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REPUBLIC ACTS

RA No. 11647 enacted on March 2, 2022

Salient Provisions:

- "Micro and small domestic market enterprises" with a paid-up capital requirement of $200,000 are still reserved for Philippine nationals. The same paid-up capital threshold was provided prior to the amendment, only the term used then was "small- and medium-sized domestic market enterprises".
- RA No. 11647 encourages the development of advanced technologies and pushes for the establishment of startups or startup enablers pursuant to the "Innovative Startup Act" (RA No. 11337) by applying the latter's lower capitalization requirement of $100,000.
- The law now provides that enterprises eligible for the lower capitalization rule are only required to have a majority of their direct employees be Filipinos. However, in no case shall the number of Filipino employees be less than 15. (Previously, the requirement is to employ at least 50 direct employees to be eligible for the $100,000 capitalization requirement.)
- An understudy or skills development program is imposed on domestic enterprises enjoying the lower capitalization requirement in order to ensure the transfer of technology or skills to Filipinos.
- The Inter-agency Investment Promotion Coordination Committee (IIPCC) is created which is mandated to develop a comprehensive and strategic Foreign Investment Promotion and Marketing Plan (FIPMP) for the next five years and 10 years.
- The IIPPC is also empowered to review foreign investments involving military-related industries, cyber infrastructure, pipeline transportation, or other activities that may threaten the territorial integrity and the safety, security, and well-being of Filipinos. The IIPCC will consult local chambers of commerce and business groups in coming up with the FIPMP.
- RA No. 11647 was signed into law last March 2, 2022.

RA No. 11649 enacted on March 23, 2022

Salient Provisions:

- The term "public utility" is now expressly defined under RA No. 11659 which now refers to a public service that operates, manages or controls for public use any of the following:

  (1) distribution of electricity;
  (2) transmission of electricity;
  (3) petroleum and petroleum product pipeline transmission systems;
  (4) water pipeline distribution systems and wastewater pipeline systems, including sewerage pipeline systems;
  (5) seaports; and
  (6) public utility vehicles.

- Concessionaires, joint ventures, and other similar entities that wholly operate, manage or control these sectors for public use are also considered public utilities.
- The definition of what constitutes a "public service" under the old PSA has been retained.
- Other businesses covered by the term "public service" that were not included in the enumeration of what constitutes a public utility *(i.e., airlines, telecommunication companies, ice plants, etc.)* are no longer subject to the definition of the term "public utility."
- Public service entities falling outside the definition of a public utility may now be owned up to 100 percent by foreign investors.

- The 60-40 restriction is now limited to entities classified as a public utility under RA No. 11659 in accordance with Article XII, Section 11 of the 1987 Constitution.
- Certificates authorizing the operation, management, or control of public service can be issued to any corporation, partnership, association, or joint-stock company constituted and organized under the laws of the Philippines.
- Upon recommendation of the National Economic and Development Authority, the president may recommend to Congress the classification of a public service as a public utility based on criteria provided under Section 13(e) of RA No. 11659. Thus, the classification of public utilities can still be modified.
- RA No. 11659 was signed into law on March 21, 2022.

BIR ISSUANCES

REVENUE MEMORANDUM CIRCULAR (RMC)

