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Backgrounder

The news that the Philippines is in the black list of non-cooperative tax havens, along with Costa Rica, Malaysia, and Uruguay, came out last year when the Organization for Economic Co-operation and Development (OECD)—a grouping of industrialized countries dubbed as the rich countries' club—issued a list of countries failing to comply with the agreed international tax standards.

Tax havens have been recently under mounting criticism for helping worsen the global financial debacle by hiding the true value of assets and robbing countries of tax income through their tight bank secrecy policies. Non-cooperative tax havens are being alleged of harboring tax avoiders who park millions or even billions of dollars out of reach of their home authorities since these so-called tax havens do not provide banking information, if and when foreign tax authorities inquire about it.

At the London G20 Summit on April 2, 2009, G20 countries agreed to define a black list for tax havens, to be segmented according to a four-tier system, based on compliance with an "internationally agreed tax standard (IATS)." The list, drawn up by the OECD, was updated on the same date in connection with the G20 meeting in London (Annex A).

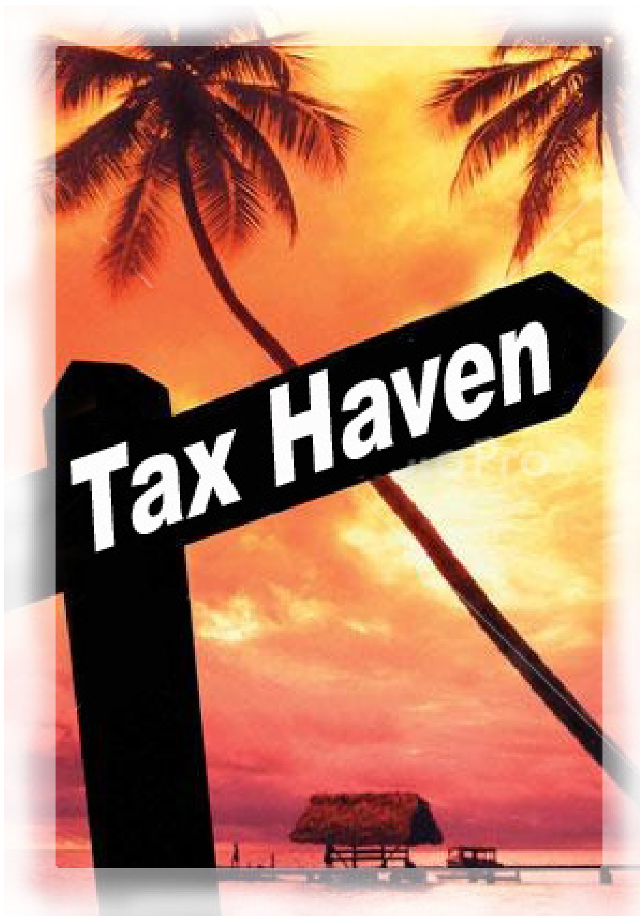
Countries were placed at that time in the following tiers or categories based on the actions they have taken to comply with the IATS:

1) Those that have substantially implemented the standard, including most advanced countries such as Britain, the US, France, Germany and China;

2) Tax havens that have committed to—but not yet fully implemented—the standard. These include Andorra, Monaco, Gibraltar and Lichtenstein;

3) Financial centers that have committed to—but not yet fully implemented—the standard. These include Switzerland, Singapore, Chile and three EU countries—Belgium, Luxembourg and Austria; and

4) Those that have not committed to the standard, including Costa Rica, Malaysia, Philippines and Uruguay.



The countries in the bottom tier were accordingly classified as being non-cooperative tax havens. Further changes were however made to the list to remove these countries from the non-cooperative category as the Philippines reported at that time that it was already taking steps to remove itself from the black list while Uruguay stated that it did meet tax transparency rules and Malaysian Prime Minister Najib Razak has suggested that Malaysia should not be in the bottom tier.

From "Black List" to "Grey List"

The OECD welcomed the manifestations from Costa Rica, Malaysia, Uruguay and the Philippines as they officially informed their commitments to cooperate in the fight against tax abuse by proposing legislation to remove the impediments to the implementation of the standard and incorporating the standard in their existing laws and treaties.

As a result, the OECD, through its Secretary General Angel Gurria, announced on April 7, 2009 that Costa Rica, Malaysia, Uruguay and the Philippines have been moved up to the category of "jurisdictions that have committed to the internationally agreed tax standard, but have not yet substantially implemented" as embodied in the OECD's succeeding progress report (Annex B).

The Philippines was momentarily removed from the black list, thus, avoiding possible sanctions which include, among others, the reduction of aid and use of political pressure on global companies to withhold investment in countries that fail to observe the said standard.

But then again, the removal of the Philippines from the black list was just for the time being since it is still being included in the so-called grey list which comprises jurisdictions that have committed to the standard, but have not yet substantially implemented. As such, the Philippines is under the classification of a Financial Center which is a tax jurisdiction that was identified in 2000 as meeting the tax haven criteria being described in the 1988 OECD report.

What is a Tax Haven?

According to Wikipedia, there are several definitions of a "tax haven" but generally it speaks of a country or territory where certain taxes are levied at a low rate or not at all where individuals and/or corporate entities can find it attractive to move themselves to areas with reduced or nil taxation levels. This creates therefore a situation of tax competition among governments. As such, different jurisdictions tend to be havens for different types of taxes, and for different categories of people and/or companies.

The monthly magazine, *The Economist*, has tentatively adopted the description by Geoffrey Colin Powell (former Economic Adviser to Jersey): "What… identifies an area as a tax haven is the existence of a composite tax structure established deliberately to take advantage of, and exploit, a worldwide demand for opportunities to engage in tax avoidance." It points out, however, that this definition would still exclude a number of jurisdictions traditionally thought of as tax havens.

Similarly, other authorities have suggested that any country which modifies its tax laws to attract foreign capital could be considered a tax haven. And still according to other definitions, the central feature of a tax haven is that its laws and other measures can be used to evade or avoid the tax laws or regulations of other jurisdictions.

In its December 2008 report on the use of tax havens by American corporations, the U.S. Government Accountability Office was unable to find a satisfactory definition of a tax haven but regarded the following characteristics as indicative of a tax haven: nil or nominal taxes; lack of effective exchange of tax information with foreign tax authorities; lack of transparency in the operation of legislative, legal or administrative provisions; no requirement for a substantive local presence; and self-promotion as an offshore financial center.

In the same manner, the OECD has also identified almost the same factors in considering whether a jurisdiction is a tax haven, particularly that of having nil or only nominal taxes, protective of personal financial information, and lack of transparency. In deciding whether or not a jurisdiction is a tax haven, the first factor to look at is whether there are no or nominal taxes. If this is the case, the other two factors—whether or not there is an exchange of information and transparency—must be analyzed.

The OECD however found that its definition has caught certain aspects of its members' tax systems since some countries have low or zero taxes for certain favored groups. As such, its later work has therefore focused on the single aspect of information exchange.

The IATS for Exchange of Information

The Internationally Agreed Tax Standard (IATS) for Exchange of Information was developed by the OECD in cooperation with the non-OECD countries and was endorsed by the G20 Finance Ministers and by the United Nations Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting.

Article 26 of the OECD Model Tax Convention provides the most widely accepted legal basis for bilateral exchange of information for tax purposes. More than 3,000 bilateral treaties are based on the Model Convention.

It creates an obligation to exchange information that is foreseeably relevant to the correct application of a tax convention as well as for purposes of the administration and enforcement of domestic tax laws of the contracting states. Countries are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. In formulating their requests, the requesting state should demonstrate the foreseeable relevance of the requested information. In addition, the requesting state should also have pursued all domestic means to access the requested information except those that would give rise to disproportionate difficulties.

It further provides that a state cannot refuse a request for information solely because it has no domestic tax interest in the information or solely because it is held by a bank or other financial institution. Bank secrecy is not incompatible with the requirements of this Article 26, and virtually all countries have bank secrecy or confidentiality rules. Meeting the standard of Article 26 requires only limited exceptions to bank secrecy rules and would not undermine the confidence of citizens in the protection of their privacy.

Finally, where information is exchanged it is subject to strict confidentiality rules. It is expressly provided in this Article 26 that information communicated shall be treated as secret and that it can only be used for the purposes provided for in the convention.

The Philippines as "Tax Haven"

Then Secretary Margarito Teves of the Department of Finance (DOF) pointed out that the culprits in having the Philippines tagged as a tax haven are the country's existing laws on bank and tax information secrecy.

Since 1955, the Philippines has been operating under Republic Act No. 1405 or the Bank Deposits Secrecy Law, which guarantees all deposits of whatever nature with banks in the Philippines, including investments in government-issued bonds to be absolutely confidential and may not be inquired or looked into unless investigators obtained a court order as part of a pending legal case, or in an impeachment case.

At present, the National Internal Revenue Code (NIRC) of 1997 allows the Bureau of Internal Revenue (BIR) commissioner to look into bank deposits only to determine the gross estate of a decedent and the financial incapacity of an individual to pay his taxes if he applies for compromise.

The Bank Secrecy Law has thereby accordingly given rise to the situation where the Philippines was tagged in June 2000 as a haven for the laundering of proceeds from drug trafficking, kidnapping and gambling by the Financial Action Task Force (FATF) on Money Laundering, which is a group convened by the major industrialized nations in 1989.

