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Highlights

COURT DECISIONS

CTA En Banc

CTA Division

SEC ISSUANCES

DOJ ISSUANCE

NPC ISSUANCE

COURT DECISIONS

CTA EN BANC DECISIONS

CE Casecnan Water and Energy Company v. Municipality of Alfonso Castaneda, Nueva Vizcaya
CTA EB No. 2494 promulgated on September 23, 2022

(A case is considered a "local tax case" when the subject thereof involves taxes that are imposed by the local government units [LGU]. The cases that should be filed before the Court of Tax Appeals [CTA] are cases covered by Titles I and II of Book II of the Local Government Code [LGC], which cover Local Business Taxes and Real Property Tax.)

Facts:

CE CASECNAN Water and Energy Company, Inc. (CASECNAN) entered into a Build-Operate-and-Transfer contract with the National irrigation Administration (NIA) for the construction and development of an irrigation and power project in Nueva Viscaya.

On July 14, 2008, the Municipality of Alfonso Castaneda (the "Municipality") issued a letter of assessment against CASECNAN wherein they demanded that CASECNAN automatically remit to the Municipality its supposed National Wealth Share in the utilization and development of the irrigation and power project.

CASECNAN filed a protest with the Municipal Treasurer which was eventually denied by the latter. Subsequently, CASECNAN filed a complaint before the Regional Trial Court (RTC) for the cancellation of the assessment.

The RTC ruled in favor of CASECNAN by ruling that CASECNAN is a private agency not mandated to directly remit to the Municipality. It is clear in the provisions of DBM-DOF-DOE Joint Circular No. 2006-01that it shall be the National Government through its agencies that has the sole authority to collect and release the claims of the LGUs from the proceeds in the utilization and development of national wealth.

The Municipality filed a Petition for Review with the CTA praying for the reversal of the decision of the RTC. The CTA Division dismissed the Petition for Review on the ground that the Court had no jurisdiction over the case.

Issue:

Does the CTA have jurisdiction over the instant case?

Ruling:

No.

The CTA has no jurisdiction because the subject of the case was not an assessment nor a claim for refund of any particular local taxes.

A case is considered a "local tax case" when the subject thereof involves taxes that are imposed by the LGUs. Thus, the cases that should be filed before the CTA are cases covered by Titles I and II of Book II of the LGC, which cover Local Business Taxes and Real Property Tax because the taxes involved therein are levied by the local government.

In this case, the assessment cannot be classified as an assessment of a local tax that is within the coverage of Title I and Title II of Book II of the LGC. A perusal of the pleadings of the

Municipality shows that its main arguments are based on Sections 289, 291, and 293, Chapter 2, Tide III, Book II of the LGC which refer to the "Shares of Local Government Units in the National Wealth." This type of charge—share in the national wealth—is not included in the definition of local taxes under Tides I and II, Book II of the LGC.

Further, although the original case heard in the RTC seems to pertain to the validity of an assessment, a simple perusal of the aforesaid assessment itself disclosed that it does not involve a tax dispute. In fact, the Municipality itself directly admitted in its Petition for Review that Section 66 of the Republic Act (RA) No. 9136 is the Municipality's sole basis for claiming to be entitled to the share.

People of the Philippines v. Active Travel and Tours
CTA EB Criminal Case No. 088 promulgated on September 22, 2022

(Just as the validity of an assessment is crucial in pursuing the civil aspect of the crime of willful attempt in any manner to evade or defeat any tax imposed in the National Internal Revenue Code, as amended, [the "Tax Code"] punishable under Section 254 thereof, so too should the same standard be applied in willful failure to pay tax due punishable under Section 255 of the same Code. The reason being the civil liability arising from both crimes is essentially the same – recovery of taxes due from the taxpayer.)

Facts:

In 2019, two (2) Amended Information were filed against respondents Active Travel and Tours, Inc. (Active Travel), See Siu Hung Dionisio (Chief Executive Officer) and See Siu Ying Dionisio (Chief Financial Officer) for the crime of willful failure to pay tax under Section 255, in relation to Sections 253(d) and 256, of the Tax Code, Criminal proceedings ensued, and later, the CTA Division, in a Resolution, granted the demurrer to evidence of the respondents. The criminal cases were dismissed, and the respondents were acquitted.

The Republic filed a motion for reconsideration on the civil aspect of the Resolution, which the CTA Division denied; hence, the Petition for Review before the CTA En Banc.

The Republic argued that, in the present case, a valid Letter of Authority (LOA) is not essential for the validity of a tax assessment. The only requirement for the validity of such examination is notice to the taxpayer through the issuance of a Tax Verification Notice (TVN), which was issued to Active Travel and its officers. People furthered that, due to the transfer of the previously assigned Revenue Officer (RO), the Memorandum of Assignment (MOA) validly conferred authority to the new set of officers to continue the audit.

Issue:

Is an LOA required in order to collect delinquent taxes in a criminal case?

Ruling:

Yes.

Section 205 of the Tax Code, states that the court shall order the payment of delinquent taxes subject of the criminal case as finally decided by the CIR. Thus, in order for the court to order the payment of taxes subject of these cases, the following conditions must be present: first, the tax subject of the criminal case is delinquent; and second, there must be a valid, final determination thereof by the CIR.

The Supreme Court has held that adherence to due process in assessments is crucial in the pursuit of the civil aspect of the criminal case for willful attempt in any manner to evade or defeat any tax under Section 254 of the Tax Code. This standard shall likewise be applied in

a criminal case under Section 255 of the same Code. The reason being the civil liability arising from both crimes is essentially the same – recovery of taxes due from the taxpayer.

Here, only a TVN was issued authorizing the verification of the pertinent records of Active Travel in relation to the tax audit for taxable year (TY) 2008. Due to the transfer of the previous RO, a MOA was issued to a new set of officers to continue the examination of Active Travel. Consequently, a Memorandum recommending the issuance of deficiency assessments against Active Travel was issued. On the basis of such Memorandum, a Preliminary Assessment Notice (PAN) with Details of Discrepancy was issued to Active Travel.

Since the authority to examine Active Travel was based on a mere TVN and not an LOA, the examination was illegal. Without a valid examination, the deficiency tax assessments issued against Active Travel are also void. Hence, no civil liability ex-delicto may be adjudged against Active Travel.

Philex Mining Corporation v. CIR
CTA EB No. 2497 promulgated on September 29, 2022

(Sections 110 and 113 of the Tax Code, on invoicing requirements, are applicable only to value-added tax [VAT]-registered persons and not to foreign sellers who are not subject to Philippine tax laws and are not VAT-registered. The Statement of Settlement of Duties and Taxes [SSDTs] and Single Administrative Documents [SADs] are sufficient to prove actual payment of VAT on the imported goods.)

Facts:

Philex Mining Corporation (Philex) filed with the Bureau of Internal Revenue (BIR) an administrative claim for refund with Application for Tax Credits/Refunds and supporting documents, for the refund or tax credit of input VAT for 2017. The BIR partially denied the administrative claim, particularly those transactions involving importation of goods, on the ground of without valid documentary proof of inward remittances.

Philex then filed a Petition for Review to the CTA Division. The CTA Division denied Philex's petition. On appeal with the CTA En Banc, Philex argues that the invoicing requirements under the Tax Code, cannot apply to input VAT credits for transactions involving importation of goods considering that the vendors of imported goods are foreign entities not subject to Philippines laws and are not bound to comply with Philippines tax laws.

