February 2015

Tax bulletin

Building a better working world

Highlights

BIR Ruling

- Since Qatar grants a reciprocal income tax exemption to Philippine carriers, an international carrier organized in Qatar and doing business in the Philippines may avail itself of exemption from tax on its gross Philippine billings from carriage of persons and their excess baggage. **(Page 3)**

BIR Issuance

- Revenue Regulations (RR) No. 1-2015 further amends the definition of "De Minimis" benefits which are exempt from income tax on compensation and fringe benefits tax (FBT). **(Page 4)**

PEZA Issuance

- The Philippine Economic Zone Authority (PEZA) informs all ecozone locators and ecozone administrators and managers of the revised guidelines of the Dangerous Drugs Board (DDB) and the Philippine Drug Enforcement Agency (PDEA) on the importation, sale and manufacture of controlled precursor and essential chemicals. **(Page 5)**

SEC Issuance

- SEC Memorandum Circular (MC) No. 4 amended Section 3 of SEC MC No. 19, which prescribes the deadline for submitting the Anti-Money Laundering (AML) Compliance Forms by financing and lending companies. **(Page 6)**

BSP Issuance

- Circular No. 870 amends the provisions of Appendix 6, an appendix to Section X192 and pertinent subsections of the Manual of Regulations of Banks (MORB). **(Page 7)**

Court Decisions

- PAGCOR's income derived from its gaming operations is subject to 5% franchise tax, in lieu of all national and local taxes, while its income from other related services or operations is subject to the regular corporate income tax. **(Page 10)**

- Local government units (LGUs) cannot impose any tax on the gross receipts of transportation contractors, persons engaged in the transportation of passengers or freight by hire, and common carriers by air, land or water.

  Although the power to tax is inherent in the State, the same is not true for LGUs to whom the power must be delegated by Congress and must be exercised within the guidelines and limitations that Congress may provide. **(Page 11)**

- The Commissioner of Internal Revenue (CIR) is given 120 days to act on a taxpayer's claim for refund of input VAT. If the CIR fails to act on the claim, the taxpayer must file an appeal with the Court of Tax Appeals (CTA) within 30 days from the lapse of the 120-day period. The taxpayer must not wait for the CIR's decision, as the inaction is the decision itself, which constitutes a denial of the refund claim. **(Page 13)**

- While the BIR can resort to the Best Evidence Obtainable Rule and estimate the tax liability of taxpayers who failed to submit their accounting records lost due to calamities, it is still required to provide sufficient evidence as basis for its deficiency tax assessment. **(Page 14)**

BIR Ruling

BIR Ruling No. ITAD 011-15 dated January 21, 2015

Since Qatar grants a reciprocal income tax exemption to Philippine carriers, an international carrier organized in Qatar and doing business in the Philippines may avail itself of exemption from tax on its gross Philippine billings from carriage of persons and their excess baggage.

Facts:

A Co., an international air carrier organized in Qatar, is engaged in air transportation services for passengers and cargo in the Philippines through a branch office. Under the Income Tax Law of Qatar, the gross income of non-Qatari air and sea transport companies operating in Qatar is exempt from tax, subject to reciprocity.

Issues:

1. Is A Co. exempt from tax on Gross Philippine Billings (GPB) from the carriage of persons and their excess baggage?
2. Is A Co. subject to tax on GPB from the carriage of cargo and mail?
3. Is A Co. subject to common carrier's tax?
4. Is there any administrative requirement to maintain exemption from GPB from carriage of persons and their excess baggage?

Ruling:

1. Yes. Under RA No. 10378, or the Act Recognizing the Principle of Reciprocity as Basis for the Grant of Income Tax Exemptions to International Carriers, an international carrier doing business in the Philippines may avail itself of exemption from tax on GPB from carriage of persons and their excess baggage, provided its home country also grants income tax exemption to Philippine carriers. Considering that Qatar grants a reciprocal tax exemption to Philippine air carriers under its Income Tax Law, A Co. is exempt from income tax on its GPB from the carriage of persons and their excess baggage.

