

TAX ALERT

April 2022

SUPREME COURT DECISIONS

DUTIES, TAXES AND FEES DUE THE GOVERNMENT ENJOY PRIORITY ONLY WHEN THEY ARE WITH REFERENCE TO A SPECIFIC MOVABLE OR IMMOVABLE PROPERTY. WITH REFERENCE TO THE OTHER REAL AND PERSONAL PROPERTY OF THE DEBTOR , THE TAXES AND ASSESSMENTS DUE THE NATIONAL GOEVRNMENT WILL COME ONLY IN NINTH PLACE IN THE ORDER OF PREFERENCE.. *Bureau of Internal Revenue v. Tico Insurance Company, Inc. et al., G.R. No. 204226 dated Apr. 18, 2022.*

COURT OF TAX APPEALS (“CTA”) DECISIONS

COMPLIANCE WITH THE APPEAL PERIOD IN SECTION 228 OF THE NATIONAL INTERNAL REVENUE CODE (“NIRC”) IS A SUBSTANTIVE REQUIREMENT AND NOT A MERE FORMALITY. The case on hand involves an appeal from a Final Decision on a Disputed Assessment (FDDA) that has a definite and distinct prescriptive period provided under the law. Section 228 of the NIRC provides quite clearly that an appeal to the CTA must be made within thirty (30) days from receipt of said decision, and that failure to appeal within the said period renders the assessment final, executory and demandable. It is well-settled that the perfection of an appeal in the manner and within the period pursuant to the relevant provisions of the law is not only mandatory but jurisdictional and non-compliance with these legal requirements is fatal to a party's cause. The CTA found petitioner's reliance upon Rules 7 and 8 the Revised Rules of the Court of Tax Appeals which is akin to filing an appeal with the Court of Appeals as provided in Rule 42 of the Rules of Court allowing an extension of fifteen (15) days to file a Petition for Review with the Court of Appeals and the Supreme Court cases allowing in several instances, the extension of the thirty (30)-day period to appeal to the CTA from a decision of the Regional Trial Court (RTC), misplaced as the basis for the dismissal of the out-of-time filing of the Petition for Review is grounded on substantive law and not procedural law. *Montalban Methane Power Corporation v. Commissioner of Internal Revenue, CTA Case No. 10678 dated Apr. 4, 2022.*

THE CTA HAS COMPETENCE TO DETERMINE WHETHER A WARRANT OF DISTRAINT AND LEVY WAS VALIDLY ISSUED BY THE BIR. The appellate jurisdiction of the CTA is not limited to cases which involve decisions of the Commissioner of Internal Revenue (CIR) on matters relating to assessments or refunds. The determination of the validity of a warrant of distraint and levy falls within the ambit of “other matters” arising under Section 7(a)(2) of R.A. No. 9282, as amended. *Milestone Holdings Corporation v. Commissioner of Internal Revenue, CTA EB No. 2224 (CTA Case No. 8858) dated Apr. 27, 2022.*

CLEARLY LEGIBLE DUPLICATE ORIGINALS OR CERTIFIED TRUE COPIES OF ASSAILED DECISIONS SHOULD BE ATTACHED TO THE APPEAL AND FAILURE TO COMPLY WARRANTS THE OUTRIGHT DISMISSAL OF THE APPEAL. Section 2, Rule 6 and Section 4(b), Rule 8 of the RRCTA, with reference to Rule 43 of the ROC, emphasize the mandatory character of attaching duplicate originals or certified true copies of the decision subject to the appeal. Accordingly, submission of mere photocopies is sufficient ground to dismiss an appeal. *Victorias Agricultural District Multi-Purpose Cooperative v. Commissioner of Internal Revenue, BIR Regional Director, Region 12, Bacolod City, CTA EB No. 2380 (CTA Case No. 9828) dated Apr. 08, 2022.*

