



Revisiting the Agriculture Sector: Countdown to 2012

MA. AURALIZ MIDI B. SABANGAN
Direct Taxes Branch

A. Introduction

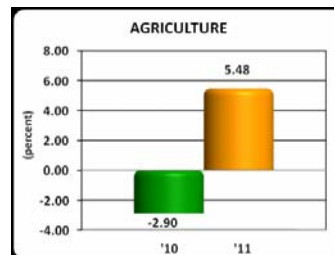
1. Agriculture remains the primary source of income for the rural folks in the Philippines. However, the government's policies on agriculture are shaped and largely influenced by the forces of globalization, international institutions such as the World Trade Organization (WTO), Association of South East Asian Nations (ASEAN), Asian Development Bank (ADB), as well as the realities of our domestic economy and politics.¹
2. Thus, the state of food security in our country likewise hinges on the movement of such variables. As explained by a farmer's group, there are two levels of food security: "national" and "household" food security. National food security means the ability of a country to meet the average need of its population regardless of how the rice was produced. On the other hand, household food security means the ability of a household to buy the rice that it needs. Given these definitions, the Philippines could be food secure although the households, particularly those with low income, have nothing to eat.²
3. This paper revisits the agriculture sector of our economy from the perspectives of the government agency tasked to promote it vis-à-vis the vision of economists and researchers with the end in view of attracting attention to the 2012 cut-off date of the WTO.

¹ V. Bruce J. Tolentino, *The Globalization of Food Security: Rice Policy Reforms in the Philippines* (2002). *Philippine Journal of Development* (54:XXIX, No. 2, Second Semester 2002).

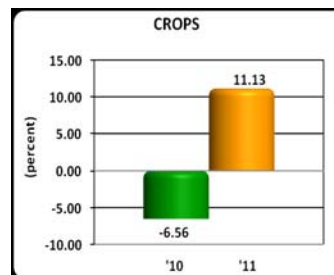
² Open Academy for Philippine Agriculture. Viewed from <http://www.openacademy.ph> on August 17, 2011.

B. Highlights of January to June 2011 Agriculture Sector Performance³

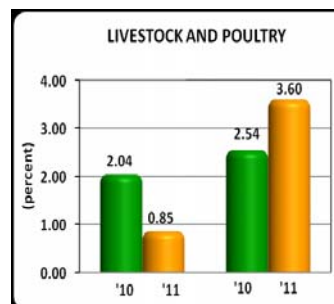
1. Agriculture grew by 5.48 percent in the first six (6) months of 2011. The crop subsector was the major growth driver during the period. Gains in the livestock and poultry output also contributed to the improved performance of the sector. The fisheries subsector recorded a downtrend in production. Gross value of agricultural output amounted to P706.4 billion at current prices which corresponded to a 15.97 percent increase from last year's level.



2. The crops subsector expanded by 11.13 percent in the first half of 2011. It posted a 51.76 percent contribution to the total agricultural output. Palay and corn production grew by 14.45 percent and 37.03 percent, respectively. Sugarcane registered a 75.59 percent growth in output. Other major gainers were tobacco, mongo and rubber. The subsector grossed P411.8 billion at current prices or 31.09 percent higher than the 2010 record.

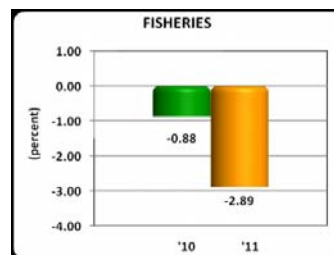


3. The livestock subsector registered a 0.85 percent increment in output this year. It accounted for 15.27 percent of total agricultural production. Hog output went up by 1.04 percent. Gross value of livestock production was P103.1 billion at current prices or 1.64 percent lower than last year's level.

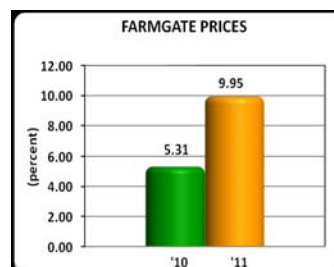


4. The poultry subsector grew by 3.60 percent. It contributed 13.35 percent to total agricultural production. Production of chicken increased by 3.80 percent and that of chicken eggs, by 3.48 percent. The subsector grossed P77.8 billion at current prices, up by 0.16 percent from the 2010 level.

