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Businesses urged to tackle disaster risk reduction in new UN/PwC led initiative p2

Client advisory letter

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pwc

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Businesses urged to tackle disaster risk reduction in new UN/PwC led initiative

UN Global Platform for Disaster Risk Reduction (19-23 May)

• PwC/UNISDR report warns that business growth in hazard-prone parts of the world is leaving the private sector more exposed to disaster risk
• New business initiative responds to the UN's call for more action from the private sector on disaster reduction

A new report by the UN International Strategy for Disaster Reduction (UNISDR) and PwC warns that large multinationals' dependencies on international supply chains, infrastructure and markets poses a systemic risk to 'business as usual'.

The findings come after a separate report, the UN's Global Assessment of Risk (GAR13) report warned that direct losses from floods, earthquakes and drought were under-estimated by at least 50%. The GAR13 warned that business needed to act to protect itself better, as mounting losses this century from catastrophic events top US$2.5 trillion and economic losses were described as 'out of control.'

The UNISDR/PwC report ***Working together to reduce disaster risk*** examined disaster risk management approaches and experiences in 14 leading global businesses, including Nestle, Walmart, General Electric, Citigroup and BG Group. It was launched to mark a new initiative led by UNISDR and PwC to link private sector businesses of all sizes in disaster planning.

Businesses taking part in the report undertook a pilot assessment of their risk management activities which showed that while good practices existed for disaster risk reduction for corporate-owned assets, the level of understanding and ability to manage risks in local supply chains was far lower.

The private sector has witnessed increasing numbers of occasions of indirect impacts of natural disasters amplifying losses globally through commodity price rises, supply chain disruption, workforce dislocation, asset damage, and lost or damaged infrastructure. The report highlights how:

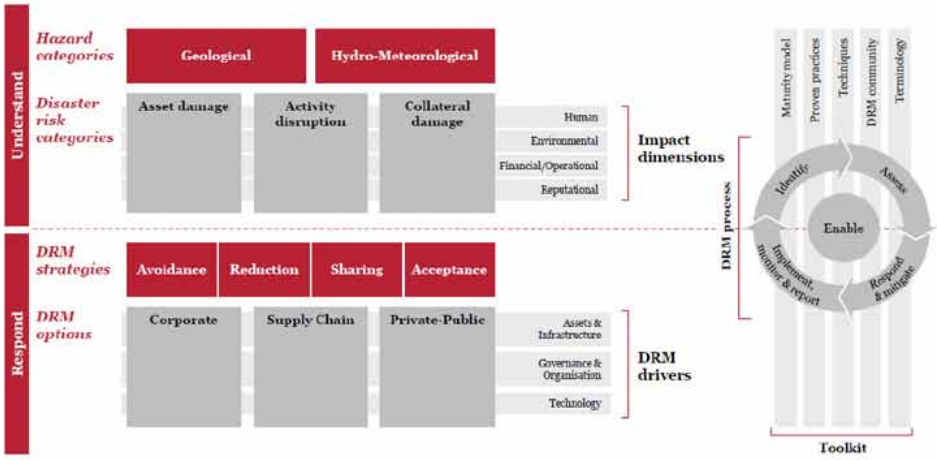
- Even businesses with established risk management systems in place need to do more to protect themselves fully against natural disasters
- Small more vulnerable enterprises in developing economies, do not have the capacity to strengthen their risk management and overall supply chain resilience alone
- Global businesses need to consider shared risks with suppliers, SMEs and local businesses in their supply chain, particularly in developing and emerging economies, where disproportionate economic and human impacts of disasters are being felt
- Few global corporations collaborate actively with governments across countries in which they operate
- Some large businesses rely on the insurance industry alone for risk assessments, with most having only limited access to disaster risk information on which to base investment decisions.

Oz Ozturk, PwC partner and leader of the global initiative, said:

"The risks posed by natural disasters go well beyond the boundaries of a company's operations. The damaging effects of disasters are reaching beyond protection insurance covering physical assets, and businesses need to consider productivity, declining customer demand and goodwill, and employee morale and stress.

"The businesses we interviewed understand they need to do more than just do business in the communities they are working in. Collaborating on disaster risk management is a strong platform on which to create local partnership with governments and cities, and demonstrates that business is having a full and positive impact on society."

Figure 1 Disaster risk management framework



UNISDR and PwC – Working together to reduce disaster risks

Being prepared saves lives, and money

According to one panellist, "For every dollar spent on mitigation and preparedness activities the ROI is between $4 and $11."

At either end of the range, the investment is worth it. While preparedness efforts aren't as high-profile or visible as response and recovery efforts, they are ultimately more effective.

The new initiative, facilitates the involvement of private and public sector organisations of all sizes and in all sectors, to take steps on disaster risk reduction, offering an assessment tool to help companies identify where their companies' plans stand, and where gaps exist in the management of disaster risk.

Margareta Wahlstrom, UN Special Representative of the Secretary-General for Disaster Risk Reduction said:

"While many private sector players are demonstrating an improved understanding of how their operations could be affected by natural hazards, there is a huge need for businesses worldwide to play a more central role in reducing disaster risk. The economic losses speak for themselves.

"The other side of the equation is that disaster risk management is a business opportunity. For example, the development of new crop insurance products or more disaster resilient infrastructure are major emerging needs in response to extreme weather events, rapid urbanization and growing exposure to disaster risk.

"This is ultimately about improving safety for all, and the security of supply chains and economic growth, and this initiative will provide a common platform for understanding disaster risk management in the private sector across businesses of all sizes, in any industry or sector."

Notes

1. UNISDR and PwC have established an initiative to facilitate the involvement of private and public sector organisations who are ready and willing to take steps on disaster risk reduction. The initiative harnesses expertise from both public and private sectors, creating a platform to link the activities of both. The UNISDR/ PwC Disaster Risk Management Framework gives concrete actions and practical guidelines driven by a standard risk management process to help business understand what a disaster will mean for their business, and how they can plan and respond.