The Congress of the Philippines eventually passed into law Republic Act No. 9160, otherwise known as the Anti-Money Laundering Act of 2001, which was intended to address the deficiencies of the banking law by establishing and strengthening an anti-money laundering regime in the country which will not only increase investors' confidence but also ensure that the Philippines is not used as a site to launder proceeds of unlawful activities as it requires financial institutions such as banks to notify and disclose with the Bangko Sentral ng Pilipinas any covered and suspicious transactions.

Moreover, tax information is likewise considered under Philippine laws as confidential and cannot be shared since there is no express authority given to the BIR to do so despite the country's existing tax treaties with other countries.

A study for British Charity Oxfam has shown that developing countries like the Philippines have missed out on tax receipts worth more than the billions of dollars in foreign aid they receive because their own nationals put cash in offshore tax havens. Accordingly, these developing countries tend to lose as much as $124 billion in taxes a year, more than their yearly $103 billion in foreign aid. As such, people from developing countries collectively hold more than $6.2 trillion abroad and capital flight is increasing by $200-300 billion per year.

Towards Complying with the IATS

In response to the April 2, 2009 OECD black list report, the Philippines, through then Finance Secretary Teves, manifested to the OECD Secretary General the country's commitment to comply with the IATS on information exchange and its full cooperation to help fight international tax evasion.

The former Finance Secretary indicated that the Philippines is and has always been ready to comply with conditions required for the exchange of tax information that have been set by international organizations, such as the G20 group of countries. In fact, it has 37 tax treaties in force with other countries which provide for exchange of information on request while there are 7 tax treaties pending ratification (Annex C).

However, it has been difficult for Philippine tax administration to comply with the provisions on the exchange of information set by international organizations and also in the existing tax treaties due to some domestic legal restrictions, particularly with the country's stringent bank secrecy laws. A review of existing domestic legislations relative to banking secrecy as well as tax information secrecy has indicated the need to amend existing laws along these areas of concern.

In this connection, the DOF called upon both Houses of Congress to amend some pertinent provisions of Republic Act No. 8424, otherwise known as the NIRC, as amended, which would essentially make the Philippines comply with the IATS on information exchange.

Enactment of Republic Act No. 10021

Recognizing the importance and urgency of this matter, Senate President Juan Ponce Enrile filed Senate Bill No. 3220 on May 6, 2009 which seeks to comply with the IATS for Exchange of Information to more effectively carry out the Philippines' commitments under its bilateral tax treaties with other countries designed to combat tax abuses. It also aims to significantly strengthen the authority of the country's tax administration to directly respond to request for tax information from its treaty partners.

Correspondingly, then House Speaker Prospero C. Nograles authored a counterpart bill in the House of Representatives which he filed as House Bill No. 6330 on May 12, 2009. Similar to the Senate bill's purpose, HBN 6330 seeks to amend Sections 6(f), 71 and 270 of the NIRC, as amended, in order to allow the exchange of information by the BIR on tax matters pursuant to the IATS.

SBN 3220 and HBN 6330 were subsequently referred to and deliberated upon by the Committee on Ways and Means of the Senate and the House of Representatives respectively chaired then by Senator Panfilo M. Lacson and Representative Exequiel B. Javier. Senator Lacson sponsored SBN 3220 on October 6, 2009 which was later on approved on Third Reading by the Senate on October 12, 2009. On the other hand, HBN 6330 was substituted on October 8, 2009 by HBN 6899, which was approved on Third Reading by the House of Representatives on November 16, 2009 under the sponsorship of Representative Javier.

In order to thresh out the disagreeing provisions of SBN 3220 and HBN 6899, the Bicameral

Conference Committee met on December 9, 2009. The two bills were then consolidated through the Bicameral Conference Committee Report, which was approved by the Senate on December 11, 2009 and by the House of Representatives on December 15, 2009, and was subsequently enrolled to the Office of the President of the Philippines.

On March 5, 2010, then President Gloria Macapagal-Arroyo approved and signed it into law and became Republic Act No. 10021.

Salient Features of RA 10021

RA 10021, otherwise known as the “Exchange of Information on Tax Matters Act of 2009”, stated that the declared policy of the State is to promote and pursue a tax environment that contributes in sustaining a favorable international investment climate and instills confidence in the adequacy and capacity of the country’s tax administration to comply with its commitments under existing international conventions or agreements on tax matters.

Pursuant to this declared policy, the government shall comply with or commit to the IATS required for the exchange of tax information with its tax treaty partners to help combat international tax evasion and avoidance and to help address tax concerns that affect international trade and investment. The government shall likewise adopt measures and procedures to enhance cooperation with other countries in the efficient collection of taxes, consistent with the international understanding to ensure the payment of taxes due the respective taxing jurisdictions of the treaty partners.

This law therefore authorizes the BIR Commissioner to inquire into bank deposits and other related information held by financial institutions to supply such information to a requesting foreign tax authority pursuant to an international convention or agreement on tax matters to which the Philippines is a signatory or a party of, subject to specific requirements as to the relevance of the tax information requested. The BIR, however, cannot just inquire into deposits without a request from a foreign authority.

It also allows the requesting foreign tax authority to examine the income tax returns of specific taxpayers in the country that are the subject of request for exchange of information, and such shall be open to inspection upon the order of the President of the Philippines, subject to the rules and regulations as may be prescribed by the Secretary of Finance upon recommendation of the BIR Commissioner. Taxpayers that are the subject of the request of a foreign tax authority shall be duly notified by the BIR Commissioner.

Moreover, it penalizes BIR officers and employees for unlawful divulgence of information obtained from banks and financial institutions pursuant to Section 6(f) of the NIRC, as amended, to persons other than the requesting foreign tax authority. It likewise imposes sanctions on officers of banks and financial institutions for their refusal to supply the information as well as provide for strict obligation of the requesting foreign tax authority to maintain absolute confidentiality of the information received.

Authors and Sponsors of RA 10021
(Fourteenth Congress)

Senate of the Philippines

Principal Author - Sen. Juan Ponce Enrile (SBN-3220)
Principal Sponsor - Sen. Panfilo M. Lacson (Committee Report No. 652)

Co-Authors : Sen. Jinggoy P. Ejercito-Estrada
Sen. Richard “Dick” J. Gordon
Sen. Jamby A.S. Madrigal
Sen. Aquilino Q. Pimentel, Jr.
Sen. Juan Miguel F. Zubiri

House of Representatives

Principal Author - Rep. Prospero C. Nograles (HBN-6330 & HBN-6899)
Principal Sponsor - Rep. Exequiel B. Javier (Committee Report No. 2420)

Co-Authors : Rep. Exequiel B. Javier
Rep. Eufrocino M. Codilla, Sr.
Rep. Gilberto C. Teodoro, Jr.
Rep. Neptali M. Gonzales II
Rep. Del R. De Guzman

Conferees to the Bicameral Committee Meeting on the Disagreeing Provisions of SBN-3220 and HBN-6899

Senate Panel

Chairman : Sen. Panfilo M. Lacson
Members : Sen. Edgardo J. Angara
Sen. Juan Miguel F. Zubiri
Sen. “Companera” Pia S. Cayetano

House Panel

Chairman : Rep. Exequiel B. Javier
Members : Rep. Andres D. Salvacion, Jr.
Rep. Liwayway Vinzons-Chato
Rep. Jeci A. Lapus
Rep. Florencio G. Noel

Issuance of BIR
Revenue Regulations No. 10-2010

Under the present administration of President Benigno Simeon C. Aquino III, the BIR has issued Revenue Regulations No. 10-2010 to all internal revenue officers and others concerned on October 6, 2010, pursuant to the provisions of Section 244 in relation to Section 4 of the NIRC, as amended.

Such regulations are promulgated to provide the necessary guidelines to enable the BIR to respond to a request for exchange of information pursuant to an existing international convention or agreement on tax matters and to fully implement the provisions of RA 10021.

Included therein are the manners and procedures in the processing of any request of information from a foreign tax authority as well as the content requirements demonstrating the foreseeable relevance of the information being requested.

Moreover, once information is gathered pursuant to a request of a foreign tax authority, the BIR is being authorized to use, for tax assessment, verification, audit and enforcement purposes, any such information obtained from the banks and other financial institutions, as provided for under RA 10021.

From "Grey List" Then to "White List" Now

After having passed RA 10021 earlier this year and the subsequent issuance of the necessary regulations to implement it, the Philippines has moved up to the "white list" which comprises jurisdictions that have substantially implemented the IATS as being reflected now in the OECD's updated progress report as of November 10, 2010 (Annex D).

According to OECD's assessment, the Philippines' Exchange of Information on Tax Matters Act of 2009 including its implementing regulations has removed the domestic legal restrictions which prevented its tax authorities from obtaining and exchanging certain types of information, such as bank information. Thus, this would enable many of the Philippines' existing treaties to meet the international standard.

The OECD also noted that jurisdictions which are currently considered to have substantially implemented the IATS should have concluded at least 12 agreements on tax information sharing for which the Philippines has substantially complied with having 37 tax treaties with other countries.

