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TAX JOURNAL

AUGUST 2022

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BIR ISSUANCES

BIR RULING

BIR Ruling No. 343-2022 issued on June 30, 2022

- In this Ruling, the BIR confirmed the tax-free merger pursuant to Section 40(C)(2) and (6)(b) of the National Internal Revenue Code (the "Tax Code"), as amended, between RFM Corporation (RFM), as the surviving corporation, and its former subsidiaries, Invest Asia Corporation (IAC), Interbake Commissary Corporation (ICC), and Cabuyao Logistics and Industrial Center, Inc. (CLIC).
- Through an upstream merger between RFM and its former subsidiaries, RFM issued shares to itself as the surviving corporation in exchange for the assets transferred to it by its former subsidiaries as a result of the merger. With RFM as the surviving corporation, the subsidiaries ceased to exist, and their legal personalities were considered terminated.
- The BIR opined that the merger of IAC, ICC, CLIC and RFM is a merger within the contemplation of Section 40 (C) (2) (a) in relation to Section 40 (C) (6) (b) of the Tax Code, as amended, for the following business reasons: (1) the integration of the administrative facilities of the four (4) corporations will result in economies of scale and efficiency of operations; (2) the consolidation of assets of the four (4) corporations will allow the procurement of financing and credit facilities under more favorable terms; and (3) the merger will make possible the more productive use of the properties of the constituent corporations. Hence, the merger of IAC, ICC, CLIC and RFM is being undertaken for a bona fide business purpose and not for the purpose of escaping the burden of taxation.
- Since the merger of IAC, ICC, CLIC, and RFM qualifies for non-recognition of gain or loss for income tax purposes, no gain or loss shall be recognized by IAC, ICC, and CLIC, as transferors of all assets and liabilities, to RFM pursuant to the Articles and Plan of Merger.
- Moreover, the essential elements of a valid donation are: (1) the reduction of the patrimony of the donor, (2) the increase in the patrimony of the donee, and (3) the intent to do an act of liberality (animus donandi). The BIR opined that there is no intention on the part of any of the parties to the merger — IAC, ICC, and CLIC to donate to RFM its assets since the transaction is purely for legitimate business purpose. Thus, the aforesaid merger will not be subject to gift tax since there is no intention to donate, and the transaction is a bona fide merger effected solely for business reasons.
- There is also no documentary stamp tax (DST) is due on the transfer of assets made pursuant to the Plan of Merger under Section 199 (m) of the Tax Code, as amended, in relation to Section 40 (C) (2) of the same Code, as amended. However, a DST at the rate of P2.00 on each P200 par value, or fractional part thereof, shall be imposed on the original issuance of shares by RFM to the stockholders of IAC, ICC, and CLIC as a consequence of the merger as provided under Section 174 of the Tax Code, as amended.
- The transfer of properties of IAC, ICC, and CLIC to RFM as a consequence of the merger shall not be subject to any output tax, pursuant to Section 4.106-8 (b) (3) of RR No. 16-2005, as amended. The conveyance of properties to effectuate a merger is not made in the course of business but by operation of law pursuant to the merger. Thus, any unused input tax as of the effective date of merger will be absorbed by RFM, as the surviving corporation pursuant to Section 4.106-8 (b) (3) of RR No. 16-2005, as amended.
- Further, any excess and unutilized creditable withholding taxes (CWT), if any, which form part of the assets to be transferred by IAC, ICC, and CLIC as of the effective date of the merger shall be transferred to and vested in RFM, as the surviving corporation, and such excess CWT may be utilized by the latter against its income tax liabilities for 2019 and

succeeding years or may be the subject of a claim for refund or issuance of a tax credit certificate (TCC).

- The excess and unexpired Minimum Corporate Income Tax (MCIT) of the absorbed corporations, IAC, ICC, and CLIC, if any, as of the effective date of the merger shall be carried forward and credited against the normal income tax due of the surviving corporation, RFM, for the three (3) immediately succeeding taxable years pursuant to Section 27 (E) (2) of the Tax Code, as amended. Since the excess and unexpired MCIT of IAC, ICC, and CLIC, is among the rights, privileges, property and/or interest of IAC, ICC, and CLIC, the excess and unexpired MCIT of the latter absorbed corporations shall be transferred to and vested in RFM on the effective date of the merger. Thus, IAC, ICC, and CLIC's excess and unexpired MCIT shall be carried forward and credited against the normal corporate income tax of RFM subject to the three-year-carry-forward period reckoned from the date of payment of IAC, ICC, and CLIC of its MCIT.
- Lastly, the BIR emphasized, however, that the net operating loss carry-over (NOLCO) under Section 34 (D) (3) of the Tax Code, as amended, and as implemented by RR No. 14-2001, of IAC, ICC, and CLIC, if any, is not one of the assets that can be transferred and absorbed by the surviving corporation, RFM, as this privilege or deduction can be availed of by IAC, ICC, and CLIC only. Accordingly, the tax-free merger between IAC, ICC, CLIC and RFM does not cover the NOLCO of the absorbed corporations.

REVENUE REGULATIONS (RR)

RR No. 11-2022 issued on June 30, 2022

- In the context of conducting risk assessments, spontaneous exchange of relevant information on taxpayer-specific rulings provides tax administrations with access to timely information on rulings that have been granted to a foreign-related party or a permanent establishment (PE) of their resident taxpayer. The exchanges are made pursuant to international exchange of information (EOI) agreements, such as Double Taxation Agreements (DTAs), Tax Information Exchange Agreements (TIEA), or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAC). The information must be exchanged with all potential exchange jurisdictions (the country of residence of the immediate parent company and ultimate parent company).
- Under the DTAs, the EOI provision mandates the competent authorities of the contracting states to exchange such information as is necessary for carrying out the provisions of the DTA or of the domestic laws of the Contracting States concerning the taxes to which the DTA applies. The EOI provision of DTAs includes all types of exchanges (request, automatic, or spontaneous).
- The International Tax Affairs Division (ITAD) of the BIR is the responsible office for exchanging taxpayer-specific rulings to the foreign tax authority of the potential exchange jurisdictions on or before the deadline.
- Listed below are rulings and their potential exchange jurisdictions subject to the exchange:

Type of Ruling	Potential Exchange Jurisdictions
Rulings related to a preferential regime	1. Countries of residence of all related parties (a 25% threshold would apply), with which the taxpayer (TP) enters into a transaction for which a preferential treatment is granted or which gives rise to income from related parties benefiting from a preferential treatment (also applies in a PE context); and

	2. Residence country of (a) the ultimate parent company and (b) the immediate parent company
Cross-border unilateral Advance Pricing Arrangements (APAs) and any other cross-border unilateral tax ruling covering transfer pricing or the application of transfer pricing principles	1. Countries of residence of all related parties with whom the TP enters into transactions that are covered by APA or cross-border unilateral tax ruling; and 2. Residence country of (a) the ultimate parent company and (b) the immediate parent company
Cross-border rulings giving a unilateral downward adjustment to the taxpayer's taxable profits in the country giving the ruling	1. Countries of residence of all related parties with whom the TP enters into transactions covered by the ruling; and 2. Residence country of (a) the ultimate parent company and (b) the immediate parent company
PE rulings	1. Country of residence of any related party making payments to the conduit (directly or indirectly; and 2. Residence country of (a) the ultimate parent company and (b) the immediate parent company
Related party conduit rulings	1. Country of residence of any related party making payments to the conduit (directly or indirectly); 2. Country of residence of the ultimate beneficial owner of payments made to the conduit; and 3. To the extent not already covered by item 2, the residence country of (a) the ultimate parent company and (b) the immediate parent company

- The template to be used for the information exchange shall be the one designed by the Forum on Harmful Tax Practices (FHTP) and the Inclusive Framework on base erosion and profit shifting (BEPS) annexed to RR No. 11-2022. The exchange shall be via registered mail or email.
- For past rulings, the exchange of information shall be done as soon as possible after identifying the potential exchange jurisdictions. These rulings pertain only to PE rulings, or rulings concerning the existence or absence of a PE of a foreign enterprise in the Philippines that were issued either (1) on or after January 1, 2015 but before September 1, 2017, or (2) on or after January 1, 2012 but before January 1, 2015, provided they were still in effect as of January 1, 2015.
- If the past ruling does not contain sufficient information to enable identification of all the relevant countries within which the information needs to be exchanged, the "best efforts" approach must be used to identify them.
- On the other hand, for future rulings, the exchange shall be done as soon as possible and no later than three (3) months after the issuance thereof. These rulings refer to rulings issued

after periods provided for past rulings. All requests for information related to future rulings shall be signed by the respective heads of offices.