2. The report and launch form part of the UN's Global Platform for Disaster Risk Reduction (19-23 May) bringing together leading businesses and international policy makers in Geneva.

3. The UNISDR has previously established a private Sector Advisory Group (PSAG). PSAG is an invitation-only group. A majority of the members are from the private sector with some members also from foundations and governments. As an advisory group, the PSAG represents the wider private sector and works with UNISDR to address disaster risk reduction in the sector. This group has contributed to this work.

4. Annual economic losses from reported natural hazards were up from US$10bn in 1975 to US$400bn in 2011 (Source: EM-DAT, OFDA/CRED International Disaster Database)

Bureau of Internal Revenue

Revenue Memorandum Circular (RMC)

Tax exemptions and incentives under the Foster Care Act of 2012

The BIR circulated the IRR of RA No. 10165, otherwise known as the Foster Care Act of 2012, which was enacted to advance the national policy of protecting the constitutional rights of children and to systematize the Foster Care Program that secures the welfare and best interest of the Foster Child.

From a taxation concept, the following are the salient features of the IRR:

a. The definition of "dependent" under Section 35(B) of the Tax Code includes a Foster Child, and thus an additional exemption of PHP25,000 for each dependent may be claimed for the Foster Child subject to the conditions that: (i) the total number of dependents, including the Foster Child, shall not exceed four (4), (ii) the period of foster care is at least a continuous period of one taxable year, and (iii) only one Foster Parent can treat the Foster Child as a dependent for a particular taxable year.

b. Agencies licensed and accredited by the DSWD to implement the Foster Care Program shall be exempt from income tax on income derived by them as such organization, and may apply for qualification as donee institutions.

c. Donations to licensed and accredited foster care agencies may be allowed as deduction from gross income in accordance with Section 34(H) of the NIRC. In addition, such donations may also be exempted from donor's tax under Section 101 of the NIRC; provided that not more than 30% of the amount of donations shall be spent for administrative expenses.

Appropriate revenue issuances and circulars implementing the tax incentives provisions of the Foster Care Act will be issued within one month from the issuance of the IRR.

(RMC No. 41-2013 dated 17 April 2013)

Amendments to the NIRC granting tax exemptions to international carriers and such other tax treatments relative to the principle of reciprocity

This RMC circularizes the full text of RA No. 10378 introducing amendments to the NIRC, specifically on the taxation of international carriers as provided under sections 28(A)(3)(a), 109, 118, and 236 thereof. The following are the relevant amendments:

a. A new paragraph was inserted in Section 28(A)(3)(a) of the Tax Code which clarifies that the basis for the grant of preferential tax treatment (either the 2 ½% tax on Gross Philippines Billings or exemption from said tax) to international carriers (both air and shipping) doing business in the Philippines is based on an applicable tax treaty or international agreement to which the Philippines is a signatory or on the principle of reciprocity such that an international carrier, whose home country grants income tax exemption to Philippine carriers, shall likewise be exempt from the tax imposed under this provision.

b. Section 109 of the NIRC was amended to include in the list of VAT exempt transactions, the *"transport of passengers by international carriers"*.

c. The 3% percentage tax on international air or shipping carriers under Section 118 of the NIRC shall be levied on *"their gross receipts derived from transport of cargo from the Philippines to another country"*.

The appropriate rules and regulations implementing RA No. 10378 will be promulgated by the DOF not later than 30 days from effectivity of the law. Also, the DOF, in coordination with the DFA, shall oversee the exchange of notes between the Philippines and the concerned countries for purposes of facilitating the availment of reciprocal exemptions under this RA.

Glossary

BIR - Bureau of Internal Revenue
DFA - Department of Foreign Affairs
DOF - Department of Finance
DSWD - Department of Social Welfare and Development
IRR - Implementing Rules and Regulations
NIRC - National Internal Revenue Code, as amended
RA - Republic Act

RA No. 10378 was passed into law on 7 March 2013 and took effect 15 days from its publication or on 29 March 2013.

(RMC No. 40-2013 dated 2 May 2013)

New rules prescribing the procedures to be followed in the receipt of taxpayers' protest letters or requests of reinvestigation/reconsideration

It has been observed that some tax cases covered by FAN and FLD under the prescribed Monthly Summary of Taxes Assessed-Unprotested (BIR Form 40.00) were still allowed for reinvestigation even if the assessments were already final and executory. These accounts should have been delinquent and are already subject to enforcement collection through summary remedies under Sections 205, 206, and 207 of the Tax Code.

To prevent these unnecessary reinvestigations, the BIR implemented a new procedure in the receipt of protest letters, requests for reinvestigation/reconsideration, and other similar correspondence to FAN/FLD, summarized as follows:

1. All letters of protest, requests for reinvestigation/reconsideration and similar correspondences shall only be filed by the taxpayers or their duly authorized representatives, in person or through registered mail with return card, with the office of the concerned RD, Assistant Commissioner-LTS and Assistant Commissioner-Enforcement Service, who signed the PAN, FAN and FLD. Failure to comply with this filing procedure will render the letter of protest, request for reinvestigation or reconsideration and similar correspondences void and without force and effect.

2. The above-named revenue officials shall ensure that a complete/accurate report (in the prescribed form) on all protests that were filed in their respective offices will be prepared and promptly submitted to the CIR every Monday of each week in soft and hard copies.

3. The office of the CIR will thereafter create a database of all letters of protest, requests for reinvestigation/reconsideration and similar correspondences received by the different offices of the BIR. Any information or protest letter or similar correspondence not included in the said database, though actually filed by the taxpayer, shall be deemed as not officially filed with the BIR and shall not be used as basis for grant of any request for reinvestigation/reconsideration of any FAN or FDDA issued against the taxpayer.