2. Yes. A Co. is subject to 2.5% GPB tax on the carriage of cargo and mail pursuant to Section 28(A)(3)(a) of the Tax Code, as amended.

3. Yes. A Co. is subject to the 3% common carrier's tax pursuant to Section 118 of the Tax Code.

4. Yes. Before January 31 of each year from the time it was issued a ruling, A Co., through its authorized representative, is required to submit to the BIR's International Tax Affairs Division a sworn certification stating that there is no change in Qatar's domestic laws granting income tax exemption to Philippine carriers. Failure to submit the sworn certification shall be a ground for revocation of the ruling.

RR No. 1-2015 further amends the definition of "De Minimis" benefits which are exempt from income tax on compensation and FBT.

BIR Issuance

Revenue Regulations No. 1-2015 dated January 5, 2015

- Section 2.78.1(A)(3) of RR No. 2-98, as last amended by RR No. 8-2012, is further amended to read as follows:

  "Sec. 2.78.1. Withholding Tax on Compensation Income. –

  (A) . . .

  xxx xxx xxx

  (3) Facilities and privileges of relatively small value. –

  xxx xxx xxx

  k) Benefits received by an employee by virtue of a collective bargaining agreement (CBA) and productivity incentive schemes provided that the total annual monetary value received from both CBA and productivity incentive schemes combined do not exceed ten thousand pesos (Php 10,000.00) per employee per taxable year;

  xxx xxx xxx"

- Section 2.33(C) of RR No. 3-98,as last amended by RR No. 8-2012, is further amended to read as follows:

  "Sec. 2.33. Special Treatment of Fringe Benefits. –

  xxx xxx xxx

  (C) Fringe Benefits Not Subject to Fringe Benefits Tax. –

  xxx xxx xxx

  l) Benefits received by an employee by virtue of a collective bargaining agreement (CBA) and productivity incentive schemes provided that the total annual monetary value received from both CBA and productivity incentive schemes combined do not exceed ten thousand pesos (Php 10,000.00) per employee per taxable year;

  xxx xxx xxx"

- These Regulations shall take effect immediately upon publication.

(Editor's Note: RR No. 1-2015 was published in the Manila Bulletin *on January 6, 2015)*

PEZA Issuance

The PEZA informs all ecozone locators and ecozone administrators and managers of the revised guidelines of the DDB and the PDEA on the importation, sale and manufacture of controlled precursor and essential chemicals.

PEZA Memorandum Circular No. 2015 – 008 dated February 23, 2015

- **How to ensure compliance with DDB regulations on importation of Controlled Precursor and Essential Chemicals (CPECs)**

  1. Check the Material Safety Data Sheet (MSDS) or the Globally Harmonized System-Safety Data Sheet (GHS-SDS) of the chemicals or materials to be imported to ensure that they contain the minimum amount of information required by the DDB.

  2. Submit the MSDS or GHS-SDS containing the minimum prescribed information by the DDB to the PEZA Zone Office or email to esg@peza.gov.ph for evaluation.

  3. Lodge the PEZA electronic import permit (e-IP) application and allow the supplier to ship the chemicals or materials only after –

     (i) The goods are cleared by the PEZA Zone Office as unregulated; OR
     (ii) Regulated goods are accompanied by appropriate permits and the PEZA Zone Office has given clearance to lodge e-IP application.

- **Requirements for Importation of Chemicals/Materials with CPEC Content**

  1. If CPECs concentration is less than or equal to what is specified in the DDB's Table of Concentration Limits, secure PDEA license prior to importation.

  2. If CPECs concentration is more than what is specified in the DDB's Table of Concentration Limits, secure PDEA license and PDEA Import Permit 15 working days before the arrival of the shipment.

     - Ensure that the amount of shipment corresponds to the amount specified in the PDEA Import Permit.

