TAX Insights

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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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HIGHLIGHTS for DECEMBER 2023

COURT OF TAX APPEALS DECISIONS

- **The administrative remedy of, among others, a request for reinvestigation, side by side with the period within which to submit documents in support thereof, both referred to in Section 228 of the NIRC, as amended, must be directed against the FLD/FAN received by the taxpayer.** *(Encore Receivable Management, Inc. v. Commissioner of Internal Revenue, C.T.A. Case No. 10062, December 6, 2023)*

- **When it is shown that the tax-paid petroleum products have become tax-exempt within the context of Section 135 of the Tax Code, the excise taxes which were previously paid thereon shall then be regarded as "erroneously or illegally collected," and, thus, subject to refund pursuant to Section 229 of the Tax Code.** *(Petron Corp. v. Commissioner of Internal Revenue, C.T.A. Case Nos. 9993 & 10015, December 5, 2023)*

- **The NIRC of 1997, as amended, states that offenses punishable under the NIRC prescribe in five (5) years.** *(People of the Philippines vs. Faivo Pascual Bartolome, CTA Crim. Case No. O-984, December 4, 2023)*

- **As a specialized court, the CTA can take cognizance only of matters which are clearly and specifically mentioned in the law conferring its jurisdiction.** *(DOLE Philippines, Inc – Stanfilo Division vs. The Sangguniang Panlungsod of the City of Davao, CTA EB No.2722 , December 1, 2023)*

- **In Commissioner of Internal Revenue v. Smart Communications, Inc., the Supreme Court emphasized that the person entitled to claim a tax refund is the taxpayer. However, in case the taxpayer does not file a claim for refund, the withholding agent may file the claim.** *(Commissioner of Internal Revenue vs. Premier Central, Inc., CTA EB No. 2689, December 1, 2023)*

- **Section 195 of the LGC provides the procedure for contesting an assessment issued by the local treasurer, while Section 196 provides the procedure for recovering an erroneously paid or illegally collected tax, fee, or charge through a refund or credit.** *(Royal Cargo Inc., v. City Treasurer of Paranaque City, CTA AC No. 270, December 13, 2023)*

- **Absent any clear and competent proof that the Taxpayer's clients are not engaged in trade or business within the Philippines, a collection of pieces of evidence aiming to reinforce the fact that a taxpayer's clients are foreign would still fall short of the requirement under Section 108(B)(2) of the NIRC, as amended.** *(Founder Philippines Corporation, v. Commissioner of Internal Revenue, CTA EB No. 2678, December 13, 2023)*

- **Although not offered, any evidence, therefore, may be admitted provided that the following requirements are present: (1) the same must have been duly identified by testimony duly recorded; and (2) the same must have been incorporated in the records of the case.** *(CBK Power Company Limited, v. Commissioner of Internal Revenue, CTA Case No. 10157, December 12, 2023)*

- **The definition of "cologne" or "toilet waters", as stated in BIR Ruling No. 43-00, appears to suggest clearly that either should be understood in the technical sense or trade or commercial meaning.** *(Green Cross, Inc., v. Commissioner of Internal Revenue, CTA Case No. 10401, December 12, 2023)*

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HIGHLIGHTS

- **Forfeiture of goods may also be effected when and while the goods are in the custody or within the jurisdiction of customs officers.** *(John Paul V. Medina, Owner and Proprietor of JPM Medical Trading v. Commissioner of Customs, CTA Case No. 10277, December 11, 2023)*

- **It does not matter how far apart the administrative and judicial claims were filed, or whether the CIR was actually able to rule on the administrative claim, so long as both claims were filed within the two-year period.** *(Ayala Corporation v. Commissioner of Internal Revenue, CTA Case No. 10056, December 11, 2023)*

- **The Court of Tax Appeals may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case.** *(Abundance Providers and Entrepreneurs Corporation v. Commissioner of Internal Revenue and the Bureau of Internal Revenue, CTA Case no. 0407, December 7, 2023)*

- **An intercompany offsetting arrangement is considered acceptable foreign currency payment for VAT-zero rating purposes**. *(Avaloq Philippines Operating Headquarters v. Commissioner of Internal Revenue, CTA Case No. 10397, December 7, 2023)*

- **Based on Section 281 of the NIRC of 1997, as amended, and the Lim case, where the commission of the violation of the law is not known, the prescriptive period begins to run from: (1) Discovery; and (2) Institution of judicial proceedings.** *(People of the Philippines vs. Shelmark Builders Phils., Inc., and Santiago C. Barangan, CTA Crim Case. No. 0-1054, December 22, 2023)*

- **Estoppel cannot bar the taxpayer from questioning the validity of the waivers since it has no hand in their infirmity.** *(Commissioner of Internal Revenue v. Philusa Corp., C.T.A. EB Case No. 2566 (C.T.A. Case No. 9409) (Resolution), [December 20, 2023])*

- **The mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion.** *(Commissioner of Internal Revenue v. Ateneo de Davao University, C.T.A. EB Case No. 2610 (C.T.A. Case No. 9779), [December 20, 2023])*

- **Pursuant to Sections 137 and 151 of the LGC, and since the situs of taxation is the place where the privilege is exercised, the city in which the franchise holder has its principal office and exercises the said privilege has the power to impose franchise tax on the latter's gross receipts, even when the source thereof is beyond the territorial limits of the said city.** *(The Local Government Unit of Camarines Sur v. Camarines Sur II Electric Cooperative, Inc. [CASURECO II] and the Local Government Unit of Naga City, CTA Case No. AC-264, December 19, 2023)*

- **The lack of TIN or failure to indicate the correct TIN, even with the taxpayer's name, would make it difficult to verify if, indeed, the taxpayer paid the correct amount to the government.** *(GHD PTY Ltd. vs. Commissioner of Internal Revenue, CTA Case No. 10187, December 19, 2023)*

- **Association dues, membership fees, and other assessments/charges are not subject to income tax because they do not constitute profit or gain.** *(CCAP), vs. Commissioner of Internal Revenue, CTA EB No. 2405, December 15, 2023)*

