TAX MANAGEMENT ASSOCIATION OF THE PHILIPPINES, INC.

TMAP TAX UPDATES FOR FEBRUARY 2015

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SUPREME COURT DECISION

Rohm Apollo Semiconductor Philippines vs. Commissioner of Internal Revenue *(G.R. No. 168950, January 14, 2015)*

This is a claim for refund of petitioner (Rohm Apollo) of unutilized input VAT in the amount of P30.3 million paid on capital goods. The close of the taxable quarter when the purchases were made was September 30, 2000. The petitioner filed with the BIR an administrative claim for the refund of the unutilized input VAT on December 11, 2000. The CIR had a period of 120 days, or until April 10, 2001, to act on the claim. This 120-day period lapsed without any action by the BIR on the claim.

The petitioner filed a petition for review with the CTA on September 11, 2002. The CTA first division denied the petition, which the CTA en banc affirmed, due to the failure of the petitioner to submit its tax return for the third quarter of 2001. The CTA in Division and CTA en banc both held that failure to present the VAT returns for the subsequent taxable year proved to be fatal to the claim for a refund/tax credit, considering that it could not be determined whether the amount being claimed to be refunded remained unutilized. Petitioner appealed the decision of the CTA en banc to the Supreme Court.

Ruling: The Supreme Court denied the petition on the grounds that (1) the judicial claim was filed out of time and (2) the 30-day period to appeal is mandatory and jurisdictional, citing the “landmark case” of *Commissioner of Internal Revenue v. San Roque Power Corporation.*

The CIR’s failure to act on the administrative claim should have been treated as a denial of the claim and petitioner would have had 30 days from April 10, 2001, or until May 10, 2001, to file a judicial claim with the CTA. But petitioner filed a petition for review with the CTA only on September 11, 2002. The judicial claim was thus filed late. The case of *CIR v. Aichi Forging Company of Asia, Inc.* [G.R. No. 184823, October 6, 2010] clarified that it is only the administrative claim that must be filed within the 2-year prescriptive period. The *San Roque* case, on the other hand, has ruled that the 30-day period always applies, whether there is a denial or inaction on the part of the CIR. The 30-day period is a 1997 Tax Code innovation that does away with the old rule where the taxpayer could file a judicial claim when there is inaction on the part of the CIR and the two-year statute of limitations is about to expire.

As a general rule, the 30-day period to appeal is both mandatory and jurisdictional. The only exception to this general rule is when BIR Ruling No. DA-489-03 was still in force, that is, between December 10, 2003 and October 5, 2010. The BIR Ruling excused premature filing, declaring that the taxpayer need not wait for the lapse of the 120-day period before it could seek relief with the CTA by way of Petition for Review. The *San Roque* case ruled out the application of the BIR Ruling to cases of late filing. In sum, premature filing is

allowed for cases falling during the time when the BIR Ruling was in force; nevertheless, late filing is absolutely prohibited even for cases falling within that period.

The petitioner in this case filed its judicial claim with the CTA on September 11, 2002. This was before the issuance of BIR Ruling No. DA-489-03 on December 10, 2003. Thus, the petitioner could not have benefited from the BIR Ruling, since its situation is not one of premature filing but of late filing.

COURT OF TAX APPEALS EN BANC DECISIONS

The City of Makati vs. Trans-Asia Power Generation Corporation *(CTA EB Case No. 1086 dated January 21, 2015)*

Respondent Trans Asia is engaged in the business of building, erecting, owning, installing, operating, maintaining, selling and leasing power generation plants and purchasing, importing and leasing power generation, transmission, telecommunications, transportation and other kinds of equipment. For the years 1996 to 2005, petitioner Makati City classified the respondent as a "manufacturer/producer" for local business tax (LBT) purposes. In 2006, Makati City changed respondent's classification to "services-other contractor" which resulted in an increase in its LBT payments and which it paid under protest. Respondent filed its claim for refund with the RTC Makati.

RTC Makati ruled that respondent is engaged in the business of transforming fuel into electricity and selling to end-user which is consistent with the term "manufacturer/producer". The decision of the RTC Makati was affirmed by the CTA First Division. Petitioner appealed the decision to the CTA en banc.

Ruling: The CTA en banc ruled that based on the definitions of "manufacturer" and "contractor" provided under Section 131(h) and (o) of the Local Government Code of 1991 and Section 3A01(ll) of the Makati Revenue Code, the respondent is a "manufacturer/producer" and not a "contractor". Respondent buys bunker fuel as its chief raw material and converts it through mechanical and chemical processes to electricity. Then it sells the electricity generated to Hi Cement. While Hi Cement initially owned the power plant, the plant was later sold to respondent under their agreement. As the owner of the plant, respondent needs to manage, operate, maintain and repair the same for a fee. Its receipt of this fee does not make it a "contractor". The additional undertakings are merely ancillary to and in aid of its primary function as a producer of electricity and are not services rendered to Hi Cement, but rather are additional undertakings to ensure the safe and continuous delivery of the electricity sold. Likewise, the classification of the respondent by the BOI under "Infrastructure & Service-oriented Industries" is not definitive of its real business purpose.