- The BIR may request other relevant documents from the domestic and foreign TPs to obtain information on the potential exchange jurisdictions, in addition to the usual documents that must accompany every request for a confirmatory ruling.

REVENUE MEMORANDUM CIRCULAR (RMC)

RMC No. 120-2022 issued on August 18, 2022

- This Circular provides additional guidelines and procedures on the manner of payment of penalty relative to violations incurred by Registered Business Enterprises (RBEs) in the Information Technology-Business Process Management (IT-BPM) sector on the conditions prescribed regarding work-from-home (WFH) arrangement for the period April 1, 2022 until September 12, 2022.
- The Fiscal Incentives Regulatory Board (FIRB) issued FIRB Resolution No. 017-22 (Resolution) for RBEs in the IT-BPM sector which allows their respective Investment Promotion Agencies (IPAs) to continue implementing WFH arrangement without adversely affecting their fiscal incentives under the Corporate Recovery and Tax Incentives for Enterprises (CREATE) Act from April 1, 2022 until September 12, 2022 only.
- The number of employees under the WFH arrangement shall not exceed thirty percent (30%) of the total workforce of the RBE. The remaining seventy percent (70%) of the total workforce shall render work or service within the geographical boundaries of the ecozone or freeport being administered by the IPA with which the project/activity is registered.
- The total workforce shall refer to the total employees directly or indirectly engaged in the registered project or activity of the RBE but excludes third-party contractors.
- Non-compliance with the prescribed conditions under the Resolution for at least one day shall result in the suspension of its income tax incentives for the month when the violation took place.
- As penalty, RBEs shall pay the regular income tax of either twenty-five percent (25%) or twenty percent (20%), whichever is applicable, for the aforesaid month. Plus, violations committed beyond September 13, 2022 may subject the RBEs to applicable taxes.

COURT DECISIONS

SUPREME COURT DECISIONS

Fritz Bryn Anthony M. Delos Santos vs. CIR
G.R. No. 222548 promulgated on June 22, 2022 (Uploaded on July 29, 2022)

(A condominium corporation is not engaged in trade or business. Association dues are not intended for profit, but for the maintenance of the condominium project, hence, not subject to VAT.)

Facts:

On April 29, 2013, Delos Santos became a resident of Makati City. He lived at his father's condominium unit where he pays condominium association dues to Classica Tower Condominium Association, Inc. (Classica). However, on October 31, 2012, CIR Jacinto-Henares of the BIR issued RMC No. 65-2012 imposing value-added tax (VAT) on condominium owners' association dues. Thereafter, Classica informed its unit owners and tenants that its Board of Trustees had decided that it will no longer shoulder the VAT on association dues.

Thus, Delos Santos questioned the constitutionality of RMC No. 65-2012. He contended that Section 105 of the Tax Code does not apply to condominium owners' or tenants' payment of association dues. In paying their association dues, they did not buy, transfer, or lease any goods, property, or services from the condominium corporation. On the other hand, the CIR asserted the Circular's validity. The management of a condominium was a beneficial service, and payment in exchange for these services was included in the condominium corporation's gross income.

Issue:

Can the BIR impose VAT on the association dues of condominium owners?

Ruling:

No.

RMC No. 65-2012 is invalid. A condominium corporation is not engaged in trade or business. Association dues are not intended for profit, but for the maintenance of the condominium project. The collection of association dues, membership fees, and other charges is purely for the benefit of the condominium owners.

The CIR gravely abused its discretion in issuing the Circular and declaring that association dues, membership fees, and other assessments or charges are subject to income tax, VAT, and withholding tax. The Circular unduly expanded and modified several provisions of the Tax Code. Sections l05 to 108 of the Tax Code impose VAT on transactions involving sale, barter, or exchange of goods, rendition of services, and the use or lease of properties. However, condominium association dues, membership fees, and other charges did not arise from these transactions. The very nature of a condominium corporation negated the application of the Tax Code provisions on VAT.

Light Rail Transit Authority vs. BIR

G.R. No. 231238 promulgated on June 20, 2022 (Uploaded on July 22, 2022)

(The PCL, the Final Notice Before Seizure, the Warrant of Distraint and/or Levy, Letter reconsidering the issuance of the WDL, and the Letter dropping the request for reconsideration of the WDL cannot be deemed as the final decisions on the appeal by the CIR. These remained tentative given the pendency of the LRTA's appeal with the CIR.)

Facts:

Light Rail Transit Authority (LRTA) was assessed by the BIR for deficiency taxes for the taxable year 2003.

A Preliminary Assessment Notice (PAN) and Final Assessment Notice (FAN) was subsequently issued by the Regional Director. The FAN was timely protested by LRTA. On April 1, 2011, the Regional Director issued the Final Decision on Disputed Assessment (FDDA) which was received by the LRTA on April 26, 2011. The LRTA appealed the FDDA to the CIR.

Pending LRTA's appeal to the CIR, a Preliminary Collection Letter (PLC), Final Notice Before Seizure (FNBS), Warrant of Distraint and/or Levy (WDL), Letter reconsidering the WDL, and another Letter dropping the request for reconsideration of the WDL were issued against LRTA.

On August 12, 2014, LRTA received a letter dated June 30, 2014 from the Regional Director (acting on the appeal to the CIR), declaring the FDDA final, executory and demandable. On September 11, 2014, the Court of Tax Appeals (CTA) Division denied the Petition for

Review filed by LRTA on the ground that it had no jurisdiction over the case by ruling that the FNBS (issued on November 23, 2011) should be the decision properly appealable to the CTA, it being the final act regarding the request for reconsideration.

The CTA *En Banc,* in denying the LRTA's Petition for Review filed before it, ruled that the 30-day period for filing a Petition for Review must be reckoned from the date when LRTA received a copy of the FDDA and not when LRTA received the decision from the CIR since the elevation of the protest to the CIR under Section 3.1.5. of RR No. 12-99 does not extend the 180-day period for the CIR to decide a protest under Section 228 of the Tax Code.

Issue:

Was the Petition for Review filed with the CTA timely filed?

Ruling:

Yes.

Pursuant to the case of *Lascona Land,* in a case of inaction on the protest, the taxpayer may either:

1. file a petition for review with the CTA within 30 days after the expiration of the 180-day period fixed by law for the CIR to act on the disputed assessment; or
2. await the final decision of the CIR on the disputed assessments and appeal such final decision to the CTA within 30 days after receipt of a copy of such decision. This is true even if the 180-day period for the CIR to act on the disputed assessment had already expired.

These options are mutually exclusive, and resort to one bars the application of the other.