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- **Due process requires that the taxpayers must have the right to know that the revenue officers are duly authorized to conduct the examination and assessment, and this requires that the LOAs must contain the names of the revenue officers.** *(ED & F Man Philippines, Inc. v. Commissioner of Internal Revenue, C.T.A. Case No. 10053, [December 14, 2023])*

BIR ISSUANCES

- **RR No. 15-2023, December 13, 2023-** This implements the Grant of Donor's Tax Exemption on the Donation of Imported Capital Equipment, Raw Materials, Spare Parts, or Accessories Directly and Exclusively Used by Registered Business Enterprises Under Section 295 (C) (2)(e) of the National Internal Revenue Code of 1997, as amended.
- **RR No. 16-2023, December 21, 2023-** This further amends the provisions of RR No. 2-98, as Amended, to Impose Withholding Tax on Gross Remittances *Made by Electronic Marketplace Operators and Digital Financial Services Providers to Sellers/Merchants*
- **RMC No. 126-2023, December 27, 2023 -** This circularizes MC No. 15, dated March 17, 2023 issued by the OP, entitled "Updating the Inventory of Exceptions to the Right to Access Information Under Executive Order No.02, (S.2016).

SEC ISSUANCES

- **SEC MC No. 22-2023, December 5, 2023** – This provides for the guidelines on the application for payment of filing fees and annual fees of Real Estate Investment Trust Fund Managers and their respective compliance officers.
- **SEC MC No. 23-2023, December 18, 2023** – This provides for the integration of MC.2023 s. 2020 and MC1. S.2021 and compliance of newly registered corporations with the eSPARC Regular and OneSEC Portals and the automatic enrollment to eFAST portal.

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UPDATES

COURT OF TAX APPEALS

DECISION HIGHLIGHTS

The administrative remedy of, among others, a request for reinvestigation, side by side with the period within which to submit documents in support thereof, both referred to in Section 228 of the NIRC, as amended, must be directed against the FLD/FAN received by the taxpayer.

The taxpayer sought to nullify the BIR's Preliminary Collection Letter (PCL) and Final Notice Before Seizure (FNBS) regarding its deficiency taxes on Withholding Tax on Compensation (WTC), Expanded Withholding Tax (EWT) and Final Withholding Tax (FWT).

In ruling against the taxpayer, the Court ruled that the Supreme Court decisions in Allied Banking and Maxicare decreed that the administrative remedy of, among others, a request for reinvestigation, side by side with the period within which to submit documents in support thereof, both referred to in Section 228 of the National Internal Revenue Code (NIRC), as amended, must be directed against the Formal Letter of Demand (FLD)/Final Assessment Notice (FAN) received by the taxpayer. Contrariwise, if no FLD/FAN was received by the taxpayer, then said administrative remedy finds no application.

Here, the taxpayer's administrative protests before the BIR were not directed against the FLD/FAN. Specifically, what was being assailed by petitioner in its Requests for Reinvestigation are the BIR's collection letters, i.e., PCL and FNBS, anchored on the supposed non-receipt of the FAN for calendar year (CY) 2014. The taxpayer's correct remedy should have challenged the PCL and FNBS directly before the CTA, under the premise that it did not receive the BIR's FAN from which the collection letters were based. *(Encore Receivable Management, Inc. v. Commissioner of Internal Revenue, C.T.A. Case No. 10062, December 6, 2023)*

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When it is shown that the tax-paid petroleum products have become tax-exempt within the context of Section 135 of the Tax Code, the excise taxes which were previously paid thereon shall then be regarded as "erroneously or illegally collected," and, thus, subject to refund.

The main issue of the case is whether the payment of excise taxes paid on manufactured or imported petroleum products but sold subsequently to international carriers or tax-exempt entities is erroneous/illegal and, thus, subject to refund.

At first instance, petroleum manufacturers/importers are liable to pay excise taxes when they take out the fuel from their refineries or from the customs house, as the case may be. However, this liability is qualified by Section 135 of the Tax Code, such that the tax-paid petroleum products become exempt from excise taxes when established that these are sold subsequently to any one of the following: (1) international carriers of Philippine or foreign registry on their use or consumption outside the Philippines (international carriers); (2) exempt entities or agencies covered by tax treaties, conventions and other international agreements for their use or consumption (tax-exempt entities by treaty); or (3) entities which are by law exempt from direct and indirect taxes (tax-exempt entities by law).

Here, when it is shown that the tax-paid petroleum products have become tax-exempt within the context of Section 135 of the Tax Code, the excise taxes which were previously paid thereon shall then be regarded as "erroneously or illegally collected," and, thus, subject to refund pursuant to Section 229 of the

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COURT OF TAX APPEALS

DECISION HIGHLIGHTS

Tax Code. *(Petron Corp. v. Commissioner of Internal Revenue, C.T.A. Case Nos. 9993 & 10015, December 5, 2023*

The NIRC of 1997, as amended, states that offenses punishable under NIRC prescribe in five (5) years.

The taxpayer argues that the criminal action for the alleged offense has already prescribed considering that the Information was already filed out of time from the time the Formal Letter of Demand (FLD) and Final Assessment Notice (FAN) were served to the taxpayer.

The Court finds for the accused. Section 2, Rule 9 of the RRCTA provides that it is the institution of the criminal action which interrupts the presecriptive period and the criminal actions before the CTA are instituted by the filing of an Information in the name of the People.

The Court ruled that the assessment had attained finality since the taxpayer failed to file a valid protest within thirty (30) days from its receipt of the assessment on January 5, 2021. Counting 30 days therefrom, the assessment then became final, executory, and demandable on February 4, 2016. The same date would have also been considered as the time when the accused had willfully failed or refused to pay his assessed tax deficiencies.

The NIRC of 1997, as amended, states that offenses punishable under the said law prescribe in five (5) years. Counting five (5) years from February 4, 2016, the last day to file the Information would have been February 4, 2021. The Information was only filed on December 5, 2022. With this, it becomes indisputable that the offense charged in this case had already been prescribed. *(People of the Philippines vs. Faivo Pascual Bartolome, CTA Crim. Case No. O-984, December 4, 2023)*

As a specialized court, the CTA can take cognizance only of matters which are clearly and specifically mentioned in the law conferring its jurisdiction.