4. The above procedure shall apply to all letters of protest, requests for reinvestigation/reconsideration or similar correspondences that will be accepted from the taxpayers beginning 29 April 2013.

(RMC No. 39-2013 dated 4 April 2013)

Glossary

ATP - Authority to Print
BIR - Bureau of Internal Revenue
CIR - Commisioner of Internal Revenue
DOF - Department of Finance
FAN - Final Assessment Notice
FDDA - Final Decision on Disputed Assessment
FLD - Formal Letter of Demand
LTS - Large Taxpayers Service
NIRC - National Internal Revenue Code, as amended
PAN - Preliminary Assessment Notice
RA - Republic Act
RD - Regional Director
RR - Revenue Regulation

Validity period of unused/unissued principal and supplementary receipts/invoices is extended to 30 August 2013

Further to RR No. 18-2012, the validity of all unused/unissued principal and supplementary receipts/invoices printed prior to 18 January 2013, has been extended from 30 June 2013 to 30 August 2013. Taxpayers may continue to issue their unused/unissued receipts/invoices until the 30 August deadline. Thereafter, the said receipts or invoices shall be considered cancelled, invalidated, and may no longer be issued in violation of Section 264 of the NIRC. Transactions bearing expired receipts/invoices shall be considered unsubstantiated and precluded as an expense deduction.

Nonetheless, the deadline for filing an application to print new receipts (ATP) remained on 30 April 2013. Applications, received after the 30 April deadline, are deemed late applications subject to imposable penalties.

All expired receipts or invoices must be surrendered to the BIR-RDO, where the taxpayer is registered, on or before the 10th day after the date of printing of the new principal and supplementary receipts/invoices. For purposes of establishing a clear-cut reckoning period, the date of the new principal and supplementary receipts/invoices, as stated thereon, shall be the date of expiration of the validity period of all unused/unissued receipts/invoices.

(RMC No. 44-2013 dated 11 June 2013)

Revenue Regulation (RR)

Amendment to the procedures in the filing of the application for abatement of surcharges and penalties by employees of international institutions who are not granted tax exemption under the law

Under RR No. 7-2013 dated 29 April 2013, Philippine nationals and alien individuals employed by Foreign Governments/Embassies/Diplomatic Missions and International Organizations (collectively referred to as

"international institutions") situated in the Philippines who are not granted tax exemption under the law may avail of abatement of surcharges, interests and compromise penalties in relation to the filing of their 2012 income tax returns. The application for abatement, however, was subject to the condition that their respective employers file with the BIR before 10 May 2013, a Summary List of Employees who are not tax-exempt as of 31 December 2012 in the prescribed form.

Certain provisions of RR No. 7-2013 were recently amended, specifically Sections 2 and 3 thereof summarized as follows:

1. The burden of submitting the prescribed Summary List of Employees to the BIR was shifted from the employer-international institution to the employee-taxpayer concerned (i.e., referring to the taxable employees who are yet to file their 2012 income tax returns or who ought to amend their tax returns to cover tax deficiencies). In other words, the international institutions concerned are no longer required to submit the Summary List of Employees to the BIR, instead, their concerned employee/taxpayer will have to secure the Summary List of Employees from them, and the names in the said list must include the name of the specific employee-taxpayer as one of the employees, diplomatic agents, staff members or officials of said international institution.

2. In lieu of the Summary List of Employees, the employee-taxpayer concerned may obtain a "Certificate of Employment" disclosing information of his/her position or rank, period of employment for 2012, and monthly salaries, emoluments and monetary benefits.

3. The Summary List of Employees or the Certificate of Employment shall be attached to the employee-taxpayer's "Declaration of Availment of Abatement" in accordance with the form prescribed in the regulations.

(RR No. 8-2013 dated 9 May 2013)

Payment of compromise offer upon filing of application for compromise settlement

Taxpayers intending to apply for compromise settlement of their tax liabilities under Section 204 of the Tax Code are required to pay the amount offered as compromise upon the filing of the application for compromise. No application for compromise settlement will be processed without full settlement of the offered amount. In case of disapproval of the application, the amount shall be deducted from the total outstanding tax liabilities of the taxpayer.

(RR No. 9-2013 dated 10 May 2013)

Filing of duplicate hard copy of BIR Form 2316 for employees qualified for substituted filing

As a rule, every employer is required to furnish each employee with the original and duplicate copies of the Certificate of Compensation Payment /Tax Withheld (BIR Form 2316). However, Section 2.83.1 of RR No. 2-98 has been amended, apprising employers of the following directives:

1. In cases covered by substituted filing, the employer is required to furnish each employee with the original copy of BIR Form No. 2316 and to file with the BIR the duplicate copy not later than 28 February following the close of the calendar year.

2. Any employer/withholding agent, including the government or any of its political subdivisions and government owned and controlled corporations, who fail to comply with the filing/submission of BIR Form 2316 within the prescribed period shall be subject to a fine of one thousand pesos (PHP1,000.00) for each failure in accordance with Section 250 of the NIRC. Non-compliance for two consecutive years shall be further penalized under Section 255 of the same Code, which upon conviction, imposes a fine of not less than Ten Thousand Pesos (PHP10,000.00) and imprisonment of not less than one year but not more than 10 years. In case of settlement, the compromise fee shall be PHP1,000.00 for each failure to file BIR Form No. 2316 without any maximum threshold.

Although published on 8 June 2013, the regulation took effect beginning with the calendar year 2013 as expressly provided thereon.