Issues:

1. Do the invoicing requirements stated under Sections 110 and 113 of the Tax Code apply to imported goods?
2. Are the SSDTs and SADs sufficient to prove payment of input VAT on Philex's importations?

Ruling:

1. No.

Based on the provisions of the Tax Code and revenue regulations, it is the VAT-registered person who is required to issue a VAT invoice for every sale, barter, or exchange of goods or services. Corollary thereto, the invoicing requirements under the Tax Code, are not applicable to imported goods sold by foreign sellers.

The Supreme Court has previously held that in substantiating input tax credits, importations must be evidenced by import entry declarations or any equivalent document, while domestic purchases must be evidenced by VAT invoices or receipts.

Here, the foreign sellers who are the sellers of the capital goods exceeding PhP1,000,000.00 and the sellers of the imported goods other than capital goods, are not bound to comply with the VAT invoicing requirements because they are not subject to Philippine tax laws. As the foreign sellers of the imported goods are not registered with the BIR and are not VAT-registered, they cannot be expected to issue VAT invoices.

2. Yes.

Under Section 4.110-8(a)(1) of Revenue Regulations (RR) No. 16-2005, input taxes for the importation of goods must be substantiated by the import entry or other equivalent document showing actual payment of VAT on the imported goods.

Here, the SSDTs and SADs are sufficient to prove the actual payment of VAT on the imported goods; thus, that the commercial invoices are mere photocopies are of no moment.

CIR v. Macquaries Offshore Services
CTA EB No. 2440 promulgated on October 3, 2022

(However, if the Authority to Print [ATP] is not indicated in the invoices or receipts, the only way to verify whether the invoices or receipts are duly registered is by requiring the claimant to present its ATP from the BIR.)

Facts:

Macquarie Offshore Services Pty Ltd. (Macquarie) filed with the BIR an Application for Tax Credits/Refunds covering the period from April 1, 2014 to March 31, 2015. The BIR denied its administrative claim for refund. Thus, on September 15, 2016, Macquarie filed its Petition for Review before the CTA. After trial, the CTA Division partially granted Macquarie's claim for refund.

Thus, the CIR elevated the case to the CTA *En Banc*. The CIR claims that Macquarie failed to present its ATP and permit to use loose leaf for official receipts and invoices to claim for a refund. On the other hand, Macquarie states that the CTA Division correctly ruled that the presentation of a taxpayer's ATP is only required if such ATP is not indicated in the invoices and receipts.

Issue:

Is the failure to present its ATP and permit to use loose leaf fatal to Macquarie's claim for refund?

Ruling:

No.

The ATP is required only if such ATP is not indicated in the invoices or receipts.

The Supreme Court has previously clarified that without the indication of the ATP, the presentation of the ATP itself would be "the only way to verify whether the invoices or receipts are duly registered." While there is no law requiring the ATP to be printed on the invoices or receipts, Section 238 of the Tax Code expressly requires persons engaged in business to secure an ATP from the BIR prior to printing invoices or receipts. Failure to do

so makes the person liable under Section 264 of the Tax Code. In the Supreme Court case, the Supreme Court held that under Section 112(A) of the Tax Code, a claimant must be engaged in sales which are zero-rated or effectively zero-rated. To prove this, duly registered invoices or receipts evidencing zero-rated sales must be presented. However, if the ATP is not indicated in the invoices or receipts, the only way to verify whether the invoices or receipts are duly registered is by requiring the claimant to present its ATP from the BIR. Without this proof, the invoices or receipts would have no probative value for the purpose of refund.

In this case, Macquarie's official receipts and service invoices contain the details of its ATP. Hence, there was no need to present the ATP.

CIR v. First Philippine Industrial Corporation
CTA EB No. 2376 promulgated on September 29, 2022

(In Revenue Memorandum Circular [RMC] No. 29-12, the BIR clarified that the form of the Waiver prescribed under Revenue Memorandum Order [RMO] No. 20-90 no longer applies starting August 2, 2001. The revised form as prescribed under Revenue Delegation of Authority Orders [RDAO] No. 05-01 shall apply thereafter.)

Facts:

During the conduct of audit of First Philippine Industrial Corporation (FPIC), its comptroller executed "Waivers of the Defense of Prescription under the Statute of Limitations of the Tax Code" (collectively, "Waivers").

On June 9, 2014, FPIC received a copy of the PAN dated June 5, 2014, issued by the BIR which stated that FPIC has been found liable for deficiency income tax (IT), VAT, withholding tax on compensation (WTC), final tax (FT), fringe benefits tax (FBT), and documentary stamp tax (DST) for TY 2009 in the total amount of PhP150,082,305.80.

On June 24, 2014, FPIC filed a Reply to the PAN dated June 23, 2014. On June 30, 2014, FPIC received a copy of the Formal Letter of Demand with Final Assessment Notice (FLD/FAN) dated June 27, 2014.

FPIC filed a Protest to Assessments, with supporting documents attached, on July 30, 2013. Thereafter, FPIC filed a Petition for Review on February 25, 2015, docketed as CTA Case No. 9000. On February 24, 2020, the Court in Division rendered the assailed Decision, granting the Petition for Review in CTA Case 9000. The Motion for Reconsideration filed by CIR on March 12, 2020, was also denied.

The CIR also filed its Petition for Review on November 16, 2020, hence this instant case.

Issue:

1. Was the CTA Division correct in ruling upon the issue of validity of the FLD, although it was not put in issue in any of the parties' pleadings?
2. Did prescription set in due to the invalidity of the waivers?
3. Were the FLD and FAN void?

Ruling:

1. Yes.

Pursuant to Section 1, Rule 15 of the Revised Rules of the CTA, the CTA is empowered to rule on related issues although the same were not raised in any of the parties' respective pleadings. The Supreme Court has also bolstered the CTA's authority on deciding an issue

which was not raised by the parties as seen in the case of *CIR v. Lancaster Philippines, Inc* (July 12, 2017).

2. Yes.

   The subject Waivers are not valid for failure to indicate the type of taxes due. Such Waivers then have not extended the prescriptive period under Section 203 of the Tax Code. Hence, the right of the government to assess the subject deficiency taxes has prescribed.

   RMO No. 20-90 is an administrative issuance that has the force and effect of law. In the case of *CIR v. Kudos Metal Corporation* (May 5, 2010), the Supreme Court emphasized that a waiver must be executed in strict compliance with the procedures laid down under RMO No. 20-90 and RDAO No. 05-01; otherwise, the waiver is considered void and the three-year prescriptive period to assess is deemed not extended.

   Based on the case of *CIR v. La Flor Dela Isabela, Inc.* (January 14, 2019), waivers extending the prescriptive period of tax assessment must indicate the specific tax and the exact amount due to be assessed. Such are material details, and the absence thereof shows that there can be no true and valid agreement between the taxpayer and the CIR.

   In RMC No. 29-12, the BIR clarified that the form of the waiver prescribed under RMO No. 20-90 no longer applies starting August 2, 2001. The revised form as prescribed under RDAO No. 05-01 shall apply thereafter.

   Considering that the Waivers executed in this case were issued beyond August 2, 2001, the applicable form of the waiver to be followed is that prescribed under RDAO No. 05-01. In this particular RDAO, the amount of taxes due is not required to be indicated in the waiver. However, it is still required that the specific type of tax must be indicated in the waiver.

3. Yes.

   The details of assessments made in the FLD/FAN are exactly based on the same findings as stated in the PAN. The only difference is that the amounts of interest were adjusted. The respective basic tax due substantially remained the same. Hence, the CIR merely reiterated the same findings as stated in the PAN, without considering or explaining the grounds for rejecting the refutations and explanations made by FPIC.

