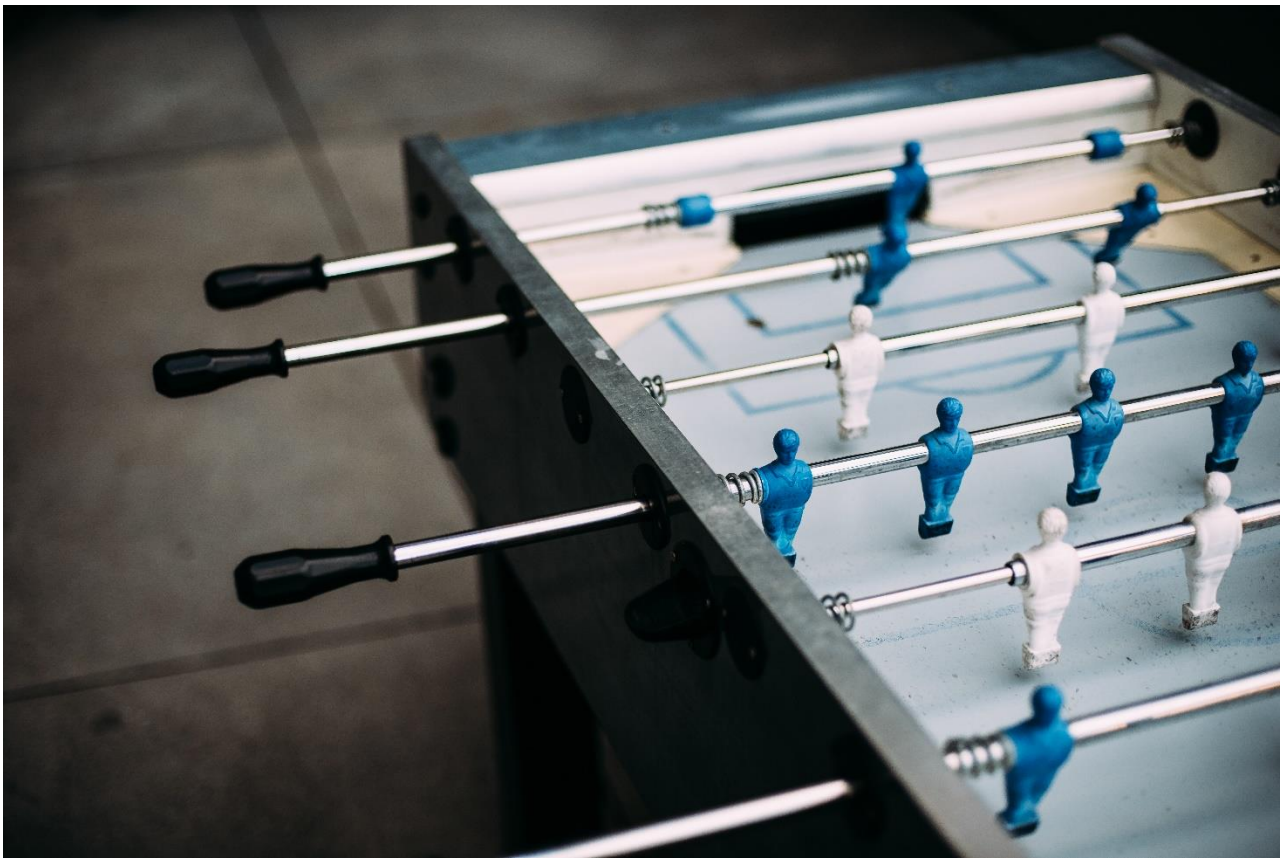
INSIGHTS

MARCH 2019

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

THIRD Issue, Series of 2019



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BDB Law Partner Atty. Rodel C. Unciano becomes a proud member of the Tax Management Association of the Philippines (TMAP) after his oath taking during the TMAP Members' General Meeting held at the Makati Diamond Residences. The event was also attended by all partners of BDB Law. *(February 28, 2019, Makati Diamond Residences, Makati City)*

HIGHLIGHTS for MARCH 2019

Court of Tax Appeals Decisions

- Filipino Employees of the Asian Development Bank are subject to income tax on compensation *(Ma. Carmela Locsin, et. Al. vs. Commissioner of Internal Revenue CTA Case No. 9094, February 4, 2019)*

- When an administrative agency renders an opinion by means of a circular or memorandum, it merely interprets a pre-existing law. *(Anthony Ortile Tuason vs. Commissioner of Internal Revenue, CTA EB No. 1700, CTA Case No. 9041, February 28, 2019)*

- Local tax cases involve the imposition of taxes by the local government thus the action should be one directed against the local government. *(Alaric Vivencio C. Andres De vs. Sps. Atanacio S. Cristobal and Isabel B. Cristobal CTA EB No. 1701 (CTA AC No. 178) February 7, 2019)*

- Section 12(C) of RR No. 17-2012 is an unauthorized administrative legislation. *(Tanduay Distillers Inc. vs. Commissioner of Internal Revenue CTA Case No. 9017 & 9035, February 7, 2019).*

- Execution of waivers are valid even if the parties are in pari delicto *(First Philippine Electric Corporation vs. Commissioner of Internal Revenue CTA Case No. 9199, February 8, 2019) .*

- Import permits need not be secured prior to importation if there is a treaty granting exemption. *(RMJR Grains Center Corporation, vs. Commissioner of Customs, Bureau of Customs (CTA Case Nos. 9156, 9157, 9158, 9159 and 9160) February 8, 2019)*

- CIR cannot decide a claim for VAT refund beyond the 120-day period. *(Hedcor, Inc., vs. Commissioner of Internal Revenue CTA EB No. 1733 (CTA CASE No. 8967) February 11, 2019)*

