SyCip Salazar Hernandez & Gatmaitan 80 Years

SyCipLaw TIPS

Tax Issues and Practical Solutions

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1. Does the Government's sixty percent (60%) share of the net proceeds in the Malampaya Natural Gas Project include the contractors' income taxes?

Yes. In *Shell Philippines Exploration B.V. ("SPEX") and Chevron Malampaya LLC ("Chevron") v. Commission on Audit / PNOC Exploration Corporation ("PNOC") v. Commission on Audit / Thelma M. Ceredeña and Nora A. Tuazon v. Commission on Audit*, G.R. No. 238846 / G.R. No. 238852 / G.R. No. 238862, February 25, 2025, the Supreme Court ruled that the Philippine Government's share in the net proceeds includes the corporate income taxes of SPEX, Chevron, and PNOC ("*Contractors*") from the start of commercial operations of the Service Contract involving the Malampaya Natural Gas Project in 2002 up to 2009.

Section 7.3 of the Service Contract provides that 60% of the net proceeds of the petroleum operations shall be remitted to the Philippine Government. Section 7.4 allots to the Contractors the 40% retention fee of the net proceeds. Under Section 12(a) of the Oil Exploration and Development Act of 1972 ("*P.D. 87*"), the Contractors are exempted from payment of all taxes except income tax.

The Supreme Court ruled that the laws governing oil exploration and development industry in the Philippines clearly and unambiguously state that the Government's share includes all taxes.

The Supreme Court delved into the scope and purpose of P.D. 87, which were to provide greater incentives to encourage private participation in the exploration and development of petroleum resources in the Philippines and attract foreign investors to take risks in the Philippine petroleum industry. To achieve this, P.D. 87 offered a tax *assumption* system. Thus, the correct interpretation of P.D. 87 is that: (1) the contractor is liable to pay income tax, *but* (2) the contractor's income tax forms part of, or is counted in, the Government's 60% share.

Tax exemption differs from a tax assumption, such that the former is the "freedom from a duty, liability, or other requirement," while the latter is the "act of taking (specifically, someone else's debt or other obligation) for or on oneself." A tax assumption means that the obligation or liability remains, although the same is merely passed on to a different person.

The Supreme Court therefore concluded that under the Service Contract, the Contractors remain liable for income taxes, but the Philippine government assumes and pays these taxes as part of its share of net proceeds. ■

SyCipLaw Tip No. 1

Taxpayers should exercise caution in distinguishing between tax assumptions and tax exemptions, particularly in sectors governed by specialized regimes such as oil exploration and development.

SyCipLaw Tip No. 1 (cont'd)

In a tax assumption, the legal obligation or liability to pay the tax remains with the taxpayer, but the economic burden may be shifted to a different person. This is fundamentally different from a tax exemption where the tax liability is extinguished. Mischaracterizing one for the other may result in inaccurate tax treatment and regulatory exposure.

P.D. No. 87, which governs oil exploration and development industry in the Philippines, clearly and unambiguously states that the Government's share of the net proceeds from petroleum operations includes all taxes. This means that while the contractor may bear the cost of taxes, such taxes are not waived and are included in the Government's entitlement.

2. Is prescription a matter of defense, such that the burden is on the taxpayer to prove that the full period of limitation has expired?

Yes. In *Commissioner of Internal Revenue v. Marily Development Corporation ("MDC")*, G.R. No. 263794, April 2, 2025, the Supreme Court ruled that prescription is a matter of defense. Hence, the burden is on the taxpayer to prove that the full period of limitation has expired. The taxpayer must positively establish the date when the period started running and when the same was fully accomplished.

MDC was assessed deficiency income tax, Value-Added Tax ("*VAT*"), Expanded Withholding Tax ("*EWT*"), and Withholding Tax on Compensation ("*WTC*") for the calendar year 2006. However, the Final Assessment Notice ("*FAN*") was only issued by the Bureau of Internal Revenue ("*BIR*") nearly five years later, on June 8, 2011. MDC filed a protest to the FAN, which the BIR denied when it issued a Preliminary Collection Letter on December 29, 2017.

Aggrieved, MDC filed a petition for review with the Court of Tax Appeals ("*CTA*") and raised the defense of prescription since the FAN was issued beyond the three-year period to assess deficiency taxes. The CTA Second Division (CTA Case No. 9756) ruled in favor of MDC and cancelled the assessment on the ground that the BIR failed to adduce evidence of fraud on the part of MDC, hence the 10-year prescriptive period to assess under Section 222 of the National Internal Revenue Code, as amended ("*Tax Code*") does not apply. The CTA *En Banc* (CTA Case EB No. 2450) affirmed the decision of the CTA Division, hence this petition before the Supreme Court.

