Quarterly Remittance Return of Final Taxes Withheld on Interest Paid on Deposits and Yield on Deposit Substitutes/Trusts/Etc. This form was revised due to the implementation of RR No. 8-2019 which prescribed the use of BIR Form Nos. 0620 and 1621 in remitting the tax withheld on the amount withdrawn from the decedent's deposit account.

Note that these forms are already available in the BIR website. However, the forms are not yet available in eFPS, eBIRForms.

Revenue Memorandum Circular (RMC) No. 141-2019 dated 20 December 2019 – This provides for the key salient points brought by RMO No. 14-2016 and its repeal of previous rules on execution of the Waiver of the Statutes of Limitations ("Waiver" for brevity) prescribed under Section 222 (b) and (d) of the NIRC, as amended.

Key salient points brought by RMO No. 14-2016 on the execution of the Waiver:

- The Waiver is a unilateral and voluntary undertaking which shall take legal effect and be binding on the taxpayer immediately upon his execution thereof;
- The Waiver need not specify the type of taxes nor the amount;
- Written and notarized delegation of authority to a representative is no longer required;
- The taxpayer cannot invalidate its own Waiver;
- The taxpayer has the duty to submit the Waiver to the officials listed in the RMO prior to the expiration of the period to assess or collect;
- The RDO or Group Supervisor as designated in the Letter of Authority or Memorandum of Assignment can accept the Waiver;
- The date of acceptance by the BIR is no longer required to be;
- The taxpayer shall have the duty to retain a copy of the submitted Waiver;
- Notarization of the Waiver is not a requirement;
- The taxpayer is charged with the burden of ensuring that his Waiver is validly executed when submitted to the BIR.; and
- There is no strict format for the Waiver.

Revenue Memorandum Circular (RMC) No. 142-2019 dated 27 December 2019 – This is issued to all concerned taxpayer-users of the Electronic Documentary Stamp Tax (eDST) System of this Bureau to provide another option for the recovery of erroneously deducted amount of DST from their respective ledger balances in the eDST System.

This may arise from erroneously encoded information by the taxpayer-user, or multiple affixture/printing of stamps due to taxpayer-user's error or a system error. Aside from filing of a claim for refund, a request for adjustment to the taxpayer's ledger balance in the eDST System may be filed by the concerned taxpayer.

BIR ISSUANCES

Revenue Memorandum Circular (RMC) No. 143-2019 dated 27 December 2019 – This clarifies the inclusion of taxpayers as Top Withholding Agents who are obliged to remit the 1% and 2% of Creditable Withholding Taxes pursuant to the criteria of RR No. 7-2019.	The provides that in cases of publication of TWAs in the newspaper of general circulation wherein certain taxpayers are included or not deleted in the existing list of TWAs but do not satisfy the criteria of RR No. 7-2019, or if they may have satisfied the same but qualify as taxpayers enumerated in OM No. 20-2019 who should be excluded from the list of TWAs, these taxpayers cannot be compelled to withhold the 1% and 2% CWTs.

SEC

OPINIONS & DECISIONS

- **Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-52 dated 18 November 2019** – this seeks to determine the nationality requirement and foreign ownership for freight forwarders.

- **Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-54 dated 25 November 2019** – this determines that pre-need plans are non-traditional securities.

- **Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-55 dated 19 November 2019** – this determines the ownership requirement for freight forwarding business.

- **Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-56 dated 28 November 2019** – this addresses the alternative remedies for election of Board of Trustees in case the members failed to reach the required quorum.

- **Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-57 dated 26 November 2019** – this determines retail trade business, and its minimum paid-up capital required in order for foreign ownerships to be allowed.

- **Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-58 dated 12 December 2019** – this pertains to the percentage of ownership a foreigner may own in an export enterprise.

Freight forwarder is considered as an operator of a public utility, hence subject to the foreign ownership requirement.

The Corporation seeks to determine the allowable percentage of foreign equity in cargo and freight forwarding activities.

The Commission opined that a freight forwarder is considered as an operator of a public utility. In that regard, the Constitution provides that only up to 40% foreign ownership is allowed in corporations and associations. Moreover, such prohibition is included in List A, Item 15 of Regular Foreign Investment Negative List. However, international freight forwarders engaged exclusively in international commerce are beyond the Constitutional prohibition limiting foreign ownership. ***(Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-52 dated 18 November 2019)***

Pre-need plans are non-traditional securities.

