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DU-BALADAD AND ASSOCIATES

INSIGHTS

AUGUST 2018

A monthly digest of significant tax-related court decisions and regulatory issuances (includes BIR, SEC, BSP and various government agencies).

Sixth Issue, Series of 2018

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BDB Law Founding Partner and CEO Atty. Benedicta Du-Baladad was moderator for the Session ""Managing Uncertainties: Turning the Risks Into Rewards" during the MAP 2018 CEO Conference held last September 4, 2018 at the Makati Shangri-La. Speakers for this session are: Mr. Wilson Chow, Global Technology Leader of PWC, and DOST Research and Development Undersecretary Dr. Rowena Guevara.

HIGHLIGHTS for AUGUST 2018

Court Decisions

- The irrevocability rule on excess creditable withholding tax also applies when a taxpayer ticks the option "Claim for Refund" *(Rhombus Energy Inc. v. CIR, G.R. No. 206362, August 1, 2018).*

- The taxpayer can elevate a WDL to the CTA when it questions the validity of the BIR's right to collect. (*MIFFI Logistics Co, Inc. v. CIR, CTA Case No. 9122, August 1, 2018).*

- The Court of Tax Appeals is not bound by the issues specifically raised by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case. *(Orient Overseas Container Line v. CIR, CTA Case No. 9179, August 2, 2018).*

- Failure to identify, mark and formally offer in evidence the administrative claim for refund is fatal. *(Shenilyn Abalos et. al v. CIR, CTA Case No. 9089, August 10, 2018).*

- The imposition of the 12% VAT twice on the same transaction as a consequence of issuing both VAT invoice and official receipt to cover the same transaction is without basis. *(Process Machinery Co. v. CIR, CTA Case No. 9217, August 17, 2018).*

- All disputes and claims solely between government agencies and offices, shall be administratively settled by the Secretary of Justice, the Solicitor General, or the Government Corporate Counsel, depending on the issues and government agencies involved. *(PSALM v. CIR, CTA Case No. 9235, August 28, 2018).*

- Postal office certifications are considered prima facie proof that the FLD /FANs were delivered to the addressees. *(UPSI Property Holdings, Inc. v. Commissioner of Internal Revenue, CTA Case No. 8860, August 22, 2018).*

BIR Issuances

- **RR No. 18-2018, August 3, 2018** - This amends certain provisions of Revenue Regulations (RR) No. 8-2016, by changing certain guidelines and policies in the processing and issuance of Tax Clearance for bidding purposes.

- **RR No. 20-2018 -** This prescribes implementing rules and guidelines on the Imposition of Excise Tax on Sweetened Beverages pursuant to the TRAIN Law.

- **RMC No. 70-2018 -** This prescribes the revised format of the BIR Form No. 1306, "Declaration of Forfeiture of Real Property".

SEC Issuances

- **SEC MC No. 10 Series of 2018, August 06, 2018 -** These Rules shall apply to unit investment trust funds (UITFs) and other funds managed by persons authorized by the Bangko Sentral ng Pilipinas (BSP) to engage in trust functions or investment management activities (IMA) and not enumerated in SRC Sec. 10.1 (I).

- **SEC MC No. 11 Series of 2018, August 22, 2018 -** These Rules shall apply to a legal person which intends to generate an index in relation to Government Securities (GS) and which, under these rules, shall obtain the license to perform GS Benchmark Administration.

Article Written

- **"Deemed Denied" Lives, Business Mirror: Tax Law for Business, August 2, 2018 –** The article discusses the the evolution of the rules on vat refund and why under the TRAIN 1 and CTA rules, a claim for vat refund is 'deemed denied' after 90 days of inaction by the BIR.

COURT ISSUANCES

I

Significant Supreme Court Decision

The irrevocability rule on excess creditable withholding tax also applies when a taxpayer ticks the option "Claim for Refund".

In the taxpayer's Annual Income Tax Return (ITR) for taxable year 2005, it indicated that its excess creditable withholding tax ("CWT") is "To be refunded". Thereafter, it filed a claim for refund of its unutilized CWT. Its Quarterly ITR for year 2006 showed the excess credits. The CTA Division granted the taxpayer's claim for refund but the decision was reversed by the CTA en banc for the reason that the taxpayer had actually carried-over said excess creditable withholding tax to the first, second and third quarters in its Quarterly ITRs for taxable year 2006. The CTA en banc ruled that said option to carryover became irrevocable.

