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Client advisory letter

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CEOs' confidence rises in 2014

Twice as many say global economy to improve • 39% strongly predict company growth • Worries about over-regulation, fiscal deficits, tax policy higher than ever • Half of CEOs plan to increase the size of their workforce

Twice as many CEOs around the world as last year believe the global economy will improve in the next 12 months, and 39% say they are 'very confident' their company's revenues will grow in 2014, according to *PwC's 17th Annual Global CEO Survey.*

Global economy

The number of CEOs who see improvement in the global economy over the next 12 months leapt to 44%, up from only 18% last year. And just 7% predict the global economy will decline, sharply down from 28% in 2013.

Regionally, CEOs in Western Europe are the most confident about short-term global economic prospects (50%), in line with signs of improving conditions. They are followed by those in the Middle East (49%), Asia Pacific (45%), Latin America (41%), North America (41%) and Africa (40%). CEOs in Central and Eastern Europe show the lowest level of confidence at 26%.

By industry, CEOs in the Hospitality and Leisure sector are most confident about prospects for the next 12 months (46%), followed by those in Banking and Capital Markets (45%), Retail (44%), Financial Services (44%), Asset Management (44%), Communications (44%), and Engineering & Construction (41%). CEOs in the Metals industry are least confident at 19%.

Revenue growth

For their own companies, 39% of CEOs say they are 'very confident' of revenue growth prospects for the next 12 months. That's up from 36% last year. Confidence in revenue growth reached a low of 21% in 2009.

CEOs in the Middle East, 69%, are the most confident of short term revenue growth, up from 53% last year. They are followed by those in Asia Pacific at 45%, up from 36% last year.

In Western Europe, confidence has risen 8% from last year's trough to reach 30%. But in Africa confidence has continued to fall. Just 4o% of African CEOs are very confident of 12-month growth, down from 44% last year and 57% in 2012. Confidence has also dipped among Latin American CEOs, to 43%, down from 53% last year. Meanwhile, CEO confidence in North America remains flat at 33%.

At an individual country level, confidence varies very widely: the highest levels of CEO confidence are found in Russia, where 53% of CEOs are very confident of revenue growth, followed by Mexico (51%) and Korea 50%. Korea has had a huge swing in confidence up from only 6% last year. They are followed by India (49%), China (48%), Switzerland (42%), Brazil (42%), US (36%), Germany (33%), UK (27%), Canada (27%), Japan (27%), Italy (27%), France (22%) and, finally Argentina where only 10% of CEOs are very confident of revenue growth in 2014.

Commenting on the survey results, released at the opening of the World Economic Forum's annual meeting in Davos, Switzerland, Dennis M. Nally, Chairman of PricewaterhouseCoopers International, said:

"CEOs have begun to regain confidence. They've successfully guided their companies through recession and now more CEOs feel positive about their ability to increase their revenues and prospects for the global economy. However, CEOs also acknowledge that generating sustained growth in the post-crisis economy remains a challenge, especially as they deal with changing conditions like slowing growth in the emerging markets.

"And worries continue to loom large on CEO horizons with CEOs sending a clear message to government with their levels of concerns about over-regulation, fiscal deficits and tax burdens at their highest levels.

"For the future, CEOs tell us that they expect three major global trends – rapid technological advances, demographic changes and shifts in economic power – will have a major impact on the future of their businesses. Finding ways of turning these global trends to their advantage will be the key to future success."

CEO top concerns

As CEOs' viewpoint on the economy slants upward, their major concerns have also changed. Government action, or the lack of it, tops the list of CEO worries. The level of concern about over-regulation at 72% and fiscal deficits at 71% are as high as they have ever been. Countries where CEOs are particularly worried about over regulation include France 88%, Australia 85%, India 82% and Germany 77%. In the US it is fiscal deficits that have CEOs most worried with 92% CEOs expressing concern, followed by Argentina at 90% and France at 84%.

In addition, CEOs say they are worried almost as much about a slowdown in emerging economies, 65%, as they are about sluggish growth in developed markets, 71%. Other top concerns include increasing tax burdens (70%), as well as availability of key skills (63%), exchange rate volatility (60%) and lack of stability in capital markets (59%).

But such topical subjects as cyber threats – including lack of data security – and the speed of disruptive technological change are named as threats by less than half of CEOs.

Talking in more detail about regulation, nearly 80% of CEOs say it has increased costs, while 52% say that regulation makes it more difficult to attract skilled workers. And 40% say regulation has inhibited their efforts to pursue a new market opportunity or to pursue innovation. On the positive side, over half of CEOs credit regulation for helping to improve service delivery and quality standards.

Preparing for the future

When asked what would drive future growth, new product or service development leads the list of opportunities, cited by 35% of CEOs compared with 25% last year. Those planning mergers and acquisitions or strategic alliances in the next year have risen to 20%, up from 17% a year ago. CEOs also say they are exploring growth in countries beyond the BRICs (Brazil, Russia, India and China), and see good growth prospects over the next three to five years in Indonesia, Mexico, Turkey, Thailand and Vietnam. The US, Germany and the UK are also ranked highly.

CEOs are also more positive about hiring plans for the coming year. Half of CEOs say they expect to add to staff in the next 12 months, compared with 45% who had such plans last year. Industries where job prospects look most positive are technology (63%), business services (62%) and asset management (58%).

