TAX MANAGEMENT ASSOCIATION OF THE PHILIPPINES, INC.

TMAP TAX UPDATES FOR SEPTEMBER 2017

Prepared by:
Romulo Mabanta Buenaventura Sayoc & De los Angeles

SUPREME COURT DECISIONS

PSALM v. Commissioner of Internal Revenue ((*En Banc*) G.R. No. 198146, 8 August 2017)

- **The sale of power plants by PSALM pursuant to the EPIRA is not subject to VAT.**

The sale of power plants by PSALM by virtue of Section 50 of the EPIRA law is not subject to VAT. The sale of the power plants is not in pursuit of a commercial or economic activity but a mandatory government function, hence not done in the course of trade or business. The repeal of section 13 of R.A. No. 6395 (exemption from VAT of NPC) by Section 24 of RA No. 9337 does not apply since the sale conducted here was done by PSALM, not NPC. The argument of CIR that the sale is considered an incidental transaction, which is now deemed covered in the phrase "in the course of trade or business", since the assets are owned by NPC and only held in trust by NPC is also erroneous since under EPIRA, these assets are already owned by PSALM.

- **The DOJ (not the CTA) has jurisdiction to resolve tax assessments issued against government agencies**

In a tax case involving only government agencies, the jurisdiction in resolving disputes arising therefrom lies with the DOJ, not the CTA. This is pursuant to PD No. 242, which, though earlier issued than the 1997 NIRC (a general law), is a special law hence is applied as an exception to the general rule. This rule will not apply if there is at least one co-party who is a private person/entity – in such a case, the jurisdiction is with the CTA.

Dissenting Opinion (Mariano, J.; shared by Bersamin, J.):

It is the CTA which has jurisdiction and not the DOJ. PD No. 242 is a general law that applies to all disputes between or among national government offices, while RA No. 1125, as amended by R.A. No. 9282 is a specific law vesting exclusive and primary jurisdiction to the CIR and the CTA on cases pertaining to disputed tax assessments, tax laws, and refunds of national revenue taxes. To state otherwise will deprive the CIR any judicial recourse. Decisions of the DOJ can be appealed to the Office of the President, but cannot, thereafter, be appealed to the Court of Appeals (via Rule 43) since the Court of Appeals does not have jurisdiction over tax cases, pursuant to R.A. No. 9282.

Edison (Bataan) Cogeneration Corporation v. Commissioner of Internal Revenue (GR No. 201665, 30 August 2017)

- **The Commissioner's admission in a Memorandum Report issued prior to the filing of the Petition for Review is not a judicial admission. A judicial admission must be in the Joint Stipulation of Facts and Issues or in the Answer.**

Edison (Bataan) Cogeneration Corporation ("EBCC") claims that the CTA *En Banc* erred in failing to consider the judicial admission made by the Commissioner of Internal Revenue ("CIR") in her Memorandum that EBCC remitted Final Withholding Tax ("FWT"). The Supreme Court ruled against EBCC stating that a careful reading of the Memorandum reveals that the alleged remittance of FWT was based on a Memorandum Report prepared by the revenue officers recommending the denial of EBCC's protest, which was issued prior to EBCC's filing of its Petition for Review before the CTA and there was no mention of such remittance in the Joint Stipulations of Facts and Issues by the parties and in the Answer filed by the CIR.

COURT OF TAX APPEALS *EN BANC* DECISIONS

Hedcor Sibulan, Inc. v. Commissioner of Internal Revenue (CTA EB No. 987, 15 August 2017)

- **The ERC Registration and Certificate of Compliance is essential to qualify the sale of power from renewable energy sources as VAT zero-rated.**

To qualify for VAT zero-rating under Section 108(B)(7) of the Tax Code (sale of power or fuel generated through renewable sources of energy), petitioner must prove, by sufficient evidence, that it is engaged in the sale of power or fuel generated through renewable sources of energy and is duly authorized by the Energy Regulation Commission (ERC) pursuant to Section 4.108-3 of Revenue Regulations No. 16-2005. As petitioner failed to submit its ERC Registration and Certificate of Compliance (COC), petitioner cannot be considered to have been duly authorized by the ERC to operate facilities used in the generation of electricity. Thus, its sales cannot qualify for VAT zero-rating under Section 108(B)(7) of the Tax Code.