(RR No. 11-2013 dated 20 May 2013)

Revenue Memorandum Order (RMO)

Revised National Office Codes aligned with the approved BIR rationalization plan under EO No. 366

The approved BIR Rationalization Plan under EO No. 366 instituted certain changes in the BIR's organizational structure which involved among others, the renaming, creation, or consolidation of certain offices within the Bureau. To implement the change, revised office codes were prescribed for the BIR National Office and its Revenue Data Centers in alignment with the new structure, which superseded the previous codes provided under RMO No. 34-2011. The revised office codes for the different revenue offices as embodied in this memorandum, must be reflected

Glossary

BIR - Bureau of Internal Revenue
DFA - Department of Foreign Affairs
DOF - Department of Finance
DSWD - Department of Social Welfare and Development
EO - Executive Order
IRR - Implementing Rules and Regulations
NIRC - National Internal Revenue Code, as amended
RA - Republic Act
RMC - Revenue Memorandum Circular

on all internal revenue documents/official paper to ensure proper identification of the particular office from which the documents originated and efficient control and monitoring of said documents and communications. The revised office codes must be indicated at the lower ***left hand corner*** (at least one line after the signature line) of an official document.

(RMO No. 14-2013 dated 8 May 2013)

BIR International Tax Affairs Division

License fee for the use of licensed software is a business profit

A non-resident foreign corporation based in Australia entered into a Software License Agreement with a Philippine government agency under which the latter as licensee, was authorized to use the licensed software within the confines of its organizational work. However, the license granted restricted the government agency from making any copies of the licensed software except in machine readable form and only for the purposes of: (a) archive, emergency restart or back-up of the software product, (b) testing the software, and (c) replacing a defective copy or verifying a programming error in the software product. As consideration for the use of the software program, the government agency was charged license fee and other service fees by the Australian licensor.

Applying the Philippines-Australia Tax Treaty in relation to RMC No. 44-2005, the BIR treated the license fees paid to the Australian licensor as business profits and not royalties. Accordingly, since it appears that the foreign licensor has no permanent establishment in the Philippines to which its profits may be attributable, the license fees payable for the use of the software in the Philippines are exempt from income tax and consequently from withholding tax.

(BIR Ruling No. ITAD 141-13 dated 21 May 2013)

BIR Rulings

Sale of digital or online educational products is subject to VAT

A domestic corporation engaged in the wholesale/retail of print, digital and online educational products requested for a certificate of tax exemption with regard to the payment of the VAT on the importation and sale of its print and online products pursuant to Section 109(1)(R) of the NIRC.

The BIR denied the request and drew a distinction between print and online educational products for purposes of VAT exemption. Under Section 109(1)(R) of the NIRC, as amended, the sale of *"books or similar publication"* are exemption from VAT. RMC No. 75-2012 further clarified that the VAT exemption covered by this provision referred to printed materials in hard copies, excluding digital or electronic format or computerized versions, such as but not limited to, e-books, e-journals, electronic copies, online library sources, CDs and software.

(BIR Ruling No. 170-2013 dated 6 May 2013)

Rescission of a Contract to Buy and Sell does not give rise to a taxable event, except for DST levied on the issuance of the sale instrument

Company A and Company B, both domestic corporations, entered into a Contract to Buy and Sell (Contract) covering certain parcels of land. For failure of Company B to comply with its undertakings under the Contract, Company A filed a judicial action to declare the contract void (or rescission of contract) which was granted by the trial court. The parties were thus directed by the trial court to return whatever they have received from each other, with Company A returning the purchase price and Company B re-conveying the titles over the subject real properties.

Company A request for exemption from the payment of CGT and DST over the re-conveyance of the parcels of land was later submitted to the BIR.

The BIR confirmed that the re-conveyance of the real properties in favor of Company A is not subject to CGT and DST. Citing jurisprudence as basis, the BIR ruled that the rescission of a contract declares a contract void from the beginning as if no contract has been made between the parties. In effect, rescission of a contract would not give rise to a taxable event since: (a) no income is realized from a sale or exchange declared void, and (b) the return of the property is not for monetary consideration, but merely an acknowledgment of the title or ownership of the original owner of the property.

However, the DST that has already been paid on the Contract rescinded can no longer be refunded. The BIR clarified that DST is levied on the exercise of certain privileges regardless of the legal status of the transactions that gave rise to it, that is, irrespective of whether the contract was declared void or unenforceable. DST must be paid upon the issuance of the specific instrument or document evidencing the legal transaction. Consequently, the cancellation of the Contract to Buy and Sell does not carry the effect of cancelling the company's DST liability upon the issuance of the deed or instrument.

(BIR Ruling No. 178-2013 dated 17 May 2013)

Glossary

BIR - Bureau of Internal Revenue
CGT - Capital Gains Tax
DST - Documentary Stamp Tax
NIRC - National Internal Revenue Code, as amended
RMC - Revenue Memorandum Circular
VAT - Value added Tax

Court decisions

Court of Tax Appeals (CTA)

Issuance of Preliminary Assessment Notice (PAN) is an integral part of procedural due process

A Filipino businessman notified the BIR in writing that his business operations would cease by the middle of 2005 and would incur taxes only up to 30 June 2005. He then filed his second quarter VAT return on 26 July 2005.

On 5 November 2008, the businessman received a FAN from the BIR assessing him for deficiency taxes with interest and compromise penalties. However, the businessman denied having previously received a PAN for the same deficiency taxes as required under the law. A protest to the FAN was filed, and thereafter, a Petition for Review before the CTA, the BIR having failed to act on the protest within the prescribed 180-day period.