National Grid Corporation of the Philippines (NGCP) vs. The Central Board of Assessment Appeals (CBAA), The Local Board of Assessment Appeals of Cabanatuan City and the City Assessor of Cabanatuan City (*CTA EB Case No. 1052*); **National Grid Corporation of the Philippines (NGCP) vs. The Central Board of Assessment Appeals (CBAA), The Local Board of Assessment Appeals of Cabanatuan City and the City Treasurer of Cabanatuan City** (*CTA EB Case No. 1053*), *dated January 28, 2015*

The first issue raised in this consolidated cases is whether or not petitioner NGCP is exempt from the payment of real property tax (RPT) on the subject properties (land and power transmission facilities) pursuant to Section 9 of RA 9511 (NGCP's legislative franchise).

Section 9 of RA 9511 provides: "xxx the Grantee xxx shall pay a franchise tax equivalent to three percent (3%) of all gross receipts derived by the Grantee from its operations under this franchise. Said tax shall be lieu of income tax and any and all taxes, duties, fees and charges of any kind, nature or description xxx; Provided, That the Grantee xxx shall be liable to pay the same taxes on their real estate, buildings and

personal property **<u>exclusive of this franchise</u>**, as other corporations are now or hereby may be required by law to pay xxx.

<u>Ruling</u>: The CTA en banc reiterated its ruling in a number of cases involving the same petitioner that NGCP is <u>not exempt</u> from the payment of real property tax on its real estate, buildings and personal property pursuant to the second paragraph of RA 9511. The CTA en banc based its decision on the ruling of the Supreme Court in the case of *Digital Telecommunications Philippines, Inc. v. City Government of Batangas, et al.* [G.R. 156040, December 11, 2008] ("Digitel Case"). The franchise of Digitel contained the phrase "exclusive of this franchise" which is also found in Section 9 of RA 9511 (NGCP's franchise). The Supreme Court ruled that the phrase "exclusive of this franchise" only means that the term 'personal property' preceding the phrase 'exclusive of this franchise' shall not include petitioner's franchise, which is an intangible personal property. The Supreme Court ruled in the Digitel Case as follows:

> "We rule that the phrase 'exclusive of this franchise' simply means that petitioner's franchise shall not be subject to the taxes imposed in the first sentence (of Section 5). The first sentence lists the properties that are subject to taxes and the list (should) exclude the franchise. xxx No matter how one reads the first sentence, there is no grant of exemption, express or implied, from realty tax. In fact, the first sentence expressly imposes taxes on both real and person properties, excluding only the intangible personal property that is the franchise. xxx Stated differently, the first sentence (of Section 5) provides that petitioner shall pay tax on its real properties as well as on its personal properties but the franchise, which is an intangible personal property, shall not be deemed personal property."

The CTA en banc also cited its ruling in the case of *NGCP v. Ofelia M. Oliva* (CTA EB Case No. 849, November 13, 2013) that while petitioner NGCP claims exemption under the "in lieu of all taxes" clause provided under the first paragraph of RA 9511, it is still nonetheless liable to pay real property tax under the second paragraph thereof. The second paragraph provided the <u>exception</u> to the first paragraph by qualifying that the petitioner shall be liable to pay taxes on its real estate buildings and personal property, as other corporations are now or hereby may be required by law to pay.

Petitioner NGCP further argued that if the subject properties are not exempt from the payment of real property tax, alternatively, they must be classified as "Special Class" and the assessed value to be used shall not exceed 10% of the fair market value (FMV) as what had been previously applied to compute the value during the operation of TRANSCO, and the 100 MVA transformer should be classified as "Exempt since TRANSCO retained the ownership of the subject property, with NGCP being only the beneficial user thereof.

On this issue, the CTA en banc ruled that NGCP cannot avail of the special tax rate of 10% as the same can only be availed of by GOCCs engaged in the generation and transmission of electric power. NGCP is not a GOCC but a privately owned corporation and is engaged in the transmission of electricity only and not in the generation thereof. NGCP cannot claim tax exemption if it performs only one of these functions.

Similarly, the transformer cannot be classified as "Exempt" simply because NGCP has mere "beneficial" use of the property. The Supreme Court has explained in the case of *GSIS v. City Treasurer and City Assessor of the City of Manila* (G.R. No. 186242) that the tax exemption a property of the Republic or its instrumentality carries ceases only if, as stated under Sec, 234(a) of the LGC of 1991, 'beneficial use thereof has been granted, for a consideration or otherwise, to a taxable person,' A GOCC may lose that status of being an "exempt entity" when it contracts its beneficial use to a taxable person.