The taxpayer argued that the present case is a local tax case because the nature of the action and the relief sought involve local tax issues. It claimed that its Petition for Review contains a tax issue as it involves an appeal to the denial of the protest, a disputed assessment of an annual environmental tax which taxpayer had paid under protest and thereafter claimed as tax refund.

The Court, however, disagreed with the taxpayer. It ruled that as a specialized court, the CTA can take cognizance only of matters which are clearly and specifically mentioned in the law conferring its jurisdiction. Crucial to CTA's valid cognizance of local tax cases is the full and proper appreciation of what constitutes the term "local tax cases" given that the jurisdiction of the CTA over decisions, orders, or resolutions of the RTC becomes operative only when the latter had ruled on a local tax case. Logically, therefore, if the action before the RTC involves an exaction or imposition not in the nature of a tax, the same cannot be treated as a local tax case.

In the present case, the sole purpose for the collection of the "Environmental Tax" is in the nature of a regulatory fee and not a tax. *(DOLE Philippines, Inc –*

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COURT OF TAX APPEALS

DECISION HIGHLIGHTS

Stanfilo Division vs. The Sangguniang Panlungsod of the City of Davao, CTA EB No.2722 , December 1, 2023)*

In Commissioner of Internal Revenue v. Smart Communications, Inc., the Supreme Court emphasized that the person entitled to claim a tax refund is the taxpayer. However, in case the taxpayer does not file a claim for refund, the withholding agent may file the claim.

The CIR argued that respondent is not the proper party to claim a Creditable Withholding Tax (CWT) refund. It emphasized that the proper claimant of the CWT refund is TIEZA, the taxpayer whose taxes were withheld, and not the withholding agent.

However, the Court has ruled that the same has already been settled by jurisprudence. The withholding agent may file a claim for a refund of the erroneously withheld taxes on behalf of the statutory taxpayer. In *Commissioner of Internal Revenue v. Smart Communications, Inc.*, the Supreme Court emphasized that the person entitled to claim a tax refund is the taxpayer. However, in case the taxpayer does not file a claim for refund, the withholding agent may file the claim. Moreover, the Supreme Court held that a withholding agent may file a claim for a refund on behalf of the taxpayer, even if they are unrelated parties. Applying the said case, respondent may file a claim for a refund on behalf of TIEZA, as it has interest over the CWT it remitted, which TIEZA is exempt from paying. *(Commissioner of Internal Revenue vs. Premier Central, Inc., CTA EB No. 2689, December 1, 2023)*

Section 195 of the LGC provides the procedure for contesting an assessment issued by the local treasurer, while Section 196 provides the procedure for recovering an erroneously paid or illegally collected tax, fee, or charge through a refund or credit.

The Taxpayer was issued by the City Treasurer of Paranaque City a Statement of Account (SOA) indicating the local business tax (LBT) to be paid by the former. The Taxpayer asserts that the SOA is not the assessment contemplated by law, which would give rise to the applicability of Section 195 of the Local Government Code (LGC) but of Section 196 of the LGC by virtue of its alleged overpayment of tax.

Sections 195 and 196 of the LGC govern the taxpayer's remedies for taxes collected by LGUs, except for real property taxes. The two remedies are different. Section 195 is triggered by an assessment made by the local treasurer or his duly authorized representative stating the nature of the tax, fee, or charge, the amount of deficiency, and the surcharges, interests, and penalties issued by the local treasurer, while Section 196 is initiated by the taxpayer by way of a written claim for refund or credit filed with the local treasurer.

The Court ruled that the subject SOA cannot be considered the "notice of assessment" required under Section 195 of the LGC since it did not contain any amount of deficiency, surcharges, interests, and penalties due from the Taxpayer. Indeed, the Taxpayer correctly availed of the remedy under Section 196 of the LGC which does not require a prior notice of assessment for a claim for refund to prosper. *(Royal Cargo Inc., v. City Treasurer of Paranaque City, CTA AC No. 270, December 13, 2023)*

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COURT OF TAX APPEALS

DECISION HIGHLIGHTS

Absent any clear and competent proof that the Taxpayer's clients are not engaged in trade or business within the Philippines, a collection of pieces of evidence aiming to reinforce the fact that a taxpayer's clients are foreign would still fall short of the requirement under Section 108(B)(2) of the NIRC, as amended

The Taxpayer through a letter and accompanied by an Application for Tax Credits/Refunds (BIR Form No. 1914), filed with the Bureau of Internal Revenue's (BIR) VAT Credit Audit Division (VCAD) an administrative claim seeking refund of the unutilized input value-added tax (VAT) arising from its domestic purchase of goods other than capital goods, services, and capital goods exceeding P1 Million, attributable to alleged zero-rated transactions. The BIR denied the Taxpayer's claim.

Based on *Deutsche Knowledge Services* case, there must be sufficient proof of the following: (1) that Taxpayer's clients are foreign corporations which can be proven by the SEC Certifications of Non-Registration; and (2) that they are not doing business in the Philippines (the prima facie proof of which is the articles of association/certificates of incorporation stating that these affiliates are registered to operate in their respective home countries, outside the Philippines).

In the instant case, while the pieces of evidence presented by the Taxpayer can respectively prove the fact of inward remittances and the scope of the Taxpayer's business activities, they do not strictly meet the two (2) components discussed above. Such pieces of evidence do not prove that the recipients of Taxpayer's services are foreign corporations not doing business in the Philippines. Thus, the taxpayer is not entitled to refund of its unutilized input VAT. *(Founder Philippines Corporation, v. Commissioner of Internal Revenue, CTA EB No. 2678, December 13, 2023)*

Although not offered, any evidence, therefore, may be admitted provided that the following requirements are present: (1) the same must have been duly identified by testimony duly recorded; and (2) the same must have been incorporated in the records of the case.

The taxpayer filed this "Motion for Reconsideration" assailing the Decision which denied its claim for value-added tax (VAT) refund. In the assailed decision, the Court held that the taxpayer did not proffer in evidence the Certificate of Compliance (COC) that would have been relevant to its period of claim. Without any proof that it validly sold electricity to the National Power Corporation (NPC), the Court deemed that the Taxpayer failed to establish that it is engaged in zero-rated or effectively zero-rated sales. The Court also declared in the assailed Decision that the Taxpayer's claim is based on Republic Act (RA) No. 9136 or the Electric Power Industry Reform Act of 2001 (EPIRA).