The Corporation seeks to determine whether or not pre-need plans are considered as securities by the Commission, if such is considered as non-traditional securities.

The Commission opined that prior to the effectivity of the Securities and Regulations Code (SRC), pre-need plans were specifically included as securities under the Revised Securities Act. However, albeit the pre-need plans were not specified under the SRC, the word "includes" preceding the enumerated securities in Section 3.1 of the SRC clearly suggests that it is a non-exhaustive list. Further, pre-need plans were discussed under Section 3.9 of the SRC, which only means that they were treated as securities.

Notably, the Commission defined "non-traditional securities" as those securities which are not specifically mentioned in the enumeration of the securities under Section 3.1 of the SRC but nonetheless are contracts of arrangements, however they may be called, which call for a person to invest, entrust, or give his money to another person/s and is led to expect profits from such primarily from the efforts of others. Hence, the Commission had included pre-need plans as one of the non-traditional securities whose registration and operation were being regulated and supervised by its newly formed Non-Traditional Securities and Instruments Department (NTD). ***(Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-54 dated 25 November 2019)***

Foreign ownership requirement does not apply to international freight forwarding, unlike those that are engage in domestic freight forwarding.

The Corporation intends to engage in the following activities: (1) to do business related to logistics. (2) To arrange needed mode of transportation for the efficient transfer of foods, products, merchandise, items, etc. through outsourcing all relevant services to subcontractors, suppliers, and service providers such as International Freight Forwarder (IFF), Non-Vessel Operating Common Carrier (NVOCC), Domestic Freight Forwarder (DFF), customs brokerage, warehousing, equipment installation, insurance and trucking services. (3) To negotiate with suppliers. (4) To pay necessary freight charges in advance on behalf of the customer. In addition, (5) to do packing of goods on behalf of the local or overseas shipper. The Corporation seeks to determine if it is allowed to establish a 100% foreign-owned domestic corporation engaged in IFF and NVOCC business activities under the Foreign Investment Act.

The Commission opined that a domestic freight-forwarding corporation is considered an operator of a public utility. As such, it must comply with the Constitution, which limits foreign ownership at 40% for the operation of public utilities. However, such restriction is not applicable to international freight forwarding because public utilities engaged exclusively in international commerce are beyond the purview of the Constitutional provision limiting the operation of public utilities to citizens of the Philippines or to corporations or entities at least 60% of the capital stock of which is owned by citizens of the Philippines. ***(Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-55 dated 19 November 2019)***

Failure to reach the required quorum during the election of the Board of Trustees, the Corporation may file a Petition to Conduct Election before the Commission.

The Corporation seeks to determine the proper alternative in electing its Board of Trustees if the members thereof do not constitute the required quorum. The Corporation proposes voting in absentia, particularly through Facebook or Messenger; or by waiving the member's right to vote after three failed attempts of reaching out to the unit owner or if no answer/feedback was received.

The Commission has held that although the Revised Corporation Code allows for voting in absentia, such is still unenforceable absent the issuance of rules and regulations from the Commission. Moreover, the right to vote is a fundamental right of a stockholder/member, which may only be waived personally upon the initiative of the stockholder/member. It may also be waived under the terms stated in the stock itself.

Article 25 of the Revised Corporation Code, however, provided for the proper remedy in cases where the election of Board was not made due to lack of quorum. Accordingly, the Corporation may file a Petition to Conduct an Election before the Commission. After finding that the non-holding of the

election was unjustified, the Commission may hold an election, as well as to issue such orders as may be appropriate, including other orders directing the issuance of a notice stating the time and place of the election, designated presiding officer, and the record date or dates for the determination of stockholders/members entitled to vote. The attendants of the election summarily ordered by this Commission who are entitled to vote shall constitute a quorum regardless of the required number of attendants stated in the Articles of Incorporation or By-Laws of the Corporation. ***(Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-56 dated 28 November 2019)***

Foreign enterprises with a paid-up capital of $2,500,000.00 is prohibited from engaging in retail trade business as it is reserved for Filipino citizens and corporations wholly owned by Filipino citizens.

