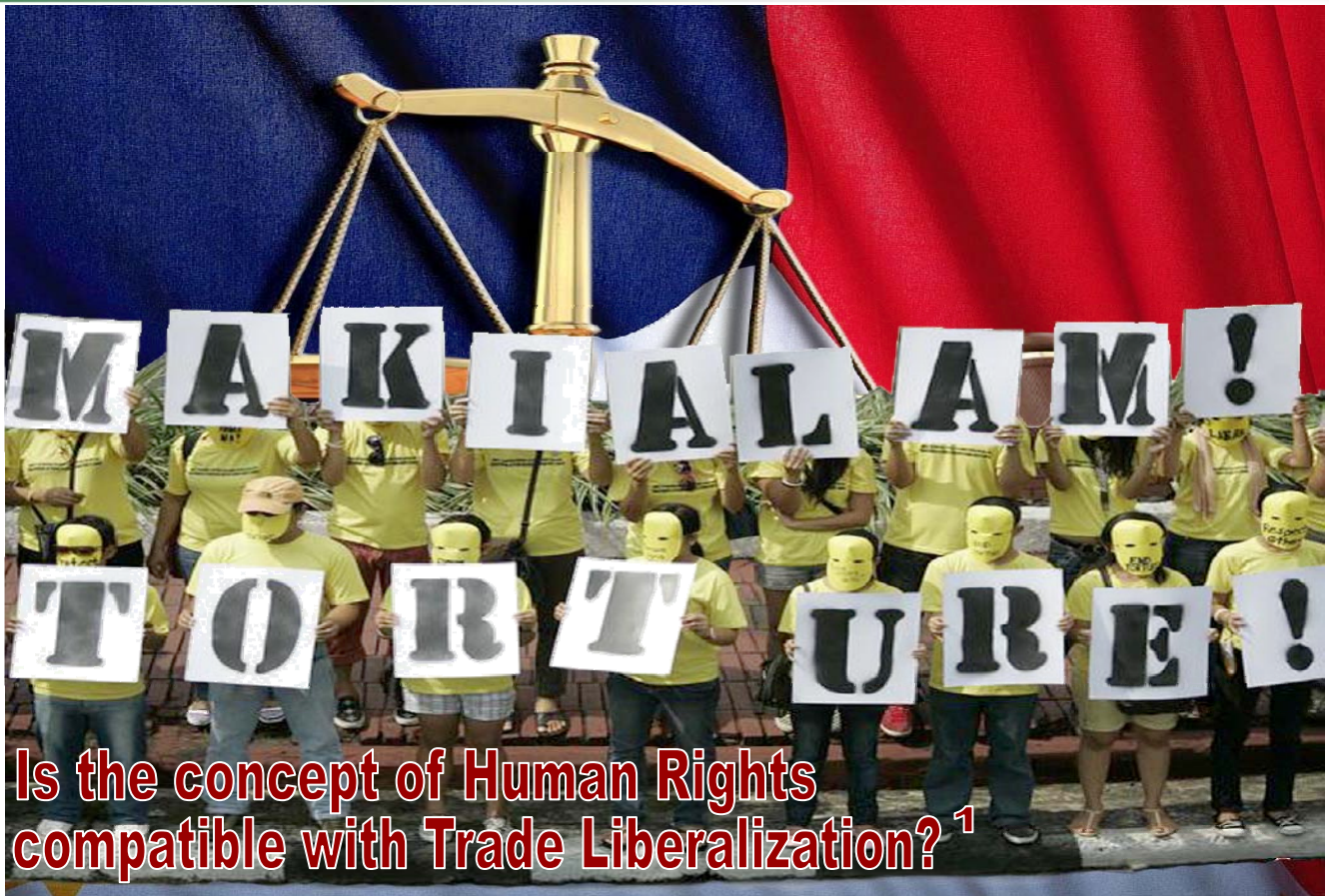




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by

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The concept of free trade ²

The creation of the World Trade Organization (WTO) in 1995 ushered in the era of free trade as we know it today. The WTO is the single, formal and permanent international organization that has the institutional capacity to oversee the implementation of the various agreements negotiated in the Uruguay Round³ and encompasses agriculture, textiles and clothing, services, trade related intellectual property rights (TRIPS), and trade related investment measures (TRIMS). There are also provisions regarding trade related conflicts among the member countries.

¹ The opinion of the author does not reflect the official stand of the Senate nor that of any particular Senator. The objective of the paper is to open issues towards an intelligent discussion of the issues in case the FTA would be submitted to the Senate for ratification/concurrence as mandated by the 1987 Philippine Constitution.

² A primer on New Developments in Trade and Tariff Policy, Philippine Tariff Commission, August 2010, Quezon City.

³ The Uruguay Round is 8th round of multilateral trade negotiations sponsored by the General Agreement on Tariffs and Trade (GATT). On January 1995, the WTO was created out of the former members of the GATT. In effect, the GATT ceased to exist giving way for the WTO. The Philippines is one of the original members of the original members of the WTO



The WTO is on a take-it-or-leave-it basis, meaning any country wishing to be a member must adhere to all of its provisions. The desired effect is to simplify international trade by having a single and universal rule covering all its members. The main rule is to allow tariff

to determine how international trade must be liberalized. As a consequence, all trade barriers like import quotas intended to protect domestic industries were given its tariff equivalent. After having converted all import quotas into its tariff equivalent, such tariffs were gradually decreased in order to liberalize trade after a pre-determined length of time. The process was called as “tariffication”. No other trade barriers are allowed by the WTO.

Nevertheless, the WTO allows the creation of free trade agreements (FTAs) because it values closer integration of national economies through free trade as an exception to the general rule of the “most favoured nation” treatment provided that certain strict rules are adhered to. The rules are intended to ensure that the agreements will facilitate trade among the countries concerned **without raising barriers to trade with the outside world.**

The “most favoured nation clause” (MFN) (also called a most favoured customer clause or most favored licensee clause) is a contract in which a seller (or licensor) agrees to give the buyer (or licensee) the best terms it makes available to any buyer (or licensee).⁴ The existence of FTA's means the disruption of the MFN, which is supposed to be applicable universally. FTA's like ASEAN, have their own “special’ tariff rates, an exception to the MFN.

The relevant FTAs are the ASEAN (Association of South East Asian Nations) and the EU (European Union). Consider the following data:

- Although the EU was formally called the European Union in **2007** as a result of the Lisbon Treaty, the Western European Countries has long banded together to form the a common market antedating the WTO (1995)
- It was only **2009** that the European Union Charter on Human Rights was made binding;
- The ASEAN was formed in 1967. At this time the concept of human rights is not included in the ASEAN Charter;
- In 2009, the human rights clause was incorporated into the ASEAN Charter. The pertinent document is called the ASEAN Intergovernmental Commission on Human Rights (AICHR). It is interesting to note that it

The ASEAN

The Member States of the ASEAN are as follows:

Member States of the Asean ⁵

Country	Capital	Area (sq. km)	Population (2008 data, in millions)	Density (Per square km)	Currency	Head of Government	Date of Accession to ASEAN
Brunei	Bandar Seri Begawan	5,765	.49	65	Brunei dollar	Hassanal Bolkiah	1984-01-07
Myanmar	Naypyidaw	676,578	50.02	81	Than Swe	Thein Sein	1997-07-23
Cambodia	Phnom Penh	181,035	13.39	78	Cambodian Riel	Hun Sen	1999-04-30
Indonesia	Jakarta	1,904,569	237.55	113	Indonesian Rupiah	Susilo Bambang Yudhoyono	1967-08-08
Laos	Vientiane	236,800	6.32	24	Lao Kip	Thongsing Thammayong	1997-07-23
Malaysia	Kuala Lumpur	329,847	28.20	72	Malasian Ringgit	Najib Abdul Razak	1967-08-08
Philippines	Manila	300,000	92.22 (2007 data)	295	Philippine Peso	Benigno Aquino III	1967-08-08
Singapore	Singapore	707.1	4.84 (2007 data)	6,619	Singapore Dollar	Lee Hsien Loong	1967-08-08
Thailand	Bangkok	513,115	63.39 (2003 data)	6,619	Singapore Dollar	Abhisit Vejjajiva	1967-08-08
Vietnam	Hanoi	331,690	88.067	248	Vietnam se dong	Nguyen Tan Dung	1995-07-28
Non-member states – ASEAN Candidate states							
Papua New Guinea	Port Moreby	462,840	6.73	14.5	Papua New Guinean kina	Michael Ogio (Governor General)	-
Timor-Leste	Dili	14,874	1.13	76.2	United States Dollar	Xanana Gusmao	-

⁴ http://itlaw.wikia.com/wiki/Most_favored_clause; June 3, 2011, 4:00 pm.

⁵ http://en.wikipedia.org/wiki/Member_states_of_the_Association_of_Southeast_Asian_Nations.

was also in 2009 when the EU incorporated its human provision in the EU charter;

- Myanmar became a member of the ASEAN in July 7, 1997, two years after the WTO came into force;

ASEAN covers an area of 4.46 million square kilometres, 3% of the total land area of the earth, with a population of approximately 600 million people, 8.8% of the world's population.