The CTA ruled in favor of the businessman and considered the assessment invalid for failure to comply with Section 228 of the NIRC, which grants to taxpayers the right to be "informed in writing of the law and the facts on which the assessment is made." The CTA explained that issuance of a PAN is an essential requisite that lays down for the taxpayer the factual and legal basis for the assessment on deficiency taxes. Its complete and faithful compliance is mandatory in observance of the right of the taxpayer to procedural due process. Consequently, for failure of the CIR to prove the PAN was delivered and actually received by the businessman, either personally or by registered mail, or that the businessman was effectively apprised of the supporting components from which the tax assessment was based, the deficiency assessment is considered void.

(CTA EB Case No. 878 dated 14 May 2013)

Exploration and development of geothermal resources by virtue of a service contract is not subject to franchise tax

A private domestic corporation entered into a Service Contract with the Department of Energy for the exploration, exploitation, and development of geothermal resources.

The company sells to the NPC geothermal steam produced from its operations. The company was assessed by the City Government for deficiency franchise tax under Section 137 of the City Revenue Code. The City Treasurer maintained that the company is a business enjoying secondary franchise within the provincial's territorial jurisdiction and should be liable for franchise tax.

The CTA ruled in favor of the company for the reason that it is not engaged in an activity which is subject to franchise tax.

Under PD No. 87, the concept of 'service contract' in relation to development of natural resources is defined as *"a contractual arrangement for engaging in the exploitation and development of petroleum, mineral, energy, land and other natural resources by which a government or its agency, or a private person granted a right or privilege by the government authorizing the other party (service contractor) to engage or participate in the exercise of such right or the enjoyment of the privilege x x x"* (Emphasis supplied).

On the other hand, Sec. 137 of the Local Government Code defines the term 'franchise' as a *"right or privilege, affected with public interest which is conferred upon private persons or corporations, under such terms and conditions as the government and its political subdivisions may impose in the interest of public welfare, security and safety"*. A franchise may pertain to a general/primary franchise, or to a special/secondary franchise. The former refers to a "right to exist as a corporation" while the latter is a "right conferred upon an existing corporation".

Glossary

BIR - Bureau of Internal Revenue
CTA - Court of Tax Appeals
FAN - Final Assessment Notice
NIRC - National Internal Revenue Code, as amended
NPC - National Power Corporation
PAN - Preliminary Assessment Notice
PD - Presidential Decree
VAT - Value added Tax

In its general context, a franchise tax is levied on a *"privilege of transacting business in the state and exercising corporate franchises* ***granted by the state****"*. (Emphasis supplied).

Considering the foregoing definitions, the company's business operation does not qualify as a secondary franchise liable to franchise tax. First, the grant of a secondary franchise is not required by law for the exploration, development, and operation of geothermal resources. Second, the company's operation is by virtue of a service contract or agreement – not a privilege granted by the Government.

(CTA AC No. 90 dated 14 May 2013)

Losses on distilled spirits due to evaporation are subject to excise tax

A domestic corporation is a manufacturer of perfumes, toilet waters, splash colognes and baby sprays. It is authorized to purchase denatured alcohol for its operation through a Permit to Buy/Use Denatured Alcohol issued by the BIR. The said BIR Permit stated as one of its conditions for importation that, *"in the event that the volume of purchased denatured alcohol actually received is more than or less than the volume reflected in the aforementioned accompanying documents, the excise tax due on the differences shall be assessed, inclusive of all applicable penalties"*.

The company was assessed for deficiency excise tax on the aggregate shortages in the actual volume of denatured ethyl alcohol it received vis-à-vis the alcohol volume reflected on the Official Delivery Invoice, pursuant to Section 141(a) of the NIRC. The company protested the assessment and argued that the difference in alcohol volume (shortages) was caused by evaporation during transit and as such, should not be subject to excise tax.

The CTA upheld the propriety of the assessment for deficiency excise tax mainly on the ground that losses due to evaporation of distilled spirits, such as denatured alcohol, are subject to excise tax pursuant to Section 22 of RR No. 3-2006 which implements Section 141 of the NIRC. Moreover, since such condition was expressly stated in the BIR Permit, the company cannot claim that such condition is an "impossible condition." To do so, it must first assail the legality of RR No. 3-2006 or the governing policy that imposed the BIR Permit conditions.

(CTA Case No. 8174 dated 16 May 2013)

Extending cash advances with interest to affiliates is deemed performance of service for a fee, subject to VAT

A domestic corporation extended cash advances and loans with interest to its affiliates in the ordinary course of its operations. It was assessed for deficiency VAT for the interest income realized from the interest-bearing loans and cash advances pursuant to Section 109 of the NIRC. The company protested the assessment and argued in its protest letter that it is not a lending investor and therefore should not be liable for VAT under Section 108 of the NIRC.

Glossary

BIR - Bureau of Internal Revenue
CTA - Court of Tax Appeals
NIRC - National Internal Revenue Code, as amended
RR - Revenue Regulations
VAT - Value added Tax

The CTA found the company liable for VAT, not as a lending investor, but on the premise that the interest income generated from the loans and cash advances is deemed revenue realized from its normal course of trade or business. Pursuant to RR No. 16-2005 in relation to Sections 106 to 108 of the NIRC, VAT is imposed on the sale or exchange of services performed in the regular conduct or pursuit of a commercial or an economic activity. It is immaterial that the company is not a lending investor since VAT is levied on all kinds of services rendered in the Philippines for a fee or consideration. The list of VATable services under Section 108 is not exclusive; rather, the enumerated services should be given a broad interpretation to include all other activities rendered for a fee. Such services would include the act of extending loans and cash advances to the company's affiliates which is rendered for a fee in the form of interest generated thereon.

Furthermore, it is of no moment that the cash advances are considered isolated transactions in the conduct of the Company's business. An isolated transaction can be treated as an incidental transaction which is also subject to VAT under Section 105 of the NIRC.