   Pursuant to Section 228 of the Tax Code, and Section 3.1.3 of RR No. 12-99, as amended by RR No. 18-2013, as part of due process in the issuance of tax assessments, the FLD/FAN must state, among others, the facts upon which the assessments are based; otherwise, the FLD/FAN shall be void. Further, the ruling in the case of *CIR v. Avon Products Manufacturing, Inc.* (October 3, 2018) was reiterated, where the tax assessment was declared void because of CIR's total disregard of taxpayer's due process for failing to fully apprise the taxpayer of the legal and factual bases of the assessment issued against it. In such case, it shall have the effect of rendering the deficiency tax assessment void and of no force and effect.

Aliboso, et al. v. CIR
CTA EB No. 2136 promulgated on October 7, 2022

(Taxes may not be imposed on salaries and emoluments earned by Asian Development Bank (ADB) employees realized from their employment at said international organization. By way of exception, salaries and emoluments of ADB Employees may be taxed when a State-member, via a declaration, retains its authority to tax its citizens.)

Facts:

On April 12, 2013, the BIR issued RMC No. 31-2013, Section 2(d)(1) thereof provides that the officers and staff of the ADB who are not Philippine nationals shall be exempt from Philippine tax. In contrast, Filipinos who are employed at the ADB are subject to Philippine income taxes.

RMC No. 31-2013 was given retroactive effect and the Filipino employees of ADB (Aliboso, et.al.) were ordered to declare and pay income taxes for income received for TYs 2012 and 2013. For this reason, they paid income taxes for said years.

On September 30, 2014, a Decision was rendered by the RTC-Mandaluyong, declaring Section 2(d)(1) of RMC 31-2013 as void for being issued without legal basis, in excess of authority and/ or without due process of law.

The CIR filed an appeal before the Court of Appeals (CA) which was later dismissed due to an improper mode of appeal. According to the CA, the proper recourse of the CIR is to institute a petition for review before the Supreme Court (SC). Aggrieved, the CIR filed a petition for review on certiorari before the SC, questioning the dismissal of his case by the CA. The case is still pending resolution by the SC.

Aliboso et. al. filed a claim for refund of the subject income taxes with the CIR, and the latter failed to act thereon. By reason thereof, Aliboso et. al. filed a Petition for Review with the CTA Division on July 10, 2015.

On April 3, 2019, the CTA Division rendered the challenged Decision, denying Aliboso's refund claim of erroneously paid or illegally collected IT covering TYs 2012 and 2013, for failure to establish the factual basis thereof.

Issues:

1. Were the requirements of Section 229 of the Tax Code complied with?
2. Does the RTC have jurisdiction to rule on the validity of RMC No. 31-2013?
3. Is legislation necessary to tax the income of Filipino ADB employees?
4. Are Aliboso et. al. entitled to claim for refund for income taxes?

Ruling:

1. No.

Aliboso et. al. failed to prove the timeliness of its administrative claim for refund, and that said claim contained a categorical demand for reimbursement of tax.

Aliboso et. al. requested from the CIR the admission of certain facts. In response thereto, the CIR solely admitted paragraph 6 thereof which states:

> 6. That petitioners, prior to filing the instant petition, filed a claim for refund of the subject income taxes with respondent Commissioner of Internal Revenue and, as of this date, respondent has not approved the refund.

A plain reading of such admission would reveal that: first, an administrative claim was filed by Aliboso et. al., prior to the filing of judicial claim for refund; and second, the CIR failed to act on said administrative claim. Yet, said admission does not hint, much less show, the exact dates when Aliboso's administrative claims for refund were filed. In the absence thereof, it may not be determined with certainty, whether Aliboso's administrative claims for refund were filed within two (2) years from their payment of IT for TYs 2012 and 2013.

2. No.

   The CTA has the exclusive jurisdiction to rule on the constitutionality or validity of a tax law or regulation or administrative issuance such as RMC No. 31-2013. As the RTC-Mandaluyong has no jurisdiction to adjudicate, it may not be invoked by Aliboso et. al. to justify their respective refund claims.

   The RTC-Mandaluyong' s Decision, invalidating Section 2(d)(1) of RMC No. 31-2013 does not bind the CTA. Such verdict is not a judicial precedent in the context of jurisprudence as "only decisions of [the Supreme] Court constitute binding precedents, forming part of the Philippine legal system.

   The RTC-Mandaluyong's Decision dated September 30, 2014, is void. It did not have any legal and binding effect. It does not divest rights, and no rights can be obtained thereunder.

3. No.

   Congress need not enact an enabling statute for the CIR to impose IT on Aliboso's income realized from their employment at the ADB because there is one already present. In particular, the provisions from which Aliboso's IT liability covering TYs 2012 and 2013 was based, i.e., Sections 23(A) and 24(A)(1), in relation to Section 31, and 32(A)(1) of the Tax Code which took effect on January 1, 1998.

   Indeed, the Tax Code was enacted after the Philippine government reserved its right to tax Filipino citizens on March 16, 1966. Thus, Aliboso's income realized from their employment at the ADB for TYs 2012 and 2013 is subject to IT on the strength of the foregoing provisions.

   As a rule, taxes may not be imposed on salaries and emoluments earned by ADB employees realized from their employment at said international organization. By way of exception, salaries and emoluments of ADB employees may be taxed when a State-member, via a declaration, retains its authority to tax its citizens.

   Considering that the Philippine government reserved its right to tax Filipinos deriving income from their employment at the ADB such as Aliboso, et. al., they are subject to Philippine income taxes pursuant to the exception clauses enshrined in Section 45(b) of the Republic of the Philippines (RP)-ADB Agreement, and Article 56(2) of the ADB Charter.

4. No.

   Aliboso et. al. failed to show that they fall within the coverage of those entitled to tax exemption under Section 56(2) of the ADB Charter. Thus, Aliboso et. al. are not entitled to the refund of income tax collected from them for TY 2012 and 2013.

JTKC Land, Inc. v. CIR
CTA EB No. 2378 promulgated on October 5, 2022

(The categorical demand for payment coupled with the threat to pursue collection of the alleged tax liabilities if payment is not made, characterize the finality of the decision of the representative of the CIR, constitutes a final decision.)

Facts:

On October 21, 2011, JTKC Land, Inc. (JTKC) received a LOA authorizing the examination of its books of account and other accounting records for the TY 2010. Thereafter, on

December 10, 2013, JTKC received a PAN assessing it for deficiency taxes. On January 10, 2014, JTKC then received several FANs for these alleged deficiency taxes for TY 2010. Petitioner filed a protest in the nature of a request for reinvestigation on January 15, 2014.

Thereafter, the BIR issued a Preliminary Collection Letter (PCL) dated June 17, 2014, which provides that several notices were sent to JTKC's office for the collection of its internal revenue tax liabilities but remained unsettled. JTKC received the PCL on July 2, 2014.

On May 24, 2017, JTKC filed the present Petition for Review before the CTA. The CTA Division dismissed the Petition for Review for lack of jurisdiction.

On appeal, JTKC avers that the PCL is not the "final decision" contemplated by law to be appealable to the CTA and that the receipt thereof did not trigger the 30-day period to file an appeal. JTKC asserts that the PCL does not contain any statement categorically upholding the validity of the assessment which is a prerequisite for an assessment to attain finality. The CIR, on the other hand, argues that the PCL constitutes the final decision appealable to the CTA because it contains a reiteration of the tax deficiency assessments due from JTKC accompanied by a categorical demand for payment of the same which signifies the "final action" of the BIR on the disputed assessment which is already appealable to the CTA.