On December 15, 2008, the ASEAN members met in Jakarta, Indonesia to launch a charter, signed in November 2007, with an aim moving closer to a "an EU-style community". The ASEAN aims to create a European style common market. Towards this end, tariffs on rubber, electronics, autos, textiles, air travel, tourism, agriculture, e-commerce, fisheries, wood and healthcare should have been abolished. Less developed ASEAN countries like Vietnam, Cambodia, Myanmar and Laos must comply to the tariff abolition by next year, 2012. The ASEAN Common Market is envisioned to be in place by 2015. After the establishment of the common market, the ASEAN leaders in the Bali summit in 2004, the plan is to achieve a single production base and market by 2020, with a free flow of goods, services and investments in the region.⁶

The objectives⁷ of the ASEAN Free Trade Area (AFTA) are as follows:

- respect for independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;

- shared commitment and collective responsibility in enhancing regional peace, security and prosperity;
- renunciation of aggression and of the threat or use of force actions in any manner inconsistent with international law;
- reliance on peaceful settlement of disputes;
- non-interference in the internal affairs of ASEAN Member States;
- respect for the right of every Member State to lead its national existence **free from external interference**, subversion and coercion;
- enhanced consultations on matters seriously affecting the common interest of the ASEAN;
- adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice**;
- upholding the United Nations Charter and international law, including humanitarian law, subscribed to by ASEAN Member States;
- abstention from participation in any policy or activity, including the use of its territory, pursued by and ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;
- respect for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity and diversity;
- the centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged, outward looking, inclusive and non discriminatory; and
- adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.

The ASEAN was formed on August 8, 1967, but the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established only in 2009, a good 42 years after the founding of the ASEAN. It implies that the

⁶ Ahmad Pathoni, *Asean Moves Closer to Single Market with "Road Map"*, Global Trade, <http://www.asean.org/afp/71.dtm>, June 4, 2011, 2:30 pm.

⁷ <http://en.wikipedia.org/wiki/ASEAN>.

ASEAN was established primarily to establish trade in the region, oblivious of the concept of human rights. A later addition in the ASEAN charter, the concept of human rights have the following are principles:⁸

- a. To promote and protect human rights and fundamental freedoms of the peoples of ASEAN;
- b. To uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity;
- c. To contribute to the realisation of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region, friendship and cooperation among ASEAN Member States, as well as the well-being, livelihood, welfare and participation of ASEAN peoples in the ASEAN Community building process;
- d. **To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities;**
- e. To enhance regional cooperation with a view to complementing national and international efforts on the promotion and protection of human rights; and;
- f. **To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN member States are parties.**

The European Union (EU)

The European Union (EU) is composed of the following twenty seven (27) independent states:

Member Countries of the European Union

Country	Capital	Area (square kms)	Population (in millions)	Density (per square km)	Currency	Head of Government	Date of Accession
Austria	Vienna	82,730	8.00	96.70	Euro ⁹	Werner Faymann, Chancellor	1995
Belgium	Brussels	33,990	10.3 (2003)	303.03	Euro	Yves Leterne, Prime Minister	Original member
Bulgaria	Sofia	110,550	7.97 (2001)	72.09	Lev	Boyko Borisov, Prime Minister	2007
Cyprus (Greek part)	Nicosia	5,895	.57	96.69	Euro	Dimitris Christofias, President	2004
Czech Republic	Prague	78,864	10.2	129.34	Koruna	Petr Necas, President of the Government	2004
Denmark	Copenhagen	46,098	5.45	118.23	Krone	Lars Lokke Rasmussen, Minister of State	1973
Estonia	Tallinn	45,227	1.43 (2000)	31.62	Euro	Andrus Ansip, Prime Minister	2004

⁸ Terms of Reference of ASEAN Intergovernmental Commission on Human Rights.

⁹ Other EU territories using the euro are Andorra, Monaco, San Marino, The Vatican, Martinique (Caribbean), Guadalupe (Caribbean), Reunion (Indian Ocean), Montenegro, and Kosovo.

Continuation..

Country	Capital	Area (square kms)	Population (in millions)	Density (per square km)	Currency	Head of Government	Date of Accession
Finland	Helsinki	303,815	5.17 (2000)	17.02	Euro	Mari Kiviniemi, Prime Minister	1995
France	Paris	547,030	62	113.34	Euro	Nicolas Sarkozy, President	1995
Germany	Berlin	357,021	82.5 (2004)	231.08	Euro	Angela Merkel, Chancellor	Original member
Greece	Athens	130,800	10.69 (2006)	81.73	Euro	George Papandreou, Prime Minister	1981
Hungary	Budapest	93,030	10.5	112.87	Forint	Viktor Orban, Prime Minister	2004
Ireland	Dublin	70,280	6.15 (2010)	87.51	Euro	Enda Kenny, Taoiseach	1973
Italy	Rome	301,230	57.6 (2010)	191.22	Euro	Silvio Berlusconi, President of the Council of Ministers	Original member
Latvia	Riga	64,589	2.35	36.38	Lat	Valdis Dombrovskis, Minister – President	2004
Lithuania	Vilnius	65,200	3.62 (2000)	55.52	Litas	Andrius Kubilius, Prime Minister	1995
Luxembourg	Luxembourg	2,585	.48 (2007)	185.69	Euro	Jean-Claude Juncker, Prime Minister	Original member
Malta	Valleta	316	.40 (2007)	1,265.82	Euro	Lawrence Gonzi, Prime Minister	2004
Netherlands	Amsterdam	41,526	15.89 (2000)	382.65	Euro	Mark Rutte, Prime Minister	Original member
Poland	Warsaw	312,685	38	121.53	Zloty	Donald Tusk, President of the Council of Ministers	2004
Portugal	Lisbon	92,391	12.6 (2011)	136.38	Euro	Jose Socrates, Prime Minister	1986
Romania	Bucharest	238,391	22.33 (2000)	93.67	Leu	Emil Boc, Prime Minister	2007
Slovakia	Bratislava	48,845	5.46 (2011)	111.78	Koruna	Iveta Radicova, President of the Government	2004
Slovenia	Ljubljana	20,140	1.93 (2011)	95.83	Euro	Borut Pahor, President of the Government	2004
Spain	Madrid	504,782	40	79.24	Euro	Jose Luis Rodriguez Zapatero, President of the Government	1986
Sweden	Stockholm	449,964	9	20.00	Krona	Fredrik Reinfeldt, Minister of State	1995
United Kingdom of Great Britain and Northern Ireland	London	244,820	60.43 (2011)	246.83	Great British Pound	David Cameron, Prime Minister	1973

The EU decision, rejecting the creation of the AFTA-EU FTA, until now is based Myanmar's human rights violations.



The EU evolved through the following series of events:

- **1961** – The first Councils of Europe were held in Paris (February 1961) and Bonn (July 1961). These informal summits of the European leaders were started due to the then-French President Charles de Gaulle's resentment at the supranational institutions like the European Commission over the integration process.
- **1969** – During the Hague summit of 1969, the United Kingdom was admitted into the Community. During the summit, the Community considered political considerations beyond economics.
- **1974** – The then French President Valery Giscard d'Estaing agreed that more intergovernmental, political cooperation in the Community due the economic problems Europe was then experiencing.
- **1975** – The European Council was established in Dublin (October 3 and November 3, 1975).
- **2002** – The seat of the European Council was designated in Brussels, Belgium.
- **2007** – The Lisbon Treaty was signed. The EU was formally established.
- **2009** – One of the functions of the Lisbon

Treaty is to make the European Union Charter of Fundamental Rights binding. The European Charter brings political, civil, economic and cultural rights together into a single and concise document. It may be the most advanced **human rights** declaration ever drafted.¹⁰

Human rights in the EU

The EU sees human rights as universal and indivisible. It actively promotes and defends them both within its borders and when engaging in relations with non-EU countries.

Human rights, democracy and the rule of law are core values of the EU. Embedded in its founding treaty, they are reinforced when the EU adopted the **Charter of Human Rights** in 2000.

Countries seeking to join the EU must respect human rights. And all trade and cooperation agreements with third countries contain a clause stipulating that human rights are an essential element in relations between parties.

The EU's human rights policy encompasses civil, political, economic, social and cultural rights strengthened still further with the entry into force of the **Lisbon Treaty** in 2009.¹¹

Prior to the Lisbon Treaty, the General Assembly of the United Nations adopted the *Universal Declaration of Human Rights* on December 10, 1948. All Member-States of the United Nations are bound by this declaration.

In order to put human rights and democracy in global context, the EU focuses on the following areas:

- strengthening democracy, good governance and the rule of law support for political pluralism, a free media and sound justice system;
- abolish death penalty in countries which still retain it;
- combating torture through preventive measures (like police training and education) and repressive measures (creating international tribunals and criminal courts); and
- fighting racism and discrimination by ensuring respect for political and civil rights.

The initiative also funds projects for gender equality and protection of children. In addition, it supports joint

¹⁰ Laurent Pech, Jean Monnet Lecturer in EU Public Law, William Schabas OC MRJA, Professor of Human Rights Law, National University of Ireland, Galway, Pd D studies in Human Rights, <http://humanrightsdoctorate.blogspot.com/2009/09/lisbon-treaty-will-be-good-for-human-rights>.

¹¹ http://www.eeas.europa.eu/human_rights/index_en.htm.

action between the EU and other organizations involved in the defence of human rights, such as the United Nations, the International Committee of the Red Cross, the Council of Europe and the organization for Security and Cooperation in Europe.

With a budget of 1.1 billion euros between 2007 and 2013, the European Instrument for democracy and human rights supports non-governmental organizations. In particular it supports those promoting human rights, democracy and rule of law; abolishing the death penalty, combating torture, and fighting racism and other forms of discrimination.

The Philippines and FTAs other than the EU¹²

The Philippines signed several FTA agreements in order to further liberalize trade. These FTAs are as follows:

1. ASEAN-China FTA

The ASEAN-China FTA is the world's biggest free trade area embracing 1.7 billion consumers, a combined domestic product (GDP) of approximately 2 trillion US dollars, and total international trade of 1.23 trillion US dollars.

