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Where to Customs Brokers?

by

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Introduction

Change is inevitable due to the demands of modern commercial practices. For example, prior to the establishment of the World Trade Organization (WTO) in 1995, the thrust of our government is to protect domestic products against the inflow of importations. Everything changed in 1995 when the Philippines became a WTO member. The thrust became the liberalization of trade. Unfortunately, the customs broker profession was also affected. Due to another trade liberalization treaty, the revised Kyoto Convention (RKC). The RKC abolished the exclusivity of customs brokers to handle importation and exportation cases.

Furthermore, by 2015 the ASEAN will implement the Asean Single Window (ASW). Incidentally, the members of the ASEAN also signed the RKC, so if we continue with the practice of maintaining the current role of the customs brokers, our country will be out of step with ASEAN practices.

Historical Timeline

- 2004 - During the 12th Congress, RA 9280, known as the Customs Brokers Act of 2004, was passed and took effect on March 30, 2004. It was incorporated in Section 1205 of the Tariff and Customs Code of the Philippines (TCCP). The law is clear that only a duly registered customs broker may practice the profession.

- 2009 - During the 14th Congress, RA 9853 was enacted and took effect on July 27, 2009. It amended Section 7 of RA 9280 by reinforcing the exclusive role of customs brokers, thus: the export declaration shall be signed by the exporter or, at his option, delegate the signing and processing of the document to his designated customs broker or authorized representative.

- 2010 - The Senate of the Philippines concurred with the Revised Kyoto Convention on February 1, 2010. Those RKC provisions adhered to by the Philippines were contained in the Instrument of Accession (IA) which was deposited in Brussels, Belgium. The RKC provides that any person having the right to dispose of the goods shall be entitled to act as declarant.

- 2011 - The 15th Congress. During the previous Congress, the House of Representatives passed the Customs Modernization Act of 2011 (CMTA), HB 4788. Among others, the House bill adopted the RKC concept of a "declarant". The Senate, however, did not adopt HB 4788; instead it maintained its own pre RKC version of the Anti-Smuggling bill, or SB 2408. Neither SB 2408 nor HB 4788 was passed by the Senate during the 15th Congress.

- 2012 - In the 16th Congress, the following proposed Senate legislation were filed on anti-smuggling: (a) SB 168 (Sen. Sergio Osmeña III), (b) SB 442 (Sen. Francis Escudero), (c) SB 456 (Sen. Ralph Recto), (d) SB 741 (Sen. Jinggoy Estrada), and (e) SB 882 (Sen. Estrada). Of the five bills only SB 168 (Sen. Osmeña) has a provision regarding customs brokers.

SB 168, Customs and Tariff Modernization Act of 2010, Sponsored by Senator Sergio Osmeña

"Section 109. - Rights and responsibilities of the declarant. - The person having the right to dispose shall be responsible for the accuracy of the information in the goods declaration made directly or through an agent and shall be liable for the duties, taxes and other charges due on the imported article.

"The declarant shall sign the goods declaration personally or through an employee or officer in case of a juridical person or even when assisted by a licensed customs broker who shall likewise sign the said goods declaration. The declaration shall be under oath under the penalties of falsification or perjury that the statements contained in the goods declaration are true and correct. Such statements under oath shall constitute a prima facie evidence of knowledge of consent of the violation of any of the applicable provisions of this act when the importation is found to be unlawful.

"Before filing of the goods declaration, the declarant, may, upon request in writing, and for such justifiable reasons and under such conditions as the Commissioner shall determine be allowed to inspect the goods and to draw samples from the importation. There shall be no need for a separate declaration for the samples withdrawn under customs supervision provided, that such samples are included in the goods declaration for the particular consignment concerned."

SB 168 clearly adopts the RKC provision on the role of a declarant which to our initial analysis, the customs brokers are against.

RA 9280, The Customs Brokers Act (2004)

During the 12th Congress, RA 9280, the *Customs Brokers Act of 2004*, was passed and took effect on March 30, 2004. Its provisions were incorporated in Section 1205 of the Tariff and Customs Code of the Philippines (TCCP). Under the law, only registered customs brokers may practice the profession of customs brokering. The following are the pertinent provisions of RA 9280:

*"**SEC. 6. Scope of the Practice of Customs Brokers.** – Customs Broker Profession involves services consisting of consultation, preparation of customs requisite document for imports and exports, declaration of customs duties and taxes, preparation signing, filing, lodging and processing of import and export entries; representing importers and exporters before any government agency and private entities in cases related to valuation and classification of imported articles and rendering of other professional services in matters relating to customs and tariff laws its procedures and practices."*

"A customs broker shall be considered in the practices of the profession if the nature and character of his/her employment in private enterprises requires professional knowledge in the field of customs and tariff administration."

***"SEC. 28. Prohibition Against the Unauthorized Practice of Customs Broker Profession.** – No person shall practice or offer to practice the customs broker profession in the Philippines or offer himself/herself as customs broker, or use the title, word, letter, figure, or any sign tending to convey the impression that one is a customs* broker*, or advertise or indicate in any manner whatsoever that one is qualified to practice the profession unless he/she has satisfactory passed the licensure examination given by the Board, except as otherwise provided in this Act, and is a holder of a valid Certification of Registration and Professional Identification Card or a valid special/temporary permit duly issued to him/her by the Board of Commission."*

RA 9853, Amending RA 9280 (2009)

Five years after the enactment of RA 9280, during the 14th Congress, RA 9853 was passed and took effect on July 27, 2009.

It retained the exclusive role of licensed customs brokers in the importation process. Section 27 thereof provided that the export declaration shall be signed by the exporter or, at his option, delegate the signing and processing of the document to his designated customs broker or authorized representative.

