SyCip Salazar Hernandez & Gatmaitan

SyCipLaw TIPS
Tax Issues and Practical Solutions
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1. May a public utility treat corporate income taxes as operating expenses for purposes of computing rates chargeable to consumers?

No. In *Maynilad Water Services, Inc. v. National Water Resources Board* (G.R. Nos. 181764, 187380, 207444, 208207, 210147, 213227, 219362, and 239938, December 7, 2021), the Supreme Court ("***SC***") ruled that income tax paid by a public utility is inconsistent with the nature of operating expenses, which are limited to those expenses that contribute or are attributable to the production of income or revenue and redound to the benefit of consumers.

Maynilad Water Services, Inc. ("***Maynilad***") and Manila Water Company, Inc. ("***Manila Water***") (collectively, the "***Concessionaires***") separately entered into a Concession Agreement with Metropolitan Water and Sewerage Systems ("***MWSS***") to regularly supply water to the public in the Service Area West and Service Area East, respectively. The Agreement allows the Concessionaires to recover, by way of tariff, items of expenditures, such as operating expenses and Philippine business taxes, among others.

In 2002, during the first-rate rebasing exercise to adjust the standard rates chargeable to consumers, the Concessionaires were allowed to recover corporate income taxes as these were considered as Philippine business taxes, hence, part of the operating expenses that the Concessionaires may recover from the consumers. However, in the same year, the SC promulgated *Republic v. Meralco* (G.R. Nos. 141314 and 141369, November 15, 2002) where it held that public utilities are prohibited from including income taxes as operating expense for purposes of computing the rates chargeable to consumers since income taxes are inconsistent with the nature of operating expenses which are those expenses "which are reasonably incurred in connection with business operations to yield revenue or income."

Citing the case of Meralco, the MWSS issued a Notice of Extraordinary Price Adjustment to the Concessionaires. The Concessionaires disputed said Notice, resulting in the creation of the Technical Working Group by the MWSS. The Technical Working Group concluded that the parties to the Agreement intended MWSS to remain the public utility and for the Concessionaires to be its agents and contractors. Hence, the Concessionaires were again allowed to recover corporate income taxes by way of tariff for the second-rate rebasing exercise in 2007 since they were not considered public utilities.

In the third-rate rebasing exercise in 2013, the MWSS again took the position that the Concessionaires were prohibited from including their corporate income taxes as expenditures recoverable from the consumers, which recommendation was adopted by the MWSS Board of Trustees.

Objecting to the denial of their petitions for tariff increase, Maynilad and Manila Water respectively submitted the dispute to arbitration where Maynilad obtained a favorable decision, while Manila Water did not. As a result, several petitions for certiorari were filed with the SC raising the common issue of whether the Concessionaires may recover the corporate income taxes they paid as operating expenses during the life of the concession. The SC ruled in the negative and declared that the Concessionaires are public utilities covered by the ruling in *Meralco*, and even if they are not considered public utilities, the Concessionaires may not recover the corporate income taxes they paid since income taxes are not business taxes.

The SC explained that the Concessionaires are public utilities since they operate the waterworks and sewerage system and, in line with the ruling in *Tatad v. Garcia* (G.R. No. 114222, April 6, 1995), it is not the ownership, but the operation of the facilities used to provide the public service that vests the status as public utility. Thus, the Concessionaires are covered by the ruling in *Meralco* applicable to public utilities.

Further, the SC held that income taxes are not business taxes. Income taxes are direct taxes that must be shouldered by the person directly liable for it, i.e., the income earner. They are excise taxes paid for by the person who enjoys the privilege to earn income and should be shouldered by the income earner who receives the benefit or protection of the State and cannot be unduly passed on the consumers. On the other hand, business taxes are indirect taxes imposed upon the goods before reaching the consumer who ultimately pays for it, not as a tax, but as part of the purchase price. They are initially shouldered by the producer but may be passed on to the consumer.

Notwithstanding such ruling, the SC declared that income taxes passed on to the consumers may, however, be no longer recovered as the right to refund had long prescribed since action to contest water rates may only be brought before the National Water Resources Board (the "***NWRB***") within 30 days after effectivity of such rates. In this case, no such action was brought before the NWRB; thus, the NWRB cannot order a refund. ■

SyCipLaw Tip No. 1

Public utilities may not pass on to consumers as operating expenses the corporate income taxes they paid since income tax paid by a public utility is inconsistent with the nature of operating expenses. Further, *Maynilad* emphasized that income taxes and business taxes are mutually exclusive. While income taxes are direct taxes that must be paid by the entity directly liable for it, business taxes are indirect taxes where liability to pay tax falls on one, but the burden may be shifted to another.