The objectives of the FTA are as follows:

- i. Strengthen and enhance economic, trade and investment co-operation between the Parties;
- ii. Progressively liberalize and promote trade in goods and services as well as the create a transparent, liberal and facilitative investment regime;
- iii. Explore new areas and develop appropriate measures for closer economic co-operation between the parties; and
- iv. Facilitate the more effective economic integration of the newer ASEAN Member States and bridge the development gap among the Parties.

2. ASEAN-Japan Comprehensive Economic partnership

ASEAN and Japan represent a market of 590 million people (approximately 18% of the global GDP). Japan is an important trading partner for ASEAN. From 1993-2000, the share of Japan's trade with ASEAN averaged 15.04% while the share of ASEAN's trade with Japan averaged 14.74%. Annual value of exports from Japan to ASEAN and vice versa during the same period averaged US\$62.7 billion and US\$ 46.4 billion, respectively. Bilateral trade in 1999 accounted for 14.3% and 13.8% of their global trade, respectively.¹³

The objectives of the Agreement are as follows:

- i. Strengthen economic integration between ASEAN and Japan through the creation of a CEP (Comprehensive Economic Partnership);
- ii. Enhance the competitiveness of ASEAN and Japan in the world market through strengthened partnership and linkages;
- iii. Progressively liberalize and facilitate trade and goods and services as well as create transparent and liberal investment regime;
- iv. Explore new areas and develop appropriate measures for further co-operation and economic integration; and
- v. Facilitate the more effective economic integration of the newer ASEAN Member States and bridge the development gap among the ASEAN Member States.

3. ASEAN-Korea Free Trade Area (AKFTA)

ASEAN and Korea are important trading partners to one another. In 2003, ASEAN exported to Korea US\$17.1 billion or 4% of ASEAN exports to the world and imported from Korea US\$15.1 billion or 4.2% of ASEAN total imports from the world. The ASEAN-Korea bilateral trade grew by 2.2% from US\$31.5 billion in 2002 to US\$ 32.2 billion in 2003. ASEAN and the South Korea are the fifth (5th) largest trading partners for each other.

The objectives of the AKFTA are as follows:

- i. Strengthen and enhance economic, trade and investment cooperation among the parties;
- ii. Progressively liberalize and promote trade in goods and services as well as create a transparent, liberal and facilitative investment regime;
- iii. Explore new areas and develop appropriate measures for closer economic cooperation and integration;
- iv. Facilitate the more effective economic integration of the new ASEAN Member Countries and bridge the development gap among the Parties; and
- v. Establish a cooperative framework for further strengthening the economic relations among the parties.

4. ASEAN-India Free Trade Area (AIFTA)

At the ASEAN-India Summit in 2003, the Association of South East Asian Nations (ASEAN) and the Republic of India signed the framework Agreement on the Comprehensive Economic Cooperation.

¹² A Primer on New Developments in Trade and Tariff Policy, Philippine Tariff Commission August 2010., Quezon City.

¹³ Joint Report of the ASEAN-Japan Closer Economic Partnership Expert Group (AJCEPEG), Executive Summary, <http://www.meti.go.jp/policy/trade/asean/html/cep-report0209e.html>, June 5, 2011, 2:00 pm.

The Framework Agreement serves as the fulcrum for establishing a Free Trade Area (FTA) by year 2011 for ASEAN 5, and by year 2016 for the Philippines and the newer member countries, with flexibility on sensitive sectors and commodities.

The ASEAN 5 is composed of the Philippines, Vietnam, Malaysia, Indonesia and Thailand.¹⁴

The objectives of the AIFTA are as follows:

- i. Strengthen and enhance economic, trade and investment cooperation between the Parties;
- ii. Progressively liberalize and promote trade in goods and services as well as create a transparent, liberal, and facilitative investment regime;
- iii. Explore new areas and develop appropriate measures for closer economic cooperation among the Parties; and
- iv. Facilitate the more effective economic integration of the new ASEAN Member States and bridge the development gap among the Parties



Japan-Philippine Economic Partnership Agreement (JPEPA)

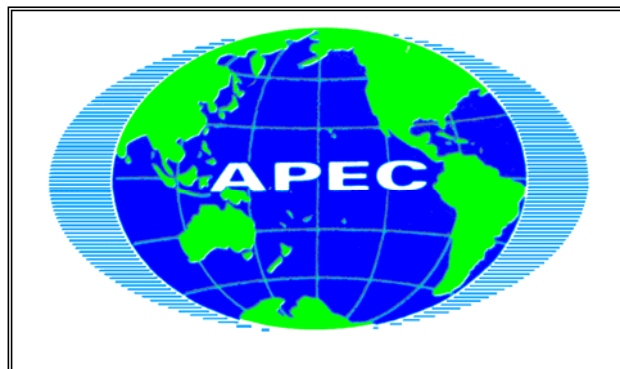
5. Japan-Philippine Economic Partnership Agreement (JPEPA)

On September 9, 2006, the Japan-Philippines Economic Partnership Agreement (JPEPA) was signed by the Philippine President Gloria Macapagal-Arroyo and the Japanese Prime Minister Junichiro Koizumi in Helsinki, Finland.

JPEPA is the first bilateral economic agreement entered into by the Philippines. The agreement is described as *“the new age of free trade area”* as it aims to go beyond the tariff reductions or eliminations. The agreement also deals with movement of natural persons and services, investments and

cooperation on areas such as technology transfer, human and resource development, small and medium enterprises development, environment and competition policy.

Although JPEPA expanded the scope trade liberalization, it still does not impose the concept of human rights.



The Asia Pacific Economic Cooperation (APEC)

APEC is an association of economies that share the boundaries of the Pacific Ocean. Under APEC, member economies work together to reduce barriers to trade, ease the exchange of goods, services, resources and technical know-how, and strengthen economic and technical cooperation between and among themselves. These concerted efforts, ultimately, would result in a greatly improved global economy and the forging of stronger ties between the developing and the major economies of the world.

APEC was created in 1989 through the initiative of Australia. The twelve (12) founding members are as follows:

- a. Australia,
- b. Brunei Darussalam,
- c. Canada,
- d. Indonesia,
- e. Japan,
- f. Korea,
- g. Malaysia,
- h. New Zealand,
- i. The Philippines,
- j. Singapore,
- k. Thailand, and
- l. The United States.

The following countries were added to the list of members:

- a. People's Republic of China (1991),
- b. Hong Kong (1991),
- c. Chinese Taipei (1991),
- d. Mexico (1993),

¹⁴ Remo Michelle, *ASEAN 5 seen to post robust gains in 2010*, Philippine Daily Inquirer, September 29, 2010

- e. Papua New Guinea (1993),
- f. Chile (1994),
- g. Peru (1998),
- h. Vietnam (1998), and
- i. Russia (1998).

APEC envisions full trade and investment liberalization and facilitation by 2010 for industrialized economies and 2020 for developing members. With respect to tariffs, the goal is zero tariffs in 2010 and 2020 for developed and developing countries, respectively.

Note that the emphasis of APEC is trade liberalization through reduced tariffs. The concept of human rights although mandated in the UN Declaration of Human Rights is not mixed with the end in view of zero tariffs, full trade liberalization.

The active participation of the Philippines in Human Rights bodies

The Philippines was among the founding members of the United Nations Human Rights Council (UNHRC) when it was established in 2006. It also served as the body's vice president representing the Asian Group of states in 2008-2009. The UNHRC re-elected a Filipino, Purification V. Quisumbing, to a second three-year term in the council's Advisory Committee during its 16th session. Quisumbing is described as "a human rights expert", having been the chairperson of the Philippines' Commission on Human Rights when extrajudicial killings and enforced disappearances reached their peak under the administration of the former President Gloria Macapagal-Arroyo. She occupied the post from 2002 to 2008.¹⁵

The reelection of Quisumbing is without its own share of controversy. Consider the following issues against the appointment of Quisumbing:

- the Philippines is engaged more in verbal assurance than action on human rights violations in the country, and
- the country's law enforcement agencies and the justice system remain weak, while the military and police commit human rights violations with impunity.¹⁶

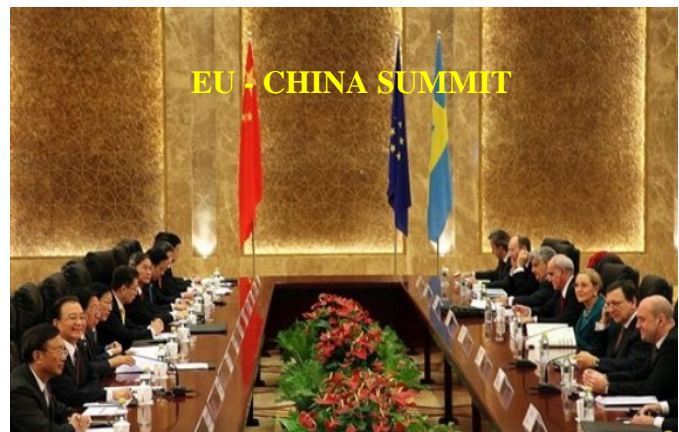
Focusing on the ASEAN Human Rights Council, a news item gives a vivid description of the ASEAN human rights effort. In order to preserve the impact of the news item¹⁷, an important portion is reproduced below so that nothing gets "lost in transcription", thus:

"The Association of Southeast Asian Nations inaugurated its human-rights commission Friday. Like its United Nations equivalent, it's a toothless body, but it can still do damage to the cause it's supposed to serve.

ASEAN members aspire for the council to be "a vehicle for progressive social development and justice, the full realization of human dignity and the attainment of a higher quality of life for ASEAN peoples," according to their inaugural declaration. These are worthy goals.