RMC No. 24-2022 issued on March 9, 2022

- This Circular clarifies issues relative to RR No. 21-2021 implementing the amendments to the VAT zero-rating provisions under Sections 106 and 108 of the Tax, in relation to Sections 294(E) and 295(D), Title XIII of the Tax Code, introduced by the CREATE Act, and Section 5, Rule 2 and Section 5, Rule 18 of the CREATE Act Implementing Rules and Regulations.
- The "cross border doctrine" as applied to Ecozones or Freeport zones has been rendered ineffectual and inoperative for VAT purposes with the passage of CREATE Act.
- Registered business enterprises (RBE) registered with the concerned Investment Promotion Agencies (IPAs) shall now be governed by the CREATE provisions on their availment of tax incentives, including VAT exemption of RBEs enjoying the 5% gross income earned (GIE) or special corporate income tax (SCIT).
- RBEs registered with the concerned IPA shall only be accorded VAT zero-rating on their local purchases of goods and/or services that are *directly and exclusively used in the registered project or activity of the registered export* enterprises.
- For the sale of goods and services where the VAT has already been billed and/or collected during the effectivity of RR No. 9-2021 from July 1, 2021 to July 27, 2021, the seller and the buyer can either retain the transaction as subject to VAT or revert the transaction from VATable to zero-rated.
- Should the local supplier inadvertently pass on VAT to the RBE, such supplier may seek reimbursement of the VAT paid, if any, from the Bureau of Internal Revenue (BIR). The RBE itself cannot seek the refund of such erroneous input VAT under Section 112 of the Tax Code. However, the RBE has the following options:
    a. If VAT registered and enjoying Income Tax Holiday (ITH), it can claim the passed-on VAT as an input tax credit under Section 110 of the Tax Code, and apply against future output VAT Liabilities; or
    b. If there are no sales subject to VAT, it can accumulate the input tax credits and claim as VAT refund upon expiration of VAT registration; or
    c. If non-VAT registered, it can charge to cost or expense account.

COURT DECISIONS

SUPREME COURT DECISION

CIR vs. Taganito Mining
G.R. Nos. 219630-31 promulgated on December 7, 2021 (Uploaded on March 23, 2022)

(Input VAT shall be amortized when: (a) the goods purchased or imported are capital goods, i.e., used in the taxpayer's trade or business; (b) deduction for depreciation of the capital goods is allowed under the Tax Code of 1997, as amended; and (c) the aggregate acquisition cost of the depreciable capital goods for the calendar month they were purchased or imported exceeds PhP 1 Million. Notably, the provision refers to "input tax" in general, without making any distinctions, exceptions, or exclusions.)

Facts:

On December 1, 2009, Taganito Mining Corporation (TMC) filed with the BIR a claim for refund of excess input VAT paid on domestic purchases of taxable goods and services and importation of goods covering the period of January 1 to December 31, 2008 which was eventually elevated before the CTA.

After trial, the CTA Division rendered its Decision partially granting the petition of TMC. It ruled that not all of the substantiated claims of TMC were refundable/creditable. It reasoned that pursuant to Section 110(A) of the Tax Code, as amended, the claim for refund/credit of input VAT on purchases of capital goods which are attributable to zero-rated sales if the aggregate acquisition cost of the capital goods exceeds PhP 1 Million, the input VAT should be spread over 60 months or the estimated useful life of the capital goods, whichever is shorter. Since the judicial claim of TMC only involved its purchases of capital goods with aggregate acquisition cost exceeding PhP 1 Million, the CTA Division spread the substantiated input VAT of TMC in 2008 over 60 months or the estimated useful life of the capital goods, whichever was shorter, to compute for the amount of input VAT refundable/creditable by December 31, 2008.

Thus, TMC asserts that the CTA Division committed reversible error in ruling that the refund granted to a 100% zero-rated taxpayer of its input tax on depreciable goods amounting to more than PhP 1 Million is subject to amortization.

Issue:

Is the tax credit/refund of input VAT on depreciable capital goods attributable to zero-rated sales, with an aggregate monthly acquisition cost of more than PhP 1 Million, subject to amortization?

Ruling:

Yes.

Under Sec. 110(A) of the Tax Code, input VAT shall be amortized when: (a) the goods purchased or imported are capital goods, i.e., used in the taxpayer's trade or business; (b) deduction for depreciation of the capital goods are allowed under the Tax Code, as amended; and (c) the aggregate acquisition cost of the depreciable capital goods for the calendar month they were purchased or imported exceeds PhP 1 Million. Notably, the provision refers to "input tax" in general, without making any distinctions, exceptions, or exclusions.

There is likewise no merit in the assertion of TMC that amortization violates the right accorded to the VAT-registered taxpayer to claim, at its option, either the refund or credit

of "any input tax" attributable to its zero-rated sales. It is apparent that to TMC, the word "any" is synonymous with "all" and amortization unduly limits the input tax on zero-rated sales which the taxpayer can claim a refund or credit. In *Abakada Guro Party List vs. Ermita*, the Supreme Court upheld the validity of such amortization of input VAT on depreciable capital goods with an aggregate acquisition cost of more than Pl Million for the month of purchase or importation, as it does not deprive the taxpayer of any tax credit, but merely delays the crediting of the same by spreading it out over the amortization period.