Generally, no evidentiary value can be given to any piece of evidence unless it is formally offered in court. However, as an exception, any evidence, may be admitted provided that the following requirements are present: (1) the same must have been duly identified by testimony duly recorded; and (2) the same must have been incorporated in the records of the case. In Heirs of *Jose Marcial K. Ochoa v. G&S Transport Corporation*, the requirement of authentication only pertains to private documents and does not apply to public documents.

In the instant case, the Taxpayer has attached the COCs which are certified machine copies of the documents and are indeed part of the BIR records. Moreover, an examination of the said COCs show that these were certified

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copies issued by the Energy Regulatory Commission (ERC) and the validity period appears which covers the subject claim.

Indubitably, the subject COCs were issued by a public officer in the performance of official duties, hence, they come within the purview of what are deemed to be public documents and are prima facie evidence of the facts stated therein pursuant to Section 2326, Rule 132 of the Revised Rules on Evidence, as amended. *(CBK Power Company Limited, v. Commissioner of Internal Revenue, CTA Case No. 10157, December 12, 2023)*

The definition of "cologne" or "toilet waters", as stated in BIR Ruling No. 43-00, appears to suggest clearly that either should be understood in the technical sense or trade or commercial meaning.

The taxpayer manufactures and sells splash colognes with the brand name "Lewis & Pearl" and pays the 20% excise taxes imposed on perfumes and "toilet waters" pursuant to Section 150(b)6 of the NIRC of1997, as amended. The taxpayer argues that its “Lewis and Pearl” products should not be subjected to excise taxes because these are not considered as “toilet waters” under Section 150(b) of the NIRC of 1997, as amended.

To clarify, the term "toilet waters" has two (2) different definitions under the relevant issuances: (1) under RR No. 08- 84, it is defined as "containing essential oils, i.e., more than 3% by weight" (to which the taxpayer alleged that its' cologne products do not exceed the 3% threshold); and (2) under BIR Ruling No. 43-00, as circularized in RMC No. 17-02, it classifies cologne and "all other colognes" as "toilet waters".

The amendment introduced by Executive Order No. 273 which modifies the nature of the tax of “toilet waters” from sales tax or percentage tax to excise tax has changed the meaning of the term “toilet waters”. Thus, the definition of "toilet waters" under RR No. 08-84 was, in effect, abandoned by the subsequent amendment of Section 194 of the NIRC of 1977 which it implements.

In the absence of legislative intent to the contrary, technical or commercial terms and phrases, when used in tax statutes, are presumed to have been used in their technical sense or in their trade or commercial meaning. Relative thereto, the definition of "cologne" or "toilet waters", as stated in BIR Ruling No. 43-00, appears to suggest clearly that either should be understood in the technical sense or trade or commercial meaning.

Thus, the definition of "toilet waters" in BIR Ruling No. 43-00 and RMC No. 17-02 must be sustained. *(Green Cross, Inc., v. Commissioner of Internal Revenue, CTA Case No. 10401, December 12, 2023)*

Forfeiture of goods may also be effected when and while the

The Taxpayer is the sole proprietor of JPM Medical Trading, engaged in the retail of medical and dental supplies. The Taxpayer argues that the Commissioner of Customs (COC) erred in ordering the forfeiture of the seized medical goods since such seizure and forfeiture were not in compliance with

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goods are in the custody or within the jurisdiction of customs officers

Section 1115 of the Customs Modernization Tariff Act (CMTA). The Taxpayer points out that he is neither the importer, exporter, original owner, consignee, or agent of another person effecting the importation, entry, or exportation of the subject goods, nor is there any factual circumstances presented to show that he had knowledge that the goods were imported contrary to law.

The Court, however, was not convinced. Section 1115 of the CMTA states that the forfeiture shall be effected only when and while the goods are in the custody or within the jurisdiction of customs officers or in the possession or custody of or subject to the control of the importer, exporter, original owner, consignee, agent of another person effecting the importation, entry or exportation in question, or in the possession or custody of or subject to the control of persons who shall receive, conceal, buy, sell, or transport the same, or aid in any of such acts, with knowledge that the goods were imported, or were the subject of an attempt at importation or exportation contrary to law.

Considering the foregoing, while it may be true that the Taxpayer is not an "importer, exporter, original owner, consignee, etc. " of the seized medical supplies, he has not shown that the subject goods are no longer in the custody or within the jurisdiction of customs officers. Thus, there is no indication that the subject seizure and forfeiture were violative of Section 1115 of the CMTA. *(John Paul V. Medina, Owner and Proprietor of JPM Medical Trading v. Commissioner of Customs, CTA Case No. 10277, December 11, 2023)*

It does not matter how far apart the administrative and judicial claims were filed, or whether the CIR was actually able to rule on the administrative claim, so long as both claims were filed within the two-year period.

On March 28, 2019, the Taxpayer filed a claim for issuance of Tax Credit Certificate (TCC) for its unutilized creditable withholding taxes (CWTs) for calendar years 2016 and 2017. Without waiting for the action of the Commissioner of Internal Revenue (CIR) on its administrative claim, the Taxpayer filed the Petition for Review praying that judgment be rendered ordering the CIR to issue a TCC in favor of the Taxpayer's administrative claim.

The CIR argues that the Taxpayer violated the substance of exhaustion of administrative remedies when the former did not give the latter ample time to ascertain the validity of
its claim.

The Supreme Court previously held that from the plain language of Section 229 of the NIRC, as amended, it does not matter how far apart the administrative and judicial claims were filed, or whether the CIR was actually able to rule on the administrative claim, so long as both claims were filed within the two-year prescriptive period. It was also previously established that Section 229 of the NIRC, as amended, does not require the CIR to resolve a claim for refund or credit of erroneously paid taxes within a specific period.

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In the case at bar, had the Taxpayer awaited the action of the Bureau of Internal Revenue (BIR) on its claim for refund prior to taking court action knowing fully well that the prescriptive period was about to end, it would have lost not only its right to seek judicial recourse but its right to recover its excess and unutilized CWTs erroneously paid to the government thereby suffering irreparable damage. (*Ayala Corporation v. Commissioner of Internal Revenue, CTA Case No. 10056, December 11, 2023)*

The Court of Tax Appeals may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case.

