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EDITOR’S PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the fourth edition, we have continued to concentrate on the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

The idea behind this book commenced in 2013 with the general increase in litigation as tax authorities in a number of jurisdictions took a more aggressive approach to the collection of tax; in response, no doubt, to political pressure to address tax avoidance. In the UK alone we have seen the tax authority vested with broad new powers not only of disclosure but even to require tax to be paid in advance of any determination by a court that it is due. The provisions empower the revenue authority, an administrative body, to compel payment of a sum, the subject of a genuine dispute, without any form of judicial control or appeal. Over the past year the focus on perceived cross-border abuses has continued with action by the European Commission on past tax rulings in Ireland, Luxembourg and Belgium and the BEPS reaching a crescendo in the announcement of a ‘diverted profits tax’ to impose an additional tax in the UK when it is felt that a multinational is subject to too little corporation tax even in an EU context. As we go to press the UK has introduced another measure imposing a ring-fenced super tax to strip away half of any interest received with the refund of overpaid tax where the refund is, in practice, the result of the enforcement of EU rights.
These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be felt. In that light, this book provides an overview of each jurisdiction’s anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing important questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are a member, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Peter Stewart in the editing and compilation of this book.

Simon Whitehead
Joseph Hage Aaronson LLP
London
February 2016
Chapter 21

PHILIPPINES

Carina C Laforteza and Mark Xavier D Oyales

I INTRODUCTION

Tax litigation in the Philippines, in terms of substantive law, remains a complex law practice and requires specialised knowledge and experience. The Philippine tax system is a combination of global and schedular systems of taxation. Taxation law does not only encompass national taxes, imposed mainly under the National Internal Revenue Code (Tax Code), but also local taxes authorised under the Local Government Code (LGC) and scattered across various local legislation by way of implementing local tax ordinances. Income taxation alone has its own intricacies. While ordinary income of corporations is taxed at a flat rate, that of individuals is taxed at a progressive rate. Certain types of income are excluded from ordinary income and are taxed separately. The law also allows various tax exemptions and deductions. One has to understand the various revenue regulations, revenue memorandum circulars and opinions regularly issued by the Philippine tax authorities to be able to view the landscape of the tax system clearly.

However, in terms of procedural law, tax litigation in the Philippines whether involving national or local taxes consists invariably of two phases: an administrative phase and a judicial phase. The challenge in procedural law is striking a balance between streamlining the assessment and increasing the tax collection while preserving the right of the taxpayers to procedural due process. This chapter focuses on the law and recent regulations of sometimes overzealous tax authorities to expedite assessment and collection, and their interactions with procedural due process.

1 Carina C Laforteza is a partner and Mark Xavier D Oyales is an associate at SyCip Salazar Hernandez & Gatmaitan.
II COMMENCING DISPUTES

The Philippine tax system is mainly based on a self-assessment approach wherein the taxpayer is responsible for determining his or her tax liability, filing his or her tax return, paying the tax due and complying with reporting requirements. Internal revenue taxes are administered by the Bureau of Internal Revenue (BIR), while local taxes are administered by the local treasurer. The self-assessment approach is balanced and regulated by the authority of the BIR and the local treasurer to examine the taxpayer’s returns and documents and to assess the correct taxes due. Tax litigation starts when the BIR or the local treasurer issues a formal assessment notice and the taxpayer disputes the same. This section provides an overview of the administrative phase of tax litigation. The judicial phase of tax litigation will be discussed in detail in Section III.

i National taxes

After the taxpayer has filed a return, the Commissioner of the BIR (Commissioner) or his or her duly authorised representatives may authorise the examination of any taxpayer and the assessment of the correct amount of tax. The BIR can assess internal revenue taxes within three years from the date of actual filing or the last day prescribed by law for the filing of the return; whichever is later. However, in cases of false or fraudulent returns with intent to evade taxes or failure to file a return, the prescriptive period is extended to 10 years after the discovery of the falsity, fraud or omission. It should be clarified that the mere falsity of a return does not merit the application of the 10-year prescriptive period, unless it can be shown that the return was made with a design to mislead or deceive on the part of the taxpayer, or at the very least show culpable negligence.