CTA EN BANC DECISIONS

Euroversal Properties vs. CIR
CTA EB No. 2393 promulgated on March 1, 2022

(It must likewise be emphasized that Section 229 of the Tax Code, as amended, provides that the two-year prescription period applies "regardless of any supervening cause that may arise after payment". Therefore, the subsequent rescission of the contract between petitioner and FDC does not affect the validity of the CGT payment made.)

Facts:

On June 4, 2013, the petitioner, through a Contract to Sell, sold eleven parcels of land to Filinvest Development Corporation (FDC). On July 5, 2013, the corresponding capital gains tax (CGT) on the transaction was paid. The CGT paid was the fair market value (FMV) of the subject properties as determined by respondent CIR. Thereafter, the parties agreed to rescind the Contract to Sell. On July 3, 2018, the petitioner filed its administrative claim for a refund representing the CGT paid on the sale. Subsequently, a few days later or on July 6, 2018, the petitioner filed a Petition for Review before the CTA due to the CIR's inaction on its claim.

Issue:

Is the petitioner entitled to the CGT refund despite the recission of the Contract to Sell?

Ruling:

No.

The two-year prescription period for a claim for tax refund should be counted from the CGT's payment on July 5, 2013. Therefore, any administrative and judicial claim for refund of the CGT should have been filed on or before July 5, 2015. Since the petitioner only filed its administrative and judicial claims for refund on July 3, 2018 and July 6, 2018, respectively, its present claim is already barred regardless of any erroneous payment.

It must likewise be emphasized that Section 229 of the Tax Code, as amended, provides that the two-year prescription period applies "regardless of any supervening cause that may arise after payment". Therefore, the subsequent rescission of the contract between the petitioner and FDC does not affect the validity of the CGT payment made.

IBEX Philippines, Inc. v. CIR
CTA Case No. 9802 promulgated on November 18, 2020

(In cases filed before the CTA, which are litigated de novo, party-litigants must prove every minute aspect of their case. It is only when the sales of a VAT-registered person are zero-rated or effectively zero-rated that he/she/it may have the option of applying for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales.)

Facts:

Ibex Philippines, Inc. (IBI) claims that is the sale of business process and contact center services to its sole client, IBEX Global Bermuda Ltd. (IBEX), a non-resident foreign corporation, and the consideration for which was paid in acceptable foreign currency and accounted for in accordance with the rules and regulations of the *Bangko Sentral ng Pilipinas* (BSP) are subject to VAT at zero rate (0%) pursuant to Section 108(B)(2) of the Tax Code.

Issue:

Is IBI entitled to the refund of its alleged input VAT attributable to its zero-rated sales?

Ruling:

No.

Other than the bare allegation of IBI's witness that it provided Business Process Outsourcing (BPO) services, particularly, contact center services, and facilities to a foreign client, no other documentary evidence was provided by IBI to support such allegation. Neither did IBI show proof that the purported services rendered to IBEX were performed in the Philippines

Jurisprudence has laid down requisites that must be complied with by the taxpayer-applicant to successfully obtain a credit/refund of input VAT. Said requisites are classified into certain categories, to wit:

A. Timeliness of the filing of the administrative and judicial claims
    1. The claim is filed with the BIR within two (2) years after the close of the taxable quarter when the sales were made;
    2. In case of full or partial denial of the refund claim, or the failure on the part of the Commissioner to act on the said claim within a period of 120 days from the date of submission of complete documents in support of the application, the judicial claim must be filed with this Court, within 30 days from receipt of the decision or after the expiration of the said 120-day period;
B. Taxpayer's registration with the BIR
    1. The taxpayer is a VAT-registered person;
C. Taxpayer's output VAT
    1. *The taxpayer is engaged in zero-rated or effectively zero-rated sales;*
    2. For zero-rated sales under Sections 106(A)(2)(a)(1), (2) and (b); and 108(B)(1) and (2), the acceptable foreign currency exchange proceeds have been duly accounted for in accordance with BSP rules and regulations;
D. Taxpayer's input VAT being refunded
    1. The input taxes are not transitional input taxes;
    2. The input taxes are due or paid;
    3. The input taxes claimed are attributable to zero-rated or effectively zero-rated sales. However, where there are both zero-rated or effectively zero-rated sales and taxable or exempt sales, and the input taxes cannot be directly and entirely attributable to any of these sales, the input taxes shall be proportionately allocated on the basis of sales volume;
    4. The input taxes have not been applied against output taxes during and in the succeeding quarters.

CIR vs. Toledo Power Company

C.T.A. EB Case No. 2237 (Resolution) promulgated on March 4, 2022

(Contrary to the petitioner's claim, the issuance of an FLD/FAN, in this case, is not tantamount to double demand since as stated earlier, without the said issuance, there is no demand nor an established tax liability to speak of.)

Facts:

In the CIR's Motion for Reconsideration, he insists that the assessment issued against Toledo Power Company (TPC) is valid. He argues that TPC's act of paying the assessed deficiency VAT signifies its concurrence with the validity of the assessment. He also contends that since the said payment was made during the Preliminary Assessment Notice (PAN) stage, the issuance of the Formal Letter of Demand (FLD)/Final Assessment Notice (FAN) is deemed superfluous.

Issue:

Can FLD/FAN be dispensed with if payment was made during the PAN stage?

Ruling:

No.

The issuance of the FLD/FAN is at all times required under the Tax Code and BIR Regulations. The FLD/FAN not only constitutes the BIR's demand for payment; it also establishes the taxpayer's basic deficiency tax liability. In short, the right to collect the deficiency taxes on the part of the BIR and the liability of the taxpayer accrues or ripens only upon the issuance of the FLD/FAN.

The PAN cannot replace the FLD/FAN since the same is merely a pre-assessment or a "proposed assessment." The function of the PAN is hinged on due process, specifically, to inform the taxpayer of the proposed findings of the BIR and to give the same a chance to dispute the findings before the BIR finalizes the assessment and determines the liability of the taxpayer. This is why a Protest or Reply to a PAN is not required under BIR Regulations; only an FLD/FAN is essential in cases when the taxpayer's tax liability is apparent (e.g., mathematical error, incorrect withholding) because the purpose of the PAN is to merely inform the taxpayer of the BIR's initial findings, not establish the taxpayer's liability.

Contrary to the CIR's claim, the issuance of an FLD/FAN, in this case, is not tantamount to double demand since as stated earlier, without the said issuance, there is no demand nor an established tax liability to speak of. The payment of TPC does not forego the need for an FLD/FAN. No law or regulations support this assertion. Furthermore, there are instances where the taxpayer settles the assessment in advance in order to stop the continuous accrual of interest charges. There is still a need to issue an FLD/FAN.

CTA DIVISION DECISIONS

Ortiz Memorial Chapel, Inc. v. CIR
CTA Case No. 9805 promulgated on March 10, 2022

(Sec. 228 of the Tax Code provides that a tax assessment issued by the BIR may be protested administratively, within thirty (30) days from receipt thereof, by filing either a request for reconsideration or reinvestigation, in such form and manner as may be prescribed by implementing rules and regulations.)

Facts:

Ortiz Memorial Chapel, Inc. (OMCI) sent two Letter-Protests to the BIR after the latter sent a PAN, FLD, and a Warrant of Distraint and/or Levy.

Issue:

Was there a valid protest?

Ruling:

No.

Under Sec. 3 of RR No. 12-99, as amended by RR No. 18-2013, the form and manner of protests to be filed by the concerned taxpayer has been clearly and distinctively defined, *i.e.*, a request for reconsideration and a request for reinvestigation. The protest must state the following: (1) the nature thereof (whether reconsideration or reinvestigation); (2) the date of the assessment notice; and (3) the applicable law, rules and regulations, or jurisprudence on which his protest is based; otherwise, the protest shall be considered void, and without force and effect.