The Corporation seeks to determine whether or not it is an enterprise engaged in a wholly or partially nationalized activity under existing laws, and thereby within the scope of the Anti-Dummy Act. Accordingly, it stated in its request for opinion that the Corporation is primarily engaged in the importation and trading of pharmaceutical, cosmetic and food products having the paid-up capital of P14,000,000.00. Moreover, it is engaged in the distribution, marketing and wholesaling (except retailing) of branded generic pharmaceutical, nutraceutical and cosmetic products.

Pursuant to the Retail Trade and Liberalization Act of 2000, the Commission has held that foreign enterprises with a paid-up capital of $2,500,000.00 is prohibited from engaging in retail trade business as it is reserved for Filipino citizens and corporations wholly owned by Filipino citizens. Moreover, to be considered as retail, the following requisites must be satisfied: (1) The seller is habitually engaged in selling; (2) the sale must be direct to the general public; and (3) the object of sale is limited to merchandise, commodities or goods for consumption.

Here, considering that the Corporation is engaged in wholesale trading, thus its sales are not to the general public as end-users. Indeed, the customers of the Corporation procures the latter's products with the view of reselling them or using the products in the delivery of services. Moreover, the Corporation's capital of P14,000,000.00 is far less than the capital requirement reserved for Filipino investors. Hence, the Corporation is not engaged in a wholly or partially nationalized activity, and the Anti-Dummy Law does not apply. ***(Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-57 dated 26 November 2019)***

Foreign investment in export enterprises, and/or domestic market enterprises, is allowed up to 100% ownership, provided that the Corporation does not fall under the negative list provided under Section 8 of the Foreign Investment Act of 1991.

The Corporation is engaged in wholesale and export business. The composition of ownership was 15% for each Filipino incorporators, with the total of 60% ownership; and 40% for their only foreign incorporator. However, subsequently, the total of 50% shares of the Corporation was assigned to the foreigner by virtue of a Deed of Assignment.

Whether or not the foreigner may own 50% of the total shares of the Corporation.

The Commission held that foreign investment in export enterprises, and/or domestic market enterprises, is allowed up to 100% ownership, provided that the Corporation does not fall under the negative list provided under Section 8 of the Foreign Investment Act of 1991.

Here, the Corporation's business of wholesale, unlike retail, is not included in List A, nor covered by List B of the FINL-11. Hence, the Corporation can be 100% foreign-owned allowing the foreigner to own 50% of its total shares. ***(Securities and Exchange Commission-Office of the General Counsel (SEC-OGC) Opinion No. 19-58 dated 12 December 2019)***

- **Insurance Commission Circular Letter (CL) No. 2019-70 dated 2 December 2019** – this supplements prior issuances by the Commission in relation to accounting for leases. PFRS 16, which supersedes PAS 17, eliminates the classification of operating and finance leases for lessees, and leases are capitalized by recognizing the present value of the lease payments and showing them as lease assets (right-of-use assets). If lease payments are made over time, a company also recognizes a financial liability (lease liability) representing its obligation to make future lease payments.

- **Insurance Commission Circular Letter (CL) No. 2019-71 dated 17 December 2019** – this provides for Guidelines on Product Oversight and Governance in Life Insurance Companies doing business in the Philippines.

- **Insurance Commission Circular Letter (CL) No. 2019-72 dated 17 December 2019** – this provides for Guidelines on Approval of Life Insurance Products, Forms and Other Product-Related Requests.

Insurance Commission Circular Letter (CL) No. 2019-70 dated 2 December 2019 – this supplements prior issuances by the Commission in relation to accounting for leases.

PFRS 16, which supersedes PAS 17, eliminates the classification of operating and finance leases for lessees, and leases are capitalized by recognizing the present value of the lease payments and showing them as lease assets (right-of-use assets). If lease payments are made over time, a company also recognizes a financial liability (lease liability) representing its obligation to make future lease payments.

The following guidelines are issued and promulgated to insurance and professional reinsurance companies acting as lessees in a leasing contract which allows for the recognition of right-of-use asset and corresponding lease liability:

- The "Right-of-Use (ROU) Asset" and corresponding "lease liability" shall be presented separately as new line items in the Statement of Financial Position and shall form part of the uniform chart of accounts on FRF under CL 2016-65;
- The ROU Asset shall be subject to 25% risk charge;
- The ROU Asset shall be admitted up to the extent of the corresponding Lease Liability. Anything in excess shall be treated as non-admitted in the computation of the net worth requirement pursuant to Section 194 of the Amended Insurance Code; and
- This Circular Letter shall be applied as of 30 September 2019 onwards.