Composite Materials Inc. v. Commissioner of Internal Revenue (CTA EB Case No. 1314, 15 August 2017)

- **An appeal to the CTA En Banc of a Decision or an Amended Decision of a Division must be preceded by a timely motion for reconsideration.**

Before an appeal of the Decision of the Court in Division may be filed before the Court *En Banc* it must be preceded by the filing of a timely motion for reconsideration or new trial with the Division. The same holds true with respect to Amended Decisions.

If, however – as in this case – an Amended Decision is merely denominated as such but is effectively a resolution of a Motion for Reconsideration as it did not alter nor modify but rather upheld the findings and conclusions in the previous Decision, there is no need to file another Motion for Reconsideration before appealing the same to the Court *En Banc* considering that the rules of the CTA do not allow the filing of a second Motion for Reconsideration or for new trial.

- **A referral memorandum issued by the RDO to an examiner not named in the LOA does not authorize the tax examination and thus the resulting assessment is void.**

The examination of a taxpayer by a revenue officer in the absence of an LOA is a violation of the taxpayer's right to due process. The resulting assessment is void. The reassignment of the audit by a Revenue District Officer, through a Referral Memorandum, to another revenue officer who is not listed in the LOA, is not equivalent

to an LOA. The resulting assessment by the second revenue officer therefore, even if authorized by the Referral Memorandum of the Revenue District Officer, is void.

Commissioner of Internal Revenue v. Coral Bay Nickel Corporation
Coral Bay Nickel Corporation v. Commissioner of Internal Revenue (CTA EB Case Nos. 1543 and 1546, 16 August 2017)

- **The failure to move for reconsideration of an Amended Decision is a ground for dismissal of the Petition.**

The failure to move for a reconsideration of an Amended Decision of the CTA Division is a ground for the dismissal of the Petition for Review filed with the CTA *En Banc* pursuant to the Supreme Court case of *Asiatrust Development Bank, Inc. v. Commissioner of Internal Revenue* (G.R. No. 201530, April 19, 2017). In this case, both parties failed to file their respective motions for reconsideration of the Amended Decision. Thus, their respective Petitions for Review must be dismissed.

P.J. Del Rosario, *Concurring and Dissenting Opinion:*

It is only the party adversely affected by the assailed Amended Decision that should move for its reconsideration. Considering that the rules of the CTA prohibit the filing of a second motion for reconsideration, it is procedurally improper for the party whose previous motion for reconsideration was partially granted under the Amended Decision to file another motion for reconsideration of the Amended Decision.

Commissioner of Internal Revenue v. Hoya Glass Disk Philippines, Inc.
Hoya Glass Disk Philippines, Inc. v. Commissioner of Internal Revenue (CTA EB Case No. 1524 and CTA EB No. 1529, 16 August 2017)

- **A wrong entry in the return due to mistake does not make the return a false return.**

Pursuant to the Supreme Court case of *Commissioner of Internal Revenue v. Philippine Daily Inquirer* (G.R. No. 213943, March 22, 2017), the entry of wrong information due to mistake, carelessness, or ignorance, without intent to evade tax, does not constitute a false return.

A mistake on the part of the taxpayer in the preparation of its return or payment of its tax does not automatically result to the operation of the ten-year prescriptive period to assess based on a false return. A mistake on the return shall not be considered a falsity if:

(i) There was no design to mislead or deceive on the part of the taxpayer;
(ii) There was no intentional non-disclosure or omission so as to put the BIR at a disadvantage in the investigation since the BIR was not prevented from issuing the deficiency assessment within the general three-year period; and
(iii) There was no fraudulent intent or willful intent to evade the payment of the correct amount of tax.

