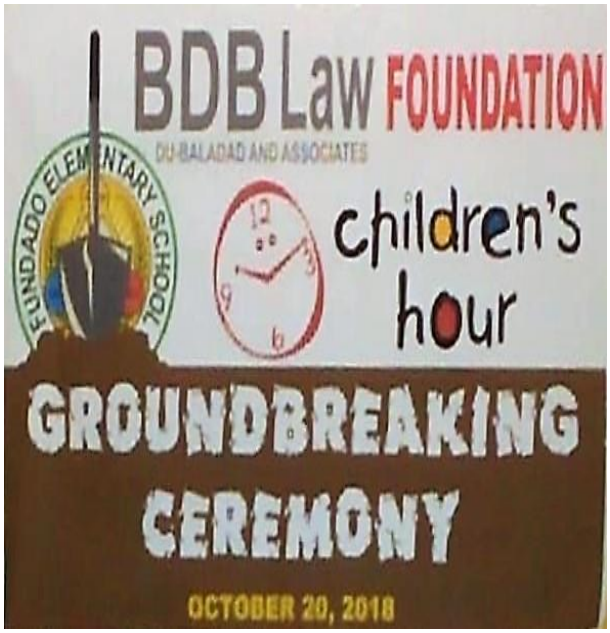
INSIGHTS

NOVEMBER 2018

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

EIGHT Issue, Series of 2018

CONTENTS



BDB Law Foundation, Inc. CSR arm of BDB Law headed by its Chairman Atty. Benedicta Du-Baladad and Director Atty. Irwin Nidea travelled south last October 20, 2018 for the groundbreaking ceremony of the construction of the soon to be school building in Fundado Elementary School, Libmanan, Camarines Sur. This is the 6th school building that the Foundation built in partnership with Children's Hour. The classroom is furnished with restroom, teacher's table, children's desks, blackboard and wall fans.

HIGHLIGHTS for NOVEMBER 2018

Supreme Court Decisions

- Due process of law must be followed in levy and sale of real property because a sale of land for tax delinquency is in derogation of private property and the registered owner's constitutional rights. *(Cruz and Heirs of Cruz vs. City of Makati, et al., G.R. No. 210894, September 12, 2018).*
- Only natural or juridical persons, or entities authorized by law may be parties in a civil action. Non-compliance with this requirement renders a case dismissible on the ground of lack of legal capacity to sue. *(Alliance of Quezon City Homeowner's Association, Inc. vs. The Quezon City Government, et. al., GR No. 230651, September 18, 2018*).
- The taxpayer has the primary responsibility for the proper preparation of the waiver of the prescriptive period for assessing deficiency taxes. The Commissioner of Internal Revenue may not be blamed for any defects in the execution of waivers. *(Asian Transmission Corporation vs. Commissioner of Internal Revenue, GR No. 230861, September 19, 2018).*

Court of Tax Appeals Decisions

- Requests for reconsideration elevated to the Commissioner of Internal Revenue, of FDDA issued by his duly authorized representative should be filed with the Office of the Commissioner. *(Lancaster Colors International, Inc. vs. CIR, CTA Case No. 8933, October 1, 2018).*
- For a government entity to be exempt from RPT, two conditions must concur: 1) the claimant should be a government instrumentality; and 2) the claimant must retain possession of the real property at the time of imposition of the RPT. *(BSP vs. CBAA, LBAA, Province of Batangas, and Fortuna Lat, CTA Case No. 1438 (CBAA Case No. L-116) (LBAA Case No. 2011-1), October 1, 2018).*
- Disputes, claims and controversies solely between or among the departments, bureaus, offices, agencies, and instrumentalities of the National Government, including constitutional offices and agencies arising from the interpretation and application of statutes, contracts or agreements are within the jurisdiction of the Solicitor General or the Secretary of Justice, as the case may be. *(CIR vs. PSALM, CTA EB Case Nos. 1618 and 1619 (CTA Case No. 8587), October 1, 2018).*
- The OIC-Chief of LTS-RLTAD II has no power to authorize the examination of taxpayers or to effect any modification or amendment to a previously issued LOA because only the CIR or his duly authorized representatives are granted such power. *(Trinity Franchising and Management Corporation vs. CIR, CTA Case No. 9190, October 2, 2018).*
- The cancellation of the sale of real property gives rise to a right to claim for refund of the CGT paid on such sale. *(Technogas Philippines Manufacturing Corporation vs. CIR, CTA Case No. 9509, October 4, 2018).*
- The FAN must be served and actually received by the taxpayer, otherwise, further notices become null and void. *(Top Draw Animation, Inc. vs. CIR, CTA Case No. 8863, October 4, 2018).*
- The gross income, which is the basis of the 5% special rate, refers to gross sales or gross revenue derived from business activities within the ecozone. *(Clark Water Corporation vs. CIR, CTA EB No. 1608 (CTA Case No. 8865), October 5, 2018).*

- If the revenue officer is unable to submit his final report of investigation within the 120-day period, he must then submit a Progress Report to his Head of Office, and surrender the LOA for revalidation. *(GS MTE Gains Corporation vs. CIR, CTA Case No. 8837, October 8, 2018).*
- The CTA is devoid of any jurisdiction to rule upon an action questioning the validity and constitutionality of an ordinance. *(Smart Communications, Inc. vs. Municipality of Jones, Isabela, CTA EB Case No. 1671 (CTA AC No. 176), October 8, 2018).*
- The CIR or his duly authorized representative is duty bound to wait for the expiration of fifteen (15) days from taxpayer's date of receipt of the PAN before issuing the FLD and FAN. *(CIR vs. Pacific Bayview Properties, CTA EB Case No. 1677 (CTA Case No. 9070), October 8, 2018).*
- An amended decision is a new decision which requires the filing of a motion for reconsideration prior to the filing of a Petition for Review in the Court ***En Banc.*** *(EHS Lens Philippines, Inc. vs CIR, CTA EB Case No. 1712 (CTA Case No. 9014), October 11, 2018; CIR vs. Jardine Lloyd Thompson Insurance Brokers, Inc., CTA EB NO. 1177 (CTA Case No. 8273), October 17, 2018).*
- In the absence of accounting records or other documents necessary for the proper determination of the taxpayer's internal revenue tax liability, Section 6(B) of the NIRC of 1997 requires that the assessment of the tax be determined based on the "Best Evidence Obtainable." *(Ups-Delbros Transport, Inc., vs. CIR, CTA Case No. 9063, October 19, 2018).*
- An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. The requirement to indicate a fixed and definite period within which a taxpayer must pay the tax deficiencies is vital to the validity of the assessment." *(Grand Plaza Corporation vs. CIR, CTA CASE NO. 8992, October 29, 2018).*