A DULY AUTHENTICATED CERTIFICATE OF INCORPORATION IS NECESSARY TO SHOW THAT A FOREIGN CORPORATION IS NOT DOING BUSINESS IN THE PHILIPPINES FOR PURPOSES OF ZERO-RATING. For a company to prove its status as a non-resident foreign corporation (“NRFC”) entitled to zero-rating, there must be sufficient proof that (1) it is not established under Philippine law; and that (2) it is not engaged in trade or business in the Philippines. Accordingly, Securities and Exchange Commission (“SEC”) Certifications of Non-Registration and service agreements prove the first component, while duly authenticated articles of association or Certificates of Incorporation stating an NRFC is registered to operate in its home country, outside the Philippines, is prima facie evidence of the second component.. *Financial Times Electronic Publishing Philippines, Inc. v. Commissioner of Internal Revenue, CTA EB No. 2223 (CTA Case No. 9631) dated Apr. 08, 2022.*

ASSESSMENTS ISSUED BASED SOLELY ON FINDINGS OF THE BOARD OF INVESTMENTS (BOI) CANNOT SERVE AS A SUBSTITUTE FOR THE CONDUCT OF AN ACTUAL INVESTIGATION. Simply adopting the findings by the BOI without independent verification by the BIR as basis for issuing an assessment violates the taxpayer’s right to due process. Correspondence sent by the BOI to inform the BIR of a taxpayer’s denial of income tax holiday (“ITH”) incentive is an unverified and unsubstantiated basis for issuing an assessment. Further investigation and examination of taxpayer’s books of accounts to ascertain the amount of revenue or income not entitled to ITH should have been conducted for purposes of issuing the Preliminary Assessment Notice (PAN), Formal Letter of Demand with Assessment Notices (FLD/FAN), and FDDA. *Commissioner of Internal Revenue v. Pueblo De Oro Development Corporation, CTA EB No. 2303 (CTA Case No. 9553) dated Apr. 18, 2022.*

AN ASSESSMENT MUST CONTAIN NOT ONLY A COMPUTATION OF TAX LIABILITIES, BUT ALSO A DEMAND FOR PAYMENT WITHIN A PRESCRIBED PERIOD. The taxpayer’s due process rights involve the right to be informed of the amount of tax due. This includes the right to know when the payment of the deficiency tax should be made in order to determine when penalties and interests begin to accrue. Accordingly, failure of an FLD to state when the payment of deficiency taxes shall become due violates the taxpayer’s right to be informed of the determinable amount for which it is liable to pay. Tax assessments issued in violation of the due process rights of a taxpayer are null and void. *Commissioner of Internal Revenue v. Fonterra Brands Philippines, Inc., CTA EB No. 2350 (CTA Case No. 9230) dated Apr. 11, 2022.*

COMPROMISE PENALTY CANNOT BE IMPOSED OR COLLECTED WITHOUT THE AGREEMENT OR CONFORMITY OF THE TAXPAYER. A compromise is mutual in essence. It cannot be imposed without a predicate agreement. Accordingly, a taxpayer's act of protesting the assessment could only signify that there was no agreement to speak of. Imposition of compromise penalties without the conformity of the taxpayer is considered illegal and unauthorized. *Commissioner of Internal Revenue v. Western Guaranty Corporation, CTA EB No. 2437 (CTA Case No. 9338) dated Apr. 20, 2022.*