- Failure to appear by a counsel despite due notice is a ground for dismissal of the case *((Snowy Owl Energy, Inc. vs. Commission of Internal Revenue CTA Case No. 9618, February 11, 2019)*

- Finance lease contracts are considered as debt instruments under the purview of the Philippine Taxation. *(Asia United Leasing & Finance Corporation vs. Commissioner of Internal Revenue CTA Case No. 8735, February 12, 2019.).*

- The criminal case against the accused may proceed even without an assessment. *(People of the Philippines vs. Benedicto P. Caguimbal, CTA Criminal Case No. O-546 & O-547, February 18, 2019)*

- Since no input taxes on its purchases of goods and services from VAT -registered suppliers from zero-rated transaction, then no output tax was paid and no input tax may be shifted or passed. (*CBK Power Company Limited vs. Commissioner of Internal Revenue CTA EB No. 1685 (CTA Case No. 8784) February 20, 2019)*

- Zero-rated sales must be proven by evidence to warrant the refund of unutilized Input VAT. *(People of the Philippines vs. Generosa Ortega, CTA Crim. Case No. O-606& O-607, February 20, 2019)*

- The presumption as to the fact of mailing the PAN/FAN is not a conclusive presumption, so it may be disproven by other evidence (*Commissioner of Internal Revenue vs. Clark Water Corporation, CTA EB Case No. 1693 (CTA Case No. 8572) February 21, 2019)*

- **Assessment issued by BIR is a nullity in the absence of valid LOA.** *(Emilo Tan Ng Hua vs. Commissioner of Internal Revenue, CTA Case No. 9291, February 21, 2019)*

- **To be exempted from IAET, appropriation for the immediate needs of the business must be coupled with actions taken towards its consummation.** *(1Maple Sales, Inc. vs. Commissioner of Internal Revenue, CTA EB Case No. 1662, CTA Case No. 8925, February 21, 2019)*

- **A Judgment on Compromise Agreement is allowed in Tax Cases.** *(ABS-CBN Corporation vs. Commissioner of Internal Revenue, CTA Case No. 9411, February 27, 2019)*

BIR Issuances

- **RR No. 1-2019, February 8, 2019 – This** revenue regulation further amends Section 2.57.2 of RR 2-98, as amended by RR 11-2018 which implemented provisions of RA 10963.

- **RMC No. 24-2019, February 14, 2019 – Clarifies** issues regarding the submission of Certificate of Compensation payment and Tax Withheld

- **RMC No. 26-2019, February 26, 2019 –** An Act which enhanced Revenue Administration and Collection by Granting an Amnesty on All Unpaid Internal Revenue Taxes Imposed by the National Government for Taxable Year 2017 and Prior Years with Respect to Estate Tax. Other Internal Revenue Taxes, and Tax on Delinquencies

- **RMC No. 28-2019, February 26, 2019 –** Prescribing the Use of Bureau of Internal Revenue Printed Receipt/Invoice in starting a business.

- **RMC No. 29-2019, February 26, 2019 –** Keeping Maintaining and Registration of Books of Accounts.

- **RMC No. 30-2019, February 28, 2019 –** Clarifying Section 100 of NIRC of 1997, as amended by RA No. 10963 or the "Tax Reform for Acceleration and Inclusion (TRAIN Law)" in Relation to Sale of Shares of Stock Not Traded or Listed

- **RMO No. 10-2019, February 12, 2019 –** This revenue memorandum order prescribes the grant of value-added tax (VAT) privileges to resident foreign missions, their qualified personnel, and the dependents of the latter which is based on the international law principles of reciprocity and comity, adopted as part of the law of our jurisdiction.

BIR Rulings

- **BIR Ruling No. 747-2018, April 30, 2018 -** Donations made under the Adopt-A-School Act of 1998 shall be exempt from donor's tax and shall entitle the donor to claim a deduction in the total amount of 150% of the donations made as enunciated in BIR Ruling No. 292-2016 dated June 27, 2016.

- **BIR Ruling No. 1216-2018, October 1, 2018 -** Independent contractors who are not licensed teachers are not subject to withholding tax even though they are hired under a contract of service to provide informal tutorial services through the internet.

- **BIR Ruling No. 1328-2018, November 15, 2018 -** Income derived by PEZA-registered entities from unregistered activities are considered as ordinary income, hence, subject to creditable withholding tax.

- **BIR Ruling No. 1334-2018, November 15, 2018 -** The return and information on the return submitted by a taxpayer to the BIR is confidential and not considered as public documents.

- **BIR Ruling No. 1388-2018, November 19, 2018 -** An electric cooperative which was originally organized under Republic Act (RA) No. 6038, as amended, did not acquire a new juridical personality when the same was reorganized as mandated by RA No. 9136 or the "Electric Power Industry Reform Act of 2001". Hence, no new Taxpayer Identification Number (TIN) nor Authority to Print (ATP) may be issued in its favor.

SEC Issuances

- **SEC Memorandum Circular No. 2 Series of 2019, February 7 2019 –** The Commission amended Rule 5.8.2 of the Investment Company Act Implementing Rules and Regulations (ICA-IRR), which shall be applicable beginning on the 2018 audit engagement.

- **SEC Memorandum Circular No. 3 Series of 2019, February 8, 2019 –** The Commission approved the adoption of Philippine Financial Reporting Standard (PFRS) No. 15, Revenue from Contracts with Customers, effective for annual reporting periods beginning on or after January 1, 2018, as part of its financial reporting rules.

- **SEC Memorandum Circular No. 4 Series of 2019, February 15, 2019 –** The Commission, in its En Banc meeting resolved to issue the Sustainability Reporting Guidelines for Publicly-Listed Companies attached to this Memorandum Circular.