The OECD further indicated that the Philippines has actively participated in its global forum on tax matters since 2005 and it therefore commended the country for upgrading its legislation to meet the IATS which reflects the worldwide movement towards greater transparency and exchange of information.

Reaping the Benefits
and the Challenges Ahead

Accordingly, the world is moving towards tax transparency. Tax information sharing allows countries to have access to a wider revenue base. It detects illegal movement of capital and discloses additional revenue for governments. It also brings down inequality in income distribution.

OECD Deputy Secretary General Pier Carlo Padoan said that the benefits of new tax rules requiring the sharing of information on tax matters, without regard to domestic interest or bank secrecy, will not only sustain the flow of aid into the Philippines but also expand the government's revenue base.

Thus, this emerging practice of information exchange, as stipulated under the IATS, would allow the Philippine government to catch tax cheats, who hide their money overseas to avoid paying local taxes. The Philippines can now ask information from its tax treaty partners about transactions, investments, bank accounts and income of Filipinos abroad which can also be reciprocated by the requests of foreign tax authorities on their taxpayers operating in the country since the secrecy of bank deposits will be waived.

According to former BIR Commissioner Joel Tan-Torres, the stigma will no longer be with the Philippines which may have caused some investment hurdles in the past. The country's non-compliance with the global tax rules has negative consequences such as reduction in aid and flight of foreign investments from global companies. In fact, the former BIR Commissioner indicated that being on the black list had left the Philippines open to sanctions including a withdrawal of financing by multilateral institutions and a cut in aid from donor countries.

The challenge now is for the Philippines to prove that it is truly a jurisdiction that has substantially implemented the IATS by ensuring the proper implementation of the new law and its regulations. This will also entail the government to act on the 7 tax treaties pending ratification which are yet to be concurred in by the Senate, and even further signed up to more tax treaties with other countries.

In conclusion, OECD Deputy Secretary General Padoan has aptly put it that "if there are no more tax havens, then there is no place where tax evaders can put their money". It is indeed reassuring to note that there are no jurisdictions left on the

OECD's list of places that have not committed to the IATS since central to the solutions to the global crisis is greater transparency to international financial dealings, notably in relation to efforts to combat tax evasion.

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- Republic Act No. 9160 – "An Act defining the crime of money laundering, providing penalties therefor and for other purposes", otherwise known as the "Anti-Money Laundering Act of 2001", September 29, 2001.
- Republic Act No. 10021 – "An Act to allow the exchange of information by the Bureau of Internal Revenue on tax matters pursuant to internationally-agreed tax standards, amending Sections 6(f), 71 and 270 of the National Internal Revenue Code of 1997, as amended, and for other purposes", otherwise known as the "Exchange of Information on Tax Matters of 2009", March 5, 2010.
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ANNEX - A

A PROGRESS REPORT ON THE JURISDICTIONS SURVEYED BY THE OECD GLOBAL FORUM IN IMPLEMENTING THE INTERNATIONALLY AGREED TAX STANDARD[1]

Progress made as of 2nd April 2009

Jurisdictions that have substantially implemented the internationally agreed tax standard			
Argentina	Germany	Korea	Seychelles
Australia	Greece	Malta	Slovak Republic
Barbados	Guernsey	Mauritius	South Africa
Canada	Hungary	Mexico	Spain
China[2]	Iceland	Netherlands	Sweden
Cyprus	Ireland	New Zealand	Turkey
Czech Republic	Isle of Man	Norway	United Arab Emirates
Denmark	Italy	Poland	United Kingdom
Finland	Japan	Portugal	United States
France	Jersey	Russian Federation	US Virgin Islands

Jurisdictions that have committed to the internationally agreed tax standard, but have not yet substantially implemented

Jurisdiction	Year of Commitment	Number of Agreements	Jurisdiction	Year of Commitment	Number of Agreements
Tax Havens[3]					
Andorra	2009	(0)	Marshall Islands	2007	(1)
Anguilla	2002	(0)	Monaco	2009	(1)
Antigua and Barbuda	2002	(7)	Montserrat	2002	(0)
Aruba	2002	(4)	Nauru	2003	(0)
Bahamas	2002	(1)	Netherlands Antilles	2000	(7)
Bahrain	2001	(6)	Niue	2002	(0)
Belize	2002	(0)	Panama	2002	(0)
Bermuda	2000	(3)	St Kitts and Nevis	2002	(0)
British Virgin Islands	2002	(3)	St Lucia	2002	(0)
Cayman Islands[4]	2000	(8)	St Vincent & Grenadines	2002	(0)
Cook Islands	2002	(0)	Samoa	2002	(0)
Dominica	2002	(1)	San Marino	2000	(0)
Gibraltar	2002	(1)	Turks and Caicos Islands	2002	(0)
Grenada	2002	(1)	Vanuatu	2003	(0)
Liberia	2007	(0)			
Liechtenstein	2009	(1)			
Other Financial Centres					
Austria[5]	2009	(0)	Guatemala	2009	(0)
Belgium[5]	2009	(1)	Luxembourg[5]	2009	(0)
Brunei	2009	(5)	Singapore	2009	(0)
Chile	2009	(0)	Switzerland[5]	2009	(0)

Jurisdictions that have not committed to the internationally agreed tax standard			
Jurisdiction	**Number of Agreements**	**Jurisdiction**	**Number of Agreements**
Costa Rica	(0)	Philippines	(0)
Malaysia (Labuan)	(0)	Uruguay	(0)

1. The internationally agreed tax standard, which was developed by the OECD in co-operation with non-OECD countries and which was endorsed by G20 Finance Ministers at their Berlin Meeting in 2004 and by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting, requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged.
2. Excluding the Special Administrative Regions, which have committed to implement the internationally agreed tax standard.
3. These jurisdictions were identified in 2000 as meeting the tax haven criteria as described in the 1998 OECD report.
4. The Cayman Islands has enacted legislation that allows it to exchange information unilaterally and has identified 11 countries with which it is prepared to do so. This legislation is being reviewed by the OECD.
5. Austria, Belgium, Luxembourg and Switzerland withdrew their reservations to Article 26 of the OECD Model Tax Convention. Belgium has already written to 48 countries to propose the conclusion of protocols to update Article 26 of their existing treaties. Austria, Luxembourg and Switzerland announced that they have started to write to their treaty partners to indicate that they are now willing to enter into renegotiations of their treaties to include the new Article 26.

ANNEX - B

A PROGRESS REPORT ON THE JURISDICTIONS SURVEYED BY THE OECD GLOBAL FORUM IN IMPLEMENTING THE INTERNATIONALLY AGREED TAX STANDARD[1]

Progress made as of 31st July 2009 (Original Progress Report 2nd April 2009)

Jurisdictions that have substantially implemented the internationally agreed tax standard			
Argentina	Finland	Jersey	Russian Federation
Australia	France	Korea	Seychelles
Bahrain	Germany	Luxembourg	Slovak Republic
Barbados	Greece	Malta	South Africa
Belgium	Guernsey	Mauritius	Spain
Bermuda	Hungary	Mexico	Sweden
Canada	Iceland	Netherlands	Turkey
China[2]	Ireland	New Zealand	United Arab Emirates
Cyprus	Isle of Man	Norway	United Kingdom
Czech Republic	Italy	Poland	United States
Denmark	Japan	Portugal	US Virgin Islands

Jurisdictions that have committed to the internationally agreed tax standard, but have not yet substantially implemented

Jurisdiction	Year of Commitment	Number of Agreements	Jurisdiction	Year of Commitment	Number of Agreements
Tax Havens[3]					
Andorra	2009	(0)	Marshall Islands	2007	(1)
Anguilla	2002	(3)	Monaco	2009	(3)
Antigua and Barbuda	2002	(7)	Montserrat	2002	(0)
Aruba	2002	(4)	Nauru	2003	(0)
Bahamas	2002	(1)	Neth. Antilles	2000	(7)
Belize	2002	(0)	Niue	2002	(0)
British Virgin Islands	2002	(11)	Panama	2002	(0)
Cayman Islands[4]	2000	(11)	St Kitts and Nevis	2002	(0)
Cook Islands	2002	(1)	St Lucia	2002	(0)
Dominica	2002	(1)	St Vincent and the Grenadines	2002	(0)
Gibraltar	2002	(2)	Samoa	2002	(0)
Grenada	2002	(1)	San Marino	2000	(2)
Liberia	2007	(0)	Turks and Caicos islands	2002	(3)
Liechtenstein	2009	(1)	Vanuatu	2003	(0)
Other Financial Centres					
Austria[5]	2009	(2)	Malaysia	2009	(0)
Brunei	2009	(5)	Philippines	2009	(0)
Chile	2009	(0)	Singapore	2009	(1)
Costa Rica	2009	(0)	Switzerland[5]	2009	(0)
Guatemala	2009	(0)	Uruguay	2009	(0)

Jurisdictions that have not committed to the internationally agreed tax standard

Jurisdiction	Number of Agreements	Jurisdiction	Number of Agreements
All jurisdictions surveyed by the Global Forum have now committed to the internationally agreed tax standard.			

