CASE UPDATES (DECEMBER 2017 TO JANUARY 2018)

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NON-PRESENTATION OF ORIGINAL QUARTERLY ITRs NOT FATAL IN CLAIM FOR REFUND; NON-SUBMISSION OF SUPPORTING DOCUMENTS IN THE ADMINISTRATIVE LEVEL NOT FATAL TO TAXPAYER'S CLAIM FOR REFUND AS THE CASE FILED BEFORE THE CTA ARE LITIGATED DE NOVO. The respondent CIR argued that the petitioner claim for refund should be disallowed due to its failure to substantiate its claim for refund/issuance of tax credit certificate amounting to P8,880,039.00. The respondent alleged that because of the failure of the petitioner to present the original quarterly ITRs of the succeeding quarters, its claim for refund should therefore be denied.

In deciding in favor of the petitioner, the CTA En Banc cited the case of *Winebrenner&Inigo Insurance Brokers, Inc. vs. Commissioner of Internal Revenue.* In the said case, the Supreme Court already ruled that the submission and presentation of the quarterly ITRs of the succeeding quarters of a taxable year is not indispensable in a claim for refund.

In the *Winebrenner* case, the Supreme Court held that any document, other than quarterly ITRs may be used to establish that indeed the non-carry over clause has been complied with, provided that such is competent, relevant and part of the records. The Supreme Court further did not make a pronouncement as to the indispensability of the quarterly ITRs in a claim for refund because according to the Supreme Court, no court can limit a party to the means of proving a fact for as long as they are consistent with the rules of evidence and fair play. The means of ascertainment of a fact is best left to the party that alleges the same. The Supreme Court further held that the court's power is limited only to the appreciation of that means pursuant to the prevailing rules of evidence. To stress, what the NIRC merely requires is to sufficiently prove the existence of the non-carry over of excess CWT in a claim for refund.

The respondent further argued that the failure of the petitioner to submit copies of its withholding tax certificates in their application for refund is fatal to their claim. The CTA En Banc ruled otherwise. The court stated that the cases filed before the CTA are litigated *de novo* and thus party litigants should prove every minute aspect of their cases. Judicial claims are decided based on the evidence presented and formally offered by the party litigants during the trial and not on mere allegation of non-submission of complete document before the BIR ***(Commissioner of Internal Revenue vs. Jardine Lloyd Thompson Insurance Brokers, Inc., CTA EB Case No. 1369, December 12, 2017)*****.**

LOCALLY IMPOSED TAX BY LOCAL GOVERNMENT UNITS MUST CONFORM TO THE NATIONAL LAW. For emphasis a municipal corporation, unlike a sovereign state, is clothed with no inherent power of taxation. If granted under a charter or a statute, and that power when granted is to be construed in strictissimi juris. As such, in this case, any doubt or ambiguity must be resolved against the city of Makati. City officials must keep in mind tax ordinances, though well-meaning, reasonable and profitable, must conform to national law ***(The City of Makati and the City Treasurers of Makati City vs. Cityland, Inc., CTA EB Case No. 1439, December 19, 2017)*****.**

STAMPING OF THE WORD “ZERO-RATED” IS SUFFICIENT TO COMPLY WITH THE INVOICING AND ACCOUNT REQUIREMENT FOR VAT-REGISTERED PERSONS. In this case, petitioner CIR insisted that the words “zero-rated” should be reflected on respondent's sales invoices but only by written or printed means to the exclusion of any other methods like that of rubber stamping. The CTA En Banc ruled otherwise and held that such rigid interpretation isolated the requirement of the law rather than to give life to its meaning.

The CTA En Banc added the true legislative intent and purpose of the requirement of imprinting the “zero-rated” is merely to distinguish sales that are subject to the regular twelve percent (12%) VAT to those that are subject to zero percent (0%) VAT and, those that are VAT exempt.