Articles Written

- **Guidelines for online/mobile app platform operators by Atty. Mabel L. Buted, Business Mirror: Tax Law for Business, February 27, 2019.** This article discusses the guidelines for online/mobile app platform operators in developing their online platforms or applications for them not to be considered engaged in advertising or mass media activities.

COURT ISSUANCES

I
Significant Court of Tax Appeals Decisions

Filipino employees of Asian Development Bank are subject to income tax on compensation

On April 12, 2013, BIR issued RMC 31-2013 (effective May 2, 2013). It provides, among others, that only officers and staff of the ADB who are not Philippine nationals shall be exempt from Philippine income tax. Such RMC was also given retroactive application. Thus, the employees of Asian Development Bank paid income taxes for the taxable periods 2012 and 2013. However, the RTC declared the said RMC as void on the ground that it was issued without legal basis, in excess of authority and/or without due process of law, and in the absence of legislation and/or regulation to the contrary. As a result, the employees filed a claim for refund against BIR for the income taxes paid.

The Court ruled that although exclusions from gross income such as "exemptions under a treaty" is considered as an exemption to the taxability of a resident citizen, Resolution No. 6 dated March 16, 1966, reserved the right to tax salaries and emoluments paid by the bank to citizens or nationals of the Philippines. Hence, RMC 31-2013 is only an interpretative rule issued by the BIR regarding the existing provision of the NIRC in relation to treaty obligations entered into by the Philippine Government.

Therefore, Filipino employees of ADB are subject to income tax on compensation. *(Ma. Carmela Locsin, et. Al. vs. Commissioner of Internal Revenue CTA Case No. 9094, February 4, 2019)*

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

The Commissioner of Internal Revenue (CIR) issued Revenue Memorandum Circular (RMC) 31-2013 which states that only foreign officers and staff of the ADB shall be exempt from Philippine income tax. Two Filipino ADB employees questioned the legality of RMC No. 31-2013 with the RTC, which declared Section 2 (d) (1) of RMC 31-2013 as void.

Pursuant to such decision, the taxpayer filed a claim for refund and subsequently filed a Petition for Review. The taxpayer asserted that the collection of tax on the salary of Filipino ADB officials and employees beginning taxable year 2012 is clearly prejudicial and he questioned the retroactive application of RMC No. 31-2013 for being illegal.

The Court denied the petition and ruled that RMC No. 31-2013 merely reiterates the general principles laid down in the Tax Code, which been in effect since January 1, 1998, before the income tax payment in 2013.

When an administrative agency renders an opinion by means of a circular or memorandum, it merely interprets a pre-existing law. RMC No. 31-2013, therefore, was issued merely to construe the existing provisions of the 1997 NIRC in relation to the various existing treaty obligations of the Philippines. The circular was not issued or intended to impose additional tax burdens not otherwise found in the law. (*Anthony Ortile Tuason vs. Commissioner of Internal Revenue, CTA EB No. 1700, CTA Case No. 9041, February 28, 2019)*

Local tax cases involve the imposition of taxes by the local government thus the action should be one directed against the local government.

The City Treasurer of Quezon City conducted an auction sale to enforce collection of unpaid real estate taxes against the Cristobals. Vivencio was the winning bidder in the said auction. He then filed a petition for Confirmation of Final Bill of Sale and Entry of New Certificate of Title and Issuance of Writ of Possession however, Cristobals filed their Opposition. The Regional Trial Court (RTC) dismissed the Petition and the case was elevated to the Court of Tax Appeals (CTA).

The CTA dismissed the case on the ground that is not a local tax case, hence, NOT WITHIN the jurisdiction of the Court of Tax Appeals. The appeal was for a decision rendered by the RTC in a Land Registration Case. Moreover, the local government of Quezon City was not sued in this case but the Cristobals, who are private persons. Furthermore, the relief prayed for by Vivencio is not for the nullification or setting aside of an assessment or refund of a local tax or other remedy under the pertinent provisions of the Local Government Code on local taxes. *(Alaric Vivencio C. Andres De vs. Sps. Atanacio S. Cristobal and Isabel B. Cristobal CTA EB No. 1701 (CTA AC No. 178) February 7, 2019)*

Tax crediting of the excise taxes paid under the old law on raw materials against excise taxes due on the compounded liquor must be allowed.

The Congress passed RA 10351, which restructured the excise tax on alcohol and tobacco products by amending pertinent provisions of the NIRC. The amendment imposed excise taxes on compounded liquor (finished goods) instead of the excise taxes on raw materials upon removal from the place of production. Accordingly, BIR issued RR 17-2012 and RMC 18-2013 disallowing tax crediting of the excise taxes paid under the old law on raw materials against excise taxes due on the compounded liquor.

As a result, the taxpayer alleged erroneously payment of excise taxes for the raw materials used for the finished goods. Upon elevating the matter to the Court of Tax Appeals, the taxpayer argued that the issuances will result in paying tax twice (double taxation) for the raw materials and their raw materials used for the finished goods. On the other hand, BIR countered that there was no double taxation because there was different subject matter.

The CTA ruled that issuances above mentioned was inconsistent with the true legislative intent. The intention of the legislature is that raw materials are not subject to excise tax since the excise tax on distilled spirits should be on the final product. Disallowing the tax crediting of the excise taxes paid under the old law on raw materials against excise taxes due on the compounded liquor (finished goods) will result in double taxation on the part of the taxpayer.

Hence, RR 17-2012 and RMC 18-2013 were unauthorized administrative legislations as they are inconsistent with the intention of the legislature. *(Tanduay Distillers Inc. vs. Commissioner of Internal Revenue CTA Case No. 9017 & 9035, February 7, 2019)*

Execution of waivers are valid if the parties are in pari delicto

The taxpayer contends that the three (3) waivers executed with the BIR were invalid because the representative of the taxpayer who signed the waiver was not authorized by the board. BIR, in its Answer, insists on the due execution and validity of the waivers.