BIR Issuances

- **RMC 86-2018, October 11, 2018 –** Provides for the Lists of Withholding Agents Required to Deduct and Remit the 1% or 2% Creditable Withholding Tax for the purchase of Goods and Services under RR No. 11-2018.

BIR Rulings

- **BIR RULING 1242-2018. October 12, 2018 -** The Commission on Elections (COMELEC) is exempt from the 12% value-added tax on its local purchases of goods and services as well as VAT on its importation of goods that will be used in the automated national and local elections.
- **BIR RULING NO. 1308-2018, October 23, 2018 -** Income derived from association dues, membership fees, other assessments and charges collected on a purely reimbursement basis and rentals of facilities of homeowners association is exempt from income tax, value-added tax or percentage tax, whichever is applicable, provided that such income and dues shall be used for the cleanliness, safety, security and other basic services needed by the members, including the maintenance of the facilities of their respective subdivisions or villages
- **BIR RULING NO. 1299-2018, October 23, 2018 -** The sale of fuel or power generated from renewable sources of energy such as but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy and other emerging energy sources using technologies such as fuel cells and hydrogen fuels, shall be subject to zero percent (0%) value-added tax (VAT).

SEC Issuances

- **MC No. 14, S. 2018, October 29, 2018 -** This Memorandum Circular provides relief to the real estate industry by deferring the application of the provisions of the Philippine Interpretation Committee Question and Answer (PIC Q&A) No. 2018-12.

Office of the President Issuances

- **Executive Order No. 65, October 29, 2018 -** This Executive Order was issued promulgating the Eleventh Regular Foreign Investment Negative List, replacing the Tenth Regular Foreign Investment Negative List, to reflect changes pursuant to existing laws and consistent with the policy to ease restrictions on foreign participation in certain investment areas or activities. Noted changes are in the areas of internet business, education, training centers, insurance, lending companies, financing companies, investment houses, wellness centers, private radio communication business, contracts for the construction and repair of locally-funded public works, practice of profession, among others.

Article Written

- **Learning the basics of the Foreign Account Tax Compliance Act. Business Mirror: Tax Law for Business, October 24, 2018.** This article discusses the basics of the "Foreign Account Tax Compliance Act" or FATCA, a U.S. legislation, and its effects on Philippine financial institutions.

COURT ISSUANCES

I
Significant Supreme Court Decisions

Due process of law must be followed in levy and sale of real property because a sale of land for tax delinquency is in derogation of private property and the registered owner's constitutional rights.

The City of Makati levied upon a condominium unit for non-payment of real property taxes. Eventually, the property was auctioned off and sold to the highest bidder. The owners of the property filed a case for the annulment of the sale, contending that the sale is null and void on the following grounds: the notice of billing statements for real property were mistakenly sent to wrong address, no warrant of levy was sent, the notice of delinquency sale was not posted, the Treasurer's Office did not notify the owners of the warrant of levy, and the excess of the proceeds of the sale were not remitted to the owners.

The Supreme Court nullified the auction sale because of the irregular conduct of proceedings by the LGU on the levy and sale of the property. There is no presumption of regularity that exists in any administrative action, which results in depriving a taxpayer of his property. Due process of law must be followed in tax proceedings, because a sale of land for tax delinquency is in derogation of private property and the registered owner's constitutional rights. *(Cruz and Heirs of Cruz vs. City of Makati, et al., G.R. No. 210894, September 12, 2018).*

Only natural or juridical persons, or entities authorized by law may be parties in a civil action. Non-compliance with this requirement renders a case dismissible on the ground of lack of legal capacity to sue.

An LGU enacted an ordinance increasing the fair market values (FMV) of real properties in its territorial jurisdiction. Petitioner homeowner's association, allegedly, a non-stock, non-profit corporation, filed a case and argued that the ordinance should be declared unconstitutional for violating substantive due process, considering that the increase in FMV's, which resulted in an increase in the taxpayer's base, and ultimately, the taxes to be paid was unjust, excessive, oppressive, arbitrary, and confiscatory, as proscribed under Section 130 of the Local Government Code.

The Supreme Court dismissed the petition due to petitioner's lack of capacity to sue. The High Court noted that the Rules of Court mandates that only natural or juridical persons, or entities authorized by law may be parties in a civil action. Non-compliance with this requirement renders a case dismissible on the ground of lack of legal capacity to sue. In this case, the court noted that petitioner homeowner's association has no juridical personality considering the revocation of its registration with the SEC and its failure to register with the HLURB as a homeowner's association. *(Alliance of Quezon City Homeowner's Association, Inc. vs. The Quezon City Government, et. al., GR No. 230651, September 18, 2018*).

The taxpayer has the primary responsibility for the proper preparation of the waiver of the prescriptive period for assessing deficiency taxes. The Commissioner of Internal Revenue may not be blamed for any defects in the execution of waivers.