     - In cases where the total quantity of the shipment is more than 30% of the approved quantity in the PDEA import permit, the shipment shall be subject to seizure proceedings of the Bureau of Customs.

  3. PDEA license holders are required to maintain a controlled chemical register and follow the format prescribed by the DDB and to update the register within 120 hours of any import, export, manufacture, supply, acquisition or disposal of the controlled chemical.

- **New Policies on Securing a PDEA License**

  1. PDEA license may be renewed within 3 months prior to expiration to avoid payment of surcharge.

  2. PDEA license holders are required to report discontinuance of license in writing at least 60 days prior to expiration to avoid payment of surcharge and to allow the PDEA to conduct a pre-retirement compliance inspection.

3. Grounds for denial of registration of license as well as procedure for the suspension and revocation are prescribed in the new guidelines.

- Requirements for Storage, Labelling, Transport and Disposal of CPECs

1. PDEA license holders are responsible for the safe and secure storage and handling of CPECS and must follow the specifications in the MSDS or GHS-SDS.

2. PDEA license holders must notify the PDEA Regional Office or Compliance Service in writing if damaged, expired or contaminated CPECs will be disposed of. Chemicals for disposal or treatment are considered as hazardous wastes; thus, locators should only deal with DENR-registered hazardous waste treatment, storage and disposal facilities for the proper management of wastes.

- Penalties for importing without a PDEA Import Permit

1. First violation: Fine of PHP50,000.00 or 15% of the total value of the shipment, whichever is higher.

2. Second violation: Fine of PHP50,000.00 or 30% of the total value the shipment, whichever is higher, and a recommendation from PDEA that the shipment be subjected to forfeiture proceedings.

3. Third violation: Fine of PHP50,000.00 or 50% of the total value of the shipment, whichever is higher, with a recommendation from PDEA that the shipment be subjected to forfeiture proceedings and that the responsible officials shall be criminally liable.

SEC Issuance

SEC MC No. 4 amended Section 3 of SEC MC No. 19 which prescribes the deadline for submitting the AML Compliance Forms by financing and lending companies.

SEC Memorandum Circular No. 4 series of 2015 dated February 13, 2015.

- Section 3 now provides that the AML Compliance Form should be filled out by the covered institution and submitted to the SEC on or before 01 June 2015 and every three years thereafter.

- Those that will be subsequently covered by SEC MC No. 19 will have to submit the AML Compliance Form on the first working day of June of the year following the due date of submission of the Manual and every three years thereafter.

[Editor's Note: SEC MC No. 4 was published in The Manila Times *and in the* Philippine Daily Inquirer *on February 17, 2015.]*

Circular No. 870 amends the provisions of Appendix 6, an appendix to Section X192 and pertinent subsections of the MORB.

BSP Issuance

BSP Circular No. 870 dated February 20, 2015

- The reports enumerated below are deleted from the reports required to be submitted by banks:

1. For deletion without amendments to Sections/Subsections under the MORB:

Category Report	Basis	Report Title	Covered Banks		
			U/KBs	TBs	RCBs
B	X343.2c	Report on Reconciliation Statement of Demand Deposit Account with BSP	Monthly	N.A.	N.A.
B	MAB dated 09.02.05	General Information Sheet	Annual/As Changes Occur	Annual/As Changes Occur	Annual/As Changes Occur
A-2	X116.3 X105.5 X258	Schedule of Other Non-Risk Asset	Weekly	Monthly	N.A.