The audit process commences with the issuance of a letter of authority (LOA) to a taxpayer who has been selected for audit. The LOA is an official document that empowers a revenue officer to examine and scrutinise a taxpayer’s books of accounts and other accounting records, in order to determine the taxpayer’s correct internal revenue tax liabilities.

If after review and evaluation by the Commissioner or his or her duly authorised representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any tax deficiency tax or taxes, the BIR will issue a preliminary assessment notice (PAN) to inform the taxpayer of the discrepancy. Prior to their amendment in 2013, the regulations provided that the BIR would issue a PAN, and that a notice of informal conference should first be issued to the taxpayer inviting him or her to conference with the examiners to present his or her side and explanations regarding the

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2 National Internal Revenue Code (Tax Code), Section 6(A); LGC, Sec. 171.
3 Id.
4 Tax Code, Section 203.
5 Tax Code, Section 222(a).
6 ESS Manufacturing Company, Inc. v. Commissioner of Internal Revenue (CTA Case No. 7958, 14 February 2014).
BIR’s findings. Under current regulations, the BIR no longer issues notices of informal conference. Consequently, the BIR will simply issue the PAN stating the proposed deficiency assessment, as well as the detailed facts and the law and the relevant rules and regulations. While the Tax Code does not require informal conferences between the BIR examiners and the taxpayer prior to the issuance of the PAN, the practice of conferring with the examiners was provided in the regulations since 1999, until its amendment, and was recognised by jurisprudence as a guarantee of procedural due process. It was also a useful tool to enable the examiners and the taxpayer to agree on certain findings before the PAN was issued.

In some cases, however, the law provides that the issuance of the PAN may be dispensed with and the formal letter of demand and final assessment notice (FLD/FAN) can be issued outright:

a when the finding for any deficiency is the result of mathematical error in the computation of the tax appearing in the tax return filed by the taxpayer;

b when a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent;

c when a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year;

d when the excise tax due on excisable articles has not been paid; or

e when an article locally purchased or imported by an exempt person has been sold, traded or transferred to non-exempt persons.

If the taxpayer fails to respond to the PAN within 15 days from date of receipt of the same, he or she is considered in default and an FLD/FAN will be issued calling for payment of the taxpayer’s deficiency tax liability, inclusive of applicable penalties.

The BIR will issue the FLD/FAN if it is not satisfied with the reply of the taxpayer to the PAN. It is noteworthy that under prevailing regulations the BIR is mandated to issue a FLD/FAN 15 days from receipt of the reply to the PAN. While this BIR innovation may have expedited the disposition of assessments, it creates a strain on the procedural due process of taxpayers. Fifteen days is too short a time for the BIR to resolve complicated tax issues, especially now that informal conferences that could have threshed out issues have been dispensed with. The practical consequence of this regulation is that an FLD/FAN will be issued as a matter of course within 15 days from receipt of the reply without the BIR having thoroughly considered the arguments that may have been raised by the taxpayer in his reply to the PAN.

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7 Revenue Regulation No. 12-99, Section 3.1.1.
8 Revenue Regulation No. 18-2013, Section 3.
9 See Revenue Regulation 12-99.
10 Tax Code, Section 228.
11 Revenue Regulation No. 18-2013, Section 3.1.1.
12 Revenue Regulation No. 18-2013, Section 3.1.1.
The FLD/FAN calling for payment of the taxpayer’s deficiency tax or taxes must state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based; otherwise, the assessment shall be void.13 The taxpayer has 30 days from receipt of the assessment to protest the same. The two kinds of protest will be discussed in detail in Section V, infra. If the protest is denied in whole or in part, or is not acted upon within 180 days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals (CTA) within 30 days from receipt of the said decision, or from the lapse of the 180-day period. Otherwise, the decision shall become final and executory.14 The reckoning point for the taxpayer to file an appeal with the CTA has been clarified in recent jurisprudence. Where the Commissioner of the BIR failed to act on the disputed assessment within the 180-day period from date of submission of documents, a taxpayer can either:

a. file a petition for review with the CTA within 30 days after the expiration of the 180-day period; or

b. await the final decision of the Commissioner on the disputed assessments and appeal such final decision to the CTA within 30 days after receipt of a copy of such decision.