CTA found that both parties were *in pari delicto*. Even if the waivers were established to be valid, the taxpayer contends that their signatory was not authorized by a board resolution despite benefiting with the said waiver. The BIR was also remiss in their duty to ensure that the waiver was accomplished and duly signed by the taxpayer or his authorized representative before affixing his signature to signify acceptance of the same.

Therefore, both parties were aware of the infirmities of the waivers, yet they continued their dealings with each other on the strength of such waivers. They are now estopped from raising an objection against the validity of waivers. *(First Philippine Electric Corporation vs. Commissioner of Internal Revenue CTA Case No. 9199, February 8, 2019)*

Import permits need not be secured prior to importation if there is a treaty granting exemption.

The company imported bags of white rice from Thailand and paid the duties and taxes on the shipments covered by the import permits and as declared in the supporting documents. Upon examination, said shipments contained an excess importation of white rice. The District Collector of Customs issued a Warrant of Seizure and Detention against the withheld containers for violation of the Tariff and Customs Code of the Philippines (TCCP), as amended. Company alleged that the detention of the imported rice was invalid.

The Court of Tax Appeals ruled that import permits were not necessary to be secured since there is a treaty that granted exemption. The Philippines became a member of the WTO Agreement on Agriculture in 1994. During the period of June 30, 2012 up to July 24, 2014, the Philippines did not enjoy any Special Treatment on Agriculture. This only means that the NFA could not legally require the taxpayer to secure an import permit for its importations made on November 2013.

Therefore, the rice shipments cannot be considered illegal for the lone reason that import permits were not secured prior to importation. The Court declared that the excess rice shipments have been legally imported into the Philippines. The Commissioner of Customs and Bureau of Customs were ordered to release the containers back to the company. *(RMJR Grains Center Corporation, vs. Commissioner of Customs, Bureau of Customs (CTA Case Nos. 9156, 9157, 9158, 9159 and 9160) February 8, 2019)*

CIR cannot decide a claim for VAT refund beyond the 120-day period.

A taxpayer filed an administrative claim for refund of its excess and unutilized input VAT. After the lapse of 120 days the BIR indicated in a Letter dated December 1, 2014 that the processing of the company's claims could not be pursued in line with the issuance of Revenue Memorandum Circular (RMC) No. 54-2014. The company elevated the matter to the Court of Tax Appeals.

The taxpayer filed its claims for the four quarters of 2011 on January 15, 2013 (1st Qtr), April 2, 2013 (2nd Qtr) October 2, 2013 (3rd Qtr), and November 8, 2013 (4th Qtr). The BIR had 120 days or until May 15, 2013, July 31, 2013, January 30, 2014, and March 8, 2014, respectively, to act on the administrative claims. Under the rules, the CIR is allowed a period of 120- days from the submission of complete documents in support of the application to either grant or deny the claim. If the claim is denied by the CIR or the latter has not acted on it within the 120-day period, the taxpayer-claimant is then given a period of 30 days to file a judicial claim via petition for review with the CTA.

The BIR failed to act or render a decision on the matter within the 120-day period. Thus, taxpayer had 30 days or until June 14, 2013 for the 1st quarter, August 30, 2013 for the 2nd quarter, March 1, 2014 for the 3rd quarter, and April 7, 2014 for the 4th quarter, of the year 2011 to elevate the inaction of respondent to the CTA. However, the taxpayer filed the judicial claims on January 9, 2015. Hence the CTA had no jurisdiction to act on the claim. *(Hedcor, Inc., vs. Commissioner of Internal Revenue CTA EB No. 1733 (CTA CASE No. 8967) February 11, 2019)*

Failure to appear by counsel despite due notice is a ground for dismissal of the case

The case was called the second time for the presentation of all witnesses by the taxpayer. However, only the counsel of the BIR appeared. The counsel for the taxpayer failed to appear. Counsel for BIR moved for dismissal of the case for failure to prosecute. The CTA affirmed the motion. Citing the Rules of Civil Procedure, it held that if there was no justifiable cause for the party to appear on the date of the presentation of evidence or to prosecute his action, the Court on its own, or upon motion of the defendant, can dismiss the case. *(Snowy Owl Energy, Inc. vs. Commission of Internal Revenue CTA Case No. 9618, February 11, 2019)*

Finance lease contracts are considered as debt instruments under the purview of the Philippine Taxation.

The BIR conducted an assessment audit against the taxpayer for all internal revenue taxes for the taxable year 2009. In its FDDA, BIR assessed the taxpayer for Documentary Stamp Taxes (DST) for the latter's transactions

pertaining to its "related party transactions" and "loans – leasing." The assessment on the "loans – leasing" pertains particularly to the taxpayer's finance lease contracts. The taxpayer contended that the "loans-leasing" should not be taxed.

The Court of Tax Appeals (CTA), interpreting RA 8556 ruled that credit shall mean any loan, mortgage, financial lease, deed of trust, advance or discount, any conditional sales contract, contract to sell, or sale or contract of sale of property or service, either for present or future delivery, under which, part of all or the price is payable subsequent to the making of such sale or contract. Moreover, the same law stated that 'Financial leasing' is a mode of extending credit. Meanwhile, under the Tax Code, debt instruments subject to DST are instruments representing borrowing and lending transactions.

Therefore, the CTA decided that financial leasing is a mode of extending credit and falls within the same category of loans, which is undoubtedly borrowing and lending transactions in relation to the definition of debt instruments under the Tax Code, as amended. As such, finance lease contracts are subject to DST. *(Asia United Leasing & Finance Corporation vs. Commissioner of Internal Revenue CTA Case No. 8735, February 12, 2019.)*

The criminal case against the accused may proceed even without an assessment.