On appeal, the Supreme Court reversed the CTA en banc's decision holding that the irrevocability rule took effect when the option was exercised. The marking of the box "To be refunded" in the taxpayer's 2005 annual ITR constituted its exercise of the option, and from then onwards, the taxpayer became precluded from carrying-over the excess creditable withholding tax. The fact that the prior year's excess credits were reported in its 2006 quarterly ITRs did not reverse the option "to be refunded" exercised in its 2005 annual ITR. *(Rhombus Energy Inc. v. CIR, G.R. No. 206362, August 1, 2018).*

Note: **This clarifies the issue of when the irrevocability rule shall apply. According to the SC, the irrevocability rule applies not only in the exercise of the option to carry over but also in the exercise of the option to claim for refund.**

II

Significant Court of Tax Appeals Decisions

The taxpayer can elevate a WDL to the CTA when it questions the validity of the BIR's right to collect.

In this case, Preliminary Assessment Notice (PAN), Final Assessment Notice (FAN), Preliminary Collection Letter (PCL), Final Notice Before Seizure (FNBS) and WDL were issued against a taxpayer. The taxpayer elevated the case to the CTA questioning the validity of the WDL. The CIR argues that the Court has no jurisdiction since the assessment has already become final and executory and contended that the Petition assailing the validity of the WDL was filed out of time.

In ruling for the taxpayer, the Court held that what is being questioned in this case is the validity of the WDL based on the allegation that it stems from a void assessment (prescription) and not the decision of respondent on a disputed assessment. Hence the period to appeal is reckoned from the time the taxpayer receives the WDL (*MIFFI Logistics Co, Inc. v. CIR, CTA Case No. 9122, August 1, 2018).*

Note: **A taxpayer may elevate to the CTA not only a Final Decision on Disputed Assessment (FDDA) but also any of the following collection letters: Preliminary Collection Letter, Final Notice Before Seizure, Warrant of Distraint and Levy, Writ of Garnishment. The proper time to elevate a particular collection letter, as enumerated**

above, depends on the circumstances of every case. Thus, taxpayers must seek professional help once it receives any of these collection letters.

The CTA is not bound by the issues specifically raised by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case.

A taxpayer received a Letter of Authority (LOA) authorizing Revenue Officers to examine its books of account and other accounting records. Thereafter, the OIC-Chief of BIR Large Taxpayers Service issued a Memorandum of Assignment referring the continuation of the audit/investigation to another group of examiners.

The Court found the deficiency tax assessments to be intrinsically void. The invalidity of the deficiency tax assessments springs from the absence of authority on the part of the revenue officers who conducted the examination of petitioner's books of accounts. While the lack of authority of the revenue officers to conduct the audit was not specifically raised as an issue, the Court said that it is not precluded from considering the same given that a void assessment bears no fruit. In this case, the revenue officers named under the issued LOA were different from those who actually examined the taxpayer's books of accounts and other accounting records. This renders the LOA and the assessment null and void. *(Orient Overseas Container Line v. CIR, CTA Case No. 9179, August 2, 2018).*

Failure to identify, mark and formally offer in evidence the administrative claim for refund is fatal.

The Court denied a claim for refund for failure of the taxpayer to observe procedural due process. Here, the administrative claims that were allegedly filed were not identified, marked and formally offered. Thus, the Court ruled that the taxpayers failed to prove that their administrative claims were filed with the BIR within the two-year period. According to the Court, taxpayers must prove not only their entitlement to a refund, but also their compliance with the procedural due process as nonobservance of the prescriptive periods within which to file the administrative and the judicial claims would result in the denial of their claims. *(Shenilyn Abalos et. al v. CIR, CTA Case No. 9089, August 10, 2018).*

Note: **In Justice Manahan's dissenting opinion, it was discussed that the rule that no evidence shall be considered if the same has not been formally offered in evidence admits of certain exceptions such as when the evidence has been duly identified in the Judicial Affidavit of the witness and the evidence was duly included as part of the records of the case. This exception is availing in the present case since the fact of the filing of administrative claims for refund was duly identified by a witness in his Judicial Affidavit which was formally offered in evidence.**

The requirement to furnish the taxpayer with a copy of the waiver is not only to give notice of the existence of the document but of the acceptance by the BIR and the perfection of the agreement.