In other words, the assessment would not become final and executorial for the sole reason that petitioner failed to appeal the inaction of the Commissioner within 30 days after the 180-day regulatory period.15 The above remedies, however, are exclusive, such that resort to the first remedy bars the other.

ii Local taxes

The process for disputing local taxes is governed by a separate legislation – the LGC. The dispute process does not deviate significantly from the model outlined above. It begins when the local treasurer issues a notice of assessment stating the nature of the local tax, fees, surcharges and penalties. The local treasurer has a longer period to assess local taxes compared to the BIR with respect to national taxes. Local taxes may be assessed within five years from the date they became due. In case of fraud or intent to evade the payment of taxes, the local treasurer has 10 years from discovery of the fraud to assess deficiency taxes.16 The taxpayer has 60 days from receipt of the notice of assessment to file a written protest with the local treasurer. The local treasurer shall decide the protest within 60 days from the time of its filing. The taxpayer, on the other hand, shall have 30 days from receipt of the denial or protest or from the lapse of the 60-day period prescribed within which to appeal to the regional trial court (RTC). The decision of the RTC may be appealed to the CTA, and the dispute process discussed below will be followed.

Disputing assessments for real property taxes are governed by a different set of rules in the LGC. In the case of real property taxes, the protest mechanism goes through

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13 Tax Code, Section 228.
14 Id.
15 Lascona Land Co. v. Commissioner of Internal Revenue, G.R. No. 171251, 5 March 2012.
16 LGC, Section 194.
Philippines

specialised quasi-judicial bodies like the local Board of Assessment Appeals (BAA) which has the power to summon witnesses, conduct visual inspections and issue subpoenas.\textsuperscript{17} It must be noted that, unlike in the case of internal revenue taxes and other local taxes, no protest involving real property tax will be entertained unless the taxpayer first pays the tax ‘under protest’.\textsuperscript{18} The protest is filed within 30 days from payment of the tax to the treasurer, who must decide the protest within 60 days from receipt.\textsuperscript{19} If the protest is denied, or upon lapse of the 60-day period, the taxpayer may appeal to the BAA.\textsuperscript{20} The taxpayer who is unsatisfied with the action of the local assessor may, within 60 days from the date of receipt of the written notice of assessment, appeal to the BAA of the province or city.\textsuperscript{21}

If the decision of the BAA is unfavourable, the taxpayer may appeal the decision to the Central Board of Assessment Appeals (CBAA) within 30 days of receipt of the decision.\textsuperscript{22}

III THE COURTS AND TRIBUNALS

The CTA is a highly specialised court that reviews cases in taxation. It has exclusive jurisdiction to review by appeal decisions and the inactions of the Commissioner of the BIR in cases involving disputed assessments and refunds of internal taxes.\textsuperscript{23} The CTA also reviews decisions of the RTCs in local taxes resolved by them in the exercise of their original and appellate jurisdiction and decisions of the CBAA.\textsuperscript{24}

The judicial phase of tax litigation consists of several levels of review. This phase of tax litigation is crucial because, in actual practice, it seems unlikely that the BIR will reverse or cancel the assessment. Thus, there is the necessity for an objective and impartial review by the courts. At the CTA alone, there are two built-in tiers of review – the CTA divisions and the CTA \textit{en banc}. The appealed decision of the Commissioner shall be decided by a division of the CTA (the CTA Division).\textsuperscript{25} A taxpayer adversely affected by the decision of the CTA Division may seek reconsideration or a new trial before the same Division. The resolution of the CTA Division on a motion for reconsideration or new trial may be appealed via a petition for review to the CTA \textit{en banc}.\textsuperscript{26} Ultimately, the decision of the CTA \textit{en banc} may be appealed to the Philippine Supreme Court through a petition for review on \textit{certiorari}.