There was inaction on the part of the BIR on LRTA's appeal of the FDDA. In this case, the LRTA genuinely chose to await the CIR's decision on its appeal. The FDDA cannot be considered as the decision appealable to the CTA. Subsection 3.1.5 of RR No. 12-99 is clear that if the protest is elevated to the CIR, "the latter's decision shall not be considered final, executory and demandable, in which case, the protest shall be decided by the CIR." The FDDA has been timely elevated to the CIR; hence, it has never become final, executory, and demandable.

Moreover, neither can the 30-day period for filing a Petition for Review be reckoned from LRTA's receipt of any of the following issuances: the PLC, the FNBS, the WDL, the letter reconsidering the issuance of the WDL, and the letter dropping the request for reconsideration of the WDL. Like the FDDA, all of these were not final decisions on the appeal by the CIR. They remained tentative given the pendency of the LRTA's appeal with the CIR. More importantly, all of these were issued on the premise that "delinquent taxes" exist.

CTA EN BANC DECISIONS

Maxima Machineries vs. CIR
CTA EB No. 2485 promulgated on July 25, 2022

(To be considered as an NRFC doing business outside the Philippines, each entity must be supported, at the very least, by both: (1) a SEC Certification of Non-Registration of Corporation /Partnership, and (2) proof of registration/incorporation in a foreign country)

Facts:

On December 27, 2017, Maxima Machineries, Inc. (Maxima) filed an administrative claim for tax credit/refund with the BIR for its excess input VAT. A significant portion of the refund for zero-rated sales of service came from its sale of services to Marubeni Corporation – Japan (Marubeni). Subsequently, the BIR denied the administrative claim of Maxima. Aggrieved, Maxima filed a Petition for Review before the CTA Division, which the latter denied.

On appeal, Maxima argued before the CTA *En Banc* that the CTA Division erred in not ruling that Marubeni cannot be considered as a non-resident foreign corporation (NRFC) for purposes of claiming zero-rated sales/services merely because there is a company registered with the SEC with the name Marubeni Corporation, which is the former's Philippine Branch.

Maxima invoked the *Marubeni* case in arguing that for excess input VAT refund purposes, a foreign corporation, albeit maintaining a branch office in the Philippines, may be considered as an NRFC if transactions are done directly with the foreign corporation and independently of its Philippine branch.

Issues:

1. Is the sale of services by Maxima to Marubeni zero-rated?
2. Can a foreign corporation maintaining a branch office in the Philippines be considered as an NRFC?

Ruling:

1. No.

   The indent commissions earned and received by the Maxima failed to qualify for VAT zero-rating under Section 108(B)(2) of the Tax Code, as amended.

   To be considered as an NRFC doing business outside the Philippines, each entity must be supported, at the very least, by both: (1) a SEC Certification of Non-Registration of Corporation /Partnership; and (2) proof of registration/incorporation in a foreign country.

   In this case, Maxima submitted a SEC Certificate of Non-Registration of Company stating that there are no SEC records showing the registration of Marubeni. However, Maxima failed to present proof of registration or foreign incorporation of Marubeni. Hence, Marubeni cannot be considered as NRFC doing business outside the Philippines.

2. No.

   For VAT purposes, sales to a foreign corporation that maintains a branch office in the Philippines, regardless of the latter's participation in the transaction, would suffice to remove the transaction within the ambit of Section 108(B)(2) of the Tax Code, as amended. The foreign corporation is deemed to be doing business in the Philippines through its branch office, thus, the services rendered to it would not qualify for VAT zero-rating.

   In this case, Marubeni's establishment of a Philippine Branch Office is "a continuity of commercial dealings and arrangements." Hence, a foreign corporation with a branch office is deemed to be doing business in the Philippines. It cannot be classified as a NRFC for purposes of taxation.

<u>CIR vs. Geniographics Inc.</u>
CTA EB No. 2357 promulgated on August 8, 2022

(The CTA has the power to decide issues not even raised by the parties in their respective pleadings or memoranda, especially if the issue concerns the authority of the revenue officers to conduct audit/investigation of a taxpayer's books of accounts and other accounting records.)

Facts:

On December 4, 2014, Geniographics was served with a Letter Notice (LN). In 2015, Geniographics was served with a PAN together with Details of Discrepancies on the alleged deficiency taxes for the taxable year 2012. Later, Geniographics was served with FAN. Thereafter, Geniographics received a FDDA dated September 13, 2017. In the same year, a petition for review was filed with the CTA Division

The CTA Division granted the petition for review on the ground that only LN was served on Geniographics, and not a Letter of Authority (LOA).

When the case reached the CTA *En Banc*, the CIR argued that Geniographics cannot raise the issue of lack of LOA for the first time on appeal when it failed to raise such issue at the administrative level.

Issue:

Can the taxpayer raise the issue of lack of LOA for the first time on appeal without raising such issue at the administrative level?

Ruling:

Yes.

Basic is the rule that before revenue officers can issue assessment notices, they should first be armed with a LOA. A LOA is an instrument of due process for the protection of taxpayers. It guarantees that tax agents will act only within the authority given them in examining a taxpayer. A mere LN cannot ensure the observance of this due process guarantee. An LN serves as a mere discrepancy notice to the taxpayer similar to a Notice of Informal Conference. It does not serve as a replacement to a LOA.

As to the issue on raising the issue of lack of LOA for the first time on appeal, the CTA *En Banc* ruled that the CTA has the power to decide issues not even raised by the parties in their respective pleadings or memoranda, especially if the issue concerns the authority of the revenue officers to conduct audit/investigation of a taxpayer's books of accounts and other accounting records. Hence, there is no reason why the same issue, while not raised during the administrative proceedings, is disallowed to be part of a taxpayer's appeal before the CTA *En Banc*.

<u>CIR vs. Rural Bank of Bacnotan</u>
CTA EB No. 2436 promulgated on July 28, 2022

(In administrative proceedings, "due process" means an opportunity to explain one's side, or an opportunity to seek a reconsideration of the action or ruling complained of.)

Facts:

The Rural Bank of Bacnotan (the “Bank”) received a LOA authorizing the examination of its books of accounts and other accounting records for all internal revenue taxes for taxable year 2009. The Bank executed a Waiver of the Defense of Prescription under the Statute of

Limitations (First Waiver) signed by its President/Manager Nicolas T. Flores (Flores). On December 3, 2014, the Bank received from the PAN on its alleged deficiency taxes.

The Bank sent a letter dated December 12, 2014 in response to the PAN contesting the proposed imposition of internal revenue tax liabilities and increments, which was received by the BIR on December 15, 2014. Later, the Bank executed another Waiver of the Defense of Prescription under the Statute of Limitations (Second Waiver). Subsequently, on January 6, 2015, the Bank received a Formal Letter of Demand (FLD) with attached Assessment Notices dated December 22, 2014, reiterating the assessments on deficiency taxes, to which the Bank filed its protest.

The CTA Division found the Waivers executed between the parties to be defective for failing to indicate the exact amount of the tax due assessed or collected. Thus, the period for a regular assessment under Section 203 of the Tax Code, as amended, was deemed applicable. Hence, the assessment has already prescribed.

Issues:

1. Were the Waivers executed by Bank defective?
2. Did the BIR violate the right of the Bank to due process?

Ruling:

1. No.

   The Bank is estopped from questioning the validity of the waivers.

   The Bank cannot raise defects that were caused by it. In this case, the Bank alleged that Flores, its President/Manager, was not authorized to sign the same on its behalf. It must be emphasized that the signatory to the subject Waivers was none other than the Bank's own President. The records show that Flores not only executed both Waivers, but he also received the PAN and FLD/FAN on the Bank's behalf. Likewise, Flores has signed both protests to the PAN and FLD/FAN. Therefore, it becomes highly doubtful that Flores lacked the authority to sign the Waivers since he was the Bank's representative in every vital exchange between it and the BIR.