5. Output in the fisheries subsector declined by 2.89 percent this period. It shared 19.61 percent in the total agricultural production. Aquaculture production managed to surpass last year's record by 5.15 percent. Meanwhile, commercial and municipal fisheries recorded decreases in outputs during the first half of 2011. The subsector generated gross earnings of P113.6 billion at current prices, representing a 1.08 percent increment from its year ago record.



6. The average farmgate prices in the first half of 2011 was 9.95 percent higher than the previous year's quotation. Prices in the crops subsector expanded by an average of 17.96 percent while those in the fisheries subsector went up by 4.09 percent. Prices of livestock and poultry products were lower by averages of 2.47 percent and 3.31 percent, respectively.



C. Current Policy Directions

1. The National Food Authority (NFA) exercises monopoly powers over the international trade of rice in the Philippines. Along with South Korea, the country remains one of only two countries in the WTO that maintains quantitative restrictions (QRs) on rice imports. The monopoly power of the NFA and its tight implementation of these QRs have maintained high farmgate and thereby

³ Source: Department of Agriculture.

high consumer rice prices in the country. This has contributed to an over-reliance of policymakers on price intervention instruments rather than productivity increases to support farmers' incomes and ensure domestic food security. As set by law, Presidential Decree No. 4 (1972), the mission of the NFA is praiseworthy: buy high (from farmers), sell low (to consumers), store long (to stabilize prices). However, its performance over the past three decades shows that its mission has been impossible to achieve.⁴

2. Information from the Department of Agriculture disclosed that rice has a special treatment vis-à-vis other agricultural products. The government negotiated with the WTO for rice QR from 1994 to 2005, with an extension until 2012. In exchange for the QR, the Philippines agreed to the lowering of tariff rates on some agricultural products as well as increased minimum access volume for rice by other countries. In the local scene, Republic Act 8178 was enacted in 1996 setting the tariff rates for agricultural products and retaining QR for rice imports.
3. In an interview with Mr. Noel Padre of the Department of Agriculture, a committee headed by NFA chief Lito Banayo was tasked to come up with recommendations to address the imminent expiration of the WTO consensus on quantitative restrictions for rice imports.

D. Current Researches

1. Economist Benjamin Diokno noted that at the height of the food crisis in 2008 government imported rice at a record 2.3 million metric tons. In 2009, it imported 1.8 million metric tons. In 2010, it planned to import 3.5 million tons, Diokno averred that it requires political will to solve this perennial rice shortage such as investing in irrigation, new and improved seeds, fertilizer, and extension services. Diokno also suggested that the govern-

ment has to fix the problems posed by the sputtering agrarian reform program. But most of all, it has to provide farmers incentives to plant more rice and adopt modern agricultural technology.⁵

2. Philippine Institute of Development Studies (PIDS) senior research fellow Dr. Roehlano Briones, using the Agricultural Multi-Market Model for Policy Evaluation (AMPLE) in assessing various scenarios for the agriculture sector advocates that growth via improvements in agricultural productivity in the areas of technology, infrastructure and environment should be the highest priority. He also believes that a reorientation of the bureaucracy toward client-based and performance-based planning, as well as refocusing and reprioritization of budget and expenditures should be made.⁶
3. Briones and Tolentino both believe that a swift implementation of the land reform program should be pursued. Tolentino notes that reform areas in agriculture have direct bearing on rice productivity and food security.

E. STSRO Challenge in Aid of Legislation

1. The quantitative restrictions on rice imports put the Philippines alone with Korea in the WTO family of nations to impose such a trade barrier.
2. The monopoly power of the NFA and its tight implementation of these QRs have maintained high farm-gate prices and high consumer rice prices in the country.
3. With the 2012 countdown to the WTO deadline on the quantitative restrictions for rice products, we would like to solicit the views of our readers, particularly those in the agriculture sector, on the question: Should the QR for rice be retained (hence, a new round of WTO extension request) or should it fall under tariffication like the rest of the agricultural products?

4 V. Bruce J. Tolentino

5 Diokno, Benjamin E. Abolish the National Food Authority. Viewed from <http://www.malaya.com.ph/02152010/columnbusi2.html> on August 17, 2011.

6 Briones, Roehlano M. (2009). A Vision for Philippine Agriculture. Development Research News: XXVII:6. Philippine Institute of Development Studies.