A motion for partial reconsideration is currently pending seeking the refund of the corporate income taxes passed on to consumers.

2. For input value-added tax ("*VAT*") refund claims filed prior to RMC No. 54-2014 (issued on June 11, 2014), is the 120-day period for the Bureau of Internal Revenue ("*BIR*") to decide a claim for refund of excess unutilized input VAT attributable to zero-rated sales counted from the date of filing of the application for refund or from the date of the submission of the complete documents?

The (then) 120-day period is counted from the date of the submission of the complete documents. In *Commissioner of Internal Revenue ("**CIR**") v. Vestas Philippines, Inc. ("**Vestas**")* (G.R. No. 255085, March 29, 2023), the SC held that for claims filed prior to the issuance of Revenue Memorandum Circular ("***RMC***") No. 54-2014 (June 11, 2014), the 120-day period is reckoned from the date of submission of complete documents, based on Sec. 112(C) of the National Internal Revenue Code ***("Tax Code"*** prior to its amendment by the TRAIN Law). On the other hand, pursuant to RMC No. 49-2003, the taxpayer has 30 days from

the filing of his or her administrative claim, within which to submit all required supporting documents.

In *Vestas*, Vestas filed a letter request for the refund and/or issuance of a tax credit certificate on March 20, 2014. On September 5, 2014, Vestas filed a Petition for Review with the Court of Tax Appeals ("***CTA***") Division. Initially, the CTA Division dismissed Vestas' claim for lack of jurisdiction as the judicial claim was allegedly filed beyond the 30-day period after the expiration of the 120-day administrative review by the BIR.

Vestas filed a motion for reconsideration, attaching a photocopy of a transmittal letter showing that it submitted the complete documents to support its claim to the BIR on April 11, 2014. Further, the BIR issued a letter denying the administrative claim on August 4, 2014, which was received by Vestas on August 6, 2014. The CTA Division, thus, granted Vestas' motion for reconsideration. The CTA *En Banc* affirmed the CTA Division's decision.

The CIR filed a Petition for Review on *Certiorari* before the SC arguing that Vestas failed to properly establish the timeliness of its judicial claim because the transmittal letter was a mere photocopy and there were no affidavits attached to the motion attesting to the existence or due execution of such evidence.

The SC ruled that CIR's failure to file any comment or objection to Vestas' Supplemental Offer of Evidence made the offered evidence form part of the evidence of the case. The SC also ruled that even if the transmittal letter is a mere photocopy, Vestas was able to establish the basis for the admission of secondary evidence.

As to the timeliness of Vestas' judicial claim, the SC summarized the relevant periods under the then Sec. 112 of the Tax Code governing claims for refund of input tax attributable to zero-rated or effectively zero-rated sales:

1. The VAT-registered taxpayer must file its application for refund or issuance of tax credit certificate with the BIR within two years from the close of the taxable quarter when the sales were made;
2. The BIR Commissioner has 120 days to grant or deny such claim for refund from the date of submission of complete documents in support of the application that has been timely filed within the two-year period under Sec. 11(A) of the Tax Code; and
3. The taxpayer must file an appeal with the CTA within 30 days from the receipt of the decision denying the claim or after the expiration of the 120-day period, whichever is earlier..

The 120-day and 30-day periods are both mandatory and jurisdictional, such that non-compliance with these periods renders the judicial claim for refund of creditable input tax premature.

In relation to the phrase "from the date of submission of complete documents in support of the application", the SC summarized the rules for determining whether the taxpayer is deemed to have submitted complete documents for the purpose of reckoning the 120-day period for claims filed prior to June 11, 2014, as follows:

1. The taxpayer has 30 days from the filing of his or her administrative claim, within which to submit all required supporting documents, pursuant to RMC No. 49-2003;
2. If the taxpayer deems that he or she had already completed the necessary documents, the 120-day period will be counted from the moment he filed his administrative claim;
3. If the BIR deems, in the course of its investigation, that additional documents are needed, it shall give notice to the taxpayer; in which case, the taxpayer has 30 days from the receipt of the request to produce the requested documents, and the BIR has 120 days to decide on the claim from receipt of such complete documents; and
4. All documents, filings, and submissions must be done within two years from the close of taxable quarter pursuant to Sec. 112 (A) of the Tax Code.