The CTA En Banc further cited the case of *Commissioner of Internal Revenue vs. Toledo Power Company* where the Supreme Court categorically ruled that mere stamping of the words “zero-rated” on the VAT invoices/receipts is sufficient compliance with the requirement. The Supreme Court stated that even if the word "zero-rated" was only stamped and not pre-printed, it is already sufficient compliance with the law because the imprinting of the word "zero-rated" was required merely to distinguish sales subject to 12% VAT, those that are subject to 0% VAT (zero-rated) and exempt sales to enable the BIR to properly implement the VAT provisions of the Tax Code ***(Commissioner of Internal Revenue vs. Phil Gold Processing & Refining Corp., CTA EB Case No. 1460, December 7, 2017)*.**

PRESENTATION OF REGISTRY RETURN CARD WITHOUT FURTHER PROOF THAT THE NOTICES WERE RECEIVED BY THE TAXPAYER ARE NOT ENOUGH TO PROVE OBSERVANCE OF DUE PROCESS. It is jurisprudentially settled that if the taxpayer denies having received an assessment from the BIR, it then becomes incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee. The *onus probandi* then will be shifted to the BIR to show by contrary evidence that the taxpayer indeed received the assessments. It has been ruled that while a mailed letter is deemed received by the addressee in the course of mail, such is merely a disputable presumption subject to controversion, the direct denial of which shifts the burden to the sender to prove that the mailed letter was, in fact, received by the addressee.

To prove the fact of mailing, it is therefore essential to present the registry receipt issued by the Bureau of Posts or the Registry return card which would have been signed by the taxpayer or its authorized representative. And if said documents could not be located, the CIR should have, at the very least, submitted to the Court a certification issued by the Bureau of Posts and any other pertinent document executed with its intervention of which the BIR failed to do in this case.

In the case at hand, the petitioner CIR merely provided the court with the registry return receipts of the Notice of Informal Conference and the FAN. The CIR was not able to prove by other relevant evidence that such Notice of Informal Conference as well as the FAN was actually received by the taxpayer. Hence, the failure of the Commissioner of Internal Revenue to strictly comply with the above requirements and its own rules is a denial of the taxpayer's right to due process ***(Commissioner of Internal Revenue vs. Mid-Land QC Realty Corporation, CTA EB Case No. 1463, December 15, 2017).***

JUDICIAL CLAIM FOR REFUND SHOULD NOT BE DENIED MERELY ON THE GROUND THAT THE TAXPAYER-CLAIMANT FAILED TO SUBMIT COMPLETE SUPPORTING DOCUMENTS AT THE ADMINISTRATIVE LEVEL. Respondent Honda Cars Makati Inc. filed with the BIR Large Taxpayers Excise Audit Division II a letter-request for refund or issuance of Tax Credit Certificate (TCC) in the amount of P25,812,793.00 representing its excess and unutilized CWT for the year 2010. Due to the failure of the BIR to act upon the said letter-request for refund, the respondent filed before the CTA in Division a *Petition for Review* which was partially granted. The petitioner CIR filed a Petition for Review before the CTA En Banc. It argued that the decision of the CTA 2nd Division partially granting the request for refund must be reversed mainly because of the failure of the respondent to submit complete supporting documents in its administrative claim for such refund/tax credit.

The CTA En Banc however denied the Petition for Review. It held that since the CTA is a court of record, cases filed before it are litigated de novo and only those evidence presented, identified, and formally offered in evidence during the trial and not those at the administrative level are to be taken into consideration in ruling a judicial claim for refund. Hence, evidence presented or lack thereof at the administrative level is immaterial once the case reached the Court especially when the case was appealed due to inaction of the BIR (***Commissioner of Internal Revenue vs. Honda Cars Makati, Inc., CTA EB Case No. 1464, December 4, 2017***).