But ASEAN is a broad church that includes countries like Burma and Laos that want to rubber stamp their authoritarian regimes, not to submit to real scrutiny. All 10 commissioners which will serve on the council for three years were chosen by their respective ASEAN member nations, in most cases through opaque selection processes that involved little or no public consultation. Commissioners include Kyaw Tint Swe, the Burmese ambassador to the UN, who has long defended the junta's record there, and Brunei's Abdul Hamid Bakal, a Shariah court judge. The commission operates by consensus and its mandate focuses on promoting human rights, not protecting them.

The initial signals aren't encouraging. At the weekend ASEAN summit in Hua Hin, Thailand, delegates discussed regional integration, climate change and removing trade barriers. No less than five ASEAN nations – Burma, Cambodia, Laos, the Philippines and Singapore - refused to meet with civil society representatives during a scheduled Friday "interface meeting" meant to act as a forum for discussion between heads of state and civil society representatives..."



EU trade with China, an enigma

The European Commission Directorate-General for Trade states the official position of the EU regarding EU's trade with China,¹⁸ thus:

China is the single most important challenge for EU policy. China has re-emerged as the world's third

¹⁵ Cruz Tonyo, Filipino reelected to UN Human Rights Council advisory panel, http://asiancorrespondent.com/51385/filipino_reelected_to_un_human_rights_council_advisory_panel, June 7, 2011, 3:15 pm.

¹⁶ Lee-Brago Pia, <http://www.philstar.com/Article.aspx?articleId=688585&publicationSubCategoryId=63>, June 7, 2011, 3:45 pm.

¹⁷ ASEAN's Human Rights Council, <http://online.wsj.com/article/SB1000142405274870433904574494771231953200.html>

¹⁸ <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/china/>, June 6, 2011, 9:00 am.

economy and the biggest exporter in the global economy, but also an increasingly important political power. EU-China trade has increased dramatically in recent years. China is now the EU's second trading partner behind the USA and the EU's biggest source of imports by far. The EU is also China's biggest trading partner.

The EU's open market has been a large contributor to China's export-led growth. The EU has also benefited from the growth of the Chinese market and the **EU is committed to open trading relations with China**. However, the EU wants to ensure that China trades fairly, respects intellectual property rights and meet its WTO obligations.

Trade in goods

- EU goods exports to China in 2010: 113.1 billion euros (+38% from 2009)
- EU goods imports from China: 281.9 billion euros (+31% from 2009)

EU's imports from China are mainly industrial goods: machinery and transport equipment and miscellaneous manufactured articles. The EU's exports to China are also concentrated on industrial products: machinery and transport equipment, miscellaneous manufactured goods and chemicals.

Foreign direct investment

- EU services exports to : 5.3 billion euros
- China inward investment to EU in 2009: 0.3 billion euros

Trade in services

- EU services exports to China in 2009: 18 billion euros
- EU services imports from China in 2009: 13 billion euros

EU trade with China is robust and still increasing in spite of the report of the Amnesty International which has documented widespread human rights violations in China. An estimated 500,000 people are currently enduring punitive detention without charge or trial, and millions are unable to access the legal system to seek redress for their grievances. Harassment, surveillance, house arrest, and imprisonment of human rights defenders are on the rise, and censorship of the Internet and other media has grown. Repression of minority groups, including Tibetans, Uighurs and Mongolians,

and of Falun Gong practitioners and Christians who practice their religion outside state-sanctioned churches continues. While the recent reinstatement of Supreme People's Court review of death penalty cases may result in lower numbers of executions, China remains the leading executioner in the world.²⁰

How does the EU regard the human rights violations committed by China?

The EU policy towards the human rights violations of China are as follows:

- engage China further, bilaterally and on the world stage, through an upgraded **political dialogue**.
- support China's **transition** to an open society based upon the rule of law and respect for human rights.
- encourage the integration of China in the world economy through bringing it fully into the world trading system, and **supporting the process of economic and social reform**.
- raise the EU's profile in China.

Everything seems to go well with ASEAN towards the creation of the Asean Free Trade Agreement (AFTA), until Myanmar, with a population of 50 million was accepted as a Member State on July 23, 1997. Even before Myanmar's membership to the ASEAN, the European Council¹⁹ already imposed an embargo of goods which may be used for repression. The European Union (EU) also refused visas for a list of junta officials and had frozen the funds of the affected officials located in EU. When Myanmar joined ASEAN in 1997, the EU refused to allow the country to accede to the 1980 EU-ASEAN cooperation agreement, effectively blocking the creation of an FTA between the ASEAN and EU.

Both China and Myanmar have high profile human rights violations. As far as the EU is concerned, China needs assistance and support through dialogues and gradual transition in order to attain the acceptable level of human rights record. In the case of Myanmar, due its bad human rights record, the EU's approach is to impose sanctions and to reject the EU-ASEAN FTA. The EU is compliant to the WTO rules of removing barriers to trade, if human rights imposition is not considered a barrier to trade. In the case of Myanmar, its human rights record is of prime importance, more important than trade liberalization.

What is the difference between the human rights violations of China and Myanmar? Is it not that the concept of human rights is universal?

¹⁹ EU to negotiate FTA with all ASEAN countries, except Myanmar, <http://democracyforburma.wordpress.com/2011/05/09/eu-to-negotiate-fta-with-all-asean-countries-except-myanmar>.

Status of the negotiations with the EU Department of Trade and Industry, As of May 12, 2011²⁰

In April 2005, the ASEAN Economic Ministers (AEM) and the EU Trade Commissioner established an ASEAN-EU Vision Group to study the feasibility of a possible ASEAN-EU Free Trade Area (FTA) and other initiatives for enhancing economic cooperation and ties between ASEAN and the EU. The ASEAN-EU Vision Group supported an idea of an FTA guided by certain key considerations. The ASEAN-EU FTA must be mutually beneficial, support the process of ASEAN integration and complementary to the successful conclusion of the Doha Development Agenda (DDA) negotiations.

On the sidelines of the AEM Retreat in May 2007, the ASEAN Economic Ministers and the EU Trade Commissioner announced the launch of the ASEAN-EU FTA. They agreed to establish a Joint Committee (JC) composing of senior officials from all ASEAN Member Countries and the EU to develop the details of the modalities, work program and time schedule for negotiating the ASEAN-EU FTA.

The Joint Committee met seven times (Danang, Vietnam, July 2007, Singapore, October 2007, Brussels, January 2008, Bangkok April 2008, Manila, June 2008, Hanoi, October 2008 and Kuala Lumpur, March 2009). Mainly, these meetings were devoted to exchanging views relating to the FTA elements, guiding principles; and modalities for tariff, services and investment liberalization, among others. These may be viewed as *"lay your card in the table"*, however, only reached the getting to know stage and have not agreed on the final FTA elements. ASEAN and EU are faced with installed FTA negotiations for a definite period given the current stand-off in the positions after the 7th round of the ASEAN-EU Joint Committee Meeting in Kuala Lumpur.

The contributory factors to the impasse are spelled out below:

- Political issue involving Myanmar EC did not want to sign an agreement with Myanmar which essentially could not be supported since ASEAN wanted all the ten (10) member states actively engaged in the FTA consistent with the instructions of the ASEAN Heads of State.
- Differing degrees of openness to trade liberalization and level of ambitions on trade policy among the Parties EU had been very open in wanting to pursue an expanded FTA was pushing or areas that are strategic and critical interest to them (a) sustainable development, (b) government procurement, (c) intellectual property rights, and (d) competition policy.

The preference of ASEAN, however, was to limit coverage to standard chapters based on its FTA engagement (i.e., Trade in Goods, Services and Investments,

Economic cooperation and Dispute Settlement). In particular, ASEAN (a) was averse to the inclusion of public procurement, (b) wanted to limit coverage of competition policy on cooperation initiatives, (c) opted for the exclusion of sustainable development, and (d) was unwilling to negotiate IPRs beyond commitments in the WTO. ASEAN and EU further had to seal with a range of issues relating to harmonization, tariff modalities and a host of other technical issues.

Meanwhile, the bilateral route was tapped up a window for the Parties to engage each other. Currently, **EU has an on-going FTA talks with Singapore, Malaysia and Vietnam.**



EU-ASEAN FTA Caucus (Philippines)

The Philippines and EU are currently exploring the idea of engaging each other in possible FTA talks. DTI will be tapping the services of the Philippine Institute of Development Studies in conducting the necessary research and impact studies to help establish the economic benefits of an FTA with EU. The Parties signed a Memorandum of Understanding in May this year to firm up the said engagement.

Observations

1. **The role of the Senate** – The Executive Department has the prerogative to sign treaties with other countries on behalf of the Philippines. However, to have a binding and valid treaty the Constitution provides for the following – *No Treaty or international agreement shall be valid unless concurred in by at least two-thirds of all the members of the Senate* (Section 21, Article VII, Executive Department).

In this regard, the Senate needs to be updated, if possible, on the progress of the negotiations in order to define the relevant issues during the ratification of any treaty. It is therefore necessary to disseminate relevant materials even before the conclusion of any treaty.

2. **The WTO concept of trade liberalization** – The provisions of the WTO mandates the removal of tariff barriers. For example, import quotas are assigned its

²⁰ The STSRO sent a letter-inquiry to the DTI addressed to Secretary Gregory Domingo on May 5, 2011. The DTI responded on May 12, 2011. The said letter-reply is reproduced in whole.



tariff equivalent with the end in view of gradually reducing such tariff within a pre-determined length of time. The process is called tariffication.