The Revised Kyoto Convention

On February 1, 2010, the Senate of the Philippines concurred with the Revised Kyoto Convention (RKC), an international convention on the simplification and harmonization of customs procedures. Senate Resolution No. 1406 states the following objectives:

1. Promote international trade by establishing a universal system of simplified and harmonized customs procedures;

2. Create better understanding of compliance requirements leading to increased transparency and predictability in customs procedures;

3. Impact positively on border security as it promotes the secure movement of legitimate trade across the globe;

4. Prevent the passing of national legislation contrary to the principles of the Convention;

5. Implement special procedures for low-risk importers; and

6. Reduce the time and cost of clearing customs in the Philippines;

The Senate held two (2) public hearings on May 15, 2006 and May 22, 2009 in order to evaluate the merits of the RKC before it finally concurred with the treaty. The issue on the role of licensed customs brokers was never discussed. As a result, the role of the licensed customs brokers was assumed by a "declarant". Consider the following relevant RKC provisions:

"RKC Definition; RKC GA (General Annex) Standard 3.6, and 3.7
The declarant

A) Persons entitled to act as declarant

3.6 Standard
National legislation shall specify the conditions under which a person is entitled to act as declarant.

3.7 Standard
Any person having the right to dispose of the goods shall be entitled to act as declarant.

3.8 Standard
The declarant shall be held responsible to the Customs for the accuracy of the particulars given in the Goods declaration and the payment of duties and taxes.

B) Rights of the Declarant
3.9 Standard
Before lodging the Goods declaration the declarant shall be allowed, under such conditions as may be laid down by the Customs:

A) to inspect the goods; and
B) to draw samples."

It is clear from the RKC that the role of the licensed customs broker has been dispensed with and is replaced by a "declarant".

As a result of the Senate concurrence with the RKC, several questions arose such as the following: (a) Is there a need to legislate a new law in order to protect the customs broker profession?, (b) Should the customs broker be considered as a declarant?, (c) Is the role of a customs broker still relevant in the age of globalization?, among others.

RKC implications

The Constitution provides – *"No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate"*[1]. In general it can be said that agreements that are permanent and original should be embodied in a treaty and need a Senate concurrence. Agreements, however, which are temporary or are merely implementations of treaties or statutes do not need concurrence.[2] It is therefore the author's opinion that the RKC is both permanent and original in nature.

It is clear that starting February 1, 2010, the day the RKC was concurred by the Senate, it became part of the law of the land. Such being the case, the role of the "declarant" under the RKC totally opposes that of the role of a licensed customs broker under RA 9280 and RA 9853.

The RKC is a latter law (or treaty) as compared with RA 9280 and 9853. Under the rules interpreting opposing laws, one of the principles is that the latter law applies. In other words, the RKC impliedly repeals former laws on the same subject matter. In order to restore the "former" role of licensed customs brokers, new legislation is required.

If ever a new law would be legislated, it would be a domestic law, meaning, it could be enforced only within the territorial jurisdiction of the Philippines. But since the RKC is an international agreement or a treaty, in case one of our country's trading partners feels aggrieved, it would not choose a Philippine court to resolve the issue. Chances are, it would choose the pertinent international tribunal having jurisdiction over the subject matter.

Unlike the World Trade Organization (WTO), wherein the Philippines must adhere to all the "Agreements" under the GATT-Uruguay Final Round when the Senate concurred with the treaty in 1994, the RKC provides that any adhering country may choose portions applicable to such country.

The RKC has three parts, namely: (a) the General Annex, (b) the Specific Annex, and (c) the body of both the General Annex and the Specific Annex. The body discusses the management of the RKC including its scope, ratification, dispute settlement and amendment. The Contracting parties have to accept the Body of the Convention and the General Annex in its entirety. The Specific Annex may, either in whole or per Chapter, be accepted as they may be also be rejected or studied further. The General Annex contains the principles to the Revised Convention and is the nucleus of how a modern Customs administration operates. Its principles for clearance, duties and taxes, guarantees, controls, information technology, relationships with third parties, information and decisions, and appeals are common to every Customs activity worldwide (WCO, 2000).[3]

In the Philippine IA (Instrument of Accession) submitted to the RKC headquarters in Brussels (Belgium), the RKC portion pertaining to "declarant" was accepted and concurred by the Senate. It means that the Philippines must retain the concept of a declarant as mandated by the RKC. It is therefore difficult to retain the exclusive nature of the role of a licensed customs broker.

Let us now focus on the intention of the Senate in its concurrence with the RKC. Senate Resolution No. 1406 states that among its objectives is to - *"Prevent the passing of national legislation contrary to the principles of the Convention"* (meaning the RKC).

[1] Section 21, Article VII, The Executive Department, Philippine Constitution.
[2] Fr. Joaquin G. Bernas, S.J., The 1987 Philippine Constitution, A Comprehensive Reviewer, 2006 Edition, page 327.
[3] Mr. Guillermo Parayno, Ms. Kim Henares and BOC Deputy Commissioner Reynaldo Nicolas, The Revised Kyoto Convention for SMEs, 2007, page 7.

Under the ASEAN setting

Globalization means that the flow of goods among trading countries must be made uniform and easy. Gone are the days when domestic industries, in this case, a profession like a customs broker must be protected at all cost in order to avoid unemployment. This is the underlying reason why the idea of a declarant is mandated by the RKC.

From the point of view of the Philippines, the customs procedures and practices within the ASEAN (Association of Southeast Asian Nations) comes to the fore. It is planned that an ASEAN Common Market be established in the region by 2015. Upon the establishment of the common market, the ASEAN Single Window (ASW) will also be established.

