



**TAX MANAGEMENT ASSOCIATION OF THE
PHILIPPINES, INC.**



TMAP TAX UPDATES FOR OCTOBER 2014

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SUPREME COURT DECISIONS

The Philippine Stock Exchange, et. al. vs. Secretary of Finance, et. al (GR No. 213860, 09 September 2014)

The SC issued a Temporary Restraining Order (TRO), effective immediately, to enjoin the Secretary of Finance, Commissioner of Internal Revenue, and the Chairperson of the SEC from further enforcing and implementing RR No. 01-14 and RMC No. 05-14 insofar as they prohibit the naming of the PCD Nominee (or any other securities intermediary designated and allowed under Section 43.1 of the Securities Regulations Code) as the payee for dividend payments made by listed companies, and SEC Memorandum Circular (MC) No. 10, Series of 2014 which provides guidelines and directives to assist issuers of securities listed and traded in the Philippine Stock Exchange in complying with the requirements of RR No. 1-2014.

The Petition for Certiorari and Prohibition (with application for the issuance of a TRO) against RR No. 01-14, RMC No. 05-14 and SEC MC No. 10-14 was based on the following grounds:

- The requirement of disclosure is vague since in prohibiting listed companies and broker dealers from naming PCD Nominee (or any other securities intermediary that may be designated and allowed under Section 43.1 of the Securities Regulation Code or SRC) - the shareholder of record for uncertificated shares and payee of dividend payments made by listed companies - as payee, have placed listed companies and broker dealers in a predicament on who should be identified as the payee of dividends due on uncertificated shares in the alphalist of the listed company concerned. Consequently, they are compelled to speculate who should be considered as payee for purposes of complying with the questioned issuances. The requirement that laws or regulations which impose criminal penalties be clear and concise is essential to due process, as this ensures that no person is criminally punishable due to the confusion and impossibility of compliance caused by an indefinite and ambiguous penal provision susceptible to varying interpretations.
- Right to privacy is violated by expressly or impliedly requiring broker dealers to disclose sensitive personal information of investors to listed companies – not to government or public authorities – without providing for any mechanism to protect the privacy of such information.

- SEC MC No. 10-14 violates the constitutional principle on non-impairment of contracts since its directives upon depository participants, broker dealers, trustees, fund managers, and other investor agents, if complied with, will constrain said persons/entities to breach their existing confidentiality agreements with their investors and disclose information protected under said confidentiality agreements.
- The questioned issuances are contrary to the state policies under the SRC, the National Internal Revenue Code of 1997, and the Data Privacy Act in requiring listed companies and broker dealers other than PCD nominee to disclose the payee of the dividend payments.
- The questioned issuances violate the constitutional principle of separation of powers when they prohibit the use of “PCD Nominee” as the payee of the dividend payments and shareholder of scrippless shares in listed companies. In making such prohibition, the questioned issuances amended the express provisions of Section 43.1 of the SRC giving listed companies the right to designate PCD Nominee to be named as the shareholder of the uncertificated shares and, as a consequence, thereof, the payee of the dividend payments of the listed companies.

COURT OF TAX APPEALS (CTA) DECISIONS

Philex Mining Corporation vs. CIR (CTA Case Nos. 7933 and 7968, 22 September 2014)

Section 106(A)(2)(a)(1) of the NIRC of 1997, as amended, in relation to Sections 113(A)(1), (B)(1), and (2)(c) of the same Code and Sections 4.113-1(A)(1), (B)(1) and (2)(c) of RR No. 16-05, provides that any VAT-registered person claiming VAT zero-rated direct export sales must present at least three (3) types of documents, namely:

- (1) Sales invoice as proof of sale of goods;
- (2) Export declaration and bill of lading or airway bill as proof of actual shipment of goods from the Philippines to a foreign country; and
- (3) Bank credit advice, certificate of bank remittance or any other document proving payment for the goods in acceptable foreign currency or its equivalent in goods and services.