   Moreover, the Bank made no mention of either the First Waiver's or the Second Waiver's defects in its protest to the FLD/FAN. The primary responsibility for the proper preparation of the waiver rests with the taxpayer; hence, the CIR may not be blamed for any defects in the execution thereof. The Waivers herein are valid on the basis of equity as both parties shared responsibility for their infirmities. Accordingly, the Bank, as a party to the faulty Waivers, is precluded from questioning the validity thereof on the basis of such defects for which it is partly to blame.

2. Yes.

   In this case, it must be pointed out that in the BIR's letter dated December 15, 2014, it not only acknowledged receipt of the Bank's protest, but it also already indicated therein that it could not act favorably on the latter's protest. Moreover, the Details of Discrepancies attached to the FLD/FAN was a literal reiteration of the Details of Discrepancies attached to PAN which the Bank had protested. There are no indications in the FLD/FAN that would show that the Bank's evidence attached to its Protest to the PAN were even considered in arriving at the assessed computation of total tax liabilities.

   In administrative proceedings, "due process" means an opportunity to explain one's side, or an opportunity to seek a reconsideration of the action or ruling complained of. However, in

this case, the Details of Discrepancies in the FLD/FAN are but echoes of those previously included in the PAN. It did not, in any way, make reference and neither did it refute the Bank's arguments in its protest to the PAN. As the records clearly evince, in its protest to the FLD/FAN, the Bank raised the same exact issue, *i.e.*, the BIR's failure to consider its arguments or the documents it attached to its protest to the PAN. However, such issue fell on deaf ears when its subsequent protest to the FLD/FAN was not acted upon. Therefore, the assessment was wholly null and void for violation of the Bank's right to due process.

CIR vs. Autostrada Motore, Inc.
CTA EB No. 2375 promulgated on July 21, 2022

(An audit and examination of a taxpayers' books and accounting records, to be valid, must be based on a valid LOA. The purpose of a Mission Order is different from an LOA. A Mission Order is issued to authorize the surveillance pursuant to Section 6(C) of the Tax Code, as amended, not the audit and assessment, of the taxpayer.)

Facts:

Autostrada Motore, Inc. (Autostrada) received a copy of Mission Order signed by Nestor G. Valeroso, then OIC-Assistant Commissioner of the Large Taxpayers Service, which directed Group Supervisor Emilie C. Peig and Revenue Officers Marianne P. Pascual and Emmanuel G. Viardo to validate and verify Autostrada's Importer's Sworn Statement and inspect its books of accounts pertaining to its importation/sales of automobiles, pursuant to Section 15 of RR No. 25-2003 for the period from 2011 to 2013.

Autostrada received PAN from the BIR informing it that through the validation and verification conducted in compliance with the Mission Order, discrepancies were found in its declared taxable base for excise tax purposes and that was found liable for deficiency taxes. Autostrada then received the FAN and thereafter the FDDA, to whch Autostrada filed its protest. Due to the denial of the BIR of its protest, Autostrada filed a Petition for Review before the CTA claiming that the assessment is void in the absence of a LOA.

The CIR argued before the CTA that, first, an LOA is not necessary to conduct the assessment in the present case as the audit was conducted by the Office of the CIR. On the other hand, Autostrada claimed that Section 13 of RR No. 25-2003 merely provides that the BIR may verify the contents of the Importer's Sworn Statement and other documents pertaining to Autostrada's importation of automobiles. Nowhere therein states that the issuance of an LOA may be dispensed with.

Issue:

Do the tax agents who conducted the audit to Autostrada's books lack authority?

Ruling:

Yes.

To be valid, an audit and examination of a taxpayers' books and accounting records must be based on a valid LOA. The purpose of a Mission Order is different from an LOA. A Mission Order is issued to authorize the surveillance pursuant to Section 6(C) of the Tax Code, as amended, not the audit and assessment, of the taxpayer. The allowable acts covered by a Mission Order include the tax agent's observation/ surveillance of the taxpayer's business operations, verification of specific documents, and his/her determination of whether the taxpayer complies with the pertinent tax laws and regulations without conducting a full-blown audit.

Records showed that the Mission Order is limited to the exercise of the CIR's verification and surveillance powers provided in Section 6(C) of the Tax Code, as amended. In fact, the CIR's own issuance, Revenue Memorandum Order (RMO) No. 003-2009, provides that if the result of the surveillance made indicates that the veracity of the taxpayer's accounting records is not reliable, an LOA must still be issued in order to cause the audit and assessment of the taxpayer.

Thus, the revenue officers involved in this case have not been authorized by virtue of an LOA to conduct an examination and inspection of Autostrada's books of accounts, their authority having emanated from a Mission Order, the assessments resulting therefrom are inescapably void.

Smart Communications, Inc. v. Arreza and Makati City
CTA EB No. 2386 promulgated on August 15, 2022

(The City Treasurer's power to require the submission of documents is necessary to enforce Makati local tax laws by examination of books of accounts and pertinent records to determine and ascertain the correct tax liability of any person.)

Facts:

Smart Communications, Inc (Smart) filed before RTC-Makati a Petition for Review, seeking the nullification of Makati City's Notice of Assessment (NOA) for deficiency franchise taxes, fees, and charges for taxable years (TYs) 2012 to 2015. Makati City filed before the RTC-Makati a Motion for Production or Inspection of Documents (the "Motion") to compel Smart to produce the certain documents, the Motion was granted by the RTC-Makati.

Thereafter, Smart filed a Petition for Certiorari (With Application for the Issuance of an Ex Parte Temporary Restraining Order [TRO] and/ or Writ of Preliminary Injunction) before the CTA Division, seeking the annulment of the decision of the RTC-Makati, which was denied by the CTA Division for lack of merit.

Smart alleged that the CTA Division erred in holding that the RTC-Makati did not act with grave abuse of discretion in granting Makati City's Motion. Smart argued that the allowance of the production or inspection of documents is violative of the Local Government Code (LGC) and by Revised Makati Revenue Code (RMRC) for it equates to another audit or examination of its books of account for the same taxable period, as well as the conduct of an examination without a valid LOA.

Issues:

1. Should there be deficiency franchise taxes due despite payment of franchise taxes by Smart to Makati City for TYs 2012 to 2015 based on gross receipts realized from Makati City?
2. Is the granting of the Motion tantamount to a second audit of its books of accounts and records for the same TYs, as well as an audit without any LOA violative of the LGC?

Ruling:

1. Yes.

   A self-assessing system governs Philippine internal revenue taxes. Self-assessed tax is defined as a tax that the taxpayer himself assesses or computes and pays to the taxing authority. In enforcing compliance with local government taxes regulations, Makati City cannot accept the self-assessment of Smart as a true and accurate declaration of its income. Makati City has the power to issue an LOA for the examination of books, accounts, records in order to ascertain the correctness of the amount paid.

The City Treasurer's power to require the submission of documents is necessary to enforce Makati local tax laws by examination of books of accounts and pertinent records to determine and ascertain the correct tax liability of any person. Hence, when Smart filed a case assailing the deficiency taxes under the NOA, Makati City had every right to assert its power to examine the records of petitioner for the purpose of ascertainment of the correct tax liabilities due.

2. No.

   In requiring the production of documents, RTC-Makati, being the court of competent jurisdiction, is not making an assessment or conducting an audit; rather, it is exercising the power of judicial review as vested in Section 1 of Article VIII of the 1987 Constitution.