Claims filed after June 11, 2014 are already governed by RMC No. 54-2014, which requires the taxpayer at the time of filing its claim to complete the supporting documents and attest that it will no longer submit any other document to prove its claim.

Vestas filed its administrative claim on March 20, 2014 for the fourth quarter of CY 2013. On April 11, 2014 it completed its supporting documents. Therefore, the BIR had 120 days from said date, or until August 9, 2014, within which to decide the

claim. However, since Vestas received the BIR's Letter Denial on August 6, 2014, Vestas had 30 days, or until September 5, 2014, within which to file its judicial claim. Hence, Vestas timely filed its judicial claim before the CTA when it filed its petition for review on September 5, 2014.

The SC noted that Sec. 112 (C) has already been amended by RA No. 10963 or the Tax Reform for Acceleration and Inclusion ("***TRAIN***") Law, and now provides that the BIR has 90 days to grant the refund of creditable input VAT from the date of submission of official receipts, invoices, or other documents in support of the application filed. The amended Section 112 provides that the taxpayer affected may file an appeal with the CTA, within 30 days from the receipt of the decision denying the claim. It further provides that failure on the part of any official, agent, or employee of the BIR to act on the application within the 90-day period shall be punishable under Sec. 269 of the Tax Code. ■

SyCipLaw Tip No. 2

For claims filed prior to June 11, 2014, the taxpayer may submit additional documents within 30 days from the filing of the administrative claim, provided that it must still be within two years from the close of the taxable quarter when the sales were made. For claims filed after June 11, 2014, the taxpayer, at the time of filing its claim, must submit the complete supporting documents to prove its claim. With the amendment introduced by TRAIN, the BIR now has 90 days within which to decide the claim for refund.

3. Is a Renewable Energy ("*RE*") Developer's registration with the Department of Energy ("*DOE*") a pre-requisite for its entitlement to the VAT incentive provided by Republic Act No. 9513 or the "Renewable Energy Act"?

Yes. In *CBK Power Company Limited* ("***CBK***") *v. CIR* (G.R. No. 247918, February 1, 2023), the SC ruled that an RE Developer can avail itself of the fiscal incentives under the Renewable Energy Act, including VAT at zero-rate, only after registration with the DOE and the DOE's issuance of the corresponding certificate, in addition to the other requirements provided for in the DOE IRR and Revenue Regulations No. ("RR") No. 7-2022.

In *CBK v. CIR*, CBK filed an administrative claim for a refund of unutilized or excess creditable input taxes paid or incurred on its domestic purchases and importations of goods and services attributable to its zero-rated sales.

The CTA Division ruled that CBK is not entitled to refund because its purchases of goods and services are VAT zero-rated in accordance with Section 15(g) of the Renewable Energy Act, without prejudice to its right to seek reimbursement of the VAT paid, if any, from its suppliers. The CTA *En Banc* affirmed the denial of the claim.

CBK filed a Petition for Review on *Certiorari* before the SC arguing that it based its refund claim on Sections 108(B)(7), 112 (A) and (C) of the Tax Code and not on the Renewable Energy Act. CBK further alleges that the Renewable Energy Act requires an RE Developer and RE suppliers to register with the DOE in order for their transactions to be entitled to VAT at zero rate and since neither CBK nor its suppliers are registered with the DOE, their transactions are subject to VAT at 12%. Hence, CBK claims that it is entitled to a refund.

The SC ruled that Renewable Energy Act, as implemented by the DOE IRR, is categorical that RE Developers must meet certain standards and must register with the DOE before it can be considered as an RE Developer duly entitled to fiscal incentives. The SC also cited RR No. 7-2022, which provides that the local supplier of goods, properties, and services shall require from the RE Developers a copy of the latter's Board of Investments ("***BOI***") registration and DOE registration for purposes of subjecting their sales to the latter to zero percent VAT. While RR No. 7-2002 does not cover CBK's claim, the SC

found that the BIR's contemporaneous interpretation of the registration requirement as a condition sine qua non for entitlement to the fiscal incentives under the Renewable Energy Act carries persuasive weight.