\begin{flushleft}
\begin{tabular}{ll}
\textsuperscript{17} & LGC, Section 229. \\
\textsuperscript{18} & LGC, Section 252 (a). \\
\textsuperscript{19} & Id. \\
\textsuperscript{20} & LGC, Section 252 (d). \\
\textsuperscript{21} & LGC, Section 226. \\
\textsuperscript{22} & LGC, Section 229. \\
\textsuperscript{23} & Republic Act No. 1125, as amended, Section 11. \\
\textsuperscript{24} & Id., Section 7. \\
\textsuperscript{25} & Id., Section 7. \\
\textsuperscript{26} & Id., Section 18. \\
\end{tabular}
\end{flushleft}
IV PENALTIES AND REMEDIES

As in the case of other jurisdictions, in the Philippines, compliance with tax legislations is regulated through administrative, civil and criminal penalties.

Under the Tax Code, failure to file an information return, statement or list, or keep any record, or supply any information required by law on the date prescribed shall be fined 1,000 Philippine pesos for each such failure.27

Moreover, non-compliance with the rules on filing of returns and payment of taxes may subject the taxpayer to civil penalties. Civil penalties refer to surcharges, deficiency and delinquency interests. A surcharge is a penalty or exaction imposed by law in addition to the main taxes required by law to be paid. A surcharge of 25 per cent of the amount due will be imposed in the following cases:

- failure to file a return and pay the tax due thereon;
- filing of a return with an internal revenue other than those with whom the return is filed;
- failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or
- failure to pay the full or part of the amount of tax before the date prescribed for its payment.

Furthermore, in case of wilful neglect to file a return or in case of a false or fraudulent return wilfully made, the surcharge to be imposed is 50 per cent of tax or of the deficiency tax.28 Under-declaration of income in an amount exceeding 30 per cent of that declared in the return is prima facie evidence of a false or fraudulent return.29

Deficiency interest is the interest payable at the rate of 20 per cent on any amount due or instalment thereof which is not paid on or before the date prescribed for its payment. In case of failure to pay (1) the amount of the tax due on any return required to be filed; (2) the amount of the tax due on which no return is required; or (3) a deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, a delinquency interest at the rate of 20 per cent shall be assessed and collected on the unpaid amount, until the amount is fully paid.30 It must be noted that under regulations interpreting the Tax Code, both deficiency interest and delinquency interest run simultaneously after a certain point in time.

Similarly, the LGC imposes administrative penalties for non-compliance of local taxation laws. Local legislature may impose a surcharge not exceeding 25 per cent of the amount of taxes, fees or charges not paid on time and interest at the rate not exceeding 2 per cent per month of the unpaid taxes, fees or charges including surcharges.31 However, the total interest is capped at 72 per cent.32

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27 Tax Code, Section 250.
28 Tax Code, Section 248.
29 Id.
30 Tax Code, Section 249.
31 LGC, Section 168.
32 Id.
In addition, the Tax Code also imposes criminal liability to offences defined in Chapter II of the said law, and both fine and imprisonment are imposed. It is noteworthy that payment of the tax due after apprehension does not constitute a valid defence in any prosecution for violation of any provision of the Tax Code.

Section 254 of the Tax Code defines the common punishable offences. Any person required under the Tax Code or by the rules and regulations promulgated by the BIR to pay any tax, make a return, keep any record, or supply any correct and accurate information, who wilfully fails to pay such tax, make such return, keep such record, or supply such correct and accurate information, or withhold or remit taxes withheld shall be subject to criminal prosecution. The current administration has been very aggressive in the prosecution of cases for tax evasion through its Run After Tax Evaders programme. As of October 2014, there are 269 pending cases at the Department of Justice. The filing of a criminal action is independent from administrative proceedings. In other words, an assessment of tax deficiency is not a prerequisite to the filing of a criminal complaint. The Tax Code does not only criminalise the actual commission of the abovementioned prohibited activities; it also penalises any person who wilfully aids or abets in its commission or who causes its commission by another.

V TAX CLAIMS

i Recovering overpaid taxes
Tax refund cases are based on the civil law principle of solutio indebiti. Jurisprudence holds that enshrined in the basic legal principles is the time-honoured doctrine that no person shall unjustly enrich himself or herself at the expense of another. The government is not exempted from the application of this doctrine.