Commissioner of Internal Revenue v. Kep (Philippines) Realty Corporation (CTA EB Case No. 1504, 18 August 2017)

- **It is not necessary that there be a zero-rated transaction at the time the input tax sought to be refunded was incurred.**

Neither the law nor the implementing regulations provide that in a claim for refund of input VAT that there be zero-rated or effectively zero-rated transactions at the time the claimed input VAT was incurred or paid. Neither does it provide that the input tax in the purchase of land be refunded only when it was sold or input tax thereon be apportioned to the period of lease. Neither does the law nor the implementing regulations provide that the option to carry over to the succeeding quarters any unutilized input tax or to file a claim for refund and availing of an option precludes choosing that of the other.

What the law and the implementing regulations provide is that a taxpayer who has zero-rated or effectively zero-rated transactions were allowed to apply for the issuance of a tax credit certificate or a tax refund for input taxes paid, in addition to the option to carry forward the input taxes against future output tax liabilities.

Commissioner of Internal Revenue v. Philippine Aerospace Development Corporation (CTA EB Case No. 1516, 23 August 2017)

The failure of the CIR to present the PAN during trial is tantamount to its failure to issue one to the taxpayer which is a violation of its due process.

Qatar Airways Company with Limited Liability v. Commissioner of Internal Revenue (CTA *EB* No. 1468 [CTA Case No. 8816], 5 September 2017)

As the denial of an application for abatement of surcharge involves the interpretation and application of Section 204(B) of the Tax Code, it clearly falls under the phrase "other matters arising under the Tax Code", pursuant to Section 7(a) (1) of R.A. No. 1125, as amended. However, the sole authority to abate tax liability rests upon the sole discretion of the Commissioner of Internal Revenue. Hence, the Court of Tax Appeals may not dip its finger into it in observance of the principle of separation of powers.

National Grid Corporation of the Philippines v. Central Board of Assessment Appeals, et al. (CTA EB No. 1392 [CBAA Case No. M-35, LBAA Case No. 01-2013], 5 September 2017)

- **Reiterates the rule that payment under protest is not required if the issue is not the reasonableness or correctness of the real property tax assessment.**

There are two situations where a taxpayer of real property taxes may question the real property tax assessment: (1) he may question the reasonableness or correctness of the assessment, or (2) question the legality or validity of the assessment.

An example for the first scenario is when a taxpayer disputes the reasonableness of an increase in a real property tax assessment. In such a case, the taxpayer must first pay the assessment under protest and then file its protest. In the event that the protest is denied or not acted upon within 60 days from filing, the taxpayer may then file an appeal with the LBAA. The decision of the LBAA may be appealed to the CBAA.

The payment of the taxes under protest is jurisdictional. Non-payment thereof will render the LBAA (and the appellate bodies, including the CTA) without jurisdiction to issue a decision.

An example for the second scenario is when a taxpayer or the owner or person having legal interest in a property questions the very authority and power of the assessor to impose the assessment, or questions the authority and power of the treasurer to collect the tax – which becomes a legal question properly cognizable by the proper trial court. In such case, the taxpayer may appeal directly to the proper RTC and appeal the decision of the RTC before a division of the CTA.

Unisys Philippines Limited v. Commissioner of Internal Revenue (CTA EB No. 1450, 6 September 2017)

The notice of hearing of a motion must be addressed to all parties and state the specific date and time of the hearing. If not complied with, a motion is considered pro forma and the court has no authority to act upon it. It likewise does not toll the running of the prescriptive period for an appeal or the filing of the requisite pleading.

People of the Philippines v. Joel C. Mendez (CTA EB Crim. No. 038, 8 September 2017)

- **The civil liability can be included in the judgment in the criminal case only if the Commissioner issued a formal tax assessment.**

Section 205 of the NIRC provides that either civil or criminal action or both simultaneously may be pursued in the discretion of the authorities charged with the collection of taxes, and that the judgment in the criminal case shall not only impose the penalty but shall also order payment of the taxes subject of the criminal case as finally decided by the Commissioner. However, for the civil liability be included in the judgment in the criminal case, there must first be a formal assessment of the taxes by the Commissioner.

