STSR TAXBITS

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PHILIPPINE TAX ACADEMY IN LIMBO

(RA 10143: A Case of Law Impoundment?)

by

Rechilda B. Gascon, MNSA
Director III, Tax Policy & Admin

Republic Act No. 10143, known as the "***Philippine Tax Academy***", whose principal author was Senator Panfilo Lacson, was passed by the Fifteenth Congress in June 2010. This legislation which lapsed into law on July 31, 2010 without the signature of the President, in accordance with Article VI Section 27 (1) of the Constitution, is without Implementing Rules and Regulations (IRR) after three (3) years of its enactment.

This law basically recognizes the need to create a specialized institution that will provide the appropriate education, training skills, and values to our tax collectors and administrators who will implement and disseminate tax laws, regulations, guidelines and relevant information to the public.

The Tax Academy will train, mold, enhance and develop the capabilities of tax collectors and administrators to help improve their tax collection efficiency and to become competent and effective public servants for the national interest. It is the vision of the legislators that the Philippine Tax Academy is a core institution of learning for our tax collectors and administrators devoted to honing their skills that will truly implement a "fair taxation and collection of internal revenues taxes".

The law granted corporate powers to the Governing Board chaired by the Department of Finance (DOF). The Academy will have separate learning institutes each for the Bureau of Internal Revenue (BIR), the Bureau of Customs (BOC), and the Bureau of Local Government Finance (BLGF). The Executive Officials of the Academy shall be staffed by a Corps of Professional Instructors with sufficient knowledge, education, training and actual experience in taxation, public finance and revenue administration, among others. The instructors shall be appointed by the Board of Trustees, upon nomination of any member of the Board.

The law also mandates the establishment of a *Tax Academy Fund* which shall be administered, appropriated and disbursed by the Board.

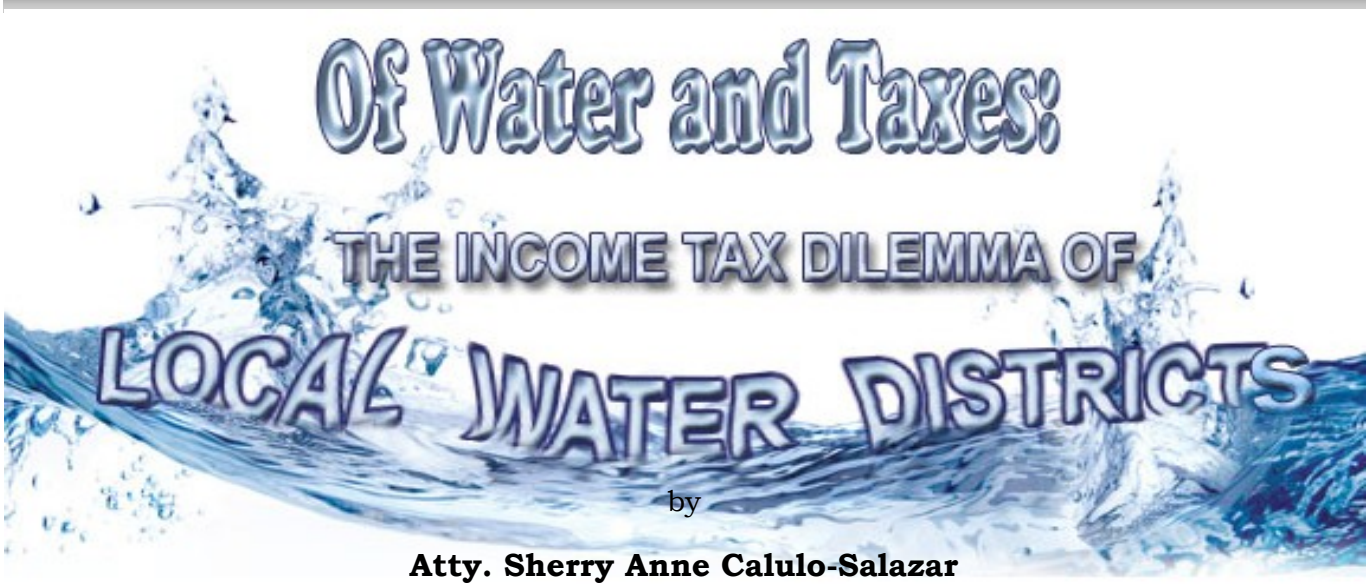
However, to this date, there is no IRR to implement this piece of legislation whose very objective is to enhance tax collection efficiency for our tax collectors and administrators, for national interests. How long shall we wait to come up with the IRR?

Section 16 of RA 10143 mandates the Secretary of the DOF, in coordination with the Commissioner of the BIR, the Commissioner of the BOC, and the Executive Director of the BLGF, in consultation with representatives from the Academe, to issue the IRR within ninety (90) days from the effectivity of the law.

The Senate Tax Study and Research Office (STSRO), together with representatives from concerned sectors, including the academe were active participants in the drafting of the IRR for the Philippine Tax Academy, which was chaired by the DOF Undersecretary Carag, sometime in 2011.

The STSRO has written a follow-up letter addressed to DOF Secretary Purisima (copy furnished DOF Undersecretary Carag) inquiring on the status of the IRR of RA No. 10143 last February and again this April 2013.

Three years have passed and the Fifteenth Congress has ended on June 30, 2013, where is the IRR for our very own Tax Academy? Why have the DOF, BIR, BOC and BLGF refused to implement RA 10143?