As the global economy stabilises, CEOs have identified major trends that will transform their business over the next five years. Top among them is technological advance, cited by 81% of CEOs, followed by demographic shifts, 60%, and shifts in global economic power, 59%.

To meet these and other challenges, CEOs say they are making changes to their talent strategies (93%), customer growth and retention strategies (91%), technology investments (90%), organisational structure/design (89%) and use and management of data (88%).

More than half of CEOs say their current planning time horizon is three years, though only 40% say that time frame is ideal.

Dealing with Governments

Asked to rank the top priorities for government, CEOs say they should be to ensure financial stability, (53%) improve infrastructure (50%); and help to create a more internationally competitive and efficient tax system (50%). But less than half (46%) of CEOs say the government in their home country has effectively ensured financial stability, and just 37% give high marks for improved infrastructure. More than half (51%) of CEOs say their government has been ineffective in improving the tax system.

Paying Taxes

The international tax system has fallen short in the eyes of CEOs around the world, the survey finds. Nearly two-thirds of CEOs say the international tax system is in need of overhaul. Notably, 75% of CEOs say that being seen as paying a 'fair share' of tax is important to their company.

Most CEOs say tax policies and competitiveness of tax regimes are key factors in corporate decision making, and agree that multinational companies should be required to report revenues, profits and taxes paid for each country in which they operate. They also agree tax authorities around the world should freely share information about companies.

But only a quarter of CEOs say current OECD attempts to reform the international tax system will be successful in the next few years, while 40% say efforts will not reach consensus.

Stakeholder expectations and trust

CEOs worldwide report that stakeholder expectations in their industry have changed significantly in the past five years: 52% say the level of trust among customers and clients has increased, compared with 12% who say it has declined. While 43% say trust has improved among creditors and investors, 16% say it has declined. Finally, 42% say trust among suppliers has improved, and 6% say it has fallen.

But while 24% of CEOs have seen improved trust among government and regulators, 34% say it has declined.

The great majority of CEOs say it is important for companies to address stakeholders' expectations by promoting ethical behaviour, ensuring the integrity of supply chains and improving diversity.

For this report, 1,344 interviews were conducted in 68 countries during the last quarter of 2013. By region, 445 interviews were conducted in Asia Pacific, 442 in Europe, 212 in North America, 165 in Latin America, 45 in Africa and 35 in the Middle East. Go to pwc.com/ceosurvey to download the report.

Bureau of Internal Revenue

Revenue Regulations (RR)

Revised rules on Alphalist submissions

Section 2.83.3 of RR No.2-98 (otherwise known as the Withholding Tax Regulations) has been amended to provide new rules on the submission of alphabetical list (“alphalist”) of employees and income payees which are required attachments to the Annual Information Returns (BIR Form No. 1604CF/1604E) and Monthly Remittance Returns (BIR Form No. 1601).

The salient portions of the RR are as follows:

1. All withholding agents shall submit an alphalist of employees and payees subject to creditable and final withholding taxes, regardless of the number of employees/payees and regardless of whether such employees/payee are exempt or not.

2. Instead of the usual submission in floppy diskettes/CD format, the withholding agent is required to submit the alphalist only under the following valid modes:
   - As attachment in the Electronic Filing and Payment System (eFPS);
   - Through electronic submission using the BIR’s website address - *esubmission@bir.gov.ph*; or
   - Through email at dedicated BIR addresses using the prescribed CSV data file format, the details of which shall be covered by a separate revenue issuance.

3. To ensure that all withholding agents are able to comply with the electronic mode of submission (even those that do not have internet access), alphalists may be electronically submitted through available BIR e-lounge facilities of the nearest revenue district office or revenue region.

4. Submissions where income payments and taxes withheld are lumped into one single amount (e.g., various employees, various payees, etc.) shall not be allowed. All income payments must be specifically enumerated.

5. Non-conformity with the prescribed format thereby resulting to unsuccessful uploading into the BIR system constitutes non-receipt by the BIR and the income payment shall not qualify as a deductible expense.

6. The manual submission of the alphalists containing less than ten employees/payees under the Annual Information Returns shall be discontinued beginning 31 January 2014.

(RR No. 1-2014 dated 17 December 2013)

Glossary

BIR - Bureau of Internal Revenue
CIR - Commissioner of Internal Revenue
CSV - Comma-Separated Values
FAN - Final Assessment Notice
NIRC - National Internal Revenue Code
PAN - Preliminary Assessment Notice
RR - Revenue Regulations
VAT - Value Added Tax

Court Decisions

Court of Tax Appeals (CTA)

Non-submission of documents to support a taxpayer's administrative claim for refund is not fatal to its judicial claim

The Court disagreed with the Commissioner's argument that there was procedural infirmity when a taxpayer claiming for refund of its unutilized creditable withholding taxes failed to submit supporting documents at the administrative level.

Judicial claims are not denied on the sole ground that the taxpayer allegedly failed to submit to the BIR the complete documents in support of its administrative claim for refund. Judicial claims are litigated de novo and decided on what has been presented and formally offered by the parties during the trial.

(CTA EB No. 933 dated 7 October 2013)

Proof of service of assessment is incumbent upon the BIR

The Court *en banc* upheld the cancellation of deficiency tax assessments issued by the BIR against a company on the ground that the PAN and FAN were not duly served upon the company, in violation of Section 228 which mandates that a taxpayer should be informed in writing of the law and the facts on which the assessment is based.