1. The internationally agreed tax standard, which was developed by the OECD in co-operation with non-OECD countries and which was endorsed by G20 Finance Ministers at their Berlin Meeting in 2004 and by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting, requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged.
2. Excluding the Special Administrative Regions, which have committed to implement the internationally agreed tax standard.
3. These jurisdictions were identified in 2000 as meeting the tax haven criteria as described in the 1998 OECD report.
4. The Cayman Islands have enacted legislation that allows them to exchange information unilaterally and have identified 12 countries with which they are prepared to do so. This approach is being reviewed by the OECD.
5. Austria and Switzerland withdrew their reservations to Article 26 of the OECD Model Tax Convention and announced that they have started to write to their treaty partners to indicate that they are now willing to enter into renegotiations of their treaties to include the new Article 26.

ANNEX - C

STATUS OF PHILIPPINE TAX TREATIES
(As of January 1, 2009)

I. 37 TAX TREATIES IN FORCE

COUNTRY	Date Effectivity	Date and Venue of Signature
1. Australia	January 1, 1980	May 11, 1979 Manila, Philippines
2. Austria	January 1, 1983	April 4, 1981 Vienna, Austria
3. Bahrain	January 1, 2004	November 7, 2001 Manila, Philippines
4. Bangladesh	January 1, 2004	September 8, 1997 Manila, Philippines
5. Belgium	January 1, 1981	October 2, 1976 Manila, Philippines
Protocol amending the tax treaty	January 1, 2000	March 11, 1996 Manila, Philippines
6. Brazil	January 1, 1992	September 29, 1983 Brasilia, Brazil
7. Canada	January 1, 1977	March 11, 1976 Manila, Philippines
8. China	January 1, 2002	November 18, 1999 Beijing, China
9. Czech	January 1, 2004	November 13, 2000 Manila, Philippines
10. Denmark (Renegotiated)	January 1, 1998	June 30, 1995 Copenhagen, Denmark
11. Finland	January 1, 1982	October 13, 1978 Manila, Philippines
12. France	January 1, 1978	January 9, 1976 Kingston, Jamaica
Protocol amending the tax treaty	January 1, 1998	June 26, 1995 Paris, France
13. Germany	January 1, 1985	July 22, 1983 Manila, Philippines
14. Hungary	January 1, 1998 (for other taxes) April 8, 1998 (for taxes withheld at source)	June 13, 1997 Budapest, Hungary
15. India	January 1, 1995	February 12, 1990 Manila, Philippines
16. Indonesia	January 1, 1983	June 18, 1981 Manila, Philippines
17. Israel	January 1, 1997 (for taxes withheld at source) July 26, 1997 (for other taxes)	June 9, 1992 Manila, Philippines
18. Italy	January 1, 1990	December 5, 1980 Rome, Italy
19. Japan	January 1, 1981	February 13, 1980 Tokyo, Japan
20. Korea	January 1, 1987	February 21, 1984 Seoul, Korea
21. Malaysia	January 1, 1985	April 27, 1982 Manila, Philippines
22. Netherlands	January 1, 1992	March 9, 1989 Manila, Philippines

COUNTRY	Date Effectivity	Date and Venue of Signature
23. New Zealand	January 1, 1981	April 29, 1980 Manila, Philippines
24. Norway	January 1, 1998	July 9, 1987 Manila, Philippines
Protocol amending the tax treaty -Res 118 September 15, 2008	January 1, 1998	May 22, 1989 Manila, Philippines
25. Pakistan	January 1, 1979	February 22, 1980 Manila, Philippines
26. Poland	January 1, 1998	September 9, 1992 Manila, Philippines
27. Romania	January 1, 1998	May 18, 1994 Bucharest, Romania
28. Russia	January 1, 1998	April 26, 1995 Manila, Philippines
29. Singapore	January 1, 1977	August 1, 1977 Manila, Philippines
30. Spain	January 1, 1994	March 14, 1989 Manila, Philippines
31. Sweden (Renegotiated)	January 1, 2004	June 24, 1998 Manila, Philippines
32. Switzerland	January 1, 2002	June 24, 1998 Manila, Philippines
33. Thailand	January 1, 1983	July 14, 1982 Manila, Philippines
34. United Arab Emirates	January 1, 2009	September 21, 2003 Dubai, United Arab Emirates
35. United Kingdom of Great Britain and Northern Ireland	January 1, 1979	June 10, 1976 London, United Kingdom
36. United States of America	January 1, 1983	October 1, 1976 Manila, Philippines
37. Vietnam	January 1, 2004	November 14, 2001 Manila, Philippines

II. NOT IN FORCE
(Pending Ratification)

Country	Date and Venue of Signature
1. Chile (Shipping)	July 18, 1988 Manila, Philippines
2. Finland (Protocol amending the tax treaty)	December 21, 1993 Manila, Philippines
3. Indonesia (Renegotiated)	September 21, 1993 Jakarta, Indonesia
4. New Zealand (Protocol amending the tax treaty)	February 21, 2002 Wellington, New Zealand
5. Nigeria	September 30, 1997 Manila, Philippines
6. Sri Lanka	December 11, 2000 Manila, Philippines
7. Yugoslavia	July 21, 1989 Manila, Philippines

Source : International Tax Affairs Division (ITAD), Bureau of Internal Revenue
Lex Libris

ANNEX - D

A PROGRESS REPORT ON THE JURISDICTIONS SURVEYED BY THE OECD GLOBAL FORUM IN IMPLEMENTING THE INTERNATIONALLY AGREED TAX STANDARD*[1]

Progress made as of 10th November, 2010 (Original Progress Report 2nd April 2009)

Jurisdictions that have substantially implemented the internationally agreed tax standard			
Andorra	Cyprus	Japan	St Vincent and the Grenadines
Anguilla	Czech Republic	Jersey	Samoa
Antigua and Barbuda	Denmark	Korea	San Marino
Argentina	Dominica	Liechtenstein	Seychelles
Aruba	Estonia	Luxembourg	Singapore
Australia	Finland	Malaysia	Slovak Republic
Austria	France	Malta	Slovenia
The Bahamas	Germany	Marshall Islands	South Africa
Bahrain	Gibraltar	Mauritius	Spain
Barbados	Greece	Mexico	Sweden
Belgium	Grenada	Monaco	Switzerland
Belize	Guernsey	Netherlands	Turkey
Bermuda	Hungary	Netherlands Antilles	Turks and Caicos Islands
Brazil	Iceland	New Zealand	United Arab Emirates
British Virgin Islands	India	Norway	United Kingdom
Brunei	Indonesia	Philippines	United States
Canada	Ireland	Poland	US Virgin Islands
Cayman Islands	Isle of Man	Portugal	
Chile	Israel	Qatar	
China[2]	Italy	Russian Federation	
Cook Islands		St Kitts and Nevis	
		St Lucia	

Jurisdictions that have committed to the internationally agreed tax standard, but have not yet substantially implemented					
Jurisdiction	**Year of Commitment**	**Number of Agreements**	**Jurisdiction**	**Year of Commitment**	**Number of Agreements**
Tax Havens[3]					
Liberia	2007	(9)	Niue	2002	(0)
Montserrat	2002	(3)	Panama	2002	(9)
Nauru	2003	(0)	Vanuatu	2003	(10)
Other Financial Centres					
Costa Rica	2009	(1)	Uruguay	2009	(7)
Guatemala	2009	(0)			

Jurisdictions that have not committed to the internationally agreed tax standard			
Jurisdiction	**Number of Agreements**	**Jurisdiction**	**Number of Agreements**
All jurisdictions surveyed by the Global Forum have now committed to the internationally agreed tax standard.			

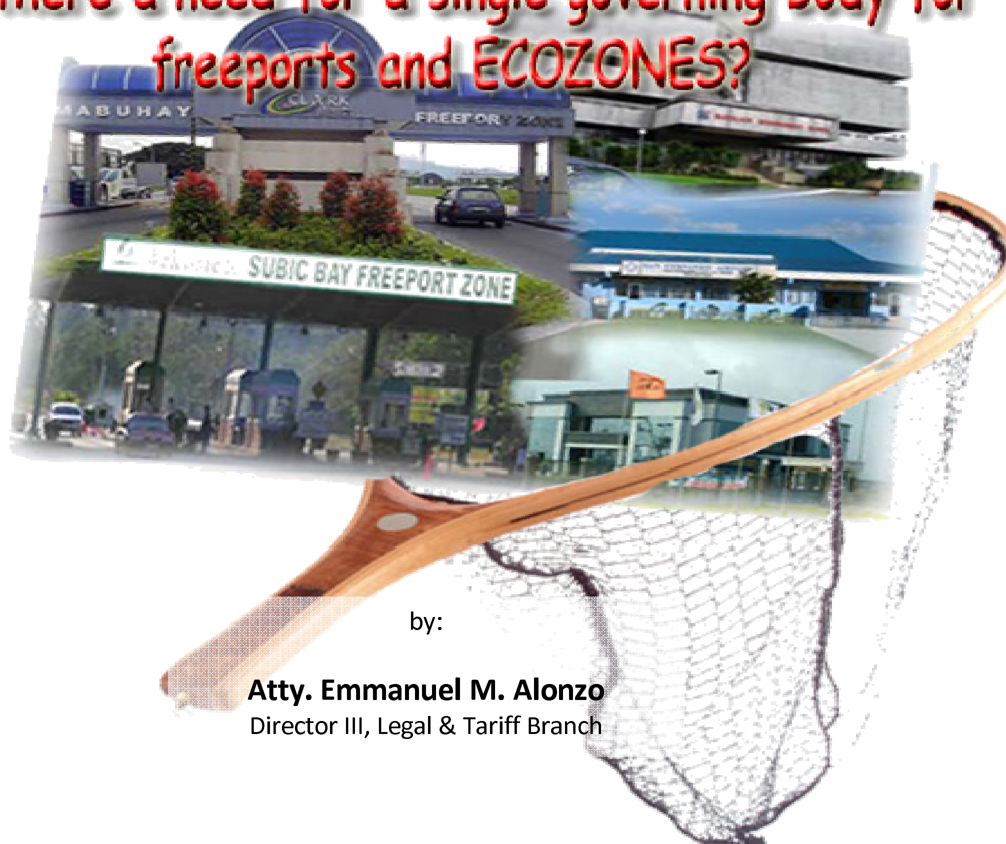
* Readers are referred to the outcomes from the Global Forum peer reviews for an in-depth assessment of a jurisdiction's (a) legal and regulatory framework (Phase 1 reviews) and (b) implementation of the standard in practice (Phase 2 reviews). [http://www.oecd.org/tax/transparency].