Here, the first Letter-Protest did not comply with Sec. 228 of the Tax Code, in relation to the Sec. 3 of RR No. 12-99, as amended by RR No. 18-2013, since it did not state the nature of the protest and the date of the assessment notice. Further, the second Letter-Protest did not comply with the same provisions for failing to state the nature of the protest, the date of the assessment notice, and even the applicable law, rules and regulations, or jurisprudence on which the protest is based.

SECURITIES AND EXCHANGE COMMISSION ISSUANCES

SEC Memorandum Circular No. 4-2022 issued on March 2, 2022

- This Memorandum discusses the rules with regard to the Disqualifications of Directors, Trustees and Officers of Corporations, and the Guidelines on the Procedure for their Removal.
- These rules shall govern pleadings, practice and procedure before the SEC in all matters of hearing and proceedings for:
    1. Independent administrative actions for the removal of directors, trustees, and officers;
    2. Removal of directors, trustees, and officers as a sanction in the SEC's proceedings; and
    3. Imposition of sanctions on the Board of Directors or Trustees who, with knowledge of the disqualification, failed to remove a disqualified directors or trustee.
- The grounds for disqualification of directors, trustees and officers are identical to the grounds found under Section 26 of the Revised Corporation Code.
- All independent administrative actions for removal brought under these Rules shall be commenced and heard at the main office of the SEC in Metro Manila or any of its Extension Offices subject to their respective geographical jurisdictions.
- Independent administrative action for the removal of a director, trustee, or officer of a corporation shall be commenced upon:
    1. The *motu proprio* issuance of a Formal Charge by the Operating Department that has jurisdiction over the subject matter; or
    2. The filing of a Verified Complaint with the Operating Department that has jurisdiction over the subject matter.

SEC Memorandum Circular No. 5-2022 issued on March 4, 2022

- This Memorandum governs the voluntary dissolution of corporations where no creditors are affected under Section 134 of the Revised Corporation Code (RCC), dissolution by shortening of the corporate term under Section 136 of the RCC, and involuntary dissolution under Section138 of the RCC.
- In case of voluntary dissolution where no creditors are affected under Section 134 of the RCC, the dissolution shall be initiated by filing, with the Company Registration and

Monitoring Department (CRMD) or SEC Extension Office, a verified request for dissolution signed by the corporation's duly authorized representative. Moreover, the Verified Request for Dissolution shall contain an affidavit and certification duly signed by the authorized representative of the corporation.

- If there has been a change in the ownership, membership, and/or composition of the board of directors or trustees prior to the filing of the withdrawal of the request for dissolution, sufficient documentary evidence of such change must be filed together with and attached to the withdrawal of the request for dissolution.
- In case of dissolution by shortening corporate term under Section 136 of the RCC, it may be effected by amending the Articles of Incorporation to shorten the corporate term pursuant to the provisions of the RCC.
- The documentary requirements for dissolution by shortening corporate term are as follows:

    A. For amendment to shorten corporate term where the proposed expiration of the corporate term is <u>one year or more than one year</u> from the approval of the application for amendment under Corporate and Partnership Registration Division (CPRD) of CRMD or SEC Extension Office-
        1. Cover Sheet:
        2. Notarized Directors' Certificate signed by the majority of the directors or trustees and the corporate secretary, attesting that: 1. the dissolution by shortening of the corporate term was approved by a majority of the board of directors/trustees and ratified by at least 2/3 vote of the stockholders representing the outstanding capital stock including the holders of non-voting shares/members of the corporation; 2. date and place of the stockholders' or members' meeting; and 3. the tax identification number of the signatories which shall be placed below their names:
        3. Amended Articles of Incorporation;
        4. Compliance Monitoring Division (CMD) Monitoring Clearance;
        5. Notarized Secretary's Certificate of no pending case involving intra-corporate dispute;
        6. Clearance/Favorable recommendation from other Departments of the SEC or from the appropriate regulatory agency, when necessary.