Issue:

Does the CTA have jurisdiction over the case?

Ruling:

The PCL, in this case, passed the standard set by the Supreme Court as having the tone of finality. The PCL made a clear demand for payment of the alleged tax liabilities of petitioner and capped by a final statement: "We shall be constrained to enforce the collection thereof thru the administrative summary remedies provided for by law, without further notice."

The categorical demand for payment coupled with the threat to pursue collection of the alleged tax liabilities if payment is not made, characterize the finality of the decision of the representative of the CIR, constitutes a final decision. The failure of JTKC to avail of the remedy of appeal within the 30-day period from receipt of the PCL made the FANs final, executory and demandable.

This case does not fall within the realm of the so-called "other matters" within the jurisdiction of the CTA, the failure to file a petition for review with the CTA within the statutory period, rendered the disputed assessment final, executory and demandable, thereby precluding the taxpayer from interposing the defenses of legality or validity of the assessment and prescription of the Government's right to assess.

CIR v. Golden Brew Marketing, Inc.
CTA EB No. 2426 promulgated on October 6, 2022

(Only the CIR, Regional Directors, Deputy Commissioners of Internal Revenue, Assistant Commissioners and Head Revenue Executive Assistants may issue an authority to examine a taxpayer. Any other officer who issues an authority to examine constitutes usurpation of the statutory authority of the CIR, or his or her duly authorized representatives to permit examination of taxpayers.)

Facts:

The CIR, through OIC – Assistant Commissioner for Large Taxpayers Service Alfredo Misajon, issued an LOA authorizing ROs Paz, Ramirez, Maddela, Parungao, Maniego, Aguila, and Group Supervisor (GS) Samoy, of the Large Taxpayer Regular Audit Division I (LTRAD

I) of the BIR, to examine Golden Brew Marketing (Golden Brew)'s books of accounts and other accounting records for all internal revenue taxes for TY 2010.

On February 25, 2013, an MOA was issued by Cesar Escalada, the Chief of Large Taxpayers Assistance Division (LTAD) I of the BIR, authorizing RO Arnalda T. Ancheta (RO Ancheta) and GS Juvy S. Dela Pefia to continue the audit/investigation of Golden Brew.

On May 16, 2016, Chief Escalada issued another MOA, authorizing RO Monforte and GS Maniego to continue the audit/investigation of Golden Brew in view of the transfer of RO Ancheta.

On June 9, 2016, a PAN was issued assessing Golden Brew of deficiency IT, VAT, EWT and DST for TY 2010. Subsequently, an undated FLD/FAN was received by Golden Brew on June 27, 2016.

On July 27, 2016, the FLD/FAN was protested by way of Request for Reconsideration. On February 22, 2017, a Petition for Review was filed before the CTA based on the inaction of the CIR.

On March 2, 2020, the CTA Division granted the Petition for Review and cancelled and set aside the assessment for being void.

Golden Brew argues that there was an invalid examination against it for TY 2010. Specifically, RO Monforte's authority to examine sprung from the MOA dated May 16, 2016, issued by Chief Escalada. No authority to examine was conferred by the CIR, or his or her duly authorized representatives to RO Monforte. Thus, RO Monforte's recommendation of deficiency taxes for TY 2010, as well as the tax assessment for TY 2010 based thereon are void.

Issues:

1. Were the officers authorized to conduct the audit?
2. Was there a FLD/FAN in this case?

Ruling:

1. No.

   Under the Tax Code, only the CIR, Regional Directors, Deputy Commissioners of Internal Revenue, Assistant Commissioners and Head Revenue Executive Assistants may issue an authority to examine a taxpayer. Chief Escalada of LTRAD I of the BIR is not one of them. Therefore, Chief Escalada's issuance of the MOA dated May 16, 2016 to RO Monforte to continue the audit and examination of respondent for TY 2010 is a usurpation of the statutory authority of the CIR, or his or her duly authorized representatives to permit examination of taxpayers, which may not be allowed.

   RO Monforte conducted an illegal examination on Golden Brew for TY 2010, violative of Sections 6(A), 10, and 13 of the Tax Code. Being so, RO Monforte's findings are void, and may not be cured through a subsequent review by GS Maniego, despite the latter being named in the LOA dated September 23, 2011.

2. No.

   On the assumption that the CIR conducted a valid examination of the books of Golden Brew, the FLD/FAN would still be void.

The CIR's undated FLD alluded Golden Brew's period to pay the deficiency IT, VAT, EWT, and DST for TY 2010, within the time shown in the enclosed assessment notices. Yet, the due dates on the FAN for remained unaccomplished. Ergo, the CIR's tax assessments issued against Golden Brew for TY 2010 lack the requisite demand for payment of tax liabilities.

Second, said undated FLD bears a notation "Please note that the interest and total amount due will have to be adjusted if paid beyond July 29, 2016." Since the total amount due is subject to adjustment, depending on Golden Brew's date of payment, the CIR's tax assessments failed to contain a fixed and determinate amount of tax liabilities.

CTA DIVISION DECISIONS

People of the Philippines v. Errizaro Shoe Corporation
CTA Criminal Case No. 0-704 promulgated on September 28, 2022

[To secure accused's conviction, it is indispensable for the prosecution to prove beyond reasonable doubt that the failure to pay the internal revenue tax liabilities was willful.]

Facts:

On July 1, 2009, the BIR issued a Letter Notice (LN) against accused Errizaro Shoe Corporation (ESC) disclosing that it had discrepancy in its declared IT and VAT. There was no LOA issued.

On December 20, 2010, the BIR issued a PAN against accused ESC finding it liable for basic deficiency VAT. On even date, a FLD/FAN was issued ordering accused ESC to pay the said basic deficiency VAT, plus surcharge and interest.

Issue:

Did the accused ESC willfully fail to file VAT returns and pay the corresponding tax thereon?

Ruling:

No.

To sustain a conviction of the crime of Willful Failure to Pay Tax under Section 255 of the Tax Code, the following elements must be satisfied: first, the taxpayer is required by the Tax Code, or its rules and regulations to pay the tax; second, the taxpayer failed to pay the tax at the time required by the Tax Code or its rules and regulations; and, third, the taxpayer's failure to pay the tax was willful.

To secure accused's conviction, it is indispensable for the prosecution to prove beyond reasonable doubt that the failure to pay the internal revenue tax liabilities was willful. Thus, to determine whether accused ESC willfully failed to pay deficiency VAT, it is proper to ascertain first whether the assessment issued by the BIR is valid.

It is noteworthy that the BIR never presented any LOA that authorized the ROs to conduct an examination of accused ESC. Although an LN was issued by the BIR, such is not equivalent to an LOA.

Moreover, both the PAN and FAN were issued on December 20, 2010. The issuance of both the PAN and FAN on the same day violated accused ESC's due process rights. Accused ESC was not given any notice of the PAN at all, and it was deprived of the opportunity to respond thereto before it was served the FAN. Tax assessments issued in violation of the due process rights of a taxpayer are null and void.

Lastly, upon examination, it is found that the FAN does not bear a due date or deadline for the payment of deficiency VAT. The Supreme Court has provided in jurisprudence that a FAN is invalid if it does not bear a due date for the payment of tax as it negates the BIR's demand for payment. Similarly in this case, the due date in the Assessment Notice was left blank or unaccomplished, rendering the same invalid.