   The RTC, as a trial court, can decide on both factual and purely legal issues. RTC-Makati, as a court of competent jurisdiction, has the authority to look into the correctness of the local treasurer's assessment against Smart and to require the production of material and relevant evidence necessary for the determination of the factual issues involved in Smart's disputed assessment. In reviewing the City treasurer's assessment, RTC-Makati has to make its determination of the Smart's tax liabilities, and may require the production of documents to aid its resolution of the principal issue of the correct amount of deficiency local franchise taxes to be paid.

CTA DIVISION DECISIONS

Gamma Gray Marketing vs. BOC
CTA Case No. 9855 promulgated on July 27, 2022

(The lack of BIR-issued Permit to Operate as an importer of automobiles constitutes sufficient ground to warrant the seizure and forfeiture.)

(Section 1400 of the CMTA provides that a discrepancy in duty and tax to be paid between what is legally determined and what is declared amounting to more than 30% shall constitute a prima facie evidence of fraud.)

Facts:

Gamma Gray Marketing (GGM) is a duly registered sole proprietorship engaged in the importation of various goods and commodities, including vehicles. In 2017 and 2018, GGM imported several motor vehicles. Upon arrival of the subject automobiles, GGM immediately filed the required corresponding Import Entries/Single Administrative Documents (SADs) together with other documents. Thereafter, the BOC officers seized the subject imported motor vehicles and filed the respective Reports of Seizure for there exists a probable cause of undervaluation or violation of Section 1400 of the Customs Modernization Tariff Act (CMTA) and GGM's lack of Authority to Release Imported Goods (ATRIG), Importer's Sworn Statement (ISS) and Permit to Operate to engage in the business of importing automobiles.

The District Collector subjected all these automobile units to forfeiture in favor of the government. GGM appealed to the BOC. However, the BOC denied the appeal of GGM. GGM then elevated the case to the CTA.

GGM argues that there is no specific period within which to secure a BIR Permit to Operate. GGM asserts that the only requirement is that such must be secured prior to release of the imported goods. Further, GGM argues that there can be no underdeclaration

of importations because the same were properly supported by commercial invoices issued by foreign exporters and BOC failed to prove that such invoices are false.

Issues:

1. Is Permit to Operate a condition sine qua non before engaging in business as an importer of automobiles?
2. Was there a probable cause for violation of Section 1400 of the CMTA?

Ruling:

1. Yes.

   RR No. 25-2003 provides that, for excise tax purposes, any person who desires to engage in business as an importer of automobiles shall, before the start of the business operations be required to register with the BIR Office having jurisdiction over his intended place of business and/or place of assembly/production or warehouse. Further, RMO No. 35-2002 states that the BIR shall not accept an application for Authority to Release Imported Goods if the importer-applicant does not have a Permit to Operate.

   Here, GGM's act of importing the subject motor vehicles (intended for sale in the Philippines) without securing the requisite BIR Permit to Operate as Importer of Automobiles is contrary to law and existing rules and regulations, and thus, on this basis alone, warrants the seizure and forfeiture.

2. Yes.

   Section 700, in relation to 701, essentially provides that the dutiable value of imported articles shall be based on the valuation methods sanctioned by the CMTA, in successive order, with the Transaction Value System or Method One as the first among the six (6) and takes precedence over the other methods. This follows the Word Trade Organization (WTO) Customs Valuation Agreement, formally known as Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, which states that the primary basis for customs value is the transaction value.

   Under the Transaction Value System or Method One, the transaction value shall be the price actually paid or payable for the goods when sold for export to the Philippines.

   Here, as confirmed from the records and stipulated by the parties, the BOC used Import and Assessment Service (IAS) reference values, instead of the transaction values, in assessing the import duties and taxes of petitioner's imported motor vehicles. In justifying the departure from the Transaction Value System or Method One to the Transaction Value of Identical Goods or Method Two, the BOC had reasonable doubt on the truthfulness or accuracy of the shipments' declared values because: (1) GGM did not submit the required ATRIG and ISS, thereby, precluding BOC from determining the excise or ad valorem taxes due on the imported motor vehicles with accuracy; and, (2) the documents filed in support of the subject shipments were allegedly replete with inaccurate and dubious information.

IEIRD No.		Imported Motor Vehicle	As Declared	IAS Reference Value
1	C-278724	2 Units Brand New 2017 Toyota Land Cruiser	$34,150.00/unit	$42,151.23/unit
2	C-278740	2 Units Brand New 2017 Toyota Land Cruiser	$34,150.00/unit	$42,151.23/unit
3	C-278805	2 Units Brand New 2017 Toyota Land Cruiser	$34,150.00/unit	$42,151.23/unit
4	C-278798	2 Units Brand New 2017 Toyota Land Cruiser	$34,150.00/unit	$42,151.23/unit
5	C-27808	2 Units Brand New 2017 Toyota Land Cruiser	$34,150.00/unit	$42,151.23/unit
6	C-279441	2 Units Brand New 2017 Toyota Land Cruiser	$34,150.00/unit	$42,151.23/unit
7	C-279866	1 Unit Range Rover Evoque	$29,964.00/unit	$32,578.00/unit
		1 Unit McLaren 720S Coupe	$83,910.00/unit	$314,278.80/unit
8	C-2809-6717	2 Units Brand New 2017 Range Rover	$29,964.00/unit	$51,000.00/unit
9	C-2809-717	2 Units Brand New 2017 Chevrolet Camaro	$20,333.60/unit	$22,076.00/unit

Section 1400 of the CMTA provides that there is undervaluation when: (a) the declared value fails to disclose in full the price actually paid or payable or any dutiable adjustment to the price actually paid or payable; or (b) when an incorrect valuation method is used or the valuation rules are not properly observed, resulting in a discrepancy in duty and tax to be paid between what is legally determined as the correct value against the declared value.

Section 1400 of the CMTA further provides that a discrepancy in duty and tax to be paid between what is legally determined and what is declared amounting to more than 30% shall constitute a *prima facie* evidence of fraud. GGM's declared values for the subject imported motor vehicles are lower than the IAS reference values determined using the Transaction Value of Identical Goods or Method Two. In particular, gross undervaluation is manifest based on the percentage of discrepancy. For instance, for the McLaren 720S Coupe (included in #7), the percentage of discrepancy is at 73.30% and for the brand new 2017 Range Rover (included in #8) at 41.25%.

With the foregoing, the CTA ruled that there exists a probable cause for violation of Section 1400 of the CMTA because of the intent to under-declare the subject shipments' value and the fact that GGM imported the same without the requisite BIR Permit to Operate as Importer of Automobiles.

Monacat Trading vs. BOC
CTA Case No. 9851 promulgated on August 4, 2022

(*The requisites for the forfeiture of goods under the TCCP, as amended, are: (a) the wrongful making by the owner, importer, exporter or consignee of any declaration or affidavit, or the wrongful making or delivery by the same person of any invoice, letter or paper – all touching on the importation or exportation of merchandise; (b) the falsity of such declaration, affidavit, invoice, letter or paper; and (c) an intention on the part of the importer/consignee to evade the payment of the duties due.*)

Facts:

In July 2015, several shipments of vehicles consigned to Monacat Trading (Monacat) arrived at the Port of Batangas (POB). Custom officers processed the subject vehicles and noted in the Import Entry and Internal Revenue Declarations (IERDs) that these were under tentative liquidation as approved, and pending the submission of the issuance of the Import and Assessment Service (IAS) clearance, ESS Motor Vehicle Monitoring and Clearance Office (EMVMCO) clearance and Authority to Release Imported Goods (ATRIG) from the BIR.

The BOC Deputy Commissioner issued Alert Orders against the subject motor vehicles for alleged violation of Section 2503, in relation to Section 2530, of Presidential Decree (PD) No. 1464, or the Tariff Customs and Code of the Philippines (TCCP), as amended (the prevailing law at the time).