Tariffication is recommended in order to facilitate the gradual decrease of tariffs or to facilitate the movement of goods among countries. Otherwise stated, there must be universal way to liberalize trading among countries. No other trade barriers are to be allowed.

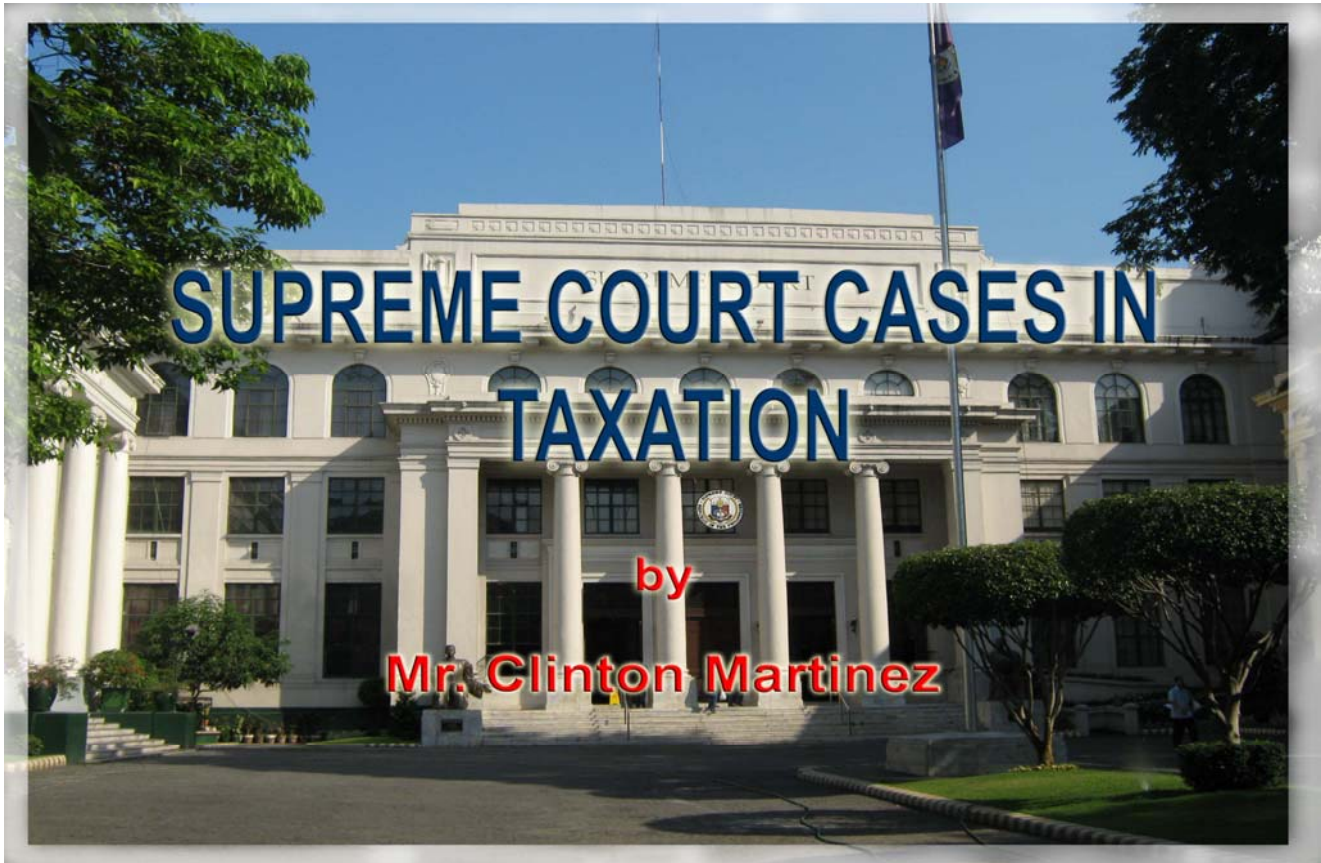
3. **Human rights** – Every person's human right should be respected, it is a universal right. It must also be applied regardless of wealth, religion, importance, race and nationality. In the case of China, the EU deals human rights violation through dialogues, in a diplomatic way. The same cannot be said for Myanmar where the EU imposes sanctions on the government of Myanmar because of its bad human rights record. The problem with mixing human rights with international commercial dealings is that such mix enters into the political arena. In this regard, the subject of human rights, no matter how laudable cannot be imposed in international commercial dealings. Every country has a negative human rights record, it is only a matter of degree. The unfair side of the issue is that some countries cannot be ignored because of its size and importance, like the case of China.

As a result of the EU policy, the establishment of an ASEAN-EU FTA is a remote possibility. The logical outcome is for individual Member Countries of the ASEAN to negotiate separately with the EU for individual FTAs. The collective strength of the ASEAN is lost.

4. **Take-it-or-leave-it approach** – During the Senate deliberations (before 1995) of the merits of the WTO, it was clear that the document to be ratified (GATT-Uruguay Final Round) is on the basis of take-it-or-leave-it basis. Such ratification requirement was meant to establish a uniform system of international trading and to simplify the procedures of trading.

However, the WTO respected the existence of the already existing regional groupings like the ASEAN and the EU. As a result, each regional grouping has an interpretation of the meaning of human rights. The EU is in the forefront in enforcing human rights, resulting in the creation of another non-trade barrier.

5. **The ASEAN Common Market** – The ASEAN aims to create a common market similar to the EU. However, such idea faces problems needing support from the EU because of the following reasons:
 - i. *Tradition* - The ASEAN does not have a common tradition, unlike that of the EU where the Judeo-Christian influence is common;
 - ii. *Language* - Even if there are several languages in the EU, it is certain that the most dominant EU language in the EU may be used. In the case of the ASEAN, the common language is English, a remnant of European colonialism in the region;
 - iii. *Government* - All the governments comprising the EU are more or less democratic. In the case of the ASEAN, the member countries have divergent form of governments ranging from communist states (Laos and Vietnam), repressive regime (Myanmar), city state (Singapore) and of course democracy. With such divergence, integration may prove a little difficult;
 - iv. *Currency* – In order to have an effective common market, it is necessary to have a common currency in order to facilitate a common monetary policy. In the case of the ASEAN, the strongest currency is the Singapore dollar. The problem is that such currency may not be enough to support the needs of the whole ASEAN; and
 - v. *Unequal development level* – The ASEAN is composed of Member Countries with divergent level of development ranging from a developed country like Singapore and developing countries like Laos and Myanmar. It is therefore difficult to bridge the gap in terms of economic development. The task ahead is monumental needing encouragement from more developed FTA like the EU and the United States.
6. **Losing a position of strength** – For a small country like the Philippines, it is better to deal with economically huge and established FTA as a member of the ASEAN. Doing otherwise would be tantamount to losing an important bargaining chip. An EU-Philippines FTA appears lopsided. Furthermore, a question may be asked – *Is an EU-Philippines FTA a bilateral or a multilateral agreement?*



1. **COMMISSIONER OF INTERNAL REVENUE (CIR), *Petitioner*, vs. SM PRIME HOLDINGS, INC. and FIRST ASIA REALTY DEVELOPMENT CORPORATION, *Respondents*, GR No. 183505, February 26, 2010 (Del Castillo, J.).**

FACTS:

The Supreme Court (SC) made this preliminary statement: When the intent of the law is not apparent as worded, or when the application of the law would lead to absurdity or injustice, legislative history is all important. In such cases, courts may take judicial notice of the origin and history of the law, the deliberations during the enactment, as well as prior laws on the same subject matter to ascertain the true intent or spirit of the law.

Both SM Prime Holdings, Inc. (SM Prime) and First Asia Realty Development Corporation (First Asia), respondents in this case, are domestic corporations duly organized and existing under the laws of the Philippines, engaged in the business of operating cinema houses, among other undertakings.

The BIR seeks to collect VAT deficiency from the gross receipts derived from admission tickets by cinema/theater operators or proprietors.

ISSUES:

Petitioner CIR alleges that the CTA *En Banc* seriously erred:

1. In not finding/holding that the gross receipts received by operators/proprietors of cinema houses from admission tickets are subject to the 10% VAT because (a) the exhibition of movies by cinema operators/proprietors to the paying public is a sale of service; (b) unless exempted by law, all sales of services are expressly subject to VAT under section 108 of the NIRC of 1997; (c) section 108 of the NIRC of 1997 is a clear provision of law and the application of rules of statutory construction and extrinsic aids is unwarranted; (d) granting without conceding that rules of construction are applicable herein, still the Honorable Court erroneously applied the same and promulgated dangerous precedents; (e) there is no valid, existing provision of law exempting respondents' services from the VAT imposed under Section 108 of the NIRC of 1997; (f) questions on the wisdom of the law are not proper issues to be tried by the Honorable Court; and (g) respondents were taxed based on the provision of Section 108 of the NIRC.
2. In ruling that the enumeration in Section 108 is exhaustive in coverage;
3. In misconstruing the NIRC of 1997 to conclude that the showing of motion pictures is merely subject to the amusement tax imposed by the Local Government Code (LGC); and
4. In invalidating Revenue Memorandum Circular (RMC) No. 28-2001.



In a nutshell, the petitioner “argues that the enumeration of services subject to VAT in Section 108 of the NIRC is not exhaustive because it covers all sales of services unless exempted by law. He claims that the CTA erred in applying the rules on statutory construction and in using extrinsic aids in interpreting Section 108 because the provision is clear and unambiguous. Thus, he maintains that the exhibition of movies by cinema operators or proprietors to the paying public, being a sale, is subject to VAT.”