Northwind Power Development Corporation (NPDC) vs. CIR (*CTA EB Case No. 1132*) and **CIR vs. Northwind Power Development Corporation (NPDC)** (*CTA EB Case No. 1141*), *dated January 29, 2015*

The first issue in this case is the application/interpretation of the provision relating to the claim for input VAT on depreciable goods under the proviso of Sec. 110(A) of the Tax Code, as implemented by Section 4.110-3 of RR No. 16-2005 as amended. The said proviso of Sec. 110(A) of the Tax Code reads as follows:

> "xxx Provided, that the input tax on goods purchased or imported in a calendar month for use in trade or business for which deduction for depreciation is allowed under this Code, shall be spread evenly over the month of acquisition and the fifty-nine (59) succeeding months if the aggregate acquisition cost for such goods excluding the VAT component thereof, exceeds One million pesos (P1,000,000); *provided however*, That if the estimated useful life of the capital good is less than five (5) years, as used for depreciation purpose, then the input VAT shall be spread over such a shorter period. xxx"

The CTA First Division ruled that out of the total input VAT incurred by NPDC on capital goods exceeding P1,000,000 purchased for the 3rd quarter of 2008, only the amount pertaining to the amortized portion of the input VAT is creditable for the third and fourth quarters for the taxable year 2008. NPDC objected to this ruling on the ground that the amortization of input VAT over the useful life of the capital goods imported or purchased whose aggregate value exceeds P1,000,000 under Section 110-3 of RR No. 15-2005 should apply only if the input VAT thereon is credited against the output VAT, and should not apply to refund claims of input VAT paid on purchases or importation on capital goods which are directly attributable to zero-rated sales. To rule that Section 4.110-3 applies also to purchases or importation of goods directly attributable to zero-rated sales will violate the 2-year rule on the filing of a claim for refund under Section 112 of the 1997 NIRC as amended.

<u>Ruling on the first issue</u>: The CTA en banc affirmed the decision of the First Division on this issue, to wit:

> "Input VAT on domestic purchase or importation of goods or properties of a VAT-registered person shall be creditable against the output VAT of the purchaser and importer upon consummation of sale and on importation of goods or properties and upon payment of VAT prior to the release of the goods upon customs custody, respectively. However, (with respect to) the input VAT on goods purchased or imported, for use in trade or business for which deduction for depreciation is allowed under the 1997 NIRC, and the aggregate acquisition cost of which exceeds P1,000,000 excluding the VAT component thereof, the claim of input tax shall be spread evenly and creditable over a period of 60 months starting from the month of acquisition or the estimated useful life of the capital goods, whichever is shorter."

The second issue in this case related to the disallowance by the CTA First Division of certain amounts as part of NPDC's zero-rated sales on the ground that (1) such amount is uncollected, or (2) such amount is billed but collected in a different quarter.

<u>Ruling on the second issue</u>: On this issue, the CTA en banc agreed with the CTA First Division as follows:

> "xxx as long as the amount of P7,775,084.14 is uncollected, the same cannot form part of petitioner's zero-rated sales. In other words, such amount will only be considered as part of petitioner's zero-rated sales at the time the same is actually or constructively received.
>
> In the same vein, the amount of P30,6634,465.59 was correctly disallowed for being made outside the period of the claim. It is here noted that while it may be true that the same is billed during the last quarter of 2008, it was only collected in the first quarter of 2009. Thus, such amount should form part of petitioner's zero-rated sales in the first quarter of 2009, not in the 4th quarter of 2008."

The third issue related to the ruling of the CTA First Division which restricted the refundable input VAT at the rate of 63.6352134% which is arrived at by dividing properly substantiated zero-rated sales of

P67,213,371.01 with the total zero-rated sales per VAT returns of P105,622,920.74. NPDC pointed out that the apportionment mechanism under Sec. 112(A) of the NIRC and implemented by Section 4.110-4 of RR No. 16-2005 as amended, only applies to situations where the taxpayer is involved in mixed transactions, i.e. VAT and Non-VAT transactions. Even then, the apportionment is only allowed if input tax cannot be clearly attributed to either a VAT taxable or VAT exempt transaction.

Ruling on the third issue: On this issue, while the CTA en banc agreed with NPDC on apportionment principle under Sec. 112(A) of the of the NIRC and implemented by Section 4.110-4 of RR No. 16-2005 as amended, it nonetheless affirmed the view of the CTA First Division that "in this case, limiting the refundable amount to 63.6352134% is proper considering that only this portion of the declared zero-rated sales is properly substantiated, and consequently, only the input VAT attributable thereto is refundable in accordance with Section 112 of the 1997 NIRC as amended".

The last issue related to certain amount of unutilized input VAT being claimed for refund in respect of which specific infirmities were cited by the CIR on some of the receipts or sales invoice of NPDC (e.g. "VAT" was not indicated in the receipt or invoice, failure to specify quantity, unit cost, description of goods, etc.).

Ruling on the fourth issue: On this matter, the CTA en banc affirmed the disallowance of the refund of such accounts with the cited infirmities and more particularly ruled as follows:

(1) Failure to print the word "zero-rated" on the VAT invoices or official receipts is fatal in claims for refund or credit of input VAT on zero-rated sales, even if the claims were made prior to the effectivity of R.A. 9337.