In connection with a taxpayer's tax investigation for taxable year 2002, several waivers of the defense of prescription were executed to extend the BIR's right to conduct audit. The Court noted the following defects on the waivers: 1) The notarization was not in accordance with the Rules on Notarial Practice; 2) Failure to indicate the acceptance by the BIR; 3) The waivers were not signed by the proper revenue officer; and 4) The waivers failed to specify the type of tax and amount of tax due.

In ruling for the validity of the waivers, the Supreme Court adopted the ruling in the Next Mobile case that the defects are not solely attributable to the BIR. The proper preparation of the waiver is primarily the responsibility of the taxpayer or its authorized representative signing the waiver. Such responsibility does not pertain to the BIR as the receiving party. Thus, the act or omission giving rise to the defects of the waivers should not be ascribed solely to the BIR. The taxpayer, after having benefitted from the defective waivers, should not be allowed to assail them. The equitable principles of in pari delicto, unclean hands, and estoppel as enunciated in the Next Mobile case are applicable to this case. *(Asian Transmission Corporation vs. Commissioner of Internal Revenue, GR No. 230861, September 19, 2018).*

Note: RMO 20-90 issued on April 4, 1990 and RDAO 5-01 issued on August 2, 2001 lay down the procedure for the execution of the waiver. In several cases[1] decided by the Supreme Court, it has been held that strict compliance with the procedures laid down under RMO 20-90 is necessary. However, in the subsequent case of Next Mobile, Inc., the Supreme Court took the case as an exception to the general rule and declared the Waivers valid even with some departures on compliance procedures under RMO 20-90, due to the peculiar circumstances in that case, where both BIR and the taxpayer apparently contributed to the defects in the waivers.

The case of Commissioner of Internal Revenue v. Philippine Daily Inquirer (G.R. No. 213943) which was promulgated subsequent to the Next Mobile case seems to have overruled the doctrine of estoppel as laid down in the Next Mobile case, where the High Court held that the BIR cannot hide behind the doctrine of estoppel to cover its failure to comply with RMO 20-90 and RDAO 05-01 which were issued by the BIR itself. A waiver of the statute of limitations is a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations and thus, it must be carefully and strictly construed.

II
Significant Court of Tax Appeals Decisions

Requests for reconsideration elevated to the Commissioner of Internal Revenue, of FDDA issued by his duly authorized representative should be filed with the Office of the Commissioner

In this case, the taxpayer was assessed for deficiency taxes that led to the eventual issuance of Final Decision on Disputed Assessment (FDDA) by the Regional Director. The taxpayer appealed the FDDA to the CIR. However, the CIR implied in its reply that the request for reconsideration should have been filed with the concerned Regional Director and not the Office of the Commissioner.

The Court held that requests for reconsideration elevated to the Commissioner arising from inactions or adverse decisions of his duly authorized representatives shall be filed with the Office of the Commissioner. *(Lancaster Colors International, Inc. vs. CIR, CTA Case No. 8933, October 1, 2018).*

For a government entity to be exempt from RPT, two conditions must concur: 1) the claimant should be a government instrumentality; and 2) the claimant must retain possession of the real property at the time of imposition of the RPT.

BSP and several of its debtors entered into a Compromise Agreement. Upon refusal of the debtors to pay their obligations, BSP foreclosed the real properties mortgaged as collateral. In order to have the properties transferred in its name, BSP paid under protest the corresponding RPT liabilities. It then sought to refund the RPT paid on the ground that government instrumentalities, such as the BSP, are exempt from the imposition of RPT.

[1] See GR 178087, May 5 2010, GR. No. 162852, December 4, 2004, and GR. No. 170257, September 7, 2011, respectively.

The Court held that for such exemption to arise, two conditions must concur: 1) the claimant should be a government instrumentality; and 2) the claimant must retain possession of the real property at the time of imposition of the RPT.

Although BSP satisfied the first condition, the second is wanting. The right of possession of the real properties remained with the owners at the precise moment the properties were subjected to RPT. Such real properties therefore are not excused from the imposition of RPT. As successor-in-interest of the latter's legal rights and obligations, BSP must ultimately bear the unaccounted RPT incurred by its predecessor. *(BSP vs. CBAA, LBAA, Province of Batangas, and Fortuna Lat, CTA Case No. 1438 (CBAA Case No. L-116)(LBAA Case No. 2011-1), October 1, 2018).*

Disputes, claims and controversies solely between or among the departments, bureaus, offices, agencies, and instrumentalities of the National Government, including constitutional offices and agencies arising from the interpretation and application of statutes, contracts or agreements are within the jurisdiction of the Solicitor General or the Secretary of Justice, as the case may be

PSALM was assessed by the BIR for deficiency value-added taxes in relation to the sale of assets by NPC, its predecessor-in-interest. The assessment was challenged before the CTA and was eventually elevated to the Court *En Banc*.

The Court *En Banc* held that it has no jurisdiction to take cognizance of the case. The Court applied the ruling of the Supreme Court in the case of *PSALM vs CIR* wherein it was held that disputes and claims solely between government agencies and offices, including GOCCs, must be adjudicated following the administrative procedure laid down in Sections 2 and 3 of P.D. No. 242. *(CIR vs. PSALM, CTA EB Case Nos. 1618 and 1619 (CTA Case No. 8587), October 1, 2018).*

The OIC-Chief of LTS-RLTAD II is bereft of any power to authorize the examination of taxpayers or to effect any modification or amendment to a previously issued LOA because only the CIR or his duly authorized representatives are granted such power.

The BIR issued Letter of Authority (LOA) for the examination of the books of accounts and other accounting records of the taxpayer. Subsequently, a Memorandum of Assignment was issued by the OIC-Chief of the LTS-RLTAD II which assigned the examination to other revenue officers. An assessment was then issued which was challenged by the taxpayer.