In connection with a taxpayer's on-going tax investigation, several Waivers of Defense of Prescription under the Statute of Limitations of the NIRC were executed. The CTA found the 3rd Waiver defective and did not validly extend the prescriptive period to assess the deficiency taxes. The said waiver does not indicate the fact of receipt by the taxpayer in violation of the provisions of RMO No. 20-90 which requires that "the fact of receipt by the taxpayer of his/her file copy must be indicated in the original copy to show that the taxpayer was notified of the acceptance of the BIR and the perfection of the agreement." (*Megabucks Merchandising Corp. v. CIR, CTA Case No. 9345; August 17, 2018).*

Note: RMO 20-90 issued on April 4, 1990 and RDAO 5-01 issued on August 2, 2001 lay down the procedure for the execution of the waiver. In several cases[1]decided by the Supreme Court, it has been held that strict compliance with the procedures laid down under RMO 20-90 is necessary. However, in the subsequent case of Next Mobile, Inc., the Supreme Court took the case as an exception to the general rule and declared the Waivers valid even with some departures on compliance procedures under RMO 20-90, due to the peculiar circumstances in that case, where both BIR and the taxpayer apparently contributed to the defects in the waivers.
The more recent case of Commissioner of Internal Revenue v. Philippine Daily Inquirer (G.R. No. 213943) seems to have overruled the doctrine laid down in the Next Mobile case, where the High Court held that the BIR cannot hide behind the doctrine of estoppel to cover its failure to comply with RMO 20-90 and RDAO 05-01 which were issued by the BIR itself. A waiver of the statute of limitations is a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations and thus, it must be carefully and strictly construed.

The imposition of the 12% VAT twice on the same transaction as a consequence of issuing both VAT invoice and official receipt to cover the same transaction is without basis.

A taxpayer primarily engaged in the sale of goods, was assessed by the BIR for deficiency VAT. The taxpayer issues both sales invoices and official receipts on its sale of goods. In its defense, the taxpayer argues that its sales have been previously declared as sales in VAT returns and that it cannot be compelled to declare the very same transactions and pay the VAT on the same transactions twice: first in the VAT sales invoice and then in the VAT official receipts.

The Court stressed that under Section 113(A) of the NIRC, as amended, a VAT invoice is issued for every sale, barter or exchange of goods or properties. Hence, the BIR's basis for the assessment should properly be the VAT invoices issued by the taxpayer and not VAT Official Receipts. Nowhere in Section 113(D) of the Tax Code does the law allow the imposition of the 12% VAT twice on the same transaction as a consequence to the taxpayer who issued both VAT invoice and official receipt to cover the same transaction. To allow this item of assessment to prosper would be to sanction collecting anew VAT on transactions for which the taxes were proven to have already been declared and paid. That would be tantamount to unjust enrichment which is not permitted by law. *(Process Machinery Co. v. CIR, CTA Case No. 9217, August 17, 2018).*

All disputes and claims solely between government agencies and offices, shall be administratively settled or adjudicated by the Secretary of Justice, the Solicitor General, or the Government Corporate Counsel, depending on the issues and government agencies involved.

Here, the CIR argues that the Court has no jurisdiction over the case since petitioner is a government-owned and controlled corporation; hence, it should have appealed the FDDA to the Department of Justice.
The Court ruled that all disputes and claims solely between government agencies and offices, including government-owned or controlled· corporations, shall be administratively settled or adjudicated by the Secretary of Justice, the Solicitor General, or the Government Corporate Counsel, depending on the issues and government agencies involved. As regards cases involving only questions of law, it is the Secretary of Justice who has jurisdiction.

In this case, petitioner PSALM is a GOCC, while respondent represents the Bureau of Internal Revenue, which is a government agency. Clearly, this involves a dispute solely between a government corporation and another government agency, as such this CTA is bereft of jurisdiction to take cognizance of the present case. *(PSALM v. CIR, CTA Case No. 9235, August 28, 2018).*

[1]See GR 178087, May 5 2010, GR. No. 162852, December 4, 2004, and GR. No. 170257, September 7, 2011, respectively.

Postal office certifications are considered prima facie proof that the FLD/FANs were delivered to the addressees.

The Court ruled that there is no disputed assessment appealable to the Court because the FLD/ FANs have already attained finality long before the FDDA was issued.

