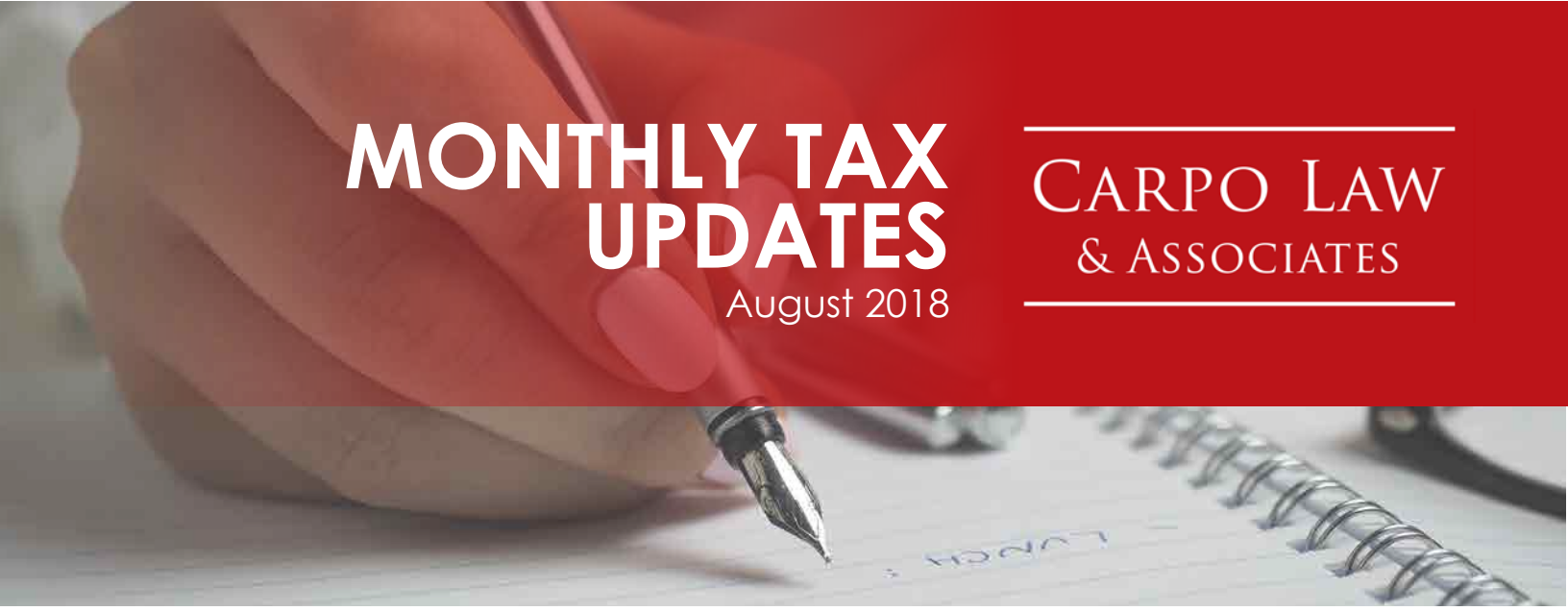


MONTHLY TAX UPDATES

August 2018

CARPO LAW & ASSOCIATES

BUREAU OF INTERNAL REVENUE (BIR) ISSUANCES

A. REVENUE REGULATIONS

APPLICATIONS FOR THE ISSUANCE OF TAX CLEARANCE FOR BIDDING PURPOSES ARE TRANSFERRED FROM NATIONAL TO REGIONAL OFFICE. In line with the BIR'S objective of "Ease of Doing Business," all applications for the issuance of tax clearance for bidding purposes shall be manually filed with the Collection Division of the Revenue Regional Office where the taxpayer or partnership/corporation is currently and duly registered or with the concerned office under the Large Taxpayers service if the taxpayer is classified as Large taxpayer, until such time that an on-line application has been made available for use of prospective bidders. *Revenue Regulations No. 18-2018, August 3, 2018.*

B. BIR RULINGS

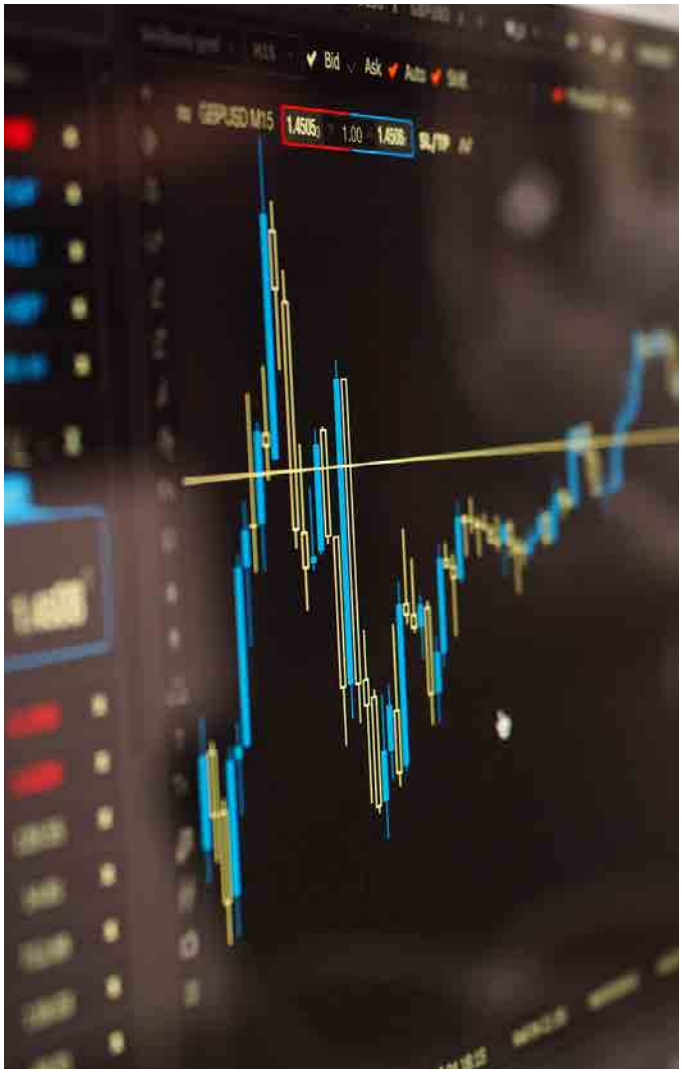
INCOME DERIVED FROM ASSOCIATION DUES, MEMBERSHIP FEES, AND OTHER ASSESSMENTS/CHARGES AND RENTALS OF FACILITIES OF HOMEOWNERS' ASSOCIATION IS EXEMPT FROM INCOME TAX, VAT OR PERCENTAGE TAX, WHICHEVER IS APPLICABLE; CONDITIONS. Homeowners' Association may be exempt from tax under Magna Carta for Homeowners and Homeowners' Association, where the homeowners' association is a duly with HLURB; that its financial statements show the delivery of basic community services; and that the local government unit covering the jurisdiction of the homeowners' association has issued a certificate that it lacks the resources to provide these services to the association; provided, that such income and dues shall be used for the cleanliness safety, security, and other basic services needed by the members, including the maintenance of the facilities of their respective subdivisions or villages. However, homeowners' association shall be subject to the applicable internal revenue taxes on its other income from trade, business or other activities. *Montecito Homeowners' Association, Inc., BIR Ruling No. 1154-18, August 31, 2018.*