Background

It is paradoxical that a food product considered as a comfort food had a not so sweet evolution. The worldwide sugar production, at its beginning, was linked to two episodes of history, namely colonialism and slavery. During that time, the colonialists brought 12 million West Africans to the Caribbeans in chains in the holds of slave ships. The early sugar business was defined by the notorious “triangular trade” (Caribbean-England-West Africa). Sugar from the Caribbean was taken to England for refining and rum production. Cloth, firearms and rum were in turn shipped down to West Africa as the capital of the slave trade. The slaves from West Africa were in turn taken to places like Haiti and the Barbados.

The Philippine Experience

Although sugar production in the Philippines did not start with such barbarity as in the Caribbeans, the colonial masters, the Spaniards, likewise exacted hard labor from the Filipinos. The important milestones¹ for Philippine sugar are as follows:

Spanish Era

- **1775** – Sugar exportation to China started;
- **1775** – The Philippines emerged as the largest sugar exporter in Asia;

- **1785** – The port of Manila was opened to non-Asian commerce;
- **1788** – Spain and India became Philippine export markets;
- **1796** – Sugar exportation to the United States began when SS Astrea, the first North American cargo ship, docked in the Philippine ports. It is interesting to know that sugar exportation to the United States predates the American colonization of the Philippines;
- **1880s** – Early in this period, the trend towards large sugarcane plantations began;
- **1842** – Sugar emerged as the country’s leading export;
- **1855** – The port of Iloilo was opened to vessels of all flags, hence increased trade and promotion of the sugar industry in the area;
- **1856** – Seeing the potential of sugarcane, Nicholas Loney, a British, established a credit system that eventually encouraged the modernization of the sugar industry. He convinced Russel & Sturgis, an American financing company, to open a branch in Iloilo;

¹ A Philippine Sugar Millers Association, 09 Nov. 2010, http://www.pasma.com.ph/index.php?option=com_content&view=artic...

- **1880** - The country produced over 200,00 tons of sugar for the first time, making it the third largest producer in the world, next only to Cuba and Java;

American Era

- **1899** – The Philippine American war resulted in a dramatic reduction in sugar production and consequently to exports;
- **1909** – Payne-Aldrich law was enacted, allowing Philippine sugar to enter the US tariff-free, provided it would not exceed 300,000 tons. Any amount in excess of this was to be charged the full tariff;
- **1918** – The country started producing centrifugal sugar and, in the following year, raw sugar for use by refineries;
- **1928** – Sugar production, bolstered by the introduction of centrifugal mills, further rose to 807,000 tons;
- **1914-27** – 820 hacienda mills in Negros were replaced by mostly American-owned centrals and their associated rail networks. These were the first mills to use the production sharing schemes;
- **1929** – Stock market crash in the US marked the beginning of economic depression. Sugar consumption declined, prices slumped, and the best growers wanted the volume of imported sugar reduced;
- **1934** – The Tydings-McDuffie Independence Law limited the importation of duty-free sugar to the US, which continued during the Commonwealth period until 1946. The sugar quota system was established under the Jones-Costigan Act of 1934;
- **1937** – The first International Sugar Agreement was established to control sugar prices;

Japanese Era

- **1941-42** – The Second World War wrecked havoc on the sugar industry when the Japanese took over some of the mills that were not destroyed by the producers themselves. The Japanese operated two mills

to produce sugar, not for food but for liquid fuel. It is an eye opener that “biofuel” production started during the Japanese occupation of the Philippines. Currently, due to the high cost of fossil fuels (petroleum), issues regarding renewable energy sources are in the forefront. One of the sources of renewable fuels is sugar;

- **1943** – Sugar supply reached a critical level, forcing the Japanese to ration sugar. Towards the end of the war, the Japanese started destroying more mills, resulting in damages to the industry of more than P75 million. The issue of food security, which is a real threat, is currently being addressed in the pertinent bills in the Senate;