by

Atty. Sherry Anne Calulo-Salazar
Director II, Indirect Taxes

Local Water Districts (LWDs) first came into existence with the enactment of **Presidential Decree No. 198,** otherwise known as "The Provincial Water Utilities Act of 1973." Through this law, LWDs provided quality and potable water to Filipinos residing outside of Metro Manila. Although the purpose of LWDs was made clear from the very beginning, their income tax treatment remained questionable given the constant change in government policy, to wit:

a. **Presidential Decree (P.D.) No. 198 –** "*Provincial Water Utilities Act of 1973*"; considered as the charter of LWDs, this is the first law that granted them an exemption from the payment of both national and local taxes, as well as duties on importation, as well as all fees and charges. Under this law, LWDs are classified as *quasi-corporations*;

b. **Executive Order No. 93 (1986) –** effectively withdrew the tax and duty privileges of LWDs granted under P.D. No. 198;

c. **R.A. No. 7109 (1991) –** "*An Act Granting Tax Exemptions Privileges to Local Water Districts*"; this law granted LWDs a *five-year* (from 1991 – 1996) moratorium from the payment of:

   i. *income taxes;*
   ii. *franchise taxes;*
   iii. *duties and taxes on imported machinery, equipment and materials required for its operations; and*
   iv. *real property taxes*

d. **R.A. No. 10026 (2010) –** *"An Act Granting Income Tax Exemption to Local Water Districts"*; included LWDs in the list of government agencies exempt from the payment of income taxes provided in Section 27 of the National Internal Revenue Code (NIRC), as amended. It also provided for the **condonation of all the unpaid taxes** due from a LWD from 13 August 1996 up to the effectivity of the Act but subject to certain conditions (Sec. 289-A of the NRIC). Moreover, this law provides that the income tax savings of LWDs shall be used to expand their water services coverage and to improve water quality (Sec. 289-A, NIRC).

With the passage of R.A. No. 10026, it was finally settled that LWDs are exempt from income taxes. However, there is still the question of the proper interpretation and implementation of the condonation clause.

Many LWDs did not pay their income tax liabilities since 1996. Thus, records of the *Office of the Government Corporate Counsel* (OGCC) showed that the Bureau of Internal Revenue (BIR) filed tax cases against 164 LWDs. Such cases range from simple protests to cases already pending before the Department of Justice (DOJ). Clearly, the income tax liabilities of these concerned LWDs already run in the millions, at the least. This was precisely the reason lawmakers inserted the condonation clause in R.A. No. 10026. It should, however, be emphasized that in order to avail of this condonation, certain conditions must be met, to wit: (1) that the BIR establishes the financial incapacity of the LWD to pay; and (2) a Program of Internal Reforms must be submitted by the LWD to Congress.

RMC NO. 68-2012 AND PAWD

On 5 November 2012, the BIR issued **Revenue Memorandum Circular** (RMC) **No. 68-2012**, which outlined the procedure for the condonation of tax liabilities of LWDs. The following were the requirements set by the BIR for the processing of condonation requests:

a. Letter application
b. Conditional Certificate of Conformance
c. Proof of its financial capacity; and
d. Proof that it has submitted to Congress a program of internal reforms

Basically, these are the same requirements provided under R.A. No. 10026, and therefore can easily be accomplished by bona fide LWDs. The RMC, however, provided a prescriptive period for the application of condonation by LWDs. The deadline set by the said RMC was **30 April 2013**.

With this deadline, the *Philippine Association of Water Districts* (PAWD)[1] sought the assistance of Congress to defer the implementation of RMC 68-2012. The following were the contentions raised by PAWD in their letter dated 16 February 2013, to wit:

a. The subject RMC is contrary to the intent and purpose declared in R.A. 10026;
b. The prescriptive period provided in the said RMC is contrary to law;
c. The issuance of this RMC was made without any consultation with the concerned agencies;
d. It was not issued by the Finance Secretary as is required; and
e. Instead of a mere RMC, it should have been a *Revenue Regulations* as mandated by law.

Although the said deadline has now passed, it still bears stressing that the issues raised by PAWD were meritorious and should have been considered by the BIR. For our scholarly discussion, it should be pointed out that the deadline set by the BIR in the said RMC finds no support in R.A. No. 10026. The subject RMC itself does not provide any rationale or legal basis to justify the said deadline. It is settled that a mere rules and regulation issued by the implementing agency cannot go beyond what is contained in the concerned law. In the case of *PAGCOR vs. BIR*[2], the Supreme Court held: "It is settled rule that in case of discrepancy between the basic law and a rule or regulation issued to implement said law, the basic law prevails, because the said rule or regulation cannot go beyond the terms and provisions of the basic law."

Moreover, it is also submitted that the period set by the BIR is unreasonable given that the said RMC was only issued November 2012. While it is understandable for the BIR to push for a deadline on this matter considering that it would be impractical to allow LWDs to apply for condonation any time they want in the future, the period that should be set for the application must be reasonable. This *reasonable standard* must be such that enough time is afforded the LWDs to be properly informed of the requirements, the procedure for application, and to accomplish the same.

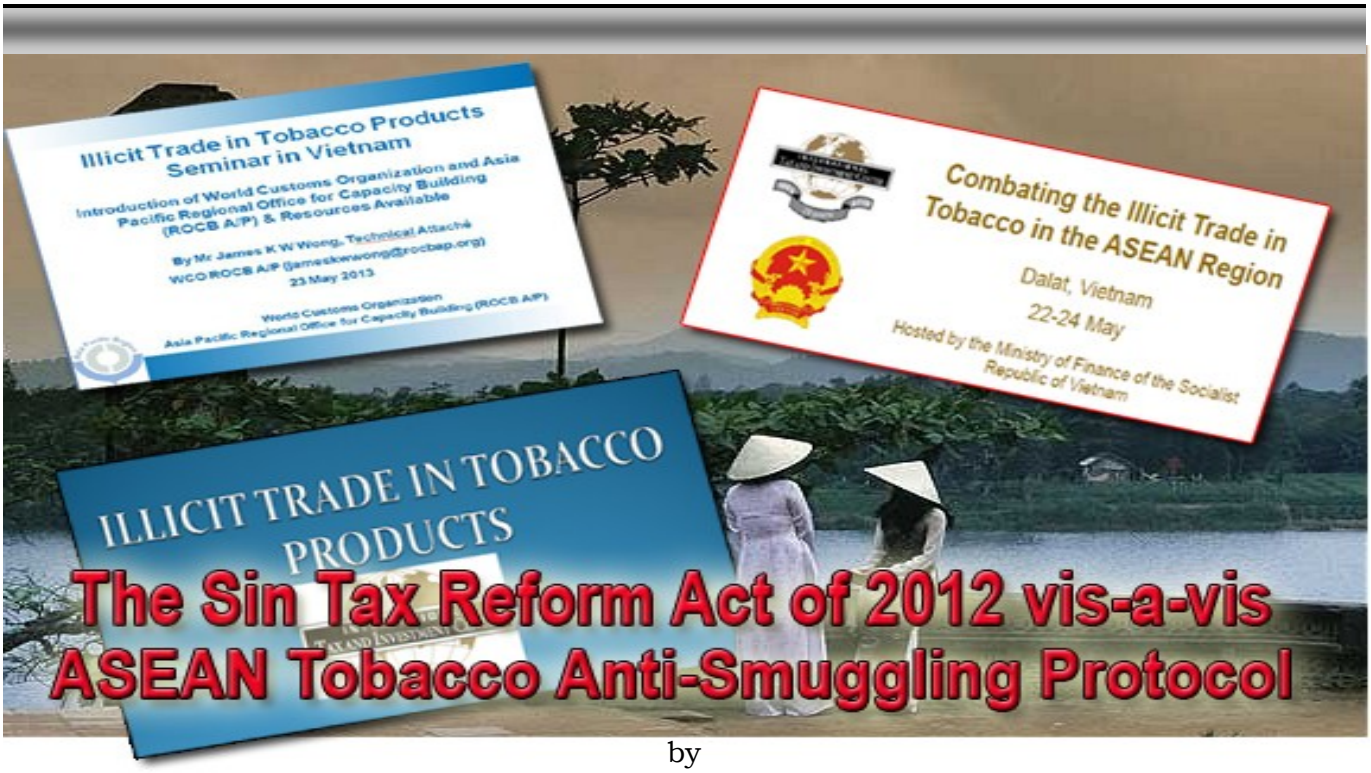
On a final note, it is truly lamentable that while R.A. No. 10026 was passed way back in 2010 (and in fact, its main sponsor, the Honorable Panfilo M.