According to the First ASEAN Task Force Meeting, held in Manila on August 4 to 6, 2004, it was agreed that – *"... the single decision making would be uniformly interpreted as a single point of decision taken by the line ministries and communicated timely to the Customs".* For emphasis, under the ASW a single decision of the BOC must be in conformity with the practices of the other customs authorities under the ASEAN common market. If it is only the Philippines who would retain the exclusive nature of the role of the licensed customs broker, it would run counter with the globalization aims of the ASEAN. To have a uniform procedure in the ASEAN, the licensed customs brokers of each member countries must also have exclusive right to deal with their respective customs office.

The ASEAN Blueprint[4] *"will transform the region into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy".* It also calls for a paradigm shift for the BOC. Under the AFTA (ASEAN Free Trade Area) – CEPT (Common Effective Preferential Tariff), the members of the ASEAN shall have common tariffs among themselves. The tariff rate within ASEAN ranges from 0% to 5%. However, in the Philippines, the rate is not zero percent in order to cover the BOC administrative cost.

It must be remembered that for every importation, VAT (value added tax) and other internal revenue taxes are also imposed on the importer. The new role of the BOC under globalization is to combat smuggling and to primarily collect internal revenue taxes. The collection of tariffs, as an agent of government revenue, takes secondary importance. Customs brokers necessarily lessen its role under the new environment considering that the emphasis under globalization is the collection of internal revenue taxes.

The 15th Congress Attempts to restore the exclusive role of customs brokers

During the previous Congress, the House of Representatives passed on third reading the Customs Modernization Act on 2011 (CMTA), or HB 4788. It adopted the RKC concept of a "declarant". The Senate, however, did not adopt HB 4788. Instead it maintained its own pre-RKC version of the Anti-Smuggling bill or SB 2408. Neither SB 2408 nor HB 4788 was passed by the Senate during the 15th Congress. However, the Association of Customs Brokers sent its own proposed amendments incorporating its own version of a "declarant".

As expected, the Association wanted to maintain its exclusivity when it comes to business dealings with the BOC.

The current 16th Congress Proposed amendments

Several anti-smuggling bills are filed in the Senate, namely: (a) SB 168 of Sen. Sergio Osmena III, (b) SB 442 of Sen. Francis Escudero, (c) SB 456 of Sen. Ralph Recto, (d) SB 741 and SB 882 of Sen. Jinggoy Estrada. Of the five bills filed, only SB 168 (Sen. Osmeña) has the following provision regarding customs brokers:

> *"Section 109. – Rights and responsibilities of the declarant. – The person having the right to dispose shall be responsible for the accuracy of the information in the goods declaration made directly or through an agent and shall be liable for the duties, taxes and other charges due on the imported article.*

[4] ASEAN Meeting, Singapore, November 20, 2007, adopting the ASEAN Blueprint.

*"The **declarant** shall sign the goods declaration personally or through an employee or officer in case of a juridical person **or even when assisted by a licensed customs broker who shall likewise sign the said goods declaration.** Xxx*

"Before filing of the goods declaration, the declarant, may, upon request in writing, and for such justifiable reasons and under such conditions as the Commissioner shall determine be allowed to inspect the goods and to draw samples from the importation. There shall be no need for a separate declaration for the samples withdrawn under customs supervision provided, that such samples are included in the goods declaration for the particular consignment concerned."

SB 168 clearly adopts the RKC provision on the role of a declarant in the importation process. It removes the exclusive role of the customs broker at the same time pinpoints responsibility to the declarant in cases of smuggling.

"Airport customs take short P3.5B through May"

"From January to May this year, the Bureau of Customs (BOC) office at the Ninoy Aquino International Airport (NAIA) registered a revenue collection deficit of more than P3.5 billion.

"With a revenue goal of P14.68 billion, the Department of Finance-attached agency's unit at the NAIA was able to collect only P11.18 billion during the five-month period.

"In May alone, the same BOC office collected only P2.12 billion, about P950 million less than its revenue target for the month, which totaled P3.07 billion.

"Despite the shortfall, the BOC cited its NAIA unit for having generated "incremental revenues" with the installation of four new X-ray machines at the facility.

"In a statement, the bureau disclosed over the weekend that the X-ray units had detected nearly P1 million worth of highly taxable undeclared items like jewelry, luxury watches and designer bags, as well as various foreign currencies.

"So far, the X-ray machines have made significant headway in ensuring that duties and taxes are properly paid, and at the same time prompted the seizure of undeclared contraband," it said.

[1] This '**Tax News Digest**' shall endeavor to provide the reader the latest information and events relevant to taxation and appurtenant issues, as published in leading daily newspapers and other pertinent sources. Compiled by Clinton S. Martinez, Indirect Taxes Branch.

"So far, the X-ray machines have made significant headway in ensuring that duties and taxes are properly paid, and at the same time prompted the seizure of undeclared contraband," it said.

"Aside from the NAIA, two other X-ray machines have been installed at the Clark International Airport in Pampanga and the Kalibo International Airport in Aklan.

"Customs has allocated P145 million for the purchase of an undisclosed number of additional X-ray machines." [Source: Philippine Daily Inquirer (PDI), July 7, 2014]

"Japan firms hit asset tax, new BIR rule"

"Japanese firms have slammed the new asset taxes being levied on foreign companies in certain economic zones as well as a new government circular clarifying the claiming of value-added tax refunds, stressing that these new tax policies once again demonstrated the lack of stability and predictability in the Philippine business environment.

"These developments might also dampen the growing interest not only of Japanese companies, but of other foreign firms in setting up their offices and manufacturing facilities in the country, warned Tetsuo Tomino, president of the Japanese Chamber of Commerce and Industry of the Philippines Inc. (JCCIPI).

"The interest of Japan in the Philippines has been increasing and many Japanese companies are seriously thinking of putting up their own manufacturing facilities and new facilities here. That is why we, together with the Japanese Embassy, are requesting the Philippine government to make business circumstances to be better, meaning to address many issues such as the value-added tax and other tax matters," Tomino said.