When the BIR alleges that the assessment notices were duly mailed to the taxpayer but said taxpayer denies receipt of the PAN and FAN, it is incumbent upon the BIR to prove by competent evidence that such notices were indeed received.

That a mailed letter is deemed received by the addressee in the ordinary course of mail is merely a disputable presumption. A direct denial thereof shifts the burden to the party favored by the presumption.

(CTA EB Case No. 021 dated 27 September 2013)

Gross receipts includes advance payments actually or constructively received but excludes receipts held in trust for another

The CIR imputed undeclared gross receipts on a domestic corporation that owns and operates a power plant supplying electricity to a cement plant and other participants in the power market. The power company claims that the discrepancy arose partly from the erroneous inclusion of universal charges and benefits to host communities as part of its gross receipts.

The power company issues its sales invoice in the name of an intermediate company, which deals directly with the ultimate buyers of the electricity. The intermediate company then pays (in advance) the power company the cost of electricity excluding the VAT component; it settles the VAT component subsequently when it has actually collected the same from the end-users. Only upon collection will the power company recognize and remit the VAT to the BIR.

Under Section 108(A) of the NIRC, the term *"gross receipts"* means the total amount of money or its equivalent representing the contract price, compensation, service fee, rental or royalty, including the amount charged for materials supplied with the services and deposits and advanced payments actually or constructively received during the taxable quarter for the services performed or to be performed for another person, excluding VAT.

Thus, it is clear that the advance payments received by the company from its customer fall within the definition of gross receipts subject to 12% VAT. While VAT is an indirect tax which can be passed on to the purchaser of goods or services, the liability still remains with the seller. The power company, being the seller of services, is mandated to pay the output tax due on its gross receipts notwithstanding the fact that the VAT due thereon has not yet been paid by its buyers.

As to the second claim of the power company, the court confirmed that, based on RA No. 9136 or the Electric Power Industry Reform Act of 2001, universal charges and benefits to host communities are merely passed-on charges that will be remitted to their proper beneficiaries; hence, it shall not be included in the gross receipts subject to VAT. For purposes of computing VAT, gross receipts should exclude any money which is specially earmarked by law, regulations or contract for someone other than the taxpayer. In view of the exclusion, the court reduced the tax assessment.

(CTA Case No. 8289 dated 26 September 2013)

Elements of tax evasion under Section 255 of the NIRC

A couple (both medical doctors) were charged with tax evasion by the BIR under Section 255 of the NIRC for failure to file their ITR for taxable year 2009 and for deliberately making it appear that they had filed the same when BIR records showed none at all. In determining whether or not the spouses should be held liable, the following elements must be established:

1. That the accused spouses are required to file a return;
2. That the accused spouses failed to file the return at the time required by law; and
3. That the failure to file the return was willful.

The court found that the spouses are resident Filipino citizens, registered taxpayers under RDO No. 49-North Makati, and earned substantial income in 2009. Clearly, both are required by law to file their ITR under the first element. As for the second element, the spouses' representative claimed to have filed the Joint ITR with RDO No. 47-East Makati instead of RDO No. 49, where they are registered. Evidence showed, however, that for 2009, neither tax office had received any such filing.

As for the third element, the court describes a "willful" act as one that is done voluntarily and intentionally, knowingly and purposely without justifiable excuse. While the BIR considered the spouses' continuous refusal or failure to verify compliance as 'willful blindness,' defined as "deliberate avoidance of knowledge of a crime, especially by failing to make a reasonable inquiry about suspected wrongdoing despite being aware that it is highly probable", the CTA ruled otherwise. In this case, the spouses delegated the filing to another person, who was a former BIR Group Supervisor. It may be inferred that the spouses would not have suspected that the ITR was not filed or improperly filed considering that the person they assigned as their tax agent had 40 years of experience in the BIR and had been filing their Joint ITRs for the last 15 years without any problems. More so, as doctors of medicine, a profession not related to tax or accounting practice, they are not expected to have known or be suspicious of any irregularity in the filing of their ITR.

The burden of proof to show guilt beyond reasonable doubt is on the BIR

The Court found that there is no competent or sufficient evidence to show that the failure of the spouses to file their ITR was willful. The burden of proof is on the prosecution (i.e., the BIR) to show guilt beyond reasonable doubt, and not on the accused to prove their innocence. The fact that the accused delegated to another their duty to file their ITR for 2009 does not establish the existence of the element of wilfulness. Since their constitutional right to be presumed innocent until proven guilty can be overthrown only by proof beyond reasonable doubt, the spouses were acquitted even though their innocence may not have been established with certainty. As for the civil aspect of the case, the estimated deficiency tax presented by the BIR was not accepted by the court for failing to satisfy the assessment procedure under the NIRC.

(CTA Crim. Case No. O-219 dated 7 October 2013)

Period covered by the PEZA Certificate should be the same period covered by the claim for refund

The Court denied a taxpayer's claim for refund or issuance of a tax credit certificate (TCC) for unutilized input VAT attributable to its zero-rated sales for failing to meet the requirements laid down by law.

The requisites for entitlement to a refund/tax credit under Section 112(A) of the NIRC are: (1) that there must be zero-rated or effectively zero-rated sales; (2) that input taxes were incurred or paid; (3) that such input taxes are attributable to zero-rated or effectively zero-rated sales; (4) that the input taxes were not applied against any output VAT liability; and (5) that the claim for refund was filed within the two-year prescriptive period.