CONVENIENCE OF THE EMPLOYER RULE AS A MATTER OF DEFENSE. Petitioner Commissioner of Internal Revenue filed a Petition for Review seeking to nullify the earlier decision of the CTA 1st Division holding the Respondent Asian Transmission Corporation liable at a reduced amount of its assessment. Several issues were raised but the main issue is centered on the imposition of deficiency withholding tax on compensation as a result of discrepancy noted on salaries and wages per Audited Financial Statements versus the amount reported in the Alphabetical List of Employees. The Respondent claimed that the noted discrepancy pertains to non-taxable compensation such as statutory contributions, de minimis benefits, and other benefits such as Hospitalization Company Contribution, Group Insurance, and Retirement Plan Contribution. However, the Court is not completely swayed by the arguments of Respondent for its failure to establish evidence that other benefits such as employee uniforms, canteen allowance, and maintenance and tools expenses which are treated as de minimis benefits are actually for the convenience of the employer and that the other benefits are specifically exempted from withholding tax on compensation. Consequently, the Petition for Review was partially granted holding the Respondent liable to deficiency withholding tax on compensation at a reduced amount with 20% interest per annum ***(Commissioner of Internal Revenue vs. Asian Transmission Corporation, CTA EB No. 1519, December 15, 2017).***

VATABILITY OF GROSS RECEIPTS BY HEALTH MAINTENANCE ORGANIZATIONS. Maxicare Healthcare Corporation filed a Manifestation and Motion for Reconsideration seeking the reversal of the earlier decision of the Court En Banc holding it liable to deficiency VAT. Several factual and legal issues have been raised but the main issue is centered on whether or not the 80% of its enrolment fees, which it earmarked and utilized for medical/hospitalization expenses of its clients, should form part of its gross receipts for the purpose of computing VAT. Citing the Supreme Court case of ***MEDICARD PH vs. CIR [G.R. No. 222743, April 5, 2017]***, the Court *En Banc* ruled that the definition of gross receipts for purposes of determining the VAT liability of HMO shall exclude the 80% of the amount of the contract price earmarked as fiduciary funds for the medical utilization of its members. On the basis of the subsequent decision of the Supreme Court in Medicard, the Court En Banc resolved to grant the Motion for Reconsideration filed by Maxicare. Accordingly, the May 8, 2017 Decision of the Court *En Banc,* and the April 21, 2014

Decision and May 5, 2015 Amended Decision of the Court in Division are **SET ASIDE.** The case is **REMANDED** to the Court in Division for further proceedings ***(Maxicare Healthcare Corporation vs. Commissioner of Internal Revenue, CTA EB No. 1312 & CTA EB No. 1317, December 12, 2017).***

Court of Tax Appeals in (Division)

BOTH CLAIM ADMINISTRATIVE AND JUDICIAL CLAIM FOR REFUND MUST BE FILED WITH THE 2-YEAR PRESCRIPTIVE PERIOD; PAYMENT RECEIVED BY A NON-RESIDENT CORPORATION THROUGH REDEMPTION OF SHARES ARE NOT DIVIDENDS UNDER THE RP-US TAX TREATY. Citing the case of Commissioner of Internal Revenue vs. Goodyear Philippines, Inc., the Supreme Court held that Section 229 of the NIRC of 1997, as amended, states that judicial claim for refund must be filed within two (2) years from the date of payment of the tax or penalty, providing further that the same may not be maintained until a claim for refund or credit has been duly filed with the CIR. Thus, the settled rule is that both claim for refund with the BIR and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period from the date of payment of the tax.

Moreover, the court in this case ruled that the payment received by virtue of redemption of shares is not “dividend” as contemplated under the NIRC of 1997, as amended, but a capital gain subject to the 5% or 10% Capital Gains Tax. However, since in this case, the recipient of the payment is a non-resident corporation (Goodyear Tire and Rubber Company) which was duly organized under the laws of America, the payment it received by virtue of the redemption of the preferred shares by Goodyear Philippines Inc. is covered by the RP-US Treaty which provides:

ARTICLE 14. CAPITAL GAINS

> (1) Gains from the alienation of tangible personal (movable) property forming part of the business property of a permanent establishment which a resident of a Contracting State has in the other Contracting State or of tangible personal (movable) property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in the other State. However, gains derived by a resident of a Contracting State from the alienation of ships, aircraft or containers operated by such resident in international traffic shall be taxable only in that State, and gains described in Article 13 (Royalties) shall be taxable only in accordance with the provisions of Article 13.
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> (2) **Gains from the alienation of any property other than those mentioned in paragraph (1) or in Article 7**