Accused Benedicto P. Caguimbal was charged of violation of Section 255 of the NIRC for his failure to declare his income and to pay the corresponding taxes thereon. He alleged that the criminal case filed against him was not proper for failure of the BIR to issue an Assessment for his alleged deficiency taxes.

The CTA held that the accused may be prosecuted even without an assessment pursuant to the law. In several Supreme Court rulings, it was held that an assessment is not necessary before a criminal charge can be filed. A criminal complaint is instituted not to demand payment but to penalize the taxpayer for violation of the Tax Code. Hence, the prosecution of criminal cases against the accused may proceed even without an assessment. *(People of the Philippines vs. Benedicto P. Caguimbal, CTA Criminal Case No. O-546 & O-547, February 18, 2019)*

The Company is not entitled to the VAT refund because the purchases of local supply of goods, properties and services, importation of goods other than capital goods, and payments for services rendered by non-residents, are zero-rated under the Renewable Energy Act of 2008.

The taxpayer filed with the BIR an administrative claim for the refund, allegedly representing its unutilized or excess creditable input taxes paid or incurred on its domestic purchases of goods and services, all attributable to zero-rated sales for 2012.

The Court of Tax Appeals ruled that the Company is not entitled to the VAT refund because the purchases of local supply of goods, properties and services, importation of goods other than capital goods, and payments for services rendered by non-residents, are zero-rated under the Renewable Energy Act of 2008.

Under the law, the Company could not have paid input taxes on its purchases of goods and services from VAT - registered suppliers because such purchases are zero-rated. No output tax was paid by the suppliers, so no input tax was shifted or passed on to the Company. The VAT is an indirect tax and the amount of tax may be shifted or passed on to the buyer, transferee or lessee of the goods, properties or services. *(CBK Power Company Limited vs. Commissioner of Internal Revenue CTA EB No. 1685 (CTA Case No. 8784) February 20, 2019)*

Zero-rated sales must be proven by evidence to warrant the refund of unutilized Input VAT.

Pursuant to a Service Agreement, the Company provides services from the Philippines to MSCI, Inc., a foreign corporation. The Company received service fees and it filed its VAT returns for taxable year 2014. It then filed an application Tax Credits/Refund with BIR for its alleged unutilized input VAT. It then received a Letter of Authority and a letter denying its administrative claim for refund on the ground that it failed to prove that it rendered services to a non-resident foreign corporation.

The Court of Tax Appeals held that to be considered as a non-resident foreign corporation doing business outside the Philippines, each entity must be supported, at the very least, by both a certificate of nonregistration of corporation/partnership issued by the Philippine Securities and Exchange Commission (SEC) and certificate/articles of foreign incorporation/association. The said transactions must also be supported by receipts and other documents to warrant the refund.

Here, the Company failed to substantiate its claim that the expenses were indeed incurred and as due to MSCI Inc. in the absence of any supporting documentation. Consequently, the same shall be disallowed as zero-rated sales. *(MSCI Hong Kong Limited vs. Commissioner of Internal Revenue, CTA Case No. 9392, February 20, 2019)*

Accused is not criminally liable for willfully violating the Tax Code if the BIR failed to prove that there was valid service of FAN/PAN (notices).

A taxpayer was accused of violating Section 255 of the Tax Code, or willful failure to pay the correct income tax for 2017. The accused alleged that he did not "willfully" violate the Tax Code because BIR failed to issue a Preliminary Assessment Notice (PAN) nor a Final Assessment Notice (FAN).

The Court affirmed the accused's defense. The accused's failure to pay the required tax or to supply correct and accurate information at the time required by law or rules and regulations was NOT willful. The term "willfulness" connotes the existence of "knowledge" and "voluntariness", with the specific intent to do something the law forbids, or with the specific intent to fail to do something that the law requires to be done. There is intent to either disobey or disregard the law.

The accused explicitly denied having received the said assessment notices and BIR failed to prove the actual service of the PAN, the FAN, and the Formal Letter of Demand. Without the said notices, there is no competent or sufficient evidence which would show that the accused was notified of his tax liabilities, and that despite such information, he deliberately and willfully chose to pay incorrect taxes. Thus, accused is not criminally liable. *(People of the Philippines vs. Generosa Ortega, CTA Crim. Case No. O-606& O-607, February 20, 2019)*

The presumption as to the fact of mailing the PAN/FAN is not a conclusive presumption, so it may be disproven by other evidence.

The Company received a Letter of Authority from the BIR. Thereafter, it received a Preliminary Collection Letter (PCL) demanding payment of alleged deficiency internal revenue taxes. The Company objected to the issuance of PCL on the ground that it did not allegedly receive any (PAN) and (FAN), in violation of its right to due process. BIR alleged otherwise and invoked presumption as to the fact of mailing of the documents, there was no alleged denial of due process.

The Court held that the presumption being invoked by the BIR is not a conclusive presumption, but merely a disputable one. In other words, it may be disproven by other evidence. Here, no registry return or certification from the post office confirming service of the PAN was presented. Furthermore, no witness from the Post Office was presented, this lead to the conclusion that taxpayer did not receive the PAN. Thus, the assessments are null and void for violating due process requirements. *(Commissioner of Internal Revenue vs. Clark Water Corporation, CTA EB Case No. 1693 (CTA Case No. 8572) February 21, 2019)*

Assessment issued by BIR is a nullity in the absence of a valid LOA.