    B. For amendment to shorten corporate term where the proposed expiration of the corporate term is <u>less than one year</u>, from approval of the application for amendment under Financial Analysis and Audit Division (FAAD) of CRMD or SEC Extension Office. -
        1. Cover Sheet;
        2. Notarized Directors' Certificate signed by the majority of the directors or trustees and the corporate secretary, attesting that: 1. the dissolution by shortening of the corporate term was approved by the majority of the board of directors/trustees and ratified by at least 2/3 vote of the stockholders representing the outstanding capital stock including the holders of non-voting shares/members of the corporation; 2. date and place of the stockholders' or members' meeting; and 3. the tax identification number of the signatories which shall be placed below their names;
        3. Amended Articles of Incorporation;
        4. Audited Financial Statements (AFS) as of last fiscal year, except:
            a. Where the applicant has ceased operations for at least one (1) year, submit:
                i. AFS as of the last year of operation; and

ii. Affidavit of non-operation certified under oath by the President

b. Where the applicant has no operation since incorporation, submit:
   i. Balance Sheet certified under oath by the Treasurer and President:
   ii. Affidavit of Non-Operation certified under oath by the President and Treasurer;
   iii. Certificate of Non-Registration issued by the BIR;

c. Where the applicant corporation is (stock or nonstock) is with total assets or liabilities of less than Six Hundred Thousand Pesos (PhP600,000.00), it shall submit its Balance Sheet as of the last preceding fiscal year certified under oath by the President and Treasurer;

5. Affidavit executed under oath by the President and Treasurer that:
   a. The dissolution is not prejudicial to the interest of the creditors; and
   b. There is no opposition from any creditors from the time of publication of the notice of dissolution up to the filing of the dissolution with the SEC;
6. BIR Tax Clearance Certificate;
7. Notarized Secretary's Certificate of no pending case involving intra-corporate dispute;
8. Clearance/Favorable recommendation from other Departments of the SEC or from the appropriate regulatory agency, when necessary.

- The proposed expiration of the corporate term for all applications for amendment filed under Section 136 of the RCC must contemplate a future date. No application for amendment under Section 136 of the RCC shall be accepted if the proposed expiration of corporate term had already lapsed at the time of filing of the application.
- Lastly, in case of Involuntary Dissolution under Section 138 of the RCC and Section 6(1) of Presidential Decree 902-A, the SEC may motu proprio, or upon the filing of a verified complaint by any interested party, dissolve a corporation based on the following:
  a. Non-use of the corporate charter as provided under Section 21 of the RCC;
  b. Continuous inoperation of a corporation as provided under Section 21 of the RCC;
  c. Upon receipt of a lawful court order dissolving the corporation;
  d. Upon finding by final judgment that the corporation procured its incorporation through fraud; and
  e. Upon finding by final judgment that the corporation:
     i. Was created for the purpose of committing, concealing or aiding the commission of securities violations, smuggling, tax evasion, money laundering or graft and corrupt practices;
     ii. Committed or aided in the commission of securities violations, smuggling, tax evasion, money laundering, or graft and corrupt practices, and its stockholders knew; and
     iii. Repeatedly and knowingly tolerated the commission of graft and corrupt practices or other fraudulent or illegal acts by its directors, trustees, officers, or employees.
- Moreover, the grounds under Section 6(i) of Presidential Decree (PD) 902-A, in addition to the above, which shall be within the jurisdiction of the CRMD and SEC Extension Office:
  a. Fraud in the procurement of certificate of registration;
  b. Failure to file or register any of the following for a period of at least five (5) years: 1.) Financial Statements; 2.) General Information Sheet; and 3.) Stock and Transfer Book or Membership Book.

- If a corporation is ordered dissolved by final judgment pursuant to securities violations, smuggling, tax evasion, money laundering or graft and corrupt practices, its assets, after payment of liabilities, shall, upon petition of the SEC with the appropriate court, be forfeited in favor of the national government. Such forfeiture shall be without prejudice to the rights of innocent stockholders and employees for services rendered, and to the application of other penalties or sanctions under the RCC of other laws.

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MTF Counsel is a full-service law firm comprised of experienced, multi-disciplined and innovative tax, customs and international trade, corporate, and litigation attorneys.