TRANSFER BY NON-STOCK, NON-PROFIT RESIDENTS ASSOCIATION IN FAVOR OF MEMBERS-BENEFICIARIES WHO HAVE MADE FULL PAYMENT OF THEIR PURCHASED SUBDIVIDED LOTS IS NOT SUBJECT TO TAX. The transfer is neither subject to capital gains tax or the creditable withholding tax considering that the said transfer of property is made without any consideration and effected only as a formality to finally effect the transfer of the said property to its members-beneficiaries who actually bought the same from the former owner through the association. In other words, the association is merely transferring the ownership of the property to its members-beneficiaries who actually own the same.

Furthermore, the said transfer is not subject to the donor's tax since there is no donative intent on the part of the association to donate the said property to said members-beneficiaries, considering that it could not donate property the ownership of which already belongs to the members-beneficiaries themselves.

Moreover, it is noted that the deeds or documents subject to the DST imposed therein are those where the realty sold shall be granted, assigned, transferred or otherwise conveyed to a purchaser or to any other person designated by such purchaser, thereby excluding from its purview the instant case considering that the supposed purchasers are actually the owners thereof. Besides, no consideration is involved in said transaction upon which the tax imposed could be based. Thus, the transfer of title of the subject lots in favor of the beneficiaries is not subject to documentary stamp tax. However, the notarial acknowledgment to the deed of conveyance is subject to the documentary stamp tax of P15.00. *Gloria Residents Association, Inc., BIR Ruling No. 1144-18, August 31, 2018.*

INDIVIDUAL SHAREHOLDERS SHALL RECOGNIZE CAPITAL GAINS UPON SURRENDER OF SHARES COMPUTED AS EXCESS OF THE CASH AND FAIR MARKET VALUE OF PROPERTY RECEIVED OVER THE COST OF THE INVESTMENT IN SHARES AND THAT SUCH GAIN SHALL BE SUBJECT TO THE GRADUATED INCOME TAX RATES; NO TAX SHALL BE IMPOSED ON THE LIQUIDATING CORPORATION'S RECEIPT OF THE SHARES SURRENDERED BY THE SHAREHOLDERS BECAUSE THE TRANSACTION IS NOT TREATED AS A SALE. The share of each stockholder in the remaining assets of the corporation upon liquidation, after the payment of all corporate debts and liabilities, is what is known as liquidating dividend. Distribution of liquidating dividend is not as a sale of asset by the liquidating corporation to its stockholder but as a sale of shares by the stockholder to the corporation or the surrender of the stockholder's interest in the corporation, in place of which said stockholder receives property or money from the corporation about to be dissolved. Thus, on the part of the stockholder, any gain or loss is subject to tax, while on the part of the liquidating corporation, no tax is imposed on its receipt of the shares surrendered by the stockholder or transfer of assets to said stockholder because said transaction is not treated as a sale. *Veratrade, Inc., BIR Ruling No. 1133-18, August 28, 2018.*



CONVEYANCE OF REAL PROPERTY IN THE FORM OF LIQUIDATING DIVIDENDS TO THE STOCKHOLDERS IS NOT SUBJECT TO DOCUMENTARY STAMP TAX. The DST shall not apply in transfers of real property as liquidating dividends to its remaining stockholders because the transfer is a mere return of capital. *Ibid.*

LOTS TRANSFERRED BY THE DEBTOR-DEVELOPERS IN FAVOR OF A CREDITOR-CORPORATION BY WAY OF DACION EN PAGO (SALE) ARE NOT CLASSIFIED AS CAPITAL ASSETS SUBJECT TO CAPITAL GAINS TAX (CGT). All real properties owned or acquired by a taxpayer engaged in the business of real estate development are classified as ordinary assets. Where the debtors are all property developers, their owned or acquired real properties are treated as ordinary assets. Thus, the capital gains tax will not apply on the transfer of lands, made by way of *dacion en pago*. The transfer, however, is subject to the regular income tax rate as well as to the value-added tax and DST. *Social Housing Finance Corporation, BIR Ruling No. 1129-18, August 22, 2018.*

COURT OF TAX APPEALS DECISIONS

A. *ASSESSMENT*

WHERE THE BIR IS ALREADY AWARE OF THE NEW LOCATION OF THE TAXPAYER, EVEN IN THE ABSENCE OF ANY FORMAL APPLICATION FOR CHANGE OF ADDRESS, THE BIR CANNOT SIMPLY PRETEND LACK OF KNOWLEDGE OF THE CHANGE OF ADDRESS AND IS BOUND TO SEND ANY ISSUANCES OR NOTICES TO SUCH NEW LOCATION OF THE TAXPAYER. Where BIR alleges that there was proper service of the Formal Assessment Notice (FAN) directly denies receipt thereof, the BIR has the burden to prove receipt thereof. Hence, despite the absence of a formal written notice of respondent's change of address, the fact remains that BIR became aware of respondent's new address as shown by documents replete in its records (i.e. audit was conducted in the new address; change of address was made known to the BIR through Certificate of Registration, reflecting the new address; Annual Income Tax Return showing the new address). Therefore, BIR cannot deny that it was not informed of the taxpayer's new address. Where BIR sent the FAN in the old address and taxpayer did not receive the same, there was no valid service of FAN to the taxpayer. Therefore, without receipt of the Preliminary Assessment Notice (PAN), FAN and Formal Letter of Demand (FLD), taxpayer was deprived of due process. Consequently, the subject assessment is deemed null and void. *Commissioner of Internal Revenue v. Fresh N' Famous Foods, Inc., CTA EB No. 1632, August 14, 2018.*

A VALID ASSESSMENT MUST INDICATE THE TAX LIABILITY THAT IS DEFINITELY SET AND FIXED. A taxpayer shall be held accountable for a valid assessment only upon notice and demand from BIR or its authorized representative. Jurisprudence defines an assessment as a written notice and demand made by the BIR on the taxpayer for the settlement of a due tax liability that is definitely set and fixed. Its primary purpose is to determine the amount that a taxpayer is liable to pay. Clearly, any FAN which is still subject to modification or adjustment is not an assessment.