The Commissioner of Internal Revenue (CIR) filed this Motion for Reconsideration of the Decision of the Court which nullified the assessments issued by the CIR against the Taxpayer. The CIR argues that the Court erred in ruling on an issue never raised by the Taxpayer.

The Court of Tax Appeals (CTA) shall be authorized to pass upon the matters even outside the parties' assigned errors or stipulations only when the following requisites concur: First, the additional issues are related to the principal issue to be resolved by the court and is necessary to achieve an orderly disposition of the case. Second, the resolution of these new issues would not require the presentation of additional evidence and must rely solely on factual bases that are already matters of record in the case.

In the instant case, whether the revenue officers were authorized to audit the Taxpayer is a matter that directly affects the core issue on the validity of the assessment issued against the taxpayer. Further, the Court reached the conclusion that the concerned revenue officers did not possess the required formal authority to audit the Taxpayer based on an examination of documents already part of the record. Thus, the Court may take cognizance of this issue despite the taxpayer's failure to raise it at the earliest opportunity. *(Abundance Providers and Entrepreneurs Corporation v. Commissioner of Internal Revenue and the Bureau of Internal Revenue, CTA Case no. 0407, December 7, 2023)*

An intercompany offsetting arrangement is considered acceptable foreign currency payment for VAT-zero rating purposes.

The Taxpayer is the regional operating headquarters (ROHQ) of Avaloq Group AG, a company organized and existing under the laws of Switzerland. The taxpayer alleged in its filed administrative claim that it incurred excess and/or unutilized input value-added tax (VAT) arising from its zero-rated sales. The administrative claim was denied, hence this Petition for Review. The taxpayer alleges that its zero-rated sales of services were paid for in acceptable foreign currency exchange through intercompany offsetting agreements. It further alleges that the fees for the Taxpayer's services were settled through a centralized clearing/netting system or group current account under Avalon Group AG.

Under Q8 and A8 of Revenue Memorandum Circular (RMC) no. 42-003, offsetting arrangements are acknowledged by the Bureau of Internal Revenue (BIR) as an alternative to proofs of foreign currency inward remittances. Moreover, under BIR Ruling No. [DA-(VAT-009) 075-08], which cites BSP

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Circular No. 1353, Series of 1992, the BIR ruled that an intercompany offsetting arrangement is considered acceptable foreign currency payment for VAT zero-rating purposes.

However, in the instant case, the Taxpayer failed to adduce evidence of the offsetting arrangement between or among Avaloq Group AG's affiliates. Thus, the Taxpayer failed to prove that there is a valid offsetting arrangement that may serve as an alternative to actual inward remittance of foreign currency in consideration for the services it rendered to Non-Resident Foreign Corporations (NRFCs) not doing business in the Philippines. Consequently, the taxpayer failed to prove that it is engaged in zero-rated sales services under Section 108(B)(2) of the NIRC, as amended. Its claim for VAT refund cannot prosper. *(Avaloq Philippines Operating Headquarters v. Commissioner of Internal Revenue, CTA Case No. 10397, December 7, 2023)*

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Based on Section 281 of the NIRC of 1997, as amended, and the Lim case, where the commission of the violation of the law is not known, the prescriptive period begins to run from: (1) Discovery; and (2) Institution of judicial proceedings.

The Joint Complaint-Affidavit for tax evasion against the taxpayer was filed before the DOJ on August 18, 2006, while the Information dated September 12, 2022, was filed before the Court only on April 20, 2023. The prosecution argues that, contrary to the findings of the Court, prescription has not set in, as the instant case involves an offense punishable by a special law, the National Internal Revenue Code (NIRC) of 1997, as amended; therefore, the filing of the complaint with the prosecutor's office interrupts the prescription period, as provided under Section 2 of Act No. 3326.

The Court held that in interpreting Section 281 of the NIRC, as amended, and the *Lim* case, the prosecution argues that it is the filing of the Joint Complaint-Affidavit that tolls the running of the prescriptive period under Section 1 of Rule 110 of the Rules of Court of 1997, as amended.

To recall, as held in the assailed Resolution, based on Section 281 of the NIRC of 1997, as amended, and the *Lim case*, where the commission of the violation of the law is not known, the prescriptive period begins to run from:
(1) Discovery; and
(2) Institution of judicial proceedings.

Based on the foregoing, criminal cases falling within the jurisdiction of the Court in Division is instituted by filing the information before the said court. Such institution of the criminal action before the court shall interrupt the running of the period of prescription. Counting five (5) years from the filing of the Joint Complaint-Affidavit before the DOJ on August 18, 2006, the government's right to institute a criminal action prescribed on August 18, 2011. Clearly, when the instant Information was filed before this Court on April 20, 2023, eleven (11) years and eight (8) months have passed since the right to institute a criminal action prescribed. *(People v. Shelmark Builders Phils., Inc., C.T.A. Crim. Case No. O-1054, [December 22, 2023])*

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Estoppel cannot bar the taxpayer from questioning the validity of the waivers since it has no hand in their infirmity.

The BIR moves for the reconsideration of the decision, which affirmed the *cancellation* of the deficiency income tax, value-added tax (VAT), expanded withholding tax (EWT) assessments, and the compromise penalty against the taxpayer for calendar year 2009. The BIR reiterates the arguments that the waivers executed by the taxpayer are valid; his right to assess the taxpayer had not yet prescribed; his right to due process was not violated; and, thus, the assessments are valid.

The Court ruled that the waivers were invalidated *not* because of the lack of authority of the taxpayer's representative *but* because of several infirmities noted by the Court. These infirmities consisted of the failure to indicate the nature and amount of tax due and the fact that *both dates of execution* by the taxpayer and *dates of acceptance* by the Bureau of Internal Revenue took place after the prescription had already set in. *(Commissioner of Internal Revenue v. Philusa Corp., C.T.A. EB Case No. 2566 (C.T.A. Case No. 9409) (Resolution), [December 20, 2023])*

The mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion.