Thus, the BIR failed to prove that accused ESC was served with a valid FAN, hence, ESC has no obligation to pay the deficiency VAT as indicated in the void FAN. Stated differently, the failure of the accused to pay the deficiency VAT assessed in a void FAN does not give rise to any criminal or civil liability on the part of the accused.

Asurion Hong Kong Limited - ROHQ v. CIR
CTA Case No. 10121 promulgated on October 5, 2022

(In claims for input VAT refund, there are two components that the taxpayer must establish to prove its client's status as "other person doing business outside the Philippines": 1) that the client was established under the laws of a country other than the Philippines (may be proven by the Security and Exchange Commission [SEC] certifications of Non-registration); and 2) that it is not engaged in trade or business in the Philippines, the prima facie proof of which is the articles of association/certificates of incorporation stating that these affiliates are registered to operate in their respective home countries, outside the Philippines.)

Facts:

Asurion Hong Kong Limited – Regional Operating Headquarter (ROHQ) (Asurion) is a Philippine branch of a multinational company in Hong Kong. For 2017, Asurion rendered services to its following affiliates:

1) Asurion Insurance Services, Inc. – Nashville, Tennessee, USA
2) New Asurion Corporation – Nashville, Tennessee, USA
3) Phone Repair Centre Limited – London, UK
4) New Asurion Singapore Pte. Ltd. – Singapore

Being an ROHQ, Asurion is engaged in qualifying services, and the same is classified as sales of "other services" defined under the Tax Code.

Asurion filed an administrative claim for refund with the BIR for the incurred amount of excess input VAT in relation to the services rendered to the above entities. This was denied by the BIR. Asurion then filed a Petition for Review with the CTA.

The CIR mainly argues that Asurion failed to prove that its clients were foreign nationals; thus, the services rendered are not zero-rated. It further argues that Asurion's clients, Asurion Insurance Services and New Asurion Corporation, cannot be classified as "other person doing business outside the Philippines" in accordance with the CTA's decision on Institutional Shareholder Services, Inc. – Philippines ROHQ v. CIR (*ISSI case*).

Issue:

Was Asurion able to establish that its clients are classified as "other person doing business outside the Philippines" in view of the requirements to claim input VAT refund?

Ruling:

Yes.

In order for the sales of "other services" to be considered VAT zero-rated under the Tax Code, one of the conditions to be satisfied is that the services are rendered to a person engaged in business conducted outside the Philippines or to a nonresident person not engaged in business who is outside the Philippines.

The Supreme Court has held that there are two components that the taxpayer must establish to prove its client's status as "other person doing business outside the Philippines": 1) that the client was established under the laws of a country other than the Philippines (may be proven by the SEC certifications of Non-registration); and 2) that it is not engaged in trade or business in the Philippines (the prima facie proof of which is the articles of association/certificates of incorporation stating that these affiliates are registered to operate in their respective home countries, outside the Philippines).

Here, Asurion was able to establish that its clients' status as evidenced by its corresponding SEC Certifications of Non-Registration and consularized foreign registration documents.

As to reliance of the CIR to *ISSI case*, the CTA did not agree with the CIR. In *ISSI case*, the ROHQ rendered services solely and exclusively to its head office, ISSI US. In this case, the CTA held that an ROHQ's parent company may not be considered an affiliate, subsidiary, or branch since the ROHQ and its parent company are treated as one and the same entity for taxation purposes. As a result, the ROHQ's services to its parent company do not qualify for VAT zero-rating.

Here, Asurion rendered qualifying services not to its parent company in Hong Kong but to corporations doing business and established outside the Philippines. Asurion Insurance Services and New Asurion Corporation are corporations duly organized and existing under the laws of Tennessee, USA. Hence, these entities are not considered as Asurion's parent company.

However, there is a significant difference in the names reflected in the SEC Certification of Non-Registration, foreign registration document and official receipts on one of its clients:

Name in the SEC Registration Certification of Non-registration	**Name in the Apostilled Foreign Registration Documents**	**Name in the OR**
Phone Repair Centre Limited (PRCL)	Phone Repair Centre Limited	Repair Center UK

For such discrepancy, it appears that the "Repair Center UK" is the sole subscriber of PRCL as evinced by its Apostilled Memorandum of Association; nevertheless, the CTA said that such are two different entities, and disallowed the transactions related to it.

In sum, the CTA held that Asurion has sufficiently proved that its clients qualify as "other person doing business outside the Philippines" as contemplated under the Tax Code.

Shang Property Developers, Inc. v. CIR
CTA Case No. 9745 promulgated on October 12, 2022

(The issuance of Warrants of Distraint and/or Levy [WDLs] qualifies as a decision by the CIR relating to other matters arising from the implementation of the Tax Code [i.e., collection of taxes] that may be appealed before the CTA as provided under Section 7(1) of RA No. 1125]

(A MOA simply notifies a taxpayer of the transfer of audit/investigation to another set of revenue officers. Unlike a LOA, a MOA does not show that the new set of revenue officers who will pursue the audit are properly authorized to do so.)

Facts:

In 2014, Shang Property Developers, Inc. (Shang) received a Letter of Authority authorizing RO Ami and GS Causapin of Revenue District Office (RDO) No. 47, authorizing them to audit and examine Shang's books of accounts and other accounting records for the TY 2013.

In 2016, Shang executed a waiver to extend the prescriptive period to assess and request for more time to submit documents necessary for the audit. In 2016, a Letter was issued by the Revenue District Officer of RDO No. 47 informing Shang that the audit would be assigned to RO Ventura and GS Bello. Attached in the said Letter is a MOA.

Thereafter, RO Ventura and GS Bello recommended the issuance of PAN. Shang protested to the PAN. Subsequently, a FAN, a PCL and a Final Notice Before Seizure (FNBS) were issued. Finally, a WDL seeking the collection of the amount provided in the FAN was issued.

Then, Shang filed the instant Petition with a Motion to Suspend Collection of Taxes.

Issue:

1. Does the CTA have jurisdiction over the case?
2. Was the assessment valid?

Ruling:

1. Yes.

Section 7(1) of RA No. 1125 provides that the CTA shall exercise exclusive appellate jurisdiction to review by appeal decisions of the CIR in cases involving disputed assessments, refunds of internal revenue taxes, fees or other chargers, penalties imposed in relation thereto, or other matters arising under the Tax Code, or other laws or part of law administered by the BIR.

Here, Shang is appealing the issuance of the WDLs, which is a manifestation of the CIR's effort to collect the subject deficiency tax assessments. The issuance of the WDLs are not decisions of the CIR directly to assessments, considering that these are usually issued post-assessment. Although not directly related to assessments, the CTA still has jurisdiction to determine the propriety of the issuance of such WDLs. This is because the issuance of such qualifies as a decision by the CIR relating to other matters arising from the implementation of the Tax Code (i.e., collection of taxes) that may be appealed before the CTA as provided under Section 7(1) of RA 1125.

Also, while Shang is mainly appealing the CIR's efforts to collect the subject deficiency taxes, this does not mean that the CTA is limited in determining whether the collection procedure employed after assessment is proper. The CTA may also rule upon the validity of the assessment. After all, a void assessment bears no fruit. As such, no tax collection can be pursued from such a void assessment.

2. No.

A LOA as an instrument of due process should particularly name the revenue officers who are authorized to conduct an audit. A MOA simply notifies a taxpayer of the transfer of audit/investigation to another set of revenue officers. Unlike a LOA, a MOA does not show that the new set of revenue officers who will pursue the audit are properly authorized to do so.