Where the subject FAN issued to the Company indicates the computation of its purported tax liabilities but the amount stated therein remains indefinite as the tax due and interest thereon are still subject to adjustment depending on actual date of payment by the Company (i.e., the FAN has a note stating that the "interest and total amount due shall be adjusted up to the actual date of payment"), the FAN cannot be considered to contain a fixed and definite amount of tax to be paid, rendering it legally infirm. *Roca Security and Investigation Agency, Inc. v. Commissioner of Internal Revenue, CTA EB No. 1523 (CTA Case No. 8718), August 15, 2018.*

A VALID LOA ORIGINATING FROM THE CIR OR THE REVENUE REGIONAL DIRECTOR IS A CONDITION SINE QUA NON FOR A REVENUE OFFICER TO LEGALLY CONDUCT AN AUDIT OF TAXPAYER. A Revenue Officer assigned to perform assessment functions in any district may, pursuant to a Letter of Authority (LOA) issued by the Revenue Regional Director, examine taxpayers within its jurisdiction in order to collect the correct amount of tax, or to recommend the assessment of any deficiency tax due. Conversely, the absence of such authority renders the assessment or examination void. The mandatory requirement of a valid LOA as a precondition to an assessment's efficacy is grounded on the fact that such requirement prevents undue harassment of a taxpayer and levels the playing field between the government's resources for tax assessment and collection on one hand and the taxpayer's need to prosecute its business while responding to the BIR's exercise of its statutory powers, on the other hand. Where the BIR's competence to audit the Company for possible tax liabilities was derived merely from a Letter-Notice, rather than a validly-issued LOA, the examination conducted by the BIR had no prior legal permission. Being a product of an illegal examination, the resulting assessment is a complete nullity. *Commissioner of Internal Revenue v. Linde Philippines, Inc., CTA EB No. 1515 (CTA Case No. 8724), August 15, 2018.*

DEFICIENCY INTEREST AND DELINQUENCY INTEREST MAY BE SIMULTANEOUSLY APPLIED. Nowhere in the law does it provide that the simultaneous imposition of a deficiency and delinquency interest is prohibited. To emphasize, the deficiency interest is applied when there is a nonpayment of a tax due from the date prescribed for its payment until the amount is fully paid. On the other hand, delinquency interest is applied when there is a failure to pay a deficiency tax, or any surcharge or interest thereon on the due date. *S.R. Metals, Inc. v. Commissioner of Internal Revenue, CTA Case No. 9256, August 8, 2018.*

ALLEGATIONS OF FALSITY OR FRAUD IN THE FILING OF TAX RETURNS MUST BE PROVEN TO EXIST BY CLEAR AND CONVINCING EVIDENCE AND CANNOT BE JUSTIFIED BY MERE SPECULATION. In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed at any time within 10 years after the discovery of the falsity, fraud or omission. Where BIR claims that substantial under-declaration of sales demonstrates falsity or fraud in the VAT returns but BIR did not present any witness or evidence to support such allegation; and where BIR did not impose a penalty of 50% of the tax or of the deficiency tax, the claim of the BIR that the alleged falsity falling within the exceptions on period of limitation to assess a taxpayer for deficiency tax is defeated. *National Food Authority v. City Government of Tagum, City Assessor and City Treasurer of Tagum, Province of Davao Del Norte, CTA AC No. 180 (RTC SP Case No. 527), August 23, 2018.*

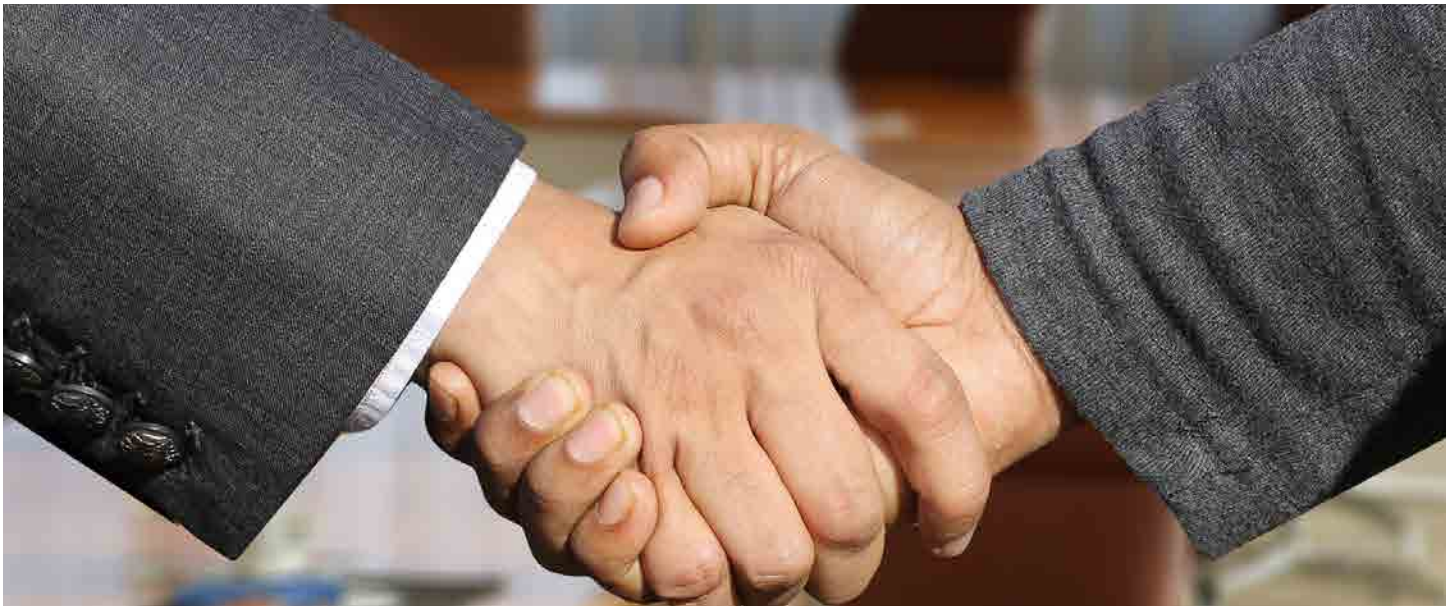
WAIVERS MUST BE EXECUTED PRIOR TO THE LAPSE OF THE PERIOD PRESCRIBED BY LAW FOR ASSESSMENT OF TAXES. The Tax Code authorizes the extension of the original 3-year prescriptive period to assess tax by the execution of a valid waiver whereby the taxpayer and the BIR agrees to extend the period of assessment prior to the lapse of the period prescribed by law. In relation thereto, both the date of execution by the taxpayer and the date of acceptance by the BIR should be before the expiration of the period of prescription. Corollary thereto, the fact of receipt by the taxpayer of its file copy must be indicated in the original copy