Upon the other hand, respondents “argue that a plain reading of Section 108 on the NIRC of 1997 shows that the gross receipts of proprietors or operators of cinemas/theater derived from admission tickets were never intended to be subject to any tax imposed by the national government. According to them, the absence of gross receipts from cinema/theater admission tickets from the list of services which are subject to the national amusement tax under Section 125 of the NIRC of 1997 reinforces the legislative intent. Respondents also highlight the fact that RMC No. 28-2001 on which the deficiency assessments were based is an unpublished administrative ruling.”

HELD:

The SC denied the petition of CIR, ruling that: “Among those included in the enumeration is the ‘lease of motion picture films, films, tapes and discs.’ This, however, is not the same as the showing or exhibition of motion pictures or films.”

A history of the precedents involving the present provisions of laws being considered led the Court to declare that “the repeal of the Local Tax Code by the LGC of 1991 is not a legal basis for the imposition of VAT on the gross receipts of cinema/theater operators or proprietors derived from admission tickets. The removal of the prohibition under the Local Tax Code did not grant nor restore to the national government the power to impose amusement tax on cinema/theater operators or proprietors. Neither did it expand the coverage of VAT. Since the imposition of a tax is a burden on the taxpayer, it cannot be presumed nor can it be extended by implication. A law will not be construed as imposing a tax unless it does so clearly, expressly, and unambiguously. As it is, the power to impose amusement tax on cinema/theater operators or proprietors remain with the local government.”

The Court likewise struck down RMC No. 28-2001 “considering that there is no provision of law

imposing VAT on the gross receipts of cinema/theater operators or proprietors derived from admission tickets. RMCs must not override, supplant, or modify the law, but must remain consistent and in harmony with, the law they seek to apply and implement.”

2. TOSHIBA INFORMATION EQUIPMENT (PHILS.), INC., *Petitioner*, vs. COMMISSIONER OF INTERNAL REVENUE (CIR), *Respondent*, GR No. 157594, March 9, 2010 (Leonardo-De Castro, J.).

FACTS:

Petitioner Toshiba Information Equipment (Phils.), Inc. seeks the setting aside and reversal of the decision of the Court of Appeals (CA) [CA-GR SP No. 63047, August 29, 2002] which found that it was not entitled to the tax credit/refund of its Value-Added Tax (VAT) payments which were not utilized, attributable to petitioner’s export sales, due to the fact that it was a tax-exempt entity and its export sales were VAT-exempt transactions. Also, petitioner seeks the reversal and setting aside of the CA’s Resolution (February 19, 2003) in the same case which denied the Motion for Reconsideration (MR) it submitted. The assailed decision of the CA reversed and set aside the decision of the Court of Tax Appeals (CTA) [No. 5762] granting the claim for tax credit/refund of petitioner Toshiba in the amount of P1,385,282.08.

Toshiba is a domestic corporation principally engaged in the business of manufacturing and exporting of electric machinery, equipment systems, accessories, etc. It is an Economic Zone (ECOZONE) export enterprise in the Laguna Technopark, Inc., registered with the Philippine Economic Zone Authority (PEZA), as shown by its Certificate of Registration No. 95-99 (September 27, 1995). It is registered with Regional District Office (RDO) of the Bureau of Internal Revenue (BIR) in San Pedro, Laguna as a VAT-taxpayer with a Taxpayer Identification Number (TIN).

ISSUES:

Did the CA err in ruling that Toshiba, being a PEZA-registered enterprise, is exempt from VAT and holding that its export sales are exempt transactions under the Tax Code and when it reversed the CTA ruling granting the refund?

Did the CA err when it failed to dismiss outright and gave due course to CIR’s petition notwithstanding the latter’s failure to adequately raise it in issue at the CTA the applicability of RA 7916 (Special Economic Zone Act of 1995, as amended) to Toshiba’s refund claim?

Did the CA err when it ruled that the CTA findings with respect to Toshiba’s export sales being zero-rated sales for VAT purposes, were based merely on the admissions of CIR’s counsel and not supported by substantial evidence?

HELD:

The Supreme Court (SC) ruled in favor of petitioner Toshiba. It reinstated the decision of the CTA granting the prayer of petitioner and ordered the CIR to refund or, in the alternative, to issue a tax credit certificate in favor of Toshiba in the amount of P1,385,282.08. The SC likewise mentioned that: "Jurisprudence has consistently shown that this Court accords the findings of fact by the CTA with the highest respect. This Court recognizes that the Court of Tax Appeals, which by the very nature of its function is dedicated exclusively to the consideration of tax problems, has necessarily developed an expertise on the subject, and its conclusions will not be overturned unless there has been an abuse or improvident exercise of authority."

Furthermore, the Court said that the CIR did not timely raise before the CTA the issues on the VAT-exemptions of Toshiba and its export sales. The failure of the CIR is deemed a waiver under the Rules of Court, which is applied suppletorily in this case (Rule 9, Section 1). With respect to the Joint Stipulation submitted by the petitioner and CTA after the pre-trial, the SC said that pre-trial is mandatory under the present Rules and hailed it as the most important procedural innovation in Anglo-Saxon justice in the nineteenth century.

The Court elaborated on this important issue:

"According to the old rule, Section 23 of Rep. Act. No. 7916, as amended, gives the PEZA-registered enterprise the option to choose between two sets of fiscal incentives: (a) The five percent (5%) preferential tax rate on its gross income under Rep. Act 7916, as amended; and (b) the income tax holiday provided under Executive Order No. 226, otherwise known as the Omnibus Investment Code of 1987, as amended.

"The five percent (5%) preferential tax rate on gross income under Rep. Act 7916, as amended, is in lieu of all taxes. Except for real property taxes, no other national tax may be imposed on a PEZA-registered enterprise availing of this particular fiscal incentive, not even an indirect tax like VAT.

"Alternatively, Book VI of Exec. Order No. 226, as amended, grants income tax holiday to registered pioneer and non-pioneer enterprises for six-year and four-year periods, respectively. Those availing of this incentive are exempt only from income tax, but shall be subject to all other taxes, including the ten percent (10%) VAT.

"The old rule clearly did not take into consideration the Cross Border Doctrine essential to the VAT system or the fiction of the ECOZONE as a foreign country. It relied totally on the choice of fiscal incentives of the PEZA-registered enterprise. Again, for emphasis, the old rule for PEZA-registered enterprises was based on their choice of fiscal incentives: (1) If the PEZA-registered enterprise chose the five percent (5%) preferential tax on its gross income, in lieu of all taxes, as provided by Rep. Act No. 7916, as amended, then it would be VAT-exempt; (2) If the PEZA-registered enterprise availed of the income tax holiday under Exec. Order No. 226, as amended, it shall be subject to VAT at ten percent (10%). Such distinction was abolished by RMC No. 74-99, which categorically declared that all sales of goods, properties, and services made by a VAT-registered supplier from the Customs Territory to an ECOZONE enterprise shall be subject to VAT, at zero percent (0%) rate, regardless of the latter's type or class of PEZA registration; and, thus, affirming the nature of a PEZA-registered or an ECOZONE enterprise as a VAT-exempt entity."

3. COMMISSIONER OF INTERNAL REVENUE (CIR), Petitioner, vs. FAR EAST BANK & TRUST COMPANY (NOW BANK OF THE PHILIPPINE ISLANDS), Respondent, GR No. 173854, March 15, 2010 (Del Castillo, J.).

FACTS:

Respondent filed with the Bureau of Internal Revenue (BIR), on April 10, 1995 two (2) corporate income tax returns (ITR): (1) For its Corporate Banking Unit [CBU]; and (2) For its Foreign Currency Deposit Unit [FCDU]. Both ITRs are for the taxable year ending December 31, 1994. The ITR for the CBU reflected a refundable income tax of P12,682,864.00. The latter amount was carried over and applied against respondents income tax liability for the taxable year ending 31 December 1995. Respondent filed its 1995 Annual ITR on 15 April 1995 which showed a total overpaid income tax of P17,443,133.00. Of this amount, respondent only sought to refund P13,645,109.00 and it chose to carry over P3,798,024.00 (Refund of P13,645,109.00 plus carry-over of P3,798,024.00 totals P17,443,133.00).

The BIR failed to act on the claim for refund of petitioner, hence the latter was forced to elevate the case to the Court of Tax Appeals (CTA). The CTA denied respondents claim for refund on the ground that it failed to show that the income derived from rentals and sale of real property from which taxes were withheld were reflected in its Annual ITR for 1994.

The Motion for New Trial filed by respondent was denied by the CTA for lack of merit. On appeal to the Court of Appeals (CA), the latter reversed the CTA and ruled that respondent has duly proven that the income derived from rentals and sale of property upon which taxes were withheld were included in the return as part of the gross income.

ISSUE:

Whether respondent Far East Bank has proven its entitlement to the refund.

HELD:

The Supreme Court (SC) ruled in favor of petitioner CIR. The SC said: A taxpayer claiming for a tax credit or refund of creditable withholding tax must comply with the following requirements: [1] The claim must be filed with the CIR within the two-year period from the date of payment of the tax; [2] It must be shown on the return that the income received was declared as part of the gross income; and [3] The fact of withholding must be established by a copy of a statement duly signed by the payor to the payee showing the amount paid and the amount of the tax withheld.

The SC ruled that Far East Bank timely filed its claim for refund. However, the Court also announced that respondent failed to prove that the income derived from rentals and sale of real property were included in the gross income as reflected in the return it submitted. Respondents allegation that its income from rentals and sales of real properties were included in the gross income but classified as other earnings in its schedule of income is not supported by the evidence.

The Court also mentioned that the CA failed to note in its Decision the absence of several Certificates of Creditable Tax Withheld at Source. It immediately granted the refund without first verifying whether the fact of withholding was established by the Certificates.