The taxpayer's claim for TCC was based on alleged unutilized input VAT attributable to its zero-rated sales for the 4th quarter of 2008. As evidence of its zero-rated sales, the taxpayer presented the 2008 PEZA Certificate of Registration of its customer.

However, evidence showed that the taxpayer did not declare any zero-rated sales during that period. Instead, it declared the zero-rated sales in the subsequent taxable quarters when it received rental payments. The Court ruled that the taxpayer should have presented a PEZA certificate to the effect that its customer is a duly registered PEZA enterprise for the year 2009. Thus, for failing to sufficiently substantiate its claim, specifically that its customer was a PEZA enterprise during the period covered by the claim for refund and therefore the related sales are zero-rated, the claim for refund was denied.

(CTA Case No. 8202 dated 24 October 2013)

Failure to prove filing of application for ITH availment is fatal to a claim for refund

A claim for refund of income taxes filed by a BOI-registered taxpayer was denied for failure to substantiate with sufficient evidence its entitlement to such claim.

Under existing rules, a BOI-registered enterprise is required to file an application for ITH with the BOI within 30 days from the filing of its annual ITR or from the last day prescribed by law for the filing of its ITR. However, the taxpayer failed to prove that it filed an ITH application.

The Court held that fatal to the taxpayer's claim for refund are the non-submission of proof of filing of its application for ITH incentive and evidence to establish the corresponding amount of income tax exemption approved by the BOI. To be entitled to the ITH incentive, it is indispensable that the BOI confirms the claimant's eligibility, rate of exemption and actual amount of income tax exemption, in a corresponding letter of advice.

Since refunds partake the nature of tax exemptions, which are construed strictly against the taxpayer, evidence must be strictly scrutinized and duly proven by the taxpayer.

Court is not bound by stipulations and may rule on related issues to properly dispose of a case

Although the CIR did not specifically raise the non-presentation by the taxpayer of an application for ITH incentive as one its bases for denying the claim for refund or TCC, the Court stressed that under the revised rules of the CTA, "[i]n deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related matters necessary to achieve an orderly disposition of the case."

(CTA Case No. 967 dated 4 November 2013)

ITAD has authority to process refunds related to TTRAs

A foreign company filed a TTRA with ITAD to confirm that the capital gains arising from the sale of its shares in a domestic company are exempt from CGT under the Philippines-Singapore Tax Treaty. For purposes of securing a CAR for the shares sold, the company paid the CGT.

Subsequently, it filed an administrative claim for refund with ITAD. The CIR claims the company did not properly file an administrative claim for refund with the CIR as required under the NIRC, arguing that ITAD has no authority to receive such application for tax refund.

A review of the records revealed that the company's written claim was addressed to the CIR but was coursed through the Chief of ITAD. As to the authority of the ITAD to receive and process applications for refund, Revenue Administrative Order No. 11-2000 clearly states that the ITAD shall process claims for tax credit or refund of erroneously collected taxes arising from the application of tax treaty provisions including requests for exemptions. Thus, the Court held that the foreign company properly filed its administrative claim before ITAD.

Immovable property refers to those enumerated under Article 415 of the Civil Code including contracts for public works; but Concession Agreement is not solely a contract for public works

A point of contention in this case is whether the assets of the domestic company (PhilCo), whose shares were sold by the foreign company, consist principally of real/immovable property (i.e., more than 50% of its entire assets is real property). If such is the case, there will be no CGT exemption available under the Philippines-Singapore Tax Treaty.

PhilCo has a Concession Agreement with the government and one of the issues in this case is whether such Agreement should be considered a contract for public works which is treated as an immovable property under the Civil Code.

The Court held that the Concession Agreement is a "contract for public works" but with respect only to the concessionaire's obligation to make the necessary construction; it is not solely a contract for public works since the concessionaire (PhilCo) is not only required to make the necessary fixed works, but is likewise mainly required to perform its service obligations such as water supply services, sewerage services, etc.

Glossary

BIR - Bureau of Internal Revenue
BOI - Board of Investments
CIR - Commissioner of Internal Revenue
CAR - Certificate Authorizing Registration
CGT - Capital Gains Tax
CTA - Court of Tax Appeals
ITAD - International Tax Affairs Division of the BIR
ITH - Income Tax Holiday
ITR - Income Tax Return
NIRC - National Internal Revenue Code
PEZA - Philippine Economic Zone Authority
RA - Republic Act
RDO - Revenue District Office
TCC - Tax Credit Certificate
VAT - Value Added Tax

As shown in the certification issued by PhilCo and printouts of its general ledger, the Service Concession Assets account is broken down into Concession Fees/Concession Accounts and Network Assets/Property Plan and Equipment. The Concession Fees are the fees paid by PhilCo to the relevant government agency, while the Network Assets are the costs of rehabilitation works.

The Court held that only the portion pertaining to Network Assets should be classified as real property as this relates to the "contract for public works". Considering the foregoing, the Court found that PhilCo's entire assets do not consist principally of real property and therefore the foreign shareholder is entitled to CGT exemption under the Philippines-Singapore tax treaty when it divested its shares.

