TAX UPDATES FOR MAY 2016

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Court of Tax Appeals Decisions

CIR VS. OAKWOOD OVERSEAS LIMITED (CTA EB No. 1212 dated 18 April 2016)

- ***No need to re-submit same PAN support in a FAN protest***

In this assessment case, the taxpayer protested a FAN without attaching any documents believing that its position is properly substantiated because it already attached to its reply to the PAN the relevant supporting documents. The BIR, on its part, is insisting that the FAN issued to the taxpayer became final and executory for failure of the taxpayer to submit supporting documents.

The CTA en banc agreed with the taxpayer and ruled that it is no longer necessary to attach to the letter protest against the FAN the same supporting documents previously attached to the protest against the PAN, which had already formed part of the BIR docket. Records show that the supporting documents submitted to the protest against the PAN are the same documents cited and relied by the taxpayer in protesting the FAN. To require submission of the same set of documents would be superfluous and a waste of resources.

MINDANAO II GEOTHERMAL PARTNERSHIP VS. CIR (CTA EB Case No. 1206 dated 20 April 2016)

- ***Short period return vital for a dissolved entity's refund***

The taxpayer, a general partnership, filed a claim for refund of its excess CWT on account of its dissolution. The CTA en banc, citing a Supreme Court case[1], reiterated that the irrevocability rule under Section 76 of the Tax Code shall not apply to a corporation that is already dissolved. The reason for allowing refund of excess CWT for dissolved corporations is because of the impossibility of carrying it over to succeeding years.

However, the CTA en banc denied the refund because the taxpayer failed to present its short period return as basis for its claim for refund. A dissolving company/partnership is required to file a short period return within 30 days from the SEC's approval of the dissolution. This is to determine whether it has a tax payable or a tax overpayment. Without the short period return, it cannot be determined whether the taxpayer is entitled for refund of the excess and unutilized CWT.

[1] G.R. No. 176290 dated 21 September 2007

HOYA GLASS DISK PHILIPPINES, INC. VS. CIR (CTA Case No. 8703 dated 25 April 2016)

- ***Delayed withholding is falsity***

In this case, the taxpayer declared dividends in December 2006 payable on or before 31 January 2007. However, the taxpayer paid the dividends only on 2 February 2007, reported the FWT thereon in February 2007, and remitted the tax on 10 March 2007. The BIR issued a final assessment for penalties for late remittance of FWT on 27 February 2013. The taxpayer questioned the imposition of penalties saying that the three-year period for the BIR to assess has already lapsed.

The CTA explained that the FWT on cash dividends should have been withheld by the taxpayer at the time when the dividends became payable, and not when it was actually paid. Tax regulations[2] require the taxpayer to deduct and withhold the tax when the income payment is paid or payable, or the income payment is accrued or recorded, whichever comes first. The term 'payable' refers to the date the obligation becomes due, demandable or legally enforceable. Considering that the taxpayer declared cash dividends to be payable on or before 31 January 2007, the FWT thereon should have been reported in the January 2007 FWT return and should have been filed and remitted on 10 February 2007 or ten days after the end of the month[3]. The taxpayer therefore has mistakenly or belatedly remitted the FWT on the dividends when it only included the same in its February 2007 FWT return (BIR Form No. 1601-F). Because of this mistake, its February 2007 FWT return is considered a false return. Consequently, the period within which the BIR can assess deficiency taxes thereon is ten years from discovery of the falsity.

LINDE PHILIPPINES, INC. VS. CIR (CTA Case No. 8724 dated 4 May 2016)

- ***FAN issued before receipt of PAN is void***

In this case, the CTA found that taxpayer received an FAN first before it received a PAN. According to the CTA, this violates the taxpayer's right to due process as the taxpayer was not given a chance to file a response or reply to the PAN. Such failure on the part of BIR also constitutes a violation of Section 3 of RR No. 12-99 in relation to Section 228 of the Tax Code. The issuance of the PAN, its receipt, and the response by the taxpayer to the PAN should precede the issuance of the FAN. The process cannot be reversed. Thus, the assessments for deficiency income tax and VAT against the taxpayer are void for violating the taxpayer's right to procedural due process.