> **(Income From Real Property) shall be taxable only in the Contracting State of which the alienator is a resident.** (Emphasis added)

The reservation clause of the same treaty further provides:

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>
> (1) reservation that, notwithstanding the provisions of Article 14 relating to capital gains, **both the United States and the Philippines may tax gain from the disposition of an interest in a corporation if its assets consist principally of a real property interest located in that country.** Likewise, both countries may tax gain from the disposition of an interest in a partnership, trust or estate to the extent the gain is attributable to a real property interest in one of the countries. **The term "real property interest" is to have the meaning it has under the law of the country in which the underlying real property is located**; (Emphasis added)

Hence, based on the above provisions by the RP-US Treaty, any gain that may be derived by a resident of the US from the alienation of its properties, other than those mentioned in paragraph (1) of Article 14 of the RP-US Tax Treaty, shall be taxable only in the US. However, under the reservation clause above, the Philippines may tax the gains derived from the disposition of shares owned by a resident of the US in a domestic corporation, if the latter's asset consist principally of real property interests located in the Philippines.

Under RR No. 4-86 dated April 2, 1986, the term "Real Property Interests" shall be understood to include real properties as understood under Philippine Laws. "Real Property Interests" means any properties enumerated in Section 3 of RR No. 4-86 which, are not, however, exclusive of others that are similarly situated. Moreover, the term "Principally" means more than 50% of the entire assets in terms of value.

In the present case, since the Audited Financial Statements of petitioner for the years 2012 and 2013 shows that the real properties components of its Property Plant and Equipment comprised less than 50% of its assets, hence, the net capital gain derived by GTRC on the redemption of preferred shares is thus exempt form 5% to 10% CGT imposed by the NIRC, as amended ***(Goodyear Philippines Inc., vs. Commissioner of Internal Revenue, CTA Case No. 9023, December 7, 2017).***

ASSESSMENTS CONDUCTED BY REVENUE OFFICERS ARE PRESUMED CORRECT AND DONE IN GOOD FAITH; FAILURE TO REBUT THIS PRESUMPTION IS FATAL. Petitioner should keep in mind that tax assessments are presumed correct and made in good faith, with the taxpayer having the burden of proving otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.

The court added that failure to present evidence for the court's consideration to rebut this presumption is fatal to petitioner's cause. The Court of Tax Appeals is a highly specialized body that reviews tax cases and conducts trial *de novo.* Clearly, petitioner was remiss in presenting crucial pieces of evidence in the *de novo* proceedings before the CTA and failed to prove relevant aspects of its defense against the income tax assessment ***(Salcedo Ristorante Italiano, Inc. vs. Commissioner of Internal Revenue CTA Case No. 8880, December 12, 2017).***

RENEWABLE ENERGY DEVELOPER TAX PAYERS REGISTERED UNDER THE R.A. 9513 (*RENEWABLE ENERGY ACT*) ARE NOT ENTITLED TO ANY VAT REFUND/CREDIT BUT THEY ARE ENTITLED TO SEEK REIMBURSEMENT FROM SUPPLIERS WHO SHIFTED THE PAYMENT OF VAT TO THEM. According to petitioner, Section 15(g) of the Renewable Energy Act must be construed in harmony with the provisions of the Tax Code. Section 15(g) of the RE Act, together with Sections 108(8)(7) and 112(A) of the Tax Code, allegedly establishes one and the same principle that renewable energy generation companies are eligible to zero-rated VAT and thus allowed to claim refund of or seek issuance of tax credit certificate of its creditable input tax.

Petitioner insists that such renewable energy generation companies are authorized under Section 112(A) of the Tax Code to seek refund or tax credit of unutilized excess input tax they paid on purchases attributable to zero-rated sales regardless of whether or not they are registered under the Renewable Energy Act.

The Court did not find this argument to be valid. It held that petitioner is not entitled to input VAT on the ground that the purchases of their local supplies needed for the development, construction and installation of its plant facilities are zero-rated pursuant to R.A. 9513. Therefore, no output VAT should be shifted or passed on to petitioner, as well as no input VAT shall also be paid by them. Hence, it clearly follows that petitioner is not entitled to refund or credit from said purchases.

