TAX UPDATE

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LAND SOLD BY REAL ESTATE DEVELOPER WILL NOT BE CONVERTED INTO A CAPITAL ASSET. While petitioner argues that the parcel of land sold is a capital asset, considering that it is a vacant and idle real property, the Court in Division correctly found said property to be an ordinary asset pursuant to *Revenue Regulations ("RR") No. 07-0338.*

In view of the Revenue Regulation cited, the parcels of land acquired, and subsequently sold, by petitioner, as an entity engaged in the real estate business, continues to be an ordinary asset and is not converted into a capital asset even if the same has not been used and remains idle. The Court *En Banc* reiterates further the Court in Division's findings that the proceeds from the sale of land amounting to Php33,975,000.00 is also subject to VAT *(San Paolo Development Corporation vs. Commissioner of Internal Revenue, CTA EB No. 1388, March 15, 2017).*

COMPROMISE PENALTY IS VOLUNTARY AND CANNOT BE IMPOSED WITHOUT THE TAXPAYER'S CONSENT. Even if, the taxpayer partly paid the compromise penalty (RMO No. 1-9), it may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses the same. It is well-settled that the Court has no jurisdiction to compel a taxpayer to pay the compromise penalty because, by its very nature, it implies a mutual agreement between the parties in respect to the thing or the subject matter that is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer. The imposition of the same without the conformity of the taxpayer is illegal and unauthorized *(Commissioner of Internal Revenue, et, al. vs. Global Quickservice Restaurant, Inc., CTA EB Nos. 1393 and 1405, March 15, 2017).*

REQUIREMENTS OF THE REFUND OF CREDITABLE WITHHOLDING TAX REFUND. Three conditions for the grant of a claim for refund of creditable withholding tax:

1. The claim is filed with the CIR within the two-year period from the date of payment of the tax;
2. It is shown on the return of the recipient that the income payment received was declared as part of the gross income; and
3. The fact of withholding is established by a copy of a statement duly issued by the payor to the payee showing the amount paid and the amount of the tax withheld therefrom *(Commissioner of Internal Revenue vs. Jardine Thompson Insurance Brokers, Inc., CTA EB No. 1344, March 21, 2017).*

REQUISITES OF CONSTRUCTIVE SERVICE OF ASSESSMENT NOTICE. Constructive service under RR No. 12-99 shall be considered effected by (1) leaving the same in the premises of the taxpayer; (2) the fact of constructive service should be attested to, witnessed and signed by at least two revenue officers other than the revenue officer who constructively served the same; and (3) the revenue officer who constructively served the same shall make a written report of this matter which shall

form part of the docket of the case *(Commissioner of Internal Revenue vs. Starsmash Badminton Center Corporation, CTA EB No. 1379, March 23, 2017).*

PRIMARY PURPOSE STATED IN ARTICLES OF INCORPORATION IS INSIGNIFICANT IN DETERMINING TAXABLE INCOME; PROCEEDS RECEIVED BY A COLLECTING AGENT ARE INCOME OF THE PRINCIPAL. Primary Purpose in the Articles of Incorporation is insignificant. This must be so because with or without the said Primary Purpose, the ultimate issue to be addressed is whether or not there was a flow of wealth, or that taxpayer earned the subject income.

It must be emphasized that taxpayer can have a taxable income even when the activity which produces the said income is not stated in its Primary Purpose, or Secondary Purpose for that matter. The Court ruled that the said Primary Purpose cannot prevail over the nature of the transactions undertaken by the taxpayer.

The decision clearly states that the Toll Road Revenue, which is defined therein as the *"Toll collected by the Grantee from the Toll Roads"*, is the property of the principal. Thus, said revenue does not belong to collecting agent (taxpayer). And as corollary thereto, pertinent provisions of the OMA (Operation and Maintenance Agreement established the agent's role in the collection and remittance of the said Toll Road Revenue *(Commissioner of Internal Revenue vs. Pea Tollway Corporation, CTA EB No. 1372, March 23, 2017).*

FALSE OR FRAUDULENT RETURN MUST BE ACTUAL NOT CONSTRUCTIVE. It is quite easy for revenue officials to claim that there was falsity in the return, and mere falsity does not automatically apply the exceptional 10-year prescriptive period, unless there is proof that the return was made with design to mislead or deceive on the part of the taxpayer, or at the very least, show culpable negligence.