The taxpayer failed to comply with the third requisite - the existence of bank credit advice, certificate of bank remittance, or any other document proving payment for the goods in acceptable foreign currency or its equivalent in goods and services, in order for it to claim VAT zero-rated direct export sales. Based on the records, it cannot be ascertained whether such remittances actually pertained to the alleged zero-rated sales of the taxpayer for the period covered by the claim. Hence, the veracity of the Reconciliation Report by the Independent CPA cannot be verified. Consequently, the taxpayer failed to prove that it engaged in zero-rated or effectively zero-rated sales, thereby causing the denial of the Petition for Review.

Victorias Milling Company Farmers Multi-Purpose Cooperative vs. CIR (CTA Case No.8658, 10 September 2014)

For claims for refund under Section 229 of the NIRC of 1997, as amended, both administrative and judicial remedies for filing a claim for refund of erroneously paid tax must be filed within two (2) years from payment of tax. In other words, the two-year period applies not only to the filing of claim for refund before the Commissioner of the Bureau of Internal Revenue, but it also applies to the filing of a Petition for Review before the CTA.

Accordingly, the taxpayer is given two years from his erroneous payment of tax within which to file his written claim for refund. However, if the Commissioner does not act on the written claim for refund and the two-year period is about to expire, the suit or proceeding must be instituted with the CTA without waiting for the decision of the BIR Commissioner.

Medtex Corporation vs. CIR (CTA Case No. 8508, September 1, 2014)

Due process in our jurisdiction refers to the right of the taxpayer to be informed of the legal and factual findings of the BIR as regards its deficiency taxes, and factual findings of the BIR as regards its deficiency taxes, and the opportunity to be heard through protest.

A PAN may or may not even be protested to by the taxpayer, and the fact of non-protest shall not in any way make the PAN final and unappealable. Thus, the issuance of the FAN before the lapse of the 15 day period for the taxpayer to file its protest to the PAN, inflicts no prejudice on the taxpayer for as long as the latter is properly served a FAN and that it was able to intelligently contest the FAN by filing a protest letter within the period provided by law.

Egis Projects S.A. vs. Secretary of Finance & Commissioner of Internal Revenue (CTA EB No. 1023, September 16, 2014)

While RA No. 1125 confers on the CTA jurisdiction to resolve tax disputes in general, this excludes the power to rule on the constitutionality or validity of a law, rule or regulation. Where what is assailed is the validity or constitutionality of a law, or a rule or regulation issued by the administrative agency in the performance of its quasi-legislative function, the regular courts have jurisdiction to pass upon the same.

Since the petition for review substantially questions the validity or constitutionality of BIR Ruling No. ITAD 2013-11 (including the DOF Ruling affirming the same) and Revenue Memorandum Order Nos. 72-2010 and 1-2000, which were issued by the BIR in the exercise of its quasi-legislative functions, the same is beyond the jurisdiction of the CTA.

Trully Natural Food Corp. vs. Department of Finance (CTA EB No. 1077, 08 September 2014)

Under Section 105(m) of the Tariff and Customs Code of the Philippines, importations of containers, holders and other similar receptacles of any materials are conditionally-free importations and exempt from the payment of import duties upon compliance with the formalities prescribed in the regulations which shall be promulgated by the Commissioner of Customs with the approval of the Secretary of Finance. In relation thereto, paragraph I(M) of Customs Administrative Order No. 7-72, as amended by CAO No. 11-74, PROVIDES for the formalities to be complied with, as follows:

- 1) That they are of such character as to be readily identifiable and/ or re-usable for shipment or transportation of goods;
- 2) That they should be identified, examined and appraised by the customs officials concerned, and that a certificate of identification shall be issued therefor;
- 3) Submission of affidavit of the importer setting forth that said container shall be exclusively used as containers of goods for exportation abroad, and stating the value thereof;
- 4) That a bond shall be filed in an amount equal to one and one-half (1 1/2) times the ascertained duties, taxes and other charges thereon, conditioned for the exportation thereof or payment of the corresponding duties, taxes and other charges within six (6) months, except in the case of the kraft paper bags for cement, from the date of acceptance of the import entry; xxx