After the conduct of the spot check or 100% physical examination of the subject vehicles, assigned Officers-on-Case recommended the issuance of Warrants of Seizure and Detention (WSDs) against the subject vehicles by reason of misdeclaration and gross undervaluation, citing Section 2503, in relation to Section 2530, of the TCCP, as amended. Consequently, POB Acting District Collector issued WSDs against the subject imported motor vehicles.

In 2017, a new POB OIC-District Collector rendered a Consolidated Decision, ordering the quashal of the WSDs issued against the subject vehicles and the continuous processing of the import entries upon payment of additional duties and taxes.

The Commissioner of Customs (COC) then rendered the assailed Decision, which reversed and set aside the POB OIC-District Collector's Consolidated Decision, and ordered the forfeiture of the subject vehicles in favor of the government, to be disposed of in accordance with customs laws, rules and regulations.

Issues:

1. Did probable cause exist for the seizure and/or forfeiture of the luxury vehicles?
2. Were the subject vehicles validly seized and/or forfeited pursuant to the TCCP?
3. Is Section 1117 of the CMTA for the issuance of an Order of Release applicable in this case?

Ruling:

1. Yes.

   There existed probable cause for the seizure and/or forfeiture of the luxury vehicles because Monacat deliberately failed to disclose the correct model and/or series of the subject vehicles in the IEIRDs and even after being notified of the BOC officials' findings, Monacat still failed to satisfactorily explain the discrepancies. There was also undervaluation on the subject vehicles.

   The requisites for the forfeiture of goods under the TCCP, as amended, are: (a) the wrongful making by the owner, importer, exporter or consignee of any declaration or affidavit, or the wrongful making or delivery by the same person of any invoice, letter or paper – all touching on the importation or exportation of merchandise; (b) the falsity of such declaration, affidavit, invoice, letter or paper; and (c) an intention on the part of the importer/consignee to evade the payment of the duties due.

   There were discrepancies in 7 IERDs, as regards the vehicles' model and/or series, as compared to the result of the spot check. Under Customs Administrative Order (CAO) No. 006-93, which clarified the word "misdeclared" and "undeclared" in Section 2503 of the TCCP, as amended, the word "misdeclared" pertains to articles that when found will certainly not fall under the same tariff heading as those declared in the import entry; thus, can be *ipso facto* forfeited in favor of the government. Such definition does not limit the meaning of misdeclaration to inaccurate declarations in the entry that will yield an incorrect tariff classification, which was Monacat's position. The term "misdeclaration" was subsequently defined under the CMTA and CAO No. 01-2019.

   The subject vehicles were also undervalued as the models and/or series thereof, as found, were higher and considerably more valuable (with differences ranging from 33% to as high as 73%) compared to what was declared in the IEIRDs. Section 2503 of the TCCP, as amended,

provides that an undervaluation, misdeclaration in weight, measurement or quantity of more than 30% between the value, weight, measurement or quantity declared in the entry, and the actual value, weight, quantity, or measurement shall constitute *prima facie* evidence of fraud penalized under Section 2530 of the TCCP, as amended.

2. Yes.

   Based on Section 2530(l)(3)(4)(5) of the TCCP, as amended, the subject vehicles must be forfeited in favor of the government for the following reasons: (1) they were imported in the Philippine territory through false declarations in the IEIRDs, and (2) they were undervalued per IEIRDs by more than 30% of the actual value as found during the physical inspection.

3. No.

   For failure to decide on appeal from the decision of the District Collector within 48 hours, or within 24 hours in case of perishable goods, Monacat is of the position that the subject vehicles should be "deemed release" pursuant to Section 1117 of the CMTA. The second sentence of the said section is applicable only when the District Collector determines that there is no probable cause for the issuance of a warrant of seizure; hence, the issuance of an order of release of the imported goods. When the District Collector issues an order of release, the COC has a limited period to review the said order; otherwise, the imported goods shall be deemed released. In this case, the Consolidated Decision of the POB OIC-District Collector was not an order of release, but a mere order of quashal of the WSDs and payment of additional duties, taxes, and surcharges.

TKH Marketing vs. BOC, BIR, and DOF
CTA Case No. 9911 promulgated on August 8, 2022

(A protest with the District Collector cannot be treated as the administrative claim for refund of VAT, since an application for refund of internal revenue taxes lie within the jurisdiction of the CIR, and not with the Commissioner of Customs, whose jurisdiction for refund relate to customs duties and fees under the customs law.)

Facts:

TKH Marketing (TKH), as the consignee, imported floor tiles. TKH filed import entry for the subject shipment with a computation of taxes based on the "item customs value" or "dutiable value". However, upon examination, the customs appraiser found a discrepancy between the subject shipment's declared unit value, or USD0.17 /kg, and the value stated in the VRIS-OCOM Reference Value No. 33-2013, or USD0.50/kg. As such, the customs appraiser adjusted the twelve percent (12%) VAT of the shipment based on the latter value, or USD0.50/kg.

On April 8, 2014, TKH paid under protest taxes and fees of the subject shipment. On April 15, 2014, TKH filed a protest with the District Collector of Manila, maintaining that the VAT on the shipment should be based on the invoice value with a request for refund of its excess VAT payment. The District Collector granted the protest and found that TKH is entitled to a refund. On February 5, 2015, on automatic review, the Commissioner of Customs (COC) affirmed the District Collector. On June 28, 2016, on automatic review, the Secretary of Finance (SOF) sustained the decision of the COC and the District Collector.

On November 21, 2016, the COC endorsed to the CIR the claim of refund of TKH. However, on November 7, 2017 the CIR said he could no longer entertain TKH's claim for refund because the two-year prescriptive period under the Tax Code, as amended, has already lapsed. Hence, TKH filed a petition for review before the CTA.

Issue:

Has TKH's claim for refund already prescribed?

Ruling:

Yes.

Under Section 204 of the Tax Code, an administrative claim for refund or credit must be filed within two years from payment of the tax. Conversely, Section 229 of the Tax Code states that an administrative claim must be filed first before the filing of the judicial claim and the latter must be filed within two years after payment of the tax sought to be refunded.

The burden of collecting the subject VAT remains with the CIR. As such, it is the CIR who has the authority to decide on the refund claim of TKH pursuant to Section 4 of the Tax Code.

Here, TKH failed to observe the pertinent provisions of law dealing with the refund of internal revenue taxes. TKH had two (2) years from the date of payment of the VAT, or specifically, from April 8, 2014, to file a claim for refund, both administrative (i.e., before the CIR) and judicial (i.e., before the CTA). However, no such filing was made to the CIR. The Protest with the District Collector, Port of Manila filed on April 15, 2014 could not be treated as the administrative claim for refund of VAT since an application for refund of internal revenue taxes lie within the jurisdiction of the CIR and not with the COC whose jurisdiction for refund relate to customs duties and fees under the customs law.

Even granting the said Protest equated as an administrative claim for refund of VAT, the same is still of no moment because the judicial claim was lodged with the CTA on August 22, 2018, beyond the two-year prescriptive period which ended on April 8, 2016. Clearly, TKH has failed to fulfill the requirements of the law in claiming a VAT refund.

SECURITIES AND EXCHANGE COMMISSION CASES

Katuwang Poultry Chicken Egg Producing, Co.

SEC No. PG202106004, For revocation of Certificate of Partnership promulgated on August 1, 2022

(The elements of an investment contract are as follows: a contract, transaction or scheme; an investment of money; a common enterprise; expectation of profits; and profits arise primarily from the entrepreneurial and managerial efforts of others.)

Facts:

Katuwang Poultry Chicken Egg Producing, Co. ("Katuwang Poultry) is a partnership registered with the SEC with a business purpose stated in their Articles of Partnership: to operate, manage and engage in the business of chicken egg production including incidental activities related thereto.