If a taxpayer believes that a national internal revenue tax has been erroneously or illegally assessed or collected, or of any penalty to have been excessively or in any manner wrongfully collected, he or she must file a claim for refund with the BIR. The Tax Code provides that no suit or proceeding shall be filed after the expiration of two years from the date of payment of the tax or penalty, regardless of any supervening cause that may arise after payment. The two-year period is a prescriptive period for both the administrative and judicial claim. For instance, if a claim for tax refund is filed with the BIR two days before the expiration of the two-year period, the judicial claim must also be filed with the CTA the next day without awaiting the decision of the Commissioner of the BIR. The prescriptive period for claims of refund is especially important in this

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33 Tax Code, Section 255.
36 Tax Code, Section 253.
38 Tax Code, Section 229.
jurisdiction because the Philippines does not adhere to the common law principle of equitable recoupment wherein tax refund claims barred by prescription may be set off against current assessment.

For refund of local taxes, the prescriptive period is also two years. However, the reckoning point is different; the two-year period is reckoned from payment of taxes or from the date the taxpayer is entitled to refund.39

In the case of value added tax (VAT), the Tax Code provides for slightly different rules on the statute of limitation applicable to refund claims relating to input VAT. A VAT-registered person may claim for refund of his or her excess input tax arising from zero-rated or effectively zero-rated transactions within two years after the close of the taxable quarter when the sales were made.40 In proper cases, the Commissioner shall grant a refund within 120 days from the date of submission of complete documents in support of the application for refund.41 In case of full or partial denial of the claim for tax refund, or the failure on the part of the Commissioner to act on application within the period prescribed above, the taxpayer affected may, within 30 days from the receipt of the decision or from the lapse of the 120-day period, appeal the same with the CTA. The Supreme Court has clarified two important principles in the procedure for refund. First, the two-year period is a prescriptive period for the administrative claim for refund. It refers to the application for refund with the Commissioner and not to appeals made to the CTA. Accordingly, the 30-day period, or any part of it, is not required to coincide within the two-year prescriptive period. Secondly, the 120-day waiting period is mandatory and jurisdictonal. The taxpayer cannot appeal to the CTA on the basis of inaction before the expiration of the 120-day period.42 Under current regulations, failure by the Commissioner to act upon a claim for refund within the 120-day period shall already be deemed a denial of the application for refund. Moreover, it would appear from the case of ROHM Apollo Semiconductor Philippines v. Commissioner,43 that upon the lapse of the 120-day period without any action on the part of the CIR, the taxpayer does not have the option of waiting for a decision after such period and must file an appeal within 30 days from the lapse of the waiting period.

ii Challenging administrative decisions

As explained in Section II, a taxpayer may file a protest against an FLD/FAN issued by the BIR. In this subsection, we will focus on the different types of protest that the taxpayer may file to challenge the FLD/FAN. The taxpayer disputing an assessment may file a written request for reconsideration or reinvestigation defined as follows:

39 LGC, Section 196.
40 Tax Code, Section 112(A).
41 Tax Code, Section 112(C).
43 G.R. No. 168950, 14 January 2015.
Request for reconsideration. This refers to a plea of re-evaluation of an assessment on the basis of existing records without need of additional evidence. It may involve a question of fact or of law or both.

Request for reinvestigation. This refers to a plea of re-evaluation of an assessment on the basis of newly discovered or additional evidence that a taxpayer intends to present in the reinvestigation. It may also involve a question of fact or of law or both.\(^\text{44}\)

For requests for reinvestigation, the taxpayer shall submit all relevant supporting documents in support of his or her protest within 60 days of the date of filing of the letter of protest; otherwise, the assessment shall become final. The term ‘relevant supporting documents’ refers to those documents necessary to support the legal and factual bases in disputing a tax assessment as determined by the taxpayer. The 60-day period for the submission of all relevant supporting documents is not applicable to requests for reconsideration. A request for reinvestigation will suspend the running of the prescriptive period because it will involve a re-evaluation of the issues based on additional documentary evidence.

iii Claimants
The taxpayer or his or her authorised representative or tax agent may commence any of the remedies against an assessment or a claim for refund.