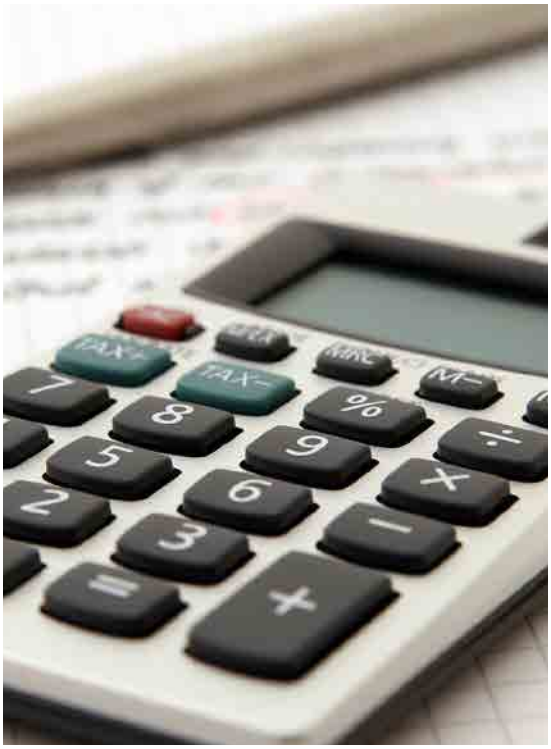
of the waiver to show that the taxpayer was notified of the acceptance of the BIR of the waiver. Where the taxpayer was not furnished a copy of the subject waiver, it is not notified of the existence of such waiver and of the acceptance by the BIR. Thus, the waiver is defective and did not validly extend the prescriptive period to assess deficiency taxes. *Megabucks Merchandising Corp., v. Commissioner of Internal Revenue, CTA Case No. 9345, August 17, 2018.*

THE AUTHORITY OF THE REVENUE OFFICER TO EXAMINE OR ASSESS A TAXPAYER MUST BE EMBODIED IN A LETTER OF AUTHORITY AND NOT IN THE FORM OF A MERE NOTICE TO THE TAXPAYER. A Revenue Officer must be clothed with authority before proceeding with an examination or assessment. Moreover, that authority must be embodied in a Letter of Authority (LOA), and not in the form of a mere Tax Verification Notice (TVN) to the taxpayer. Where it is clear that there was no LOA issued to examine accused's books of accounts and accounting records. Instead, the examination/assessment is void. *Ibid.*

THE THREE-YEAR PRESCRIPTIVE PERIOD TO ASSESS TAXPAYER MAY BE EXTENDED IF BEFORE THE EXPIRATION OF THE TIME PRESCRIBED FOR THE ASSESSMENT OF THE TAX, BOTH PETITIONER AND THE TAXPAYER MAY HAVE AGREED IN WRITING TO ITS ASSESSMENT AFTER SUCH TIME. The BIR and the tax payer may validly extend the 3-year prescriptive period through a written agreement, which must be duly executed prior to the expiration of the period. Waiver becomes effective upon acceptance by the BIR. Where BIR accepts the waiver after the lapse of the 3-year prescriptive period, the said waiver, failed to validly extend the BIR's right to assess taxes. Thus, the said assessments are deemed invalid or without any force or effect. *Commissioner of Internal Revenue v. Coral Bay Nickel Corporation, CTA EB No. 1652, August 14, 2018.*

A PRIOR APPLICATION FOR TAX TREATY RELIEF IS NOT REQUIRED BEFORE A TAXPAYER CAN AVAIL OF THE PREFERENTIAL TAX RATE UNDER THE PHILIPPINES-JAPAN TAX TREATY. It is clear from the previous jurisprudential pronouncements that a prior application for tax treaty relief is mandatory before a taxpayer may enjoy the reliefs provided under Philippine tax treaties. As ruled by the Supreme Court, the application for a tax treaty relief from the BIR should merely operate to confirm the entitlement of the taxpayer to the relief, and not for the granting of the relief being sought.





Moreover, the Philippines-Japan Tax Treaty does not provide for any prerequisites for the availment of the benefits provided therein. Accordingly, the fact that respondent failed to file a prior application for tax treaty relief for its income payments does not *ipso facto* preclude it from enjoying the preferential tax rate under Philippines-Japan Tax Treaty. *Ibid.*

RETAINED EARNINGS FROM PRIOR YEARS SHALL NOT BE INCLUDED IN THE DETERMINATION OF UNREASONABLY ACCUMULATED PROFITS FOR THE PURPOSE OF IMPOSING IAET. Section 29(A) of the Tax Code specifically provides for the imposition of Improperly Accumulated Earnings Tax (IAET) for each taxable year on the improperly accumulated taxable income of each corporation computed based on a formula provided therein. Thus, with the introduction of a specific formula to be used in determining the unreasonable accumulation of profits in the 1997 Tax Code (i.e., [taxable income for the year + income exempt from tax + income excluded from gross income + income subject to final tax + amount of NOLCO deducted] – [income tax paid/ payable for the taxable year + dividends actually or constructively paid/ issued from the applicable year's taxable income + amount reserve for the reasonable needs of the business as defined]), it should be clear that retained earnings from prior years shall be excluded from the said computation for purposes of IAET. *Fortune Tobacco Corporation v. Commissioner of Internal Revenue, CTA Case No. 9105, August 15, 2018.*