Under the Republic of the Philippines

- **1946** – The Philippine Rehabilitation Act and the Bell Trade Act, known as the Philippine Trade Act, were signed by President Truman. Under the Philippine Rehabilitation Act, the war-damaged sugar mills were given monetary grants. The Bell Trade Act provided for the continuance of sugar free trade between the Philippines and the United States for eight years. After 1954, a gradual imposition of US tariff duties were placed in effect for a period of 20 years. Thereafter beginning 1974, full duties were assessed. It also set absolute quota of 980,000 short tons free of duty;
- **1954** – The Laurel-Langley Agreement was inked stipulating among others, the delayed importation of US duties until 1959;
- **1958** – The industry’s performance was phenomenal – from 112,884 short tons after the war, production rose to 1.313 million tons;
- **1962** – Amendments to the US Sugar Act of 1948 assured the Philippines of a basic export quota of 1.05 million short tons raw value plus 10.86% of increased US consumption requirements or a total basic quota of 1.126 million short tons;

- **1971** – The country's export to the US peaked at 1.593 million tons earning for the country around \$210 million;
- **1972** – The Philippine share of US imports rose to 1.326 million tons, as Cuba, under the embargo imposed by the US, lost its share of the US market;

Decline of the Philippine Sugar Industry

- **1974** – The Laurel-Langley Agreement expired. Access to the US market, though continued, was limited to 13.5% of the total sugar import requirements. During this time, the Philippines seriously considered other markets aside from the United States. In a way, it signalled the “globalization” of the industry. Unwittingly, the expiration of the Laurel- Langley Agreement paved the way towards the era of globalization when the Philippines became a member of the World Trade organization (WTO) in 1995;
- **1975-1978** – Worldwide glut of sugar forced prices to plummet. Surplus sugar was stored in swimming pools, schools, and churches in Negros;
- **1976** – President Marcos created PHILSUCOM and its trading arm, NASUTRA, to control domestic pricing, local distribution and marketing, and all the export functions;
- **1980s** – High fructose corn syrup started to make inroads, displacing cane and beet sugar in the US soft drinks industry;
- **1984** – NASUTRA closed operations;
- **1986** – PHILSUCOM was dismantled and the Sugar Regulatory Administration (SRA) was created to promote the growth and development of the sugar industry through greater participation of the private sector and to improve the working condition of the laborers;

- **1987** – The Comprehensive Agrarian Reform Law (CARL) was implemented resulting further fragmentation of farms and a decline in the average hectareage;

Remedial Measures to save the Industry

- **1992** – The sugar mills were included in the Investments Priorities Plan to encourage rehabilitation and modernization of the milling sector;
- **1995** – The Philippine Sugar Research Institute Foundation (PHILSURIN) was organized to fast track the sugar industry's development towards world-class competitiveness;
- **1996** – Executive Order (EO) 313 took effect modifying the tariff rate for sugar to 100% for out-quota imports to be gradually reduced to 65% by 2000. The in-quota tariff rate was pegged at 50%;
- **1999** – World market prices dropped to their lowest in 500 years in real terms, or 4.5 cents per pound. The government issued an Executive Order mandating tariff bidding [Conversion Fee that became the sugar Agricultural Competitiveness Enhancement Fund (ACEF)] for importation as a Safeguard Measure under the WTO rules;
- **2000** – The government formulated a “*Master Plan for the Sugar Industry*” which addresses priority concerns deemed important to increase the productivity and sustain the viability of the industry. In 2002, the Sugar Master Plan Foundation was established to implement various components of the Master Plan. The Philippines was awarded a grant of US \$1.4 M for a Sugarcane Variety Improvement Program in Southeast Asia and the Pacific, with PHILSURIN as the executing agency;