Finally, "X X X, the fact that the petitioner failed to present any evidence to refute the evidence presented by respondent does not *ipso facto*, entitle the respondent to a tax refund. It is not the duty of the government to disprove a taxpayers claim for refund. Rather, the burden of establishing the factual basis of a claim for a refund rests on the taxpayer."

4. TFS, INCORPORATED, *Petitioner*, vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent*, GR No. 166829, April 19, 2010 (Del Castillo, J).

FACTS:

Petitioner TFS (engaged in the pawnshop business) was issued a Preliminary Assessment Notice (PAN) for deficiency value added tax (VAT), expanded withholding tax (EWT), and compromise

penalty in various amounts. Petitioner requested in a letter it sent to the Bureau of Internal Revenue (BIR), that said PAN and assessments be set aside for having no basis. Respondent Commissioner of Internal Revenue (CIR), in a letter-reply dated 7 February 2002 told TFS that a Final Assessment Notice (FAN) had been issued on 25 January 2002 and that it has until 22 February 2002 within which to file a letter of protest. In a letter dated 19 February 2002, TFS protested the FAN on 20 February, 2002.

Subsequently, on 11 September 2002 TFS filed a Petition for Review with the Court of Tax Appeals (CTA-Case No. 6535), due to the non-action of the CIR. TFS offered to compromise and to settle the assessment for deficiency EWT. Hence, what was left on appeal was the case involving the issue of VAT on pawnshops. The CTA upheld the assessment pursuant to Sections 248 and 249 (B) of the National Internal Revenue Code (NIRC) of 1997, as amended. It also ruled that pawnshops are subject to VAT under Section 108 (A) of the NIRC as they are engaged in the sale of service for a fee, remuneration or consideration. The CTA denied on 20 July 2004 petitioners motion for reconsideration, which it received on 30 July 2004.

Petitioner filed before the Court of Appeals (CA) a Motion for Extension of Time to File Petition for Review, on 16 August 2004. On 24 August 2004, TFS filed a Petition for Review, but the same was dismissed by the CA in a Resolution dated 31 August 2004. The basis was lack of jurisdiction due to the enactment of RA 9282 (Expanding the jurisdiction of CTA, amending Republic Act (RA) No. 1125. RA 9503 was later enacted enlarging the CTA).

On 16 September 2004, acknowledging its error, TFS filed a Petition for Review with the CTA *En Banc*, which was dismissed for having been filed out of time, per CTA Resolution dated 18 November 2004. Petitioners Motion for Reconsideration (MR) was denied on 24 January 2005.

ISSUES:

Whether the Honorable CTA *En Banc* should have given due course to the Petition for Review and not strictly applied the technical rules of procedure to the detriment of justice.

Whether or not petitioner is subject to the ten percent (10%) VAT.

HELD:

The Supreme Court (SC) ruled in favor of petitioner TFS. The Court said that "Jurisdiction to review decisions or resolutions issued by the Divisions of the CTA is no longer with the CA but with the CTA *En Banc*." This is embodied under Section 11 of RA 9282 which provides that:

SECTION 11. Section 18 of the same Act is hereby amended as follows:

SEC. 18. Appeal to the Court of Tax Appeals En Banc. - No civil proceeding involving matters arising under the National Internal Revenue Code, the Tariff and Customs Code or the Local Government Code shall be maintained, except as herein provided, until and unless an appeal has been previously filed with the CTA and disposed of in accordance with the provisions of this Act.

A party adversely affected by a resolution of a Division of the CTA on a motion for reconsideration or new trial, may file a petition for review with the CTA en banc.

The SC ruled: "It is settled that an appeal must be perfected within the reglementary period provided by law; otherwise, the decision becomes final and executory. However, as in all cases, there are exceptions to the strict application of the rules for perfecting an appeal."

The SC continued that while "x x x petitioner's excuse of inadvertence or honest oversight of counsel deserves scant consideration x x x strong compelling reasons such as serving the ends of justice and preventing a grave miscarriage may nevertheless warrant the suspension of the rules."

In resolving the second issue, the SC said that TFS is not liable for the 1998 VAT and that the VAT deficiency assessment, surcharge and interest has no bases, citing *First Planters Pawnshop, Inc vs. CIR* (GR # 174134, July 30, 2008, 560 SCRA 606, 621), to wit:

"Since petitioner is a non-bank financial intermediary, it is subject to 10% VAT for the years 1996 to 2002; however, with the levy, assessment and collection of VAT from non-bank financial intermediaries being specifically deferred by law, then petitioner is not liable for VAT during these tax years. But with the full implementation of the VAT system on non-bank financial intermediaries starting January 1, 2003, petitioner is liable for 10% VAT for said tax year. And beginning 2004 up to the present, by virtue of R.A. No. 9238, petitioner is no longer liable for VAT but it is subject to percentage tax on gross receipts from 0% to 5%, as the case may be."

Nota Bene: RA No. 9503, An Act Enlarging the Organizational Structure of the Court of Tax Appeals, was enacted on 12 June 2008. It further amended RA 1125 (Law creating the CTA, 16 June 1954), as amended by RA 9282 [Expanding and Elevating the CTA, 30 March 2004], in particular Sections 1 and 2 re Qualifications of Justices and Quorum and Proceedings.

5. COMMISSIONER OF INTERNAL REVENUE, *Petitioner*, vs. KUDOS METAL CORPORATION, *Respondent*, GR No. 178087, May 5, 2010 (Del Castillo, J.).

FACTS:

Respondent Kudos Metal Corporation filed its Annual Tax Return (ITR) for taxable year 1998, on 15 April 1999.

By virtue of a Letter of Authority (LA) dated 7 September 1999, the BIR served upon respondent three (3) Notices of Presentation of Records. Respondent did not comply with said notices. Subsequently, the BIR issued a Subpoena Duces Tecum (21 September 2000), the receipt of the same being acknowledged by Kudos' President in a letter dated 20 October 2000.

Respondent's accountant, on 10 December 2001 executed a Waiver of the Defense of Prescription. The same was notarized on 22 January 2002 and received by the BIR Enforcement Service on 31 January 2002, while the BIR Tax Fraud Division (National Investigation Division) received the same on 28 February 2003. It was accepted by an Assistant Commissioner (ACIR).

The BIR issued a Preliminary Assessment Notice (PAN) for taxable year 1998 on 25 August 2003 against respondent. After this, a Formal Letter of Demand with Assessment Notices for Taxable year 1998 was issued dated 26 September 2003. Respondent received the same on 12 November 2003.

Respondent challenged the assessments on 3 December 2003 by filing a "Protest on Various Tax Assessment." On 2 February 2004, Kudos filed its "Legal Arguments and Documents in Support of Protests against Various Assessments."

On 22 June 2004, the BIR rendered a final Decision requesting Kudos to pay the corresponding tax liabilities, amounting to P25,624,048.78.

On appeal, the Court of Tax Appeals (CTA) ruled that the government's right to assess the unpaid taxes of Kudos has prescribed.

ISSUES:

Were the Waivers issued valid?

HELD:

The SC ruled in favor of respondent, stating:

"Section 222 (b) of the NIRC provides that the period to assess and collect taxes may only be exercised upon written agreement between the CIR and the taxpayer executed before the expiration of the three-year period. RMO 20-90 issued on April 4, 1990 and RDAO 05-01 issued on August 2, 2001 lay down the procedure for the proper execution of the waiver, to wit:



- "1. The waiver must be in proper form prescribed by RMO 20-90. The phrase "but not after _____ 19____", which indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription, should be filled up.
- "2. The waiver must be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials. In case the authority is delegated by the taxpayer to a representative, such delegation should be in writing and duly notarized.
- "3. The waiver should be duly notarized.
- "4. The CIR or the revenue official authorized by him must sign the waiver indicating that the BIR has accepted and agreed to the waiver. The date of such acceptance by the BIR should be indicated. However, before signing the waiver, the CIR or the revenue official authorized by him must make sure that the waiver is in the prescribed form, duly notarized, and executed by the taxpayer or his duly authorized representative.
- "5. Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the

expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.

- "6. The waiver must be executed in three copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the office accepting the waiver. The fact of receipt by the taxpayer of his/her file copy must be indicated in the original copy to show that the taxpayer was notified of the acceptance of the BIR and the perfection of the agreement."

The SC further declared:

"A perusal of the waivers executed by respondents' accountant reveals the following infirmities:

- "1. The waivers were executed without the notarized written authority of Pasco¹ to sign the waiver in behalf of respondent.
- "2. The waivers failed to indicate the date of acceptance.
- "3. The fact of receipt by the respondent of its file copy was not indicated in the original copies of the waiver.

"Due to the defects in the waivers, the period to assess or collect taxes was not extended. Consequently, the assessments were issued by the BIR beyond the three-year period and are void.

"Estoppel does not apply in this case.

"We find no merit in petitioners claim that respondent is now estopped from claiming prescription since by executing the waivers, it was the one which asked for additional time to submit the required documents.

"In *Collector of Internal Revenue v. Sayoc Consolidated Mining Company*, the doctrine of estoppel prevented the taxpayer from raising the defense of prescription against the efforts of the government to collect the assessed tax.

¹ Accountant of Kudos.

However, it must be stressed that in said case, estoppel was applied as an exception to the statute of limitations on *collection* of taxes and not on the *assessment* of taxes, as the BIR was able to make as assessment within the prescribed period. More importantly, there was a finding that the taxpayer made several requests or positive acts to convince the government to postpone the collection of taxes.

“X x x.