(CTA Case No. 8307 dated 7 November 2013)

CTA has jurisdiction over decisions of the RTC regarding local tax

For LBT purposes, a domestic company allocated 70% of its annual gross sales and receipts and apportioned the tax among three LGUs where it maintains its operations pursuant to Section 150 of the LGC. Questioning the apportionment, two of the LGUs adopted an opinion rendered by the BLGF, confirming that the 70% allocation should be equally divided only between them, considering the company's office at the third LGU (Makati) is an administrative office and is not among the sites enumerated under Section 150 (such as branch or sales office, factories, project offices, etc.) for purposes of local business taxation.

Disagreeing with the ruling of the RTC which allowed a 20% allocation to the local government of Makati, the LGU of Bakun elevated the case to the CTA.

The CTA, as a highly specialized court, has appellate jurisdiction over local tax cases pursuant to Section 7(a)(3) of RA No. 1125, as amended by RA No. 9282. It has jurisdiction to review the decision of the RTC in local tax cases resolved in the exercise of its original or appellate jurisdiction.

BLGF opinions are not binding upon the courts

In the present case, the BLGF issued an opinion declaring that the Makati LGU is not entitled to share in the 70% allocation of the domestic company for the payment of its LBT. However, the Court held that the opinion rendered by the BLGF is not binding upon the CTA. The BLGF was created to provide consultative services and technical assistance to LGUs and the general public on local taxation, real property assessment, and other related matters. It is not an administrative agency whose findings on questions of fact are given weight and deference by the courts. Since the issue in this case involves a legal question, the BLGF does not possess the expertise of the CTA as a specialized court reviewing tax cases.

A branch or sales office must be engaged in the sale of goods/services of the principal office

In determining the situs of taxation for LBT, the LGU where the branch, sales or project office is located shall be considered, not the location of the administrative office.

The CTA held that, to be considered as a branch or sales office for purposes of LBT, such office must be engaged in the sale of goods/services of the principal office for it to be entitled to the 70% sales allocation. The Makati office of the company cannot be considered as a branch or sales office since it does not sell the goods/products of the principal office, nor can it be a project office since it is not "equivalent to the factory of a manufacturer". Thus, the LGU of Makati is not entitled to share in the 70% allocation.

(CTA AC No. 100 dated 8 November 2013)

By virtue of its special charter, PAGCOR's tax exemption is extended to its agents and adjuncts

PAGCOR, a GOCC, established 24 PAGCOR e- Games Stations (PEGS). Officials of Quezon City, the municipal corporation where the PEGS were operating, imposed additional business tax on the gross winnings of the PEGS (not on the commission revenue of the PEGS operators). Since the business/city tax is assessed on gross winnings, a percentage of the amount to be taxed includes PAGCOR's revenue.

The municipal corporation argues that PEGS are operated by independent private proprietors/corporations, with a separate and distinct personality from PAGCOR. Both PHILWEB, the game software provider, and these independent private proprietors/corporations exercise control over the stations. As operators of PEGS, they should be subject to tax.

PAGCOR's charter, as amended by Section 3(h) of Republic Act 9487, however, granted it the power to enter into special agreements with third parties to share the privileges under its franchise for the operation of gambling casinos. Evidently, PAGCOR's tax exemption extends to all taxes except corporate income tax pursuant to a congressional legislation. Stated otherwise, PAGCOR and all its agents and adjuncts, such as operators of PEGS, are exempt from the payment of local franchise tax. PAGCOR's exemption extends to those it has contractual relationships with in connection with the operation of its business activities.

The basis of a contract of agency is one of representation

The officials of Quezon City claimed that there is no principal-agent relationship between PAGCOR and PHILWEB and other independent private proprietors/corporations since the latter merely procure a permit from PAGCOR and do not bind themselves to render service or to do something in representation or on behalf of PAGCOR. The Court disagreed with this reasoning and explained that an agency may be express or implied from the acts of the principal, from his silence or lack of action, or his failure to repudiate the agency, knowing that another person is acting on his behalf without authority.

It is clear from the Certificate to Operate issued by PAGCOR Internet Casino Station (ICS) to the PEGS operators, and tax bills paid to the Quezon City local government bearing the name of PAGCOR that their relationship is one of principal and agent. The basis of agency is representation.

(CTA AC No. 93 dated 20 November 2013)

Simultaneous receipt of PAN, FAN/FLD violates taxpayer's right to due process

In an assessment case alleging deficiency improperly accumulated earnings tax, the Court found that the PAN and FAN/FLD were both received by the taxpayer on the same day. Thus it appears that that the FLD/FAN were issued without giving the taxpayer the opportunity to protest the PAN. The Court held that the sending of a PAN to a taxpayer to inform him of the assessment made is part of the due process requirement in the issuance of a deficiency tax assessment, the absence of which renders nugatory any assessment issued by tax authorities. The use of the word "shall" in Subsection 3.1.2 of RR No. 12-99 describes the mandatory nature of the service of a PAN. The RR also mandates that the taxpayer shall be required to respond to the PAN within 15 days from receipt of the PAN.

While the corporation was able to protest the FLD/FAN, the taxpayer was still deprived of procedural due process to contest the PAN within the 15 day-period.

Aside from the Commissioner's violation of the taxpayer's right to due process, the assessment must also be cancelled for lack of factual basis. From the reports, notices and letters issued by the CIR, there appears to be uncertainty on the latter's part as to whether the income from which the improperly accumulated earnings tax rate was applied actually pertains to earnings/profits which the taxpayer accumulated to avoid the income tax with respect to its shareholders, or that said income pertains to earnings/profits which the taxpayer was permitted to accumulate beyond the reasonable needs of the business.