1. The internationally agreed tax standard, which was developed by the OECD in co-operation with non-OECD countries and which was endorsed by G20 Finance Ministers at their Berlin Meeting in 2004 and by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting, requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged.

2. Excluding the Special Administrative Regions, which have committed to implement the internationally agreed tax standard.

3. These jurisdictions were identified in 2000 as meeting the tax haven criteria as described in the 1998 OECD report.

Is there a need for a single governing body for freeports and ECOZONES?



by:

Atty. Emmanuel M. Alonzo
Director III, Legal & Tariff Branch

Introduction

The only permanent thing in this world is change itself. Nothing is immune to it even the well intentioned legislations. Laws may be effective during its enactment, somehow the change of environment offers new opportunities as well as new challenges. The volatile nature of international investment and finance is known to all especially the lawmakers. To be effective, the legislature has to capture the innovations demanded by the environment. Such being the case they have to be quick in responding to challenges on hand.

Creation of Freeports

As early as **June 21, 1969,** RA 5490 was enacted creating the Port of Mariveles in Bataan as "*foreign trade zone*" in order to make the port "*a vital center of international trade*". During that time, the term *"freeport"* is still relatively unknown in the Philippines. The Free Trade Zone Authority was created to manage the Mariveles Port. As envisioned, all imports used in the manufacture of goods were later exported. Whenever the goods produced in Mariveles enter the tax jurisdiction of the country, the appropriate taxes and duties must be paid. Thus, the concept of a freeport was born, laying the foundations of laws of similar nature.

After three years, on **November 20, 1972**, RA 5490 was amended by creating the Export Processing Zone Authority (EPZA), which will manage the Port of Mariveles replacing the Free Trade Zone Authority. The amendment provides that EPZA shall operate, administer, and manage the export processing zones existing as well as *other export processing zones as may be established by law.* As we shall see later, this futuristic provision would be amended by the law creating the Philippine Export Zone Authority (PEZA).

The BCDA Law

A good two decades afterwards, a new demand arose. More or less, this demand was more political in nature after the non-extension of the RP-US Military Bases agreement in 1991, there is a need to maintain the former military bases. As a result, on **March 13, 1992** RA 7227 (the Bases Conversion and Development Act of 1991) was enacted resulting in the creation of the Clark and Subic Freeport. The Camp John Hay in Baguio City, the Wallace Air Station and the Capas Relay extension were also included in the coverage of the law. During this time, the Philippine legislature

is still in a learning curve, groping its way so to speak.

Nevertheless, the purpose of RA 7227 is to raise funds through the sale of portions of Metro Manila military camps, and apply said funds for the development and conversion to productive civilian use of the lands covered under the Military Bases Agreement between the Philippines and the United States of America.

Another unfortunate event occurred, this time not of political nature but nature itself, the eruption of Mount Pinatubo in 1991. Such eruption hastened the leaving of the American bases here. Being nearest to the eruption, the Clark Air base in Pampanga was badly hit although the Subic Bay area was to not immune to the devastating effect of the volcanic eruption.

The blanket coverage of RA 7227, covered all the former American held territories. Problems did arise considering that these territories had divergent land use, so a blanket mandate became ineffective. For example, the selling point of Clark is its airport considering that it was a former US air base. Subic base on the other hand is a maritime port with a great advantage being located along the Pacific Ocean. It is also near China, an emerging world economic power. Later on, a controversy arose because of the blanket application of the law, clarification is therefore needed.

The SBMA

The Subic Bay Metropolitan Authority (SBMA), the governing body of Subic bay, is mandated to perform diverse functions, to wit:

- "operate, administer, manage and develop the ship repair and ship building facility, container port, oil storage and refuelling facility and Cubi Air Base within the Subic Special Economic and Free-Port Zone as a *free market,* This is so because there exists an underground oil pipeline from Subic to Clark;
- accept any local or foreign investment, business or enterprise. This is the essential character of a freeport;
- construct, acquire, own lease, operate and maintain on its own or through contract, franchise, license permits bulk purchase from the private sector and build-operate transfer scheme or joint venture the required utilities and infrastructure in coordination with local government units and appropriate government agencies concerned and in conformity with existing applicable laws;
- raise or borrow the necessary funds from local and international institutions and issue bonds, promissory notes and other securities and secure the same by guaranty, pledge, mortgage deed of trust or assignment of properties by Subic Authority for the purpose of financing its projects and programs; and
- operate directly or indirectly or license tourism related activities, including games and amusements, except horse racing, dog racing and casino gambling."

Furthermore, the freeports under RA 7227 are also mandated to perform governmental functions like undertaking reclamation projects to make room for future expansion as well as to exercise eminent domain whenever a need would arise in the future.

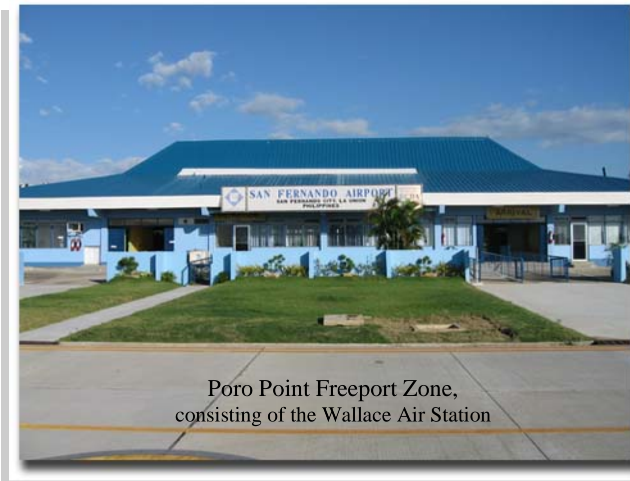
Although the SBMA controls its operations, and is superior in powers relative to other government agencies, it must coordinate with the BOC. In order to illustrate the needed coordination, sample agreements are mentioned below, thus:

1. **January 11, 2008** - Customs Memorandum Order No. 1-2008 was signed. It laid down the procedures to be undertaken on the operations of a regional storage warehouse for tobacco leaf in the Subic Bay Freeport Zone (SBFZ).
2. **October 9, 2008** – Customs Memorandum Order No. 36-2008 was signed covering the interim enhanced cargo transfer system for transit of goods consigned to freeport locators with Subic and Clark Freeport Zones as final destinations.

The Poro Point Freeport Zone

On **September 20, 1993**, President Fidel V.

Ramos issued Proclamation No. 218 creating and designating the area covered by the former Wallace Air station and contiguous area of Poro Point to be known as *Poro Point Special Economic and Freeport Zone.* The property was transferred to the Bases Conversion Development Authority (BCDA), pursuant to Section 15 of RA 7227. Poro Point has all the applicable incentives in the Subic Special Economic and Freeport Zone. This is a clarificatory Presidential issuance to dispel blurred provisions of RA 7227.



Poro Point Freeport Zone,
consisting of the Wallace Air Station

The creation of the Poro Point through Proclamation 218, however, in effect eliminated the distinction between an economic zone (ECOZONE) and a freeport, considering that the law states that Poro Point should be both an ECOZONE and a freeport. It is an interesting law provision considering that in two years time, the PEZA law (RA 7916) would be enacted specifically defining the areas to be considered as ECOZONE to the exclusion of freeports. To complicate matters, freeports would be established with a distinction of having their own charters, otherwise stated, freeports would be independent entities.

Other glaring distinctions would be made later on. Freeports import goods to be used as raw materials in the manufacture of finished goods to be exported later. Theoretically, no finished product should enter the tax jurisdiction of the Philippines. It becomes axiomatic then that domestic products used as raw materials in the manufacturing process are considered as *constructive exportation.* So far, there is no problem as far as the government is concerned because the act of exportation is tax and duty free anyway. Problems arise when goods manufactured inside the freeport enter the domestic market. This is considered, from the point of view of the government as *constructive importation* needing the payment of taxes and duties.

To have a strict definition of a freeport is that a freeport must have an access to either the open sea or a navigable river. Airports should not be considered as freeports because they located deep within the tax jurisdiction of a country.