[1] PAWD is the umbrella organization of all local water districts in the country.

[2] GRN 172087, 15 March 2011 *citing* Hijo *Plantation, Inc. v. Central Bank*, 247 Phil. 154, 162 (1988)

Lacson, has already "graduated" from the Senate), there is still no Revenue Regulations issued by the BIR for this particular law[3].

As the income tax liabilities of LWDs still remain in limbo – no information has yet been received by our office from the BIR as to the number of LWDs who applied for condonation; what will be the next course of action for those LWDs who were not able to comply; and what further steps will be taken by the BIR regarding this problem – one can only hope that a better solution will be offered as the 16th Congress opens this July.



by

Atty. Emmanuel M. Alonzo
Director III, Legal and Tariff

The Sin Tax Reform Act of 2012
RA 10351

On December 20, 2012, President Benigno "Noynoy" Aquino signed into law RA 10351, or the Sin Tax Reform of 2012 containing the following features:

1. Reducing tobacco and alcohol consumption leading to better health outcomes;
2. Funding the universal healthcare by allocating 80% of its incremental revenue for universal healthcare, and 20% for medical assistance and health facilities;
3. Sourcing the additional funding for tobacco farmers' livelihood support on top of the subsidy provided by RA 7171 and RA 8240;
4. Removing price/brand classification freeze with the proper tax classification of alcohol and tobacco products to be determined every two years;
5. Gradually shifting to a unitary taxation simplifying the current multitier structure of taxes to prevent the excise taxes from being eroded by inflation and to discourage consumption of sin products;
6. Annually indexing of excise taxes by 4% effective 2016 for distilled spirits and 2018 for cigarettes and beer;
7. Complying with the World Trade Organization (WTO) provisions on distilled spirits;

[3] Per information, as of 04 February 2013, the BIR has been drafting the requisite revenue regulations to implement RA No. 10026. This RR is expected to be issued sometime in the second quarter of this year.

8. Adhering to the World Health Organization (WHO)-Framework Convention on Tobacco Control. The excise tax incidence for cigarettes, which is the ratio of excise tax to price, will increase from the current 29.1% to 52.5% in 2013 to 63% by 2017;
9. Generating the following revenue for the government:

Projected Incremental revenue
(in billions of Pesos)

	2013	2014	2015	2016	2017	2013-2017
Tobacco	24.3	29.56	33.52	37.09	40.9	164.47
Fermented Liquor	10.56	6.99	9.52	12.06	15.46	48.53
Spirits	6.06	6.31	7.59	7.71	7.82	35.49
Total	33.96	42.86	50.63	56.86	64.18	248.49

Cigarette smuggling in the Philippines

Even prior to the enactment of RA 10351, the Philippines had problems regarding tobacco smuggling. The Bureau of Customs (BOC) has the following data:

Summary of Apprehended Cigarette Shipments[1]
1998 to March 2009

Year	Number of shipments	Estimated Value (in pesos)
1998	4	13,040,280.62
1999	12	84,732,050.80
2000	2	10,000,000.00
2001	-	-
2002	2	1,800,000.00
2005	1	15,000,000.00
2006	1	12,570,000.00
2007	1	6,250,000.00
2008	1	10,000,000.00
2009	2	10,000,000.00
Total	**26**	**163,392,331.42**

[1] www.abs-cbnnews.com/special-report/05/25/09/philippines-haven-cigarette-smugglers.

From the same report it states: [2]

> *"Worldwide, according to a 2000 report commissioned by the World Bank, from 6 to 8.5 percent of cigarettes were being smuggled, purportedly driven by* ***high taxes.***
>
> *In 2006, the non-profit Framework Convention Alliance for Tobacco Control pegged the percentage of contraband at 11 percent of worldwide cigarette sales – roughly 600 billion sticks per year.*
>
> *In the same year, governments all over the world lost from $40 billion to $50 billion in tax revenues,* ***with the Philippines losing P29 billion****. According to a September 2008 study on foregone revenues and tax leakage from cigarettes, the amount could have been collected from smuggled cigarettes.*
>
> ***Cigarette prices here are among the cheapest****. For instance, a pack of Marlboro sells for about $0.50 or P20-plus, whereas in other countries, this could sell ten-fold for as much as $5 to $6.* ***The cost of production in the Philippines is relatively lower compared to other countries so that today, smuggling according to some experts, is actually more outward bound.****"*

While RA 10351 was being discussed late last year, some legislators aired their apprehensions regarding the proposed increase in excise tax on tobacco products knowing that any subsequent increase in the retail prices of tobacco products would trigger both inward and outward smuggling activities.