B. VALUE-ADDED TAX

IN CLAIMS OF REFUND OF INPUT VAT, BIR'S INACTION ON TAXPAYER'S CLAIM DURING THE 120-DAY PERIOD FROM COMPLETE SUBMISSION OF DOCUMENT IS, BY EXPRESS PROVISION OF LAW, 'DEEMED A DENIAL' OF TAXPAYER CLAIM. Taxpayer has 30 days from the expiration of the 120-day period to file its judicial claim with the CTA. Taxpayer's failure to do so renders the 'deemed a denial' decision of the Commissioner final and unappealable. In other words, a decision made by the BIR after the 120 + 30-day period like in the appealed case, is therefore inconsequential as the inaction of the CIR during the 120-day period is 'deemed a denial' of a claim for refund, and without a timely appeal filed by the taxpayer, the 'deemed a denial' decision of the CIR becomes final and unappealable. *Phil. Gold Processing and Refining Corp. v. Commissioner of Internal Revenue, CTA EB No. 1645 (CTA Case No. 8856), August 14, 2018.*

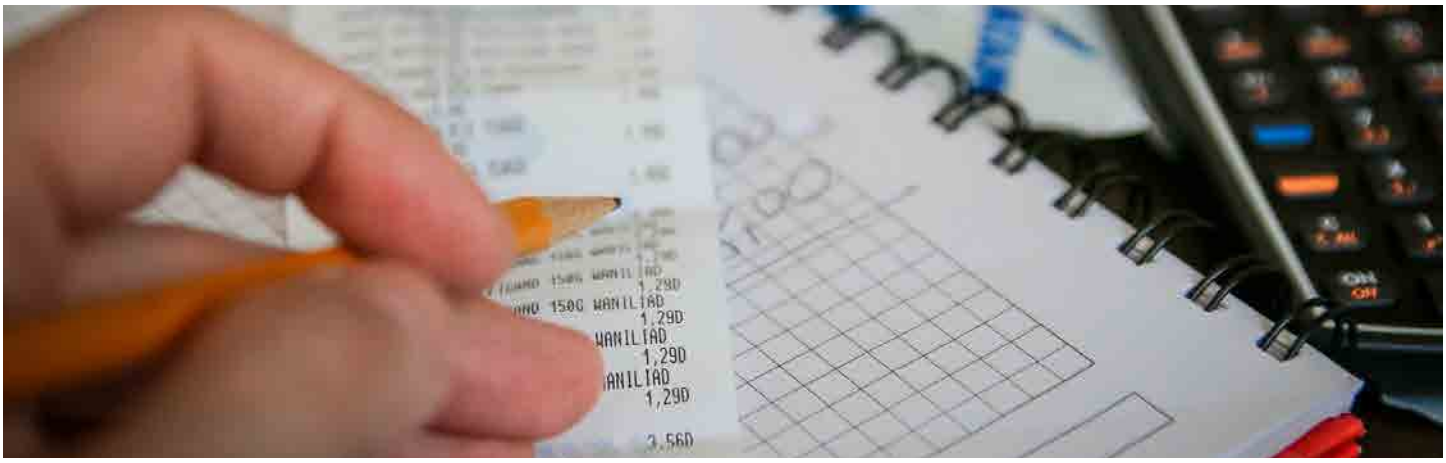
THE PERIOD FROM WHICH THE BIR IS SUPPOSED TO ACT UPON AN ADMINISTRATIVE CLAIM FOR REFUND OR TAX CREDIT FOR VAT IS RECKONED FROM THE DATE OF SUBMISSION OF COMPLETE DOCUMENTS IN SUPPORT OF THE APPLICATION. The 120-day period given to a taxpayer claiming for a refund or an issuance of a Tax Credit Certificate shall be reckoned from the day of the submission of additional documents, which must be within 30 days from the filing of the administrative claim for refund, or if additional documents are required for the proper determination of the legitimacy of the claim, within 30 days from the request of the investigating/ processing office. *Vestas Services Philippines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 8888, August 31, 2018.*

ZERO-RATED TRANSACTIONS MUST BE DULY SUPPORTED BY PROPERLY ISSUED RECEIPTS IMPRINTED WITH THE WORD "ZERO-RATED SALE." Only sales of services supported by duly registered official receipts imprinted with the word "zero-rated sale" and which contain all the required information under the law and regulations shall qualify for VAT zero-rating. *Ibid.*

ALL RENEWABLE ENERGY DEVELOPERS SHALL BE ENTITLED TO ZERO-RATED VALUE ADDED TAX ON THEIR PURCHASES OF LOCAL SUPPLY OF GOODS, PROPERTIES, AND SERVICES NEEDED FOR THE DEVELOPMENT, CONSTRUCTION, AND INSTALLATION OF THEIR PLANT FACILITIES. Developers are entitled to zero-rated VAT on their purchases of local supply of goods, properties, and services needed for the development, construction, and installation of their plant facilities. The zero-rating further extends to the whole process of exploring and developing renewable energy sources up to its conversion into power and includes services performed by contractors and/or subcontractors. *Ibid.*

SUBMISSION OF COMPLETE SUPPORTING DOCUMENTS BY THE TAXPAYER IS PRESUMED IN REFUND CLAIMS. While the burden to prove entitlement to a tax refund is on the taxpayer, it is presumed that in order to discharge this burden, the taxpayer has to attach complete supporting documents necessary to prove their entitlement to a refund in their application, absent any evidence to the contrary. *Commissioner of Internal Revenue v. ABB Inc., CTA EBCase No. 1501 (CTA Case Nos. 8563, 8594 & 8674), August 22, 2018.*