COURT OF TAX APPEALS DECISIONS

Splash Corporation v. Commissioner of Internal Revenue (CTA Case No. 8483, 18 August 2017)

- **A new LOA should be issued if a revenue officer not named in the LOA will continue the audit; otherwise, the resulting assessment is void.**

The issuance of an LOA prior to the conduct of an examination of a taxpayer's books and other accounting records by any revenue officer is indispensable to the validity of an assessment. Continuation of audit by a revenue officer other than the revenue officer named in a previous LOA requires the issuance of a new LOA. If a new LOA for the new revenue officer conducting the audit is not issued, the resulting assessment will be null and void.

Following the Supreme Court case of *Medicard Philippines Inc. v. Commissioner of Internal Revenue* (G.R. No. 222743, April 5, 2017) failure to raise the issue of lack of authority of the examining revenue officers in the administrative level as well as in the Petition for Review does not preclude the petitioner from subsequently insisting upon motion for reconsideration that the assessment is intrinsically void for want of a valid LOA.

Arturo E. Villanueva v. Commissioner of Internal Revenue (CTA Case No. 8935, 18 August 2017)

If the taxpayer denies having received an assessment from the BIR, it becomes incumbent upon the latter to prove that such notice was indeed received by the taxpayer. To prove the fact of mailing, it is 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.

Substantial under declaration or failure to report sales or income in an amount exceeding 30% of that declared per return, merely operates as a prima facie evidence of fraud, which can still be contradicted by other evidence. While the Total Sales was without any amount, there can be no under-declaration of sales because the amounts for Net Income, Taxable Income and Tax Due were properly indicated in petitioner's ITR.

Telstar Manufacturing Corporation v. Commissioner of Internal Revenue (CTA Case No. 8900, 18 August 2017)

In this case, the waivers of the statute of limitations under the Tax Code were alleged to be defective as: (1) the person who signed the waiver on behalf of petitioner was not specifically authorized by petitioner's Board of Directors and (2) the waivers failed to specify the type of tax and the amount of tax due.

The CTA held that since petitioner itself is partly to blame for the flaws of the waivers, petitioner cannot be allowed to benefit from the flaws of its own waivers and insist on its invalidity to escape its responsibility to pay deficiency taxes.

Moreover, petitioner is likewise estopped from challenging the validity of the subject waiver as petitioner allowed the respondent to rely on the waivers they have executed and remained silent on the waivers' defects. It did not raise any objection against the waivers' validity up until it was already assessed with deficiency taxes and penalties.

San Miguel Brewery, Inc. v. Commissioner of Internal Revenue (CTA Case No. 8955, 18 August 2017)

- **A collateral attack on the validity of an RMC in a claim for refund is not allowed.**

In connection with a claim for refund, petitioner alleges that the excise tax rate specified in RMC No. 90-2012 is directly contradictory to the express provisions of Section 143 of the Tax Code and is therefore invalid.

While the CTA has the power to rule on the validity of a particular administrative rule or regulation by virtue of its *certiorari* powers, petitioner should have directly attacked RMC No. 90-2012 *via* a Petition for *Certiorari* at the earliest opportunity rather than through a collateral attack *via* a judicial claim for refund.

Collateral attacks on a presumably valid law is not allowed. RMC No. 90-2012 is an administrative rule with the force of law. Thus, unless and until RMC No. 90-2012 has been declared invalid and unconstitutional through the proper proceeding, the same is binding; and there is no basis for petitioner's claim for refund or Tax Credit Certificate.