The taxpayer received an undated Letter Notice (LN) inviting him to appear at the BIR office to reconcile the discrepancies in the assessment. He eventually received a PAN and FAN. He protested both on the ground that subject assessment is invalid because no Letter of Authority (LOA) was issued before the issuance of the disputed assessment and no examination of his books of accounts and other accounting records was conducted by BIR. BIR alleged that it is authorized to obtain information from other sources other than those obtained from the taxpayer.

The Court held that the assessment issued by BIR against the taxpayer was a nullity in the absence of valid LOA. Here, there was no LOA issued to replace the LN earlier served to the taxpayer. The assessment that resulted from the examination of the taxpayer's internal revenue taxes is a nullity for lack of authority issued for the conduct of tax audit. *(Ermilo Tan Ng Hua vs. Commissioner of Internal Revenue, CTA Case No. 9291, February 21, 2019)*

To be exempted from IAET, appropriation for the immediate needs of the business must be coupled with actions taken towards its consummation.

An assessment was issued against the Company for its alleged failure to pay the Improperly Accumulated Earnings Tax (IAET). The Company alleged that the appropriations of retained earnings was done pursuant to "reasonable needs of the business" and is well within the meaning of the "immediacy test", hence it is not liable for IAET. The BIR on the other hand alleged that it is liable for IAET for failure to pass the "Immediacy Test".

The CTA held that earnings or profits of a corporation are permitted to accumulate beyond the reasonable needs of the business and the law does not impose tax on retained earnings as standby capital. However, for it to be exempted from IAET, such appropriation must be for the immediate needs of the business and the definiteness of plans coupled with actions taken towards its consummation are essential.

The fact that it was only in 2013 when the retained earnings were reverted and declared as dividends would already negate the immediacy test and what was required by law for the retained earnings to be exempt from IAET. Thus, the retained earnings are subject to tax. *(1Maple Sales, Inc. vs. Commissioner of Internal Revenue, CTA EB Case No. 1662, CTA Case No. 8925, February 21, 2019)*

A Judgment on Compromise Agreement is allowed in Tax Cases.

This Case is a Judgment on Compromise Agreement and the same is allowed in Tax Cases. Under the Civil Code and in the Revised Rules of Court, courts are directed to persuade litigants in civil cases to agree upon some fair compromise. Such agreement has the force of law and is conclusive between the parties.

A compromise agreement is a contract whereby the parties make reciprocal concessions in order to resolve their differences and, thus, avoid or put an end to a lawsuit. It must not be contrary to law, morals, good customs and public policy, and must have been freely and intelligently executed by and between the parties. A compromise agreement may be executed in and out of court.

Once a compromise agreement is given judicial approval, however, it becomes more than a contract binding upon the parties. Having been sanctioned by the court, it is entered as a determination of a controversy and has the force and effect of a judgment. Here, the Court finds Compromise Agreement is in compliance with the established laws, rules and regulations. Hence, the Court approves the same. *(ABS-CBN Corporation vs. Commissioner of Internal Revenue, CTA Case No. 9411, February 27, 2019)*

BIR Issuances

BIR REVENUE REGULATION 1-2019, February 8, 2019

This revenue regulation further amends Section 2.57.2 of RR 2-98, as amended by RR 11-2018 which implemented provisions of RA 10963. More particularly, it lowers the creditable withholding tax rate to15% for income payments on:

1. the gross amount of refund given by MERALCO to customers under Phase IV as approved by the ERC, arising from the Supreme Court case GR No. 141314 and the gross amount of interest paid directly to non-residential customers;

2. the gross amount of interest paid directly to non-residential customers, in relation to interest income on the refund paid through direct payment or application against customer's billings by other electric Distribution Utilities in accordance with ERC Resolution No. 8 Series of 2008; and

3. interest income derived from any other debt instruments not within the coverage of deposit substitutes and RR No. 14-2012, unless otherwise provided by law or regulations.

BIR REVENUE MEMORANDUM CIRCULAR NO. 26-2019, February 26, 2019

Circularizing Republic Act No. 11213, entitled "An Act Enhancing Revenue Administration and Collection by Granting an Amnesty on Ail Unpaid Internal Revenue Taxes Imposed by the National Government for Taxable Year 2017 and Prior Years with Respect to Estate Tax. Other Internal Revenue Taxes, and Tax on Delinquencies".

BIR REVENUE MEMORANDUM CIRCULAR NO. 28-2019, February 26, 2019

Prescribing the Use of Bureau of Internal Revenue Printed Receipt/lnvoice

This Circular is being issued to prescribe the use of the Bureau of Internal Revenue Printed Receipt/Invoice(BPR/BPI) as one of the reforms in starting a business. This will allow new business taxpayers to immediately start its business operations while waiting for the printing or delivery of its receipts/invoices by the BIR-accredited printers

All persons subject to an internal revenue tax shall at the point oi each sale and transfer of merchandise or for services rendered valued at One hundred pesos (P100), issue duly registered receipts or sale or commercial invoices.

New business registrants are required to secure Authority to Print (ATP) principal receipts/invoices upon registration with the BIR. However. in order for them to immediately commence business operations aft.er registration, they shall be allowed to secure BPR/BPI at the time of registration from the New Business Registrant Counter (NBRC) in the meantime that their receipts are being printed. The, shall be allowed to use said BPR/BPI for a period of fifteen (15) days from the date of registration.

Only the BIR is allowed to print and issue the BPR/BPI.

RMC 29-2019, February 26, 2019

Keeping Maintaining and Registration of Books of Accounts

This Circular is being issued to continuously support our government programs in improving our country's competitiveness ranking in starting a business relative to (1) keeping and maintaining books of accounts; and (2) registration deadline of books of accounts.

Corporation, companies, partnership or persons whose annual sales, earning, receipts or output exceed Three million pesos (Php 3,000,000) shall have their books of accounts audited and examined yearly by Independent Certified Public Accountants.