The Court ruled that the assessments issued by the BIR are intrinsically void and thus, shall be cancelled and set aside. The invalidity of such assessment springs from the absence of authority on the part of the revenue officer to conduct the examination. Only the CIR or his duly authorized representatives can authorize the examination of taxpayers. Further, any reassignment or transfer of cases to another revenue officer shall require the issuance of a new LOA. *(Trinity Franchising and Management Corporation vs. CIR, CTA Case No. 9190, October 2, 2018).*

The cancellation of the sale of real property gives rise to a right to claim for refund of the CGT paid on such sale

The taxpayer mortgaged a parcel of land to PNB. Upon default by the taxpayer, the mortgage was foreclosed and PNB was declared the winning bidder. PNB withheld CGT and paid the same to the BIR. A compromise agreement was subsequently entered into between the taxpayer and PNB. Upon a petition by the taxpayer, the sale of the parcel of land to PNB was cancelled. The taxpayer then filed a claim for refund of CGT corresponding to the cancelled sale.

In deciding, the Court held that upon rescission of a sale previously subject to CGT, the CGT must be refunded. Here, the compromise agreement is analogous to that of rescission. As such, a refund is proper. However, the Court denied the refund since the claim was filed out of time. *(Technogas Philippines Manufacturing Corporation vs. CIR, CTA Case No. 9509, October 4, 2018).*

The FAN must be served and actually received by the taxpayer, otherwise, further notices become null and void.

The taxpayer received a PAN, PCL, and FNBS from the BIR but denied receiving a FAN. It then filed a petition seeking the cancellation of the assessment, PCL, and FNBS.

The Court ruled that the issuance of the PCL and FNBS was null and void as no collection can stem from an invalid tax assessment. Based from the BIR records, the Court noted that there was no indication on the face of the FAN that it was received by any official representative of the petitioner. To be valid, assessments must be served and actually received by the taxpayer itself or its duly authorized representative as evidenced by the latter's receipt thereof in the duplicate copy of said assessment. *(Top Draw Animation, Inc. vs. CIR, CTA Case No. 8863, October 4, 2018).*

The gross income, which is the basis of the 5% special rate, refers to gross sales or gross revenue derived from business activities within the ecozone

The BIR assessed the taxpayer, an ecozone registered enterprise, for regular income tax and VAT on its sales to enterprises within the Customs Territory. The taxpayer argues that since only 7.65% of its sales was derived on its sales of services to enterprises within the Customs Territory, which do not exceed the 30% threshold, such sale of service outside is not subject to regular income tax and VAT.

The Court *En Banc* ruled that in order to avail of the incentives under the 5% special tax regime, pertinent is Section 5 of DOF Department Order No. 03-05. Under the Department Order, for purposes of implementing the special 5% tax on Gross Income Earned, the term "Gross Income Earned" shall refer to gross sales or revenue derived from business activities within the subject ecozone. Here, considering that the sale of services were derived in the Customs Territory, these sales should not be included in the computation of the special 5% tax. Thus, the CIR is correct in imposing the relevant internal revenue taxes under the NIRC. *(Clark Water Corporation vs. CIR, CTA EB No. 1608 (CTA Case No. 8865), October 5, 2018).*

If the revenue officer is unable to submit his final report of investigation within the 120-day period, he must then submit a Progress Report to his Head of Office, and surrender the LOA for revalidation

A Letter of Authority (LOA) was received by petitioner authorizing a revenue officer to examine the records of Petitioner. However, the revenue officer submitted a Memorandum Report beyond the 120-day validity of the LOA.

The Court ruled that the revenue officer should have submitted a Progress Report and surrendered the LOA for revalidation for the issuance of a new LOA instead of continuing with the audit beyond the prescribed 120-day period. Therefore, the LOA has ceased to be valid and the resulting assessment or examination is a nullity. *(GS MTE Gains Corporation vs. CIR, CTA Case No. 8837, October 8, 2018).*

The CTA is devoid of any jurisdiction to rule upon an action questioning the validity and constitutionality of an ordinance.

The taxpayer was assessed by the Municipal Treasurer of Jones, Isabela pursuant to a newly enacted ordinance imposing an annual regulatory fee for the operation of telecommunications tower. A petition for certiorari was filed by the taxpayer with the RTC but the same was dismissed. The taxpayer filed an appeal with the CTA.

The Court *En Banc* ruled that the matter raised by the taxpayer is not a local tax case but a petition for certiorari and prohibition on the implementation of an ordinance. Hence, the Court has no jurisdiction. *(Smart Communications, Inc. vs. Municipality of Jones, Isabela, CTA EB Case No. 1671 (CTA AC No. 176), October 8, 2018).*

The CIR or his duly authorized representative is duty bound to wait for the expiration of fifteen (15) days from taxpayer's date of receipt of the PAN before issuing the FLD and FAN.

The taxpayer received the PAN from the BIR. One day before the expiration of the 15-day period within which to file a Reply to the PAN, the taxpayer received the FAN and the FLD.

The Court *En Banc* ruled that the CIR or his duly authorized representative is duty bound to wait for the expiration of fifteen (15) days from the date of receipt of the PAN before issuing the FLD and FAN. Such a process or procedure is part and parcel of the due process requirement in the issuance of a deficiency tax assessment. In this case, the BIR, by prematurely issuing the FLD or FAN, wantonly disregarded the mandatory due process. *(CIR vs. Pacific Bayview Properties, CTA EB Case No. 1677 (CTA Case No. 9070), October 8, 2018).*

A reversal of the BIR regulation or ruling cannot adversely prejudice a taxpayer who, in good faith, relied on the BIR regulation or ruling prior to its reversal

The BIR issued a BIR Ruling declaring that the taxpayer's transfer of real properties by way of liquidating dividend to its stockholders is not considered a sale for tax purposes. As such, it will not give rise to any liability for payment of income tax. However, the taxpayer remitted CGT which was paid under protest. A claim for refund for the CGT was subsequently filed.