Although the SC found that CBK's transactions with its suppliers were subject to 12% VAT, the SC remanded the case to the CTA Special First Division in order to determine whether all of the following requisites for refund of input VAT had been adequately established by CBK: (1) the taxpayer is VAT-registered, (2) the administrative and judicial claims for refund were filed within their respective prescriptive periods, (3) the taxpayer is engaged in zero-rated or effectively zero-rated sales, (4) the input taxes were incurred or paid, (5) the input taxes are attributable to zero-rated or effectively zero-rated sales, and (6) the input taxes were not applied against any output VAT liability.■

SyCipLaw Tip No. 3

If the RE Developer does not register with the DOE under the Renewable Energy Act, it may still be entitled to a refund of input VAT attributable to its zero-rated sales under the Tax Code. On the other hand, if the RE Developer is registered with the DOE and meets all the requirements under the DOE IRR and RR No. 7-2022, then it will be entitled to the fiscal incentives, including VAT at zero-rate for its purchases, and if the sales to it (which should have been VAT zero-rated) were subjected to VAT, its remedy may be to seek reimbursement (of the VAT paid) from the suppliers, who may in turn file a refund claim with the government.

4. Are sales by a renewable energy developer entitled to zero-rated VAT prior to the issuance of a Certificate of Compliance by the Energy Regulatory Commission?

No. In *EDC Burgos Wind Power Corporation v. CIR* (CTA En Banc Case No. 2548, June 2, 2023), the CTA *En Banc* ruled that a Certificate of Compliance ("***COC***") issued by the Energy Regulatory Commission ("***ERC***") is required to prove that the sale of power generated from renewable energy, by a renewable energy developer, qualifies for VAT zero-rating.

In this case, the taxpayer filed, with the BIR, an application for tax credit/refund for its alleged excess and unutilized input VAT amounting to PhP33,903.404.70 for the period covering January 1 to June 30, 2014 (the "***Subject Period***"). The BIR denied the administrative claim for refund, prompting the taxpayer to file a petition for review with the CTA. The CTA Third Division rejected the claim for refund because the taxpayer failed to present a COC issued by the ERC prior to the Subject Period.

The taxpayer subsequently filed an appeal to the CTA *En Banc* and argued that securing a COC from the ERC, prior to its sales of power generated from wind energy, is not a requirement for its entitlement to VAT zero-rating under both Republic Act No. 9513, or the Renewable Energy Act, and the Tax Code.

The CTA *En Banc* ruled that the taxpayer failed to prove that it was engaged in VAT zero-rated sales during the Subject Period because it was unable to present a COC issued by the ERC for that period. The CTA *En Banc* ruled that a COC, among other certifications, is required to prove that the taxpayer's sale of power generated from renewable energy qualifies as VAT zero-rated sales. Under Section 26 of the Renewable Energy Act, all certifications required to qualify renewable energy developers to avail themselves of the incentives under the Renewable Energy Act shall be issued by the DOE through the Renewable Energy Management Bureau, provided that the DOE certification shall be without prejudice to additional requirements that may be imposed by other concerned agencies charged with the administration of fiscal incentives for renewable energy developers. Pursuant to this, the CTA *En Banc* found Section 6 of the Electric Power Industry Reform Act ("***EPIRA***") applicable, which provides that a generation company must first obtain a COC from the ERC before it is authorized to operate.

Considering that the taxpayer here is a renewable energy developer engaged in power generation, then the requisites of the EPIRA (i.e., securing a COC prior to operating) must be complied with before the taxpayer can avail itself of the relevant fiscal incentives. The taxpayer here was issued a COC from the ERC only on April 13, 2015, or after the Subject Period. Therefore, the taxpayer's sales of power generated from wind energy during the Subject Period cannot qualify as VAT zero-rated sales as it had no COC from the ERC at that time. ■

SyCipLaw Tip No. 4

Prior to its commercial operations, a renewable energy developer should ensure that it has all the documentary requirements, including a COC from the ERC, so that the sale of power it generates from renewable energy will qualify as VAT zero-rated sales or effectively VAT zero-rated sales.

A motion for reconsideration of the decision is currently pending.

CTA decisions, while persuasive, do not become part of the law of the land, unlike decisions of the SC.

5. What is the difference between a tax and a regulatory/license fee imposed by a local government unit?

In *Dole Philippines Inc. Stanfilco Division v. Sangguniang Panlungsod of the City of Davao, et al.* (CTA En Banc Case No. 2461, May 12, 2023), the CTA *En Banc* ruled that the designation given by local government authorities does not decide whether the exaction is a tax or a regulatory/license fee. It is the purpose and effect of the exaction that determines whether it is a tax or a regulatory/license fee. If revenue generation is the primary purpose and regulation is merely incidental, the exaction is a tax. On the other hand, if regulation is the primary purpose of the exaction, it is a regulatory/license fee, and the fact that revenue is incidentally obtained does not make the exaction a tax.