Here, RO Ventura and GS Bello were able to audit, examine and inspect Shang's books of accounts and other accounting records (which then led to deficiency tax assessments against

respondent) through a mere MOA, despite the clear requirement that all revenue officers conducting an audit/investigation of a taxpayer should be properly authorized with an LOA.

While it can be argued that a LOA does not partake a particular form, any document may qualify as a LOA provided that the essential requisites of a LOA are present. To be effective, a LOA must be issued by any of the following:

1) CIR himself or his duly authorized representative;
2) Revenue Regional Director;
3) Regional Directors;
4) Deputy Commissioners;
5) Commissioner; and
6) Other officials that may be authorized by the Commissioner for the exigencies of service.

Here, the Letter and MOA in 2016 were issued by a mere Revenue District Officer. Hence, the subject MOA cannot qualify as a valid LOA.

Hence, due to the absence of a LOA authorizing RO Ventura and GS Bello to examine Shang, the deficiency tax assessment issued against Shang are void. Accordingly, no tax collection can be pursued based on these assessments. It is noteworthy that assessments issued without the requisite LOA are inescapably void.

Banclife Insurance Co., Inc. v. CIR
CTA Case No. 9939 promulgated October 5, 2022

(Warrants of Garnishments [WOGs] are not decisions of the CIR directly related to assessments, considering that these are usually issued post-assessment. Although not directly related to assessments, the CTA still has jurisdiction to determine the propriety of the issuance of the WOGs.)

(Once receipt of the tax assessments is denied, the CIR must prove through a preponderance of evidence that the assessment notices were indeed received by the taxpayer.)

Facts:

In 2014, Banclife Insurance Co., Inc. (Banclife) received an LOA authorizing RO Santos and GS Navarro of RDO 34, authorizing them to audit and examine Banclife's books of accounts and other accounting records for the taxable year 2013.

In 2015, a Letter was issued by Revenue District Officer Galanza informing Banclife that the audit would be assigned to RO Alaan and GS San Diego. Attached in the said Letter is a MOA.

In 2016, RO Alaan and GS San Diego recommended the issuance of PAN. Subsequently, an FLD/FAN, a PCL, and an FNBS were issued.

On August 31, 2018, WOGs were received by Banclife's affiliates from the BIR seeking to collect the alleged deficiency from Banclife. Upon learning of this, Banclife requested the cancellation of the WOG and WDL, if any had been issued, since Banclife never received a copy of the PAN and FAN/FLD. Likewise, Banclife requested for copies of the PAN, FAN/FLD, and the WDL, if any had been issued.

The CIR did not comply with Banclife's request. As such, on September 28, 2018, Banclife filed the Instant Petition with an Urgent Motion to Quash WOG and/or to Suspend Tax Collection of Taxes.

Issues:

1. Does the CTA have jurisdiction over the case?
2. Was Banclife's right to due process violated?

Ruling:

1. Yes.

   Jurisdiction by the CTA is not solely limited to matters directly related to assessment or refunds of internal revenue taxes. The CTA is also empowered to take cognizance of other matters which arise from the implementation of the Tax Code.

   Here, Banclife is appealing the issuance of the WOGs, which is part of CIR's efforts to collect the subject deficiency tax assessments. WOGs are not decisions of the CIR directly related to assessments, considering that these are usually issued post-assessment. Although not directly related to assessments, the CTA still has jurisdiction to determine the propriety of the issuance of the WOGs.

2. Yes.

   Once receipt of the assessment notices is denied and controverted by the taxpayer, the burden of proof is shifted to the CIR to prove through a preponderance of evidence that the taxpayer, or his/her authorized representative, indeed received the subject assessment notices.

   Here, Banclife unequivocally denied receipt of the PAN and FLD/FAN. Accordingly, the burden to prove that the PAN and the FLD/FAN were received by Banclife is shifted to the CIR. Pieces of evidence (i.e., proofs of mailing and the testimony of a revenue officer) show that CIR failed to provide convincing proof that the PAN and FLD/FAN were actually received by Banclife. CIR only showed that the PAN and FLD/FAN were mailed through registered mail.

   Accordingly, Banclife was not notified and informed of the deficiency tax assessment issued against it. Consequently, Banclife was not able to avail of the remedies allowed under the Section 228 of the Tax Code in protesting deficiency tax assessments. Banclife's right to due process in assessment proceedings, particularly the right to be informed of the deficiency tax assessments issued against it, has thus been violated.

   Further, revenue officers conducting an examination of a taxpayer to determine the correct amount of taxes due should be armed with an LOA. An LOA is an instrument of due process for the protection of taxpayers, and it guarantees that tax agents will act only within the authority given them in auditing a taxpayer.

   Here, a LOA was initially issued authorizing RO Santos and GS Navarro of RDO 34 to audit/examine Banclife for possible deficiency tax liabilities for TY 2013. Subsequently, a MOA was issued, transferring the audit to RO Alaan and GS San Diego. Through the MOA, RO Alaan and GS San Diego were able to come up with audit findings and then resulted in the issuance of assessment notices.

   Hence, due to the absence of an LOA authorizing RO Alaan and GS San Diego to examine Banclife, the deficiency tax assessments issued against Banclife are void. Accordingly, no tax collection can be pursued.

SECURITIES AND EXCHANGE COMMISSION ISSUANCES

SEC MC No. 8-2022 issued on September 19, 2022

- These Guidelines have been issued pursuant to Section 181 of the Revised Corporation Code (RCC).
- These rules apply to appointments made by the Securities and Exchange Commission (SEC), upon the request of the parties, of arbitrators tasked to resolved intra-corporate disputes of domestic incorporations in accordance with Section 181 of the RCC. However, these rules shall not apply if the arbitration agreement expressly states a seat or place of arbitration that is other than the Philippines.
- Section 3 of the Guidelines provides that an intra-corporate dispute which involves criminal offenses and interests of third parties shall not be referred to arbitration.
- These rules provide that an arbitration agreement may be a clause incorporated in the articles of incorporation or by-laws of a corporation or in a form of a separate contract.
- After compliance with any agreed pre-arbitration alternative forms of dispute resolution (*i.e.*, negotiation or mediation) under the arbitration agreement, the dispute shall be referred to arbitration.
- The Guidelines provide the minimum provisions that all arbitration agreements shall contain:

    - The number of arbitrators;
    - The designated independent third party who shall appoint the arbitrator/s;
    - The procedure for the appointment of the arbitrator/s; and
    - The period within which the arbitrator/s should be appointed by the designated independent third party.

  Any arbitration agreement that does not meet the foregoing minimum provisions shall be unenforceable under these Guidelines. However, arbitration shall proceed under the Alternative Dispute Resolution Act and its implementing rules and regulations if the seat or place of arbitration is in the Philippines, or under the relevant arbitration law if the seat or place of arbitration is outside the Philippines.
- Unless the Arbitration Agreement states otherwise, the seat or place of arbitration shall be presumed to be the Philippines unless the arbitral tribunal subsequently decides otherwise.
- The power to appoint the arbitrator/s shall be granted to a designated independent third party and in accordance with the procedure agreed upon in the arbitration agreement. In case of the independent third party's failure to appoint, any of the parties may request the SEC to appoint the arbitrators. Specific details as to default appointments to be made by the SEC are also provided in the Guidelines.
- The Guidelines provide that arbitrators must be (a) accredited by the Office of Alternative Dispute Resolution (OADR) or the SEC, or (b) accredited by organizations accredited by the OADR or the SEC for the purpose of arbitration.
- The Guidelines also give the arbitral tribunal the power to grant interim measures necessary to ensure the enforcement of the award, prevent a miscarriage of justice, or otherwise protect the rights of the parties. These measures may include the following:
    - Preliminary injunction directed against a party to arbitration;
    - Preliminary attachment against property or garnishment of funds in the custody of a bank or a third person;
    - Appointment of a receiver;
    - Detention, preservation, delivery or inspection of property; or
    - Appointment of a management committee.
- The Guidelines also provide that a person who may possibly be appointed as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. From the time of appointment and throughout the arbitral

proceedings, an arbitrator shall without delay disclose any such circumstances to the parties and other arbitrators.