The Protocol on the Anti-Illicit Trade in Tobacco

The smuggling issue raised by some legislators seemed to be answered when the International Tax and Investment Center (ITIC), in partnership with the Vietnamese Ministry of Finance held a workshop in Dalat, Vietnam on May 23 and 24, 2013. The facilitators were from the WCO (World Customs Organization), HMRC (Her Majesty's Revenue and Customs, UK), ITIC, and the Vietnamese Ministry of Finance.

The purpose of the workshop is to tackle the illicit trade and tobacco in the ASEAN as well as to introduce a new Protocol on the same subject among the member countries. Governments are increasingly facing well-networked and organized fraudsters and traffickers whose activities are harder to detect and disrupt so we all need to continue to step up our efforts to tackle the problem.[3]

The two aspects discussed during the conference were the illicit importation of tobacco products within the region as well as the illegal domestic production. There were no reliable global statistics for tobacco products but the **Euromonitor International** revealed that 10% of all cigarettes consumed in the world are illicit costing governments between US$40 to 50 billion, based on 2012 estimates. The estimates were based on the following: (a) seizures, (b) household surveys and consumption estimates, (c) smoker surveys, (d) empty pack and cigarette collection and analysis (done in the UK), international trade data, and (e) street prices of illicit goods.

The trading of tobacco products obviously affects the economies in the ASEAN, that is why there are protectionist measures among the member countries affecting the licit flow of the goods. By their nature, tobacco products have high value but are light and portable. However, there are inadequate enforcement measures along the borders including control of "free zones" and porous borders among the ASEAN member countries. As a result of such illicit trade there is rampant corruption. It is also observed that there are inadequate penalties and time consuming prosecution process. Still worse, Illicit trade in the region is not a political priority and is not considered a crime. Consumption is considered illegal in most countries.

Consider the following information[4], (a) around 600 billion illegal cigarettes are smoked per year, (b) up to $40 billion a year is lost to governments in the excise and other taxes, (c) illegal cigarettes can mean fake products with no quality controls, and (d) legitimate retailers, often small or family businesses, are damaged as criminals steal their trade. In 2012, the US Congressional Research Office stated that *"the production, smuggling and sale of tobacco products, including genuine and counterfeit cigarettes, are lucrative forms of financing for organized crime as well as terrorist groups."* However, tackling this illegal trade requires effective cooperation among the industry, retailers, regulators and enforcement authorities.

[2] Philippines a haven for cigarette smuggling/ABS-CBN News, www.abs-cbnnews.com/special-report/05/25/09/philippines-haven-cigarette-smugglers.

[3] Covering letter welcoming the participants during the workshop, May 23, 2013.

[4] Mr. Pat Henegan – BAT (British American Tobacco) Global head of Anti-Illicit Trade.

The following conditions are conducive to cigarette smuggling: (a) corruption, (b) weak borders, (c) **increasing taxation**, (d) lack of enforcement, (e) globalisation of brands, (f) victimless crimes, (g) use of the internet, (h) the existence of free trade zones, (i) in effective regulations and legislation, (j) commoditisation, and (k) lightweight penalties.

Within the ASEAN

Illicit trade impacts ASEAN countries in different ways, while some are sources of manufacture, in some are countries the products pass simply through (transshipments), and in many countries, illicit products are eventually consumed.

The regional integration under the ASEAN Economic Community will undoubtedly make possible the increased mobility of illicit goods. It will simultaneously provide opportunities for transnational organized crime to expand.

The ASEAN Economic Community aims for a greater economic integration but it differs in the European Union in the sense that there is no customs union, no full border controls, and no centralized excise tax policy[5].

International norms and conventions are required to set the stage for a response. For this reason, only interventions that are made at a regional level or global levels are likely to have any chance of succeeding[6].

Given the cross border nature of the illicit trade, the Protocol provides the ideal framework for cross border cooperation.

However, the Protocol may give way to the following risks: (a) inconsistent implementations between countries could maintain the safe havens criminals exploit, and (b) a lack of consultation with all relevant experts could result in ineffective implementation. The unintended consequences of regulations are: (a) restrictive regulations of retail sales outlets which could lead existing sellers to sell illicit products, and (b) restrictive regulations on tobacco growers could exclude them from legitimate trade, leaving only the illicit trade as a market for their crops.

Discussion and agreement between ASEAN countries on how to jointly combat the illicit trade in tobacco products will increase the chances of a successful implementation. Leveraging of industry know-how in developing the supply chain controls to combat illicit trade will improve the effectiveness of measures adopted.

Internal cooperation

In most governments, whenever smuggling is mentioned, the focus is on drugs, weapons, counterfeit products, illegal waste, currency, animal products, commercial fraud, strategic exports and cultural artefacts. Why then focus on cigarette smuggling?

By its nature cigarettes are portable products but have high value. Because of its inherent characteristics, the proceeds of cigarette smuggling partly financed the operations of the IRA (Irish Republican Army) against Great Britain in Northern Ireland. It also financed the operations of the *"mudjahedins"* in Afghanistan. In Malaysia, a police officer was killed by cigarette smugglers.

According to one of the speakers during the conference[7], the following are the facts about tobacco smuggling: (a) cigarette smuggling is a criminal activity, (b) it is dominated by organized crime gangs, (c) it is not necessarily *"products specific"*, (d) it is motivated by huge profits, (e) profits can be recycled into other criminal activities, (f) it is linked to violent crime and terrorism, and (g) it is often linked to corruption.

Because of its inherent characteristics, activities of the legal enforcement agencies (LEA) of the ASEAN member countries would be sufficient to combat cigarette smuggling. There is a need to consider the following: (a) LEAs are nationally focused, organized crime groups (OCGs) are internationally focused, (b) LEAs are inflexible, OCGs are flexible, (c) the needed information is not held by any particular jurisdiction, (d) national legislative barriers may protect criminals, (e) seizing cigarettes is not a deterrent, and (f) money moves faster than cigarettes and is faster to find. For the above mentioned reasons, there is a need for an ASEAN-wide protocol to effectively combat cigarette smuggling in the region.