"Tomino disclosed that one local government has started imposing this year a new fixed asset tax on a Japanese firm working within the economic zone managed by the Philippine Economic Zone Authority (Peza).

"Peza locators should be free from that tax but some local government tax authority decided to impose that. [Peza Director General Lilia] de Lima promised to check it while the Department of Interior and Local Government is creating a fact-finding committee to look into this. But we feel that such kind of actions are very slow. We submitted this issue three months ago and yet they are still in the fact-finding stage," he said.

"What I want to say is that business circumstances should be very stable and trustful. Many foreign investors believe Peza is a very great system, that's why they invest. But if some local government violates the national rules, then we're in a very pessimistic situation. We're doubtful of the ability of the central government as they cannot control the local governments," he pointed out.

"Another issue, Tomino said, was Revenue Memorandum Circular No. 54-2014 issued by the Bureau of Internal Revenue in June. This, he said, contained provisions that effectively denied them their rights and disallowed them to negotiate with the BIR,

as provided under the current Tax Code. The circular sought to clarify the application for VAT refund/tax credit, as made by the Supreme Court in relation to the case of the BIR against San Roque Power Corp.

"JCCIPI secretary general Masazumi Nishizawa noted that this circular would affect mostly their construction and logistics companies, particularly those that were in negotiations with the BIR for their claims over the last three to five years.

"Before, a company, following the submission of documents to BIR on VAT refund, could choose whether they will file or continue to negotiate with BIR. But the new circular states that a company can no longer do that. And if the BIR doesn't answer within the 120-day period, the claims are automatically considered denied, after which you have to file before the CTA," Nishizawa said." [Source: Supra]

"Miners dismayed by proposed tax hike"

"The Chamber of Mines of the Philippines (COMP) has expressed dismay [over] that the Mining Industry Coordinating Council (MICC) is going ahead with proposed tax hikes "without taking into consideration comments and observations by authoritative third parties."

"The inter-agency MICC was earlier reported to have approved a proposed revenue sharing scheme where the government would take 55 percent of a mining operation's adjusted net revenue or 10 percent of gross revenue, whichever is higher.

"According to the Department of Environment and Natural Resources, the MICC is said to have submitted this to the Office of the President for concurrence.

"The MICC-proposed tax structure cannot, by any measure, be considered equitable, much less competitive," the chamber said in a letter to Executive Secretary Paquito N. Ochoa Jr.

"In the two-page letter signed by COMP chair Artemio F. Disini and president Benjamin Philip G. Romualdez, the group said the scheme would not attract investments that are needed to allow the development of the country's mineral resources in a responsible manner. [Source: Supra]

"There are other countries with more reasonable tax structures and are equally [if not better] endowed than the Philippines," they said.

"The results of our financial modeling indicate that the government share under such proposal will be much higher than [those of] large mineral producing jurisdictions such as Canada, Queensland (Australia), Peru, South Africa, Chile and Papua New Guinea," they added.

"The COMP said they have shared this financial modeling with the MICC, but this appears to have been ignored." [Source: PDI, July 8, 2014]

by

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CAO No. 1-2013

Amendment to CAO 1-2007 Providing for New Rates of Services, Storage and Other Charges on Articles/Merchandise Stored at Customs Bonded Warehouse Nos. 31, 55, 83, 124, 125, 128, 158 and 182 Operated by Philippine Skylanders, Inc., Philippine Airlines, PairCargo, Delbros, Cargohaus, DHL Philippines, MIASCOR Logistics, and TMW Worldwide Express, within NAIA Complex

This standardizes different charges for operations affecting imported cargoes before actual delivery to the importer/consignee, taking into account the present economic conditions and the facilities given by Customs Bonded Warehouse (CBW) operators, the service, storage and other charges on articles/merchandise stored in the CBWs.

Cargoes not classified as General Cargo falls into Special Cargo which are divided into three categories:

- Baggage and personal effects – shipments that are handled with special care and provided special storage locations;

- Perishables – shipments shown as such in the Cargo Manifest (CM) and Airway Bill (AWB) or labeled/ identified on the package as such, hence requiring storage under specified temperatures. (All aquatic products fall under this classification).

- Valuable cargo – shipments shown in the CM and/or AWB as such or so labeled/identified on the packages pursuant to IATA regulations.

Date of Issue: April 11, 2013

CAO 02-2013

Amendment to CAO 1-2007 on Penalties related to Inward Foreign Manifest and Consolidated Manifest

CAO No. 2-2013 amends CAO No. 1-2007 which requires the submission of Inward Foreign Manifest and Consolidated Cargo Manifest.

Pursuant to Sec. 1007 of the Tariff and Customs Code of the Philippines, immediately upon arrival of the carrying vessel, the master or agent thereof must submit to the Piers and Inspection Division (PID) or its equivalent unit four sets of the Inward Foreign Manifest, to be distributed as follows:

1. PID or equivalent office;
2. Intelligence Enforcement Group;
3. Assessment and Operations Coordinating Group;
4. COA Resident Auditor.

The Commissioner of Customs, upon consultation with private stakeholders, shall issue the rules and regulations to implement CAO No. 2-2013.

Date of Issue: May 2, 2013

CAO 03-2013

Simplified Procedure for the Submission of Baggage Declaration Form (BC Form No. 117)

This aims to simplify customs procedures by prescribing a standard Customs Declaration Form (CDF) for arriving passengers and crew members of international airline including chartered planes in all international airports in the Philippines.[2]

All arriving passengers are required to accomplish Customs Declaration form (BC Form 117) which is given on board the carrying aircraft. If traveling as one family, one declaration is sufficient.

