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SyCipLaw TIPS

TAX ISSUES AND PRACTICAL SOLUTIONS

1. May the Bureau of Internal Revenue issue assessments against a taxpayer based on third-party information?

Yes, provided that such third-party information is verified or confirmed with the relevant customers or suppliers. In *Commissioner of Internal Revenue v. Mercury Group of Companies, Inc.* (CTA EB No. 2215 (CTA Case No. 9531), June 30, 2021), the Court of Tax Appeals En Banc (*CTA En Banc*) ruled that "[w]ithout conducting such confirmation or verification, the data gathered from the computerized/third party matching are left unsubstantiated, and the resulting assessment is void for lack of factual and legal basis."

In this case, the Bureau of Internal Revenue (*BIR*) issued deficiency tax assessments (corresponding to alleged undeclared service income, undeclared purchases and unaccounted source of cash) based only on discrepancies arising from a comparison between taxpayer's Summary List of Sales (SLS) and Summary List of Purchases (*SLP*) vis-a-vis third-party SLS and SLP. The CTA En Banc noted that the BIR failed to verify the amounts reflected in the third-party SLS and SLP with the relevant customers and suppliers, and this "casts doubt as to the reliability and correctness of the findings of deficiency taxes assessed by [it]."

The CTA En Banc ruled that "[i]n order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of the correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption."

SyCipLaw Tip 1:
Under the BIR's Reconciliation of Listings for Enforcement (*RELIEF*) System, the BIR may match taxpayer-provided information with externally sourced data in order to detect any underdeclaration of revenues or overdeclaration of costs and expenses. While this should encourage taxpayers to faithfully report their revenues and expenses in their returns, the BIR should still verify the amounts obtained from the RELIEF System and should not issue assessments based solely on the amounts generated under the RELIEF System.

A motion for reconsideration of the decision of the CTA En Banc is currently pending.

CTA decisions, while persuasive, do not form part of the law of the land, unlike decisions of the Supreme Court.

2. May a taxpayer avail of the provisional remedies of a Suspension Order and a Writ of Preliminary Injunction/Temporary Restraining Order at the same time in the same case?

Yes. In *Commissioner of Internal Revenue v. Court of Tax Appeals and Pilipinas Shell Petroleum Corporation* (G.R. No. 210501, March 15, 2021), the Supreme Court clarified that "the subject matters of these two remedies are separate and distinct; hence, the issuance of one does not necessarily result into or preclude the other."

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SyCipLaw Tip 2:
If the elements for a Suspension Order and a TRO/WPI are present, it remains prudent for a taxpayer to apply for both provisional remedies in the same petition. It must be noted though that the Supreme Court observed that a TRO/WPI appears to be a broader relief which renders unnecessary further Suspension Orders covering future assessments stemming from the assailed tax statute or issuance.

If the taxpayer appeals a tax assessment, decision, ruling, or inaction mandating the payment of taxes, it may file a Motion for a Suspension Order to suspend the collection of the specific amount of taxes stated in such assessment or demand for the collection of taxes.

On the other hand, if, in appealing the tax assessment, decision, ruling or inaction, the taxpayer questions the constitutionality or validity of a tax statute or issuance, it may also seek (in the same petition) a Temporary Restraining Order (*TRO*) or a Writ of Preliminary Injunction (*WPI)* to restrain the immediate implementation of the statute or issuance.

3. May the CTA rule on the validity of a BIR issuance which was previously declared void by a Regional Trial Court?

Yes. In *Maria Amparo M. Dato, et al. v. Commissioner of Internal Revenue* (CTA EB No. 2253 (CTA Case No. 9321), June 30, 2021), the CTA En Banc ruled that it has jurisdiction to rule on the validity of a Revenue Memorandum Circular (*RMC*), which was previously declared void by a Regional Trial Court (*RTC*).

This case involves a claim for refund of income taxes filed by the petitioners, who are current and former employees of the Asian Development Bank (*ADB*). In a separate proceeding before an RTC, other ADB employees filed a petition to nullify the provision of RMC No. 31-2013, which states that only the officers and staff of ADP who are not Philippine nationals shall be exempt from Philippine income tax. The RTC declared this provision of the RMC void. After learning of the RTC's decision, the petitioners in the CTA case filed applications for refund of their income tax payments.

SyCipLaw Tip 3:
A taxpayer-litigant should note that the CTA may rule on the validity of any BIR issuance so long as it is within the CTA's appellate jurisdiction. Thus, if a taxpayer is assailing an assessment before the CTA, the taxpayer may raise the constitutionality or validity of a BIR issuance, which is the basis of the assessment, in the same proceeding.