The documents to prove completeness of service of the FAN will vary depending upon the method used, thus:

a. If made by personal service, proof of service shall consist of a written admission of the party served OR official return of the server OR the affidavit of the party serving, containing a full statement of the date, place and manner of service;

b. If made by ordinary mail, proof of service shall consist of the affidavit of the person mailing of the facts showing compliance with Section 7 of Rule 131 of the Rules of Court;

c. If made by registered mail, proof shall be made by such affidavit and the registry receipt.

Here, the evidence presented by the BIR specifically the Registry Receipt No. 922821, the Judicial Affidavit of a witness and the Certification issued by the Head of the Records Unit of the Postmaster, Central Office, Manila are more than sufficient to prove the taxpayer's receipt of the FAN. Postal office certifications are considered prima facie proof that the FAN was delivered to the addressees. *(UPSI Property Holdings, Inc. v. Commissioner of Internal Revenue, CTA Case No. 8860, August 22, 2018).*

BIR Issuances

RR No. 18-2018, August 3, 2018

This Regulation amends certain provisions of Revenue Regulations (RR) No. 8-2016, by changing certain guidelines and policies in the processing and issuance of Tax Clearance for bidding purposes.
The regulations added two provisions that amended Revenue Regulations (RR) No. 8-2016 to wit:
"4.4.1- All applications for the issuance of Tax Clearance in accordance with the requirements under RA No, 9184 and EO No. 398 shall be manually filed with the Collection Division of the Revenue Regional Office where the taxpayer or partnership/corporation is currently and duly registered or with the concerned office under the Large Taxpayers service if the taxpayer is classified as Large taxpayer, until such time that an on-line application for this purpose has been made available for use of prospective bidders."
"4 4.2
xxx xxx xxx
c. For those with or previously issued Tax Clearance for bidding Purposes, the requested Tax Clearance shall only be issued if they are found to be regular eFPS users from the time of enrollment up to the time of filing of application. The regular usage of eFPS shall not apply to new applicants. The submission of the new applicant's latest income tax and business tax returns not filed and paid through the Bureau's eFPS shall suffice.

RR No. 20-2018

This revenue regulation prescribes implementing rules and guidelines on the imposition of excise tax on Sweetened Beverages pursuant to Section 47 of the TRAIN Law.
As defined by the regulation, sweetened beverages (SBs) refers to non-alcoholic beverages of any constitution that are pre-packaged and sealed in accordance with the FDA standards that contain caloric and/or non-caloric sweeteners added by the manufacturers. This revenue regulation covers locally manufactured and imported sweetened beverages. Manufacturers, owners or importers, as well as, person having possession of

imported/domestically manufactured SBs removed from customs/place of production without the payment of the tax shall be subject to excise tax from SBs.

However, excluded from the coverage of this excise tax are milk products, soymilk, flavored soymilk, 100% natural fruit juices, 100% natural vegetable juices, meal replacement and medically indicated beverages, ground coffee, instant soluble coffee, and pre-packaged powdered coffee products. Also, exportation of sweetened beverages may not be subjected to prepayment of excise tax provided it complies with requirements set by this regulation.

RMC No. 70-2018

This circular prescribes the revised format of the BIR Form No. 1306, "Declaration of Forfeiture of Real Property".

This provides the revised format of BIR Form No. 1306 for want of bidder or insufficient consideration on the public auction sale relative to the seized real property of the delinquent taxpayer pursuant to Sec. 215 of the NIRC. Also, the form on the Affidavit of Consolidation of Title of Absolutely Forfeited Property in Favor of the Republic of the Philippines was revised, relative to the transfer of the title to the Republic of the Philippines of the absolutely forfeited real properties.

SEC Issuances

SEC OGC Opinion No. 18-15, August 24, 2018

Igloo Philippines is engaged in the operation of cold storage facilities, cold logistics and distribution services, value added cold processing and related services. Is Igloo Supply Chain Philippines, Inc., (Igloo Philippines), considered engaged in a partially nationalized activity?

The SEC opined that Igloo Philippines is engaged in partially nationalized activity. It can be classified as an ice-refrigeration plant as it provides cold storage and refrigeration facilities. Philippine laws and jurisprudence provide that ice refrigeration plants are considered public utilities if their enterprise is devoted to the public or their services are sold to the public for compensation. As such, Igloo Philippines is considered a public utility and is therefore engaged in partially nationalized activity and should comply with the requirements of the Constitution and the Public Service Act.