In this case, a local ordinance in Davao City declared portions of watershed areas as prime agricultural areas for utilization for human and economic activities. It imposed an annual exaction designated as "Environmental Tax" to be imposed (i) on all agricultural and economic undertakings in prime agricultural areas, and (ii) on entities engaged in economic undertakings on lands covered by growership contracts.

The taxpayer, who was engaged in producing and exporting agricultural crops within prime agricultural zones in Davao City, was assessed an Environmental Tax of PhP3,324,825. The taxpayer paid the assessment, but it subsequently filed a protest, which was denied by the City Treasurer. The taxpayer appealed the denial, which was also denied by the Regional Trial Court ("***RTC***").

The taxpayer then filed a petition for review before the CTA, arguing that the matter is a local tax case as it emanates from an assessment coupled with "Tax Orders of Payment" issued by the City Treasurer. The taxpayer also argued that the assessment letter issued to it demanded settlement of its "tax obligations," and directed it to refer all of its inquiries or concerns to the "Business Tax and Assessment Division" of Davao City. The taxpayer also raised the unconstitutionality of the local ordinance, arguing that its enactment failed to undergo the required publication for tax ordinances under the Local Government Code.

The CTA Second Division denied the petition for review on jurisdictional grounds, agreeing with the RTC's ruling that the Environmental Tax is a regulatory fee and not a local tax. Accordingly, the CTA Second Division ruled that it had no jurisdiction over the case. On appeal, the CTA En Banc upheld the ruling of the CTA Second Division, ruling that since the Environmental Tax is not in the nature of a local tax, the CTA has no jurisdiction over the case.

The CTA *En Banc* ruled that while the Environmental Tax was called a "tax" and the assessment and collection were made pursuant to a "Tax Order of Payment," the exaction is actually a regulatory fee. The CTA *En Banc* ruled that the purpose and effect of the exaction, as may be apparent from the provisions of the ordinance, determine whether it is a tax or a regulatory fee. If revenue generation is the primary purpose and regulation is merely incidental, the exaction is a tax. But if regulation is the primary purpose of the exaction, the fact that revenue is incidentally obtained does not make the exaction a tax.

Here, the local ordinance imposing the Environmental Tax contains provisions showing that the purpose of the Environmental Tax is not to generate revenue, but to serve as a regulatory fee to ensure protection and sustenance of Davao City's watershed areas. Thus, the Environmental Tax imposed on the taxpayer is a regulatory fee that will aid in the operational expenses incurred in the regulation and supervision of economic activities within Davao City's agricultural zones.

Considering that the dispute is not in the nature of a local tax case contemplated under Section 7(3) of RA No. 1125, as amended by RA No. 9282, because of the finding that the Environmental Tax is a regulatory fee and not a tax, the CTA *En Banc* dismissed the case for lack of jurisdiction. ■

SyCipLaw Tip No. 5

In determining whether an exaction is a tax or a regulatory or license fee, the taxpayer should not rely solely on the designation given by the local government authorities to such exaction. The determinative factor is the purpose of the exaction. If revenue generation is the primary purpose and regulation is merely incidental, the exaction is a tax. On the other hand, if regulation is the primary purpose of the exaction, the fact that revenue is incidentally obtained does not make the exaction a tax. The difference is important because, as in this case, the remedies and venue to assail such exaction will differ if it is in the nature of a tax or in the nature of a regulatory or license fee.

The records from the CTA show that the taxpayer filed a motion for extension of time to file a petition for review on *certiorari* before the SC to question the CTA decision.

CTA decisions, while persuasive, do not become part of the law of the land, unlike decisions of the SC.

6. May a VAT-registered taxpayer file VAT returns and pay the corresponding VAT liabilities on a monthly basis notwithstanding the amendment introduced by Section 37 of the TRAIN Law requiring the filing and payment of VAT returns on a quarterly basis?

Yes. Under RMC No. 52-2023, the BIR clarified that VAT-registered persons have the option to file their VAT returns and pay the corresponding VAT liabilities on a monthly basis despite the amendment introduced by the TRAIN Law requiring the quarterly filing of VAT returns and payment of the corresponding VAT.