The Court *En Banc* ruled that based on the BIR Ruling, the transfer of the real properties as liquidating dividends is not subject to, *inter alia*, income tax, which perforce includes capital gains tax. The taxpayer relied in good faith on the BIR Ruling. Thus, the BIR cannot now revoke such ruling and say that the transaction is an exchange subject to the capital gains tax and apply such revocation retroactively. *(CIR vs. Belle Corporation, CTA EB Case No. 1684 (CTA Case No. 8939), October 10, 2018).*

An amended decision is a new decision which requires the filing of a motion for reconsideration prior to the filing of a Petition for Review in the Court *En Banc.*

The taxpayer obtained an Amended Decision from the Court in Division. Still unsatisfied with the amended decision, the taxpayer directly elevated the matter to the Court *En Banc*. The taxpayer argued that its non-filing of the MR on the Court in Division's Amended Decision is not fatal considering the use of the word "may" under Section 11 of RA No. 1125.

The Court *En Banc* ruled that an amended decision is issued when there is any action modifying or reversing a decision. Essentially, it was therefore a different decision and, hence, the proper subject of an MR. *(EHS Lens Philippines, Inc. vs. CIR, CTA EB Case No. 1712 (CTA Case No. 9014), October 11, 2018).*

In another case, the taxpayer likewise did not seek reconsideration of the Amended Decision of the CTA Division. Instead, it counted a period of fifteen (15) days, within which to file an appeal with the CTA En Banc.

The CTA *En banc*, citing the Supreme Court case of *Asiatrust Development Bank, Inc. v. Commissioner of Internal Revenue*[2], held that the taxpayer made the fatal flaw of not seeking reconsideration of the Amended Decision. Thus, the taxpayer's Petition for Review must be dismissed as the Court's jurisdiction has been incorrectly invoked. The Amended Decision has attained finality. *(CIR vs. Jardine Lloyd Thompson Insurance Brokers, Inc., CTA EB NO. 1177 (CTA Case No. 8273), October 17, 2018).*

Note: In his Dissenting Opinion, Presiding Justice Del Rosario opined that the fact that an amended decision is eventually issued does not necessarily deviate from its nature, which may in certain instances, be strictly a mere resolution of a motion for reconsideration. If the amended decision results from a re-evaluation

[2] G.R. Nos. 201530 and 201680-81, April19, 2017.

of the parties' respective positions which the Court originally rejected but which it eventually considered as meritorious (in whole or in part), a second motion for reconsideration of the amended decision is unwarranted. To allow a second motion for reconsideration raising the same ground which the amended decision already considered would render the proscription against a second Motion for Reconsideration meaningless even as it would result to unnecessary delay in the disposition of cases.

Any tax refund anchored on the tax exemption under a special law or statute should be strictly construed against the claimant

The CIR asserts that in order to be exempted from tax, duties, charges, royalties or fees on the importation of its commissary and catering supplies under P.D. No. 1590, the claimant must prove, among others, that the imported articles are not locally available in reasonable quantity, quality or price. On the other hand, the taxpayer maintains that the Court in Division correctly granted the claim for tax refund of excise taxes as it was based on evidence presented and admitted during trial as well as prevailing jurisprudence on the matter.

The CTA *En Banc* ruled that any tax refund anchored on the tax exemption under a special law or statute should be strictly construed against the claimant, such that an interpretation thereof should pass the crucible test of judicial scrutiny. In this case, the taxpayer, having passed the strict test of legal entitlement to the tax exemption under P.D. 1590, had only to prove, by preponderance of evidence, the fulfillment of the conditions for said entitlement, which it was able to do by the documents submitted and the testimony of its witnesses during the trial in the Division level. The CIR failed to rebut the evidence presented by the taxpayer in proving its right to the claim for refund, hence the refund should prosper. *(CIR vs. Philippine Airlines, Inc., CTA EB No. 1648 (CTA Case Nos. 8708 & 8770), October 18, 2018).*

Since the subject San Miguel shares of respondent, and respondent itself, are owned by the government, it follows that the dividends and any income therefrom are also owned by the government, and is beyond the taxing power of the City of Davao

Arguing that taxpayer THI is a "bank and other financial institution", Petitioner City of Davao imposed local business tax (LBT) against respondent THI's receipt of dividends and interest income on money placements from San Miguel Corporation.

The CTA *En Banc* ruled that respondent, being a holding company, cannot be deemed included in "banks and other financial institutions" for the purpose of imposing the local business taxes. Further, in Philippine Coconut Producers Federation, Inc. v. Republic of the Philippines[3] (COCOFED case), the Supreme Court already declared that respondent THI, among others, and the San Miguel shares it held, are owned by the government. Thus, respondent's dividend and interest income from its SMC shares belong to the government, and is beyond the taxing power of the petitioner City of Davao. Any local tax imposed on respondent is imposed on the national government. To insist taxing the respondent would clearly be in contravention of Section 133(o) of the LGC. *(CITY OF DAVAO and BELLA LINDA N. TANJILI in her official capacity as The Officer-in-Charge City Treasurer's Office of Davao City vs. TODA HOLDINGS, INC.,CTA EB NO. 1683 (CTA AC No. 138), October 19, 2018).*

As provided in Revenue Memorandum Circular No. 23-0023, in the absence of accounting records or other documents necessary for the proper determination of the taxpayer's internal revenue tax liability, Section 6(B) of the NIRC of 1997 requires that the assessment of the tax be determined based on the "Best Evidence Obtainable"

In this case, the CIR assessed deficiency VAT and EWT, among others, for the CY 2005. In its defense, the taxpayer asserts that the deficiency EWT assessment be cancelled for being null and void as it is based on mere presumptions and not based on actual facts.