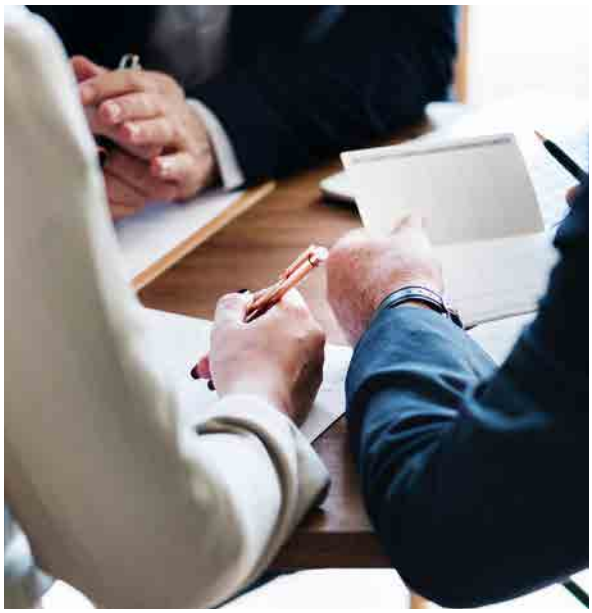
ALL REQUISITES FOR CLAIM OF REFUND OR ISSUANCE OF TAX CREDIT CERTIFICATE OF UNUTILIZED INPUT VAT ATTRIBUTABLE TO ZERO-RATED OR EFFECTIVELY ZERO-RATED SALE MUST BE PRESENT. To be entitled to VAT refund or to the issuance of tax credit certificates, the following requisites must be present: (1) the taxpayer is VAT-registered; (2) the claim was filed within the prescriptive period both in the administrative and judicial levels; (3) there must be zero-rated or effectively zero-rated sales; (4) input taxes were incurred or paid; (5) input taxes due or paid were attributable to zero-rated or effectively zero-rated sales; and (6) input taxes were not applied against any output VAT liability. Where the taxpayer's VAT returns showed discrepancy vis-à-vis its supporting VAT zero-rated official receipts; failed to submit PEZA/ CDC Certification for some of its supposedly VAT zero-rated sales; and failed to present VAT invoices or receipts to support bulk of its claimed "input tax carried over from previous period," the claim shall be denied. *Riofil Corporation v. Commissioner of Internal Revenue, CTA Case No. 9344, August 17, 2018.*



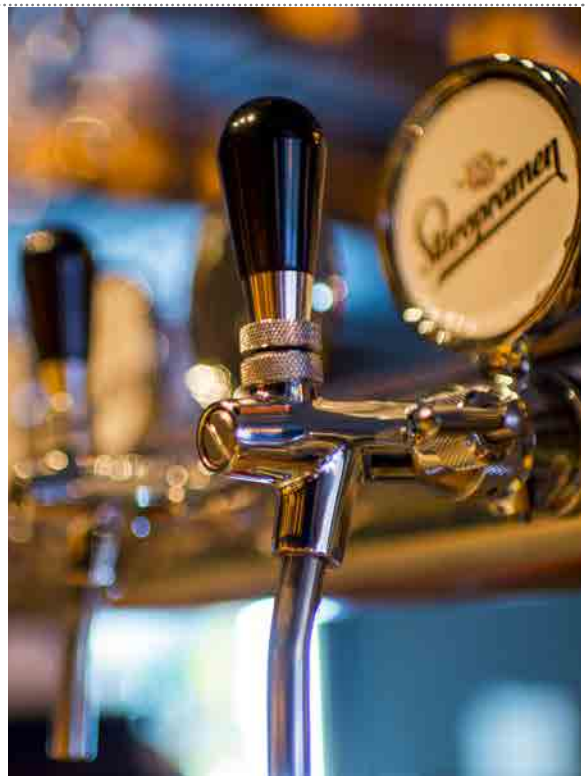
BIR'S BASIS FOR VAT ASSESSMENTS ON A COMPANY PRIMARILY ENGAGED IN THE SALE OF GOODS SHOULD BE THE VAT INVOICES IT ISSUED, NOT ITS VAT OFFICIAL RECEIPTS. A VAT invoice is issued for every sale, barter or exchange of goods or properties. Where the taxpayer is primarily engaged in the sale of goods, its issuance of VAT invoices for its sales is in accordance with the law and shall be the only basis for VAT assessments and reconciliation of the BIR. The fact that the taxpayer issues both VAT invoices and official receipts covering the same transactions does not allow the BIR to impose VAT twice on the same transaction which has already been declared and paid. *Process Machinery Co., Inc. v. Commissioner of Internal Revenue, CTA Case No. 9217, August 17, 2018.*

FOR TAX CREDIT OR REFUND FILED PRIOR TO JUNE 11, 2014 (ISSUANCE OF RMC NO. 54-2014), THE RECKONING POINT IN COUNTING THE 120-DAY PERIOD IS THE DATE OF SUBMISSION OF COMPLETE DOCUMENTS OR THE EXPIRATION THEREOF. BIR has 120 days from the date of submission of complete documents in support of its claim for refund to act thereupon. In case of an adverse ruling, the taxpayer may within thirty (30) days from receipt of the decision, or if there is no action thereof after the expiration of the 120-day period, seek judicial intervention with the CTA. Thus, the 120-day period must be reckoned from the filing of the complete documents or expiration of the period given. It is only upon the manifestation of the Company that it no longer wishes to submit any additional documents that the 120-day period would begin to run. In this case, considering that the Company itself asked for an extension period of until June 17, 2013 within which to submit the supporting documents, but it did not submit such documents within the said period, then the counting of the 120-day period should be reckoned on June 17, 2013. The Company should have waited for the lapse of the 120 days from June 17, 2013 before filing a Petition for Review with the CTA. *Nokia (Philippines), Inc., v. Commissioner of Internal Revenue, CTA EB No. 1585 (CTA Case No. 8679), August 17, 2018.*

IN CASES OF REFUND OF EXCESS UNUTILIZED VAT, TAXPAYER HAS 30 DAYS FROM THE DATE OF FILING OF THE CLAIM WITHIN WHICH TO SUBMIT ADDITIONAL DOCUMENTARY REQUIREMENTS SUFFICIENT TO SUPPORT ITS CLAIM. Under the Tax Code, upon filing its application for tax credit or refund for excess creditable input taxes, the taxpayer is given thirty (30) days within which to complete the required documents, unless given further extension by the BIR. It is not from the date when the documents were belatedly filed that the counting of the 120-day period should commence, but from the expiration of the 30-day period to submit supporting documents. *Vestas Services Philippines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 8877, August 15, 2018.*



THE TAXPAYER ULTIMATELY DETERMINES WHEN COMPLETE DOCUMENTS HAVE BEEN SUBMITTED FOR THE PURPOSE OF COMMENCING AND CONTINUING THE 120-DAY PERIOD IN CLAIMS FOR REFUND/ CREDIT. The term "complete documents" under Section 112(C) of the Tax Code,



as amended, should be understood to refer to those documents that are necessary to support the application for refund or tax credit certificate, as determined by the taxpayer. The BIR examiner can require the taxpayer to submit additional documents but the examiner cannot demand what type of supporting documents should be submitted by the taxpayer. Otherwise, the taxpayer will be at the mercy of the examiner, who may require the production of documents that it cannot submit. Moreover, it is basic that the BIR ought to know the tax records of all taxpayers. Besides, as between the taxpayer and the BIR, it cannot be denied that the former has greater interest in ensuring that the complete set of documentary evidence is provided for proper evaluation. Thereafter, whether these documents are actually complete as required by law is for the BIR and the courts to determine. *Commissioner of Internal Revenue v. CE Luzon Geothermal Power Company, Inc., CTA EB No. 1579 (CTA Case No. 7890), August 15, 2018.*