- Further, any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his/her impartiality or independence. Nevertheless, a party may challenge the arbitrator it appointed only for reasons of which such party becomes aware after the appointment has been made. The Guidelines provide for the procedure for making a challenge as well.
- On the other hand, the Guidelines provide that the arbitrator may also request to be released from his/her appointment either with the consent of the parties or by the SEC.
- Lastly, in the broader interest of justice and in order to best serve public interest, the SEC may, in particular matter, exempt a party from the application of these Rules in exceptional cases and apply such suitable, fair, and reasonable procedure to improve the delivery of public service and to assist the parties in obtaining a speedy and judicious disposition of cases.

SEC OGC Opinion No. 22-12 issued on September 27, 2022

- This Opinion is on whether Fleet Marine Cable Solutions, Inc. (FMCSI) can issue shares at a premium to Mr. Iskandar Shah (Mr. Shah) without increasing its authorized capital stock (ACS).
- Mr. Shah, an Indonesian national who is a holder of a Special Investor's Resident Visa (SIRV) issued by the Board of Investments (BOI), invested Three Million and Seven Hundred Fifty Thousand Pesos (PHP3,750,000.00) in FMCSI, by subscribing five thousand (5,000) of its common shares, with a par value of One Hundred Pesos (PHP100.00) per share, for a subscription price of Seven Hundred Fifty Pesos (PHP750.00) for each share.
- However, upon Board of Investments (BOI)'s validation of Mr. Shah's investment in FMCSI relative to his application for an indefinite SIRV, the BOI found it irregular for FMCSI to have a paid-up capital of Thirteen Million and Two Hundred Fifty Thousand Pesos (PHP13,250,000,00), which is more than its ACS of Ten Million Pesos (PHP10,000,000.00).
- The SEC opined that a company may be allowed to issue shares of stock at a premium. The Supreme Court, in *Salido vs Aramaywan Metals Development Corp.*, confirms that the capital subscribed can be more than the par value of the shares. The Supreme Court explained that "capital" refers to the value of the property or assets of a corporation The "capital subscribed" is the total amount of the capital that persons (subscribers or shareholders) have agreed to take and pay for, which need not necessarily be, and can be more than, the par value of the shares. In fine, it is the amount that the corporation receives, inclusive of the premiums if any, in consideration of the original issuance of the shares.
- Therefore, it is legal for a company to issue shares at a premium or over the par value of the shares as stated in its Articles of Incorporation (AOI), and for the subscribers of a corporation to pay more than the par value of the shares they subscribed as there is no law, rule or regulation that prohibits the same.

SEC OGC Opinion No. 22-14 issued on October 7, 2022

- Under Republic Act (R.A.) No. 11232 or the Revised Corporation Code of the Philippines (RCC), corporations can be classified either as stock corporations or non-stock corporations. On the one hand, stock corporations are those which have capital stock divided into shares and are authorized to distribute to the holders of such shares, dividends, or allotments of the surplus profits on the basis of the shares held. On the other hand, non-stock corporations are those where no part of its income is distributable as dividends to its members, trustees, or officers." The following are the most common characteristics of a non-stock corporation:

a. Any profit derived by it from any authorized activity cannot be distributed as dividends to its members;
b. It may not lawfully engage in any business activity for profit as it would run counter to its very nature as a non-profit entity;
c. When incidental to the objects and purposes of the corporation and without the end of making profits to be distributed to the members, it may engage in certain economic activities stated in its articles of incorporation;
d. Does not issue stock and distribute dividends to its members; it is created not for profit but for public good and welfare; and
e. The mere fact that a non-stock corporation may earn profit does not make it a profit-making corporation where such profit or income is used to carry out the purposes set forth in the articles of incorporation and is not distributed to its incorporators, members, trustees or officers.

- A non-stock corporation may not be "converted" into a stock corporation without liquidating its assets nor is an undertaking in the Corporate By-laws indicating that the corporation is accountable for the obligations acquired while it was still a non-stock corporation sufficient.
- The former members of the non-stock educational corporation may incorporate and organize the educational institution as a stock corporation after liquidating its assets in accordance with the provisions of the RCC.

SEC OGC Opinion No. 22-13 issued on September 30, 2022

- CommVerge Solutions Philippines, Inc. (CommVerge Philippines) has an authorized capital stock (ACS) of PhP10 Million divided into 100,000 shares at a par value of PhP100.00 each. From the years 1999-2001, CommVerge Philippines suffered recurring losses and incurred a cumulative deficit of PhP220 Million. To help CommVerge Philippines, its parent company, CommVerge Solutions Holdings (Asia) Inc. (CommVerge Holdings), made advances in the amount of PhP236 Million ("advances") to support the former's operations.
- The SEC approved an increase of CommVerge Philippines' ACS from its Initial 100,000 shares to 2.5 million shares at par value of PhP100.00 each, or PhP250 Million. Subsequently, CommVerge Philippines converted the advances equivalent to PhP236 Million. By 2006, CommVerge Philippines continued to suffer operating losses and incurred an annual deficit which reached a total of PhP421 Million. By 2007, CommVerge Holdings made additional advances to CommVerge Philippines in the amount of PhP149.6 Million.
- Meanwhile, CommVerge Philippines submitted to the SEC an application for equity restructuring and creation of additional paid-in capital ("APIC") to partially wipe out the existing deficit as of financial year 2007. The application was then approved by the SEC which resulted in the conversion of PhP149.6 Million (advances received from CommVerge Holdings) to APIC.
- Thereafter, CommVerge Philippines has paid out the advances which accumulated to about Php157 Million to CommVerge Holdings.
- CommVerge Holdings has expressed its intent to recover the PhP149.6 Million advances that was converted to APIC and CommVerge Philippines intends to return the same provided it can do so legally and without violating the Trust Fund Doctrine.
- APIC is any contribution of stockholders over the par value of shares. Section 2 of Memorandum Circular No. 11 (MC No. 11), also considers APIC as premium when it defines paid-in capital as "the amount of outstanding capital stock and additional paid-in capital or premium paid over the par value of shares". Thus, the SEC allows a stockholder to infuse cash or property to be treated as APIC or premium.
- Under jurisprudence, trust fund doctrine is not limited to reaching the stockholder's unpaid subscriptions. The scope of the doctrine when the corporation Is insolvent encompasses not

only the capital stock, but also other property and assets generally regarded in equity as a trust fund for the payment of corporate debts.

- The SEC opined that "equity" includes the entity's issued ordinary shares, and options and warrants held by external parties to purchase those shares. There are many types of share capital, including ordinary shares. preferred shares, non-voting shares, participating shares and redeemable shares. The price of share capital is recorded at the amount that a corporation received in consideration for the issuance of shares, plus share premium or APIC, if any.
- Thus, subsequently infused APIC forms part of equity emanating from the original subscription agreement. APIC, as a premium, forms part of the capital of the corporation and therefore falls within the purview of the trust fund doctrine.
- Until the liquidation of the corporation, no part of the subscribed capital may be returned or released to the stockholder (except in the redemption of redeemable shares) without violating this principle. The corporate creditors, therefore, should have the first claim on the trust fund of the corporation, and the stockholders have no rights to it, until all the creditors are satisfied.
- Based on the foregoing, the SEC opined that a corporation may not nullify its APIC and subsequently convert it into subscribed capital, as the same violates the Trust Fund Doctrine.