VI COSTS

There is no specific legislation which allows the taxpayer to recover the cost of litigation from the government, even in cases where the final decision is favourable to the taxpayer. The appeal to the CTA may take years to resolve given the current state of clogged dockets and backlog of work of most of the courts in the Philippines. The filing fee with the CTA is dependent upon the amount of disputed tax assessment. Hence, tax litigation in this jurisdiction could be very costly.

VII ALTERNATIVE DISPUTE RESOLUTION

The assessment by the BIR may be settled by compromise or abatement.\(^\text{45}\) A compromise is essentially a contract whereby the parties by reciprocal concessions avoid a litigation or put an end to one already commenced.\(^\text{46}\) The Commissioner is the official vested with the power and discretion to enter into a compromise. It is noteworthy that the authority of the Commissioner is not absolute and is subject to statutory limitations. For example, the compromise settlement of any tax liability is subject to minimum amounts provided by law (e.g., for cases of financial incapacity, a minimum compromise rate

\(^{44}\) Revenue Regulation No. 18-2013.

\(^{45}\) Tax Code, Section 204.

\(^{46}\) Civil Code of the Philippines, Article 2028.
equivalent to 10 per cent). 47 Criminal violations already filed in court and those cases involving criminal tax fraud may not be compromised. 48 Under the Tax Code, there are two instances when the Commissioner may compromise the payment of any internal revenue tax:

\[ a \] reasonable doubt exists as to the validity of the claim against the taxpayer; or

\[ b \] the financial position of the taxpayer demonstrates a clear inability to pay the assessed tax.

The Commissioner may also abate or cancel the whole or any unpaid portion of a tax liability if the assessment is excessive or if the administration costs involved do not justify the collection of the amount due. To abate means to reduce in value while to cancel means to obliterate. The BIR has issued Revenue Memorandum Order No. 7-2015 to adopt and implement a uniform application of the compromise penalties involving violations of the Tax Code. The recent regulation deleted from its coverage certain acts commonly resorted to by taxpayers as a means of tax evasion such as failure to make, file or submit the required SLS, Annual Alpha List of Employees.

In practice, it is best to settle at the audit stage if the claim is indefensible or even if it is defensible but the cost of litigation exceeds the proposed assessment.

VIII ANTI-AVOIDANCE

In this jurisdiction, the law draws a distinction between tax avoidance (legitimate tax minimisation) and tax evasion (a scheme used outside of lawful means). Tax avoidance is a method sanctioned by law and is used by the taxpayer in good faith and at arm’s length. 49 Considering that the Philippine tax system is semi-schedular, meaning there are specific rates for specific taxes, an imaginative tax lawyer would typically take advantage of the tax rate differences in drawing a transaction.

Tax evasion, when availed of, would subject the taxpayer to further or additional civil or criminal liabilities. Tax evasion connotes the integration of three factors:

\[ a \] the end to be achieved, in other words, the payment of less than that known by the taxpayer to be legally due, or the non-payment of tax when it is shown that a tax is due;

\[ b \] an accompanying state of mind which is described as being ‘evil,’ in ‘bad faith,’ ‘wilful,’ or ‘deliberate and not accidental’; and

\[ c \] a course of action or failure of action which is unlawful. 50

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47 Tax Code, Section 204.
48 Id.
50 Id.
IX DOUBLE TAXATION TREATIES

International double taxation arises when a person is subject to tax on the same income by two or more countries for the same tax period. To ease the burden of international double taxation on international trade, the Philippines has entered into a number of bilateral tax treaties with other countries. Basically, a tax treaty seeks to reconcile the national fiscal legislations of the contracting parties and to impose a preferential tax rate on specific taxpayers. The BIR has issued Revenue Memorandum Order (RMO) No. 01-2000, which outlines the procedure for the tax treaty relief application (TTRA). Further, RMO 72-2010, which partially superseded RMO 01-2000, provides that failure to properly file the TTRA with the International Tax Affairs Division of the BIR within the prescribed period shall have the effect of disqualifying the TTRA.