2. For deletion with amendments to Subsections under the MORB:

Category Report	Basis	Report Title	Covered Banks		
			U/KBs	TBs	RCBs
B	X192.1	Report on Designation of Authorized Signatories of Bank's Reports Classified as Category A-1, A-2, A-3 and B	As designation by bank's board of directors occurs	As designation by bank's board of directors occurs	As designation by bank's board of directors occurs
B	X192.6	Report on Reconciling items Outstanding for More than Six Months in the "Due from/Due to Head Office, Branches and Agencies" accounts (by banking unit)	N.A.	Quarterly	Semestral

B	X235.12	Notarized Certification that the bank did not enter into repurchase agreements covering government securities, commercial papers and other non-negotiable securities or instruments that are not documented.	Semestral	Semestral	Semestral
B	X235.12	Report on Undocumented Repurchase Agreement	Upon Occurrence	Upon Occurrence	Upon Occurrence

3. Item "b" of Subsection X192.1 is amended, as follows:

"b. Authorized signatories

(1) Category A-1 reports shall be signed by the bank's chief executive officer or, in his absence, by the executive vice president, and by the comptroller or, in his absence, by the chief accountant, or officers holding equivalent positions.

(2) Category A-2 reports shall be signed by the president, executive vice president, vice president or by an officer holding equivalent position.

(3) Category A-3 and Category B reports shall be signed by officers or their alternates, duly designated by the board of directors

The designated signatories of Categories A-1, A-2, A-3 and B reports including their specimen signatures shall be contained in a resolution approved by the board of directors. A copy of the board resolution covering the initial designation and subsequent change(s) in signatories as well as specimen signatures of the signatories and alternates, shall be made available for inspection by BSP examiners and submitted to the BSP upon request of the appropriate supervising department of the SES."

4. Subsection X192.6 on reconciliation of head office and branch transactions is amended as follows:

"Banks shall prepare reconciliation statements covering transactions between the head office and all its branches within 30 banking days after the end of each month.

The reconciliation statement shall be made available for inspection by BSP examiners and submitted to the BSP upon request of the appropriate supervising department of the SES."

5. The following are the amendments to Subsection X235.12. In addition, Appendix 65 and its Annex on Format Certification, which is an appendix to Subsection X235.12 of the MORB are deleted.

   "Subsection X235.12 Repurchase agreements covering government securities, commercial papers and other negotiable and non-negotiable securities or instruments. - The following regulations shall govern repurchase agreements covering government securities, commercial papers and other negotiable and non-negotiable securities or instruments of banks as well as sale on a without recourse basis of said securities by banks.

   xxx

   "b. Responsibilities of the chief executive officer (CEO) or officer of equivalent rank.

   xxx

   (2) Ascertain and ensure that the bank did not enter into a repurchase agreement covering government securities, commercial papers and other negotiable and non-negotiable securities or instruments that are not documented in accordance with existing BSP regulations and that the bank has strictly complied with the pertinent rules of the SEC and the BSP on the proper sale of securities to the public and performed the necessary representation and disclosures on the securities particularly the following:

   (a) Informed the clients that such securities are not deposits and as such, do not benefit from any insurance otherwise applicable to deposits such as, but not limited to, R.A. No. 3591, as amended, otherwise known as the PDIC law.

   xxx

   (d) Clearly stated to the client that:

   (i) The bank does not guarantee the payment of the security sold on a "without recourse basis" and in the event of default by the issuer, the sole credit risk shall be borne by the client; and
   (ii) The bank is not performing any advisory or fiduciary function."

   xxx

[Editor's Note: Circular No. 870 was published in the Philippine Star *on February 27, 2015.]*

Court Decisions

Philippine Amusement and Gaming Corporation vs. Bureau of Internal Revenue
Supreme Court (*En Banc*), G.R. No. 215427 promulgated December 10, 2014

PAGCOR's income derived from its gaming operations is subject to 5% franchise tax, in lieu of all national and local taxes, while its income from other related services or operations is subject to the regular corporate income tax.

Facts:

On March 15, 2011, the Supreme Court ruled that RA No. 9337 is valid and constitutional insofar as it amends Section 27(c) of the Tax Code of 1997 by excluding petitioner PAGCOR from the enumeration of government-owned and controlled corporations (GOCCs) that are exempt from corporate income tax. The Supreme Court declared that PAGCOR is liable for corporate income tax without making any distinction as to the nature of the income subject to tax.