(2) The refund of input VAT on purchase of goods supported by VAT official receipts instead of sales invoice shall be disallowed in accordance with the ruling of the Supreme Court in *Kepco Philippines Corporation v. CI*R ([G.R. No. 181858, November 24, 2010]. A VAT invoice is necessary for every sale, barter or exchange of goods or properties while a VAT official receipt properly pertains to every lease of goods or properties or every sale, barter or exchange of services.

(3) The taxable year in question in this case is taxable year 2008. Thus, RR No. 18-2012, which imposed a different rule on printing of receipts, cannot be applied retroactively against NPDC which printed its receipts in accordance with RMO No. 83-99.

Commissioner of Internal Revenue vs. Nagase Philippines Corporation (*CTA EB No. 1048 dated January 29, 2015)*

Respondent Nagase Philippines Corporation ("Nagase") filed its Income Tax Return for taxable year 2003 on April 14, 2004. Nagase received from the CIR a Formal Assessment Notice (FAN) dated September 12, 2007 on September 13, 2007. On October 10, 2007, Nagase filed its protest to the FAN which was received by the CIR on October 11, 2007. In its protest, Nagase requested that the assessment be reconsidered, withdrawn and cancelled. In May 2008, Nagase filed a Petition for Review before the CTA and the CTA in Division granted the petition, cancelling the assessment including the 50% surcharge and interest. Petitioner CIR appealed the decision to the CTA en banc.

The CIR argued that Nagase requested for reinvestigation and it was this request for a "reinvestigation" which led to the issuance of the FAN only on September 12, 2007.

Ruling: The CTA en banc ruled that what was requested by Nagase was a reconsideration of the assessment, not a reinvestigation. The CTA en banc cited the ruling of the Supreme Court in the case of *CIR v. Phil. Global Communication* [G.R. No. 167146, October 31, 2006] which differentiated between a "reconsideration" and a "reinvestigation", to wit:

"xxx xxx xxx

> (a) Request for Reconsideration – refers to a plea for a re-evaluation of an assessment on the basis of existing records without need of additional evidence. It may involve both a question of fact or law or both.
>
> (b) Request for Reinvestigation – refers to a plea for re-evaluation of an assessment on the basis of newly-discovered evidence or additional evidence that a taxpayer intends to present in the investigation. It may also involve both a question of fact or law or both.
>
> xxx A re-evaluation of existing records which results from a request of reconsideration does not toll the running of the prescription period for the collection of an assessed tax. Section 271 of the Tax Code distinctly limits the suspension of the running of the statute of limitations to instances when **reinvestigation** is requested by a taxpayer and is granted by the BIR. xxx"

Since it was clear that what requested by the taxpayer in this case is a reconsideration, which did not toll the running of the prescriptive period of assessment, the right of the CIR to assess has prescribed.

Commissioner of Internal Revenue vs. Fabtech Export Industries, Inc. (*CTA EB No. 1176 dated January 28, 2015*)

Though petitioner CIR alleged that she issued a PAN and sent it through registered mail, she failed to present evidence to prove its existence and the due issuance and receipt of the alleged PAN by the petitioner. The CIR merely attached an alleged photocopy of the PAN and an alleged mailing envelope containing the said PAN to the present Petition for Review.

Respondent argued that the Court should not consider any evidence which has not been formally offered. Further, the issuance of the Final Letter of Demand (FLD) violated its right to due process because petitioner CIR still issued the same notwithstanding its previous findings of no liability.

Ruling: The Court cannot give probative value to the alleged PAN and mailing envelope attached to the Petition for Review considering that the same were not formally offered during trial in violation of Section 34, Rule 132 of the Revised Rules of Court. A careful perusal of the BIR record shows that the original copy of the mailing envelope is tucked inside the folder, still sealed and unopened. This clearly shows that the PAN dated February 25, 2011 contained inside the envelope was not received by the respondent.

For failure of the petitioner to prove that the PAN was mailed or sent to the respondent and that the said PAN was received by the respondent, and considering further than the original copy of the envelope containing the PAN is in the BIR records, the CTA in Division did not err in ruling that no PAN was issued against respondent. In the absence of a valid PAN, respondent's right to due process was violated, rendering the assessment null and void.

Well settled is the rule that a void assessment bears no fruit and it cannot give rise to an obligation to pay deficiency taxes. Consequently, there is no factual and legal basis for the CIR to formally demand the payment or to collect the deficiency taxes which are not covered by a valid PAN.

COURT OF TAX APPEALS (IN DIVISION) DECISIONS

Polymer Products (Phil.), Inc. vs. Commissioner of Internal Revenue (*CTA Case No. 8299 dated January 30, 2015*)

Records show that petitioner (Polymer) received a copy of the PAN dated December 17, 2010 on January 3, 2011. Petitioner therefore had 15 days or until January 18, 2011 within which to file a reply or protest

against the PAN. However, prior to the lapse of the 15-day period, or on January 17, 2011, petitioner received a Formal Letter of Demand (FLD) and Assessment Notices dated January 7, 2011. Notably, the BIR did not even wait for petitioner to reply to the PAN before issuing the FLD and the Assessment Notices.