[2]Section 2.57.4 of RR No. 2-98, as amended by RR No. 12-01
[3]Pursuant to Section 4(1) of RR No. 6-2001

- ***Converting an assessment to a refund claim is allowed***

Pending the resolution of the assessment case before the CTA, the taxpayer paid the alleged deficiency tax assessments and then immediately filed a written request for refund stating that the taxes were erroneously collected. Subsequently, the taxpayer asked permission from the CTA to amend its petition for review (converting it from an assessment case to a refund claim). The BIR questioned the amendment but the CTA ruled in favour of the taxpayer.

The CTA explained that an amendment which substantially changes a cause of action or defense is sanctioned by Section 3, Rule 10 of the Rules of Court when the amendments sought to be made shall serve the higher interests of substantial justice, prevent delay and secure a just, speedy and inexpensive disposition of every action and proceeding. Citing its promulgated Resolution, the CTA ruled that since both actions arose from the same set of facts and issues, then both cases would necessarily rely on the same evidence. Although the party will need to present additional evidence, the amendment would not substantially change the cause of action or alter the theory of the case. Thus, to avoid multiplicity of suits and in order to completely dispose of the case, the Court allowed the amendment of the petition for review.

- ***Due process issue exempt from exhaustion of administrative remedies***

The BIR alleged that the taxpayer violated the principle of exhaustion of administrative remedies when it filed a petition with the CTA in 2013 before it filed a claim for refund with the BIR on 21 January 2015. Accordingly, such act deprived the BIR the opportunity and time to act on the administrative claim, and exercise its function. However, upon review, the CTA noted that the said petition was not a request for refund but for the cancellation of the tax assessment. The judicial claim for refund was filed only on 5 February 2015 through the amended petition for review.

Further, citing a Supreme Court case , the CTA held that exhaustion of administrative remedies may be dispensed with in certain cases, one of them is a case where the controverted acts violate due process. The CTA said that the act of the BIR in not g1ving the taxpayer a chance to file a response or reply to the PAN constitutes violation of the taxpayer's right to procedural due process. Clearly, the instant case falls under one of the exceptions to the doctrine of exhaustion of administrative remedies.

CIR VS. THE HONGKONG SHANGHAI BANKING CORPORATION LIMITED - PHILIPPINE BRANCH (CTA EB Case No. 1257 dated 17 May 2016)

- ***Goodwill is a capital asset***

If “goodwill”, i.e. the good reputation of the business, is acquired in the course of a company’s operation, it forms part of the capital with which it was established. Once it is valuated and used, it becomes a part of the assets.

Goodwill is considered a capital asset because it satisfies the following elements[4]: (1) it is not included in stock in trade or property which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, (2) nor is it held primarily for sale to customers in the ordinary course of the taxpayer's trade or business, (3) nor is it a property used in trade or business, of a character which is subject to the allowance for depreciation provided in subsection (F) of Section 34 of the Tax Code, and (4) it is not real property used in trade or business of the taxpayer.

MR. URBANO L. VELASCO VS. BUREAU OF INTERNAL REVENUE (REVENUE REGION NO. 8; RDO 047; MAKATI CITY) (CTA Case No. 8497 dated 17 May 2016)

- ***Filing of CGT return triggers running of prescriptive period to assess donor's tax***

The filing of the CGT return for the sale of shares constitutes sufficient compliance with the requirement of filing a tax return under Section 103 of the Tax Code for the purpose of computing the prescriptive period. This is notwithstanding that the sale was assessed deficiency donor's tax for having been deemed a transfer of property with insufficient consideration. Hence, the FAN should have been issued within three years from the filing of the CGT return. The ten-year prescriptive period only applies when there is "failure to file a return".

PETRON CORPORATION VS. CIR; COMMISSIONER OF CUSTOMS AND COLLECTOR OF CUSTOMS (PORT OF LIMAY; BATAAN) (CTA Case No. 8544 dated 17 May 2016)

- ***CTA jurisdiction over BIR ruling***

A BIR ruling is an interpretation of a provision of the Tax Code or pre-existing law. Thus, the action of the CIR in issuing an opinion by means of a circular or memorandum is an exercise of its quasi-legislative power. In this regard, the CTA has jurisdiction to rule not only as to the propriety of an assessment or tax treatment of a certain transaction, but also on the validity of the revenue regulation or revenue memorandum circular on which the said assessment is based. Hence, the CTA can directly rule on the propriety of a BIR circular or ruling provided an assessment had been issued.