The Court added that the petitioner’s recourse for its purchases of goods and services where it paid VAT is not a claim for refund against the BIR, but to seek reimbursement of its input VAT paid from its supplier of goods and services since its purchases of local goods, properties and services needed for the development, construction and installation of the plant facilities as well as its purchases of goods, properties and service for the whole process of exploration and development of renewable energy sources up to its conversion into power, including but not limited to the services performed by subcontractors or contractors, are subject to zero percent VAT under R.A. No. 9513 ***(Hedcor, Inc., vs. Commissioner of Internal Revenue, CTA Case No. 8990, December 12, 2017).***

ASSESSMENT BASED ON A MEMORANDUM OF ASSIGNMENT IN LEIU OF AN LOA SHALL MAKE THE ASSESSMENT VOID. In this case, the respondent (CIR) argued that in cases of re-assignment arising from the transfer of a taxpayer to another RDO, a Memorandum of Assignment (MOA) is sufficient to confer to the new Revenue Officer to continue the audit investigation. It further argued that to require a new Letter of Authority is detrimental to the government who will be made to suffer for the natural occurrence of things that caused the issuance of the MOA such as resignation, re-assignment, or death of BIR employees.

The CTA was not convinced. Citing the decision of the Supreme Court, the tax court ruled that it is the LOA which empowers a Revenue Officer to examine the books of accounts and accounting records of the taxpayer. Hence, all acts of a Revenue Officer not armed with an LOA specifically designating him/her to conduct the audit investigation are void ***(Sugar Crafts, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 8738, December 4, 2017).***

BIR ASSESSMENT CANCELLED FOR FAILURE TO ESTABLISH RECEIPT OF ASSESSMENT NOTICE. FEATI University, Inc. filed a Petition for Review praying for the cancellation of BIR assessment. According to the Petitioner, it received the First Notice for Presentation of Records and the Final Notice Before Seizure without proper receipt of the Formal Assessment Notice. Thus, both making the First Notice and Final Notice Before Seizure prematurely issued. The court ruled that the Petitioner's right for due process had been violated after failure of the BIR to prove that it had properly served the assessment notices to the Petitioner. Petition for Review is **GRANTED** and the BIR assessment is **CANCELLED** ***(Feati University, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 8659, December 5, 2017).***

CAPITAL GAINS TAX (CGT) & DOCUMENTARY STAMP TAX (DST) EXEMPTION AS A RESULT OF TAX-FREE EXCHANGE TRANSACTION. Sartorious Aketiengesellschaft filed a Petition for Review praying for the refund of alleged erroneously paid CGT and DST. Several issues were raised but the main point of contention is whether or not the Petitioner is entitled to claim for refund the erroneously paid CGT and DST. Petitioner contends that the transfer of its shares in Sartorius Philippines to its wholly-owned subsidiary, SWT GmbH, a German-based company is not subject to CGT pursuant to Section 40(C)(2) of the 1997 Tax Code, as amended, which provides that no gain or loss shall be recognized if property is transferred to a corporation by a person in exchange for stock or unit of participation in such a corporation of which as a result of such exchange said person, alone or together with others, not exceeding four (4) persons, gains control of said corporation. Provided, that stocks issued for services shall not be considered as issued in return for property. After careful study and analysis of the case, the Court finds that Petitioner's transfer of its shares in Sartorius Philippines to SWT GmbH satisfied the requisites of a tax-free exchange and is exempt from CGT. Likewise, it is exempt from DST pursuant to Section 199 of the 1997 Tax Code, as amended ***(SartoriousAketiengesellshaft vs. Commissioner of Internal Revenue, CTA Case No. 8951, December 8, 2017).***