Bangko Sentral ng Pilipinas v. Commissioner of Internal Revenue (CTA Case No. 9010, 18 August 2017)

There is no showing that BSP is bank which has been jurisprudentially defined as a moneyed institute engaged in facilitating the borrowing, lending, and safekeeping of money and in dealing in notes, bills of exchange, and credits. Correspondingly, since

the BSP is not considered a bank, the period of redemption under R.A. No. 8791 or the General Banking Law of 2000 is not applicable to the purchase by BSP of a foreclosed property. Rather, it is the one-year period of redemption under Section 6 of Act No. 3135, as amended by Act No. 4118, which must be applied in this case. From the expiration of the said redemption period, BSP has thirty (30) days within which to file the Capital Gains Tax Return and remit the capital gains tax due.

Saturn Holdings, Inc. v. Commissioner of Internal Revenue (CTA Case No. 9085, 18 August 2017)

- **The FLD without a due date for payment is void.**

The FLD and FAN are void since the due date when the taxpayer should pay the deficiency taxes is left blank. An assessment must not only contain a computation of tax liabilities but also a demand for payment within a prescribed period.

Even assuming that the FLD and FAN are valid, the surcharges and interests are cancelled considering that the taxpayer believed in good faith that at the time the tax was due for payment, the taxpayer was not liable to pay the same on the basis of previous rulings by the BIR.

Compromise penalties are only amounts suggested in settlement of criminal liability and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same. The Court has no jurisdiction to compel a taxpayer to pay the compromise penalty. In the absence of consent from the taxpayer, the assessment of compromise penalty cannot be granted.

Pacifichub Corporation v. Commissioner of Internal Revenue (CTA Case No. 8895, 31 August 2017)

- **The CTA cannot interfere with the exercise of discretion of the Commissioner in abatement cases.**

A petition praying for an order declaring a Warrant of Distraint and Levy and/or a Notice of Denial to be void and of no legal force and effect falls within the jurisdiction of the CTA under the term "other matters" in Section 7(a)(1) of R.A. No. 1125.

However, a declaration that the Notice of Denial has no force and legal effect does not mean that the taxpayer is already entitled to its request for abatement. The Commissioner of Internal Revenue has the sole authority or discretion to abate a taxpayer's tax liability. The CTA must not interfere with such exercise of discretion.

Wellington Investment and Manufacturing Corporation v. Commissioner of Internal Revenue (CTA Case No. 8726, 14 September 2017)

Mere reimbursements-at-cost for shared expenses such as utilities and other maintenance expenses of the leased areas, do not constitute income but are amounts held in trust by the lessor for the service providers. Thus, they should not form part of the taxable gross receipts of the lessor provided that the input tax pertaining to the share of the tenants on the shared cost was not claimed, VAT is not passed on the tenants and the same are receipted separately using NON-VAT Official Acknowledgment Receipts.

Taganito Mining Corporation v. Commissioner of Internal Revenue (CTA Case No. 8680 14 September 2017)

A BOI-registered company subject to 0% VAT may not seek a refund or issuance of tax credit of the amount of the VAT passed onto it by its suppliers. The BOI-registered company's recourse is to seek reimbursement of the VAT amount from its suppliers.

National Power Corporation v. Province of Dinagat Islands and Ermilinda C. Biol (CTA AC No. 117, 14 September 2017)

The EPIRA Law removed power generation from the ambit of local franchise taxes. Therefore, NPC's business of generating electricity is exempted from local franchise tax.

However, NPC's missionary electrification function, through its Small Power Utilities Group, involves the transmission of electricity which remains as a public utility. This function of NPC is therefore still covered by local franchise tax.

REVENUE ISSUANCE

Revenue Memorandum Circular No 69-2017 (17 August 2017)

Clarifies the registration and tax compliance requirements of individual professionals (licensed/unlicensed) under a Job Order or Service Contract Agreement with the Departments and Agencies of the Government, Instrumentalities, LGUs, State Colleges and Universities, including GOCCs and GFIs. Said professionals were classified based on gross receipts derived and on whether or not they had other sources of income.