Documents from the DOF proving the validity and existence of petitioner's exemption from duties and taxes (i.e., DOF exemption) is not included in the list of documents required to be presented for the articles to be considered conditionally-free importations. Thus, there is no legal basis for respondent to require petitioner to present the same upon entry of the said articles.

Ong Beng Gui (operating under the name and style "Much Prosperity Trading") vs. CIR (CTA Case No. 8410, 08 September 2014)

Section 32(B)(6)(b) of the Tax Code, as amended, and Section 2.78.1 (B)(1)(b) of the RR No. 02-98 provide that any amount received by an official or employee or by his heirs from the employer as a consequence of separation of such official or employee from the service of the employer because of death, sickness or other physical disability or for any cause beyond the control of the said official or employee shall not be included in gross income and shall be exempt from taxation.

Thus, any amount paid by an employer to his employees as separation pay, wherein the separation resulted from the latter's involuntary termination from service (i.e. cessation of business), is exempt from income tax and consequently from withholding tax.

Municipality of Labrador Pangasinan and the Office of the Municipal Treasurer of Labrador, Pangasinan vs. National Transmission Corporation (CTA AC Case No. 112, 03 September 2014)

Section 195 of the Local Government Code of 1991 provides that if the taxpayer disagrees with the Assessment made by local treasurer or his duly authorized representative, the taxpayer may file a written protest within sixty (60) days from receipt of the notice of assessment. The local treasurer shall decide the protest within sixty (60) days from the time of its filing. If the local treasurer finds the assessment to be wholly or partly correct, he shall deny the protest wholly or partly with notice to the taxpayer. The taxpayer shall have thirty (30) days from the receipt of the denial of the protest or from the lapse of the sixty (60) day period within which to appeal with the court of competent jurisdiction, otherwise the assessment becomes conclusive and unappealable. On the other hand, the taxpayer may, instead of filing a written protest, opt to pay the tax, fee or charge and then seek a refund thereof within the 2-year statute of limitation. The payment, if an assessment is issued, must be made before the lapse of the 60-day period from receipt thereof, otherwise, the assessment becomes final and executory and it may no longer thus be disputed. In this case, respondent failed to appeal the denial of its protest within thirty (30) days from the receipt of the denial or from the lapse of the sixty-day period within which to appeal with the court of competent jurisdiction. Hence, the assessment notices issued by petitioners against respondent became conclusive and unappealable. The claim for refund on taxes collected based on the final and executory assessments issued by petitioners must necessarily fail.

BIR RULINGS

BIR ITAD Ruling No. 195-2014, 22 September 2014

Under Article 11 of the Philippines-Japan tax treaty, interest arising in the Philippines and paid to a resident of Japan may be taxed in the Philippines at a rate not to exceed 10%. The term “interest” means income from debt-claims of every kind, whether or not secured by mortgage or whether or not carrying a right to participate in the debtor’s profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures.

Since the interest arising from the Loan Agreement is not in respect of government securities, bonds or debentures at hand, Isla Petroleum-Philippines is not registered with the Board of Investments as such, and interest is not paid to the Government of Japan, etc., such interest to be paid by Isla Petroleum-Philippines to Itochu-Japan in relation to the Loan Agreement is subject to income tax at the rate of 10% of the gross amount thereof under Article 11 (2) of the Philippines-Japan tax treaty.