In this case, Customs Memorandum Circular No. 164-2012 dated 18 July 2012, which provides that alkylate is subject to excise tax under Section 148(e) of the Tax Code, is considered a BIR ruling. Considering however that no assessment exists, the CTA has no jurisdiction to directly pass on the validity of the assailed CMC. Instead, the power to review the CIR's ruling belongs to the Secretary of Finance. The taxpayer cannot directly question the propriety of CMC No. 164-2012 before the CTA, without giving the Secretary of Finance the opportunity to review the ruling.

[4] Provided under Section 39(A)(1) of the Tax Code

Bureau of Internal Revenue Issuances

REVENUE MEMORANDUM ORDER NO. 14-2016 (4 April 2016)

- ***Revised guidelines for the execution of waiver***

The following are the revised guidelines in the execution of a "Waiver of the Statute of Limitations" to extend the prescriptive period of a tax assessment or collection of taxes:

1. No prescribed format is required for a waiver to be valid. Non-compliance with the format stated in RMO No. 20-90 or RDAO No. 5-01 does not invalidate a waiver provided that the waiver:
   - must be executed before the expiration of the period to assess or to collect taxes;
   - must be signed by the taxpayer himself, his duly authorized representative, or in the case of a corporation, any of its responsible officials; and
   - must indicate the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription.
2. Waivers extending the period to collect taxes must state the particular taxes being assessed. However, waivers for tax assessment do not have to specify the particular taxes to be assessed nor the amount, as the CIR or her duly authorized representative is still in the process of examining and determining the tax liability of the taxpayer.
3. Taxpayers have the burden of ensuring that their waivers are validly executed by their authorized representative. Taxpayers may not contest the authority of their representative, who participated in the conduct of an audit or investigation, to invalidate a waiver.
4. A waiver may be notarized. However, it is already sufficient that it is in writing as provided by the Tax Code.
5. A waiver is effective and binding on the taxpayer upon its execution.
6. Taxpayers have the duty to submit the duly executed waiver to, and have it signed by: the CIR, the officer previously designated in existing issuances, the concerned revenue district officer, or the group supervisor indicated in the Letter of Authority/Memorandum of Assignment. Waivers are to be executed and duly accepted prior to the expiration of the period to assess or to collect by said officers. Taxpayers have the duty to retain a copy of the accepted waiver.
7. There are only two material dates that need to be present in the waiver:
   - The date of execution of the waiver by the taxpayer or its authorized representative; and
   - The date of expiration of the period the taxpayer waives the statute of limitations.

A previously executed waiver may be extended before the expiration of the period earlier set through a subsequent written waiver made in accordance with this Order.

REVENUE MEMORANDUM ORDER NO. 17-2016 (5 May 2016)

- ***Additional rules on tax-free exchange transactions***

In May 2016, the BIR issued a new RMO to supplement the requirements for securing a tax-free exchange ruling under RMO No. 18-2001 and RR No. 18-2001. The new RMO prescribes the number of shares to be issued by the transferee corporation in exchange for the property it received from the transferor. It provides the following, among others:

1. The value of shares to be issued for the exchange should be equal to the fair market value (FMV) of the property transferred.
2. The corporation issuing shares of stocks for assets should reflect the transfer as follows:
   - The property/asset transferred shall be recorded at FMV.
   - For purposes of computing gains or loss for subsequent transfer of the property/asset, the substituted basis as defined in RR No. 18-2001, shall be used.
   - There must be a disclosure note in the audited financial statements (AFS) submitted to the BIR indicating the relevant information about the tax-free exchange.
3. The transferor of the property/assets, on the other hand, should reflect the transfer as follows:
   - For tax accounting purposes, the shares of the transferee corporation received in exchange for the property/assets transferred shall be recorded at its substituted value.
   - The transferor's AFS submitted to the BIR should have a disclosure note indicating the information required by the RMO.
4. Both parties are required to annotate in the certificate of title of ownership of properties the requirements of the tax-free exchange; otherwise, the tax-free exchange ruling shall be null and void.
5. Both parties should present a copy of the ruling relating to the tax-free exchange in the event the said property/asset or shares of stocks given in exchange are to be subsequently transferred, assigned and/or sold.
6. If the property/asset being exchanged involves shares of stocks, the value of the shares of stock shall be determined as follows:
   - *Listed shares*: the closing price on the day when the shares are transferred or exchanged. When no sale is made in the local stock exchange on the day when the listed shares are transferred or exchanged, the closing price on the day nearest to the date of transfer or exchange.
   - *Shares not listed and traded in the local stock exchange*: the book value of the shares of stock as shown in the annual financial statements duly certified by an independent certified public accountant submitted or should have been submitted to the BIR nearest to the date of sale, with the assets therein adjusted to its FMV as of a date not earlier than 90 days from the date of the transaction. If the company assets include shares in other corporation, the said shares shall be adjusted to its FMV as of a date not earlier than 90 days from the date of the transaction.
   - The adjustment shall be made pursuant to RR No. 6-2013.

7. The substituted basis as defined in Section 40(C)(5) of the Tax Code, as amended and implemented by RR No. 18-2001 shall be the basis of determining gain or loss on the subsequent transfer of the properties subject of the tax-free exchange.
8. Input VAT, if any, on the property transferred shall be based on FMV of the properties transferred.

REVENUE MEMORANDUM ORDER NO. 22-2016 (12 May 2016)

- ***Prescribing the policies and procedures for the issuance of eCAR***

The CIR has prescribed the following policies and procedures for the issuance of electronic Certificate Authorizing Registration (eCAR):

1. Effective 1 June 2016, the issuance of manually prepared Certificate Authorizing Registrations (CARs) [BIR Form No. 2313], as well as the generation and issuance of Tax Clearance (TCL2) in the Integrated Tax System (ITS), shall be stopped. It will be replaced by the eCARs.
2. The use of BIR Form 2313 shall be discontinued. All manually issued CARs that are outstanding and not yet presented to the Registry of Deeds are no longer valid. Instead, the concerned Revenue District Officer (RDO)/Large Taxpayer (LT) Division Chief shall replace this CAR with an eCAR and cancel the previously issued CAR.
3. eCARs have a validity of one year reckoned from the date of issuance for purposes of presenting the same to the Registry of Deeds. The RDOs/LT Division Chiefs of the BIR shall issue a new eCAR to the taxpayer in case the taxpayer fails to present the eCAR to the Registry of Deeds within the one year period. eCARS lost within the validity period will be reprinted by the RDOs/LT Division Chiefs and issued to the requesting taxpayers.
4. Requirements for the issuance/reissuance/replacement/reprinting of eCAR are enumerated in the Order, and a Certification Fee (PHP100.00) and Documentary Stamp Tax (DST) (PHP15.00) shall be charged.
5. For transfers of titled real properties, the RDO shall issue one eCAR per property covered by OCT/TCT/CCT. On the other hand, for transfers of untitled real properties, one eCAR shall be issued for each Tax Declaration, including the improvements thereon. However, for transfers of personal properties, a separate eCAR shall be issued for all personal properties per transfer document (e.g., Deed of Sale, Deed of Donation, etc.). For transfer of personal properties e.g. Cash in Bank, wherein the taxpayer requests for issuance of separate eCAR for each bank account, the RDO shall issue instead a certified true copy of the eCAR for presentation to the concerned bank, subject to the payment of a certification fee and DST.
6. Once the eCAR is generated by the system, it shall be signed by the Assistant Commissioner-LT Service.
7. eCARs issued by the RDO other than the district office where the property is located shall no longer be authenticated/countersigned by the RDO/Head, ONETT Team having physical jurisdiction over the property/ies. The Register of Deeds shall validate the eCAR

details on the LRA-BIR CAR Verification System to authenticate the eCAR copy of the taxpayer.