Under Section 37 of the TRAIN Law amending Section 114(A) of the Tax Code, VAT-registered taxpayers are required to file and pay quarterly VAT (using BIR Form No. 2550Q) instead of monthly VAT declarations (BIR Form No. 2550M) effective on January 1, 2023. However, on May 10, 2023, the BIR issued RMC No. 52-2023 allowing VAT-registered taxpayers to voluntarily file VAT returns and pay VAT on a monthly basis using BIR Form No. 2550M in response to the request of the taxpayers.

With the issuance of RMC No. 52-2023, although VAT-registered persons are required to file their VAT returns and pay the corresponding VAT liabilities on a quarterly basis, they may opt to file their VAT returns and pay the corresponding VAT

liability on a monthly basis. According to the BIR, this is in line with the Ease of Doing Business Act and the pay-as-you-file system followed by the Tax Code where taxpayers compute their own tax liability, prepare the tax returns, and pay the tax as the file the returns.

The RMC clarified that no penalties will be imposed if a VAT-registered person opts to switch from monthly VAT filing and payment to quarterly VAT filing and payment even within the same taxable year. The VAT-registered taxpayers must follow the deadline for the filing of quarterly VAT returns (BIR Form No. 2550Q) which is within twenty-five (25) days following the close of each taxable quarter. There is no deadline for filing of the monthly VAT returns (BIR Form 2550M). ■

SyCipLaw Tip No. 6

VAT-registered persons have the option to continue filing the monthly VAT declarations and paying the corresponding monthly VAT for their convenience. However, they are still mandated to file and pay their quarterly VAT within the deadline prescribed by law.

In this regard, since the filing and payment of monthly VAT is merely optional, there is no prescribed deadline for the filing and payment of the monthly VAT. However, RMC No. 52-2023 provides that the procedures and guidelines set forth in the Consolidated Value-Added Tax Regulations of 2005 (RR No. 16-2005, as amended) and other related issuances regarding the use of BIR Form No. 2550M (which is the monthly VAT return) shall continue to apply. RR No. 16-2005, as amended, provides that BIR Form 2550M shall be filed and the taxes shall be paid not later than the 20th day following the end of each month. VAT-registered taxpayers that opt to file and pay monthly VAT may also opt to follow the previous deadline for the filing and payment of such monthly VAT.

7. May an economic zone developer and operator be classified as an export enterprise and hence be granted VAT incentives?

Yes. Under RMC No. 53-2023, an economic zone developer and operator may be classified as an export enterprise if it meets the following qualifications provided under BOI Memorandum Circular ("***MC***") No. 2022-003:

1. The developer/operator must be involved in the following:
    a. Development and operation of economic zones, and industrial parks within export or Freeport zones with integrated facilities for export-oriented enterprises.

        These economic zones and industrial parks must have infrastructure such as but not limited to:

        i. Paved roads
        ii. Power system
        iii. Water supply
        iv. Drainage system
        v. Sewerage treatment facilities
        vi. Pollution control systems, communication facilities; and
        vii. Other infrastructure/facilities needed for the operation of exporters located therein.
    b. Development and management of new buildings located outside NCR, declared as an economic zone or within export or freeport zones –
        i. With a minimum contiguous land area of 10,000 square meters

ii. With the following features:
    1. High-speed fiber-optic telecommunication backbone and high-speed international gateway facility or wide-area network (WAN); or any high0speed data telecommunication system that may become available in the future;
    2. Clean, uninterruptible power supply
    3. Computer security and building monitoring and maintenance systems (e.g., computer firewalls, encryption technology, fluctuation controls, etc.); and
    4. Any other requirements as may be determined by the Board of the concerned Investment Promotion Agencies (IPAs).

2. At least 70% of the leasable/saleable areas should be dedicated to exporters.

The term "exporter" means: (i) for business enterprises registered with investment promotion agencies (IPA) – those exporting at least 70% of their total production/service as defined under Section 293(E) of the CREATE Act; or (ii) for non-IPA registered enterprises – those exporting at least 60% of their output as defined under Section 3(e) of the Foreign Investments Act, as amended.

Note that revenues arising from clients/tenants engaged in activities that are not allowed pursuant to the definition of a registered business enterprise under Section 293(M) of CREATE Act will not be entitled to the ITH incentive.