5 Mr. Rob Preece, Associate Professor, University of Caberra.

6 Source: UNODC, April 2013.

7 Laurence Howard, HM Revenue and Customs, Fiscal Crime Liaison Officer, UK.

An ASEAN Tobacco Protocol[8]

The Protocol reduces the opportunities for illicit trade in the following manner: (a) support mutual assistance and enforcement, (b) consistency of data requirements, processing and standards across the region essential for joint cross-border operations, and (c) a region wide framework for administration requirements, enforcement (offenses and penalties) reduces smugglers' ability to take advantage of regional differences. The Protocol will support legitimate operators with clear, simple and consistent approach.

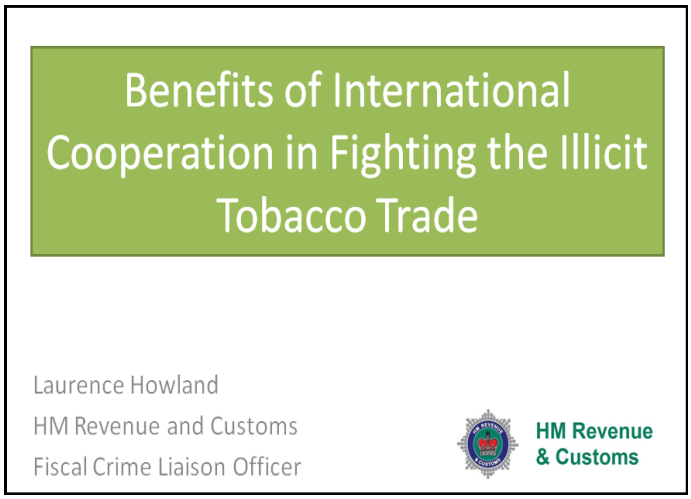
The Protocol covers the licensing, record keeping operations, financial controls, retail sales by internet, duty free sales, data to be reported, track and trace, free zones, and enforcement (offenses and sanctions).

The following should be implemented regionally (within ASEAN):

- **Licensing –** manufacturing, import and export, wholesaling , equipment;
- **Reporting –** records and disclosure for duty-suspended products, due diligence, commitment to supply commensurate with demand, material usage;
- **Track and Trace –** tobacco products marking, implementation of track and trace beyond the first customer,
- **Free zones –** controls are required; and
- **Enforcement –** sanctions, seizure payments.

The following Protocol provisions should remain at a national level:

- National licensing authority and fees for licenses,
- Licensing of and record keeping for growers,
- Licensing of tobacco transporters and distributors,
- Licensing of transport and distribution of manufacturing equipment,
- Registration/licensing of retailers, internet sales, controls on internet transactions,
- Declaration of bank accounts, payment currency and institutions,
- Declaration of production facilities and products,
- Duty-free sales,
- Provision of market information to Government.



Protocol licensing requirements

The Protocol defines "illicit trade"[9] as *any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase, including any practice or conduct intended to facilitate such activity.*

The Protocol aims to license the following entities related to the supply chain of tobacco:

- **Grower –** Licensing is recommended, not mandatory. The Protocol exempts small scale and traditional farms.
- **Equipment producer –** Mandatory licensing is required.
- **Equipment supplier –** Mandatory licensing is required.
- **Factory –** Mandatory licensing is required.
- **Distributor –** Licensing is recommended, not mandatory.
- **Importer –** Mandatory licensing is required.
- **Distributor –** Licensing is recommended, not mandatory.
- **Retailer –** Licensing is recommended, not mandatory.
- **Transport –** Licensing is recommended, not mandatory.

Licensing must be done by a competent authority, probably, the BOC or the DOF. The licensing authority needs pre-requisite information on the entity needing licensing, and must be in charge of administration, meaning: (a) fees to be charged, (b) length of renewal of the license, (c) suspension of the license, and (d) cancellation of the license, among others.

[8] Mr. Rob Preece, Associate Professor, University of Canberra.

[9] Article 1, paragraph 6, AIT Protocol.

Once the Protocol has been adhered to by ASEAN member countries, it would establish a standard of integrity of the applicant entity, would clearly define the aspects of the supply chain, and would be easy for multinational companies to operate.

Due diligence
Article 7

Within the framework of the Protocol, due diligence means:

> Each party shall require, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, that all natural and legal persons engaged in the supply chain of tobacco and tobacco products and manufacturing equipment:
>
> a. conduct due diligence before the commencement of and during the course of, a business relationship;
>
> b. monitor the sales to their customers to ensure that the quantities are commensurate with the demand for such products within the intended market of sale or use; and
>
> c. report to the competent authorities any evidence that the customer is engaged in activities in contravention arising from the Protocol.

Under Article 7, establishes what constitute a "genuine" sale because (a) it will confirm customer identity and license, (b) it will confirm quantities match market, (c) report discrepancies, and (d) where the equipment is to be installed.

While on the subject of "due diligence", the World Health Organization is calling for a comprehensive ban on all forms of tobacco advertising, including point-of-sale promotion and cultural or sports-related sponsorship. WHO warns that if tobacco use is not curbed, the annual death toll could increase to more than eight million by 2030.[10]

Track and trace
Article 8

The Protocol provides for the following:

1. For the purposes of further securing the supply chain and to assist in the investigation of illicit trade in tobacco products, the parties agree to assist in the investigation of illicit trade in tobacco products, the Parties agree to establish within five years of entry into force of this Protocol a **global tracking and tracing regime**, comprising national and/or regional tracking and tracing systems and a global information-sharing focal point located at the Convention Secretariat of the WHO Framework Convention on Tobacco and accessible to all Parties to make enquiries and receive relevant information.

2. Each party shall establish, in accordance with this Article, a tracking and tracing system, controlled by the party for all tobacco products that are manufactured in or imported onto its territory taking into account their own national or regional specific needs and available best practice.

3. With a view to enabling effective tracking and tracing, each party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this protocol for that Party.

It is necessary to affix identification on the grower, equipment producer, equipment supplier, the factory, and the importer.

Included in the unique identification mark are the following: (a) date and location of manufacture, (b) manufacturing facility, (c) machine used in the manufacture, (d) production shift/time of manufacture, (e) name, invoice, order number and payment records of the first customer not affiliated with the manufacturer, (f) intended market of retail sale, (g) product description, (h) any warehousing and shipping, (i) identity of any known subsequent purchaser, and (j) intended shipment route, date and consignee.