(CTA Case No. 8024 dated 24 April 2013)

A tax assessment based on mere presumption is void and unenforceable

A domestic corporation was assessed for deficiency income tax and VAT on assumed income based on the BIR's findings that it had under declared its purchases or unaccounted expenses. However, no evidence was submitted showing that income resulted from the unaccounted purchases/ expenses and that said income was actually received by the corporation.

The CTA considered the assessment without legal and factual basis. For an assessment to be valid, there must be proof that there was income and such income was received by the taxpayer. Mere presumption of income based on under declared purchases/unaccounted expenses which supposedly translates into income is not sufficient to sustain the validity of an assessment. Such speculation runs afoul with the well-established elements for the imposition of income tax, namely: (a) that there must clear proof of gain or profit, (b) that such gain or profit was received by the taxpayer, actually or constructively, and (c) that it is not exempted by law or treaty from income tax. In the same vein, VAT can be imposed only if the taxpayer received an

amount of money from the sale or exchange of services – not when there are under-declared purchases.

A taxpayer is free to claim or not to claim deductions from gross income. What is prohibited by the law is to claim a deduction beyond the authorized amount. Accordingly, an under-declaration of purchases or unaccounted expenses is not prohibited by law.

While tax assessments enjoy the legal presumption of correctness and regularity in its preparation, the presumption is disputable and cannot be made to rest on another presumption. An assessment should not be based on mere presumption no matter how reasonable or logical said presumption may be *(Collector of Internal Revenue vs. Alberto D. Benipayo, G.R. No. L-13656, 31 January 1963)*. Where there is proof that the assessment is arbitrary, capricious, and without factual or rational basis, the presumption does not apply.

(CTA Case No. 8345 dated 29 May 2013)

Taxpayer has the option to file a judicial claim after the lapse of the 120-day waiting period, regardless of whether the BIR received complete supporting documents on the administrative claim

A domestic construction company was contracted in 2009 by a PEZA-registered export enterprise to provide design and construction services for a clean room facility within its premises, which is a VAT zero-rated activity. The construction company then filed its Quarterly VAT Returns for the four quarters of 2009 which showed excess input VAT for the period covering said four quarters of 2009. Thereafter, the construction company filed with the BIR an administrative claim for issuance of tax credit certificate for the 2009 unutilized input VAT. Due to the BIR's inaction on the administrative claim, the company filed a judicial claim within 30 days after the lapse of the 120-day period given to the CIR to act on the claim as prescribed by law.

The BIR opposed the claim on various grounds one of which is that, the company prematurely filed the judicial claim since it did not submit the documents in support of its claim for refund. The CTA found the judicial claim to have been timely filed pursuant to Section 112(C) of the NIRC. It explained that this provision clearly grants the taxpayer an option to elevate its administrative claim in case of inaction on the part of the CIR within the 30-day period from the expiration of the 120-day period, without any condition that the BIR must first receive the supporting documents in order that it can act on the administrative claim. The CTA emphasized that if the submission of documents were meant to be a condition precedent for the BIR to act on the claim, the 120-day period provided by law will be rendered meaningless as there could be no end when the 120-day period will be reckoned because the BIR would still be waiting for the submission of the documents.

(CTA Case No. 8159 dated 30 April 2013)

Application of "the law of the case" doctrine

A domestic corporation engaged in the business of rendering information, promotional, supportive and liaison services, filed an administrative and judicial claim before the BIR-RDO and CTA, respectively, for its unutilized input VAT attributable to its zero-rated sales for the year 2002. The claim was denied by the CTA in Division for lack of substantiation, i.e., the sales invoices presented by the company failed to support its zero-rated sales of services. The CTA applied Section 106(A) and (D)(1) and Section 108(A) and (C) of the NIRC which requires official receipts to support sales of service. The CTA in Division was later affirmed by the CTA En Banc. Consequently, the company elevated the case to the Supreme Court (SC) on certiorari.

In its 3 August 2010 Decision, the SC reversed the CTA En Banc ruling and held that the company has complied with the substantiation requirements to prove entitlement to refund/tax credit. The SC emphasized that both Sections 110 and 113 of the Tax Code do not distinguish between sales invoice and an official receipt, and that a claim for refund/tax credit of unused input VAT pertaining to zero-rated sales of goods or services may be substantiated by either sales invoices or official receipts, for as long as the requirements under Sections 113 and 237 of the Tax Code are met. The SC then remanded the case to the CTA Division for computation and determination of the amount for refund or tax credit. The SC Decision became final and executory on 26 August 2010.

However, instead of merely determining the amount for refund/tax credit as instructed by the SC, the CTA Special First Division promulgated an Amended Decision once again denying the company's judicial claim for refund/tax credit for lack of substantiation. The CTA relied on a subsequent SC decision which ruled that VAT invoice and VAT official receipt are different documents and that VAT invoices are insufficient proof of zero-rated sales of services. On reconsideration, however, the CTA Special First Division reversed its Amended Decision and ordered the refund of the unutilized input VAT in accordance with the 3 August 2010 Decision of the SC.

The CTA En Banc further affirmed the Amended Decision of the CTA Special First Division applying the *law of the case* doctrine which applies to *"a situation where an appellate court has made a ruling on a question on appeal and thereafter remands the case to the lower court for further proceedings; the question settled by the appellate court becomes the law of the case at the lower court and in any subsequent appeal"*.

Glossary

BIR - Bureau of Internal Revenue
BIR-RDO - Bureau of Internal Revenue Regional District Office
CTA - Court of Tax Appeals
NIRC - National Internal Revenue Code, as amended
PEZA - Philippine Economic Zone Authority
VAT - Value added Tax
SC - Supreme Court

The CTA En Banc considered of paramount consideration the fact that the present case was elevated on certiorari before the SC whose Decision of 3 August 2010 has became final and executory. Since the SC Decision was rendered by the High Court who has the last word on what the law is and is the final arbiter of any justifiable controversy, said Decision has become the law of the case and can no longer be altered even at the risk of legal infirmities and errors it may contain. *"As the Final Arbiter of all legal questions properly brought before it, a decision by the High Court in any given case constitutes the law of that particular case, from which there is no appeal"*. Thus, as far as the issue on the company's entitlement over its claim was concerned, the High Court had resolved it with finality and now became the law in that case between the parties. Dictates of public policy, judicial orderliness, and economy requires attainment of stability and finality in the judgments of courts or tribunals exercising competent authority and jurisdiction.