The CTA Third Division ruled that assessments based on estimates or approximates are valid under the Best Evidence Obtainable Rule. As held by the Supreme Court in the case of *Sy Po vs. Hon. Court of Tax Appeals,*

[3] G.R. Nos. 177857-58 & 178193, January 24, 2012

et al[4]., the rule on the "best evidence obtainable" applies when a tax report required by law for the purpose of assessment is not available or when the tax report is incomplete or fraudulent. Hence, the questioned documents may be used as basis for the assessment of any internal revenue tax. Assessments made as such are deemed prima facie correct and sufficient for all legal purposes. The burden of proving the illegality of the assessment lies upon the petitioner alleging it to be so. *(Ups-Delbros Transport, Inc., vs. CIR, CTA Case No. 9063, October 19, 2018).*

In the appreciation of evidence in criminal cases, it is a basic tenet that the prosecution has the burden of proof in establishing the guilt of the accused for the offense with which he is charged.

For failure of a company to pay its deficiency taxes for taxable year 2007, the company's President and Treasurer were accused for violation of Section 255 of the National Internal Revenue Code of 1997, as amended. The prosecution claims that the notices were properly sent and received by the accused, and the latter failed to interpose objections on the issued assessments. Accused on the other hand argued that there was no valid assessment because there was no proper service of assessment notices.

In this case, considering that the prosecution failed to prove the fact of mailing of the PAN, FAN and Formal Letters of Demand, and no evidence was presented to prove that accused actually received the assessments, the PAN and Assessment Notices, which were the basis of the criminal complaint for willful failure to pay tax under Section 255, cannot be considered valid assessments. *(The People of the Philippines vs. David de Leon and Ann Marie de Leon, CTA Crim. Case No. 0-594, October 24, 2018).*

An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. The requirement to indicate a fixed and definite period within which a taxpayer must pay the tax deficiencies is vital to the validity of the assessment.

In this case, a taxpayer questions the validity of the tax assessment, contending that the absence of a due date for payment in the Formal Letter of Demand and the relevant Assessment Notices violates its right to due process. It alleges that the only date that appears to be a due date is "January 00, 1900", which is clearly erroneous and inexistent.

The CTA Second Division agreed with the taxpayer and ruled that the subject FLD and Assessment Notices are not valid assessment for failure to indicate a definite due date for payment by the taxpayer. Citing *Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation, et al.*[5], it was held that an assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. To enable the taxpayer to determine his remedies thereon, due process requires that it must be served on and received by the taxpayer." *(Grand Plaza Corporation vs. CIR, CTA CASE NO. 8992, October 29, 2018).*

BIR Issuances

RR 22-2018, October 17, 2018

This revenue regulation pertains to the amendment of Section 10 of Revenue Regulation (RR) No. 10-2010, otherwise known as the "Exchange of Information Regulation".
This regulation added another option when the notice to taxpayer shall be made. It provided that in cases where notifications is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction, and the requesting jurisdiction has made a substantiated request for a deferment of the notification

[4] G.R. No. 81446, August 18, 1988.
[5] G.R. No. 128315, June 29, 1999

based on these grounds, notice to the taxpayer must only be given after receipt of communication from the requesting jurisdiction that the investigation has already attained finality.

RMO 46-2018, October 11, 2018

This revenue memorandum order pertains to the processing and issuance of the Tax Clearance which shall now be with the concerned Revenue Regional Offices and Large taxpayers Service (LTS) where the taxpayer-applicant is currently and duly registered.

RMC 86-2018, October 11, 2018

This revenue memorandum circular is issued circularizing the lists of withholding agents under the jurisdictions of the Large Taxpayers Service and Revenue Regions who are required to deduct either the one percent (1%) or two percent (2%) creditable withholding tax from their suppliers of goods and services.
The obligation to deduct and remit to the BIR the one percent (1%) and two percent (2%) creditable withholding tax from the suppliers of goods and services shall continue, commence or cease, as the case may be, effective November 1, 2018.

RMC 91-2018, October 25, 2018

This revenue memorandum circular provides for the authority of Microfinance Non-Government Organizations (MF-NGOs) to facilitate the TIN issuance on behalf of their clients by using the BIR eRegistration (eREG) System as Third Party Users.
It prescribes policies, guidelines and procedures to be observed by the MF-NGOs with regard to the use of the eREG System.

BIR Rulings

BIR RULING 1217-2018, October 1, 2018

This is a request for exemption from applicable taxes on the transfer of real properties in exchange for a company's shares of stock pursuant to Section 40(C) (2) of the 1997 Tax Code, as amended, pertinent portion of which reads:

> "No gain or loss shall also be recognized if property is transferred to a corporation by a person in exchange for stock or unit of participation in such a corporation of which as a result of such exchange said person, alone or together with others, not exceeding four (4) persons, gains control of said corporation: Provided, That stocks issued for services shall not be considered as issued in return for property".

Here, private individuals assigned their rights over parcels of land to a corporation in exchange for the latter's shares of stocks, as follows:

Transferors	Number of Shares
Heirs of Nemesio Javier	1,200
Leovino Dagli	400
Heirs of Bonifacio Rabano	60
Total	1,660

After the exchange, the combined shareholdings of the transferors constitute 70% of the company's equity.

In ruling that the exchange does not fall under the exception provided under Section 40(C)(2) of the Tax Code, the BIR said that while the transferors acquired more than 51% of the outstanding shares of the company, it has been noted that there are more than five (5) transferors involved in the exchange, that is, the five (5) Heirs of Nemesio Javier, the seven (7) Heirs of Bonifacio Rabano, and Leovino Dagli, or a total of thirteen (13) transferors. One of the requirements for the grant of tax exemption under Section 40(C)(2) of the Tax Code of 1997, as amended, is that the number of transferors should not exceed five (5). This requirement is wanting in this case.

BIR RULING 1243-2018; BIR RULING 1244-2018. October 12, 2018

In this ruling, the BIR confirmed that a joint venture (JV) formed for the purpose of undertaking construction projects is not taxable as a corporation. As provided under RR 10-2012, the requisites for the exemption are (1) the JV is for the undertaking of construction project; (2) the JV involves joining or pooling-of resources by licensed local contractors (licensed as general contractor by the PCAB); (3) the local contractors are engaged in construction business; and (4) the JV itself is duly licensed by PCAB.