Whether the interest payments are effectively connected with a permanent establishment, the Supreme Court, in *Marubeni Corporation vs. CIR* (G.R. No. 76573, 14 September 1989), ruled that such payments are effectively connected only if they are paid in respect of assets owned by the permanent establishment or otherwise effectively connected with that establishment. Since Itochu-Philippines is not a party to the Loan Agreement between Itochu-Japan and Isla Petroleum-Philippines, Itochu-Japan is deemed not to have a permanent establishment in the Philippines.

BIR ITAD Ruling No. 198-2014, 23 September 2014

Under Article 7(1) in relation to Article 5 of the Philippines-Canada tax treaty, business profits arising in the Philippines and derived by an enterprise of Canada shall be subject to Philippine income tax if they are attributable to a permanent establishment which the enterprise has in the Philippines; otherwise such profits are exempt from Philippine income taxes. The term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on, and includes, for example, a place of management, a branch, and an office. Hence, services paid to a nonresident entity without a permanent establishment in the Philippines shall be exempt from Philippine income tax under the Philippines-Canada tax treaty. This conclusion is even buttressed by the fact that, unlike the majority of other Philippine tax treaties, the Philippines-Canada tax treaty (particularly the Permanent Establishment article thereof), does not have a provision on the furnishing of services as constituting a permanent establishment for the foreign enterprise undertaking it in a *situs* country for a sufficient duration like 183 days.

Under Section 108 of the Tax Code, the said service fees are subject to 12% VAT. Thus, the resident withholding agent and payor in control of payment shall be responsible for the withholding of the final VAT on such service fees before making any payment to TVI.

BIR ISSUANCES

Revenue Regulations (RR) No. 07-2014, 04 July 2014, prescribes the affixture of internal revenue stamps on imported and locally manufactured cigarettes and use of Internal Revenue Stamp Integrated System (IRSIS) for the ordering, distribution and monitoring thereof.

A letter of intent for enrollment and registration with IRSIS shall be filed by the importer and/or local cigarette manufacturers with the Chief of Excise LT Field Operations Division (ELTFOD) of the BI. Thereafter, the taxpayer shall proceed to the BIR website and access the IRSIS icon displayed for purposes of initiating the enrollment process.

Every order of internal revenue stamp submitted by the authorized user of the importer or local manufacturer of cigarettes shall be subject to BIR approval. All BIR duly-approved orders for internal revenue stamps are no longer allowed by IRSIS to be cancelled or changed by the authorized users of cigarette importers and manufacturers. Authorized users shall ensure that the correct information is encoded prior to the submission thereof in the ordering module.

The internal revenue stamps shall be released and received personally by the authorized representatives of the importer or local manufacturer of cigarettes within fifteen (15) calendar days from the scheduled date of its release. Failure to claim the stamps within said period shall make the taxpayer liable for reasonable storage fees.

Revenue Memorandum Circular (RMC) No. 70-2014, 18 August 2014, clarifies the requirements for issuance of certifications on outstanding tax liabilities and/or delinquency verification slips for purposes of processing payment of claims for tax refund, cash conversion of tax credit certificates (TCC) and value added tax (VAT) monetization.

In cases where the taxpayer has Integrated Tax System (ITS) - generated “open cases”, particularly “stop-filer cases” in addition to delinquent account cases, the concerned revenue office shall determine the validity thereof and only valid “stop-filer cases” shall be reflected in the prescribed certifications/delinquency verification slips. Processing of payment of the abovementioned applications shall be held in abeyance pending the resolution of the “stop-filer cases” by the concerned revenue offices.

The status of assessment cases against taxpayers, pending before the courts of law or with other revenue offices, shall first be determined and clearly indicated in the certifications/verification slips whether or not the same are final and executory.

If the assessment cases are not yet final and executory, the processing of the payment of the said applications shall proceed.

If the assessment case is already final and executory, processing of tax refund payment, cash conversion of TCC or VAT monetization, shall be discontinued by the concerned processing revenue office and the entire docket shall be returned to the concerned revenue office having jurisdiction over the concerned taxpayer for the issuance of the written denial of the application, subject to the re-filing thereof after settlement of the delinquency account.