(CTA Case No. 8331 dated 28 November 2013)

Claim for refund is valid even if the taxpayer failed to indicate the option to refund in the ITR

A corporate taxpayer filed its original and amended annual ITRs for the taxable year 2008 but failed to mark any of the three option boxes on the application of its excess CWT. Notwithstanding, the CTA held that claims for refund of unutilized CWT are valid even if the taxpayer failed to mark the corresponding option box in its FAR. Although the taxpayer is required to mark its choice in the form provided by the BIR, this requirement is only for the purpose of simplifying the collection of taxes.

The intent to be refunded of excess CWT was clear when the succeeding ITRs did not include the excess CWT from the previous year

An examination of the taxpayer's original and amended annual ITRs for the year 2008 revealed that it did not mark any of the three option boxes in line 31 thereof. However, it filed a claim for refund with the BIR clearly indicating its intention to be refunded of its excess CWT. In as much as the taxpayer did not indicate any amount of its prior year's excess credits in its succeeding quarterly and annual ITRs for the taxable year 2009, the excess CWT for the taxable year 2008 may be the subject of a claim for refund.

Requisites for a claim for refund

In a claim for refund, the taxpayer must prove compliance with the following requirements, pursuant to Section 2.58.3 of RR No. 2-98: (1) that the claim for refund was filed within the two-year prescriptive period; (2) that the fact of withholding is established by a copy of a statement duly issued by the payor (withholding agent) to the payee, showing the amount of tax withheld therefrom; and (3) that the income upon which the taxes were withheld was included in the return of the recipient.

Reviewing the facts of the case, the first element was satisfied since the taxpayer was able to file its claim within the two-year prescriptive period. The period is reckoned from the date of filing of the FAR since this is the time the taxpayer will know whether a tax is still due or a refund can be claimed based on the adjusted and audited figures.

To comply with the second requisite, the company presented withholding tax certificates (BIR Form No. 2307). However, the certificates reflected a CWT amount that is higher

Glossary

BLGF - Bureau of Local Government Finance
CGT - Capital Gains Tax
CIR - Commissioner of Internal Revenue
CTA - Court of Tax Appeals
CWT - Creditable Withholding Tax
FAN - Formal Assessment Notice
FAR - Final Adjustment Return
FLD - Formal Letter of Demand
GOCC - Government-Owned and Controlled Corporations
ITR - Income Tax Return
LBT - Local Business Tax
LGC - Local Government Code
LGU - Local Government Unit
PAGCOR - Philippine Amusement and Gaming Corporation
PAN - Preliminary Assessment Notice
PEGS - PAGCOR e-Games Stations
RA - Republic Act
RTC - Regional Trial Court

than the company's reported amount. The discrepancy was due to some certificates that were issued in the name of its then president. The CTA ruled that the amount of CWT represented by certificates issued in the name of its president was filed with flawed content since the payee in the said certificates was an individual while the one claiming for refund is a corporation. The foregoing defect should have been corrected through an amendment prior to the filing of the claim for refund. For failing to timely rectify the defect, the Court denied the refund of the amount represented by the flawed CWTs.

As for the third requisite, it was clear from the corporation's quarterly ITR for 2008 that the revenues received by it from which the creditable taxes were withheld were declared as part of its gross income for the year 2008.

(CTA Case No. 8271 dated 18 November 2013)

The BIR has five years after an assessment within which to collect the deficiency tax

An assessment issued by the BIR had become final and such finality was not being disputed by the taxpayer. The taxpayer, however, raised as an issue the prescription of the period for the BIR to collect the deficiency taxes.

Under Section 222(c) of the NIRC, any internal revenue which has been assessed within the prescribed period may be collected by distraint or levy or by a proceeding in court within five years following the assessment of the tax. Thus the Court held that when the BIR validly issues an assessment, within either the three-year or ten-year period, whichever is appropriate, the BIR has another five years after the assessment within which to collect the national internal revenue tax due thereon by distraint, levy and/or court proceeding.

Records show that the concerned RDO wrote a letter to the taxpayer demanding payment of the deficiency excise taxes on 17 December 2008 (more than eight years from the time the assessments were made). Thus, the Court ordered the cancellation and withdrawal of the Assessment Notices for failure of the BIR to enforce collection within the period allowed by law.

Five-year collection period begins to run from the date the assessment notice is released, mailed or sent by the BIR to the taxpayer

The FLD was undated, while the assessment notices were dated 29 February 2000 and received by the taxpayer on 24 May 2000. However, there was no showing as to when the said assessment notices were released, mailed or sent out by the BIR. The Court said that the latest date the BIR could have released, mailed or sent the assessment notices to the taxpayer was on the same date that the taxpayer received them, which was 24 May 2000. This means that the period for collection expired on 24 May 2005, five years from the date the FLD/FAN was presumably sent to the taxpayer.

Full execution of the WDL is not essential for it to suspend the running of the statutory limitations

Also, the RDO issued a WDL only on 19 August 2010 which was served on 24 September 2010. Existing jurisprudence establishes that distraint and levy proceedings are validly begun or commenced by the issuance of the WDL and service thereof to the taxpayer. Thus, the WDL served on the taxpayer on 24 September 2010 was already beyond the prescriptive period (24 May 2005).