Ruling: Section 228 of the NIRC of 1997, as amended, and Section 3.1.2 of RR No. 12-99 prescribe a fifteen-day period from receipt of a PAN within which a taxpayer may respond thereto. Indubitably, the right of the taxpayer to respond to a PAN is an important part of the due process requirement in the issuance of a deficiency tax assessment. In wantonly disregarding petitioner's right to be heard with regard to its positions or arguments against the PAN, the BIR clearly violated petitioner's right to due process. To be sure, procedural due process is not satisfied with the mere issuance of a PAN, *sans* giving the taxpayer an opportunity to respond thereto. (The Supreme Court cases of *CIR vs. Metro Star Superama, Inc.* [G.R. No. 185371, December 8, 2010] and *Pilipinas Shell Petroleum Corporation v. CIR* [G.R. No. 172598, December 21, 2007, were cited).

In a number of cases, the Court has declared void any assessment that fails to comply with the due process requirement (citing *A. Brown Co., Inc. vs. CIR* [CTA Case No. 6357, June 7, 2004], *Puratos Philippines, Inc. vs. CIR* [CTA Case No. 6980, October 4, 2010] and *Yumex Philippines Corporation vs. CIR* [CTA Case No. 8331, November 28, 2013]). Considering the palpable violation of petitioner's right to procedural due process, the FLD and the Assessment Notices dated January 7, 2011 issued in this case, being fatally infirmed (sic), should be considered void and for that reason, their cancellation and withdrawal is warranted.

SVI Technologies, Inc. vs, Commissioner of Internal Revenue (*CTA Case No. 8488 dated February 2, 2015*)

For the taxable year 2006, petitioner first received a PAN on December 18, 2009 to which it replied through a letter dated January 6, 2010. The petitioner next received a Final Notice Before Seizure (Final Notice) on March 12, 2012. On April 12, 2012, petitioner received a Warrant of Distraint and/or Levy (WDL) seeking collection of alleged deficiency taxes stated in the Final Notice. On May 11, 2012, petitioner filed its Petition for Review to the CTA.

Petitioner raised the issue that its tax liability has not been established for failure of the BIR to issue a FAN/FLD. The respondent CIR alleged that she sent through registered mail a Formal Letter of Demand and Details of Discrepancies (FLD) which were received by the Post Office on January 4, 2010 presumed to have been received by the petitioner.

Ruling: In the absence of a valid service of the alleged FLD to the petitioner and proof that it was duly received by the latter or its duly authorized agent, the subject deficiency assessments cannot be considered as final, executory and demandable. Accordingly, the FLD and the WDL are cancelled and set aside.

Based on the allegation of the petitioner that it did not receive a FAN/FLD covering the alleged deficiency taxes, the burden to prove that said FAN/FLD was issued and received by the petitioner shifts to the respondent (*Barcelon Roxas Securities vs. CIR* [G.R. No. 157064, August 7, 2006]). The presumption of regularity in the ordinary course of mail is merely disputable, and when the taxpayer-addressee denies the receipt of the disputed assessment—delivered and served through registered mail-- issued by the respondent against the taxpayer-addressee, the burden of proof is now shifted to the respondent to present and offer evidence to prove that the same was duly delivered and received by the taxpayer-addressee (*People of the Philippines vs. Joseph Typingco* [CTA EB Criminal Case No. 021, September 27, 2013]. Respondent failed to prove that the alleged FLD with attached Details of Discrepancies dated January 4, 2010 were indeed served and received by the petitioner or its duly authorized agent. It is pertinent to note that even registry return receipts contain a proviso that "[a] registered article must not be delivered to anyone but the addressee, or upon the addressee's written order, in which case the authorized agent must write the addressee's name on the proper space and then affix legibly his own signature below it." Also, it is a rule that receipts for

registered letters and return receipts do not prove themselves; they must be properly authenticated in order to serve as proof of receipt of the letters".

The respondent's right to assess for income tax, VAT and EWT has already prescribed. The 3-year period to assess has lapsed (i) as of April 15, 2010, for income tax; (ii) as of January 25, 2010 for VAT based on the quarterly VAT returns; and (iii) as of January 10, 2010, for EWT based on the last monthly return.

Farcon Marketing Corp. vs. Bureau of Internal Revenue (*CTA Case No. 8367 dated February 3, 2015*)

Petitioner (Farcon) received from the BIR revenue officer a letter dated June 3, 2010 requesting for the submission of books of accounts and other accounting records necessary for examination in connection with a Tax Verification Note (TVN) issued against the petitioner. In a letter dated June 3, 2010, petitioner replied that this is not possible because its books of accounts and records were destroyed and damaged by typhoons *Ondoy* and *Pepeng*. After receiving a PAN from respondent BIR on March 28, 2011, the petitioner, in a letter dated April 15, 2011, requested for 30 days to reconstruct its accounting records and to dispute or protest its tax liability. On April 28, 2011, petitioner received a FAN dated April 11, 2011. Petitioner protested the FAN but the protest was denied.