Insurance Commission Circular Letter (CL) No. 2019-71 dated 17 December 2019 – this provides for Guidelines on Product Oversight and Governance in Life Insurance Companies doing business on the Philippines.

The salient features therefrom are as follows:

- The Company shall set up a management-level committee, which shall have the oversight and governance over the Company's insurance products, from the creation of internal processes up to documentations for audit purposes;
- The Company shall submit an annual inventory of all insurance products as of 31 December of prior year, on or before 30 April of each year. Including those products that the Company has discontinued selling; and
- The Company shall conduct a regular review of the insurance products it offers or markets taking into account any event that could materially affect the potential risk to the identified target market.

Insurance Commission Circular Letter (CL) No. 2019-72 dated 17 December 2019 – this provides for Guidelines on Approval of Life Insurance Products, Forms and Other Product-Related Requests.

This Circular shall be applicable to all requests for approval of life insurance products, forms, or other product-related requests issued by insurers. Further, this Circular gives the Commission the power to conduct an on-site or off-site examination within ten (10) years from the date of approval of product, form or other product-related requests to verify if it fully complies with the requirements of the pertinent provisions of the Insurance Code, circulars and guidelines issued by the Commission.

Moreover, this Circular also provided for sanctions and penalties specifically for insurer and the actuary.

BSP ISSUANCES

UPDATES

- **Bangko Sentral ng Pilipinas Circular No. 1065 dated 3 December 2019** – This amends Manual of Regulation for Banks (MORB) as of 31 December 2019.

- **Bangko Sentral ng Pilipinas Circular No. 1067 dated 13 December 2019** – This provides for the approval of the revisions to the minimum disclosure requirements under Appendix 59 on the Risk-Based Capital Adequacy Framework for the Philippine Banking System on interest rate risk in the banking book (IRRBB)

- **Bangko Sentral ng Pilipinas Circular No. 1068 dated 26 December 2019** – This provides for the extension of the period of registration/notification of Operators of Payment Systems (OPS).

- **Bangko Sentral ng Pilipinas Circular No. 1069 dated 27 December 2019** – This provides for guidelines on the establishment of Islamic banks and Islamic banking units.

- **Bangko Sentral ng Pilipinas Memorandum No. M-2019-029 dated 12 December 2019** – This provides for revised guidelines on sound risk management practices in dealing with Foreign Exchange Dealers/Money Changers, and Remittance and Transfer Companies.

Bangko Sentral ng Pilipinas Circular No. 1065 dated 3 December 2019 – This provides for amendments to Manual of Regulation for Banks (MORB) as of 31 December 2019.

The salient amendments are as follows:

1. The Revised Rules and Procedures on Administrative Cases involving directors and officers of BSP-Supervised financial institutions is codified as Appendix 135;
2. Banks may accept either a specimen signature or biometrics of the new individual customer;
3. In relation to Section 109 of the MORB on Appreciation or increase in book value, appraisal increment is no longer allowed;
4. The required report on Basel III Net Stable Funding Ratio Report, and Minimum Liquidity Ratio provided on BSP circulars are now codified in Appendix 7; and
5. The sample list of regulatory incentives for merger/consolidations and/or acquisitions contained in a BSP memorandum is hereby incorporated as Annex A of Appendix 90 in Item 2(f).

Bangko Sentral ng Pilipinas Circular No. 1067 dated 13 December 2019 – This provides for the approval of the revisions to the minimum disclosure requirements under Appendix 59 on the Risk-Based Capital Adequacy Framework for the Philippine Banking System on interest rate risk in the banking book (IRRBB).

The following information with regard to IRRBB have to be disclosed in the bank's annual reports:

1. A description of how the bank defines IRRBB for purposes of risk control and measurement;
2. A description of the bank's overall IRRBB management and mitigation strategies;
3. The periodicity of the calculation of the bank's IRRBB measures, and a description of the specific measures that the bank uses to gauge its sensitivity to IRRBB;
4. A description of the interest rate shock and stress scenarios that the bank uses to estimate changes in the economic value and/or earnings;
5. A high-level description of how the bank hedges its IRRBB, as well as the associated accounting treatment; and
6. A high-level description of key-modelling and parametric assumptions used in IRRBB measurement.