Several emails were received by the SEC inquiring on the authority of Katuwang Poultry to solicit money from the public. Investigation showed that Katuwang Poultry has been offering investment contracts through its Facebook account. These investment contracts promise potential profit ranging from 48% up to 120% in only six (6) months. It appears from its posts that the bigger the initial investment or capital given to the partnership, the bigger the profit will be. The SEC's probe revealed that Katuwang Poultry has no secondary license to engage in such investment solicitation.

Issue:

Is the investment scheme offered by Katuwang Poultry qualifies as an investment contract contemplated in Section 8 of the Securities Regulation Code (SRC)?

Ruling:

Yes.

Jurisprudence cites the so-called Howey Test which provides for the elements of an investment contract: a contract, transaction or scheme; an investment of money; a common enterprise; expectation of profits; and profits arise primarily from the entrepreneurial and managerial efforts of others.

Here, the investment scheme of Katuwang Poultry qualifies as an investment contract since the investors place a minimum amount of money depending on the type of package package availed of then wait for the profits to be yielded through the efforts of Katuwang Poultry. The investment contracts being in the nature of securities under the SRC, Katuwang Poultry violated Section 8 of the SRC which require prior registration of securities before being sold or offered to the general public.

SECURITIES AND EXCHANGE COMMISSION ISSUANCES

SEC Opinion No. 22-09 issued on June 28, 2022

- In this Opinion, the SEC addressed the query of Prime Infrastructure Capital Inc. (Prime).
- Prime is a domestic corporation in which all or substantially all of its outstanding capital stock which are entitled to vote are owned by Philippine nationals. New Philippine Corporation (NewCo) is a proposed holding company to be formed by Prime and another domestic corporation which is also a Philippine national. NewCo's paid-in capital will not be less than US$200,000.
- Prime inquires whether these two acts are allowed: first, for NewCo to elect a foreigner as its president and Chief Executive Officer; and second, for NewCo to nominate a foreigner to the Board of Directors of its subsidiaries that are engaged in power generation from renewable energy sources and supply of electricity, and which own land.
- As to the first act, the SEC opined that since NewCo's paid-in capital will not be less than US$200,000, a foreigner may be elected as a director and president of NewCo, a holding company, since the nationality restriction on domestic enterprises does not apply.
- It was previously opined by the SEC that a holding company is a domestic market enterprise. Micro and small domestic market enterprises with paid-in equity capital of less than the equivalent of US$200,0000 are reserved to Philippine nationals at 60%, the maximum allowable foreign equity being limited to 40%.
- As to the second act, foreigners may be elected as directors in the subsidiary companies engaged in a partly-nationalized activity, provided that the number of foreign directors shall not exceed the allowable proportion of foreign participation in the corporation's capital.
- The 11th Foreign Investment Negative List limits foreign participation in the exploration, development and utilization of natural resources to a maximum of 40% equity. Moreover, while the Anti-Dummy Law prohibits the employment of an alien as an officer who shall intervene in the management, operation, administration or control in a corporation engaged in wholly or partially nationalized activity, it allows foreigners to be

elected as directors in proportion to their allowable participation in the corporation's capital.

SEC Opinion No. 22-10 issued on August 15, 2022

- Pryce Corporation (Pryce) is a property holding and real estate development company duly registered with the SEC. It is engaged in the development and operation of memorial parks.
- Pryce is planning to put up a Real Estate Investment Trust ("REIT") company under the name "Pryce REIT" pursuant to Republic Act No. 9856 or the REIT Act. Thereafter, Pryce will lease to Pryce REIT some of its real properties used in the operation of its memorial gardens business. Alternatively, Pryce will convey to Pryce REIT, either through sale or assignment, such real properties.
- Pryce generates income from the operation of memorial parks: a) sale of burial lots; b) sale of double interment right; c) collection of periodic maintenance assessment charges; and d) rentals from the use of the memorial park facilities.
- Under the REIT Act, a REIT is a stock corporation established principally for the purpose of owning income-generating real estate assets. The term "income-generating real estate" means real property which is held for the purpose of generating a regular stream of income, such as rental, toll fees, user's fees, among others.
- Section 8.3 of the REIT Act provides the allowable investments that a REIT may only invest in, which includes real estate on leasehold that is located in the Philippines. These real property assets form part of the deposited property of the REIT, which is the total value of the REIT's assets reflecting the fair market value of the total assets held by the REIT. Further, as least seventy-five percent (75%) of the deposited property of the REIT must be invested in, or consist of income-generating real estate.
- As to the first query whether the mentioned income generated from Pryce's activities are included from the term 'income-generating real estate', the SEC opined that: as to the sale, since this is a disposition of real property assets, there would be no generation of recurring income for the REIT selling such real property; hence, not considered as part of income-generating real estate assets of a REIT. Meanwhile, the collection of periodic maintenance assessment charges and rentals are income-generating real estate as these may generate a regular stream of income and there is no divestment of the REIT's ownership rights over the real property assets.
- As to the second and third queries whether Pryce may lease or convey (by sale or assignment) to Pryce REIT its real properties used in the operation of its memorial parks business, the SEC opined that Pryce may do so provided that Pryce REIT must ensure that at least seventy-five (75%) of its deposited property must be invested in, or consist of, income-generating real estate.

NATIONAL PRIVACY COMMISSION ISSUANCES

Privacy Policy Office Advisory Opinion No. 2022-0141 issued on March 25, 2022

- The advisory opinion is predicated on an email request seeking clarification on whether the recording of online classes and uploading the same to Google Classroom are violative of privacy laws.
- The National Privacy Commission (NPC) is of the opinion that such acts are not violative of privacy laws. RA 10173, or the Data Privacy Act of 2012 (DPA) is the law that governs the processing of all types of personal information, and provides for the rights of the data subjects. Recording of online classes and any kind of activity pertaining to the recording are considered as processing of personal data, and thus are governed by the said law.
- On this point, the NPC notes that the contract between the school and the student is imbued with public interest, as per the Supreme Court case of *Non v. Danes II*. More

particularly, the NPC characterizes the contract between the school and the student as an "educational framework", which encompasses all activities and operations the school may perform in line with the student's education. And, for there to be a lawful basis for recording and virtually storing online classes, Section 12(b) of the DPA provides that the processing of personal information shall be permitted when, at the very least, it is necessary and is related to the fulfillment of a contract with the data subject. On the other hand, Section 13(a) only permits the processing of sensitive personal information when, among others, the data subject has given his or her consent, specific to the purpose prior to the processing.

- In this case, the NPC is of the opinion that, upon enrollment, the student and the school are deemed to have executed a contract imbued with public interest, that necessarily carries with it the consent of both parties. Thus, the NPC clarifies that the educational institutions may process personal data to achieve the purposes within its educational framework without the need for further consent of the data subject. On this point, the NPC cautions schools to clearly delineate all processing operations and to identify those that are indispensable and necessary to their educational framework, and those that are outside of it, e.g., operations for marketing or public relations purposes.
- The NPC also opines that the doctrine of Academic Freedom, i.e., the freedom to determine who may teach, what may be taught, how it shall be taught and who may be admitted to study, applies in processing of personal data within the educational framework, so long as done in accordance with the provisions of the DPA and other existing laws, rules and regulations.
- Given the foregoing, the NPC is of the opinion that the complained requirement of recording online classes and uploading of the same to Google Classroom is not violative of one's data privacy. However, the NPC cautions schools to uphold the principle of transparency and the data subject's right to information, such as the subjects are apprised of the school's privacy policies.