INCOME TAX EXEMPTION OF INTERNATIONAL CARRIERS UNDER THE RECIPROCITY PRINCIPLE DOES NOT NECESSITATE THAT THERE BE ACTUAL OPERATIONS OF A PHILIPPINE CARRIER IN THE FOREIGN COUNTRY. Section 28(A)(3)(a) of the NIRC of 1997, as amended by Republic Act ("RA") No. 10378, provides that international carriers doing business in the Philippines may avail of a preferential rate or exemption from the tax imposed on their gross revenue on the basis of reciprocity – such that an international carrier, whose home grants income tax exemption to Philippine carriers, shall likewise be exempt from the tax imposed under this provision. Meanwhile, Paragraph 3, Section 4.2(B) of Revenue Regulations No. 15-2013 states that reciprocity requires that Philippine carriers operating in the home country of an international carrier are actually enjoying the income tax exemption. This provision in the regulation unduly expands the pertinent provision in the Tax Code. A plain reading of RA No. 10378 shows that for purposes of availing the exemption from income tax under the rule on reciprocity, it is sufficient that the international carrier's home country grants an income tax exemption to Philippine carriers. *Commissioner of Internal Revenue v. Gulf Air Company Philippine Branch, CTA EB No. 2439 (CTA Case No. 9334) dated Apr. 12, 2022.*

A FOREIGN CORPORATION EXERCISING CONTROL AND PARTICIPATION IN THE MARKETING AND DISTRIBUTION FUNCTIONS OF ITS DOMESTIC SUBSIDIARY AND DISTRIBUTOR IS DEEMED DOING BUSINESS IN THE PHILIPPINES. HENCE, SALE OF SERVICES BY THE LATTER TO THE FORMER CANNOT BE DEEMED ZERO-RATED SALES. To invoke the applicability of VAT zero-rating under Section 108(B)(1) and (2) of the NIRC, as amended, the following requisites are put forth: Services other than processing, manufacturing, or repacking must be rendered by VAT registered persons; the transaction must be paid for in acceptable foreign currency; and the recipient of services must be performing business outside of the Philippines. Otherwise, if both the provider and recipient of service are doing business in the Philippines, the sale transaction is subject to regular VAT. While the fact that a foreign corporation wholly owns its subsidiary does not automatically equate to "doing business" in the Philippines, the Foreign Investments Act of 1991, as amended, elucidates that the term subsumes participation in the management, supervision or control of any domestic business in the Philippines, or exercising some of its functions in progressive prosecution of, commercial gain, or the purpose of the business organization. As the distributor can be an independent entity which transacts in its own name and for its own account, a perusal of the agreements between both entities may be edifying in determining the exercise of control and participation of the parent in furthering its purpose. *Amadeus Marketing Philippines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 10094 dated Apr. 4, 2022.*

BIR ISSUANCES

AMENDMENT TO CERTAIN PROVISIONS AND ADDITIONAL GUIDELINES ON THE USE OF VIDEO CONFERENCE HEARINGS FOR ADMINISTRATIVE CASES. A video conference hearing may be ordered by the Personnel Adjudication Division (PAD) *motu proprio* in cases of (1) acts of God; (2) periods of public emergencies officially declared by the government; (3) inability of a litigant, witness or counsel to physically appear due to security risks, health concerns, or vulnerability of the witness; and (4) when compelling reasons warrant the same based on the sound judgment of the assigned Hearing Officer. Meanwhile, videoconferencing may be initiated by motion filed through email or personally by stating the grounds and evidence to support such motion. A comment or opposition to this motion must be filed within five calendar days from its receipt. On the other hand, the hearing officer must resolve the motion five calendar days before the scheduled hearing by issuing an order by email indicating the date, time, long-in credentials, and link of the video conference, among others. Furthermore, the platforms for formal investigation/hearing via video conference shall only be the officially provided Zoom, or MS Teams application, or those authorized by the BIR Information Systems Group. These proceedings are recorded and stored in a drive for filing purposes, forming part of the records of the case. ***Revenue Memorandum Order No. 22-2022 dated Apr. 4, 2022.***

PRESCRIBING ADDITIONAL GUIDELINES FOR IMPLEMENTING THE TAX PROVISIONS OF THE PERA ACT OF 2008. The application for the Personal Equity and Retirement Account (“PERA”) Tax Credit Certificate, which evidences a tax credit equivalent to five percent of the total amount of qualified annual contributions, is filed online by the PERA administrator within sixty days from the close of the calendar year. It may only be utilized against income tax liabilities of qualified employees and self-employed contributors, but may be used against the payment of any internal revenue tax by overseas Filipino contributors. ***Revenue Regulations No. 2-2022 dated Apr. 04, 2022.***