The Supreme Court acknowledged the application of the ordinary three-year period to assess under Section 203 of the Tax Code, unless the Government proves by clear and convincing evidence that the ten-year period shall apply. The ten-year period applies in the case of a false return, fraudulent return with intent to evade tax, or failure to file a return.

Considering MDC did not offer in evidence its Annual Income Tax Return and VAT returns for 2006, MDC cannot avail itself of the defense of prescription. Since there is no presumption that the taxpayer duly filed its returns, the Supreme Court concluded that no such returns were filed. The BIR had ten years to make the assessment. As for the deficiency EWT and WTC assessment, the returns presented show unreadable filing dates. The Supreme remanded the case and directed the CTA Second Division to conduct proceedings with reasonable dispatch to determine MDC's tax liability. ■

SyCipLaw Tip No. 2

Taxpayers cannot rely on any presumption that tax returns were filed within the deadlines prescribed by law. To successfully raise the defense of prescription against a deficiency tax assessment, it is incumbent upon the taxpayer

SyCipLaw Tip No. 2 (cont'd)

to clearly establish both the fact of filing and the actual date on which the return was filed.

Accordingly, during a tax audit, taxpayers must be prepared to present copies of duly filed tax returns that clearly indicate the legible filing dates. These documents are essential in determining whether or not an assessment was issued beyond the prescriptive period provided under the applicable tax laws.

3. Are services rendered to a PEZA-registered enterprise by a supplier located in the customs territory and consumed outside the ecozone subject to 12% VAT?

Yes. In *Coral Bay Nickel Corporation ("Coral Bay") v. Commissioner of Internal Revenue*, G.R. Nos. 251333-34, March 5, 2025, Coral Bay sought to claim a refund for unutilized input VAT from its local purchases of goods and services attributed to zero-rated sales for the year 2012.

Coral Bay is a PEZA-registered enterprise engaged in the manufacture and export of nickel and cobalt mixed sulfide. For taxable year 2012, Coral Bay purchased goods and services for the construction of its laborers' row houses and dwellings that were all located outside the PEZA ecozone. The CIR denied Coral Bay's refund claim; hence, Coral Bay filed a petition with the CTA. The CTA Third Division, in CTA Case No. 8804, partially granted the claim, but on appeal, the CTA *En Banc* (CTA EB No. 1909 and 1910) denied the entire VAT refund claim and ruled that Coral Bay is an absolutely VAT-exempt entity and hence, its recourse is to seek reimbursement for input tax from its suppliers.

The Supreme Court reversed the decision of the CTA En Banc and reinstated the CTA Division's ruling. The Supreme Court delved into various jurisprudence interpreting the provisions on exemptions and fiscal incentives under the Special Economic Zone Act of 1995 ("*PEZA Act*"), which is the primary law governing the tax treatment of PEZA-registered enterprises such as Coral Bay.

In *Commissioner of Internal Revenue v. Seagate Technology (Phils.)*, 491 Phil. 317 (2005), the Supreme Court held that PEZA-registered enterprises that availed of the incentives under Section 24 of the PEZA Act enjoyed exemption from both direct and indirect taxes. Thus, any of its purchases, regardless of whether the same is consumed or rendered within or outside the ecozone, should be effectively zero-rated.

However, in *Commissioner of Internal Revenue v. Sekisui Jushi Phils., Inc.*, 528 Phil. 639 (2006), the exclusion of PEZA-registered enterprises from the coverage of the VAT system is dependent on which fiscal incentive is availed of. This demarcation is no longer in effect due to the issuance of Revenue Memorandum Circular No. 74-99, which recognized that the cross-border doctrine and destination principle applied regardless of the type of registration of the PEZA-registered enterprise.

In *Commissioner of Internal Revenue v. Toshiba Information Equipment (Phils.), Inc.*, 503 Phil. 823 (2005), the Supreme Court clarified that PEZA-registered enterprises are treated as VAT-exempt entities not because of their tax incentives under the PEZA Act, but rather because of the legal fiction of regarding ecozones as separate customs territories.

The Supreme Court ruled that PEZA-registered enterprises are not absolute VAT-exempt entities, and the VAT treatment of their transactions depends on whether the cross-border doctrine applies. VAT is a tax on consumption. As such, the cross-border doctrine and the destination principle apply. The situs of VAT is determined by where goods are consumed or where services are rendered.