- **2001** - The Philippine government negotiated the transfer of raw and refined sugar from the Common Effective Preferential Tariff Scheme (CEPT) *Temporary Exclusion List* to its sensitive list, which was approved by the ASEAN Ministers during the 33rd ASEAN Economic Ministers Meeting held in Vietnam in September 2001. In July 2003, EO 230 was issued to this effect imposing 48% tariff concession on imported raw and refined sugar from ASEAN members;
- **2003** – President Arroyo issued EO 164 to implement Article XXVIII modifications on raw and refined sugar increasing the bound rate from 50% to 80%. The EO set the applied Most Favored Nation (MFN) tariffs at 65%. In December 2003, the President issued EO 264 to continue the implementation of Article XXVIII modifications by establishing applicable tariff rates of 65% for 2004 and 2005. The industry has regained self-sufficiency status. It also began exporting to the world market aside from its quota to the US;
- **2004** – President Arroyo signed EO 295 which imposed additional tariffs on “*premixes*” by classifying HS 1701.91 and 1701.99 as sugar containing products (containing more than 65% sugar). To further strengthen EO 295, the President issued Memorandum Order (MO) No. 164 which provides the SRA with the authority to assist the Bureau of Customs (BOC) in the monitoring and classification of imported sugar containing products and the subsequent application of appropriate duties on the same. The MO also instructs the BOC to notify the SRA in case of any importation, exportation or withdrawal from Customs Bonded Warehouses (CBWs) of sugar, and all forms thereof, prior to their release and allow the SRA to inspect the shipments of the warehouses;
- **2005** – The Philippine Quota to the US was increased from 137,000 metric tons (MT) to 216,438 MT to cover the shortage caused by hurricane Katrina;
- **2006** – World market price increased up to 18 cents per pound. The industry was able to enjoy the higher world market prices and enjoyed a much awaited banner year;
- **2007** – The Biofuels Act of 2006, RA 9367, was signed into law. It provides for the mandatory blending of biofuels with petroleum based fuels. In the case of ethanol for blending with gasoline, the most promising feedstocks are sugarcane juice and molasses.
- **2011** – The Department of Agriculture (DA) announced that the crop year 2010-2011 exhibited the biggest harvest of 2.39 million MT, a 21.3 percent improvement over the previous crop year. Because of this, the Philippines is poised to export 300,000 MT, the country’s biggest export volume since the 1990s. The DA is eyeing to export sugar to the neighboring countries like Indonesia, China, South Korea, and Japan.²

The WTO Era Sugar Importation Safety Measures

With the ratification by the Senate of the Uruguay Round Final Act of the General Agreement on Tariffs and Trade (GATT) in January 1995, a new order in international trade was established, resulting in the following enactments:

- The concept of “*protecting the domestic industry*” was redefined. The emphasis is on the liberalization of international trade, bringing the “protection of domestic industry” idea to the sidelights;
- Starting January 1, 1995 the Philippines became an original member of the WTO, the governing body for international trade;
- In effect, the concept of “*sovereignty*” needs a redefinition. Any WTO member

Signs for Recovery for Philippine Sugar

² Alave, Kristine, L., Sweet year for Philippine sugar planters; exports set at 300,000 MT, Philippine Daily Inquirer, August 20, 2011.

³ Section 301, Anti-Dumping Duty, The Tariff and Customs Code of the Philippines.

country must toe the line of the different agreements under the GATT Uruguay Round. The different trade related agreements were on a “take-it-or-leave-it” basis, meaning that any member country like the Philippines may not take an agreement at the same time reject another agreement deemed disadvantageous to a WTO member country. Domestic laws must be enacted in order to adopt the WTO principles and agreements; and

- In this regard, several laws were enacted in order to comply with the WTO requirements.

In response to the WTO mandates, the following laws were enacted:

- **The Anti-Dumping law³, RA 8752 (August 12, 1999) -**

Immediately after the membership of the Philippines in the WTO, the first Anti-Dumping law was enacted. During that time, the opposing concepts of globalization and protection of domestic industry were still blurred. Eager to protect the domestic industry, Congress enacted an Anti-Dumping law stricter than what the WTO Agreement on Anti-Dumping provides.

As a result, a case was brought to the WTO Dispute Settlement Court. While the first Anti-dumping law was still being settled from 1995 until 1999, the BOC used the WTO Agreement on Anti-Dumping in lieu of an applicable domestic law on the subject. Learning from the mistake, Congress enacted RA 8752 on August 12, 1999, a WTO compliant **Anti-Dumping law**. RA 8752 is the applicable law up to the present.

RA 8752 defines dumping as follows:

*“...Whenever any product, commodity or article of commerce imported into the Philippines at an export price less than its normal value in the ordinary course of trade for the like product, commodity or article destined for consumption in the exporting country is causing or is threatening to cause **material injury** to a domestic industry, or **materially retarding the establishment of a***

***domestic industry** producing like product...shall cause the imposition of an anti-dumping duty **equal to the margin of dumping...in addition to the ordinary duties, taxes and charges imposed by law** on the imported product, commodity or article...”*

- **The Countervailing law⁴, RA 8751 (August 7, 1999) -** The Countervailing law (RA 8751) was enacted while the second Anti-dumping law was being enacted by Congress. This time around, Congress was not too eager to protect the domestic industry (exceeding the requirements of the WTO) by enacting a WTO compliant Countervailing law.