Bangko Sentral ng Pilipinas Circular No. 1068 dated 26 December 2019 – This provides for the extension of the period of registration/notification of Operators of Payment Systems (OPS).

Previously, Circular No. 1049 provided that OPSs currently operating under RA 11127 should register with the BSP not later than three (3) months from its effectivity, or 1 October 2019. Hence, the deadline for registration/notification should be 1 January 2020.

This Circular provided that OPS should register with, or notify, the BSP not later than 1 April 2020.

Bangko Sentral ng Pilipinas Circular No. 1069 dated 27 December 2019 – This provides for guidelines on the establishment of Islamic banks and Islamic banking units.

With prior approval of Bangko Sentral, the establishment of the following entities or units may be allowed: (1) Domestic Islamic banks; (2) Foreign Islamic banks; and (3) Islamic banking units (IBU).

In addition to the general powers granted to corporations, IBs shall have such powers as shall be necessary to carry out the business of a bank in accordance with Shari'ah principles.

Bangko Sentral ng Pilipinas Memorandum No. M-2019-029 dated 12 December 2019 – This provides revised guidelines on sound risk management practices in dealing with Foreign Exchange Dealers/Money Changers, and Remittance and Transfer Companies.

The following are the guideline of BSP Supervised Financial Institutions (BSFI) to ensure the soundness and adequacy of risk management policies and practices in dealing with foreign exchange dealers (FXDs)/money changers (MCs) and remittance and transfer companies (RTC):

1. To deal only with FXDs/MCs and RTCs registered with BSP and Anti-Money Laundering Council; and accredited Remittance Sub-Agents (RSA) of duly registered RTCs;
2. To conduct risk assessment to identify, understand and assess money laundering/terrorism financing risk arising from FXD/MCs and RTCs and apply appropriate standard of customer due diligence;
3. To perform appropriate due diligence when dealing with FXDs/MCs and RTCs, either as remittance partners or tie ups or accounts being used to facilitate remittance/money charging business, to effectively manage and mitigate risks;
4. To perform enhanced due diligence procedures, which include, among others, the following: (a) review of the AML/CFT program and

measures adopted by the FXDs/MCs and RTCs to assess whether they have appropriate processes to identify, measure, manage and control ML/TF risks, and to comply with AML/CFT requirements, including the reporting obligation for covered and suspicious transactions; (b) obtain additional information and conduct validation procedures, as provided; and (c) secure senior management approval for establishing business relationship in accordance with the BSFIs risk management policies and procedures; and

5. To perform continuing account and transaction monitoring.

TAX OBLIGATIONS OF PERMANENT ESTABLISHMENTS

By

Fulvio D. Dawilan

The Philippines generally follows the "source of income" rule in identifying the income that are taxable to corporations in the Philippines. For a foreign corporation, whether engaged in business or not in the Philippines, it is taxable only on income derived from sources within the country. The concept of source taxation is premised on the relationship of the income and the taxing state. A state's claim to tax a particular income is based on the state's specific relationship with that income.

In this light, the source of income is necessary in determining if an item of income should be taxed in the Philippines or not, especially for foreign corporations. If the income is sourced from the Philippines, our tax authority has the jurisdiction to call for the payment of tax. While this is the rule, the same would yield to the provisions of a tax treaty (double taxation agreement) that the Philippines has with the country of which the recipient of the income is a resident. In so far as business profits are concerned, they may be taxed in the Philippines if the income recipient has a permanent establishment (PE) in the Philippines.

Tax Obligations of Permanent Establishments

By
Fulvio D. Dawilan

For income taxation purposes, a foreign corporation is classified into two types of taxpayers: (a) resident foreign corporation(RFC) or a foreign corporation that is engaged in trade or business within the Philippines, or (b) nonresident foreign corporation (NRFC), which refers to a foreign corporation not engaged in trade or business within the Philippines. Doing business in the Philippines makes the foreign corporation a resident foreign corporation.