On the basis of this decision, the BIR issued Revenue Memorandum Circular (RMC) No. 33-2013 dated April 17, 2013, which provides that PAGCOR is no longer exempt from corporate income tax, and that its income from operations and licensing of gambling casinos, gaming clubs and other similar recreation or amusement places, gaming pools and other related operations, and other income not connected with the foregoing operations are subject to the corporate income tax under the Tax Code. RMC No. 33-2013 also prescribes that PAGCOR is subject to the 5% franchise tax pursuant to its Charter, Presidential Decree (PD) No. 1869, on gross revenue or earnings it derives from its operations and licensing of gambling casinos, gaming clubs and other similar recreation or amusement places, gaming pools and from other related operations.

PAGCOR sought clarification from the Supreme Court and alleged that the RMC is an erroneous interpretation and application of the March 15, 2011 Supreme Court decision.

Issue:

Is the income earned by PAGCOR from gaming operations and other related services subject to both income tax under the Tax Code and the 5% franchise tax under its Charter?

Ruling:

No. PAGCOR's income from gaming operations is subject to the 5% franchise tax, in lieu of all national and local taxes, pursuant to its Charter. On the other hand, its income from other related services is subject to the corporate income tax under the Tax Code.

PAGCOR's exemption in Section 27(c) of the Tax Code, before its amendment by RA No. 9337, only pertains to income tax on revenues from other related services and not on the revenues from gaming operations. This is because the tax exemption for the income from gaming operations is granted in PAGCOR's Charter, which imposes a 5% franchise tax on the gross revenues derived from its operations conducted under the franchise, in lieu of all taxes of any kind, which necessarily includes corporate income tax. The exemption attached to the income from gaming operations existed even before the enactment of the Tax Code.

There is no conflict between PD No. 1869 and RA No. 9337 because the former imposes the 5% franchise tax on the gross revenues derived from PAGCOR's operations conducted under its franchise, in lieu of all taxes of any kind, while the latter merely reinstates the income tax imposed by RA No. 8424 on PAGCOR's income from other necessary and related services, shows, and entertainment.

A special law, i.e., PAGCOR's Charter, prevails over a general law, i.e., RA No. 9337, regardless of their dates of passage, and the special law will be considered as an exception to the general law. Without any categorical repeal or amendment in RA No. 9337 of the income tax exemption of PAGCOR, its income tax exemption remains.

Hence, PAGCOR's income derived from gaming operations is subject only to 5% franchise tax in accordance with its Charter. With respect to PAGCOR's income from operation of other related services, the same is subject to income tax only, pursuant to its Charter which provides that any income from other related services shall not be included as income subject to the franchise tax, but should be considered as a separate income subject to income tax.

Consolidated Cases of City of Manila, et al. vs. Hon. Colet and Malaysian Airline System, G.R. No. 120051; Maersk-Filipinas, Inc., et al. vs. City of Manila, et al., G.R. No. 121613; Eastern Shipping Lines, Inc. vs. City Council of Manila, et al., G.R. No. 121675; William Lines, Inc., et al. vs. Regional Trial Court of Manila, et al, G.R. No. 121704; PNOC Shipping and Transport Corporation vs. Hon. Nabong, et al., G.R. No. 121720-28; Maersk-Filipinas, Inc., et al. vs. City of Manila, et al., and with Intervenors William Lines, Inc., et al., G.R. No. 121847-55; Cosco Container Lines and HEUNG-A Shipping Co., Ltd., et al. vs. City of Manila, et al., G.R. No. 122333; Sulpicio Lines, Inc. vs. Regional Trial Court of Manila, et al., G.R. No. 122335; Association of International Shipping Lines, Inc. vs. City of Manila, et al., G.R. No. 122349; Dongnama Shipping Co., Ltd, et al, vs. Court of Appeals, et al., G.R. No. 124855
Supreme Court (*En Banc*), promulgated December 10, 2014

LGUs cannot impose any tax on the gross receipts of transportation contractors, persons engaged in the transportation of passengers or freight by hire, and common carriers by air, land or water.