The issue in this case is whether the deficiency assessment has valid factual basis in relation to the Best Obtainable Rule in light of the destruction of the records of the petitioner.

Ruling: Section 6(B) of the NIRC as amended states that "when a report required by law as basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by law or rules and regulations or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable". Section 2.3 of Revenue Memorandum Circular No. 23-2000 (RMO No. 23-2000) also states that "an assessment based on best evidence obtainable is justified when any of the grounds provided by law is clearly established, viz: (1) the report or records requested from the taxpayer are not forthcoming, i.e., the records are lost; xxx."

While the law allows wide latitude to respondent in resorting to the Best Evidence Obtainable Rule, such power is not without limitation. The best evidence obtainable does not include mere photocopies of records/documents (*CIR vs. Hantex Trading Co., Inc.* [G.R. No. 136975, March 31, 2005]. The assessment must also be based on actual facts, citing the case of *Collector of Internal Revenue vs. Benipayo*. In this case, a perusal of the records shows that respondent failed to present before the Court any evidence which it supposedly procured by resorting to the Best Evidence Obtainable Rule, as basis for the deficiency assessment against petitioner.

Applying the rule laid down by the Supreme Court in the *Hantex* case, respondent could have determined petitioner's tax liability through estimation considering the absence of the latter's accounting records, which were destroyed by the typhoons *Ondoy* and *Pepeng.* However, such estimation should be based on sufficient evidence. Thus, as aptly held by the Supreme Court in the Hantex case citing the Benipayo case, the presumption of correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption. Since respondent failed to present any evidence which it used as basis or foundation for the subject deficiency assessment, the Court finds that respondent's assessment is void for lack of merit. Accordingly, the deficiency tax assessment as evidenced by the FAN is cancelled and withdrawn.

Nickel Asia Corporation vs. Commissioner of Internal Revenue (*CTA Case No. 8662 dated February 2, 2015*)

The petitioner (Nickel Asia) was served a PAN for alleged deficiency VAT based principally on management fees received from sale of services by the petitioner to four BOI-registered mining firms which is subject to zero-rated VAT under Section 4.106.5(a)(5) of RR No. 16-2005. The last sentence/proviso of such section states:

"xxx Provided, finally that sales of goods, properties or **services** made by a VAT-registered supplier to a BOI-registered manufacturer/producer whose products are 100% exported are considered as export sales. xxx"

It will be noted that Section 4.106.5(a)(5) of RR No. 16-2005 is captioned "Zero-Rated Sales of Goods or Properties".

After replying to the PAN, petitioner received from respondent an FLD with FAN which the petitioner contested through a protest letter. Thereafter, petitioner received a Final Decision on Disputed Assessment (FDDA) from the respondent for alleged deficiency VAT arising from the above management fees. Considering that the protest letter of the petitioner to the respondent were anchored on its entitlement to zero percent (0%) rate on the sale of its services to the 4 BOI-registered mining firms pursuant to Section 4.106.5(a)(5) of RR No. 16-2005, the respondent posited in the FDDA that the inclusion of "**services**" in the last-quoted sentence of Section 4.106.5(a)(5) of RR No. 16-2005 was an error and thus cannot be given effect; therefore, the petitioner is not entitled to the zero-percent (0%) VAT rate. The FDDA was signed by OIC-Assistant Commissioner Misajon.

Ruling: It is the Secretary of Finance who possesses the mandate to issue rules and regulations implementing the amended VAT provisions. At the time that OIC-Assistant Commissioner Misajon issued the FDDA, Section 4.106.5(a)(5) of RR No. 16-2005 clearly included "services" in the enumeration of items that are deemed to be "export sales" subject to zero percent (0%) rate, when sold by a VAT-registered supplier to a BOI-registered manufacturer/producer whose products are 100% exported. Whether the inclusion of the "services" among "export sales" subject to zero percent (0%) VAT was "erroneous" or not is a point distinct from the fact of inclusion.

OIC-Assistant Commissioner Misajon, thus, should have applied that provision of RR No. 16-2005, instead of subjecting it to interpretation and twisting it to suit his opinion or belief. Secondly, he was without authority to interpret tax laws. While it is true that respondent CIR has clarified that "any reference to sale of services under the aforementioned section is erroneous and unmistakably in conflict with the governing law, specifically Section 108 of the Tax Code," this pronouncement was made only in her Memorandum, rather than in a ruling, and has not at all changed the text of Section 4.106.5(a)(5) of RR No. 16-2005, which can only be changed by the Secretary of Finance upon the CIR's recommendation.