The false or fraudulent return as an exception to the period of limitation must be actual not constructive. It must be intentional, consisting of deception willfully and deliberately done or resorted to *(Commissioner of Internal Revenue vs. Transnational Plans, Inc., CTA EB Nos. 1337 and 1339, March 27, 2017).*

EXPORT SALE TO QUALIFY AS ZERO-RATED. The conditions that must be complied with in order for an export sale to qualify as zero-rated are as follows:

1. The sale was made by a VAT-registered person;
2. The buyer must be a BOI-registered manufacturer/producer; and
3. The buyer's products must be 100% exported as shown by a certification issued by the BOI *(Commissioner of Internal Revenue vs. Filminera Resources Corporation, CTA EB No. 1362, March 29, 2017).*

IMPORTANCE OF INPUT VAT INVOICES OR RECEIPTS FOR TAX REFUND. Needless to state, the phrase *"shall prove every minute aspect"* includes proving not only

the amount of input VAT for the period under consideration, but also the amount of input VAT carried over from the previous quarter, if any, since this latter aspect is greatly significant in determining whether the claimant is indeed entitled to the refund of the input VAT being sought. Accordingly, claimant should also present VAT invoices and receipts from previous quarter *(Air Liquide Philippines, Inc. vs. Commissioner of Internal Revenue, CTA EB No. 1377, April 4, 2017).*

CTA's JURISDICTION IS NOT LIMITED ON DISPUTED ASSESSMENTS ONLY. Pursuant to Section 7(a)(1) of RA No. 1125 and Section 3(a)(1), Rule 4 of the RRCTA, CTA has jurisdiction not only over *"disputed assessment"* but also on *"other matters"*.

It is settled that for the CTA to acquire jurisdiction over a "disputed assessment", the assessment must first be disputed by the taxpayer and ruled upon by the CIR to warrant a decision from which a petition for review may be taken to the CTA.

On the other hand, the term *"other matters"* has been ruled to include, but not limited to: review of the BIR's authority and decision to compromise; Prescription of the CIR's right to collect taxes; determination of the validity of a warrant of distraint and levy issued by the CIR and the validity of a waiver of the statute of limitations.

The Court in Division found that there was no disputed assessment for failure of the petitioner to file its protest within the time required, thus, dismissing the case before it for lack of jurisdiction. However, the Court *En Banc* finds that while there is no disputed assessment, the Court in Division should have assumed jurisdiction over *"other matters" (Lanao Del Norte Electric Cooperative [LANECO] vs. Commissioner of Internal Revenue, CTA EB No. 1452, April 5, 2017).*

Court of Tax Appeals (In Division) Decisions

THE BEST EVIDENCE RULE APPLIES ONLY WHEN CONTENTS OF THE DOCUMENTS IS NECESSARY BUT NOT REQUIRED IN PROVING THE EXISTENCE OF A DOCUMENT. Where the issue is only as to whether such document was actually executed, or exists, or on the circumstances relevant to or surrounding its execution, the best evidence rule does not apply and testimonial evidence is admissible. Any other substitutionary evidence is likewise admissible without need to account for the original[1].

A valid stipulation of fact constitutes a deliberate and clear statement which qualifies as an admitted fact. Such stipulation constitutes as a waiver of proof and the production of evidence is dispensed with. Henceforth, in view of the foregoing stipulation made by the parties, the issue of petitioner's failure to file an administrative claim for refund with the BIR already ceased to exist *(Air Philippines Corporation vs. Commissioner of Internal Revenue and Commissioner of Customs, CTA CASE NOS. 7966, 7990 and 8020, March 15, 2017).*

[1] Skunac Corporation and Alfonso F. Enriquez vs. Roberto S. Sylianteng and Caesar S. Sylianteng, G.R. No. 205879, April23, 2014.