PARTY LIABLE TO PAY CAPITAL GAINS TAX (CGT) & DOCUMENTARY STAMP TAX (DST). Petitioner, LKY Property Holding, Inc. filed a Petition for Review seeking the cancellation of BIR assessment on CGT and DST as a result of its purchase of hotel from Mayon International Hotel Inc. (MIHI) as evidenced by a Deed of Absolute Sale. The assessment is premised on the interpretation of the BIR on the stipulation contained in the deed that the Petitioner shall advance the payment of CGT and DST that may fall due by virtue of the sale. Petitioner denies that it agreed to shoulder the payment of CGT and DST and posits that it is very clear in the Deed of Absolute Sale that it shall merely advance the amount for the payment of the CGT and DST to MIHI who shall still bear the burden of paying the said taxes. The amount advanced by Petitioner shall be deducted from the total purchase price that the Petitioner would pay to MIHI. Hence, by agreement of the parties, MIHI, the seller, shall bear the burden of paying the CGT and DST. The Court resolved to grant the Petition for Review and cancelled the assessment citing that CGT is a tax imposed on the gains presumed to have been realized by the seller, thus, the party liable to pay the CGT should be the seller (i.e MIHI). Likewise, the decision to cancel the CGT and DST imposition is premised on the fact that the BIR failed to issue a Formal Assessment Notice which is a substantive prerequisite to tax collection, for it contains not only a computation of tax liabilities but also a demand for payment within the prescribed period, thereby signaling the time when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies therefor ***(LKY Property Holdings, Inc. vs. Commissioner of Internal Revenue CTA CASE No. 9066, DECEMBER 14, 2017).***

SALARIES OF ADB EMPLOYEES WHO ARE FILIPINO NATIONALS ARE SUBJECT TO INCOME TAX; INCOME TAX EXEMPTION OF ABD EMPLOYEES ARE NOT ABSOLUTE. Several Filipino nationals who work for the Asian Development Bank (ADB) filed a claim for the refund of the income tax collected by the government from their salaries. They contend that paragraph 2 of Article 56 of ADB Charter specifically provides for their exemption from income tax, to wit:

"xxx xxx xxx

> 2. No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to Directors, alternates, officers or employees of the Bank, including experts performing missions for the Bank, except where a member deposits with its instrument of ratification or acceptance a declaration that such member retains for itself and its political subdivisions the right to tax salaries and emoluments paid by the Bank to citizens or nationals of such member.

xxx xxx xxx

The Court ruled that it is evident from the foregoing provision that the tax exemption granted to ADB personnel is not absolute based on the following phrases stated in the afore-quoted provision: **"except where a member x xx retains for itself and its political subdivisions the right to tax salaries and emoluments paid by the Bank to citizens or nationals of such member" and "subject to the power of the Government to tax its nationals".** The Court of Tax Appeals finds the said phrases to be an express reservation on the part of the Philippine government to tax the salaries and emoluments paid by the ADB to Philippine citizens or nationals ***(ADB Employees vs. Commissioner of Internal Revenue, CTA Case No. 9073, December 1, 2017).***

NO ZERO-RATED OR EFFECTIVELY ZERO-RATED SALES ON THE PART OF THE REFUND CLAIMANT, INPUT VAT IS NOT REFUNDABLE, OR AT THE VERY LEAST, NOT YET REFUNDABLE. Petitioner claimed that the law does not impose as a requirement that the zero-rated or effectively zero-rated sales must be made during the same periods as when the input taxes sought to be refunded were incurred or paid. In other words, the petitioner contended that a taxpayer-claimant must only establish the existence or presence of zero-rated or effectively zero-rated sales and attribute the input taxes subject of the claim to said sales; however, it is not allegedly necessary for a claimant that the zero-rated or effectively zero-rated sales and the input taxes subject of the refund fall during the same periods. Hence, based on the above assumptions, petitioner submits that the input taxes it incurred during the taxable year (TY) 2011, as well as those incurred in TYs 2012 and 2013, can be traced or attributed to the first zero-rated sale made during the 1st quarter of TY 2014. As such, petitioner asserts that it is entitled to a refund of unutilized input taxes incurred during the 1st to 4th quarters of taxable year 2011 which were attributable to its zero-rated sale for the 1st quarter of TY 2014.