Arriving passengers are required to declare all articles purchased or acquired abroad, indicating the quantity and total acquisition price.

If the Customs Declaration shows that some articles are declared dutiable, the examiner shall conduct an examination and report his findings and appraisal in the Declaration Form under column "FOR CUSTOMS USE ONLY", indicating therein the quantity, description of articles, dutiable value and rate of duty and tax, together with the summary of duties and the Flight Supervisors/Customs Appraiser (COO V) above that printed name, designation and date. The amount of duty and tax to be paid shall be assessed by the Customs Office. Rates of duty imposed depend on the articles imported. Receipts and/or supporting documents must be ready for inspection/verification by the Customs.

Date of Issue: June 28, 2013

CAO 04-2013

Rules, Regulations and Procedures Governing 24x7 Customs Services and the Payment of Corresponding Overtime and/or Night Differential Fees.

This identifies offices/divisions in ports and subports where 24x7 customs services or where beyond regular working hours customs services are required and defines guidelines and procedures in the rendition of such customs services as well as the prescribed rates for overtime and night differential fees and its disbursement.

The following divisions/offices in ports and subports are required to provide customs services beyond regular working hours:

1. Arrival Operations Division, Departure Operations Division, Baggage Assistance Division and Aircraft Operations Division or equivalent units in all international airports of entry in accordance with the flight schedules provided by airline operators for purposes, among others, of checking the entrance and clearance of aircrafts, monitoring and supervision of aircrafts while loading and unloading of passengers, baggage and cargoes, examination, clearance and/or collection of duties, taxes and other charges from passenger's baggage;

2. Piers and Inspection Division or equivalent units in all seaports of entry in accordance with

[2] The following are the international airports in the Philippines, namely: Ninoy Aquino International Airport, Bacolod Airport, Diosdado Macapagal International (Clark International Airport), Francisco Bangoy International Airport (Davao), General Santos International Airport, Iloilo International Airport, Kalibo Airport, Laoag International Airport, Legazpi Airport, Mactan-Cebu International Airport, Puerto Princesa Airport, Subic Bay International Airport and Zamboanga International Airport.

the schedules provided by shipping operators for purposes, among others, of examining the entrance and clearance of vessels and monitoring and supervision of vessels while loading and unloading passengers, baggage and cargoes;

3. Export Division or equivalent units at all ports of entry as may be requested by the exporters, airline operators or shipping operators or exporters for the purpose of export cargo examination, processing of export declaration and issuance of authority to load;

4. Customs Container Control Division or equivalent units in all seaports of entry as may be requested by shipping operators for the purpose of cargo control supervision;

5. Customs Offices in all PEZA Zones, Special Economic and Freeport Zones, Duty-Free Stores, Customs Bonded Warehouses, Container yard/Container Freight Stations (CY/CFS) and other customs jurisdictions as may be requested by concerned locator/operator for specific customs services in the clearance of imports and exports; and,

6. Other offices/divisions as may be requested by concerned stakeholders or duly authorized customs officials to render specific customs services beyond the regular working hours.

In order that necessary customs services are well provided to concerned stakeholders and to accommodate the unique requirement of each customs service, different modes of time scheduling is authorized and prescribed as follows:

- Shifting working hours shall be observed by the Arrival Operations Division, Departure Operations Division, Baggage Assistance Division, Aircraft Operations Division, or equivalent units in all international airports of entry;

- Continuous working hours shall be observed by the Piers and Inspection Division or equivalent units in all seaports of entry;

- Extended working hours shall be observed by all other divisions/offices covered by this Order as may be directed by duly authorized BOC official and/or requested by concerned stakeholders.

Under this Order, customs services rendered by BOC personnel shall be compensated as necessary by BOC, applying government rates and using the appropriate guidelines.

In accordance with this, BOC personnel shall not directly or indirectly receive payment of overtime work, transportation, and/or accommodation in connection with the performance of their duty and services rendered from airlines, shipping lines, locators, operators, importers, exporters and all other stakeholders served.

Date of Issue: Aug. 30, 2013

CAO 05-2013

Authority to Assign Employees to International Airports During the Holiday Season

This authorizes the Commissioner of Customs to designate, from time to time, BOC personnel from other offices to render overtime service in all international airports, depending on the number of flight arrivals and passenger volume. Contingencies are met under this Order.

Date of Issue: Dec. 11, 2013

CAO 06-2013

Implementation of the Memorandum of Understanding Among the Governments of the Participating Member States of the Association of Southeast Asian Nations on the Second Pilot Project for the Implementation of a Regional Self-Certification System

This implements Executive Order No. 142 (Implementing the Memorandum of Understanding (MOU) among the Governments of Participating Member States of the ASEAN on the Second Pilot Project for the Implementation of a Regional Self-Certification System). The order allows certified exporters[3] to self-declare that their products have satisfied the ASEAN Trade in Goods Agreement (ATIGA) Rules of Origin (ROO). It also eliminates the need for exporters to present a certificate of origin

[3] A certified exporter is a producer or manufacturer duly authorized by the Bureau of Customs (BOC) to make out an Invoice Declaration on the origin of a good exported.

(Form D) in claiming tariff preferences.

It further provides procedures on how the Philippine importer of goods from the Participating Members States can avail of the preferential tariffs, as well as guidelines for customs officers of the Preferential Rate Unit (PRU) in the Formal Entry Division (FED) or equivalent unit in the port that will grant the ATIGA Preferential Tariff Rates using the Invoice Declaration of an exporter from the Participating Member States.

For exportations of originating goods to the Participating Member States, the Self-Certification System will be initially limited to the three (3) major ports of the Bureau of Customs (BOC) namely: Port of Manila (POM), Manila International Container Port (MICP) and Ninoy Aquino International Airport (NAIA). Importations from the Participating Members States will be implemented in all ports.