The Court ruled that the BIR should have served the WDL upon the taxpayer first notwithstanding the fact that no property could be located. It is not essential that the WDL be fully executed so that it can suspend the running of the statute of limitations on the collection of tax. It is enough that the proceedings were validly begun or commenced and that their execution has not been suspended by reason of the voluntary desistance of the CIR. It is only logical to require that the WDL be, at the very least, served upon the taxpayer to suspend the running of the prescriptive period for collection of an assessed tax, because it may only be upon the service of the WDL that the taxpayer is informed of the denial by the BIR of any pending protest of the taxpayer and the resolute intention of the BIR to collect the tax assessed.

(CTA Case No. 8150 dated 1 October 2013)

Supreme Court (SC)

Reiteration of the 120 + 30 day rule in VAT refund claims

In an earlier decision, the SC settled the controversy surrounding the application of the 120+30-day period provided for under Section 112 of the NIRC and reiterated that such period is mandatory and jurisdictional. The 120+30-day rule requires the judicial claim to be filed within 30 days if not acted upon by the CIR within 120 days.

Thus, in this case, the taxpayer's judicial claim for refund was denied for having been filed out of time. Although the taxpayer filed its administrative claim with the BIR within the two-year period under Section 112(A) of the NIRC, it elevated the case to the CTA only after the expiration of the 30-day period from the lapse of the 120-day period within which the CIR can decide on the administrative claim (but did not act on it).

(G.R. No. 184145 dated 11 December 2013)

Executive Issuances

Bangko Sentral ng Pilipinas (BSP)

New rules on appointment of bank security officer
The revised regulations mandate banks, with at least ten branches/offices with regular cash handling activities, to designate a Chief Security Officer. Smaller banks with reduced security risk exposure (i.e., those with assets under PHP100m) may choose a senior officer as a concurrent Chief Security Officer provided such appointment shall not result to a conflict of interest. The parent or primary bank in a group or conglomerate may establish a group-wide security management system; however, this does not relieve each bank from appointing its own Chief Security Officer.

In addition to the minimum experience of at least five years in the field of law enforcement and/or security operations, the Chief Security Officer must have held a managerial position for two years during that time. Otherwise, said officer must be supported by a consultant/adviser (appointed by the Board or the country head) who may be an independent person/firm with special knowledge, skill and experience on security management matters.

The circular takes effect 15 days from its publication. However, banks are given three months from the effectivity date to submit a certification of their compliance to the BSP. Non-compliant banks shall submit an acceptable plan of action to achieve compliance within six months from effectivity.

(BSP Circular No. 823 dated 10 January 2014)

Glossary

BIR - Bureau of Internal Revenue
CIR - Commissioner of Internal Revenue
CTA - Court of Tax Appeals
CWT - Creditable Withholding Tax
FAN - Formal Assessment Notice
FLD - Formal Letter of Demand
ITR - Income Tax Return
NIRC - National Internal Revenue Code
RDO - Revenue District Office
SC - Supreme Court
VAT - Value Added Tax
WDL - Warrant of Distraint and/Levy

Other Issuances

Implementation of a Regional Self-Certification System
Consistent with the ASEAN Economic Blueprint which seeks to establish a single market for the free flow of goods, the BOC issued CAO No. 6-2013 to provide guidelines and procedures on the SPP for the Implementation of a Regional Self-Certification System. This allows exporters to self-declare the origin of the goods for export without presenting a Certificate of Origin (Form D) in claiming preferential tariff rates.

The salient provisions include, among others, the following:

- Only manufacturers/producers who meet the criteria shall qualify for self-certification and be granted a "Certified Exporter" status that remains valid during the implementation of the SPP, unless otherwise suspended/revoked.
- Exporters who wish to apply for a "Certified Exporter" status must: (a) be a legitimate manufacturer/producer; (b) have been exporting products to any member country of the ASEAN for at least one year; and (c) have responsible officers or persons authorized to sign the invoice declaration, possess sufficient competence in ROO application and have undergone relevant training under the SPP.
- The BOC may grant the "Certified Exporter" status, provided the exporter: (a) allows the BOC to access its records and premises for monitoring and verification purposes; (b) makes an invoice declaration only for goods approved for inclusion in the SPP and duly supported by documents to prove their origin; (c) issues an undertaking that the persons responsible for making the invoice declarations understand the ATIGA-ROO; (d) accepts full responsibility for all invoice declarations; and (e) submits a quarterly summary report of all invoice declarations using the prescribed form to the Port Operations Service.
- The Invoice Declaration should describe the goods in sufficient detail to determine if it is an ASEAN Originating Product, signed by hand and should include the date of issuance and expiry date of the authorization.
- The implementation of the project shall be under the direct supervision and control of the BOC's Assessment and Operations Coordinating Group, which shall determine, approve and monitor the exporters qualified to participate in the project.
- For purposes of the SPP, the BOC shall conduct orientation seminars for exporters and importers on the implementation of the project.

(Customs Administrative Order No. 6-2013 dated 12 December 2013)

Imposing applicable tariff rates under the ASEAN Trade in Goods Agreement (ATIGA)
Applying the Agreement on the CEPT Scheme to eliminate tariff barriers among the member states of the ASEAN, EO 148 was issued to impose the applicable tariff rates under the ATIGA on qualified imports from special economic and freeport zones. Accordingly, products manufactured in qualified special economic and/or freeport zones that enter the Philippine customs territory and qualify under the applicable rules of ATIGA-ROO shall be entitled to the preferential rate of duty under the ATIGA, applicable to its raw materials based on the value of such raw materials, and subject to applicable provisions of the laws governing such economic zones.