C. EXCISE TAX

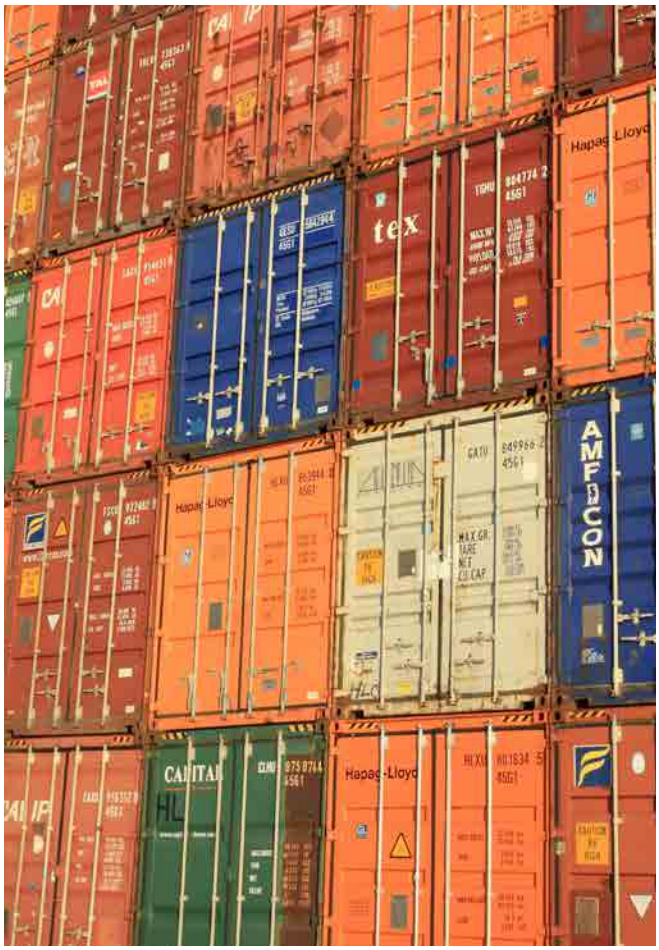
A BAR AND RESTAURANT CAN FALL UNDER A DEFINITION OF CABARET, NIGHT CLUB OR DAY CLUB THAT IS SUBJECT TO AMUSEMENT TAX, IF THE PATRONS ARE ENTERTAINED BY PERFORMERS WHO DANCE AND SING OR IT IS FREQUENTED BY PLEASURE SEEKERS WHERE MUSIC IS FURNISHED AND CUSTOMERS ARE ALLOWED TO DANCE WHETHER ON THEIR OWN, WITH THEIR OWN PARTNER, WITH THE PERFORMER OR OTHER PATRONS OR PROFESSIONAL HOSTESSES FURNISHED BY THE PLACE. Night and day clubs are drinking, dancing and entertainment venues which often times also serve food and provide entertainment while cabarets, on the other hand, are restaurants or clubs where liquor and food are served, with a stage provided for performances by musicians, dancers or comedians, including a venue for dancing by patrons/customers, similar to that of nightclubs. However, where it was established that although taxpayer provides some form of entertainment, but the same are but incidental to its main line of business of serving food and drinks; and while customers may dance within the dining area, there is no designated dance floor; and there is no evidence that taxpayer employs dancers to dance with its customers; there is no evidence that establishment was frequented by customers for dancing either with their own partners or professional dancers furnished by petitioner, there is no basis to assess the taxpayer for amusement tax. *Hard Rock Café (Makati City), Inc. v. Commissioner of Internal Revenue, CTA Case No. 9135, August 10, 2018.*

D. LOCAL GOVERNMENT CODE

LOCAL GOVERNMENT UNITS MAY NOT IMPOSE TAXES ON BUSINESS ENTERPRISES CERTIFIED BY THE BOARD OF INVESTMENTS (BOI) FOR A PERIOD OF SIX (6) YEARS, FOR PIONEER, OR OF FOUR (4) YEARS, FOR NON-PIONEER, FROM THE DATE OF REGISTRATION. CONVERSELY, AFTER THE APPLICABLE PERIOD, DESPITE EXTENSION OF INCOME TAX HOLIDAY, THE SAID LOCAL GOVERNMENT UNITS MAY

ALREADY EXERCISE THEIR POWER TO TAX AND IMPOSE BUSINESS TAXES ON THE SAID ENTERPRISES. Local government units may not impose business taxes against BOI-registered pioneer or non-pioneer companies for a certain period of time. The extension of taxpayer's supposed Income Tax Holiday is of no moment in the imposition of local business taxes by the LGU after the exemption period. The incentive under Omnibus Investment Code refers to a full exemption from income taxes levied by the national government. It does not extend or pertain to an exemption from business taxes imposed by local government units. On the other hand, the Local Government Code limits the taxing powers of local government units to impose taxes on business enterprises certified by the BOI for a period of six (6) years, for pioneer, or of four (4) years, for non-pioneer, from the date of registration. After the applicable period, the said local government units may already impose business taxes on the said enterprises. *The Municipal Treasurer of the Municipality of Claver v. Platinum Group Metals Corporation (PGMC), CTA AC No. 183 (Civil Case No. 8208), August 9, 2018.*

FOR THE PURPOSE OF LOCAL TAXATION, A HOLDING COMPANY IS NOT INCLUDED IN THE DEFINITION OF BANKS AND OTHER FINANCIAL INSTITUTIONS. Section 133(a) of the Local Government Code expressly provides that the taxing powers of provinces, cities, municipalities and barangays shall not extend to the levy of income tax, except when levied on banks and other financial institutions. Under the same provision, "banks and other financial institutions" include "non-bank financial intermediaries, lending investors, finance and investment companies, pawnshops, money shops, insurance companies, stock markets, stock brokers, and dealers in securities and foreign exchange", as defined under applicable laws or rules and regulations. The enumeration is evidently exclusive of other entities. A holding company is not included in the list of non-banking intermediaries. *City of Davao and Bella Linda N. Tanjili in her capacity as the Officer-in-Charge City Treasurer's Office of Davao City v. AP Holdings, Inc., CTA EB No. 1634 (CTA AC No. 129), August 17, 2018.*