RMC 30-2019, February 28, 2019

Clarifying Section 100 of NIRC of 1997, as amended by RA No. 10963 or the "Tax Reform for Acceleration and Inclusion (TRAIN Law)" in Relation to Sale of Shares of Stock Not Traded or Listed

When shares of stock not traded in stock exchange are sold for less than its fair market value, the excess of the fair market value over the selling price shall be treated as gift subject to donor's tax imposed by Sec. 100 of the

1997 NIRC, as amended, except when it is sold at arm's length, free from any donative intent (in the ordinary course of business).

The determination of whether the sales of shares of stock not listed and traded is at arm's length is a question of fact and not of law. Since an arm's length transaction is a question of fact, it therefore behoves upon the party seeking to apply the exception to prove that indeed presentation and reception of reasonable evidence sufficient enough to convince that the sale of the shares of stock for less than its FMV is without intent to evade tax and defraud the government (of the tax due therein). The evidence that should be presented should be viewed in accordance with its relation and relevance to the transaction on a case to case basis.

RMC 10–2019, February 12, 2019

This revenue memorandum order prescribes the grant of value-added tax (VAT) privileges to resident foreign missions, their qualified personnel, and the dependents of the latter which is based on the international law principles of reciprocity and comity, adopted as part of the law of our jurisdiction. Pursuant to this RMO, VAT exemption may be accorded on their purchase of goods and/or services either at point-of-sale or on refund/reimbursement basis. The method of granting VAT exemption highly depends on the VAT privilege being accorded to our Philippine Foreign Service Posts (PFSPs) by the different tax jurisdictions abroad, regularly monitored by the Office of Protocol of the Department of Foreign Affairs (DFA-OP). The following should also be noted:

With regard to point-of-sale exemption from VAT, the RMO states that VAT Certificate (VC) is the new name of VAT Exemption Certificate, while VAT Identification Card (VIC) is that of VAT Exemption Identification Card. A resident foreign mission and its members who are entitled to the grant of VAT exemption at point-of-sale, will be issued with a VC. A VIC may be issued to qualified personnel and their qualified dependent/s, in lieu of a VC, subject to certain additional procedures in the production thereof.

When a resident foreign mission or its qualified personnel is issued with a VC, the sellers cannot pass on any VAT to them on their official or personal purchase of goods and services in the Philippines as such purchase qualify for zero rating. The VC/VIC, however, cannot be used for the purpose of securing zero-rated VAT and/or ad valorem tax exemption on local purchase of motor vehicle.

Furthermore, the BIR will issue a ruling to confirm whether a foreign mission and its members are entitled to reimbursement/refund of VAT paid on purchase of goods and services in the Philippines. The duly issued BIR Ruling shall be the basis for the VAT reimbursement/refund applications and shall be attached to the claim for reimbursement/refund to be processed by the appropriate Revenue District Office (RDO) that has jurisdiction over the foreign mission.

Lastly, the revenue memorandum order lays down the application guidelines and procedures, duties and responsibilities of the VC/VIC holder and business establishments, and the procedure as to the issuance of a BIR Ruling on indirect tax exemption in relation to the local purchase of motor vehicles of resident foreign missions.

Any revenue official or employee who fails to act on the VAT refund application within the 90-day period shall be punished in accordance with Section 269 of the Tax Code, as amended.

BIR Rulings

BIR Ruling No. 747-2018, April 30, 2018. Donations made under the Adopt-A-School Act of 1998 shall be exempt from donor's tax and shall entitle the donor to claim a deduction in the total amount of 150% of the donations made as enunciated in BIR Ruling No. 292-2016 dated June 27, 2016.

Donations made to the Government, its agencies, or political subdivisions are deductible in full from the gross income of the donor. However, donations not in accordance with the National Priority Plan issued by the National Economic and Development Authority (NEDA) are subject to limited deductibility to an amount not exceeding 10% of taxable income in case of an individual and 5% in case of a corporation.

Donations made under the Adopt-A-School Act entitles the adopting agency to an additional deduction from gross income equivalent to fifty percent (50%) of the expenses incurred for the project. Hence, the allowable deduction on the transaction totals 150% of the donation.

BIR Ruling No. 1216-2018, October 1, 2018. Independent contractors who are not licensed teachers are not subject to withholding tax even though they are hired under a contract of service to provide informal tutorial services through the internet.

What is the applicable withholding tax rate on the Company, covering the income of individuals rendering online-based tutorial services to student-clients.

Since there is no provision that deals with withholding tax on non-professional individuals, the independent contractors who are non-professionals hired by the Company under a contract of service shall not be subject to creditable withholding tax. However, they must report such income payments in their income tax returns. Moreover, independent contractors who are non-professionals are required to register with the BIR.

BIR Ruling No. *1328-2018, November 15, 2018.* Income derived by PEZA-registered entities from unregistered activities are considered as ordinary income, hence, subject to creditable withholding tax.

The sale of land by a PEZA registered entity, to a non-PEZA registered entity, is subject to the creditable withholding tax.

The BIR ruled that the transaction is subject to creditable withholding tax notwithstanding the preferential tax rate of 5% grated to PEZA registered entities because the sale of property is not among the registered activities of such entity. Income realized a registered enterprise that is not related to its registered activities shall be subject to the regular internal revenue taxes.

BIR Ruling No. 1334-2018, November 15, 2018. The return and information on the return submitted by a taxpayer to the BIR is confidential and not considered as public documents.