Accordingly, this Court cannot extend the presumption of correctness to an FDDA that openly deviates from and refuses to apply a provision of a duly–issued revenue regulation, especially where the officers who issued the FDDA interpreted tax laws without authority. Moreover, it is settled that a taxpayer's reliance in good faith on revenue rules and regulations cannot be prejudiced by subsequent changes in the interpretation thereof. It thus becomes manifest that the FDDA subject of this case cannot lawfully and justly be given effect.

BSJ Fishing and Trading, Inc. vs. Hon. Napoleon Morales in his capacity as Commissioner of the Bureau of Customs (BOC) (*CTA Case No. 8026 dated February 3, 2015)*

The subject cases were the result of respondent BOC's exercise of his "visitorial power" granted pursuant to Section 2536 of the Tariff and Customs Code of the Philippines (TCCP). BOC officials conducted the inspection/examination of 4 fishing vessels and petitioner BSJ's compound where smuggled petroleum products were suspected to be stored. As petroleum products were found therein, respondent demanded the presentation of evidence of payment of duties and taxes on suspected foreign articles kept in storage but no such evidence was presented. The OIC District Collector of the Port of Manila ordered the forfeiture of the seized diesel fuel, which decision was affirmed by the BOC Commissioner.

<u>Ruling</u>: BOC had basis to seize the diesel fuel and subject it to forfeiture proceedings. While petitioner argued that the seized fuel were locally purchased and that the duties and taxes thereon were paid, the documents presented in court can only prove that petitioner made diesel fuel purchases from Petron Corporation within the period covered but does not prove that these fuel purchases are the same diesel fuel that were seized from the petitioner.

Sales invoices or the certification as to the sales invoices alone are not sufficient evidence to prove that indeed the seized diesel fuel were locally purchased or that the purchases covered by these invoices are the same diesel fuel that were seized.

There is unlawful importation or smuggling if goods are entered into the country without the proper duties and taxes having been paid. Considering that petitioner failed to present evidence of payment of duties and taxes on the seized diesel fuel, it follows that petitioner failed to establish the fact of its lawful importation. Under Section 2530 in relation to Section 3601 of the TCCP, the seized diesel fuel including the vessels, vehicles or any conveyances used for its transport shall be forfeited in favor of the Government.

BIR RULINGS

BIR Ruling No. 007-2015 dated January 20, 2015

The request for ruling did not comply with the requirements of Revenue Memorandum Order No. 9-2014 (RMO 9-2014). More specifically, the letter-request was not sworn to and executed under oath, does not contain a list of submitted documents, does not contain the affirmations required under Section 4 of RMO 9-2014, the accompanying documents submitted with the letter-request was not certified as true copy of the original document by the public officer or private person having custody of the original document and does not contain a Special Power of Attorney or authorization in writing since the request was filed by a representative of the taxpayer. Therefore, the request for ruling cannot be given due course.

BIR Ruling No. 009-2015 dated January 20, 2015 and BIR Ruling Nos. 011-2015, 012-2015, 013-2015, 014-2015, and 015-2015 dated January 21, 2015

The requests in these rulings conform to similar factual circumstances. A homeowner's association secured a housing loan under the Community Mortgage Program (CMP), a financing assistance program of the Social Housing Finance Corporation (SHFC), a subsidiary of the National Home Mortgage Finance Corporation (NHMFC). On the issues raised for confirmation pursuant to RA No. 7279 otherwise known as the "Urban Development and Housing Act of 1992", the BIR confirmed that:

(1) The landowners who sold their properties for use in a socialized housing project are exempt from the payment of capital gains tax. Upon issuance of the ruling and upon registration of the document of sale, a lien on the Certificates of Title of the land to be issued in the name of the Homeowners' Association shall be annotated by the Register of Deeds having jurisdiction over the properties, to the effect that the said properties shall be used for socialized housing pursuant to RA No. 7279.

(2) The landowner shall be liable to pay DST on the documents conveying the properties imposed under Section 196 of the 1997 Tax Code based on the consideration contracted to be paid for such realty or its fair market value determined in accordance with Section 6(E) of the said Code, whichever is higher.

(3) The sale of the real properties utilized for low-cost and socialized housing as defined by RA No. 7279 shall be exempt from VAT.

(4) This ruling is not intended and shall not be construed as giving authority to the concerned Register of Deeds to effect transfer of the land titles in the name of the buyer without the necessary certificate of authority to register issued by the BIR. This ruling shall be presented to the RDO concerned for the latter to

issue the Certificate Authorizing Authority (CAR). The CAR shall only be issued after the submission of the requirements provided under RMO No. 15-2003.

BIR Ruling No. 017-2015 dated January 23, 2015

This ruling is issued upon the request of Outreach Helper Foundation, Inc. (the "Foundation"). Under its Articles of Incorporation, the Foundation's purposes are to (1) establish, operate, maintain, manage and subsidize churches, charitable institutions or programs; (2) furnish financial assistance to pastors, missionaries and church workers, (3) propagate and disseminate the Christian faith, teachings, precepts and ethics in accordance with its rules, usages and beliefs, (4) promote goodwill and understanding among its members as well as with other denominations, congregations or organizations established for similar purposes, and (5) and generally to carry out religious, charitable, humanitarian and other eleemosynary activities for the promotion of the welfare of its members as well as the community in general and not for any profit, gain or income of this corporation.