DEPARTMENT OF JUSTICE ISSUANCE

DOJ Legal Opinion No. 21, s. 2022 issued on September 29, 2022

- The Department of Energy (DOE) requested for a legal opinion on the maximum foreign equity participation allowable in the exploration, development and utilization (EDU) of solar, wind, hydro and ocean/tidal energy resources under Section 2, Article XII of the Constitution.
- The DOE was of the position that the term "natural resources" only covers those that may be owned or acquired by the State by virtue of its power of dominium and the Regalian Doctrine, such that common things (res communes) and the energy resources that may be generated from them are outside the scope of "natural resources,". The term "all forces of potential energy" should be understood in its technical sense since it is argued that the framer's intent to exclude "kinetic energy" from the constitutional limitation is clear from their use of term "potential energy;"
- The DOJ shared the position of the DOE that the EDU of solar, wind, hydro and ocean or tidal energy should not be subject to the forty percent (40%) foreign equity limitation under Section 2, Article XII of the Constitution because such energy resources are beyond the ambit of the term "natural resources" as used in the said Section and that the term "all forces of potential energy," also mentioned in the said Section, is to be understood in its technical sense, which necessarily excludes kinetic energy.
- Accordingly, the DOJ opined that the term "natural resources" in Section 2, Article XII does not include inexhaustible renewable resources, such as solar, wind, hydro and ocean or tidal energy. Considering that solar, wind, hydro and ocean or tidal energy sources are beyond the ambit of the term "natural resources" in Section 2, Article XII of the Constitution and that the term "all forces of potential energy" is to be understood in its technical sense, which necessarily excludes kinetic energy, the EDU of solar, wind, hydro and ocean or tidal energy should not be subject to the forty percent (40%) foreign equity limitation under Section 2.
- The DOJ, however, emphasized that this opinion is subject to the following qualifications: (1) the executive construction, as provided in Section 19 of the IRR of RA No. 9513, that solar, wind, and, hydro and ocean or tidal energy is subject to the forty percent (40%) foreign equity limitation, would remain, unless amended, and

(2) the Water Code and jurisprudence limiting to Filipino citizens or juridical persons the appropriation of waters, direct from the source, for power generation shall continue to prevail, unless repealed or reversed.

NATIONAL PRIVACY COMMISSION ISSUANCES

Advisory Opinion No. 2022-019 issued on September 21, 2022

- ON Semiconductor Philippines (the "Corporation") requested for an advisory opinion regarding the use of body-worn cameras ("BWC") by its security personnel and its possible compliance with the Data Privacy Act.
- The Corporation is exploring the possibility of requiring their security personnel to use BWCs to record their field observations and encounters, on top of the use of closed-circuit television systems (CCTVs).
- Under the Data Privacy Act (DPA), the images of identifiable individuals captured in a photograph or audiovisual recordings are considered personal information about the individual. Thus, the processing of which should comply with the provisions of the Data Privacy Act.
- The Corporation argued that the use of the BWCs will be for a legitimate purpose, i.e., to promote the safety and protect the security of people and the manufacturing facilities of the Corporations.
- The NPC ruled that while the processing of personal information based on the legitimate interests of the Personal Information Controllers is allowed under the DPA, the Corporations must assess if the use of BWCs within the premises will pass the three-part test of Legitimate Interest, namely:
  1. Purpose test - The existence of a legitimate interest must be clearly established, including a determination of what the particular processing operation seeks to achieve.
  2. Necessity test - The processing of personal information must be necessary for the purposes of the legitimate interest pursued by the PIC or third party to whom personal information is disclosed, where such purpose could not be reasonably fulfilled by other means; and
  3. Balancing test - The fundamental rights and freedoms of data subjects must not be overridden by the legitimate interests of the PICs or third party, considering the likely impact of the processing on the data subjects.
- Considering all attendant circumstances, the Corporations must first conduct an assessment that the use of additional BWCs is truly necessary and is the least privacy intrusive manner of processing in relation to the declared purpose. After evaluation, if the Corporations decide to use BWCs, they must ensure that the data subjects are informed that their security personnel are equipped with BWCs.
  This may be done through an appropriate privacy notice which you ensure will be complied with. The privacy notice should describe the specific processes relating to the use of BWCs. In crafting the privacy notice regarding the use of BWCs, reference can be made to Section 16 (b) of the DPA on the information that should be provided to the data subjects pursuant to their right to be informed and to demonstrate the Corporations' adherence to the data privacy principle of transparency.
- Finally, the NPC recommends conducting a privacy impact assessment (PIA) on the use of BWCs to identify potential privacy risks to the data subjects. The PIA will help identify and provide an assessment of various privacy risks, and propose measures intended to address and mitigate the effect of these identified risks on the data subjects.

Advisory Opinion No. 2022-020 issued on September 21, 2022

- The advisory opinion was issued in response to a request for a clarification on the propriety of the denial of the Philippine Statistics Authority (PSA) of request for a copy of another person's civil registry documents on data privacy grounds.
- The requester is intending to process his deceased father's benefits from Government Service Insurance System (GSIS). The requester submitted his deceased father's Certificate of No Marriage (CENOMAR) which apparently lists two (2) marriages, of which, the second marriage pertains to his mother. GSIS informed the requester that the first wife of his father may be disqualified from claiming the benefits if he can submit the death certificate or CENOMAR of the first wife. Thus, the requester asked the PSA for a copy of such death certificate; however, the same was denied citing data privacy grounds.
- A death certificate qualifies as a document which consists of sensitive personal information under the DPA. Under the DPA, the processing of sensitive personal information is generally prohibited, but the DPA recognizes certain exceptions. One of which is the processing of information for the establishment, exercise or defense of legal claims [Section 13(f), DPA].
- In line with the DPA's policy to protect the fundamental right of every individual to privacy, the PSA issued Memorandum Circular No. 2019-15, which essentially provides that the request should be pursuant to a pending case and that there is a duly issued subpoena directing the release of the personal data requested.
- In this regard, the NPC opined that such requirement of the PSA unduly restricts the lawful basis to process information under the DPA and is an erroneous interpretation of Section 13(f) of the DPA.
- The NPC cited its previous ruling that processing as necessary for the establishment of legal claims does not require an existing court proceeding. The very idea of establishment of legal claims presupposes that there is still no pending case since a case will only be filed once the required legal claims have already been established.
- Further, the DPA should not be seen as curtailing the practice of law in litigation. Applying the qualifier "necessary" in Section 13(f) of the DPA serves to limit the potentially broad concept of "establishment of legal claims" consistent with the general principles of legitimate purpose and proportionality.
- The NPC is of the opinion that PSA's interpretation that lawful processing under Section 13(f) requires the existence of an actual case should be reviewed and revised to properly conform to the DPA.
- Nonetheless, the NPC said that even if the request for processing is supported by a lawful criteria, the request would still be evaluated on a case-to-case basis subject to the Personal Information Controller's (in this case, the PSA) guidelines for release of such information.
- The NPC suggested that since PSA allows the disclosure of personal data through a request from another government agency, the requester may request from GSIS to issue a formal request to PSA the confirmation of the death and/or status of marriage of the first wife.

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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.