A WRITTEN CLAIM FOR REFUND FILED WITHIN TWO (2) YEARS FROM THE DATE OF PAYMENT ARE REQUIREMENTS FOR LOCAL TAX REFUND. Contrary to the Ruling in *VALHALLA*[2] *case*, Petitioner Rock Steel Resources, Inc. (RSRI) was also one of the fourteen (14) holding companies [including Soriano Shares, Inc. (SSI)] formed by the Coconut Industry Investment Fund (CIIF) in 1983 for the purpose of owning and holding shares of stock of San Miguel Corporation (SMC). In 1986, the said 14 holding companies were sequestered by the Philippine Commission on Good Government (PCGG). Hence, RSRI shares including dividends and any income derived therefrom are owned by the government, thus not subject to local taxes.

For purposes of refund/tax credit of any erroneously levied and collected local tax, fee, or charge, certain conditions under Section 196 of the LGC, must first be satisfied, to wit:

1. A written claim for refund or tax credit filed by the taxpayer with the local treasurer; and
2. The court proceeding for refund filed within two (2) years from the date of the payment of the tax, fee, or charge or from the date the taxpayer is entitled to a refund or credit *(Rock Steel Resources, Inc. vs. City of Davao and Hon. Rodrigo S. Riola, CTA AC No. 158, March 16, 2017).*

WHEN THE TAXPAYER OPTED NOT TO SUBMIT SUPPORTING DOCUMENTS; ASSESSEMENT SHOULD NOT BE BASED ON PRESUMPTION; FUNDS RECEIVED BY BRANCH OFFICE FROM HOME OFFICE SHOULD NOT BE TREATED AS LOAN, THUS CANNOT BE SUBJECT TO DST. It is the taxpayer who determines what documents are relevant and necessary to support its protest. Should the taxpayer decide not to submit any supporting documents within sixty (60) days from the date of filing of the protest (Sec. 228 of the Tax Code), the same does not render the assessment final and executory, and the 180-day period shall be counted from the date of filing of the protest.

While it is axiomatic that all presumptions are in favor of the correctness of tax assessments, the assessment itself should not be based on mere presumptions no matter how logical the presumption might be. In order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption.

Petitioner-Philippine Branch Office and its Home Office are one and the same entity. Hence, the same entity cannot be a creditor or debtor of itself. Funds received by petitioner from its Home/Head Office should not be treated as loans subject to DST *(Modern Imaging Solutions, Inc. vs. Commissioner of Internal Revenue, CTA EB No. 8987, March 21, 2017).*

[2] (VALHALLA PROPERTIES LIMITED, INC. vs. CITY OF DAVAO AND HON. RODRIGO S. RIOLA, in his capacity as the city Treasurer of Davao City, CTA AC No. 154, March 2, 2017).

LIMITATION OF LGUs TO IMPOSE LOCAL TAX. As a rule, a province is authorized to impose a tax on "businesses enjoying a franchise" based on the incoming receipt, or realized, within its territorial jurisdiction. However, by way of a limitation, it cannot impose a tax on business enjoying a franchise operating within the territorial jurisdiction of any city located within the province. Likewise, a province cannot impose a tax with the transferee of a nationwide franchise, such as with TRANSCO, a transferee of NPC's nationwide franchise for the operation of transmission system and the grid *(The Province of Batangas, et. al. vs. National Transmission Commission, CTA AC Case No. 145, March 27, 2017).*

RESCISSION OF CONTRACT OF SALE RESULTS FOR A TAX REFUND. Capital gains tax is a tax on the gain from the sale of the taxpayer's property forming part of capital assets. Thus, in the absence of a gain from, or the absence of, a sale, disposition or conveyance of real property considered as capital assets, capital gains tax should not be imposed.