Although the power to tax is inherent in the State, the same is not true for LGUs to whom the power must be delegated by Congress and must be exercised within the guidelines and limitations that Congress may provide.

Facts:

Several corporations with principal offices in Manila and operating as transportation contractors, persons who transport passenger or freight for hire, and common carriers by land, air or water, filed various cases to question the constitutionality of Section 21(B) of the Manila Revenue Code (MRC), which imposes upon them a business tax at the rate of 50% of 1% per annum on their gross receipts or sales of the preceding year.

The cases were consolidated, and all sought the declaration of Section 21(B) of the MRC as void or invalid for being contrary to the Constitution and the Local Government Code of 1991 (LGC).

The proponents of Section 21(B) of the MRC argued that the Constitution and Congress, through the LGC, expressly granted LGUs the general power to tax. Inasmuch as transportation contractors, persons who transport passenger or freight for hire, common carriers by land, air or water are engaged in businesses subject to excise, value added, or percentage tax under the Tax Code, the City of Manila could lawfully levy local business tax under Section 21(B) of the MRC, pursuant to Section 143 of the LGC (on Tax on Business) which provides that "(t)he municipality may impose taxes xxx (o)n any business, not otherwise specified in the preceding paragraphs, which the *sanggunian* concerned may deem proper to tax: Provided, that on any business subject to the excise, value-added or percentage tax under the National Internal Revenue Code, as amended, the rate of tax shall not exceed two percent (2%) of gross sales or receipts of the preceding calendar year."

Petitioner corporations, on the other hand, argued that the power of taxation is not inherent in LGUs and it may only exercise the power only if and to the extent that it is delegated to them. The corporations argue that Section 133(j) of the LGC (on Common Limitations on the Taxing Powers of LGUs) provides that "(u)nless otherwise provided herein, the exercise of the taxing powers of provinces, cities, municipalities, and *barangays* shall not extend to the levy of "(t)axes on the gross receipts of transportation contractors and persons engaged in the transportation of passengers or freight by hire and common carrier by air, land or water, except as provided in this Code(.)" The corporations add that Section 133 (j) is a special provision which prevails over Section 143(h), a general provision.

Issue:

Is Section 21(B) of the MRC constitutional?

Ruling:

No, Section 21(B) of the MRC is unconstitutional and invalid for being beyond the power of the City of Manila to enact, approve, and implement under the LGC.

Although the power to tax is inherent in the State, the same is not true for LGUs, to whom the power must be delegated by Congress and must be exercised within the limitations that Congress may provide.

Among the common limitations on the taxing power of LGUs is Section 133(j) of the LGC which clearly and unambiguously proscribes LGUs from imposing any tax on the gross receipts of transportation contractors, persons engaged in the transportation of passengers or freight by hire, and common carriers by air, land or water.

Section 133(j) of the LGC prevails over Section 143 (h) of the same Code. Section 143 of the LGC defines the general power of the municipality (as well as the city, if read in relation to Section 151 of the LGC) to tax businesses within its jurisdiction. While paragraphs (a) to (g) thereof identify the particular businesses and fix the imposable tax rates for each, paragraph (h) is apparently the "catch-all provision" allowing the municipality to impose tax "on any business, not otherwise specified in the preceding paragraphs, which the *sanggunian* concerned may deem proper to tax."

The succeeding proviso of Section 143(h) of the LGC which says "Provided, That on any business subject to the excise, value-added or percentage tax under the National Internal Revenue Code, as amended, the rate of tax shall not exceed two percent (2%) of gross sales or receipts of the preceding calendar year" is not a specific grant of power to the municipality or city to impose business tax on the gross sales or receipts of such a business. Rather, the proviso only fixes a maximum rate of imposable business tax in case the business taxed under Section 143(h) of the LGC happens to be subject to excise, value added, or percentage tax under the Tax Code.