RA 8751 defines a countervailing duty as follows:

*“...Whenever any product, commodity or article of commerce is granted **directly or indirectly by the government in the country of origin or exportation, any kind of or form of specific subsidy upon the production, manufacture or exportation of such product, commodity or article, and the importation of such subsidized product, commodity or article has caused or threatens to cause material injury to a domestic industry or has materially retarded the growth or prevents the establishment of a domestic industry...shall issue a department order imposing a countervailing duty **equal to the ascertained amount of the subsidy**. The same levy shall be imposed on the like product, commodity or article thereafter imported to the Philippines under similar circumstances. The countervailing duty shall be in addition to any duties, taxes and charges imposed by law on such imported product, commodity or article...”***

As a result of the WTO Agreement on Countervailing Measures, the farmers in the developed countries protested against the removal of subsidies in the agricultural sector. Agricultural products from the countries of western Europe and the United States are heavily subsidized. The removal of such subsidies as well as the imposition of a countervailing duty

⁴ Section 302. Countervailing Duty, The Tariff and Customs Code of the Philippines.

⁵ “Secretary” shall refer to the Secretary of the Department of Trade and Industry (DTI) in the case of non-agricultural products or the Secretary of the Department of Agriculture (DA) in case of agricultural products.

on their agricultural exports will make their products more expensive, hence less competitive internationally.

For a developing country like the Philippines, the granting of subsidies to Filipino farmers is unheard of simply because the Philippine government does not provide the budget for such an activity. In summary, the removal of subsidies as well as the imposition of the countervailing duty is a big boost for domestic farmers, the sugar farmers included.

The Safeguards Measures Act, RA 8800 (July 19, 2000)

About five and a half years from the Philippine membership to the WTO (January 1, 1995), RA 8800, the Safeguard Measures Act was enacted. RA 8800 is applicable whenever there is a surge of imports to the Philippines, even if such imports are "fairly traded". The law lays down the rules before a Safeguard measure may be imposed, thus:

"Section 5- Conditions for the Application of General Safeguard Measures. – The Secretary⁵ shall apply a general safeguard measure upon a positive final determination of the Commission (Tariff Commission) that a product is being imported into the country in increased quantities, whether absolute or relative to the domestic production, as to be a substantial cause of serious injury or threat thereof to the domestic industry; however, in the case of non-agricultural products, the Secretary shall first establish that the application of such safeguard measures will be in the public interest."

Congress was a bit hesitant to enact RA 8800 due to the following reasons:

- The Agreement on Safeguards allows a country to take measures to stop import surges that cause serious injury or threat of serious injury to domestic industry producing like or directly competitive products, even if such imports are fairly traded;
- Safeguard measures may be applied only after an investigation shows a relationship

between the increased imports and the injury to the domestic industry. Furthermore, safeguards should be taken after consultation with supplying countries. It may not be imposed unilaterally;

- In cases where the delay in the application of the measure would cause damage to the domestic industry which would be difficult to repair, provisional safeguard measures may be applied, preferably in the form of increased tariff and can be imposed for 200 days subject to the subsequent consultations with the affected supplying countries;
- Safeguard measures should be applied only for as long as necessary to prevent or remedy serious injury and to facilitate adjustment. They must be time bound and designed to help domestic industries to adjust to competition;
- A WTO member country proposing to apply a safeguard measure, or seeking an extension of a safeguard measure has to agree to an adequate means of trade compensation with parties adversely affected by the measure with a view of maintaining a substantially equivalent level of concession that existed before the measure is taken. The compensation provision of the WTO Agreement on Safeguards is the most undesirable part of the Safeguard measure.

For example, if a safeguard measure is imposed on imported sugar, a "sacrificial" product must be chosen as means of trade compensation in favor of the adversely affected industry in the exporting country.