The income taxation of an RFC and NRFC in the Philippines are essentially the same. Both are subject to Philippine income taxes only with respect to income derived from sources within. The difference lies in the tax base. An NRFC is taxed based on the gross income while an RFC is, in general, taxed based on net taxable income, which means that related expenses are allowed as deductions. The taxes due on income of NRFCs are paid through the final withholding tax system. It follows that an NRFC does not have reportorial requirements. The payment of taxes of an NRFC, if any, is the responsibility of the payor/customer as withholding agent. Thus, except for the one-time TIN, it is not required to register as a regular taxpayer. On other hand, an RFC has to comply with the reportorial requirements, including the filing of its own tax returns and the payment of taxes due. It is thus required to register as a regular taxpayer. Apparently, registration as a regular taxpayer requires the submission of the SEC registration documents. Thus, to be able to register as a regular taxpayer, a foreign corporation has to register with the SEC, usually as a branch (in any of its forms). An RFC, therefore, is usually referred to as a Philippine branch of a foreign corporation.

In line with this, a usual question raised is with respect to a PE—how should a PE be classified and/or how should it comply with its tax obligations, especially PEs created by reason of short-term projects where no branch is registered? There are decisions of the Tax Court holding that PEs are still treated as NRFCs for income taxation purposes, in the absence of registration. As such, income taxes due on their income derived from sources within the Philippines shall still be subject to the final withholding taxes. Accordingly, the customer/payor of the income shall be required to withhold final tax on the gross amount of income.

Impliedly, it is not enough that a foreign corporation is doing business in the Philippines to be treated as an RFC for income taxation purposes. Also, the fact that a foreign corporation has a PE in the Philippines does not necessarily make the foreign corporation an RFC. It is still treated as an NRFC if it has no license to transact business in the Philippines and not registered with the tax authority.

Even the tax authority has a conflicting view on this matter. It has earlier issued a number of rulings confirming that the payments to a foreign corporation with a PE in the Philippines are subject to the final withholding tax, thereby treating them as NRFCs. But there are also issuances holding that a foreign corporation that has created a PE in the Philippines is treated as a foreign corporation engaged in trade or business in the Philippines or an RFC. In one ruling, for example, a German company, by reason of its service and maintenance contract with a Philippine entity, was found to have a PE. The tax bureau ruled that the enterprise shall be taxed in the same manner as an RFC, which should also be entitled to claim deductions for expenses incurred for purposes of the PE. But there was no guidance on how the filing of tax returns and payment of taxes should be made.

The apparent incompleteness or differences in issuances/rulings is due to the fact that there is really no specific rule governing the registration and compliance by a PE, which is not registered as a branch. I believe that there is basis to state that a foreign entity with a PE is to be treated as an RFC, considering that it is doing business in the Philippines. Thus, it should be allowed to register as a regular taxpayer.

It is time for the tax authorities to craft guidelines on how PEs should be registered for tax compliance purposes so that they can comply with their tax obligations, even without commercial registration, especially for shorter-term projects where maintaining an entity is not viable. Also, with the reform in the international tax system on its way, including taxation of the digital economy, the concept of permanent establishment will potentially be expanded to cover activities not covered by the traditional definition. This will provide jurisdictions outside an enterprise's physical residence the right to tax a portion of the income. Nonetheless, if there is no mechanism for these entities without physical presence to register for tax purposes, these will still provide a convenient excuse for these enterprises to escape from their tax obligations, and the income supposedly allocable to the country will remain untaxed.

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Transfer Pricing Masterclass

The rise of globalization, e-commerce, and technology are causing the structure of business transactions to evolve. This, in turn, presents tax challenges for both businesses and governments. There are two dynamics that need to be reconciled: first, that businesses will always look for ways to efficiently conduct their businesses and bring in more profits net of tax; and second, that tax authorities will exert effort to regulate these business activities and ensure that taxes are collected.

To be part of the solutions, the BDB Law conducted a TRANSFER PRICING MASTERCLASS to its clients (TPM) to provide a practical and working knowledge on managing transfer pricing risks, the best practices on transfer pricing function, and the overall strategic management of risks.

The Transfer Pricing Masterclass was conducted by international transfer pricing and digital tax experts from WTS Taxise Singapore, Mr. Sam Sim and James Yeo. It was organized in response to the BIR's imminent requirements for compliance with RAMO No. 1-2019, and also as an early preparation for a stricter scrutiny on related-party transactions by the BIR under the proposed CITIRA (Package 2) of the tax reform, which may be passed early this year. *(January 22, 2020, Rizal Ballroom C, Makati Shangri-La)*

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