The grant of power to municipalities and cities under Section 143(h) of the LGC cannot overcome the specific exemption in Section 133(j) of the same Code. This is in accord with the rule on statutory construction that specific provision prevails over general ones.

In case of any doubt, any tax ordinance or revenue measure shall be construed strictly against the LGU enacting it, and liberally in favor of the taxpayer.

The legislative intent is to withhold from the LGUs the power to tax transportation contractors, persons engaged in the transportation of passengers or freight by hire, and common carrier by air, land or water in order to prevent a duplication of the common carrier's tax.

RA No. 7716 (Expanded Value-Added Tax or the E-VAT Law) expressly amended Section 115 (now Section 117) of the Tax Code on Percentage Tax on carriers and keepers of garages, to state that "(t)he gross receipts of common carriers derived from their incoming and outgoing freight shall not be subjected to the local taxes imposed under the Local Government Code."

Rohm Apollo Semiconductor Philippines vs. Commissioner of Internal Revenue
Supreme Court (First Division), G.R. No. 168950 promulgated on January 14, 2015

The CIR is given 120 days to act on a taxpayer's claim for refund of input VAT. If the CIR fails to act on the claim, the taxpayer must file an appeal with the CTA within 30 days from the lapse of the 120-day period. The taxpayer must not wait for the CIR's decision, as the inaction is the decision itself, which constitutes a denial of the refund claim.

Facts:

Petitioner Rohm Apollo Semiconductors Philippines (Rohm Apollo) is a domestic corporation registered with the PEZA as an Ecozone Export Enterprise.

Before the start of its operations in September 2001, Rohm Apollo contracted the services of Shimizu Philippine Contractors, Inc. for the construction of its factory, for which it made payments in July and August 2000. Rohm Apollo treated these payments as purchase of capital goods. On December 11, 2000, Rohm Apollo filed with the BIR an application for the refund or credit of the unutilized input VAT attributable to its purchases of capital goods under then Section 112 (B) of the Tax Code.

The CIR failed to act on the claim. On September 11, 2002, Rohm Apollo filed a petition for review with the CTA. Rohm Apollo assumed that it had 2 years from the close of the taxable quarter when the purchases were made or until September 30, 2002 within which to elevate its claim to the CTA.

The CTA denied the claim on the ground that the Company failed to submit its VAT return for the third quarter of 2001 which was necessary to verify if the Company did not carry over the claimed input VAT to the succeeding quarter. The Company appealed to the Supreme Court.

Issue:

Is Rohm Apollo entitled to the refund of unutilized input VAT on its purchase of capital goods?

Ruling:

No, Rohm Apollo is not entitled to the VAT refund.

The Tax Code provides that the application for refund of unutilized creditable input taxes paid on locally purchased capital goods must be filed within two years after the close of the taxable quarter in which the purchase was made. The CIR is given

120 days within which to act on the claim. If the claim is denied, or the CIR fails to act on the claim within the 120-day period, the taxpayer may file the judicial claim within 30 days after such denial or after the lapse of the 120-day period, as the case may be. This 120+30 day period is mandatory and jurisdictional.

Although Rohm Apollo filed both the administrative and judicial claims within the two-year period, it failed to comply with the mandatory 120+30 day period. From the filing of the claim on December 11, 2000, the CIR had 120 days or until April 10, 2001 to act on the claim. Since the CIR failed to act upon the claim, Rohm Apollo had 30 days from the lapse of the 120-day period or until May 10, 2001 to file the claim with the CTA. Since the Company filed the judicial claim beyond the 120+30 day period, its claim was filed out of time.

When the 120-day period lapses and there is inaction by the CIR, the taxpayer must no longer wait for the CIR to come up with a decision. The CIR's inaction is the decision itself, which constitutes a denial of the refund claim. Thus, the taxpayer must file an appeal with the CTA within 30 days from the lapse of the 120-day period.