Further, the gross payments to the joint venture on the JV Project are likewise not subject to the 2% creditable withholding tax prescribed under Section 57 (B) of the Tax Code, as amended. Being exempt from corporate income tax, the JV is not required to file quarterly and final adjustment returns but the co-venturers are separately subject to the regular corporate income tax imposed under Section 27 (A) of the Tax Code of 1997, as amended, on their taxable income during each taxable year respectively derived by them from the construction project.

BIR RULING 1242-2018, October 12, 2018

Pursuant to Section 12 of Republic Act (RA) 9369, amending Section 8 of RA 8436, the Commission on Elections (COMELEC) is exempt from the 12% value-added tax on its local purchases of goods and services as well as VAT on its importation of goods that will be used in the automated national and local elections. Accordingly, the suppliers/sellers of goods and services to the COMELEC cannot shift or pass on any VAT to COMELEC on the latter's purchases of goods and services that will be used in the May 13, 2019 Automated National and Local Elections. Moreover, importation by COMELEC of goods that will be used in the aforesaid automated elections is also exempt from VAT.
The BIR emphasized that the exemption of the COMELEC from VAT is limited only to its purchases and/or importation of goods and services enumerated above during the period beginning July 2018 until completion of the post-election activities; and provided further, that the aforesaid purchases and/or importation of goods and services will be used in, or directly related to, the conduct of the May 13, 2019 automated elections. Any purchase of goods and services not related thereto will be subject to the 5% final VAT in accordance with Section 114 (C) of the Tax Code of 1997, as amended.

BIR RULING 1282-2018, October 22, 2018

A non-stock/non-profit organizations and other tax- exempt entities are exempt from the payment of annual registration fee, since their undertakings or endeavors are not directed nor intended to generate income or profit. However, if such entities are engaged in any profit oriented activity, the payment of annual registration fee must be imposed.

BIR RULING NO. 1299-2018, October 23, 2018

In this ruling, the BIR confirmed that sale of power/energy generated from run-of-river hydropower facility shall be subject to zero percent (0%) value added tax (VAT). This is pursuant to Section 15 of RA No. 9513, otherwise known as the "Renewable Energy Act of 2008," which provides that the sale of fuel or power generated from renewable sources of energy such as but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy and other emerging energy sources using technologies such as fuel cells and hydrogen fuels, shall be subject to zero percent (0%) value-added tax (VAT). Under said law, the local purchases of goods and services by RE Developers are subject to zero percent (0%) VAT provided that they are needed for the development, construction and installation of their power plant facilities. Also, pursuant to the provisions of RA No. 7156, also known as the "Mini-hydroelectric Power Incentive Act, any person authorized to engage in mini-hydroelectric development shall be exempted from the payment of VAT on their importations of all machinery and equipment including control and communication equipment, within a period of seven (7) years from the date of awarding of the contract.

BIR RULING NO. 1308-2018, October 23, 2018

In this ruling, SVAACHOA, Inc., a non-stock and non-profit residential homeowners' association duly registered with the Housing and Land Use

Board (HLURB), is requesting for confirmatory ruling for exemption from all taxes under Republic Act No. 9904 otherwise known as the "Magna Carta for Homeowners and Homeowners Associations, as enunciated in Revenue Memorandum Circular No. 9-2013, which clarifies the taxability of association dues, membership fees, and other assessments/charges collected by homeowners associations.
The BIR ruled that since SVAACHOA, Inc. is a duly registered homeowners' association with the HLURB; that its financial statements show the delivery of basic community services defined under Section 3(d) of RA 9904; and that the LGU has issued a Certificate that it lacks resources to provide these services to the association, the BIR ruled that the income derived from association dues, membership fees, other assessments and charges collected on a purely reimbursement basis and rentals of facilities of the association is exempt from income tax, value-added tax or percentage tax, whichever is applicable, provided that such income and dues shall be used for the cleanliness, safety, security and other basic services needed by the members, including the maintenance of the facilities of their respective subdivisions or villages. However, the association shall be subject to the applicable internal revenue taxes on its other income from trade, business or other activities.

SEC Issuances

SEC EB Case No. 09-16-413, October 25, 2018

This is an Appeal of the COMPANY REGISTRATION AND MONITORING DEPARTMENT (CRMD) Order dated 26 August 2016, declaring as an intra-corporate dispute the double filing of General Information Sheets (GIS) by two groups of members, each claiming to be the duly-elected Board of Trustees, and directing that the conflicting GIS for 2014 and 2015 be marked "DISPUTED," in accordance with SEC Office Order No. 242, Series of 2013.

The SEC Commission En Banc agreed with CRMD that the determination of (1) which group is the duly-elected Board of Trustees, and (2) which of the GIS filed is authentic, are intra-corporate disputes that are entirely outside

the jurisdiction of the Commission. The CRMD also correctly marked the respective GIS filed by the QUISTO and HERNANDEZ groups as "disputed" in accordance with SEC Office Order No. 242, Series of 2013.

MC No. 14, S. 2018, October 29, 2018

This Memorandum Circular provides relief to the real estate industry by deferring the application of the provisions of the Philippine Interpretation Committee Question and Answer (PIC Q&A) No. 2018-12 with respect to the accounting for significant financing component, uninstalled materials and the exclusion of land in the calculation of percentage of completion (POC), for a period of three (3) years.

During this period of deferral, land will be allowed to be included in the POC calculation only at historical acquisition cost. Uninstalled materials shall be included in the calculation of the POC based on the proportionate work accomplishment of significant building components procured which are specifically and directly identifiable to the project, as long as covered by contracts, purchase orders and partially paid for. These include structural, architectural, mechanical, electrical, plumbing/ sanitary and fire protection materials. Moreover, the impact of significant financing component on the transaction price shall not be considered during the period of deferral.