This BIR ruling was issued pursuant to a letter by Ms. Eleuteria Mirasol, Legislative Committee Secretary, Committee on Government Corporations and Public Enterprises of the Senate of the Philippines requesting that the BIR submit documents on its possession reflecting the income generated by the (1) Subic Bay Metropolitan Authority (SBMA); (2) Clark Development Authority (CDA); (3)Aurora Pacific Economic Zone and Freeport Authority (APECO); (4) Philippine Economic Zone Authority (PEZA); (5) Tourism Infrastructure and Enterprise Zone Authority (TIEZA); and (6) Bases Conversion and Development Authority (BCDA).

The BIR, citing Section 71 and 270 of the 1997 National Internal Revenue Code, refused to honor the request, stating that the information gained from taxpayers are not considered as public documents but are treated as confidential. Revenue Memorandum Circular (RMC) 50-2016 reminded the BIR officials that unauthorized disclosure of confidential information is criminally and administratively punishable by law.

It likewise stated that under Section 20 of the NIRC, any return or return information that can identify, directly or indirectly, a particular taxpayer shall be furnished to the appropriate Committee of Congress only when sitting in Executive Session unless such taxpayer otherwise consents in writing to such disclosure.

SEC Issuances

SEC Memorandum Circular No. 2 Series of 2019, February 28, 2019

The Commission amended Rule 5.8.2 of the Investment Company Act Implementing Rules and Regulations (ICA-IRR), which shall be applicable beginning 2018 audit engagement.

As stated in the amended rule, independent accountants and auditors are expected to observe the principles on the expectation for an effective audit function issued by the Commission under Financial Reporting Bulletin No. 19 and any other amendments thereto. They shall also perform the audit of financial statements of the Investment Company, Fund Managers, and Fund Distributor in accordance with the required standards and relevant BSP Issuances. Finally, they shall report to the Commission any non-compliance by the Investment Company, Fund Managers, and Fund Distributor with their contractual and regulatory requirement, based solely on the matters discovered from performing the audit. The engagement contract between the said companies and the independent auditor shall contain a provision that the disclosure of information by the independent auditor to the Commission shall not constitute a breach of confidentiality nor shall it be a ground for civil, criminal or disciplinary proceedings against the independent auditor.

Remedies SEC Memorandum Circular No. 3 Series of 2019, February 15, 2019

The Commission approved the adoption of Philippine Financial Reporting Standard (PFRS) No. 15, Revenue from Contracts with Customers, effective for annual reporting periods beginning on or after January 1, 2018, as part of its financial reporting rules.

SEC Memorandum Circular No. 4 Series of 2019, February 18, 2019

To promote sustainability reporting and make it relevant for Philippine publicly-listed companies (PLCs), the Commission, in its En Banc meeting resolved to issue the Sustainability Reporting Guidelines for Publicly-Listed Companies attached to this Memorandum Circular.

The Guidelines is intended to help PLCs assess and manage non-financial performance across Economic, Environmental and Social aspects of their organization and enable PLCs to measure and monitor their contributions towards achieving universal targets of sustainability, such as the United Nations Sustainable Development Goals, as well as national policies and programs.

Articles Written

Business Mirror: Tax Law for Business

Guidelines for Online Mobile Platform App Operators

By: Mabel L. Buted

The advent of today's technology, such as the Internet, has clearly changed the way businesses offer their products and services, as well as the way consumers avail themselves of them. Back then, we usually become aware of new products only after watching television commercials. But now, most, if not everything, that you need to know about a particular product can be searched online. Online shopping is the new trend.

This has paved the way for the development of many online platforms or applications that serve as a "market" where these businesses could sell and the consumers could, in turn, buy. But you might encounter a problem on equity restrictions if you are found to be using your platform for advertising or for mass media activities.

For you not to be deemed as engaged in advertising activities, (a) you must not write or prepare commercial messages or materials for the products of your third-party clients to be posted in the platform or mobile app and (b) you must not select for or advise your third-party-clients what medium or vehicle to use to disseminate the advertising materials and commercial messages (SEC-OGC Opinion No. 18-21).

The Securities Exchange Commission (SEC) also opined that for an online or mobile app platform operator not to be deemed as engaging in mass media activities, (a) there must be no pervasive or indiscriminate display to the general public of any promotional materials or advertisements on the products or services being offered by the third-party clients or even the platform or mobile app itself; (b) only the following information must be made available in the app, web site or platform:

(i) enumeration of the services offered by the platform itself,
(ii) instruction on how to use the said platform,
(iii) enumeration of third-party partner, and this shall only be limited to the listing of the name or logo of the third-party client and
(iv) any other information on the platform required to be disclosed by any law or regulatory measures; and

(c) the disclosure of the products and services offered by its third-party clients must only be for the purpose of completing the transaction enabled by the app, web site or platform. (SEC-OGC Opinion No. 18-21).

Note that in the said opinion issued by the SEC, the entity involved is a software developer of a digital loans origination and management platform, which provides the following services to financial institutions (a) providing information about their loan products in the "marketplace" feature of the application; (b) accepting, processing and approving applications for such loan products; and (c) monitoring the status of loan products availed of. Information about the loan products featured there are accessible and can be availed only by a registered consumer who must have to create an account first before it can use the application and avail himself/herself of the said loan products.

It must be emphasized that although information about the loan products are not disseminated to the public and cannot be seen by the public and only the registered users can view the said information, the SEC still laid out the aforesaid specific guidelines just to ensure that the platform operator is not engaged in any form of advertising or mass media activities. Otherwise, the entity will be subject to the 70 percent/100 percent equity restriction of the Philippine Constitution.

The problem with these guidelines is on its enforcement. The Internet is capable of generating infinite applications and web sites. But the government is finding it hard to build the infrastructure to catch up with the Internet

world. With all its vast powers, who knows the government might develop its own app or platform to enforce these guidelines.

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

Our Experts

If you have any comments or questions concerning the contents of this issue of Insights, you may contact any of our experts

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