Thus, based on RMO 72-2010, it is mandatory for the taxpayer to seek a ruling with the BIR confirming its eligibility for the preferential tax rates before it can avail of the benefits of the tax treaty. This creates a legal conundrum because the BIR is, in effect, unilaterally imposing an additional requirement beyond the text of the tax treaty in violation of the Philippines’ international obligations. In the 2013 case of Deutsche Bank AG Manila Branch v. Commissioner, the Supreme Court held that prior application is not required before the taxpayer can avail itself of the tax treaty benefit. The Supreme Court said that a state that has contracted valid international obligations is bound to make in its legislations those modifications that may be necessary to ensure the fulfilment of the obligations undertaken. The Supreme Court further clarified that failure to strictly observe the procedure under the RMOs should not operate to divest entitlement to the relief lest we violate the international duty to comply with treaty in good faith. The Deutsche Bank ruling has not yet been circularised by the BIR to date. No clarifying administrative issuance has been issued by the BIR.

Recently, the Supreme Court has reiterated the Deutsche Bank ruling in the case of CBK Power Company Limited v. Commissioner wherein the Court noted that the TTRA should merely operate to confirm the entitlement of the taxpayer to the relief. It must be noted that both rulings cover a transaction that took place prior to the issuance of RMO 72-2010. To date, the BIR has yet to issue a memorandum circular adopting the Deutsche Bank and CBK Power rulings. The Deutsche Bank and CBK Power rulings notwithstanding, it would still be prudent to comply strictly with the RMOs issued by the BIR. Compliance with the RMOs will ensure that the taxpayer will not be subjected to deficiency assessments by the BIR arising solely from non-filing of a TTRA. It is noteworthy that in recent months, the International Tax Affairs Division accepted applications filed even after the first taxable event.

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51 G.R. No. 188550, 19 August 2013.
52 G.R. Nos. 193383-84, 14 January 2015.
X AREAS OF FOCUS

In line with the Association of Southeast Asian Nations (ASEAN) integration, initiatives are underway to revise the Tax Code, specifically on income taxation, to achieve a more simplified tax system. There have been initiatives in the Philippine Congress to revisit the current schedular rate on compensation income and to increase the level of tax exempt income. Just recently, the BIR issued Revenue Regulation No. 3-2015 to implement the provisions of Republic Act No. 10653, which increased the total amount of 13 months' pay and other benefits from 30,000 to 82,000 Philippine pesos.

In the area of tax collection, Congress has been studying the enactment of a Bill of Rights of Taxpayers. These rights are in addition to the legal rights and remedies that are provided under the current laws. The bill also seeks to establish an Office of the Taxpayers Advocate.

XI OUTLOOK AND CONCLUSIONS

Tax litigation remains to be a dynamic field of law in the Philippines. Generally, the current tax laws provide adequate remedies to taxpayers against erroneous assessments. However, the main challenge for tax practitioners is navigating the many administrative issuances and opinions that arise from the desire to increase tax collections and invariably conflict with the laws they seek to implement.

53 See, for instance, Senate Bill No. 718.
Appendix 1

ABOUT THE AUTHORS

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Carina C Laforteza is a lawyer and a certified public accountant with extensive tax and corporate practice. Her tax work ranges from tax structuring (including how investments are to be made into the Philippines and estate tax planning) to tax compliance (including assisting clients in audits by the Philippine Bureau of Internal Revenue) to tax litigation (including petitions questioning the legality of revenue issuances) and tax-related arbitration. She was part of the team that assisted the Republic of the Philippines in defending its excise taxation on distilled spirits before the World Trade Organization.

In addition to tax work, Ms Laforteza does mergers, acquisitions and divestments. She has advised clients in the advertising, food manufacturing, mass media, telecommunications, money remittance and gaming industries. She assisted Coca-Cola FEMSA (KOF) in the acquisition of Coca-Cola Bottlers Philippines, Inc, KOF’s first investment in Asia. In the past, she has been involved with infrastructure and power projects.

Ms Laforteza has been a professorial lecturer in taxation at the University of the Philippines since 2009. Before going into law, she worked as an auditor for a major accounting firm.

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