A motion for reconsideration of the decision of the CTA En Banc is currently pending.

CTA decisions, while persuasive, do not form part of the law of the land, unlike decisions of the Supreme Court.

The CTA En Banc ruled that it "can rule not only on the propriety of an assessment or tax treatment of a certain transaction, but also on the validity of the revenue regulation or revenue memorandum circular on which the said assessment is based." It further ruled that this doctrine also applies to claims for refund, such as this case. The CTA En Banc then ruled that RMC 31-2013 is valid and denied the petitioners' claim for refund of their income tax payments.

SyCipLaw Tip 4:
A company registered with the PEZA and is under ITH is exempt from IAET. If the CIR issues an IAET assessment against it on the basis that only PEZA-registered companies under the 5% tax regime are exempt from IAET, the company may protest the assessment and cite *Commissioner of Internal Revenue v. Yumex Philippines Corporation* (G.R. No. 222476, May 5, 2021).

Note that the Corporate Recovery and Tax Incentives for Enterprises Act (*CREATE*) repealed the IAET. Thus, the IAET shall no longer be imposed for all taxable years ending after the effectivity of CREATE on April 11, 2021.

4. For taxable years prior to the Corporate Recovery and Tax Incentives for Enterprises Act, is a company registered with the Philippine Economic Zone Authority (*PEZA*) exempt from improperly accumulated earnings tax even if it is under income tax holiday and not under the 5% special tax regime which is imposed in lieu of all other taxes?

Yes. Section 4(g) of Revenue Regulations No. 2-2001 provides that "[e]nterprises duly registered with the Philippine Economic Zone Authority (*PEZA*) under R.A. 7916 and enterprises registered pursuant to the Bases Conversion and Development Act of 1992 under R.A. No. 7227 (*BCDA*), as well as other enterprises duly registered under special economic zones declared by law which enjoy payment of special tax rate on their registered operations or activities in lieu of other taxes, national or local" are exempt from improperly accumulated earnings tax (*IAET*).

In *Commissioner of Internal Revenue v. Yumex Philippines Corporation* (G.R. No. 222476, May 5, 2021), the Supreme Court rejected the Commissioner of Internal Revenue's (*CIR's*) argument that only income from PEZA-registered activities which are subject to the preferential tax rate of 5% is exempt from IAET. It quoted with approval the CTA En Banc's interpretation that "the phrase "*which enjoy payment of special tax rate on their registered operations or activities in lieu of other taxes, national or local*" applies only to corporations belonging to the third group – other companies duly registered under special economic zones declared by law. On the other hand, PEZA-registered enterprises and those registered pursuant to the BCDA, are exempted from the imposition of the improperly accumulated earnings tax without further qualification. Section 4(g) [of Revenue Regulations No. 2-2001] made no distinction whether a corporation duly registered with the PEZA or registered pursuant to the BCDA enjoys an income tax holiday (*ITH*) or the special tax regime at a rate of 5% on its registered activities. In other words, the fact of registration with the PEZA under RA No. 7916 or pursuant to the BCDA under RA No. 7227 alone excludes a corporation or enterprise from the coverage of corporations upon which improperly accumulated earnings tax may be imposed."

5. Is the renunciation of rights, interest and participation in the settlement of estate of the decedent subject to donor's tax and documentary stamp taxes?

It depends on whether the renunciation is a general renunciation or a partial renunciation of the heir's rights, interest and participation in the settlement of the estate of the decedent.

A general renunciation by an heir of his share in the decedent's estate is not subject to donor's tax and documentary stamp taxes (*DST*). However, if an heir's renunciation is done specifically and categorically in favor of identified heir/s to the exclusion or disadvantage of the other co-heirs in the hereditary estate, then the renunciation of such heir's share will be subject to donor's tax and, if it involves real property, consequently, to DST.

In cases where the heirs agree among themselves to receive specific property instead of all the heirs receiving their respective shares in all the properties of the decedent, an heir may end up receiving a share lower or higher than the value of his rightful share in all the properties of the decedent. RMC No. 94-2021 clarified that this results in a partial renunciation of inheritance on the part of the heir receiving a share lower than the value of his rightful share in all the properties because the heir is waiving his share to identified properties only and not to the entire properties of the decedent. In such a case, donor's tax and DST will be imposed on the value of the property/ies waived as a result of the partial renunciation.