[10] Jenny F. Manongdo, WHO Bats For Comprehensive Ban on Tobacco Advertising, Manila Daily Bulletin, May 31, 2013.

Record keeping
Article 9

Article 9 provides for the following:

1. Each Party shall require, as appropriate, that all natural and legal persons engaged in the supply chain of tobacco and tobacco products and manufacturing equipment maintain complete and accurate records of all relevant transactions. Such records must allow for the full accountability of materials used in the production of their tobacco products.
2. Each Party, as appropriate, require persons licensed in accordance with Article 6 to provide, on request, the following information to the competent authorities:

    a. general information on market volumes, trends, forecasts and other relevant information; and

    b. the quantities of tobacco products and manufacturing equipment in the licensee's possession, custody or control kept in stock, in tax and customs warehouses under the regime or transit or transhipment or duty suspension as of the date of the request…

Under this Article, the equipment producers, equipment suppliers, the factory, the distributor and the importer must maintain record keeping. If possible, the grower and the retailer may also keep records.

The freezones and international transit
Articles 12

The intermingling of tobacco products with non-tobacco products in a single container, or any other similar transportation unit at the time of removal from the freezones shall be prohibited. The freeports shall adopt and apply control and verification measures to the international transit or transhipment, within its territory, of tobacco products and manufacturing equipment in conformity with the provisions of the protocol in order to prevent illicit trade in such matters.

Timetable

Section 45 of the Protocol provides for the following:

1. This Protocol shall enter into force on the ninetieth day following the date of deposit of the fortieth instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.
2. For each party to the WHO Framework Convention on Tobacco control that ratifies, accepts, approves of formally confirms this protocol or accedes thereto after the conditions set out in paragraph 1 for entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of this instrument of ratification, acceptance, approval, accession or formal confirmation.

Recommendation

As planned, the ASEAN will be transformed into an ASEAN Economic Community by 2015. It will promote the free flow of goods, services, skilled workers and capital among the 10 member countries. Its key characteristics are: (a) a single market and production base in ASEAN's highly competitive economic region, (b) a region of equitable economic development, and (c) a region fully integrated into the global economy. In this regard, individual member-countries within ASEAN must re-consider their economic policies as well as their law enforcement activities in order to reap the desired benefits.

The ASEAN Protocol on the Illicit trade in Tobacco products is highly recommended.

I. COMMISSIONER OF INTERNAL REVENUE, Petitioner, vs. FORTUNE TOBACCO CORPORATION, Respondent, G.R. No. 180006, September 28, 2011, Brion, J.

Facts:

Pursuant to the National Internal Revenue Code (NIRC), as amended, respondent Fortune Tobacco Corporation (FTC) paid excise taxes in advance for the year 2003 and for the period January 1 to May 31, 2004. In June 2004 FTC filed an administrative claim for refund with the Commissioner of Internal Revenue (CIR) for erroneously and/or illegally collected taxes. Respondent, without waiting for the CIR's response, filed with the Court of Tax Appeals (CTA) a judicial claim for refund.

The CTA First Division ruled in favor of the FTC and said decision was upheld by the CTA *En Banc*.

Issue:

FTC asserts that Section 1 of Revenue Regulation (RR) No. 17-99 is an unauthorized administrative legislation on the part of the CIR. Said section *"X x x requires the payment of the excise tax actually being paid prior to January 1, 2000 if this amount is higher than the new specific tax rate, i.e., the rates of specific taxes imposed in 1997 for each category of cigarette, plus 12%."*

Held:

The Supreme Court (SC), alluding to its earlier ruling in *CIR vs. Fortune Tobacco Corporation*, decided in favor of FTC. In that case, the SC declared Section 1 of RR 17-99 as invalid.

Said the Court:

"Section 145 states that during the transition period, i.e., within the next three (3) years from the effectivity of the Tax Code, the excise tax from any brand of cigarettes shall not be lower than the tax due from each brand on 1 October 1996. This qualification, however, is conspicuously absent as regards the 12% increase which is to be applied on cigars and cigarettes packed by machine, among others, effective on 1 January 2000. Clearly and unmistakably, Section 145 mandates a new rate of excise tax for cigarettes packed by machine due to the 12% increase effective on 1 January 2000 without regard to whether the revenue collection starting from this period may turn out to be lower than that collected prior to this date.

"By adding the qualification that the tax due after the 12% increase becomes effective shall not be lower than the tax actually paid prior to 1 January 2000, Revenue Regulation No. 17-99 effectively imposes a tax which is the higher amount between the ad valorem tax being paid at the end of the three (3)-year transition period and the specific tax under paragraph C, sub-paragraph (1)-(4), as increased by 12% - a situation not supported by the plain wording of Section 145 of the Tax Code.

"Following the principle of stare decisis, our ruling in the present case should no longer come as a surprise. The proviso in Section 1 of RR 17-99 clearly went beyond the terms of the law it was supposed to implement, and therefore entitles Fortune Tobacco to claim a refund of the overpaid excise taxes collected pursuant to this provision."

The SC further mentioned that revenue-raising is not the only objective of Republic Act (RA) No. 8240 [January 1, 1997]. The Court took notice of the fact that the shift from *ad valorem* to specific taxes was likewise meant to minimize the corruption that became innate to the imposition of the former taxes.

Moreover, the Court declared that Section 1 of RR 17-99 is incongruous with the rule on uniformity of taxation. The SC said:

"The Constitution requires that taxation should be uniform and equitable. Uniformity in taxation requires that all subject or objects of taxation, similarly situated, are to be treated alike both in privileges and liabilities. This requirement, however, is unwittingly violated when the proviso in Section 1 of RR 17-99 is applied in certain cases. X x x.

"Evidently, the 1997 Tax Code's provisions on excise taxes have omitted the adoption of certain tax measures. To our mind, these omissions are telling indications of the intent of Congress not to adopt the omitted tax measures; they are not simply unintended lapses in the law's wording that, as the CIR claims, are nevertheless covered by the spirit of the law. Had the intention of Congress been solely to increase revenue collection, a provision similar to the third paragraph of Section 145(c) would have been incorporated in Sections 141 and 142 of the 1997 Tax Code. This, however, is not the case."