The Assessment and Operations Coordinating Group (AOCG) of the BOC is now accepting application for the "Certified Exporter" status from legitimate manufacturer or producers who have been exporting products to any ASEAN country for at least a year, have knowledge and competence in the Rules of Origin and have undergone training on the implementation. The BOC will conduct orientation seminars for exporters and importers on the implementation of the Self-Certification System.

Accreditation as certified exporter may be revoked if the exporter no longer offers the guarantees and fulfills the conditions and violates the order. Certified exporters found in breach of these conditions may be suspended for three months for the first offense, six months for the second and revocation of accreditation for the third.

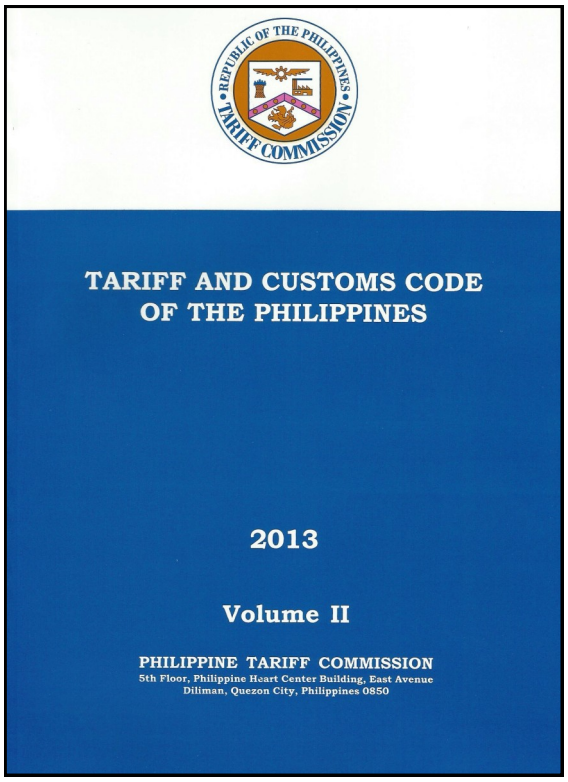
The order is applicable to exporters from other ASEAN member countries that may accede to the MOU on the Second Pilot Project.

The MOU on the Second Pilot Project was signed on Aug. 29, 2012 by the Philippines, Indonesia and Laos, in preparation for the development and putting into operation of an ASEAN-wide self-certification system by 2015. This CAO will ease the flow of trade and exchange of goods among member states.

Date of Issue: Dec. 12, 2013

CAO NO. 01-2014

Guidelines on the Imposition of Surcharge under Section 2503 of the Tariff and Customs Code, as Amended.



This serves as guidelines in determining surcharges for misclassification, misdeclaration and undervaluation of imported goods. It aims to ensure a uniform implementation of Section 2503 of the Tariff and Customs Code of the Philippines (TCCP), as amended.

Under the CAO, the guidelines on the amount of surcharges that will be imposed by the Collector of Customs are as follows:

a. For misclassification:

Where the percentage difference in misclassification is 10% or more but not exceeding 30% of value, the amount of surcharge will be as follows:

i. When the percentage is 10% or more but not exceeding 20%, a one-time surcharge of the difference in customs duty shall be imposed.

ii. When the percentage exceeds 20% but not more than 30%, a two times surcharge of the difference in customs duty shall be imposed.

b. For undervaluation, misdeclaration in weight, measurement or quantity:

When the percentage difference in undervaluation/ misdeclaration in weight, measurement or quantity is 10% or more but not exceeding 30%, a surcharge of two

times the difference in customs duty shall be imposed.

An undervaluation, misdeclaration in weight, measurement or quantity of more than 30% between the value, weight, measurement or quality declared in the entry, the actual value, weight or measurement or quantity should constitute a *prima facie* evidence of fraud penalized through seizure proceedings under the TCCP.

(Repeals CAO 10-93 entitled, "Guidelines in the Imposition of Surcharge under Section 2503 of the Tariff and Customs Code, as amended" and CMO 64-93, entitled "Guidelines in the Implementation of Customs Administrative Order No. 10-93 dated November 16, 1993 regarding the Imposition of Surcharge under Section 2503 of the Tariff and Customs Code as amended by Republic Act 7651")

Date of Issue: June 23, 2014

CAO 02-2014

Simplified Procedures for Clearance of Baggage of Passengers and Crew of International Airlines Arriving in International Airports of Entry.

This aims to simplify customs procedures in order to improve the flow of arriving passengers at international airports of entry for efficient and effective Customs control.

Through CAO 02-2014, there will be two lanes designated for arriving travelers. The Green Lane is for passengers and crew who have nothing to declare or have no goods for purposes of import duties and taxes, with goods that can be admitted free of import

duties and taxes or do not carry any goods which are subject to import prohibition, restriction or regulation.

The Red Lane is for passengers of international airlines with goods to declare for purposes of import duties or taxes, those with goods above the exempted Customs limits, or carrying goods or articles prohibited, controlled or regulated by several statues.

Those in the green channel/lane are not required to fill-out a Customs Declaration Form. The same rules will apply to the crew of international airlines and duly-acknowledged members of the Diplomatic Corps, though the latter will continue to enjoy privileges previously accorded to them.

Date of Issue: March 25, 2014

The Bureau of Internal Revenue (BIR) is headed by a Commissioner. The Commissioner of Internal Revenue (CIR) has the power to interpret tax laws and decide tax cases[1], subject to review and appeal, where warranted. Under Section 2 of the Tax Code, it is provided:

> *"**SEC. 2. Powers and duties of the Bureau of Internal Revenue**. - The Bureau of Internal Revenue shall be under the supervision and control of the Department of Finance and its powers and duties shall comprehend the assessment and collection of all national internal revenue taxes, fees, and charges, and the enforcement of all forfeitures, penalties, and fines connected therewith, including the execution of judgments in all cases decided in its favor by the Court of Tax Appeals and the ordinary courts. The Bureau shall give effect to and administer the supervisory and police powers conferred to it by this Code or other laws*."