The Court was not convinced. The tax court ruled that without any zero-rated or effectively zero-rated sales being shown by petitioner, the attribution requirement or that the input tax due or paid must be attributable "to such sales" as provided by Section 112(A) of the NIRC cannot be fulfilled or complied with. The Court added that what is refundable under Section 112(A) is the input VAT attributable to the taxpayer-claimant's zero-rated or effectively zero-rated sales. In other words, the input tax due or paid which may be refunded by the taxpayer-claimant under Section 112(A) must be attributable to "such sales", or to the "sales" previously referred to. Hence, any contention that the existence of zero-rated or effectively zero-rated sales during the subject period is immaterial, has no basis in law ***(Maibarara Geothermal Inc., vs. Commissioner of Internal Revenue, CTA Case Nos. 8699, 8732, 8771, and 8811, January 3, 2018).***

DEFECTIVE WAIVERS ISSUED BY TAXPAYERS CANNOT BE RAISED AS A DEFENSE IN ORDER TO SET ASIDE AN ASSESSMENT. In the instant case, petitioner-taxpayer and respondent executed five waivers. The waivers were executed without a written and notarized authority of petitioner’s authorized signatory. Petitioner-taxpayer failed for five times to submit the written and notarized authority of its signatory, and respondent likewise failed for five times to demand petitioner's compliance with the strict requirement for the validity of the waivers. Despite this, both parties continued to deal with each other.

During the trial however, the petitioner raised the defect of the waivers it issued as a defense against the final assessment by the respondent-BIR. Petitioner argues that the waivers were invalid because they were not validly notarized because Mr. Miyake, the person who signed the waiver, did not personally appear before the notaries public.

The Court in this case ruled in favor of the respondent-CIR. First, it ruled that under RDAO 05-01, the waiver should not be accepted by the concerned BIR office and official unless the said waivers are duly notarized. But since the waivers submitted by the petitioner taxpayer were duly notarized, the respondent cannot therefore be faulted for relying in good faith on the validity and due execution of said notarized waivers. The Court further finds the petitioner-taxpayer in bad faith when it impugns the due notarization of the waivers considering the said defects was caused by the petitioner. The Court reminded the petitioner-taxpayer in this case these waivers in fact benefitted them as it allowed the petitioner in this case to gather and submit documents to substantiate its claim before the CIR; it was also able to postpone the payment of taxes, etc. Therefore, by virtue of evident bad faith of the petitioner-taxpayer, the Court ruled for the validity of the waivers and also on the validity of the assessment by the respondent-CIR ***(First Sumiden Circuits, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 8924, January 3, 2018).***

NON-STOCK, NON-PROFIT ORGANIZATIONS ARE STILL SUBJECT TO PAYMENT OF VALUE ADDED TAX; FINANCIAL INTERMEDIARIES AS DEFINED BY GENERAL BANKING ACT AND THE TAX CODE.VAT is a form of sales tax. It is a tax on consumption levied on the sale, barter, exchange or lease of goods or properties and services in the Philippines and on importation of goods into the Philippines. It is an indirect tax, which may be shifted or passed on to the buyer, transferee or lessee of goods, properties or services.

> Section 105 of the NIRC of 1997, as amended, provides who are subject to VAT and explains the phrase "in the course of trade or business" as follows:
>
> "SEC. 105. *Persons Liable.* - **Any person who, in the course of trade or business,** sells barters, exchanges, leases goods or properties, **renders services,** and any person who imports goods **shall be subject to the value-added tax (VAT)** imposed in Sections 106 to 108 of this Code.
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> XXX XXX XXX
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> The phrase **"in the course of trade or business" means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a nonstock, nonprofit private organization (irrespective of the disposition of its net income whether or not it sells exclusively to members or their guests), or government entity."***(Emphasis added)*

The foregoing section explicitly provides that even a non-stock, non-profit organization or government entity is liable to pay VAT on the sale of goods or services. VAT is a tax on transactions, imposed at every stage of the distribution process on the sale, barter, exchange of goods or property, and on the performance of services, even in the absence of profit attributable thereto.