“This case has no precedent in this jurisdiction for it is the first time that such has risen, but there are several precedents that may be invoked in American jurisprudence. As Mr. Justice Cardozo has said: “The applicable principle is fundamental and unquestioned. He who prevents a thing from being done may not avail himself of the non-performance which he has himself occa-

sioned, for the law says to him in effect “this is your own act, and therefore you are not damnified.” Or, as was aptly said, “The tax could have been collected, but the government withheld action at the specific request of the plaintiff. The plaintiff is now stopped and should not be permitted to raise the defense of the Statute of Limitations.”

The SC added:

“The doctrine of estoppel cannot be applied in this case as an exception to the statute of limitations on the assessment of taxes considering that there is a detailed procedure for the proper execution of the waiver, which the BIR must strictly follow. X x x. Moreover, the BIR cannot hide behind the doctrine of estoppel to cover its failure to comply with RMO 20-90 and RDAO 05-01, which the BIR itself issued.”

In relation to our Taxbits issue (Special Anniversary, Volume 1, October 2010) on Value-Added Tax (VAT) on Toll Fees, we are including herein as a special feature, a digest of the case on the same.

Renato V. Diaz and Aurora Ma. F. Timbol, *Petitioners*, vs. The Secretary of Finance and the Commissioner of Internal Revenue, *Respondents*, G.R. No. 193007, July 19, 2011 (Abad, J.).

FACTS:

This case is about the imposition of VAT on Tolls under the law and the issuance of BIR Rulings and Circulars, necessary for its implementation.

This case discusses the prerogative of the executive branch of the government, through the Department of Finance (DOF) and Bureau of Internal Revenue (BIR), to impose a value-added tax (VAT) on toll fees being collected by franchise grantees or toll operators under Toll Operating Agreements (TOA).

TOAs are actually grants from the government to the private sector which has the capability to build and operate certain activities and charge fees approved by the government to recover the cost of constructing and managing said undertaking. It is a partnership between the public and private sector wherein the latter cedes ownership of the project to the former upon recovery of cost pursuant to a given time frame.

In this case, petitioners challenged the imposition of the VAT on toll fees being collected from the users of the road, arguing that:



1. “X x x, since VAT would result in increased toll fees, they have an interest as regular users of tollways in stopping the BIR action.”
2. “X x x Congress did not, when it enacted the NIRC, intend to include toll fees within the meaning of ‘sale of services’ that are subject to VAT; a toll fee is a ‘user’s tax,’ not a sale of services; to impose VAT on toll fees would amount to a tax on public service; and since VAT was never factored into the formula for computing toll fees, its imposition would violate the non-impairment clause of the constitution.”

On the part of the respondents, they are of the view that:

1. "X x x, the NIRC imposes VAT on all kinds of services of franchise grantees, including tollway operations, except where the law provides otherwise; the Court should seek the meaning and intent of the law from the words used in the statute; the imposition of VAT on tollway operations has been the subject as early as 2003 of several BIR rulings and circulars."



2. "X x x, non-inclusion of VAT in the parametric formula for computing toll rates cannot exempt tollway operators from VAT; it cannot be claimed that the rights of tollway operators to a reasonable rate of return will be impaired by the VAT since this is imposed on top of the toll rate; the imposition of VAT on toll fees would have very minimal effect on motorists using the tollways."

Petitioners emphasize "X x x that tollway operators cannot be regarded as franchise grantees under the NIRC since they do not hold legislative franchises." They likewise allege that "X x x the BIR intends to collect the VAT by rounding off the toll rate and putting excess collection in an escrow account. But this would be illegal since only the Congress can modify rates and authorize its disbursement. Finally, BIR Revenue Memorandum Circular 63-2010 x x x, contravenes Section 111 of the NIRC which grants entities that first become liable to VAT a transitional input tax credit of 2% on beginning inventory."

ISSUES:

Procedural

1. "Whether or not the Court may treat the petition for declaratory relief as one for prohibition"; and
2. Whether or not petitioners have legal standing to file the action.

Substantive

1. "Whether or not the government is unlawfully expanding VAT coverage by including tollway operators and tollway operations in the terms 'franchise grantees' and 'sale of services' under Section 108 of the Code"; and
2. "Whether or not the imposition of VAT on tollway operators a) amounts to a tax on tax and not a tax on services; b) will impair the tollway operators' right to a reasonable return of investment under their TOAs and; c) is not administratively feasible and cannot be implemented.

HELD:

On the procedural issues, the Supreme Court (SC) ruled that "X x x there are precedents for treating a petition for declaratory relief as one for prohibition if the case has far-reaching implications and raises questions that need to be resolved for the public good. The Court has also held that a petition for prohibition is a proper remedy to prohibit or nullify acts of executive officials that amount to usurpation of legislative authority."

The SC further declared:

"Hence, the imposition of VAT on toll fees has far-reaching implications. Its imposition would impact, not only on the more than half a million motorists who use the tollways everyday, but more so on the government's effort to raise revenue for funding various projects and for reducing budgetary deficits.

"X x x.

"Although the petition does not strictly comply with the requirements of Rule 65, the Court has ample power to waive such technical requirements when the legal questions to be resolved are of great importance to the public. The same may be said of the requirement of *locus standi* which is a mere procedural requisite."

With respect to the substantive problem, the Court interpreted Section 108 of the National Internal Revenue Code (NIRC), as amended. The SC stressed:

"It is plain x x x that the law imposes VAT on 'all kinds of services' rendered in the Philippines for a fee, including those specified in the list. The enumeration of affected services is not exclusive. By qualifying 'services' with the words



‘all kinds,’ Congress has given the term ‘services’ an all-encompassing meaning. The listing of specific services are intended to illustrate how pervasive and broad is the VAT’s reach rather than establish concrete limits to its application. Thus, every activity that can be imagined as a form of ‘service’ rendered for a fee should be deemed included unless some provision of law especially excludes it.”

“X x x.

“When a tollway operator takes a toll fee from a motorist, the fee is in effect for the latter’s use of the tollway facilities over which the operator enjoys private proprietary rights that its contract and the law recognize. In this sense, the tollway operator is no different from the following service providers under Section 108 who allow others to use their properties or facilities for a fee:

- “1. Lessors of property, whether personal or real;
- “2. Warehousing service operators;
- “3. Lessors or distributors of cinematographic films;
- “4. Proprietors, operators or keepers of hotels, motels, resthouses, pension houses, inns, resorts;
- “5. Lending investors (for use of money);
- “6. Transportation contractors on their transport of goods or cargoes, including persons who transport goods or cargoes for hire and other domestic common carriers by land relative to their transport of goods or cargoes; and
- “7. Common carriers by air and sea relative to their transport of

passengers, goods or cargoes from one place in the Philippines to another place in the Philippines.”

On the issue that a toll fee is a “user’s tax” and that to impose VAT on toll fees is “tantamount to taxing a tax”, the Court proclaimed:

“X x x. Tollway fees are not taxes. Indeed, they are assessed and collected by the BIR and do not go to the general coffers of the government. X x x. What the government seeks to tax here are fees collected from tollways that are constructed, maintained, and operated by private tollway operators at their own expense under build, operate, and transfer scheme that the government has adopted for expressways. X x x. Parenthetically, VAT on tollway operations cannot be deemed a tax on tax due to the nature of VAT as an indirect tax. In indirect taxation, a distinction is made between the liability for the tax and burden of the tax. The seller who is liable for the VAT may shift or pass on the amount of VAT it paid on goods, properties or services to the buyer. In such a case, what is transferred is not the seller’s liability but merely the burden of the VAT.



“X x x.

“Consequently, VAT on tollway operations is not really a tax on the tollway user, but on the tollway operator. Under Section 105 of the Code, VAT is imposed on any person who, in the course of trade or business, sells or renders services for a fee. In other words, the seller of services, who in this case is the tollway operator, is the person liable for VAT. The latter merely shifts the burden of VAT to the tollway user as part of the toll fees.

“For this reason, VAT on tollway operations cannot be a tax on tax even if toll fees were deemed as a ‘user’s tax.’ VAT is assessed against the tollway operator’s gross receipts and not necessarily on the toll fees. Although the

tollway operator may shift the VAT burden to the tollway user, it will not make the latter directly liable for the VAT. The shifted VAT burden simply becomes part of the toll fees that one has to pay in order to use the tollways.”

On the issue on whether petitioner Timbol has personality to pursue the case, the SC said:

“Petitioner Timbol has no personality to invoke the non-impairment of contract clause on behalf of private investors in the tollway projects. She will neither be prejudiced by nor be affected by the alleged diminution in return of investments that may result from the VAT imposition. She has no interest at all in the profits to be earned under the TOAs. The interest in and right to recover investments solely belongs to the private tollway investors.”

On the fourth and final issue of substantiation requirements making the VAT on toll difficult to implement, the SC mentioned:

“Administrative feasibility is one of the canons of a sound tax system. It simply means that the tax system should be capable of being effectively administered and enforced with the least inconvenience to the taxpayer. Non-observance of the canon, however, will not render a tax imposition invalid ‘except to the extent that specific constitutional or statutory limitations are impaired.’ Thus, even if the imposition of VAT on tollway operations may seem burdensome to implement, it is not necessarily invalid unless some aspect of it is shown to violate any law or the Constitution.

“X x x.

“Lastly, the grant of tax exemption is a matter of legislative policy that is within the exclusive prerogative of Congress. The Court’s role is to merely uphold this legislative policy, as reflected first and foremost in the language of the tax statute. Thus, any unwarranted burden that may be perceived to result from enforcing such policy must be properly referred to Congress. The Court has no discretion on the matter but simply applies the law.”

The Court’s decision supports the imposition of VAT on toll fees being charged and collected by tollways operators.



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