The ATIGA, ratified by the Philippines on 11 August 2009, consolidated all existing provisions under the CEPT Agreement and other relevant ASEAN economic agreements and instruments.

(Executive Order No. 148 dated 26 November 2013)

Amending EO 68 on the VAT monetization program
The Office of the President issued EO 68-A to facilitate the implementation of the VAT Tax Credit Certificates (TCCs) Monetization Program (the "Program") established under EO No. 68 (s. 2012).

To simplify the process, the changes were introduced:

1. The Program gives all qualified VAT registered taxpayers the ability to monetize the full cash value of their outstanding TCCs issued as of 31 December 2012, which shall be verified by the BIR or BOC, as the case may be.

2. The Program covers all outstanding VAT TCCs as of 31 December 2012 which have been issued in accordance with Section 112(A) of the NIRC, and the VAT component of drawback TCCs outstanding as of 31 December 2012, which have been issued in accordance with Section 106(e) of the TCCP.

3. The monetization of outstanding VAT TCCs shall be fully implemented not later than 30 June 2016. Those holders who did not avail of the monetization program shall be paid through the cash conversion mechanism presently implemented by the BIR, and which shall be subsequently implemented by the BOC.

4. The BIR and BOC shall no longer issue TCCs for VAT refund, unless applied for by the taxpayer.

The option of holders to collect in advance the discounted value of the VAT TCCs from trustee banks was deleted. Consequently, the detailed procedures and coordination work between the DOF, BSP, Bureau of Treasury, and Government Financial Institutions was also taken out.

(Executive Order No. 68-A dated 13 January 2014)

Glossary

ASEAN - Association of Southeast Asian Nations
ATIGA - ASEAN Trade in Goods Agreement
BIR - Bureau of Internal Revenue
BOC - Bureau of Customs
BSP - Bangko Sentral ng Pilipinas
CAO - Customs Administrative Order
CEPT - Common Effective Preferential Tariff
DOF - Department of Finance
EO - Executive Order
NIRC - National Internal Revenue Code
ROO - Rules of Origin
SPP - Second Pilot Program
TCC - Tax Credit Certificate
TCCP - Tariff and Customs Code of the Philippines
VAT - Value Added Tax

Meet us

The panel members (from left): Chairman and Senior Partner **Alex Cabrera**; **Walter Wassmer**, Senior EVP Institutional Banking Group BDO Unibank, Inc.; **Arsh Chaudhry**, Executive Managing Director, Cushman & Wakefield; and **Alistair Meadows**, Head of International Capital Group Jones Lang Lasalle, Singapore. **Rick Santos** (far right), chairman and chief executive officer of CB Richard Ellis, acted as moderator.

Alex Cabrera joins panel members for "Emerging Trends in Real Estate Asia Pacific 2014" report launch

In the recent survey conducted by Urban Land Institute (ULI) and PwC, Manila emerged as one of Asia's top real estate investments this year.

In ULI and PwC's *Emerging Trends in Real Estate Asia Pacific*, from ranking 12th in 2013, Manila went up to fourth place this year, outdoing Singapore, Beijing, and Hong Kong, to name a few.

Chairman and Senior Partner **Alex Cabrera**, along with **Alistair Meadows**, Head of International Capital Group Jones Lang Lasalle, Singapore; **Arsh Chaudhry**, Executive Managing Director of Cushman & Wakefield; and **Walter Wassmer**, Senior Executive Vice President Institutional Banking Group BDO Unibank, Inc. made up the panel members during the survey report launch last 9 January 2014.

Emerging Trends provides an outlook on real estate investment and development trends, real estate finance and capital markets, property sectors, metropolitan areas, and other real estate issues throughout the Asia Pacific region.

Tax Managing Partner **Malou Lim**, Assurance and Markets Director **Allan Cao**, Markets Manager **Rocky Saldajeno** and M&C Graphic Design Assistant **Jagz Gonzales** also attended the launch at the Makati Shangri-La.

From left: Markets Manager Rocky Saldajeno, Chairman and Senior Partner Alex Cabrera, Tax Managing Partner Malou Lim, and Assurance and Markets Director Allan Cao.

Gene Morales, Yumi Ishii talk at PIIE Congress

The Philippine Institute of Industrial Engineers (PIIE) held its 13th National Congress in Radisson Blu Hotel, Cebu City last December with the theme "Operational Excellence Towards Green Growth".

PwC Consulting Director **Gene Morales**, who serves as a member of the PIIE board of trustees, was one of the resource speakers at the conference. Gene talked about the topic "Business Continuity Management".

The other speaker from the firm was Japanese Business Development and Consulting Manager **Yumi Ishii**, who talked about the concept of a "Smart City".

PricewaterhouseCoopers Consulting (Philippines), Inc. was one of the sponsors of this three-day conference that was held in conjunction with the 14th Asia Pacific Industrial Engineering and Management Society Conference (APIEMS). The participants represented the academe, companies and individuals, as well as institutional members of the PIIE.

This year's congress theme highlighted the industrial engineers' resolve as productivity and quality improvement specialists in finding ways to pursue operational excellence efficiently and effectively with lesser negative impact on the environment.

Gene Morales (standing) discusses the topic "Business Continuity Management" as Yumi Ishii (seated, right) listens.

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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