If an economic zone developer or operator does not satisfy the above-mentioned qualifications in item (1) and (2), such ecozone developer or operator will instead be classified as a domestic market enterprise under item D(I)(8)(j) of the General Policies and Specific Guidelines to Implement the 2020 Investment Priorities Plan ("IPP") and will not be entitled to the VAT incentives, under the CREATE Act. [1] ■

SyCipLaw Tip No. 7

The BOI has declared that economic zone developers and operators may be classified as export enterprises and thus enjoy VAT incentives provided that they satisfy the qualifications mentioned in BOI MC No. 2022-003. Failure to satisfy the qualifications means that economic zone developers and operators will be classified as domestic market enterprises that are not entitled to VAT incentives under the CREATE Act. Economic zone developers and operators must therefore ensure that they maintain the qualifications if they want to continue being classified as export enterprises and enjoy the VAT incentives.

8. Are IPA-registered enterprises conducting energy projects entitled to an Income Tax Holiday ("ITH") incentive on all their revenues from the sales of electricity?

No. The BOI in BOI MC No. 2023-03 clarified that revenues from sales of electricity generated utilizing conventional fuels waste, waste heat and other wasters are not entitled to the ITH incentive.

BOI MC No. 2023-003 amended the General Policies and Specific Guidelines to Implement the 2020 IPP ("2***020 IPP Specific Guidelines***"), specifically, item D.I.12 on Energy projects. Item D.I.12 covers (i) power generation projects utilizing conventional fuels waste, heat, and other wasters; and (ii) the establishment of battery energy storage systems ("***BESS***").

Before its amendment by the BOI MC, item D.I.12. of the 2020 IPP Specific Guidelines on Energy projects provided that "revenue from sales of electricity sourced from the wholesale electricity spot market ("***WESM***") shall not be entitled to ITH".

[1] Note that RMC No. 53-2023 did not mention that, if an economic zone developer or operator is classified as a domestic market enterprise, it will not be entitled to other incentives under the CREATE Act. RMC No. 53-2023 only mentioned that such ecozone developer or operator will not be entitled to the VAT incentives.

BOI MC No. 2023-003 amended item D.I.12. of the 2020 IPP Specific Guidelines to state that "revenue from sales of electricity **sourced by power generation projects utilizing conventional fuels, waste heat and other wastes** from the wholesale electricity spot market (WESM) shall not be entitled to ITH." (*emphasis supplied*)

The amended provision expressly stated that revenues from the sale of electricity sourced by "power generation projects utilizing conventional fuels, waste heat and other wastes" are not entitled to the ITH incentive but excluded BESS projects from the coverage of the amendment. According to this circular, the amendment was made to emphasize that "the sourcing of electricity from all sources is an essential component in the operation of Battery Energy Storage Systems (BESS) projects for the provision of ancillary service to the national grid, and hence should be entitled to the ITH incentive."■

SyCipLaw Tip No. 8

Preferred activities listed under the 2022 SIPP may not automatically be entitled to certain tax incentives such as the ITH based on implementing guidelines. The government may nonetheless subsequently issue amendments to existing guidelines to take into account developments in industries to encourage and promote investments in such industries as shown by the amendment introduced to the guidelines on ITH entitlement for BESS projects. Project proponents should thus be aware of existing guidelines and developments so they can properly assess the tax impact on their investments in the preferred industries.

9. Is Clark Development Corporation ("*CDC*") entitled to fiscal incentives (i.e., preferential tax rate of 5% on gross income in lieu of national and local taxes) granted to registered business enterprises ("*RBEs*")?

No. The BIR issued RMC No. 63-2023 revoking BIR Ruling No. 038-2001 and BIR Ruling No. 046-1995 which ruled that given the proprietary nature of its business activities, CDC is considered a registered business enterprise that is entitled to the same privileges as other business enterprises operating within the CSEZ, such as the 5% preferential tax rate based on gross income earned in lieu of local and national internal revenue taxes.

In revoking the two rulings, the BIR stated that, while CDC performs activities that are proprietary in nature, the fact remains that it is a government-owned and controlled corporation ("***GOCC***"). CDC is entrusted with the responsibility of carrying out the following regulatory functions:

1. To operate, administer, manage, and develop the CSEZ according to the principles and provisions under the law;
2. To register, regulate and supervise the enterprises in the CSEZ in an efficient and decentralized manner;
3. To coordinate with local government units and exercise general supervision over the development, plans, activities, and operations of the CSEZ;
4. To construct, acquire, own, lease, operate and maintain on its own or through contract, franchise, license, bulk purchase from the private sector or joint venture adequate facilities and infrastructure; and
5. To create, operate and/or contract such agencies and functional units or offices of the authority as it may deem necessary.