The taxpayer was assessed on its alleged deficiency income tax, VAT, and EWT for taxable year 2006. The Court in Division ruled that the period to assess has already prescribed. In its Petition for Review before the Court En Banc, the BIR argued that the period to assess the EWT has not yet prescribed pursuant to Section 222 (a) of the NIRC of 1997. Since there was a substantial under-declaration of sales in taxpayer's value-added tax (VAT) and income tax returns, the ordinary period of prescription to assess respondent is extended to ten (10) years. Hence, it claims that the exception provided under Section 222 (a) of the NIRC of 1997, as amended, should be considered in the determination of the period of limitation of petitioner's right to assess respondent.

The Court En Banc held that it cannot conclude as true BIR's allegation that there is substantial under-declaration of sales in respondent's VAT and Income Tax Returns without anything to support such an allegation. The mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion. The fraud contemplated by law must be actual and not constructive. It must be intentional, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right. Thus, finding no reason to apply the exception, the instant case falls under the general rule and should, therefore, be assessed within three (3) years from the date of actual filing of the tax returns or from the last day prescribed by law for the filing of such return, whichever comes later. *(Commissioner of Internal Revenue v. Ateneo de Davao University, C.T.A. EB Case No. 2610 (C.T.A. Case No. 9779), [December 20, 2023])*

Pursuant to Sections 137 and 151 of the LGC, and since the

Respondent Naga City assessed and collected franchise tax from respondent CASURECO II based on gross receipts earned within Naga City, while Petitioner Province of Camarines Sur assessed and collected franchise tax from respondent CASURECO II based on gross receipts earned within the aforesaid

situs of taxation is the place where the privilege is exercised, the city in which the franchise holder has its principal office and exercises the said privilege has the power to impose franchise tax on the latter's gross receipts, even when the source thereof is beyond the territorial limits of the said city.

nine (9) municipalities in Camarines Sur. Due to conflicting claims on franchise tax on gross receipts, respondent CASURECO II filed a Verified Complaint for Interpleader against Petitioner Province of Camarines Sur and respondent Naga City before the RTC. The RTC ruled in favor of Respondent Naga City. Hence, this Petition for Review filed by the Province of Camarines Sur.

The issue in this case is whether or not respondent Naga City is the rightful LGU entitled to the franchise tax due from respondent CASURECO II based on gross receipts derived from the subject nine (9) municipalities, which are within the territorial jurisdiction of petitioner Province of Camarines Sur.

The Court held that according to Article 226 (a) and (b) of the IRR of LGC in relation to Section 137 of the LGC, a province is authorized to impose a tax on "business enjoying a franchise operating within the territorial jurisdiction of any city located within the province."

Further, in *City of Iriga v. Camarines Sur III Electric Cooperative, Inc., G.R. No. 192945, September 5, 2012*, the Supreme Court has interpreted and applied Section 137, which grants a province the power to tax franchises, and Section 15, which also authorizes, in effect, a city to impose franchise tax, both of the LGC, vis-à-vis situs of taxation, in that such power of city to levy franchise tax covers all gross receipts not only from within the territorial limits of that city where the franchise holder exercises the privilege but also from other areas where the services of products are delivered. In other words, pursuant to said Section 137 (applicable to provinces) and Section 151 (pertaining to cities), both of the LGC and since situs of taxation is the place where the privilege is exercised, the city in which the franchise holder has its principal office and exercises the said privilege has the power to impose franchise tax on the latter's gross receipts, even when the source thereof is beyond the territorial limits of the said city.

In other words, the rightful LGU entitled to the franchise tax due from respondent CASURECO II based on its gross receipts, including those derived from the said nine (9) municipalities, albeit such municipalities are within the territorial jurisdiction of petitioner Province of Camarines Sur, is the LGU of Naga City. *(The Local Government Unit of Camarines Sur v. Camarines Sur II Electric Cooperative, Inc. [CASURECO II] and the Local Government Unit of Naga City, CTA Case No. AC-264, December 19, 2023)*

The lack of TIN or failure to indicate the correct TIN, even with the taxpayer's name, would make it

The issue in this case is whether or not the taxpayer is entitled to its claim for refund or of issuance of TCC representing its excess and unutilized CWT for FY ended June 30, 2017. The taxpayer argues that the Court-Commissioned ICPA erred in disallowing the CWT certificates with no payor's TIN indicated or those where the taxpayer's TIN was either not indicated or incorrect. It further argues that there is nothing in Sections 2.58(B) and 2.58.3, RR No. 2-98, as amended

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difficult to verify if, indeed, the taxpayer paid the correct amount to the government.

which states that the income payor's and/or income payee's TIN is an essential requisite for the validity of a CWT certificate.

The Court, however, disagrees with the taxpayer. It bears reiterating that a claim for tax refund or credit like a claim for tax exemption, is construed strictly against the taxpayer. TIN serves as identification of taxpayers in relation to their payment with the BIR. Thus, the lack thereof or failure to indicate the correct TIN, even with the taxpayer's name, would make it difficult to verify if, indeed, the taxpayer paid the correct amount to the government. Thus, it was proper for the ICPA to disallow taxpayer's CWT for being supported by CWT certificates either with no payor's TIN or with incorrect or without the taxpayer's TIN. *(GHD PTY Ltd. vs. Commissioner of Internal Revenue, CTA Case No. 10187, December 19, 2023)*

Association dues, membership fees, and other assessments/charges are not subject to income tax because they do not constitute profit or gain.

The taxpayer is a non-stock, non-profit association registered with the SEC. However, despite its nature, the BIR assessed it for taxable year 2013 for deficiency income tax, VAT, EWT, and compromise penalty, in the aggregate amount of P10,183,719.10. It argued that it was able to prove that the income being assessed by BIR was not derived from its real or personal properties or from any activity conducted for profit. It also claims that its receipts pertaining to registration, sponsorships, and other collections are not subject to VAT.

In ruling, the Court held that it is undisputed that the taxpayer qualified as a business league, chamber of commerce, or board of trade not organized for profit, whose net income does not inure to the benefit of any private stockholder, or individual. Such a fact, however, does not automatically exempt taxpayers from paying taxes. Only its income derived from its not-for-profit activities is exempt, while its income from activities conducted for profit are subject to income tax, regardless of disposition thereof. The Court *cited BIR vs. First E-Bank Tower Condominium Corp. (G.R. No. 215801 & 218924, January 15, 2020)* wherein it held that association dues, membership fees, and other assessments/charges are not subject to income tax because they do not constitute profit or gain as they are collected purely for the benefit of the condominium owners and are the incidental consequence of a condominium corporations's responsibility to effectively oversee, maintain, or even improve the common areas of the condominium as well as its governance.