The cases discussed in this issue emphasize the pertinence of Section 244 of the National Internal Revenue Code (NIRC), as amended. Said section stipulates:

> *"**SEC. 244**. **Authority of Secretary of Finance to Promulgate Rules and Regulations**. - The Secretary of Finance, upon recommendation of the Commissioner, shall promulgate all needful rules and regulations for the effective enforcement of the provisions of this Code."*

Also prominently mentioned in the next two (2) cases is the importance of imprinting the words "***zero-rated***" on the invoice of taxpayers, as required in the Revenue Regulations issued by the Secretary of Finance, for value-added tax (VAT)-registered taxpayers.

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by: Mr. Clinton S. Martinez
SLSO II - Indirect Taxes

[1] Sections 3 & 4, NIRC, as amended.

Western Mindanao Power Corporation, *Petitioner*, vs. Commissioner of Internal Revenue, *Respondent* (GR No. 181136; June 13, 2012), Sereno, *J*.

Facts:

Petitioner Western Mindanao Power Corporation (WMPC) filed a Petition for Review under Rule 45 of the Revised Rules of Court praying for the reversal of the 15 November 2007 Decision and 9 January 2008 Resolution of the Court of Tax Appeals (CTA) En Banc (No. 272). The same upheld the CTA Second Division's denial of the Petition for Refund of WMPC of unutilized input VAT for the reason that the official receipts (OR) it issued did not contain the phrase "***zero -rated***" as required under Revenue Regulation (RR) No. 7-95 (Emphasis supplied).

WMPC is engaged in the production and sale of electricity and registered with the BIR as a VAT taxpayer. Petitioner alleges that it sells its product exclusively to the National Power Corporation (NPC). Pursuant to its Charter (RA 6395) the NPC, it is exempt from the payment of all forms of taxes, duties, fees and imposts. Under the NIRC, as amended, a VAT-registered taxpayer may apply for the issuance of a tax credit or refund of creditable input tax due or paid and attributable to zero-rated or effectively zero-rated sales. Hence, WMPC filed with the CIR applications for a tax credit certificate (TCC) of its input VAT. The CIR was not acting on its application prompting the petitioner to file on 28 September 2008 a Petition for Review with the CTA, fearing that its action might be barred.

The CIR filed its Comment on the CTA Petition stating that WMPC was not entitled to the tax refund because of its failure to comply with the Invoicing requirements under the Tax Code, in relation to RR 7-95.

The CTA 2nd Division dismissed the Petition holding that the submitted Quarterly VAT Returns did not reflect any zero-rated or effectively zero-rated sales. Moreover, it discovered that WMPC's VAT invoices and ORs did not contain on their face the phrase "zero-rated". The CTA En Banc upheld the Division's Decision observing that: "*X x x, a closer examination of the returns clearly shows that the same do not reflect any zero-rated or effectively zero-rated sales allegedly incurred during the said periods*."

Issue:

"*Whether the CTA En Banc seriously erred in dismissing the claim of petitioner for a refund or tax credit on input tax on the ground that the latter's Official Receipts do not contain the phrase "zero-rated*".

Held:

The Supreme Court (SC) denied the Petition of WMPC. The SC said:

> "*Being a derogation of the sovereign authority, a statute granting tax exemption is strictly construed against the person or entity claiming the exemption. When based on such statute, a claim for tax refund partakes of the nature of an exemption. Hence, the same rule of strict interpretation against the taxpayer-claimant applies to the claim*."

The SC also said that a taxpayer involved in zero-rated or effectively zero-rated sale may apply for the issuance of a TCC, or a refund of the creditable input tax paid or due, related to the sale. It added:

> "*In a claim for tax refund or tax credit, the applicant must prove not only entitlement to the grant of the claim under substantive law. It must also show satisfaction of all the documentary and evidentiary requirements for an administrative claim for a refund or tax credit. Hence, the mere fact that petitioner's application for zero-rating has been approved by the CIR does not, by itself, justify the grant of a refund or tax credit. The taxpayer claiming the refund must further comply with the invoicing and accounting requirements mandated by the NIRC, as well as by revenue regulations implementing them*."

The SC further stated:

> "*Under the NIRC, a creditable input tax should be evidenced by a VAT invoice or official receipt, which may only be considered as such when it complies with the requirements of RR 7-95, particularly Section 4.108-1. This section requires, among others, that "(i)f the sale is subject to zero percent (0%) value-added tax, the term 'zero-rated sale' shall be written or printed prominently on the invoice or receipt.*" (Underscoring provided)

The Court also ruled that RR 7-95 does not constitute an undue expansion of the scope of the law

it seeks to implement on the allegation that the statutory requirement for printing the phrase "zero-rated" on VAT ORs appears only pursuant to RA 9337. The SC pronounced that said RR "*proceeds from the rule-making authority granted to the Secretary of Finance by the NIRC for the efficient enforcement of the same Tax Code and its amendments*."

The SC took cognizance of the findings of the CTA that WMPC failed to substantiate the presence of its effectively zero-rated sales to NPC for the periods of the 3rd and 4th quarters of 1999 and the whole of 2000.

Finally, the Supreme Court emphasized that:

"*It must also be noted that the CTA is a highly specialized court dedicated exclusively to the study and consideration of revenue-related problems, in which it has necessarily developed an expertise. Hence, its factual findings, when supported by substantial evidence, will not be disturbed on appeal. We find no sufficient reason to exempt the present case from this general rule*."