In case of rescission of a contract, any resulting gain will have the effect of not being realized, since the proceeds of the sale will eventually be returned to the seller. When a contract is rescinded, it is deemed inexistent, and the parties are returned to their *status quo ante.* Hence, there is mutual restitution of benefits received. In other words, rescission abrogates the contract from its inception and requires a mutual restitution of benefits received.

Considering the rescission of the contracts evidencing the subject transactions in these cases, the supposed gain that could have been realized therefrom had been abrogated, and the basis for the imposition of capital gains tax failed to exist. Correspondingly, the capital gains taxes paid must be refunded *(Spouses Eduardo X. Genato and Lydia M. Genato, et, al. vs. Commissioner of Internal Revenue, CTA CASE Nos. 8919 and 8920, March 30, 2017).*

REQUISITES OF TAX REFUND OR ISSUANCE OF TAX CREDIT CERTIFICATE DUE TO EXCESS AND UNUTILIZED CWT. Section 76 of the NIRC of 1997, as amended, jurisprudence and pertinent BIR Revenue Regulations provide that the following requisites must be further complied with in order that the subject claim may be granted:

1. The claim for refund must be filed within the two-year prescriptive period as provided under Sections 204 (C) and 229 of the NIRC of 1997, as amended;
2. The fact of withholding must be established by a copy of a statement duly issued by the payor (withholding agent) to the payee, showing the amount paid and the amount of tax withheld therefrom; and
3. The income upon which the taxes were withheld must be included in the return of the recipient *(Sonoma Services, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 9026, April 5, 2017).*

TAX EXEMPTION GRANTED UNDER RA 7459 IS AVAILABLE ONLY TO THE INVENTOR HIMSELF. Sec. 6 of RA 7459 provides that *"To promote, encourage, develop and accelerate commercialization of technologies developed by local researchers or adapted locally from foreign sources including inventions, any income derived from these technologies shall be exempted from all kinds of taxes during the first ten (10) years from the date of the first sale, x x x Provided, that this tax exemption privilege pertaining to invention shall be extended to the legal heir or assignee upon the death of the inventor."*

As the patentee, the inventor's invention is protected. But even as the inventor has the exclusive right to make use, and vend the thing patented, and consequently to preclude others from exercising like privileges, he may give his consent and allow third parties to copy and profit from his patented invention. The tax exemption privilege, however, remains exclusive to him. To reiterate, the exemption on income derived from the invention by the inventor, being personal to him, may only be extended to his legal heirs or assignees upon his death.

Had the "inventor" opted to convert itself to a corporate entity which, in turn, obtained the corresponding accreditation from the Filipino Inventors Society (FIS), the corporate entity would then be entitled to the tax exemption as, in essence, the corporation becomes the "inventor". In the case at bar, however, it is Dr. Hortaleza who remains the "inventor" while petitioner undeniably stands as a party separate and distinct from the inventor. Mere invocation of the vague concept of "commercialization of invention" does not *per* se justify a blind disregard of settled principles regarding the nature of a juridical entity as possessing a personality separate from its corporate officers and stockholders *(Splash Corporation vs. Commissioner of Internal Revenue, CTA Case No. 8483, April 6, 2017).*

BIR Issuances

REVENUE MEMORANDUM ORDER NO. 8-2017 issued on March 28, 2017 prescribes the procedures for claiming tax treaty benefits for dividend, interest and royalty income of non-resident income earners.

The mandatory Tax Treaty Relief Applications (TTRA) shall no longer be filed with the International Tax Affairs Division (ITAD). In lieu of the TTRA, preferential treaty rates for dividends, interests and royalties shall be applied and used outright by the withholding agents upon submission of a Certificate of Residence for Tax Treaty Relief (CORTT) Form by the non-resident. The use of the preferential rates shall be done through Withholding Final Taxes at applicable treaty rates.