NPC Advisory Opinion No. 2022-010 issued on July 14, 2022

- In this Opinion, the NPC discussed whether Citibank, N.A., Philippine Branch can validly transfer the personal information of non-responsive depositors to Union Bank of the Philippines pursuant to the Share and Business Transfer Agreement (SBTA).
- Union Bank of the Philippines (the "Buyer") and Citibank, N.A., Philippine Branch (the "Seller"), together with other affiliates of the Seller, entered into a SBTA for the proposed acquisition by the Buyer of certain assets and liabilities of the Seller's consumer business in the Philippines as well as other assets (the "Transaction"). The Transaction includes the Seller's local credit card, unsecured lending, and deposit businesses.
- The Seller has undertaken an information campaign and successfully sent notices to its deposit customers wherein the Seller advised its customers of the intended sale and transfer to the Buyer, and in addition to consenting to the transfer of their customer account to the Buyer, requested them to reaffirm their previous express consent to the 2017 Data Privacy Terms.
- Moreover, some 46,148 depositors, representing 74.4% of the Seller's total depositors, have given their consent or signified their objection to the transfer of their accounts. For those who consented, the depositors also reaffirmed their previous express consent to transfer their personal information under the 2017 Data Privacy Terms to the Buyer. However, the remaining 15,838 depositors have not, to date, replied to the Notices to Depositors (the "Non-Responsive Depositors").
- Under Section 3(b) of the DPA, consent is defined as any freely given, specific, informed indication of will, whereby the data subject agrees to the collection and processing of personal information about and/or relating to him or her. Consent shall be evidenced by

written, electronic or recorded means. It may also be given on behalf of the data subject by an agent specifically authorized by the data subject to do so. Thus, it is clear that consent must be evidenced by written, electronic, or recorded means.

- The NPC opined that "consent" should cover all processing activities carried out for the same purpose or purposes. As long as the purpose, scope, method and extent of the processing remains to be the same as that disclosed to the data subject when consent was given, the consent given by the non-responsive depositors upon agreeing to the 2017 Data Privacy Terms of the Seller remains to be valid.
- Thus, the Seller may validly transfer to the Buyer the personal information of the Non-Responsive Depositors who have adhered to the 2017 data privacy terms.
- It is noteworthy that in cases where consent is not required, a privacy notice would be sufficient. However, a privacy notice is not equivalent to consent. This document is an embodiment of the observance of the data privacy principle of transparency and upholding the right to information of data subjects.

Privacy Policy Office Advisory Opinion No. 2021-045 issued on December 29, 2021

- The BIR requested for an opinion on the legality of Globe Telecom, Inc. (Globe) of providing the BIR with requested information pertaining to Social Media Influencers pursuant to the BIR's mandate under RMC No. 97-2021.
- The NPC opined that the BIR has authority to investigate Social Media Influencers to determine their tax liabilities and compliance with tax laws and regulations. Globe should then provide the information requested by the BIR Revenue District Office (RDO) pursuant to its mandate while keeping in mind the principle of proportionality.
- In order to comply with the request while upholding the data privacy of its subscribers, Globe may seek clarification with the BIR the particular information of the subscribers are necessary in relation to their specified purposes. Limited personal information of the subscriber concerned that is sufficient to enable the BIR to properly conduct its investigation may be provided. As the letter gives an option for Globe to provide the registered address only, provided that, the same may be the least privacy-intrusive manner to comply with the request, unless the BIR provides a more specific list of personal data needed to achieve their declared purposes.
- Once the BIR has the requested addresses of the Social Media Influencers, it may then issue its Letter of Authority and transmit the same to the Social Media Influencers. Thereafter, the BIR can request for the needed documents from the influencers themselves.

NPC Circular No. 2022-01 issued on August 8, 2022

- This Circular fixed the amount of administrative fines to be imposed for infractions of the Data Privacy Act of 2012 (DPA), its Implementing Rules and Regulations held, and other issuances of the NPC. These guidelines apply to all Personal Information Controllers (PICs) and Personal Information Processors (PIPs).
- *Grave Infractions* include (1) any infringement of (a) the general privacy principles in the processing of personal data (Sec. 11 of the DPA), where the total number of affected data subjects exceeds one thousand (1,001 or more); or (b) the data subject rights (Sec. 16 of the DPA), where the total number of affected data subjects exceeds one thousand (1,001 or more); or (2) any repetition of the same infraction penalized under this Circular, regardless of the classification as Major Infractions or Other Infractions. Each Grave Infraction or any repetition of the same infraction under this Circular shall subject any natural or juridical person to administrative fines of 0.5% to 3% of the annual gross income of the immediately preceding year when the infraction occurred.

- *Major Infractions* include (1) any infringement of (a) the general privacy principles in the processing of personal data (Sec. 11 of the DPA), where the total number of affected data subjects is one thousand or below (1-1,000); or (b) the data subject rights (Sec. 16 of the DPA), where the total number of affected data subjects is one thousand or below (1-1,000); (2) any failure by a PIC to implement reasonable and appropriate measures to protect the security of personal information (Sec. 20 (a), (b), (c), or (e) of the DPA); (3) any failure by a PIC to ensure that third parties processing personal information on its behalf shall implement security measures (Sec. 20 (c) or (d) of the DPA); or (4) any failure by a PIC to notify the NPC and affected data subjects of personal data breaches (Sec. 20(f) of the DPA), unless otherwise punishable by Sec. 30 of the DPA. Any Major Infraction shall subject any natural or juridical person to administrative fines of 0.25% to 2% of the annual gross income of the immediately preceding year when the infraction occurred.
- *Other Infractions* include the commission of any of the omissions: (1) the failure to register the true identity or contact details of the PIC, the data processing system, or information on automated decision making (Sec. 7(a), Sec. 16, and Sec. 24 of the DPA and its corresponding implementing issuances), or (2) the failure to provide updated information as to the identity or contact details of the PIC, the data processing system, or information on automated decision making (Sec. 7(a), Sec. 16, and Sec. 24 of the DPA and its corresponding implementing issuances). The commission of any of the said omissions subjects any natural or juridical person to an administrative fine of not less than Fifty Thousand Pesos (PhP50,000.00) but not exceeding Two Hundred Thousand Pesos (PhP200,000.00). The failure to comply with any Order, Resolution, or Decision of the NPC, or any of its duly authorized officers (Sec. 7 of the DPA and its corresponding implementing issuances) also falls under "Other Infractions" and shall subject any violator to an administrative fine not exceeding PhP50,000.00. The fine to be imposed as a result of this infraction shall be in addition to the fine imposed for the original infraction subject of the Order, Resolution, or Decision.
- The NPC also provides that the total imposable fine for a single act of a PIC or PIP, whether resulting in single or multiple infractions, shall not exceed Five Million Pesos (PhP5,000,000.00).
- In order to ascertain the annual gross income of the PIC or PIP, the NPC may require the submission of the PIC's or PIP's audited financial statements filed with the appropriate tax authorities for the immediately preceding year when the infraction occurred, the last regularly prepared balance sheet or annual statement of income and expenses, and such other financial documents as may be deemed relevant and appropriate.
- The Decision or Resolution of the NPC shall be immediately executory, unless otherwise restrained by the Court of Appeals or the Supreme Court.
- A cash or surety bond equivalent to the total amount of fine imposed shall be posted upon filing of any action assailing the Decision or Resolution of the NPC. Non-posting of such bond shall result in the immediate execution of the administrative fine imposed. However, no motion to reduce bond shall be entertained by the NPC.
- In case of refusal to pay the administrative fine, the PIC or PIP may be subject to a Cease or Desist Order, other processes or reliefs as the NPC may be authorized to initiate under Sec. 7 of the DPA, and appropriate contempt proceedings under the Rules of Court.

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