As the goods and services were consumed and rendered outside of the ecozone, the cross-border doctrine does

not apply, and the same could not have been deemed exported to Coral Bay. Having been rendered within the Philippines' customs territory, the services are subject to VAT. ■

SyCipLaw Tip No. 3

PEZA-registered enterprises are not deemed absolute VAT-exempt entities, and the VAT treatment of their transactions depends on the applicability of the cross-border doctrine. However, taxpayers must take note of the significant changes introduced by Republic Act No. 11534 ("*CREATE Act*") and Republic Act No. 12066 ("*CREATE MORE Act*") to our VAT laws and the VAT incentives of enterprises registered with Investment Promotion Agencies.

In particular, Revenue Memorandum Circular No. 24-2022 clarified that the cross-border doctrine has been rendered inoperative and ineffectual as applied to ecozones and freeport zones under the CREATE Act. The prevailing rule, after the effectivity of the CREATE Act on April 11, 2021, is that VAT zero-rating on local purchases of goods and services shall only apply if such goods and services are directly and exclusively used in the registered project or activity.

For further guidance, please refer to the November 2024 issue of TIPS.

4. May a local government unit immediately resort to the use of the presumptive income level assessment approach in computing the local business tax due instead of the taxpayer's gross sales or receipts of the preceding calendar year?

No. In *The City of Taguig and Atty. Marianito D. Miranda v. Union Cement Holdings Corporation*, CTA AC No. 313, July 29, 2025, the CTA Third Division ruled that the local government unit's ("*LGU's*") use of the presumptive income level assessment approach ("*PILAA*") is improper because the PILAA was not found in the local tax ordinance of the LGU and the taxpayer was able to provide proof of its gross sales or receipts.

In this case, the taxpayer filed a certification indicating their gross receipts/sales for the taxable year 2010 amounting to PhP88,502,169.47. The filing was related to the taxpayer's business permit application for the year 2011. On January 24, 2011, the LGU issued a Tax Order of Payment for local business tax ("*LBT*") to the taxpayer for the first quarter of 2011, amounting to PhP400,418.86.

Upon inquiry, the taxpayer learned that the LBT assessment was computed from its 2009 gross receipts/sales on the basis of the LGU's practice of computing the assessment of LBT based on a purported PILAA, which is based on the industry or income from previous years, whichever is higher. The taxpayer paid the first quarter installment under protest to avoid delay in the issuance of its business permit and the payment of penalties and surcharges.

The LGU argued that it has the right to verify or assess the gross sales or receipts of the taxpayer from previous years under the best available evidence, as provided under Section 82(d) of the LGU's Revenue Code.

The CTA, however, ruled against the LGU. Section 82(d) of the LGU's Revenue Code allows the City Treasurer to "verify or assess the gross sales or receipts of the taxpayer under the best available evidence upon which the tax may be based." On the other hand, Item B(3) of the Bureau of Local Government Finance ("*BLGF*") Memorandum Circular ("*MC*") No. 01-2020 dated January 2, 2020, which was preceded by BLGF MC No. 01-001-2017, sets out the requisites for the use of the PILAA: [a] the PILAA is in the local tax ordinance and has undergone public hearings and publications; and [b] the PILAA may be used in computing the local business tax ONLY if the taxpayer is unable to provide proof of its gross sales or receipts.

Here, the CTA found both requisites are absent. First, aside from the word "best available evidence" being mentioned in Section 82(d) of the LGU's Revenue Code, the LGU failed to adduce or present any evidence that the

PILAA was adopted in their local tax ordinance, nor has it conducted public hearings and publications.

Also, the PILAA can only be used if the taxpayer is unable to provide proof of its gross sales or receipts. In *City Government of Balanga, Bataan and Joselito R. Evangelista, in his capacity as City Treasurer of Balanga, Bataan v. Smart Communications, Inc., Smart Broadband, Inc. and Pilipino Telephone Corporation*, CTA Case No. AC-200, October 22, 2018, the CTA enumerated the steps in order for a local government unit to apply the PILAA in the absence of proof of gross sales or receipts: [a] require the taxpayer to declare the amount of its gross sales or receipts; [b] if the LGU believes that the taxpayer underdeclared its gross sales or receipts, the LGU should proceed in the computation of the LBT based on the declared amount of gross sales or receipts; [c] the LGU should issue a Letter of Authority for the examination and audit of the taxpayer's books of accounts and other records; [d] the LGU should validate the amount of declared gross sales or receipts from the taxpayer's books of accounts and records, and re-compute the local business tax after said verification; and [e] if the taxpayer fails to present its books of accounts and other records, or if it has no such records to validate its declared gross sales or receipts, the LGU may use the PILAA in computing or re-assessing the local business tax due from the taxpayer.