Eastern Telecommunications Philippines, Inc. (ETPI), *Petitioner*, vs. The Commissioner of Internal Revenue (CIR), *Respondent* (GR No. 168856; August 29, 2012), Mendoza, *J.*

Facts:

Petitioner Eastern Telecommunications Philippines, Inc. (Eastern) is a corporation engaged in the telecommunications business pursuant to a legislative franchise. It has several international service agreements with non-resident telecommunications companies. It handles incoming services for non-resident telecom companies and relays the same to its intended recipients within the country. Additionally, it made various interconnection pacts with local carriers for the acceptance of foreign calls relayed by it and the distribution of said calls to the local end-receiver. Due to this, Eastern earns foreign currency revenues which are remitted inwardly. ETPI filed its quarterly VAT returns on time for 1999, but the same were later amended on February 22, 2001. The BIR and Petitioner both confirmed the truth of the entries under Excess Input VAT in their Joint Stipulation of Facts and Issues, dated June 13, 2001. Said excess is equivalent to P23,070,911.75. ETPI filed an administrative claim for refund and/or tax credit of the said excess input taxes attributable to zero-rated transactions.

To toll the running of the period, ETPI filed a Petition for Review with the CTA on March 26, 2001. The CTA Division denied the Petition, finding that Eastern failed to imprint the word "zero-rated" on the face of its invoices or receipts, in contravention of RR No. 7-95. ETPI likewise failed to substantiate its taxable and exempt sales. On appeal to the CTA En Banc, the latter dismissed the petition, ruling *"X x x that in order for a zero-rated taxpayer to claim a tax credit or refund, the taxpayer must first comply with the mandatory invoicing requirements under the regulations. One such requirement is that the word "zero-rated" be imprinted on the invoice or receipt. According to the CTA-En Banc, the purpose of this requisite is to avoid the danger that the purchaser of goods or services may be able to claim input tax on the sale to it by the taxpayer of goods or services despite the fact that no VAT was actually paid thereon since the taxpayer is zero-rated. Also, it agreed with the conclusion of the CTA-Division that ETPI failed to substantiate its taxable and exempt sales."*

Issues:

Eastern interposes the following grounds for the grant of its Petition:

I

"*The CTA-En Banc erred when it sanctioned the denial of petitioner's claim for refund on the ground that petitioner s invoices do not bear the imprint "zero-rated," and disregarded the evidence on record which clearly establishes that the transactions giving rise to petitioner's claim for refund are indeed zero-rated transactions under Section 108(B)(2) of the 1997 Tax Code."*

II

"*The CTA-En Banc erred when it denied petitioner's claim for refund based on petitioner's alleged failure to substantiate its taxable and exempt sales."*

III

"*Petitioner presented substantial evidence that unequivocally proved petitioner's zero-rated transactions and its consequent entitlement to a refund/tax credit*."

IV

"*In civil cases, such as claims for refund, strict compliance with technical rules of evidence is not required. Moreover, a mere preponderance of evidence will suffice to justify the grant of a claim*."

The main question to be answered in this case is whether the absence of the imprint of the word "zero-rated" on the invoices or receipts of Eastern is fatal to its claim for tax refund for excess input VAT.

Held:

As with other cases decided by the Supreme Court (SC) involving the same issue, it decided that the failure to imprint the word "**zero-rated**" is fatal to a party's claim for refund. The SC ruled that the Tax Code explicitly grants the Secretary of Finance the authority to promulgate the necessary rules and regulations for the proper enforcement of the provisions of the NIRC, as amended. The Court said: "*Such rules and regulations 'deserve to be given weight and respect by the courts in view of the rule-making authority given to those who formulate them and their specific expertise in their respective fields.'*" The requirements under the RR are:

"Sec. 4.108-1. Invoicing Requirements. All VAT-registered persons shall, for every sale or lease of goods or properties or services, issue duly registered receipts or sales or commercial invoices which must show:

"1. the name, TIN and address of seller;

"2. date of transaction;

"3. quantity, unit cost and description of merchandise or nature of service;

"4. the name, TIN, business style, if any, and address of the VAT-registered purchaser, customer or client;

"5. <u>the word "zero-rated" imprinted on the invoice covering zero-rated sales</u>; and

"6. the invoice value or consideration." (Underscoring supplied)

To negate ETPI's assertion that there is no need to substantiate the amounts of its taxable and exempt sales because its quarterly VAT returns, which clearly show the amounts of taxable sales, zero-rated sales and exempt sales, were not refuted by the CIR, the SC declared that:

"*ETPI should be reminded of the well-established rule that tax refunds, which are in the nature of tax exemptions, are construed strictly against the taxpayer and liberally in favor of the government. This is because taxes are the lifeblood of the nation. Thus, the burden of proof is upon the claimant of the tax refund to prove the factual basis of his claim. Unfortunately, ETPI failed to discharge this burden*."

The SC mentioned that the CIR is right in asserting that ETPI is into mixed transactions and, hence, its claim for refund covers not only its zero-rated sales but also its taxable domestic and exempt sales. Eastern should have presented the pertinent documents to validate all entries in its return. Only its zero-rated sales were supported with assistive documents.

The SC finally stressed that:

"*The Court finds no cogent reason to disturb the decision of the tax court. The CTA has developed an expertise on the subject of taxation because it is a specialized court dedicated exclusively to the study and resolution of tax problems. As such, its findings of fact are accorded the highest respect and are generally conclusive upon this Court, in the absence of grave abuse of discretion or palpable error. Its decisions shall not be lightly set aside on appeal, unless this Court finds that the questioned decision is not supported by substantial evidence or there is a showing of abuse or improvident exercise of authority*."

Petition is denied.

STSRO CORNER

CONGRATULATIONS !!!

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