This deferral will only be applicable for real estate transactions. Effective January 01, 2021, real estate companies will adopt PIC Q&A No. 2018-12 and any subsequent amendments thereof retrospectively or as the SEC will later prescribe.

A real estate company may opt not to avail of any of the relief provided above and therefore will comply in full with the requirements of PIC Q&A 2018-12 in respect of the relief not availed of.

Office of the President Issuances

Executive Order No. 65, October 29, 2018

This Executive Order was issued promulgating the Eleventh Regular Foreign Investment Negative List, replacing the Tenth Regular Foreign Investment Negative List, to reflect changes pursuant to existing laws and consistent with the policy to ease restrictions on foreign participation in certain investment areas or activities.

Following the new List, internet business can now be owned 100% by foreigners. Also, radio communications networks are now allowed up to 40% foreign equity, from the previous limit of up to 20% foreign equity only. Contracts for the construction and repair of locally-funded public works are now likewise allowed up to 40% foreign equity, from the previous limit of up to 25% foreign equity only.

The List also enumerated certain professions where foreigners are allowed to practice in the Philippines, provided that their home country allows Filipinos to be admitted to the practice of the same profession. Likewise enumerated are certain professions where corporate practice is allowed, subject to the requirements and conditions under pertinent regulatory laws. Foreigners may teach at higher education levels provided the subject being taught is not a professional subject.

Articles Written

Business Mirror: Tax Law for Business

Learning the basics of the Foreign Account Tax Compliance Act

By: Jomel N. Manaig

A globalized market is the bedrock of modern economy. It allows corporations to conduct business in and derive income from beyond its country of residence. Naturally, where there is income, tax is surely not far behind. Taxing authorities, aware of the potential tax loopholes brought about by a globalized market, tries to implement remedial measures to stop or at least minimize the bleeding. Enter the "Foreign Account Tax Compliance Act" or Fatca.

In this issue, we would cover basic tenets concerning Fatca. However, due to its varied and far-reaching effects and implications, we would limit our discussion on the effects to non-US financial institutions, or more commonly referred to in Fatca as Foreign Financial Institutions (FFI).
To start off, what is Fatca? It is a 2010 US legislation requiring FFIs to report to the Internal Revenue Service or IRS (the tax authority in the US) information about financial accounts held by US persons, or by foreign entities in which US persons hold substantial ownership interest. Fatca is used to determine or detect indicia of US persons and their assets outside of the USA.

Financial institutions that are subject to Fatca compliance include, but are not limited to, depositary institutions, custodial institutions, investment entities and certain types of insurance companies that have cash value products or annuities.

On the other hand, US persons are identified by certain indicia or signs which include, among others, a US place of birth, a US citizen or resident, a US residence, a US telephone number, standing instructions to pay using a foreign account to a US- maintained account, an authority or power of authority in favor of a person with a US address, or a US "in-care-of" or "hold mail" address.

Although it is a US legislation, financial institutions in the Philippines may still feel the drawbacks of noncompliance. Under Fatca, FFIs that refuse to register with and report to the IRS will be subjected to a 30-percent withholding tax on income payments sourced from the US. Likewise, FFIs that enter into reporting agreements with the IRS may be required to withhold 30 percent on certain payments to foreign payees that do not comply with Fatca. In other words, as long as an FFI receives income payments from US sources or from other FFIs with reporting agreements with the IRS, noncompliance to Fatca would subject the income they receive to a 30-percent withholding tax.

If a Philippine financial institution determines that it is indeed covered by Fatca, it must first register with the IRS. Luckily, through the wonders of modern technology, registration is a breeze. Registration is done completely online through a secure Web-based system called "Fatca Online Registration System." Here, FFIs need only to provide their information and await confirmation of their registration.

After registration comes the reporting phase of Fatca. Since the IRS is concerned with nonfinancial US accounts of its resident taxpayers, it requires the FFIs to report such information. In the Philippines, however, Fatca does not require Philippine financial institutions to report directly to the IRS. Instead, by virtue of an Intergovernmental Agreement (IGA) entered into between the Philippines and the US on July 13, 2015, Philippine financial institutions will report relevant information to the BIR rather than directly to the IRS.

With all the foregoing, are Philippine financial institutions now mandated to submit reports as required under Fatca? Not necessarily.

It should be noted that the 1987 Constitution says: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate." The IGA is an international agreement which requires concurrence by the Senate. The IGA was entered into on July 13, 2015. The same was ratified by President Duterte on December 1, 2016, and was transmitted to the Senate for concurrence where it is still pending. Sans the concurrence of Senate, full implementation of the IGA will not take place. Consequently, Fatca reporting cannot be carried out.

As of now, Philippine financial institutions can breathe easier knowing that they still do not need to comply with Fatca reporting. However, as the BIR once published in an advisory, Philippine financial institutions must take necessary steps to prepare for full implementation of the terms of the IGA and the concomitant submission of information. It is better to prepare for Fatca than to suffer a whopping 30-percent withholding tax on income received.

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

BENEDICTA DU-BALADAD
Managing Partner & CEO
T: +63 2 403 2001 loc. 300
dick.du-baladad@bdblaw.com.ph

FULVIO D. DAWILAN
Senior Partner
T: +63 2 403 2001 loc. 310
fulvio.dawilan@bdblaw.com.ph

IRWIN C. NIDEA, JR.
Partner
T: +63 2 403 2001 loc. 330
irwin.c.nideajr@bdblaw.com.ph

RODEL C. UNCIANO
Senior Associate
T: +63 2 403 2001 loc. 140
rodel.unciano@bdblaw.com.ph

MABEL L. BUTED
Senior Associate
T: +63 2 403 2001 loc. 380
mabel.buted@bdblaw.com.ph