Alluding to the "*higher tax rule*", the SC quoted the statement of Rep. Jesli Lapuz during the deliberations for RA 9334 (amending Section 145):

"This bill serves as a catch-up measure as government attempts to collect additional revenues due it since 2001. Modifications are necessary indeed to capture the loss proceeds and prevent further erosion in revenue base. X x x. As it is, it plugs a major loophole in the ambiguity of the law as evidenced by recent disputes resulting in the government being ordered by the courts to refund taxpayers. This bill clarifies that the excise tax due on the products shall not be lower than the tax due as of the date immediately prior to the effectivity of the act or the excise tax due as of December 31, 1999."

The SC commented on the above, viz:

"This remark notwithstanding, the final version of the bill that became RA 9334 contained no provision similar to the proviso in Section 1 of RR 17-99 that imposed the tax due as of December 31, 1999 if this tax is higher than the new specific tax rates. Thus, it appears that despite its awareness of the need to protect the increase of excise taxes to increase government revenue, Congress ultimately decided against adopting the 'higher tax rule."

In connection with the above, it should be noted that RA No. 10351 was approved on December 19, 2012. The same is entitled:

"AN ACT RESTRUCTURING THE EXCISE TAX ON ALCOHOL AND TOBACCO PRODUCTS BY AMENDING SECTIONS 141, 142, 143, 144, 145, 8, 131 AND 288 OF REPUBLIC ACT NO. 8424. OTHERWISE KNOWN AS THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED BY REPUBLIC ACT NO. 9334, AND FOR OTHER PURPOSES."

Subsequently, the Bureau of Internal Revenue (BIR) issued RR No. 17-2012 (December 21, 2012) to implement RA No. 10351. The RR is entitled:

> ***"Revenue Regulations (RR) No. 17-2012 (December 21, 2012). - Prescribing the Implementing Guidelines on the Revised Tax Rates on Alcohol and Tobacco Products Pursuant to the Provisions of Republic Act No. 10351 and to Clarify Certain Provisions of Existing Revenue Regulations."***

II. COMMISSIONER OF INTERNAL REVENUE, Petitioner, vs. SAN MIGUEL CORPORATION, Respondent, G.R. No. 184428, Villarama, J.

Facts:

The Tax Reform Act of 1997 (RA No. 8424) took effect on January 1, 1998. Section 143 (Formerly Section 140) of said Act details the provisions on the taxation of fermented liquor.

Respondent San Miguel Corporation (SMC) is a domestic entity engaged in the manufacture and sale of fermented liquor. It produces Red Horse beer sold in 500 ml and 1 liter bottles. Section 143 of RA 8424 provides:[1]

> ***"Sec. 143.*** *Fermented Liquor. - There shall be levied, assessed and collected an excise tax on beer, lager beer, ale, porter and other fermented liquors except tuba, basi, tapuy and similar domestic fermented liquors in accordance with the following schedule:*
>
> *"(a) If the net retail price (excluding the excise tax and value-added tax) per liter of volume capacity is less than Fourteen pesos and fifty centavos (P14.50), the tax shall be Six pesos and fifteen centavos (P6.15) per liter;*
>
> *"(b) If the net retail price (excluding the excise tax and the value-added tax) per liter of volume capacity is Fourteen pesos and fifty centavos (P14.50) up to Twenty-two pesos (P22.00), the tax shall be Nine pesos and fifteen centavos (P9.15) per liter;*
>
> *"(c) If the net retail price (excluding the excise tax and the value-added tax) per liter of volume capacity is more than Twenty-two pesos (P22.00), the tax shall be Twelve pesos and fifteen centavos (P12.15) per liter.*
>
> *"Variants of existing brands which are introduced in the domestic market after the effectivity of Republic Act No. 8240 shall be taxed under the highest classification of any variant of that brand. Fermented liquor which are brewed and sold at micro-breweries or small establishments such as pubs and restaurants shall be subject to the rate in paragraph (c) hereof.*
>
> *"The excise tax from any brand of fermented liquor within the next three (3) years from the effectivity of Republic Act No. 8240 shall not be lower than the tax which was due from each brand on October 1, 1996.*
>
> *"The rates of excise tax on fermented liquor under paragraphs (a), (b) and (c) hereof shall be increased by twelve percent (12%) on January 1, 2000.*
>
> *"New brands shall be classified according to their current net retail price.*
>
> *"For the above purpose, 'net retail price' shall mean the price at which the fermented liquor is sold on retail in twenty (20) major supermarkets in Metro Manila (for brands of fermented liquor marketed nationally) excluding the amount intended to cover the applicable excise tax and the value-added tax. For brands which are marketed only outside the Metro Manila, the 'net retail price' shall mean the price at the which the fermented liquor is sold in five (5) major supermarkets in the region excluding the amount intended to cover the applicable excise tax and the value-added tax.*
>
> *"The classification of each brand of fermented liquor based on its average net retail price as of October 1, 1996, as set forth in Annex 'C', shall remain in force until revised by Congress.*

[1] This has been amended by RA No. 9334 (December 21, 2004). RR No. 03-2006 (January 5, 2006) implements this provision. See *NIRC of the Philippines, as amended, 3rd Rev. Ed.*, (2011), p. 289 by Rodelio T. Dascil, *MNSA*.

"'A variant of brand' shall refer to a brand on which a modifier is prefixed and/or suffixed to the root name of the brand and/or a different brand which carries the same logo or design of the existing brand.

"Every brewer or importer of fermented liquor shall, within thirty (30) days from the effectivity of R.A. No. 8240, and within the first five (5) days of every month thereafter, submit to the Commissioner a sworn statement of the volume of sales for each particular brand of fermented liquor sold at his establishment for the three-month period immediately preceding.

"Any brewer or importer who, in violation of this Sec., knowingly misdeclares or misrepresents in his or its sworn statement herein required any pertinent data or information shall be penalized by a summary cancellation or withdrawal of his or its permit to engage in business as brewer of importer of fermented liquor.

"Any corporation, association of partnership liable for any of the acts or omissions in violation of this Sec. shall be fined treble the amount of deficiency taxes, surcharge, and interest which may be assessed pursuant to this Section.