CLARIFICATORY GUIDELINES ON THE SUBMISSION OF CERTIFICATE OF ENTITLEMENT TO TAX INCENTIVES. All registered business enterprises (RBEs) enjoying tax incentives under the transitory provisions in CREATE Act and all business enterprises registered under the said law shall apply for a Certificate of Entitlement to Tax Incentives (CETI) with their respective Investment Promotion Agency (IPA) through the Fiscal Incentives Registration and Monitoring System (FIRMS) prior to the filing of the Annual Income Tax Return (AITR). However, RBEs already issued with a certificate of entitlement to tax incentives in a template/format previously prescribed by the IPA shall be allowed to attach the same in their AITR for taxable year 2021, in lieu of the Fiscal Incentives Review Board (FIRB)-prescribed CETI. ***Revenue Memorandum Circular No. 37-2022 dated Apr. 06, 2022.***

CLARIFYING THE TRANSITORY PROVISIONS FOR NON-INCOME RELATED TAX INCENTIVES UNDER CREATE. All existing Registered Export Enterprises (REEs) enjoying their income tax incentives prior to CREATE may continue to enjoy VAT zero-rating on local purchases that are directly attributable and exclusively used in the registered project or activity until the expiration of the transitory period. However, for REEs whose income tax incentives have expired prior to CREATE, such could no longer be availed. ***Revenue Memorandum Circular No. 38-2022 dated Apr. 06, 2022.***

MANNER OF PAYMENT OF PENALTY RELATIVE TO VIOLATIONS INCURRED BY RBES UNDER THE INFORMATION TECHNOLOGY-BUSINESS PROCESS MANAGEMENT (IT-BPM) SECTOR ON THE CONDITIONS PRESCRIBED REGARDING WORK FROM HOME (WFH) ARRANGEMENT. RBEs in the IT-BPM Sector enjoying ITH which fail to comply with the conditions on WFH arrangements shall pay said penalty by filing the AITR using BIR Form No. 1702-EX, while RBes enjoying 5% gross income tax or with mixed transaction shall use the BIR Form 1702-MX. However, RBes with no transactions subject to Regular Income Tax shall use BIR Form No. 0605, by choosing the radio button pertaining to 'Others,' under 'Voluntary Payment' and by indicating in the field provided the phrase "Penalty pursuant to FIRB Res. No. 19-2021." The tax type code shall still be "IT" and the ATC to be indicated is "MC 200." *Revenue Memorandum Circular No. 39-2022 dated Apr. 06, 2022.*

IMPLEMENTING THE PROVISIONS OF REPUBLIC ACT NO. 11635 ON THE INCOME TAXATION OF PROPRIETARY EDUCATIONAL INSTITUTIONS AND HOSPITALS WHICH ARE NON-PROFIT. (1) Proprietary Educational Institutions; (2) Hospitals which are non-profit; and (3) Non-Stock, Non-Profit Educational Institutions (“NSNPEI”) whose net income or assets accrue/inure to or benefit any member or specific person are institutions covered by the preferential ten percent (10%) corporate income tax rate, provided, that the rate of one percent (1%) shall apply from July 1, 2022 until June 30, 2023. However, NSNPEIs not covered by the aforementioned shall be subject to the regular corporate income tax (“RCIT”) on the portion of its revenues or assets not actually directly, and exclusively used for educational purposes. Moreover, the RCIT rate shall be imposed on the entire taxable income of the covered institutions if their gross income from unrelated trade, business or other activities exceed fifty percent of the total gross income from all sources. *Revenue Regulations No. 3-2022 dated Apr. 07, 2022.*