Under the General Banking Act or RA No. 337, as amended, the term "financial intermediaries" is defined as "persons or entities whose principal functions include the lending, investing or placement of funds or evidences of indebtedness or equity deposited with them, acquired by them, or otherwise coursed through them, either for their own account or for the account of others."

Also, Section 22(W) of the NIRC of 1997, as amended, defines non-bank financial intermediary as follows:

> "(W) the term *'non-bank financial intermediary'* means a financial intermediary, as defined in Section 2(D)(c) of Republic Act No. 337, as amended, otherwise known as the General Banking Act, authorized by the Bangko Sentral ng Pilipinas (BSP) to perform quasi-banking activities."

True, petitioner's Amended Articles of Incorporation states its corporate purposes which are, among others, "[t]o provide access to economic, financial, social and other developmental opportunities to the small cottage and micro entrepreneurial sector of society and other poor and disadvantaged sectors so that they may live in abundance with strengthened faith in God and in right relationships with their fellowmen and the rest of creation" and "[t]o conduct micro-finance operations.

Nonetheless, the petitioner cannot be considered as "other non-bank financial intermediary" simply on the basis of its bare allegation; there is nothing in the records that would show that it has been authorized by the BSP to perform quasi-banking activities ***(Kabalikat Para Sa Maunlad Na Buhay Inc. vs. Commissioner of Internal Revenue, CTA Case No. 9003, January 3, 2008).***

ENUMERATIONS OF ALLOWABLE DEDUCTIONS UNDER RR NO. 11-2005 AND RULE XX OF IRR OF THE PEZA LAW ARE NOT EXCLUSIVE. Section 2 of Rule XX of the IRR of the PEZA Law enumerates the allowable deductions can availed by PEZA registered entities, viz:

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> SECTION 2. *Gross Income Earned; Allowable Deductions.* - For purposes of these Rules, Gross Income Earned shall be defined in Section 2(nn), Rule I of these Rules subject to the following allowable deductions for specific types of enterprises:
>
> 1. ECOZONE Export Enterprises, Free Trade Enterprises and Domestic Market Enterprises
>
> - Direct salaries, wages or labor expenses
> - Production supervision salaries
> - Raw materials used in the manufacture of products
> - Goods in process (intermediate goods)
> - Finished goods
> - Supplies and fuels used in production
> - Depreciation of machinery and equipment used in production, and buildings owned or constructed by

an ECOZONE Enterprise

- Rent and utility charges associated with building, equipment and: warehouses, or handling of goods
- Financing charf5es associated with fixed assets

XXX XXX XXX

To implement the above provisions of the PEZA Law, the BIR issued RR No. 2-2005 on February 1, 2005 which provides:

> SECTION 7. Gross *income earned.*-xxx
>
> For purposes of computing the total five percent (5%) tax rate imposed by Republic Act No. 7227, Republic Act No. 7903, Republic Act No. 7922 and Republic Act No. 7916, *the cost of sales or direct cost shall consist only of the following cost or expense items* which shall be computed in accordance with Generally Accepted Accounting Principles (GAAP): **(italics ours)**

Subsequently, the above provision was amended by RR No. 11-2005 issued in June 23, 2005, to read as follows:

> “For the purposes of computing the total five percent (5%) tax rate imposed, *the following direct costs are included in the allowable deductions* to arrive at gross income earned for specific types of enterprises:”**(italics ours)**

Based on the foregoing, RR 11-05 thus effectively amended the provisions of RR 02-05 where the words "consists only" were deleted and replaced with the words "the following direct costs are included in the allowable deductions xxx". This suggests, as already ruled several times by the tax court, that the allowable deductions from gross income of PEZA registered enterprises enumerated in the IRR of the PEZA Law and RR No. 2-2005, as amended by RR No. 11-2005, are not exclusive. Thus, if a particular cost or expense is directly related to the PEZA-registered activity, then it should be treated as a direct cost includible in the allowable deductions from the gross income ***(Moog Controls Corporation-Philippine Branch vs. Commissioner of Internal Revenue, CTA Case No. 9077, January 3, 201****8).*