"Any person liable for any of the acts or omissions prohibited under this Sec. shall be criminally liable and penalized under Sec. 254 of this Code. Any person who willfully aids or abets in the commission of any such act or omission shall be criminally liable in the same manner as the principal.

"If the offender is not a citizen of the Philippines, he shall be deported immediately after serving the sentence, without further proceedings for deportation."

On December 16, 1999, the Secretary of Finance issued Revenue Regulations (RR) No. 17-99 increasing the tax rates on fermented liquor by 12%. The last paragraph of Section 1 of said RR provides:

> "*Provided, however, that the new specific tax rate for any existing brand of cigars, cigarettes packed by machine, distilled spirits, wines and fermented liquor shall not be lower than the excise tax that is actually being paid prior to January 1, 2000."* (Underscoring supplied)

Based on the last paragraph of RR 17-99, SMC paid excise tax on its Red Horse beer. Respondent however subsequently contended that said qualification in the last paragraph has no basis in the plain wording of Section 143. SMC avers that it should be granted a refund or a Tax Credit Certificate (TCT) should be issued in its favor.

The petitioner CIR failed to act on the claim of SMC, hence the latter went the Court of Tax Appeals (CTA) on a Petition for Review. The CTA Second Division decided in favor of SMC. The CTA *En Banc* affirmed the pronouncement of the Second Division. Said the CTA:

> *"[c]onsidering that there is nothing in the law that allows the BIR to extend the three-year transitory period, and considering further that there is no provision in the law mandating that the new specific tax rate should not be lower than the excise tax that is actually being paid prior to January 1, 2000, the last paragraph of [BIR Revenue Regulations No.] 17-99 has no basis in law and is inconsistent with the situation contemplated under the provisions of Section 143 of the [Tax Reform Act of 1997]. It is an unauthorized administrative legislation and, therefore, invalid."*

Petitioner contends that the said provision of the RR is a valid administrative interpretation as "*It carries out the legislative intent behind the enactment of R.A. No. 8240, which is to increase government revenues through the collection of higher excise taxes on fermented liquor*."

Issue:

Is Section 1 of RR No. 17-99 a valid administrative interpretation of Section 143 of the Tax Reform Act of 1997?

Held:

The Supreme Court (SC) decided in favor of SMC. The Court declared:

> *"Section 143 of the Tax Reform Act of 1997 is clear and unambiguous. It provides for two periods: the first is the 3-year transition period beginning January 1, 1997, the date when R.A. No. 8240 took effect, until December 31, 1999; and the second is the period thereafter. During the 3-year transition period, Section 143 provides that "the excise tax from any brand of fermented liquor" shall not be lower than the tax which was due from each brand on October 1, 1996." After the transitory period, Section 143 provides that the excise tax rate shall be the figures provided under paragraphs (a), (b) and (c) of Section 143 but increased by 12%, without regard to whether such rate is lower or higher than the tax rate that is actually being paid prior to January 1, 2000 and therefore, without regard to whether the revenue collection starting January 1, 2000 may turn out to be lower than that collected prior to said date. Revenue Regulations No. 17-99, however, **created a new tax rate** when it added in the last paragraph of Section 1 thereof, the qualification that the tax due after the 12% increase becomes effective shall not be lower than the tax actually paid prior to January 1, 2000."*
>
> *"X x x.*
>
> *"It bears reiterating that tax burdens are not to be imposed, nor presumed to be imposed beyond what the statute expressly and clearly imports, tax statutes being construed strictissimi juris against the government. In case of discrepancy between the basic law and a rule or regulation issued to implement said law, the basic law prevails as said rule or regulation cannot go beyond the terms and provisions of the basic law. It must be stressed that the objective of issuing BIR Revenue Regulations is to establish parameters or guidelines within which our tax laws should be implemented, and not to amend or modify its substantive meaning and import. As held in Commissioner of Internal Revenue v. Fortune Tobacco Corporation,*
>
> *"x x x. The rule in the interpretation of tax laws is that a statute will not be construed as imposing a tax unless it does so clearly, expressly, and unambiguously. A tax cannot be imposed without clear and express words for that purpose. Accordingly, the general rule of requiring adherence to the letter in construing statutes applies with peculiar strictness to tax laws and the provisions of a taxing act are not to be extended by implication. x x x As burdens, taxes should not be unduly exacted nor assumed beyond the plain meaning of the tax laws."*

In connection with the above, it should be noted that RA No. 10351 was approved on December 19, 2012. The same is entitled:

> ***"AN ACT RESTRUCTURING THE EXCISE TAX ON ALCOHOL AND TOBACCO PRODUCTS BY AMENDING SECTIONS 141, 142, 143, 144, 145, 8, 131 AND 288 OF REPUBLIC ACT NO. 8424. OTHERWISE KNOWN AS THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED BY REPUBLIC ACT NO. 9334, AND FOR OTHER PURPOSES."***

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STSRO CORNER

July 1, 2013

On the first day of the 16th Congress, Senator Nancy Binay visited the STSRO and engaged the Officers and Staff in animated conversation.

ERRATA: 18th Issue (March - April 2013) and 19th Issue (May - June 2013) should be cited as Volume IV instead of V. Sorry for the oversight.

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Website: http://www.senate.gov.ph
Email: attydascil@yahoo.com, taxbits@yahoo.com
Telefax No.: 552-6849 ; Tel. No. : 552-6850

Editors and Contributing Writers

Atty. RODELIO T. DASCIL, MNSA
Director General

Atty. EMMANUEL M. ALONZO
Director III, Legal & Tariff

RECHILDA B. GASCON, MNSA
Director III, Tax Policy & Admin

MARIA LUCRECIA R. MIR, MNSA
Director III, Direct Taxes

VIVIAN A. CABILING
Director III, Indirect Taxes

JULIETA M. FONTIVEROS
Director II, Legal & Tariff

NORBERTO M. VILLANUEVA
Director II, Tax Policy & Admin

ELVIRA P. CRUDO
Director II, Direct Taxes

Atty. SHERRY ANNE C. SALAZAR
Director II, Indirect Taxes

BONIFACIO R. JOSON
LSA-III, ODG - Layout Artist

CLINTON S. MARTINEZ
SLSO II, Indirect Taxes