Non-residents are allowed to use the prescribed certificate of residency of their country of residence. However, non-residents are still required to accomplish A, B and C of Part I of the CORTT Form, for monitoring purposes. If the prescribed certificate of residency is used, it shall be attached to the CORTT Form.

For dividend income purposes, the CORTT Form shall be valid for two (2) years from date of issuance. However, if a prescribed certificate of residency of the country of residence is used, the date of validity of the latter document will prevail over the two (2) year period given. For interest and royalty income purposes, the CORTT Form shall be valid per contract.

Withholding agents or income payors can withhold at a reduced rate or exempt the non-resident based on the duly accomplished CORTT Form submitted to them. Failure to submit a CORTT Form to the withholding agent/income payor would mean that the non-resident is not claiming any tax treaty relief and, therefore, such income shall be subject to the normal rate provided under the National Internal Revenue Code (NIRC) of 1997, as amended.

The ITAD and Revenue District Office (RDO) No. 39 shall be in charge of receiving and recording information stated in the CORTT. Compliance check and post reporting validation on Withholding Tax obligations and confirmation of appropriateness of availment of treaty benefits shall be part of BIR's regular audit investigations conducted by the RDO where the domestic withholding agent is registered.

Any violation of the provisions of this Order shall be subject to the penalties provided in Section 250 and other pertinent provisions of the NIRC, as amended.

Failure to supply accurate and complete information in the CORTT Form and BIR Forms 1601F and 1604-CF will render the non-resident and withholding agent non-compliant. Noncompliance shall be a ground for the denial of the use of preferential treaty rates and the disallowance of the pertinent expense/s of the withholding agent.

Furthermore, withholding agents/income payors that willfully fail to pay any tax, make a return, keep any record, or supply correct and accurate information or withhold or remit taxes withheld, or aids or abets any manner to evade any such tax or the payment thereof shall be liable under Sections 251 and 255 of the NIRC.

Non-residents who already filed TTRAs with the BIR on dividend, interest and royalty income prior to the effectivity of this Order will be allowed to use the tax treaty rates invoked based on effective tax treaties of the Philippines with other countries. However, the same will be subjected to compliance check.

For existing TTRAs with the BIR with supporting documents, ITAD will use the submitted information in creating a database for purposes of tax treaty relief availment. If the requisite certificate of residency is not available in the submitted documents, the withholding agents/income payor will be requested to submit the same.

This Order shall take effect after 90 days upon signing to afford non-resident income earners time to secure the required CORTT Form or prescribed certificate of residency from their respective countries of residence.

REVENUE MEMORANDUM CIRCULAR NO. 18-2017 issued on March 1, 2017 circularizes Memorandum No. 008-2017 regarding issuance of Certificate of Tax Exemption to service cooperatives.

Based on the said Memorandum, service cooperatives must not be totally prohibited from availing of the tax incentives provided under Republic Act (RA) No. 9520, provided that they are duly registered with the Cooperative Development Authority (CDA)and have been issued Certificates of Good Standing to show that they are bona fide cooperatives falling under RA No. 9520. Provided, however, that these cooperatives will be subject to post audit verification to check on whether they are just being used as a tax shield to avoid or evade payment of taxes.

Service cooperatives that fully comply with the guidelines of the CDA may be given tax exemption certificates provided that they also submit the documents required by the BIR under Revenue Memorandum Order No. 76-2010 dated September 27, 2010.

REVENUE MEMORANDUM CIRCULAR NO. 27-2017 issued on March 28, 2017 clarifies that the tax on the sale, exchange or other disposition of real property (whether classified as capital or ordinary asset) shall be based on the gross selling price or current fair market value, as determined in accordance with Section6(E) of the Tax Code, whichever is higher.

Nothing in the Tax Code or any of its implementing guidelines provide for the application of a comparative sale or any other tax base. Thus, in no case shall revenue officials or employees apply any other basis for the imposition of Capital Gains Tax/Income Tax/Withholding Tax on sale, exchange or other disposition of real property, except as provided in this Circular, as it has no legal basis.