In connection with the request by the Foundation for the issuance of a certificate of exemption as a non-stock, non-profit corporation under Section 30 of the 1997 Tax Code, the BIR ruled as follows:

(1) The Foundation is a corporation contemplated under Section 30(E) of the Tax Code of 1997. It is exempt from the payment of income tax received by it as such organization, provided that no part of its net income or asset shall belong to, or inure to the benefit of any member, organizer, officer or any specific person. However, it is subject to the corresponding internal revenue taxes imposed under the Tax Code of 1997 on its income from any of its properties, real or personal, or any activity conducted for profit regardless of the disposition thereof, which income should be returned for taxation. For instance, interest income from currency bank deposits and yield or any other monetary benefits from deposit substitute instruments and from trust funds and similar arrangements and royalties derived from sources within the Philippines are subject to 20% final withholding tax.

(2) The Foundation shall be constituted as withholding agent of the government if it acts as an employer and its employees receive compensation income subject to withholding tax, or if it makes income payments to individuals or corporations subject to the expanded withholding tax.

(3) If the Foundation will be engaged in the sale of goods or services in the course of business pursuit, including transactions incidental thereto, in general, it shall be liable for VAT. The Foundation's purchase of goods or services and importation of goods shall be subject to the 12% VAT.

(4) Revenue from any membership fees, special assessments or contributions from members and donations, not being derived from sale of goods made in the course of business but rather in connection with its operation for the promotion of social welfare, is exempt from the 12% VAT.

(5) Donations to the Foundation are exempt from the payment of donor's tax pursuant to Section 101 (A)(3) of the Tax Code of 1997 subject to the condition that not more than 30% of said gift shall be used for administrative purposes.

For purposes of full deductibility from taxable business income of donations extended to the Foundation by its donors, the Foundation must be accredited with the Philippine Council for NGO Certification (PNCN) which has been designated by the Secretary of Finance as the Accrediting Entity pursuant to Memorandum of Agreement dated January 29, 1998 executed by and between the Secretary of Finance and PNCN's Interim Chairman.

(6) The Foundation is required to file on or before the 15th day of the 4th month following the end of its accounting period a Profit and Loss Statement and Balance Sheet with the Annual Information Return under oath, stating its gross income and expenses incurred during the preceding period and a certificate showing

that there has not been any change in its By-Laws, Articles of Incorporation, manner of operation and activities as well as sources and disposition of income. The books of accounts and other pertinent records of the Foundation shall be subject to examination by the BIR for the purpose of ascertaining compliance with the conditions under which it has been granted tax exemptions.

(7) The Foundation is subject to the payment of the annual registration fee of P500 as prescribed under Section 226 (B) of the Tax Code of 1997. It is also required under Section 6 (C) of the Tax Code in relation to Section 237 of the same code to issue duly registered receipts or sales or commercial invoices for each sale or transfer of merchandise or for services rendered which are not directly related to the activities for which the Foundation is registered.

(8) A copy of this letter of exemption shall be attached to the Annual Information Return.

(9) The tax exemption ruling shall be valid for a period of three (3) years from the date of issue unless sooner revoked or cancelled. The tax ruling may be renewed upon filing of a subsequent Application for Tax Exemption/Revalidation provided under RMO No. 20-2013. Failure to renew the tax exemption ruling shall be deemed revocation thereof upon the expiration of the 3-year period. The new tax exemption ruling shall be valid for another period of 3 years unless sooner revoked or cancelled.

BIR ISSUANCES

Revenue Memorandum Circular No. 6-2015 (*January 22, 2015*)

RMC No. 602015 publishes the full text of Executive Order No. 173 entitled “Reduction and Condonation of Real Property Taxes and Interest/Penalties Assessed on the Power Generation Facilities of Independent Power Producers under Build-Operate-Transfer Contracts with Government Owned or Controlled Corporations (GOCCs).”

Revenue Memorandum Circular No. 4-2015 (*January 13, 2015*)

RMC No. 4-2015 publishes the full text of Department Order (DO) No. 107-2014 issued by the Department of Finance entitled “Rules on Accreditation with the Bureau of Customs for PEZA Locators”.

All locators of the Philippines Export Zone Authority (PEZA) Special Economic Zones throughout the Philippines registered with the PEZA are exempted from the requirements of DO No. 12-2014, as amended by DO No. 18-2014, and shall be eligible for accreditation as importer with the Bureau of Customs-Account Management Office (BOC-AMO). For this purpose, BOC may request a certified list of registered locators from PEZA.

The Bureau of Customs (BOC) may still require the submission of documents and information about PEZA locators prior to granting accreditation, without prejudice to sanctions and penalties that may apply pursuant to the Tariff and Customs Code of the Philippines for failure to comply with documentary requirements in relation to importation.