Here, the LGU failed to comply with the foregoing steps. Instead, it arbitrarily imposed an assessment that is not based on the taxpayer's declared gross sales or receipts for the immediately preceding calendar year, but on the taxpayer's presumptive income level in 2009. Thus, the LGU's LBT assessment was declared invalid. ■

SyCipLaw Tip No. 4

Upon receipt of an LBT assessment from the LGU, the taxpayer should check whether the basis of the LBT assessment is proper. Generally, an LBT assessment is computed based on the gross sales or receipts of the preceding calendar year. An LGU may only use the PILAA in computing the LBT if [a] the PILAA is in the local tax ordinance and has undergone public hearings, and [b] the taxpayer is unable to provide proof of its gross sales or receipts.

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 Supreme Court. They only bind the parties to the dispute.

5. Is a tax assessment valid if the payment due date had already lapsed by the time the assessment is received by the taxpayer?

No. In *I-Cyberworld Biz, Inc. v. Bureau of Internal Revenue*, CTA Case No. 10827, July 10, 2025, the CTA First Division ruled that the Formal Letter of Demand/FAN is void for violating the taxpayer's right to due process since the payment due date indicated in the FAN had already lapsed by the time the taxpayer received it.

On February 13, 2019, the taxpayer received the FAN indicating a due date of January 31, 2019 to pay the total tax liabilities. The taxpayer filed a petition for review before the CTA arguing that the FAN is void due to the BIR's violation of the taxpayer's right to due process. On the other hand, the BIR argued that the taxpayer failed to overcome the presumption of validity and correctness of the assessment.

The CTA agreed with the taxpayer in this case. According to the CTA, requiring payment on a date that has already passed at the time of receipt of the tax assessment renders compliance not only unreasonable, but also legally impossible. A valid demand for payment presupposes that the taxpayer is given a real and fair opportunity to pay within the time prescribed, which must be a future date. When the due date has lapsed prior to receipt of the tax assessment, that opportunity is effectively denied, undermining the basic requirement of due process embedded in tax assessments. Accordingly, a past due date is invalid and negates compliance with the requirement that a tax assessment must contain a demand for payment within a prescribed period, a period that must necessarily refer to a future date.

The CTA also ruled that the late service of the FAN is not a mere procedural infirmity; it directly affects the

amount due to the taxpayer. Under Section 249(C)(3) of the Tax Code, delinquency interest is computed from the due date stated in the tax assessment until the date of actual payment. Allowing a prior due date in the tax assessment would unjustly permit the accumulation of delinquency interest before the taxpayer has even received the formal demand to pay. ■

SyCipLaw Tip No. 5

A taxpayer who receives a tax assessment with a due date that has already lapsed may contest the tax assessment for being violative of the taxpayer's right to due process. Such a tax assessment is invalid for being unreasonable and legally impossible. When the payment due date has lapsed prior to receipt of the taxpayer of the tax assessment, the opportunity to pay within the time prescribed is effectively denied, undermining the basic requirement of due process embedded in tax assessments.

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 Supreme Court. They only bind the parties to the dispute.

6. What are the requirements for Nonresident Digital Service Providers ("*NRDSPs*") to register, file VAT returns, and pay VAT in the Philippines?

To facilitate compliance with the VAT registration requirement of NRDSPs under Republic Act No. 12023, the VAT on Digital Services ("*VDS*") Portal was established for the online registration, filing of returns, and payment of VAT.

NRDSPs must first register with the BIR through the Online Registration and Update System ("*ORUS*") to obtain a Philippine Taxpayer Identification Number ("*TIN*"). The NRDSPs may also use its ORUS account to update their VAT registration details if necessary. After completing the ORUS registration, the NRDSP may then enroll in the VDS Portal. Enrollment may be done directly by the NRDSP or through their resident third-party service provider such as a law firm or accounting firm. If the NRDSP appoints a resident third-party provider, it must be formally reported to the BIR within 30 days from the date of appointment by submitting a Letter of Appointment to the BIR through email at rdo39_vds@bir.gov.ph. For VAT purposes, appointing a third-party service provider does not convert the NRDSP into a resident corporation doing business in the Philippines.