SEC OGC Opinion No. 18-15, August 24, 2018

Cenertec is engaged in the business of power generation, trading, supply, distribution and/or transmission. Its current equity structure is 60% owned by Filipinos and 40% owned by foreigners and its incumbent president is a French national.
Is Cenertec Philippines Inc., (Cenertec) engaged in a partly-nationalized activity?

The SEC opined that Cenertec is engaged in a public utility operation, a partly-nationalized activity, subject to 40% foreign equity restriction under the 1987 Constitution and the Tenth Foreign Investment Negative List (FINL-10).

Public utility is defined as one organized for hire or compensation to serve the public which is given the right to demand its service should they like to do so. It is a business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone or telegraph service. Applying the foregoing to Cenertec, while electric power generation is not considered a public

utility operation under the Electric Power Industry Reform Act of 2001, transmission and distribution of electric power to the general public is considered a public utility.

Articles Written

Business Mirror: Tax Law for Business,

"Deemed Denied" Lives

By: Irwin C. Nidea, Jr.

IN my many years in practice, I have seen how the rules in claims for value-added tax (VAT) refund have evolved.

In the early-2000 the Court of Tax Appeals (CTA) was divided on whether the 120-day waiting period is mandatory. Majority of the CTA justices were of the opinion that it is not, i.e., the taxpayer is not required to elevate a claim for refund to the CTA even if the 120-day waiting period has expired, as long as it files the claim within two years from filing of the VAT return. But later on, the Supreme Court (SC) promulgated the Aichi case where it ruled that inaction by the Bureau of Internal Revenue (BIR) within the 120-day period is deemed a denial of a claim for VAT refund.

Thus, it was made clear that a claim for VAT refund must be elevated to the CTA within 30 days after the expiration of the 120-day waiting period. As a result of this SC ruling, many claims for refund that were filed prior to the Aichi case were dismissed because some were either filed before or after the expiration of the 120-day period. As regards the former, they were dismissed for having been prematurely filed. On the other hand, as regards the latter, some were filed after 30 days from the expiration of the 120-day period. These cases were also dismissed because they were considered as belatedly filed.

It is also worth noting that, before the Aichi case, there was no definite ruling on when the two-year period to file a claim for refund must be reckoned from. Should it be counted from the filing of the VAT return or from the end of the quarter when the sales were made? The SC later on ruled that since the wordings of the law states the latter, then it is the one that should be followed. Of course, this was not without consequence. All claims for VAT refund that were filed using the date of filing as the reckoning point were dismissed for having been filed late.

There is another issue that the court is yet to resolve with finality. When should the two-year period be reckoned from? Is it within two years when the input VAT was incurred or is it within two years when the sales were made? The CTA in many cases use the former, but there are some divisions of the CTA that use the latter interpretation. This issue will also have far reaching implications when the time comes that the SC rules either way.

This brief narration of history will show that the taxpayer is the loser as the interpretation of the law changes over time. When there is a flip-flop of decisions, taxpayers are almost always left in the cold.

The evolution of the law on VAT refund is not yet over. In Tax Reform for Acceleration and Inclusion (TRAIN) 1, the BIR is only given 90 days to act on a claim. But unlike the old law, where failure to act by the BIR is considered a denial that can be elevated to the CTA, TRAIN 1 is silent in this regard. In fact, there was an express repeal of a similar provision of the old law.

But I think the "deemed denied" principle lives. The CTA rule is enlightening. It provides that, "The CTA shall have exclusive jurisdiction on inaction by the Commissioner of Internal Revenue in cases involving...refunds of internal revenue taxes...where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial."

Note that TRAIN 1 uses the phrase "the Commissioner shall grant a refund for creditable input taxes within 90 days." Clearly, there is a specific period of action in the law.

If you reconcile these two provisions, you will come to a conclusion that if there is an inaction of the BIR within 90 days (which is the specific period of action), it will be deemed a denial which must be elevated to the CTA.

There have been billions of pesos lost because of the continuing evolution of the VAT refund provision of the Tax Code. Now that you know your history, as laid down above, it is now up to you to use that knowledge to make a better judgment. If there is an inaction on your claim for VAT refund after 90 days, should you elevate your claim to the CTA or just pray that the BIR will act on the same and risk forfeiting any judicial relief?

BDB Law's "Tax Law for Business" appears in the opinion section of Business Mirror every Thursday.

Our Experts

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