Once more in theory, ECOZONES as contrasted with freeports are located within the tax jurisdiction of a country like an airport. At this point it is noteworthy to note that both ECOZONES and freeports may import tax and duty free. An ECOZONE locator like its Freeport counterpart import goods tax and duty free; manufacture them into finished products; to be later exported. Another difference is that under existing system of laws on the matter, an ECOZONE may sell its products, under certain conditions to the domestic market, provided that taxes and duties are paid.

The Philippines took a liberal interpretation of freeports so as to include Clark and other former territories held by the US military. Another laudable reason for declaring Clark as a freeport is to spur economic development around Clark.

The PEZA Law

Two years later (after Presidential Proclamation 218), on **February 21, 1995,** RA 7916, the Special Economic Zone Act of 1995 was enacted. It created the PEZA (Philippine Economic Zone Authority) to manage all ECOZONES in the Philippines, although, as noted earlier, ECOZONES already existed in the country. What is so surprising is that the law declares almost the whole country as ECOZONES.

RA 7916 specifically pinpoints the following areas as ECOZONES:

1. Portion of Morong, Hermosa, Dinalupihan, Orani, Samal and Abucay in Bataan;
2. Municipalities of Ibaan, Rosario, Taysan, San Jose, San Juan, and the cities of Lipa and Batangas;
3. Portion of the city of Cagayan de Oro in Misamis Oriental;
4. City of Iligan, in Lanao del Norte;
5. Portion of the province of Sanranggani;
6. Portion of the City of Laoag in Ilocos Norte;
7. Portion of Davao City and Samal Island in Davao;
8. Portion of Oroquieta City in Misamis Occidental;
9. Tulaban Cove, Malita in Davao del Sur;
10. Portion of Baler, Dinalungan and Casigu-

ran including its territorial waters and islets and immediate environs in Aurora;

11. Portion of cities of Naga and Iriga, in Camarines Sur; Legaspi and Tabaco in Albay; and Sorsogon in Sorsogon;

12. Portion of Bataan Island in Batanes;

13. Portion of Lapu Lapu in Mactan, municipalities of Balamban and Pinamugnahan and the cities of Cebu and Toledo, in Cebu, including its territorial waters and islets and its immediate environs;

14. Portion of Tacloban City;

15. Municipality of Barugo in Leyte;

16. Portion of Buenavista in Guimaras;

17. Portion of San Jose de Buenavista, Hamtic, Sibalom, and Culasi in Antique;

18. Portion of the Catarman, Bobon, and San Jose in Northern Samar, the Island of Samar;

19. Portion of Ternate and its immediate environs in Cavite;

20. Portion of Polloc, Parang in Maguindanao;

21. Portion of the Municipality of Boac in Marinduque;

22. Portion of the Minicipality of Pitogo in Zamboanga del Sur;

23. Portion of Dipolog City-Manukan corridor in Zamboanga del Norte;

24. Portion of Mambajao in Camiguin;

25. Portion of Infanta, Real, Polillo, Alabat, Atimonan, Mauban, Tiaong, Pagbilao, Mulanay, Tagkawayan, and Dingalan Bay in Quezon;

26. Portion of Butuan City in Agusan del Norte, including its territorial waters and islets and its immediate environs;

27. Portion of Roxas City including its territorial waters and islets and its immediate environs in Capiz;

28. Portion of San Jacinto, San Fabian, Mangaldan, Lingayen, Sual, Dagupan, Alaminos, Manaog, Binmaley in Pangasinan;

29. Portion of the automonous region; (The law does not specify the particular autonomous region concerned.)

30. Portion of Masinloc, Candelaria and Santa Cruz in Zambales;

31. Portion of the Palawan Island;

32. Portion of General Santos City in South Cotabato and its immediate environs;

33. Portion of Dumaguete City in Negros Oriental, including its territorial waters and islets and its immediate environs;

34. Portion of the province of Ilocos Sur;

35. Portion of the province of La Union;

36. Portion of the Province of Laguna, including its territorial waters and its environs;

37. Portion of the province of Rizal;

38. All existing processing zones and government-owned industrial estates; and any private industrial estate which shall voluntarily apply for conversion into an ECOZONE.

As if the enumeration is not enough the law provides that *in addition to the identified ECOZONES, the President may proclaim a particular area an ECOZONE subject to certain conditions.*

The following observations may be made:

1. The law, in effect, somehow clarified the definition of ECOZONES, processing zones, government owned industrial estates, and private industrial estates;

2. It differentiate a freeport from PEZA operation, In also clarified that freeports are PEZA, although ECOZONES and freeports

basically operate under the same scheme;

3. Manufacturing is usually done on dry land. Nevertheless, the law includes the open sea in the determination of the coverage of individual ECOZONES like those located in the provinces of Aurora, Cebu, Agusan del Norter/Butuan City, Capiz, Dumaguete City/Negros Oriental, and Laguna. The inclusion of navigable waters in an ECOZONE once more blurs the distinction between it and a freeport. As mentioned earlier, the main characteristic of a freeport is its access to the open sea, and

4. Freeports are confined in a contigous area, but ECOZONES have the liberty to choose a confined area where all the locators are situated, or the more liberal approach of having its locators choose their home-bases. In the second option, the grant of an ECOZONE locator would be based of the kind on activity not on location. Why should ECOZONE locators be confined in a definite area?

The need for coordination between BOC and PEZA

Once again, time proved to be a good teacher. Realizing the need to coordinate with each other, the BOC and PEZA realized the need to coordinate with each other, culminated in the following BOC memorandum orders:

1. **June 8, 2009** – The BOC and PEZA signed Customs Memorandum Order No. 24-2009. It amends CMO 41-2002. It covers the transshipment from the port of entry until the imports reach its final destination, the particular PEZA locator. In order to ensure that the imports in transit do not enter the domestic market, a surety bond equivalent to the average duties and taxes due is paid by the PEZA locator.

2. **March 8, 2010** – Customs Memorandum Order No. 12-2010 was signed. It further streamlined the procedures assuring that smuggling would not occur by introducing a pre-paid account. The locator shall fund such account in a formerly agreed domestic bank. Any transfer fee payment made may be debited from the pre-paid account.

Creation of other Freeports

Two (2) days later, on **February 23, 1995**, RA 7903 was enacted creating the Zamboanga City Special Economic Zone. Its aim is to establish a special economic zone in suitable and selected areas of the country where enterprises will be given incentives to create an environment conducive to business. The desire is to attract local and foreign investors, create employment opportunities, and encourage the regional dispersal of industries.

The following comments may be made regarding the Zamboanga City Special Zone Economic Zone:

1. It is an ECOZONE but it is a freeport. If it is an ECOZONE then it should be under PEZA, nevertheless it is an independent entity because it has its own charter;

2. ECOZONES under PEZA are also located in Cagayan de Oro, Lanao del Norte, Saranggani, Davao City, Samal Island, Oroquieta City, Davao del Sur, Maguinadanao, Zamboanga del Sur, Zamboanga del Norte, and Camiguin Island, all located in Mindanao;

3. The Zamboanga ECOZONE/and Freeport is a stone throw from the barter trade area. The barter trade may also be considered a freeport because imports enter the domestic market tax and duty free. The existence of a freeport has no legal basis, however it was tolerated because of ancient practice. Note further that no manufacturing is done is a barter trade zone; and

4. The claim to fame of the Zamboanga Economic Zone and Freeport is its being the only freeport in Visayas and Mindanao.

Very notable is the enactment of the Cagayan Special Economic Zone (CEZ) on **February 24, 1995** because the Zamboanga Special Economic Zone and Freeport was enacted a day earlier (February 23, 1995). It seems that the year 1995 is the heyday for the creation of freeports.

The unique feature of CEZ is that its corporate

franchise shall expire in fifty (50) years counted from the first day of the fifth (5th) calendar year after the effectivity of the law (sometime in 2045). The other charters of freeports do not have an expiry date.

It is also unique in the sense that it faces the Pacific Ocean. It is also near Taipei and mainland China.

However, it is near the ECOZONES of Aurora and Batanes. It is also near the Subic freeport.

On **July 24, 2006,** RA 9400 was enacted amending RA 7227, the Bases Conversion and Development Act of 1992. RA 9400 gives the same incentives to the Clark Special Economic Zones, the Poro Point Freeport Zone, the Morong Special Economic Zone, and the John Hay Special Economic Zone. The law puts to rest the question of whether the mentioned areas should have the same incentives as the Subic Freeport. Bear in mind that these areas are located inside the tax jurisdiction of the country.

On **February 19, 2007**, RA 9490, also known as the Aurora Special Economic Zone (ASEZ) of 2007 was enacted. Although the area of the ASEZ was defined by the law, it contains a provision stating – *"The areas comprising the Aurora ECOZONE may be expanded or reduced when necessary."* It is a little bit confusing because, PEZA law (RA 7916) also includes areas near the ASEZ, quoting the law - *"a portion of Baler, Dinalungan and Casiguran including its territorial waters and islets and its immediate environs in the Province of Aurora"* as an ECOZONE.