Considering that the fees are not considered income but only form part of capital, it it but logical that the same is also not derived from activities conducted for profit.

As to VAT, the Court held that VAT is imposed on gross receipts derived from sale or exchange of services which include the performance of all kinds of services for another for a fee, regardless of whether or not the person engaged therein is a non-stock, non-profit private organization and irrespective of the disposition of its net income. Therefore, taxpayer's receipts pertaining to

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registration, sponsorships, and other collections were found to be paid in exchange for services or some kind of benefit from the taxpayer. (Contact Centers Association of the Philippines, Inc. *(CCAP), vs. Commissioner of Internal Revenue, CTA EB No. 2405, December 15, 2023)*

Due process requires that the taxpayers must have the right to know that the revenue officers are duly authorized to conduct the examination and assessment, and this requires that the LOAs must contain the names of the revenue officers.

The issue in this case is whether or not the BIR accorded due process in issuing the final assessment notice (FAN) to the taxpayer.

The Court ruled in the negative. *First.* Jurisprudence defines a final assessment as a notice "to the effect that the amount therein stated is due as tax and a demand for payment thereof." Taking the cue therefrom, there was no final assessment for deficiency VAT covering TY 2008 to speak of, because of lack of due date in the FAN for said tax.

Second. On the assumption that there exists a final assessment for VAT against petitioner covering TY 2008, the BIR violated the latter's right to due process on audit or investigation, because it was tethered solely on an LN. No LOA was issued by respondent or his duly authorized representatives for said year. The Court cited *CIR vs. McDonald's Philippines Realty Corp., G.R. No. 242670, May 10, 2021*, where it explained that Due process requires that the taxpayers must have the right to know that the revenue officers are duly authorized to conduct the examination and assessment, and this requires that the LOAs must contain the names of the revenue officers. In other words, identifying the authorized revenue officers in the LOA is a jurisdictional requirement of a valid audit or investigation by the BIR, and therefore of a valid assessment.

Since the BIR failed to accord petitioner due process, the effect thereof is that the FAN for TY 2008 could never reach finality and incontestability. *(ED & F Man Philippines, Inc. v. Commissioner of Internal Revenue, C.T.A. Case No. 10053, [December 14, 2023])*

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BIR ISSUANCES

HIGHLIGHTS

RR No. 15-2023, December 13, 2023 - *This implements the Grant of Donor's Tax Exemption on the Donation of Imported Capital Equipment, Raw Materials, Spare Parts, or Accessories Directly and Exclusively Used by Registered Business Enterprises Under Section 295 (C) (2)(e) of the National Internal Revenue Code of 1997, as amended.*

Conditions for and Effects of Availment of Donor's Tax Exemption	
If made within the first five (5) years from date of importation	The RBE secures Certificate of Approval issued by the concerned IPA
If made after 5 years from the date of importation	The RBE has provided prior notice to the concerned IPA
Deed of Donation details	Include items donated, quantity/number, and the amount /value of the donation for post audit/verification by the BIR.

The amount/value of donation shall be deductible from the gross income of the donor subject to limitations, conditions, and rules set forth in Section 34 (H) of the Tax Code, as amended.

The deduction shall be availed of in the taxable year in which the donation was made. Moreover, the donor can substantiate the deduction with sufficient evidence, such as sales invoice/s, deed of donation, delivery receipt, and other adequate records indicating the following:

a. The amount of donation being claimed as deduction;
b. Proof of acknowledgment of receipt of the donated capital equipment, raw materials, spare parts, or accessories by TESDA, SUCs, or DepEd and CHED-accredited schools.

Valuation of the Donation:
The amount of donation shall be based on the net book value of the capital equipment, raw materials, spare parts, or accessories donated.

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RR No. 16-2023, December 21, 2023 - *This further amends the provisions of RR No. 2-98, as Amended, to Impose Withholding Tax on Gross Remittances Made by Electronic Marketplace Operators and Digital*

As a general rule, remittances of electronic marketplace operators and digital financial services providers to merchants shall be subject to creditable withholding tax as follows:

Withholding Tax Rate	Withholding Tax Base
One percent (1%)	On one-half (1/2) of the gross remittances by e-marketplace operators and digital financial service providers to the sellers/merchants for the goods/services sold/paid through their platform/facility

Exception: The withholding tax will not apply in the following instances:

Financial Services Providers to Sellers/Merchants

1. Annual total gross remittances to an online seller/merchant for the past taxable year has not exceeded Php 500,000.00; or
2. Cumulative gross remittances to an online seller/merchant in a taxable year has not exceeded Php 500,000.00; or
3. Seller/merchant is exempt or subject to a lower income tax rate provided that the necessary certification, clearance, ruing, or any other document serving as proof of entitlement to the exemption or lower income tax rate is secured and presented to the e-marketplace operator or digital financial services provider.

Existing Withholding Tax Obligations:

This withholding tax imposition is in addition to the existing withholding tax obligations being imposed to the e-marketplace operators and digital financial services provider such as, but not limited to, withholding taxes on payment:

a. To transportation contractors; and
b. For commissions.

Mandatory Registration:

All online sellers/merchants shall register with the BIR on or before the commencement of business in an e-marketplace platform. E-marketplace operators shall likewise:

a. Require the submission of the online sellers'/merchants' Certificate of Registration or BIR Form No. 2303; and
b. Include the same as part of the e-marketplace operator's minimum seller/merchant accreditation requirements.

RMC No. 126-2023, December 27, 2023 - *This circularizes MC No. 15, dated March 17,2023 issued by the OP, entitled "Updating the Inventory of Exceptions to the Right to Access*

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RMC No. 126-2023 circularizes Memorandum Circular (MC) No. 15 issued by the Office of the President (OP) for the information and guidance regarding the Updated Inventory of Exceptions to the Right to Access Information Under Executive Order No. 2, (S.2016).