[Editor's Note: Section 112 (B) of the Tax Code previously allowed the refund of unutilized input VAT paid on the purchase of capital goods. However, this provision allowing the refund of input VAT paid on capital goods was removed in RA No. 9337, which took effect on November 1, 2005.]

Farcon Marketing Corporation vs. Bureau of Internal Revenue
CTA (Second Division) Case 8367 promulgated February 3, 2015

While the BIR can resort to the Best Evidence Obtainable Rule and estimate the tax liability of taxpayers who failed to submit their accounting records lost due to calamities, it is still required to provide sufficient evidence as basis for its deficiency tax assessment.

Facts:

Respondent BIR, as represented by the CIR, issued a Tax Verification Notice to petitioner Farcon Marketing Corp. (Farcon) to verify its supporting documents and pertinent records relative to all its revenue taxes for taxable year 2007. When required to present its books of accounts and accounting records, Farcon claimed it cannot comply as the documents were destroyed and damaged by typhoons *Ondoy* and *Pepeng*.

The CIR assessed Farcon for alleged deficiency income tax for taxable year 2007 arising from disallowed expenses, such as gas and oil, postage, telephone and telegraph, and other purchases. Farcon protested the assessment. Upon denial of its protest, Farcon filed a petition for review with the CTA.

Farcon argued that the assessment is without factual and legal bases and that its failure to submit the required documents was not willful but was due to reasonable and justifiable causes, i.e., its records were destroyed by the flood caused by typhoons. Farcon also claimed that it was able to submit to the BIR reconstructed worksheets and schedules of purchases and expenses to support its protest, which were not considered by the BIR.

The CIR countered that Farcon's failure to submit the required supporting documents within the prescribed period justifies the BIR's resort to the Best Evidence Obtainable Rule under Section 6 (B) of the Tax Code. The CIR argued that Farcon failed to substantiate the expenses claimed as deduction from gross income as provided under Section 34 (A)(1) of the Tax Code.

Issues:

1. Can the BIR estimate Farcon's tax liability in the absence of accounting records which were destroyed by the typhoons?

2. Are there limitations to the BIR's reliance on Best Evidence Obtainable Rule?

Ruling:

1. Yes, Section 6(B) of the Tax Code, as amended, and Section 2.3 of RMC No. 23-2000 provide the BIR with wide latitude to resort to the Best Evidence Obtainable Rule to make an assessment.

   The BIR may determine Farcon's tax liability through estimation considering the absence of accounting records, which were destroyed by the typhoons. The BIR is not required to compute such tax liabilities with mathematical exactness. Approximation in the calculation of the taxes due is justified.

2. Yes, the BIR's power to estimate Farcon's tax liability has limits. Citing the case of *Commissioner of Internal Revenue vs. Hantex Trading Co., Inc.* (GR No. 136975, March 31, 2005), the CTA said that such estimation should still be based on sufficient evidence.

   The CIR failed to present any evidence which it supposedly procured by resorting to the Best Evidence Obtainable Rule, as basis for the deficiency tax assessment against Farcon.

   The rule on the *prima facie* correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious. Thus, as held by the Supreme Court in *Hantex*, the presumption of correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption.

About SGV & Co.
SGV is the largest professional services firm in the Philippines that provides assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities. SGV & Co. is a member firm of Ernst & Young Global Limited.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients.

For more information about our organization, please visit www.ey.com/PH.

SGV & Co. maintains offices in Makati, Cebu, Davao, Bacolod, Cagayan de Oro, Baguio, General Santos and Cavite.

For an electronic copy of the Tax Bulletin or for further information about Tax Services, please visit our website
www.ey.com/ph

We welcome your comments, ideas and questions. Please contact
Ma. Fides A. Balili via e-mail at
Ma.Fides.A.Balili@ph.ey.com or at telephone number 894-8113 and
Mark Anthony P. Tamayo via e-mail at
Mark.Anthony.P.Tamayo@ph.ey.com or at telephone number 894-8391.