On **March 20, 2007**, a day after the enactment of RA 9490 creating the ASEZ, RA 9399 was enacted granting a one-time amnesty of certain tax and duty liabilities, inclusive of fees, fines, and penalties. The tax and duty amnesty covers Clark, Poro Point, John Hay, and Morong feeports/ECOZONES. The law complements RA 9400 granting the same fiscal incentives to the mentioned freeports similar to those enjoyed by Subic Freeport. It is also an offshoot of a Supreme Court decision.[1]

The latest addition to the list of incentive-giving bodies is the freeport area of Bataan (FAB), which was created by virtue of RA 97281, the Freeport Area of Bataan (FAB) Act of 2009. It was signed into law by President Gloria Macapagal Arroyo on October 23, 2009. As expected FAB has the powers and responsibilities common to previously established freeports.

Conclusion

In conclusion, Congress created freeports in the following areas:

1. Mariveles, Bataan, (1969)
2. Clark/Subic (1992)
3. Poro Point/Wallace Air Station (1993)
4. Zamboanga, (1995)
5. Cagayan, (1995)
6. Zamboanga (1995)
7. Aurora, (2007) and
8. Bataan, (2009)

The creation of freeports is in addition to the thirty-eight (38) ecozones in different parts of the country.

Freeports, unlike the ECOZONES have their own port facilities independent of the Bureau of Customs (BOC). In this regard, if freeport importations were kept secret from the BOC, the situation would border into "chaos", particularly from the point of view of curtailing smuggling in the Philippines.

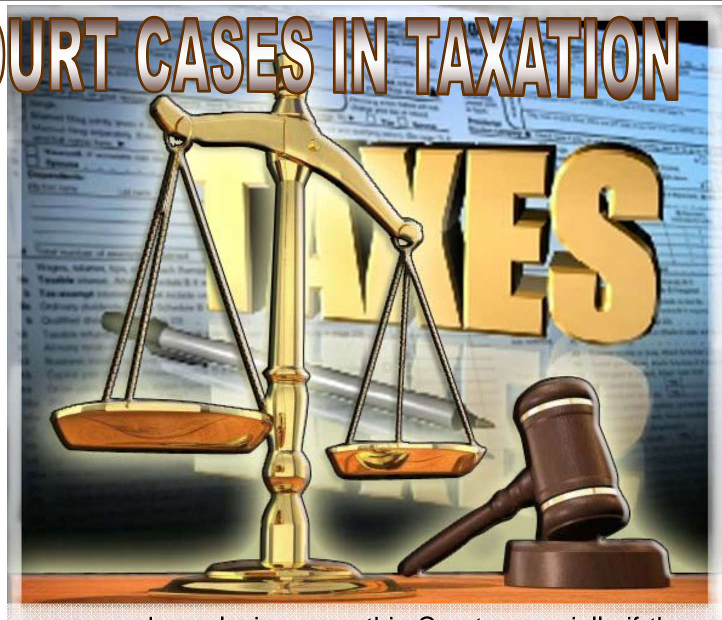
In order to remedy the situation, the BOC signed in **May 2010,** a Joint Memorandum of Agreement with the Subic Special Economic and Freeport Zone (SSEFZ), the Diosdado Macapagal International Airport (DMIA) in Clark, and the Ninoy Aquino International Airport (NAIA) in Manila to simplify the documentation procedures of the concerned freeports.

In the future, the BOC intends to include the ECOZONES in the Calabarzon region and Cebu in the May 2010 Memorandum Agreement with the BOC. Already in place (since 2002), a similar agreement with the locators of PEZA. The BOC move is in accordance with SB 2408 the Anti-Smuggling Bill, currently being considered by the Senate because the freeport and ecozone were in included in the said Bill (SB 2408).

Perhaps the time has come to evaluate the laws on government entities creating freeports and ecozones in order to simplify things. By doing so, the Philippines would be nearer its goal of attracting foreign investors by having simple rules. It is therefore recommended, that a single entity be created to handle the matter.

[1] John Hay People's Coalition vs. Lim, et al., G.R. No. 119775 dated 23 October, and Coconut Oil Refiners Association Inc. vs. Torres, et al, G.R. No. 132527 dated 29 July 2005.

2010 SUPREME COURT CASES IN TAXATION



By:

Mr. Clinton S. Martinez

Note: In order to update the readers of the recent rulings and/or jurisprudence on taxation, this Office took the liberty of digesting selected cases on the matter, to wit:

1. **COMMISSIONER OF INTERNAL REVENUE (CIR), *Petitioner,* vs. JULIETA ARIETE, *Respondent*, GR No. 164152, January 21, 2010 (Carpio*, J.*).**

FACTS:

The CIR filed this petition for review seeking to reverse the Court of Appeals (CA) decision (June 14, 2004, CA-GR SP No. 70693) which affirmed the decision and resolution (Jan. 15 and May 3, 2002) of the Court of Tax Appeals (CTA) cancelling the assessments issued against herein respondent for deficiency income taxes for the years 1993, 1994, 1995 and 1996, totaling P191,463.04. The case arose out of the affidavit filed by a certain George P. Mercado (Informer) with the Special Investigation Division (SID) of Revenue Region No. 19, Davao City attesting that respondent earned substantial income for the years 1994, 1995 and 1996 without paying income tax. Respondent availed of the Voluntary Assessment Program (VAP) of the Bureau of Internal Revenue (BIR).

ISSUE/S:

Whether the CA erred in holding that the recording in the Official Registry Book (ORB) of the BIR of the information filed by the Informer under Section 281 of the National Internal Revenue Code (NIRC), as amended, is a mandatory requirement before a taxpayer-applicant may be excluded from the coverage of the VAP.

HELD:

The Supreme Court ruled in favor of the respondent. It decided that: "Generally, the findings of fact of the CTA, a court exercising expertise on the subject of tax, are regarded as final, binding, and conclusive upon this Court, especially if these are similar to the findings of the Court of Appeals which is normally the final arbiter of questions of fact." On the issue of recording in the ORB, the Court proclaimed: "X X X, we affirm the CTAs finding that neither the verified information nor the investigation was recorded in the Official Registry Book of the BIR." It continued: "Petitioner claims that that this was merely a procedural omission which does not affect respondent's exclusion from the coverage of the VAP." In denying petitioner's thesis, the Court ruled: "Petitioners failure to effect compliance with the requirement of recording the verified information or investigation in the Official Registry Book of the BIR means that respondent, even if under investigation, can avail of the benefits of the VAP."

In addition to the above SC pronouncement, it has also been held that the criminal liability under this section prescribes in five (5) years after the commission or discovery of the violation (CIR vs. Gonzales, 18 SCRA 757). In the case of Lim vs. CA, GR No.48134-37, 190 SCRA 616, the SC held: "The 5-year prescriptive period starts from the commission of the violation, but if unknown, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment. The commission of the violation is deemed to have taken place when the final notice and demand for payment of deficiency taxes is served on the taxpayer, it being only then when the cause of action on the part of the BIR can be said to have accrued. Furthermore, there must be a judicial proceeding for the investigation and punishment of the tax offense before the 5-year limiting period begins to run. It would then seem that such tax violations become imprescriptible for so long as the period from the discovery and institution of judicial proceedings for its investigation and punishment up to the filing of the information in court does not exceed five years." (Cited in Vitug

and Acosta: Tax Law and Jurisprudence, p.348).

2. **FISHWEALTH CANNING CORPORATION, *Petitioner*, vs. COMMISSIONER OF INTERNAL REVENUE (CIR), *Respondent*, GR No. 179343, January 31, 2010 (Carpio-Morales, *J*).**

FACTS:

The CIR, pursuant to a Letter of Authority (LA) dated May 16, 2000, ordered the examination of the 1999 internal revenue taxes of herein petitioner. The investigation found out that petitioner was liable for the amount of P2,395,826.88, covering value-added tax (VAT), income tax, withholding tax and other miscellaneous deficiencies. Said tax was settled by the petitioner on August 30, 2000.

Subsequently, on August 6, 2003, the CIR sent petitioner a Final Assessment Notice (FAN) of income tax and VAT deficiencies in the amount of P67,597,336.75 covering taxable year 1999. The same was protested by the petitioner but the CIR denied said protest letter and issued a Final Decision on Disputed Assessment on August 2, 2005.

Fishwealth Canning Corporation filed a Petition for Review which was held filed out of time by the Court of Tax Appeals (CTA) First Division and by the CTA *En Banc.*

ISSUE:

Did the CTA err in holding that the petition was filed out of time?

HELD:

The Supreme Court (SC) ruled in favor of the CIR, stating that: "In the case at bar, petitioners administrative protest was denied by Final Decision on Disputed Assessment dated August 2, 2005 issued by respondent and which petitioner received on August 4, 2005. Under X X X Section 228 of the 1997 Tax Code, petitioner had thirty (30) days to appeal respondents denial of its protest to the CTA. Since petitioner received the denial of its administrative protest on August 4, 2005, it had until September 2, 2005 to file a petition for review before the CTA Division. It filed one, however, on October 29, 2005, hence, it was filed out of time. For a motion for reconsideration of the denial of the administrative protest does not toll the 30-day period to appeal to the CTA." Petition is dismissed.

In relation to the above, the Tax Code under Section 228 provides:

"SEC. 228. Protesting of Assessments. - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however*, That a preassessment notice shall not be required in the following cases:

"(a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or

"(b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or

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

"(d) When the excise tax due on exciseable articles has not been paid; or

"(e) When the article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

"The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

"Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue as assessment based on his findings.

"Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt

of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

"If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Appeals within thirty (30) days from receipt of the said decision, or from the lapse of one hundred eighty (180)-day period; otherwise, the decision shall become final, executor and demandable."

3. PHILIPPINE BRITISH ASSURANCE COMPANY, INC., *Petitioner*, vs. REPUBLIC OF THE PHILIPPINES, represented by the BUREAU OF CUSTOMS (BOC), *Respondent*, GR No. 185588, February 2, 2010 (Velasco, Jr., *J*).

FACTS:

Petitioner is an insurance company duly organized and existing under and by virtue of the laws of the Philippines. Petitioner issues customs bonds to its clients in favor of the BOC to secure the release of imported goods so that the goods may be released from the BOC sans prior payment of customs duties and taxes. Petitioner and its clients are bound jointly and severally under the customs bonds.

BOC filed a Complaint dated December 3, 2003 against petitioner on December 9, 2003 for Collection of Money with Damages at Branch 20 of the Regional Trial Court (RTC) of Manila. The RTC ruled in favor of BOC and ordered petitioner to pay P736,742.00 covering unpaid/unliquidated customs bonds plus legal interest from the finality of the Decision. The Motion for Reconsideration (MR) by the petitioner was denied on February 5, 2007. The Court of Appeals (CA) likewise dismissed the appeal of petitioner, citing lack of jurisdiction.

ISSUES:

1). Whether or not the CA committed serious error of law when it ruled that it has no jurisdiction over the appeal and the same lies with the Court of Tax Appeals (CTA) because the instant case is a tax collection case; and

2). Whether or not the CA committed serious error of law when it failed to rule that customs bonds are in the nature of a contract between the surety and the BOC.

HELD:

As to the first issue, the Supreme Court (SC) ruled in favor of petitioner Philippine British Assurance Company, Inc.

The SC opined that, "X X X, the original complaint filed with the trial court was in the nature of a collection case, purportedly to collect on the obligation of petitioner by virtue of the bonds executed by it in favor of respondent, essentially a contractual obligation. As petitioner correctly points out, an action to collect on a bond used to secure the payment of taxes is not a tax collection case, but rather a simple case for enforcement of a contractual liability."

The SC continued: "Certainly, the administrative agencies tasked with the prosecution of cases within their specific area of concern should know the nature of the action to be filed and the proper procedure by which they can collect on liabilities to it. Here, the BOC's action reveal its position that indeed the case was not a tax collection case but an action for the enforcement of a contractual obligation. Hence, appellate jurisdiction lies with the CA and not the Court of Tax Appeals." The SC further ruled that the case does not concern tax collection, it involves contractual obligations. Hence, the CA erred in declaring the case as a tax collection case. Customs bonds are in the nature of contracts. The case was remanded to the CA for hearing on the merits. This concerns the second issue.

4. REPUBLIC OF THE PHILIPPINES represented by the COMMISSIONER OF INTERNAL REVENUE (CIR), *Petitioner*, vs. PHILIPPINE AIRLINES, INC. (PAL), *Respondent*, GR No. 179800, February 4, 2010 (Peralta, *J.*).

FACTS:

PAL seeks the refund of P134,431.95 from the CIR representing the amount of ten percent (10%) overseas communication tax (OCT) it paid to a service provider, citing Section 13 of PD 1590 (PAL Franchise) and BIR Ruling 97-94 dated April 13, 1994. Because of inaction on the part of the CIR, PAL appealed to the Court of Tax Appeals (CTA).

PAL espoused that since it incurred negative taxable income for the years 2002 and 2003 and chose the zero basic corporate income tax – lower than the franchise tax of two percent (2%) – it complied with the "in lieu of all other taxes" clause found in its franchise. Hence, it was no longer liable for all other taxes, including OCT, and the wrong payment thereof entitles it to a refund pursuant to its franchise.

CIR disagrees, contending that Section 120 of the Tax Code of 1997, as amended, imposes a ten percent (10%) OCT on overseas dispatch, message, etc. Furthermore, the CIR believes that PAL, in order for it to be not liable for other taxes, the OCT in this case, should pay the two percent (2%) franchise tax, since it did not pay any amount as its basic corporate income tax.

ISSUE:

Whether or not respondent PAL is exempt from the payment of the ten percent (10%) OCT under its franchise and therefore entitled to the refund.

HELD:

Section 13 of PD 1590 states that: "In consideration of the franchise and rights hereby granted, the grantee shall pay to the Philippine Government during the life of this franchise whichever of subsections (a) and (b) hereunder will result in a lower tax: (a) The basic corporate income tax based on the grantee's annual net taxable income computed in accordance with the provisions of the National Internal Revenue Code; or (b) A franchise tax of two percent (2%) of the gross revenues derived by the grantee from all sources, without distinction as to transport or nontransport operations; provided, that with respect to international air-transport service, only the gross passenger, mail, and freight revenues from its outgoing flights shall be subject to this tax."

The Supreme Court (SC) ruled in favor of PAL. The SC cited a previous case, CIR vs. PAL (GR No. 160528, October 9, 2006, 504 SCRA 90): "A franchise is a legislative grant to operate a public utility. Like those of any other statute, the ambiguous provisions of a franchise should be construed in accordance with the intent of the legislature. In the present case, Presidential Decree 1590 granted Philippine Airlines an option to pay the lower of two alternatives: (a) "the basic corporate income tax base on PAL's annual net taxable income computed in accordance with the provisions of the National Internal Revenue Code" or (b) "a franchise tax of two percent of gross revenues." Availment of either of these two alternatives shall exempt the airline from the payment of "all other taxes," including the 20 percent final withholding tax on bank deposits."

Worth note taking is the following pronouncement of the SC: "Determining whether this tax exemption is wise or advantageous is outside the realm of judicial power. This matter is addressed to the sound discretion of the lawmaking department of government."

Hence, the SC opined: "Given the foregoing, and the fact that the 10% OCT properly falls within the purview of the "all other taxes" proviso in P.D. No. 1590, this Court holds that respondent PAL is exempt from the 10% OCT and, therefore, entitled to the refund requested."

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by

VIVIAN A. CABILING
Director III, Indirect Taxes Branch

Christmas is in the air! With the season of gift-giving creeping in, we see a lot of *tiangge* stalls sprouting here and there. As tax compliance conscious individuals, we ask: Are *tiangge* stall owners/operators liable to pay percentage taxes? Are exhibitors or organizers of these events subject to taxes too?

Yes, they certainly are!

As early as 2003, the Bureau of Internal Revenue (BIR) issued Revenue Regulation (RR) No. 16-2003 (31 March 2003) that govern the tax regime on *tiangge*. Grounded on Section 245(j) of the National Internal Revenue Code (NIRC), as Amended, the Bureau saw the proliferation of these establishments as an opportunity to reduce tax leakage as well as tap another source of revenue. Privilege-stores or stalls or outlet selling a variety of goods/services for less than six months, popularly called *tiangge*, are subject to both the value-added tax (VAT) or percentage tax and the income tax.

Exhibitors or organizers of privilege-stores, bazaars and similar establishments are required to register with the BIR at least fifteen (15) days before the commencement of the *tiangge* activity. The registration, valid within a calendar year, is confirmed through a Certificate of Registration (COR). The exhibitor shall post the COR in a conspicuous place within the space devoted to the *tiangge*. The BIR requires him to remit the five percent (5%) of the gross lease rentals to the owner of real property every month of operation on or before the 10th day of the following month. The exhibitor is also obliged to submit to the Revenue District Office (RDO) the list of *tiangge* owners, their individual Taxpayer Identification Number (TIN) and COR.

Tiangge operators on the other hand are required to deduct an expanded withholding tax on rental payments to exhibitors at the same rate of five percent (5%). These withheld taxes will also be remitted to the BIR on or before the 10th day of the following month. Operators are also obliged to pay an advance percentage tax to the BIR through the Authorized Agent Bank (AAB) or Revenue Collection Officer (RCO) of the RDO having jurisdiction over the place where the *tiangge* is located.

The BIR released Revenue Regulations No. 24-2003, which clarified RR No. 16-2003. It contains the schedule of rates of advance percentage tax (in pesos) to be collected from *tiangge* operators by the AAB or RCO within the week prior to the actual start of the exhibit, or the month of *tiangge* operation:

Location of *Tiangge*	Daily rate	Monthly rate
Airconditioned place, in a city or first class municipality	150.00	4,500.00
Non-airconditioned place, in a city or first class municipality	100.00	3,000.00
Airconditioned place, in a municipality other than first class municipality	75.00	2,500.00
Non-airconditioned place, in a municipality other than first class municipality	50.00	1,500.00

In an effort to enhance its tax collection services on privilege stores, *tiangge*, bazaars and like establishments, the BIR issued Revenue Memorandum Circular No. 80-2007 on 04 December 2007. Every day from 11 am to 6 pm during the period 05 – 28 December 2007, the BOW shall be open to assist buyers in obtaining Official Receipts from these establishments as well as apprehend sellers violating BIR rules and regulations.

From the above BIR issuances, we glean that the BIR seeks every opportunity to improve its collection efficiency while ensuring fast and courteous service to the country.

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