Information Under Executive Order No.02, (S.2016).

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SEC ISSUANCES
HIGHLIGHTS

SEC MC No. 23-2023, December 18, 2023 - *This provides for the integration of MC.28 s. 2020 and MC1 s. 2021 and compliance of newly registered corporations with the eSPARC Regular and OneSEC Portals and the automatic enrollment to eFAST portal.*

Upon effectivity of this Memorandum Circular, all registrants of the eSPARC and OneSEC shall be deemed to have complied with:

- Provisions of MC28, on the creation and/or designation of an official e-mail account and cellphone number for transactions with the Commission.
- Provision of MC01, on the requirement for incorporators to disclose with the Commission on the person or person on whose behalf the registration of the corporation was applied for.
- The temporary credentials for the eFAST account of the registrant shall be forwarded to the official e-mail address enrolled under their MC28 compliance following the automatic enrolment to the eFAST portal.

SEC MC No. 22-2023, December 5, 2023 - *This provides for the guidelines on the application for payment of filing fees and annual fees of Real Estate Investment Trust Fund Managers and their respective compliance officers.*

The following guidelines on the applicable Filing and Annual Fees for REIT Fund Manager and REIT Fund Manager's Compliance Officers are hereby issued:

- Filing fee of REIT Fund Manager upon initial application is P15,000.
- Filing fee of REIT Fund Manager Compliance Officer upon initial application is P3,000.
- Annual fee of REIT Fund Manager is 1/2000 of 1% of the total value of the assets of the REIT/s under management as of September 30 of the current year as reflected in the Quarterly Report (SEC Form 17-Q) but in no case shall be less than P30,000 nor more than P100,000.00.
- Annual fee of Compliance Officer of a REIT Fund Manager is P1,500.

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COMPLIANCE WITH VAT OBLIGATIONS: ARE WE EXPECTING CHANGES?

By

Fulvio D. Dawilan

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In my previous article, I started discussing the contents of the proposed law that aims to ease the payment and compliance by taxpayers of their tax obligations. I begun with the presentation of the proposed changes related to the rules on venue for filing and payment, and the cancellation and transfer of tax registration.

For today's article, let me proceed with the presentation of the proposed changes in the rules for VAT compliance, specifically on the timing for VAT recognition. As we are aware, the current rules differ between sales of goods and sales of services – especially with respect to the timing of recognition of output/input taxes and the required documentation to support the related transactions. And we also understand the complications brought by these differences in treatment.

The Ease of Paying Taxes Act (EOPT) seeks to remedy these complications by harmonizing the rules and providing uniform treatment for sales of goods and services. Together with other colleagues in the tax practice, we proposed that in harmonizing the rules, the current requirements for sale of goods should be changed and follow the current rules for sale of services, that is: recognition of output tax/input tax for

both sales of goods and services shall be upon receipt/payment with the official receipts as the prescribed documents. And there are a number of reasons for that, especially when referring to the ease in compliance with the VAT obligations. But I would no longer dwell on that. Instead, let's focus on understanding what we would be expecting based so far on the provisions of the final version of the bill.

Substantially, the regime currently prescribed for sales of goods shall be adopted for sales of services. As a consequence, the output taxes on sale of services would have to be reported, as a general rule, upon sale. It follows that the input tax shall be recognized and claimed by the buyer upon purchase. This means that the reference for the payment of output taxes and in claiming the input taxes for both sales of goods and services shall be the gross sales. As the recognition of the output and input tax would no longer be reckoned upon receipt and payment for sale/purchase of services, the present prescribed documentation - which is the official receipt – will be discarded. Instead, like in the sale of goods, sales invoices should also be issued for sale of services and serves as the supporting document.

What does this mean to a taxpayer? Specifically, what is meant by "gross sales" as the basis for the recognition of output tax? When is sale considered complete that would trigger the realization of VAT? This is easily understood for sale of goods. Apparently, it is not easy to determine when "gross sales" arise for sale of services. And that's precisely one of the reasons why the current rule provides for a different timing for sale of services.

To make the determination of "gross sales" easier for sale of services under the EOPT, the proposed law provides an additional description as referring to "service that has already been rendered by the seller and use or lease of properties that have already been supplied by the seller." This approximates the accrual of revenues. That simply means that the VAT should be determined and paid when the revenue is accrued.

I understand that the purpose of this rule is to make the recognition of revenue for VAT purposes similar to the recording of revenue in the financial statements and income tax return, which is normally based on accrual. The same may also be computed based on the issued invoices. And that makes it easier for the tax authorities to easily identify discrepancies in the amounts presented in the financial reports, and various information and tax returns, as opposed to the current practice where a reconciliation of the information in the financial reports, income tax returns and VAT returns is necessary.

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But with that as the timing for VAT recognition, there could still be an issue with respect to the issuance of the corresponding invoice, which as noted earlier, will serve as the supporting document. Unlike sale of goods where the issuance of invoice normally coincides with the sale and delivery, that is not necessarily so for sale of services. In case of the latter, the issuance of invoice depends on the business arrangements between the parties and other schemes adopted by the buyer and the seller. Invoicing could be done even before service is rendered, or upon the achievement of a specific milestone or based on percentage of accomplishment, upon completion of specific deliverables, or some other schemes that may not necessarily match with the accrual of revenues.

The issuance of an invoice may not therefore necessarily mirror the recognition of revenues derived from sale of services. Revenues may be recognized in a taxable period different from the issuance of the invoice. And to refer to the invoices issued in a specific period as reference in the determination of VATable amounts for same taxable period could be misleading. Apparently, for long-term contracts, the proposed law includes a provision that “the invoice shall be issued on the month in which the service or use or lease of properties is rendered or supplied.” That is mandating the service provider and the client to agree on a monthly billing arrangement. It could be done for some other types of services where the duration runs through different quarters. But that would be another case of tax law dictating what a business should do. For ease in compliance, it should be the tax rules following the business practice.

There are still some concerns associated with the proposed changes. As the law cannot possibly cover everything needed to realize the objectives of easing the payment of taxes, I hope the implementing regulations would fill in those details. Otherwise, we will just be replacing the inefficiencies sought to be avoided with another issue.

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