As such, CDC must be treated on par with other GOCCs. This means that its income shall be subject to the regular income tax rate.

The BIR also explained that even assuming that CDC is correctly treated as a business enterprise, the CREATE Act repealed the relevant provisions of RA No. 7227 (as amended by RA No. 9400 [An Act Amending RA No. 7227, as amended, otherwise known as the Bases Conversion and Development Act of 1992, and for Other Purposes]) and the availment of fiscal incentives was limited to business enterprises registered with IPAs only. [2]

The BIR distinguished between an IPA and an RBE. According to the BIR, an RBE is "any individual, partnership, corporation, Philippine branch of a corporation, or other entity organized and existing under Philippine laws and registered with an IPA whether inside or outside the zones, which are granted fiscal and/or non-fiscal incentives to the extent of their approved registered project or activity under the Strategic Investment Priority Plan ("***SIPP***")" while an IPA is a government entity "created by law, executive order, decree, or other issuance, in charge of promoting investments, granting and administering fiscal and/or non-fiscal incentives, and overseeing the operations of the different economic zones and freeports in accordance their respective special laws."

Based on the foregoing, an IPA and a RBE are two separate and distinct entities. An entity may either be classified as an IPA or an RBE but can never be both. Section 293(H) of the Tax Code, as amended explicitly states that CDC is an IPA. As such, CDC cannot be an RBE. Consequently, CDC cannot avail itself of the fiscal and non-fiscal incentives which are exclusively granted to RBEs. ■

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The BIR has confirmed that CDC is not an RBE that can avail itself of the fiscal and non-fiscal incentives (i.e., 5% preferential tax rate based on gross income earned in lieu of local and national internal revenue taxes). Suppliers dealing with CDC should take note of the CDC's status and make sure the correct tax treatment is applied on its transactions with the CDC.

[2] While RMC No. 63-2023 correctly states that Section 12(c) of R.A. No. 7227, as amended, was repealed by the CREATE Act. this provision deals with the Subic Bay Metropolitan Authority. Hence, it would have been more accurate and appropriate had the BIR cited the repeal of Section 7 of R.A. No. 9400 by the CREATE Act because Section 7 of R.A. No. 9400 provides:

> Section 7. Business enterprises presently registered and granted with tax and duty incentives by the Clark Development Corporation (CDC), Poro Point Management Corporation (PPMC) JHMC, and Bataan Technological Park Incorporated (BTPI), including such governing bodies, shall be entitled to the same incentives until the expiration of their contracts entered into prior to the effectivity of this Act.

Managing Partner:
Hector M. de Leon, Jr.

Tax Department Head:
Carina C. Laforteza

Tax Department Partners:
Carlos Roberto Z. Lopez
Ramon G. Songco
Benedicto P. Panigbatan
Russel L. Rodriguez
Ronald Mark C. Lleno
Hiyasmin H. Lapitan
Leah C. Abutan
John Christian Joy A. Regalado
Ma. Patricia B. Paz-Jacoba
Joanna Marie O. Joson
Maria Viola B. Vista
Maria Christina C. Ortua-Ang
Mark Xavier D. Oyales

Of Counsel:
Rolando V. Medalla, Jr.

Special Counsel:
Catherina M. Fernandez

Tax Department Senior Associates:
Austin Claude S. Alcantara
Camille Angela M. Espeleta-Castillo
Kristina Paola P. Frias
Hailin D.G. Quintos-Ruiz
Renz Jeffrey A. Ruiz

Tax Department Associates:
Reena Aleksandra M. Acop
Diana Elaine B. Bataller
Paolo Gabriel P. Bautista
Paul Nathan A. Beira
Kevin Joseph C. Berbaño
Roman George P. Castillo
Franhzi T. Ferraris
Dece Christine C. Fulache
Armand Karlo G. Lustre
Monica Therese B. Lee
Jose Patricio S. Medalla
John Alfred H. Mendoza
Patrice Jane L. Romero

Editor-in-Chief:
Ronald Mark C. Lleno (Partner)

Editor:
Catherina M. Fernandez

Contributors:
Catherina M. Fernandez
Sharlene Ann O. Joson
Jose Maria C. Ramos
Denise Gabrielle E. Simpelo
Nicole Kate P. Tan

Coordinators:
Marie M. Ingcoco
Joanne V. Lacsina
Angelita O. Dizon

For more information regarding the issuances discussed in this briefing, please contact:

Carina C. Laforteza
cclaforteza@syciplaw.com

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