(CTA EB No. 845 dated 27 May 2013)

Claims for refund/tax credit of input tax must be substantiated by zero-rated sales

A domestic corporation filed in 2009 an administrative claim for refund/tax credit of its excess and utilized input VAT pertaining to its zero-rated sales for the third quarter of 2007. Receiving no action from the BIR, the company filed a judicial claim before the CTA Division, which was denied on the ground that the judicial claim was prematurely filed.

The CTA En Banc affirmed the denial of the claim effectively stating that the company failed to meet the requisites for a refund/tax credit of unutilized input VAT as provided under Section 112 (A) of the NIRC. This provision states that *"Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, x x x"*.

Clearly under this provision, one of the criteria in the recovery of unused input VAT pertaining to zero-rated sales is that the claim for tax credit/refund must be filed within two years after the close of the taxable quarter when such sales were made. This presupposes that sufficient proof must be presented to show that zero-rated or effectively zero-rated sales were actually made during the close of the taxable quarter, and failure to do is a ground for the denial of the claim for refund/tax credit. *"Concomitantly, absence of zero-rated or effectively zero-rated sales during the close of the taxable quarter where the claim for refund is made does not entitle the claimant for refund"*.

Glossary

BIR - Bureau of Internal Revenue
CTA - Court of Tax Appeals
NIRC - National Internal Revenue Code, as amended
VAT - Value added Tax
SC - Supreme Court

The records of the case disclosed that the company had no effectively zero-rated sales for the year 2007, 2008, and 2009, since it started to sell generated power only in 2010. Hence, in the absence of zero-rated or effectively zero-rated sales during the taxable quarter of 2007 when the sales were made, the company is not entitled to the claim for refund, notwithstanding the existence of unutilized input VAT.

(CTA EB Case No. 884 dated 17 May 2013)

Executive issuances

Securities and Exchange Commission (SEC)

Guidelines on compliance with the Filipino-Foreign Ownership Requirements prescribed in the Constitution and/or existing laws by Corporations engaged in Nationalized Activities

The SEC issued guidelines on compliance with the ownership requirements by corporations engaged in nationalized or partly nationalized activities as prescribed under the Constitution, the Foreign Investment Act of 1991 (FIA) and/or existing laws. Nationalized or partly nationalized corporations refer to corporations engaged in identified areas of activities or enterprises specifically reserved, wholly or partly, to Philippine nationals by law.

The guidelines provide that for purposes of determining compliance with the citizenship requirement, the required percentage of Filipino ownership shall be applied to ***both***: (a) the total number of outstanding shares of stock entitled to vote in the election of directors; ***and*** (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.

Compliance with the two criteria would ensure that full beneficial ownership and effective control of the appropriate voting rights lie in the hands of Philippine nationals.

All corporate secretaries of covered corporations are directed to monitor and observe compliance with the provisions on ownership requirements provided by applicable laws. This responsibility cannot be delegated without the express authority from the Board of Directors or Trustees, as the case may be. Non-compliance with the Circular shall subject the juridical entity, any person, and the corporate officers responsible, to sanctions provided in Section 14 of the FIA.

The Circular took effect on 22 May 2013 immediately after its publication.

(SEC Memorandum Circular No. 8, Series of 2013 dated 20 May 2013)

Glossary

CTA - Court of Tax Appeals
FIA - Foreign Investment Act
IRR - Implementing Rules and Regulation
SEC - Securities and Exchange Commission

Department of Labor and Employment (DOLE)

Implementing rules and regulation to the "Batas Kasambahay"

The Rules and Regulations implementing (IRR) RA No. 10361 (otherwise known as the "Batas Kasambahay" or "Domestic Workers Act") have been issued. It contains rules clarifying the implementation of the various aspects of the law such as coverage, mode/manner of hiring of kasambahay, their recruitment and deployment, their basic rights and privileges, rights and obligations of the employer, and post employment rules and procedures, among others.

"Kasambahay" as contemplated under RA No. 10361, refers to domestic workers, whether on a live-in or live-out arrangement, such as but not limited to: general house-help; yaya; cook; gardener; laundry person; or any person who regularly performs domestic work in one household on an occupational basis. Excluded from the coverage of the law are service providers, family drivers, children under foster family arrangement, and any other person who performs work occasionally or sporadically and not on an occupational basis. Kasambahays are protected with the following rights and privileges:

a. Minimum wage;
b. Other mandatory benefits, such as the daily and weekly rest periods, service incentive leave, and 13th month pay;
c. Freedom from employers' interference in the disposal of wages;
d. Coverage under the SSS, PhilHealth and Pag-IBIG laws;
e. Standard of treatment;
f. Board, lodging and medical attendance;
g. Right to privacy;
h. Access to outside communication;
i. Access to education and training;
j. Right to form, join, or assist labor organization;
k. Right to be provided a copy of the employment contract;
l. Right to certificate of employment;
m. Right to terminate the employment as provided in Section 2, Rule VII; and
n. Right to exercise their own religious beliefs and cultural practices.

Concomitantly, employers are entitled to certain rights which include the right to require submission by the Kasambahay of pre-employment documents, to recover deployment expenses, to demand replacement from a private employment agency, and to terminate employment.