E. PEZA LAW

FREEPORT ZONE-REGISTERED ENTERPRISES MAY GENERATE INCOME FROM SOURCES WITHIN THE CUSTOMS TERRITORY UP TO THIRTY (30) PERCENT OF ITS TOTAL INCOME FROM ALL SOURCES; IN EXCESS THEREOF, IT SHALL BE SUBJECT TO THE INCOME TAX LAWS OF THE CUSTOMS TERRITORY. Where it was established that taxpayer is a registered freeport enterprise and is entitled to enjoy the 5% preferential tax regime in lieu of national and local taxes, including VAT, so long as its sales within the Customs Territory do not exceed the aforesaid 30% threshold, the taxpayer's sale of services to its clients within the customs territory should not be subject to VAT. *Clark Water Corporation v. Commissioner of Internal Revenue, CTA Case No. 9286, August 8, 2018.*

F. RULES OF PROCEDURES

ADMINISTRATIVE CLAIMS FOR REFUND MUST BE IDENTIFIED, MARKED, AND FORMALLY OFFERED. Taxpayers must prove not only their entitlement to a refund, but also their compliance with the procedural due process as nonobservance of the prescriptive periods within which to file the administrative and judicial claims would result in the denial of their claims. A formal offer is necessary because judges are mandated to rest their findings of facts and their judgment only and strictly upon the evidence offered by the parties at the trial. Its function is to enable the trial judge to know the purpose or purposes for which the proponent is presenting the evidence. On the other hand, this allows opposing parties to examine the evidence and object to its admissibility. Moreover, it facilitates review as the appellate court will not be required to review documents not previously scrutinized by the trial court. Therefore, where administrative claims that were allegedly filed were not identified, marked, and formally offered, taxpayer is considered to have failed to prove that their administrative claims were filed within the two-year period. *Shenelyn Abalos et. al. v. Commissioner of Internal Revenue, CTA Case No. 9098, August 10, 2018; see also Manila Genesis Entertainment & Management, Inc. v Hon. Kim Jacinto Henares in her capacity as Commissioner of the Bureau of Internal Revenue, CTA Case No. 9259, August 31, 2018.*

ALL CONTROVERSIES INVOLVING GOVERNMENT OFFICES, BUREAUS, AGENCIES, AND INSTRUMENTALITIES, INCLUDING GOCCS FALL WITHIN THE INITIAL JURISDICTION OF THE SECRETARY OF JUSTICE OR THE SUPREME COURT. Where a petitioner is a Government-Owned and Controlled Corporation (GOCC), while respondent represents the Bureau of Internal Revenue, the case involves a dispute solely between a government corporation and another government agency and as such the Court of Tax Appeals is bereft of jurisdiction to take cognizance of the present case. *Power Sector Assets and Liabilities Management Corporation v. Commissioner of Internal Revenue, CTA Case No. 9235, August 28, 2018.*

AN APPEAL TO THE CTA EN BANC MUST BE PRECEDED BY THE TIMELY FILING OF A MOTION FOR RECONSIDERATION OR NEW TRIAL WITH THE CTA DIVISION. The CTA rules provide that a petition for review of a decision or resolution of the Court in Division must be preceded by the filing of a timely motion for reconsideration or new trial with the Division. Failure to do so is a ground for the dismissal of the appeal as the word "must" indicates that the filing of a prior motion is mandatory, and not merely directory. The same is true in the case of an amended decision,

which is a different decision altogether, and thus, a proper subject of a motion for reconsideration or new trial. Therefore, failure to move for a reconsideration of the Amended Decision of the CTA Division is a ground for dismissal of its Petition for Review before the CTA En Banc. Due to such procedural lapse, the Amended Decision has therefore attained finality and may no longer be assailed on its merits. *Commissioner of Customs v. Air Philippines Corporation, CTA EB Case No. 1622 (CTA Case Nos. 7966, 7990 & 8020), July 12, 2018; see also Greenhills Properties, Inc. v. Commissioner of Internal Revenue, CTA EB No. 1604 (CTA Case No. 8295), August 16, 2018.*

A PARTY WILL NOT BE PERMITTED TO CHANGE THE THEORY OF ITS CASE ON APPEAL. As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court will not be permitted to change its theory on appeal. Points of law, theories, issues, and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. Where the BIR relied solely upon a single legal issue on the taxpayer's non-exhaustion of administrative remedies without raising therein any factual questions concerning a supplemental report of the independent certified public accountant submitted after the reopening of the trial. Accordingly, the BIR is barred from raising any factual issues when it failed to set up the same at any time during trial especially after the taxpayer rested its case. *Commissioner of Internal Revenue v. Philippine National Bank, CTA EB Case No. 1533 (CTA Case No. 8268), August 23, 2018.*

TAXPAYERS NEED NOT WAIT FOR BIR'S DECISION BEFORE FILING A JUDICIAL CLAIM FOR REFUND OF ERRONEOUSLY PAID TAX WITH THE CTA WHEN THE 2-YEAR PRESCRIPTIVE PERIOD IS ABOUT TO EXPIRE. For the recovery of tax erroneously or illegally collected, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment. Clearly, if the BIR takes time in deciding the claim for refund, and the 2-year period is about to end, the suit or proceeding must be started in the CTA before the end of the said period without awaiting the BIR's decision. This is so because of the positive requirement of the Tax Code and the doctrine that delay of the BIR in rendering decision does not extend the peremptory period fixed by the statute. *Commissioner of Internal Revenue v. ABB Inc., CTA EB Case No. 1501 (CTA Case Nos. 8563, 8594 & 8674), August 22, 2018*

THE 2-YEAR PRESCRIPTIVE PERIOD FOR ADMINISTRATIVE AND JUDICIAL CLAIM OF REFUND/CREDIT OF EXCESS INCOME TAX PAID/WITHHELD IS RECKONED FROM THE TIME OF FILING OF FINAL ADJUSTMENT RETURN OR THE ANNUAL INCOME TAX RETURN. Under the Tax Code, the claim for refund must be filed within the 2-year prescriptive period. The reckoning of the said period for the filing of a claim for refund/tax credit of excess income tax paid/withheld, both in the administrative and judicial levels, commences from the date of filing of the Final Adjustment Return or the Annual Income Tax Return. It is only when the Final Adjustment Return covering the whole year is filed that the taxpayer would know whether a tax is still due or a refund can be claimed based on the adjusted and audited figures. It is only at this time that the Company would be able to determine whether it has paid an amount exceeding its annual income tax liability. *Sonoma Services, Inc. v. Commissioner of Internal Revenue, CTA Case No. 9249, August 15, 2018.*