Once enrolled, NRDSPs must file VAT returns and pay VAT on or before the 25th day of the month following the close of each taxable quarter (following the Philippine time zone) through the VDS Portal and authorized payment channels. Failure to file or remit VAT on time will subject the NRDSPs to surcharges, penalties, interest, and possible criminal liability, including suspension or blocking of their online platforms. Refunds for erroneously paid VAT are not allowed, but NRDSPs may amend previously filed VAT returns to reflect overpayments, which may then be carried over to succeeding quarters.

The BIR may also conduct independent verification, including third-party checks, to ensure that NRDSPs are correctly declaring their gross sales and VAT liabilities. The BIR will inform the NRDSPs of any discrepancy discovered and give the NRDSP an opportunity to correct the discrepancy. The NRDSP may face administrative or criminal sanctions if it fails to correct any discrepancy. ■

SyCipLaw Tip No. 6

NRDSPs should ensure they are properly registered in ORUS and enrolled in the VDS Portal, either directly or through a resident third-party service provider. Strict compliance with filing and payment rules is critical to avoid

SyCipLaw Tip No. 6 (cont'd)

penalties, criminal liability, or blocking of their online site in the Philippines. The NRDSPs should also ensure they schedule the filing of the VAT return and pay the VAT following the Philippine time zone to ensure that the filing and payment are done on time and avoid penalties for late filing and payment.

7. How can an Export-Oriented Enterprise ("*EOE*") avail of VAT zero-rating on local purchases and VAT exemption on importation under the CREATE MORE Act?

Under Department Administrative Order No. 25-03 issued by the Department of Trade and Industry ("*DTI*"), the Department of Trade and Industry – Export Marketing Bureau ("*DTI-EMB*") is tasked with certifying whether an EOE qualifies for VAT zero-rating on local purchases of goods and services and VAT exemption on importations under Republic Act No. 12066 or the CREATE MORE Act. To qualify, an EOE must demonstrate that at least 70% of its total annual production in the preceding taxable year was exported.

As provided in Joint Administrative Order No. 002-2025, issued jointly by the Department of Trade and Industry, Department of Finance, Bureau of Internal Revenue, and Bureau of Customs ("*BOC*"), EOEs must secure a CREATE MORE EOE Certificate from the DTI-EMB which will certify the EOE's entitlement to the VAT incentive. The CREATE MORE EOE Certificate must be presented to suppliers for VAT zero-rated transactions and to the BOC for VAT-exempt importations.

Applications must be filed with the DTI-EMB together with supporting documents such as the EOE's BIR Certificate of Registration, audited financial statements, inward remittance certifications, export declarations, bills of lading, invoices, and a notarized affidavit certifying compliance with the 70% export sales threshold. Service exporters must likewise provide copies of the contracts and SEC certification of non-registration of its nonresident clients. The DTI-EMB is required to act on applications within 20 working days of receiving complete documents. The CREATE MORE EOE Certificate is valid until the end of the EOE's applicable taxable year (calendar or fiscal) unless earlier revoked.

The DTI-EMB may revoke a CREATE MORE EOE Certificate if the EOE is later found to be non-compliant. Grounds for revocation include: (a) failure to submit to the DTI-EMB the certified true copy of the EOE's audited annual financial statement ("*AFS*") within five (5) working days after the last day of filing of the income tax return with the BIR; or (2) a finding, upon review of the submitted AFS, that the EOE failed to meet the seventy percent (70%) export sales threshold.

Once revoked, the EOE will be removed from the DTI-EMB's Master List of certified EOEs. Removal from the list results in the immediate loss of entitlement to VAT zero-rating and VAT exemption, and the EOE may also be subjected to deficiency VAT assessments, penalties, and interest for prior transactions previously treated as exempt or zero-rated. ■

SyCipLaw Tip No. 7

EOEs must apply with the DTI-EMB for a CREATE MORE EOE Certificate to avail the VAT zero-rating on their local purchases and VAT exemption on their importation. The certificate is indispensable proof of entitlement to VAT incentives, which must be presented to their suppliers or the BOC. Absent the CREATE MORE EOE Certificate, the EOE may be charged with VAT even if it meets the 70% export sales requirement. EOEs should note that the CREATE MORE EOE Certificate is separate from the VAT Zero-Rating certificate issued by the relevant investment promotion agency.

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