Certifications/ verification slips on the existence of tax liabilities of the concerned taxpayer shall only be valid for one (1) month from the date of issuance thereof.

Revenue Memorandum Circular (RMC) No. 73-2014, 12 September 2014, clarifies the appropriate withholding tax rates on dividend payments to Philippine Central Depository (PCD) nominees by issuers of securities.

For the payment of dividends to PCD nominees, a declaring corporation (issuer) is required to withhold appropriate taxes based on the pertinent provisions of the National Internal Revenue Code of 1997.

When the PCD nominee is a Filipino, the income recipient is deemed to be subject to final withholding tax of 10%, unless it is satisfactorily shown that the actual entity investor is a domestic corporation.

When the PCD nominee is a non-Filipino, the income recipient is deemed to be a non-resident foreign corporation subject to final withholding tax of 30%, unless it is satisfactorily shown that the actual equity investor is a resident alien, non-resident alien whether engaged in trade or business in the Philippines or a resident foreign corporation.

Revenue Memorandum Circular No. 77-2014, dated 15 September 2014, clarifies that all applications for cash conversion of TCCs which have been filed with the concerned revenue office before the expiration of the validity period of the TCC, shall no longer be revalidated.

Revalidation only applies to TCC whose validity period is about to expire and the same needs to be revalidated by reason that the holder of the TCC has to apply the unutilized portion thereof on its/his/her tax liabilities.

Accordingly, the processing of all applications for TCC cash conversion filed before the expiration of the validity period of the TCC with the TCC-issuing office and remained pending with and withheld by the concerned processing revenue Office as of the date of expiration shall proceed accordingly, whether for verification, approval or for payment, without the need for revalidation of the covered TCC.

Revenue Memorandum Order (RMO) No. 34-2014, 18 September 2014, clarifies the provisions of RMO No. 28-2013 on the issuance of Tax Exemption Rulings (TER) for Qualified Non-Stock, Non Profit Corporations and Associations under Section 30 of the National Internal Revenue Code of 1997.

Non-stock, non-profit entities (NSNP) with valid TERs are presumed compliant with the conditions for tax exemption with respect to any income earned as such. The absence of a valid, current, and subsisting TER will not divest qualified NSNPs of the tax exemption. NSNPs without a TER are required to prove their compliance with the conditions under the law, in the event of a tax investigation.

NSNPs who fail to renew their TER may still file their applications with the Revenue District Office where they are registered which shall treat them as new applications. The presentation of previously issued tax exemption rulings is not necessary.

Failure to present valid TER to withholding agents shall subject the income payments made to NSNP to the applicable withholding taxes. Failure of the withholding agents to withhold despite the lack of a Tax Exemption Ruling shall subject the withholding agent to penalties under the National Internal Revenue Code of 1997.

Umbrella organizations or confederations may file applications on behalf of its member entities, subject to the submission of the Board Resolution authorizing it to do so, as well as all documentary requirements under RMO No. 20-2013.

Revenue Regulations No. 8-2014, 01 October 2014, amended the provisions of RR No. 7-2014, specifically the deadlines prescribed under Section 13 thereof, extending the same as follows:

The transitory provisions in Section 13(c) of RR No. 8-2014 now reads, “*No later than November '1, 2014, all locally manufactured packs of cigarettes shall be affixed with the internal*

revenue stamps prescribed by these Regulations” while Section 13 (e) now reads, “Effective March 1, 2015, all locally manufactured cigarettes found in the market shall be affixed with the said stamps. No imported cigarettes shall be found in the market without the new stamps effective April 1, 2015; provided, however, that even prior to such date, imported cigarettes should bear either the old stamps or the new stamps.”

Any violation of such regulation shall be subject to corresponding penalties under the pertinent provisions of the NIRC of 1997, as amended, and applicable regulations issued by the BIR.