RMC No. 94-2021 provides an illustrative example and the manner of computing the donor's tax due in cases where the heirs agree to receive specific property instead of receiving their respective share in all the properties of the decedent. The heir making the renunciation may be subject to the 6% donor's tax on the value of the properties waived.

SyCipLaw Tip 5:
Heirs who are considering renouncing their inheritance should be aware that there are possible donor's tax and DST consequences when they renounce their share in favor of a particular heir or to a particular property comprising the estate. In addition to the estate tax, donor's tax and, possibly, DST will have to be paid before the BIR will issue a Certificate Authorizing Registration to enable the transfer of title to the property (such as land or shares of stock) to the heirs. Late payment of donor's tax and DST will also subject the heir who partially renounces his inheritance to penalties such as the 25% surcharge on the unpaid tax and interest at the rate of 12% per annum.

SyCipLaw Tip 6:
Social media influencers are subject to tax on income they earn from their activities. Like any other taxpayer, they should be aware of their obligations under the tax laws. RMC 97-2021 sets out the taxes that are applicable to them.

6. Are social media influencers required to register with the BIR?

Like all taxpayers, social media influencers are required to register with the BIR and secure a Philippine tax identification number. RMC No. 97-2021 defines a "social media influencer" as "all taxpayers, individuals or corporations, receiving income, in cash or in kind, from any social media sites and platforms (YouTube, Facebook, Instagram, Twitter, TikTok, Reddit, Snapchat, etc.) in exchange for services performed as bloggers, video bloggers or "vloggers" or as an influencer, in general, and from any other activities performed on such social media sites and platforms."

Unless exempted under the National Internal Revenue Code of 1997, as amended (*Tax Code*) (*e.g.*, those earning a taxable annual income not exceeding Php250,000), special laws or tax treaties, income derived (a) from sources within or without the Philippines by social media influencers who are resident citizens or (b) from sources within the Philippines by social media influencers who are non-residents or residents of the Philippines, are subject to Philippine tax.

The Tax Code requires every person subject to internal revenue taxes to register with the appropriate Revenue District Office (*RDO*) and to update his registration information with the RDO in case of any change in taxpayer details. Influencers who are already registered with the BIR (*e.g.*, as employees) must ensure that their registration reflects their existing or current line of business and, if necessary, update their registration information with the RDO where they are registered. Accordingly, unless the social media influencer is exempt from Philippine tax under the Tax Code, special laws or applicable tax treaty, he must register or update his registration with the BIR to facilitate the filing of tax returns and payment or withholding of taxes on the income derived from his business activities as a social media influencer.

For resident foreign influencers, the RMC provides that income derived from Philippine-based contents is generally subject to Philippine tax. The resident foreign influencer has the burden of proving that the income was derived from sources outside the Philippines; otherwise, the income will be assumed to have been derived from sources within the Philippines and thus subject to Philippine tax.

7. How can a social media influencer avoid the risks of double taxation on income received from non-resident foreign companies residing in a country with which the Philippines has a tax treaty?

The influencer should inform the non-resident payor that he is a resident of the Philippines and thus entitled to claim tax treaty benefits under the applicable tax treaty. If the non-resident payor requires the presentation of proof of residency in the Philippines, the influencer may obtain a Tax Residency Certificate from the International Tax Affairs Division of the BIR in accordance with Revenue Memorandum Order No. 043-20 (SyCipLaw's Tax Department has prepared an article on the application for a Philippine Tax Residency Certificate in the international edition of its Tax Issues and Practical Solutions (T.I.P.S.) for the month of March, which may be accessed at https://syciplawresources.com/wp-content/uploads/2021/03/SyCipLaw-Tax-TIPS-International-March312021.pdf).

RMC No. 97-2021 provides that if the influencer does not avail of the tax treaty benefits and his income from outside the Philippines was subjected to the regular tax rates, the influencer will not be allowed to claim foreign tax credits in excess of the amount of tax that was supposed to have been paid in the source state had the influencer invoked the tax treaty and proved his Philippine residency.

SyCipLaw Tip 7:
Social media influencers should ensure that they comply with their tax obligations in the conduct of their activities as influencers. Under RMC No. 97-2021, the BIR advised its various offices to conduct a full-blown investigation against social media influencers residing or registered within their respective jurisdictions. Social media influencers who fail to truthfully declare their income and/or pay the correct taxes may be subject to penalties under the Tax Code, such as imprisonment and the payment of surcharges and interest on top of the amount of the unpaid tax.

Alien individuals and foreign corporations are not allowed to claim foreign tax credits for taxes paid in foreign countries because they are subject to Philippine income tax only on Philippine source income.