More importantly also, is the requirement for employers to register the Kasambahay under their employ in the barangay where their residence is located. The DILG, through the NBOO, will be issuing a circular prescribing the standard Registration Form and Protocols as guide for registration, which may contain personal, education, family, and work information.

(DOLE- IRR of RA No. 10361 dated 9 May 2013)

Glossary

DILG - Department of Interior and Local Government
NBOO - National Barangay Operation Office

Meet us

L-R: The travel blogger behind journeyingjames.com James Betia; PwC Philippines' Vice Chairman, Tax Managing Partner and Markets Leader Alex Cabrera; Digital Strategist and Senior Convention Services Officer at the Department of Tourism's Tourism Promotions Board Christel Arguelles and Nedalin Miranda; Assistant Professor at the Asian Institute of Tourism in the University of the Philippines-Diliman Caloy Libosada; Senior Vice President, Partner and General Manager at FleishmanHillard Manila Cosette Romero; PwC Philippines' Tax Senior Consultants Rey Maniego III and Jasper Bata.

Judges shortlist 25 destinations that will vie for the ten Philippine Gems

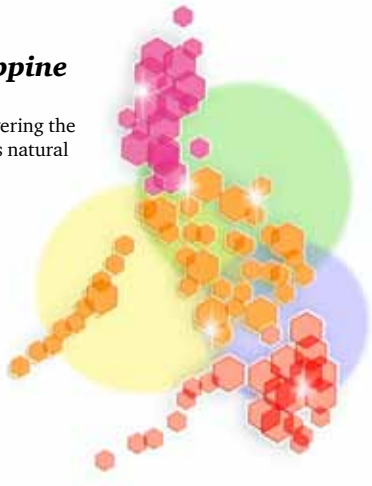
Ten judges shortlisted 25 local destinations for the **Philippine Gems** campaign last May.

Philippine Gems aims to showcase the country's "good side" to the world, especially the many pristine natural sceneries of our picturesque country. Increasing the awareness and appreciation for these sites will foster both local and international interest and attention that may eventually increase economic activity.

Philippine Gems is a part of Isla Lipana's corporate social responsibility. In 2010, the company also embarked on a project that gathered the thoughts, comments and ideas of the country's top executives on the path of Philippine economy called "Philippine Resiliency—A Gem Uncovered".

Three years after the publication of *Philippine Resiliency*, Isla Lipana & Co. continues its journey, this time harnessing the country's natural wonders with Philippine Gems. Considered as the company's corporate social responsibility project, Philippine Gems hopes to promote and further boost the country's growing economy.

Philippine Gems
Rediscovering the country's natural assets



Vice Chairman, Tax Managing Partner and Markets Leader **Alex Cabrera**, who spearheads the **Philippine Gems**, welcomed the judges and sought their ideas to enhance the campaign.

Panel head Caloy Libosada, who is an Assistant Professor at the Asian Institute of Tourism in the University of the Philippines-Diliman, came up with 50 remarkable destinations in the Philippines in partnership with Isla Lipana & Co. These were further shortlisted to 25 by the panel of judges.

In order to be shortlisted, a site has to be breathtaking, be in good condition, be peaceful and secure, and be accessible. Those sites that receive fewer visitors compared to mainstream sites were also prioritized. Awards or recognitions received are an advantage, but not a must. The community in which the site is located also has to be willing to be recognized.

Libosada, also the director of UP-Diliman's Division of Tourism Research and Extension Services, headed the panel composed of **Nedalin Miranda** and **Christel Arguelles** (Senior Convention Services Officer and Digital Strategist at the Department of Tourism's Tourism Promotions Board, respectively), **Cosette Romero** (Senior Vice President, Partner and General Manager at FleishmanHillard Manila), **James Betia** (the travel blogger behind journeyingjames.com), **Junie del Mundo** (Chairman, ASEAN Integration Committee, Management Association of the Philippines), **Jing Lejano** (Editor-at-Large, Turista Magazine), **Cherrylin Javier** (Assurance Partner, Isla Lipana & Co. and an active traveler), **Love Añover** (television personality, GMA Network), and **Jose Javier Reyes** (writer and director, an active traveler).

PwC Japan's transfer pricing expert conducts seminar for financial services clients

PwC Japan partner **Ryann Thomas** conducted a special transfer pricing (TP) seminar for financial services clients last 7 May at the firm's office at Philamlife Tower, Paseo de Roxas, Makati City.

The free seminar, relevant across all sectors of the financial services industry, discussed how tax examiners approach financial services TP audits, hot topics in the region and globally, TP issues relating to customer-facing activities, as well as unique issues affecting each of the three main industry sub-sectors (investment manager, insurance, and banking/capital markets).

Ryann Thomas is a partner in PwC Japan's TP practice who also serves as regional coordinator for PwC's financial services TP network in the Asia Pacific region.

Since she joined Zeirishi-Hojin PricewaterhouseCoopers in 2001, Ryann has worked exclusively in the transfer pricing area, assisting both inbound and outbound multinational corporations with transfer pricing audit defense, APAs and documentation for Global Trading (Spot Deals, Derivatives), Asset Management (Traditional, Alternative) and Investment Banking (Underwriting, M&A).

Prior to coming to Japan, Ryann worked as a barrister and solicitor in commercial and private litigation in New Zealand. Ryann is currently Treasurer for the Australian & New Zealand Chamber of Commerce in Japan. Ryann is a graduate of the University of Auckland (majors in law and commerce) as well as Massey University (major in Japanese), and has been admitted to the bar of the High Court of New Zealand.

Tax Partners **Malou Lim** and **Carlos Carado** welcomed Ryann, along with Tax Director **Roselle Yu.**

Talk to us

For further discussion on the contents of this issue of the *Client Advisory Letter*, please contact any of our partners.

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Disclaimer
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