NON-IMPOSITION OF SURCHARGE ON AMENDED TAX RETURNS. The twenty-five percent (25%) surcharge shall not be imposed to an amendment of a tax return if the taxpayer was able to file the initial tax return on or before the prescribed due date for its filing. Meanwhile, it shall be imposed on a tax deficiency found during tax audit if the particular tax return being audited was found to have been filed beyond the prescribed period or due date. *Revenue Memorandum Circular No. 43-2022 dated Apr. 12, 2022.*

AMENDMENT TO CERTAIN QUESTION AND ANSWERS IN RMC NO. 24-2022 IN THE INTERPRETATION OF CREATE AND ITS IRR. Transactions considered by sellers as VAT zero-rated for the period 01 July 2021 to 09 December 2021 shall remain VAT zero-rated. Furthermore, treatment of sales by non-export locators or domestic market enterprises (DMEs) located in Ecozones and Freeport Zones are as follows: (1) If registered prior to CREATE, if the DME is under the 5% Gross Income Tax (5% GIT) regime, sales related to its registered activity are VAT Exempt, while if the sale includes VAT passed on by VAT-registered suppliers, the VAT shall form part of its cost or expenses. (2) If the DME is under the ITH regime or if it is registered during the effectivity of CREATE, sales to REEs directly and exclusively used for the latter’s registered activity is VAT zero-rated, while sales to DMEs are subject to 12% VAT. Additionally, REEs enjoying 5% GIT or Special Corporate Income Tax (SCIT) regime and has other activities

that are subject to VAT (i.e., VAT at 12% and 0%) shall remain as a VAT taxpayer; Finally, local supplier of goods and services that failed to secure an approved application for VAT zero-rating for its sales transactions may not be required such application until 09 March 2022, or the effectivity of this RMC. ***Revenue Memorandum Circular No. 49-2022 dated Apr. 19, 2022.***

DATA SHARING AGREEMENT BETWEEN THE BIR AND THE PHILIPPINE STATISTICS AUTHORITY (“PSA”). The Philippines has entered into Double Taxation Agreements (“DTAs”) with various foreign jurisdictions. These DTAs contain an article on the Exchange of Information (“EOI”) that allows the requested jurisdiction to provide information to the requesting foreign jurisdiction as is foreseeably relevant or necessary to the administration and enforcement of the domestic taxation laws of the latter. Accordingly, the BIR, being the agency tasked to implement the EOI provision of the DTAs, entered into a Data Sharing Agreement (“DSA”) with the PSA, whereby the latter, upon a formal letter from the former, undertakes to provide requested information or any alternative relevant information. Relevant information includes, but is not limited to, the dates of birth and/or death of the person subject of the request and the address/es per record; and the identities, addresses and the respective dates of birth and/or death of his/her legal heirs. Data collection, storage, disposal, security, confidentiality, and remedies in case of violation of the rights of the data subject shall be in accordance with the Data Privacy Act, its IRR and other National Privacy Commission issuances. ***Revenue Memorandum Circular No. 53-2022 dated Apr. 22, 2022.***

AVAILABILITY OF CENTRAL BUSINESS PORTAL FOR ONLINE REGISTRATION. New taxpayers, whether single proprietors, corporations, and partnerships, can process their BIR registration through the Central Business Portal (“CBP”), an online platform that is aimed to streamline and to integrate the business registration processes of SEC, DTI, BIR, SSS, Philhealth, Pag-Ibig, and selected LGUs in Metro Manila. Business taxpayers who register through the CBP may opt to pay the annual registration fee through various electronic payment channels, who are then issued electronic Certificates of Registration, or manually through their respective Revenue District Offices (“RDOs”). These business taxpayers must then buy BIR Printed Receipts/Invoices or secure an authority to print their receipts/invoices with their RDOs and register their books of accounts on or before filing their first income tax return. ***Revenue Memorandum Circular No. 61-2022 dated Apr. 22, 2022.***

Note: The information provided herein is general and may not be applicable in all situations. It should not be acted upon without specific legal advice based on particular situations. If you have any questions, please feel free to send us an email at mail@baniquedlaw.com.

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