The WTO Agreement on Safeguards provide for the following:

A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such measure... To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.⁶

6 GATT Uruguay Round Final Act, Agreement on Safeguards, Article 8, Level of Concessions and Other Obligations.

The WTO provision on equivalent level of compensation is not included in RA 8800. Nevertheless, international agreements and treaties duly ratified by the Senate of the Philippines form part of the legal system of the country. The WTO Agreement on Safeguards, particularly the provision on equivalent level of concessions is also part of RA 8800;

- If no agreement on compensation is reached, the affecting parties have the right to suspend an equivalent concession; and
- More often than not, sugar is an export product of developing countries. In this regard, the application of safeguard measure would be cumbersome to implement considering the following WTO Agreement on Safeguards:

“Safeguard measures shall not be applied against a product in a developing country Member as long as its share of imports of the product concerned in the importing Members does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.”⁷

In this regard, even if there is an import surge of sugar in the country, RA 8800 would not be chosen as a remedy.

The Tariffication Law, RA 8178 (March 28, 1996) – The aims of RA 8178 are as follows:

“Section 2. Declaration of Policy. – It is the policy of the State to make the country’s agricultural sector viable, efficient and globally competitive. The State adopts the use of tariffs in lieu of non-tariff import restrictions to protect local producers of agricultural products, except in the case of rice, which will continue to have quantitative import restrictions.

*Consistent with the constitutional mandate of protecting Filipino firms against unfair trade, it is furthermore the policy of the State to employ **anti-dumping and countervailing measures** to protect local producers from unfair trade practices, rather than use quantitative import restrictions.*

The *raison d’être* of RA 8178 is to remove all quantitative restrictions in importations by replacing them with their tariff equivalents. Once tariffed, it will be easier to gradually decrease tariff to its desired level after a certain period of time.

Simultaneous with the decrease in tariff the “minimum access volume” is gradually increased. By decreasing the tariff at the same time increasing the minimum access volume, the product concerned would eventually be “liberalized”. Minimum access volume refers to the volume of a specific agricultural product that is allowed to be imported with a lower tariff as committed by the Philippines to the WTO under the Uruguay Round Final Act.

RA 8178 also creates the Agricultural Competitiveness Enhancement Fund (ACEF) valid up to 2015. As to the utilization of the ACEF, the law provides for the following – *“The entire proceeds (ACEF) shall be set aside and earmarked by Congress for irrigation, farm-to-market roads, post-harvest equipment and facilities, credit, research and development, other marketing infrastructures, provision of market information, retraining, extension services, and other forms of assistance and support to the agricultural sector.”*

- **The Law Extending the Utilization Period of the Agricultural Competitiveness enhancement Fund (ACEF), RA 9496 (July 23, 2007)** – Aside from the ACEF utilization as mandated by RA 8187, in RA 9496, gives the following details:

- a. the protection of farmers against unfair trade practices such as smuggling, dumping of agricultural products, or other similar unfair trade practices; and
- b. for the increased productivity of farmers by providing the necessary support services such as, but not limited to irrigation, farm-to-market roads, post harvest equipment and facilities, credit, research and development, other marketing infrastructures, provision for market information retraining, extension services.

⁷ GATT Uruguay Round Final Act, Agreement on Safeguards, Article 9, Developing Country Members.

The Philippines imported ethyl alcohol (ethanol) of an alcoholic strength by volume exceeding 99% from the following countries from 2007 to 2009:

COUNTRY OF ORIGIN	IMPORT VALUE (CIF IN US\$)				% share to TOTAL
	2007	2008	2009	TOTAL (2007-2009)	
Brazil	804,643	1,013,297	75,681	1,893,621	25.00
Thailand	374,042	1,116,685	-	1,490,727	19.68
Korea	33,169	225,070	1,203,070	1,461,952	19.30
Singapore	-	578,434	592,720	1,171,154	15.46
Belgium	-	-	704,661	704,661	9.30
Vietnam	293,154	293,154	-	293,154	3.87
United States	-	607	183,412	184,019	2.43
Indonesia	48,375	79,864	-	128,224	1.69
South Africa	72,317	34,317	-	107,210	1.42
Netherlands	-	78,040	-	78,040	1.03
United Kingdom	-	50,680	-	50,680	0.67
Japan	-	-	7,253	7,253	0.10
Canada	-	4,073	-	4,073	0.05
Total	1,332,546	3,474,802	2,767,440	7,574,788	
Growth Rate (%)	-	160.76	-20.36		

The following figures were taken from the data presented by Director Mario Marasigan in a conference entitled Status of Bioethanol Mandate – Public Consultation for Metro-Manila on October 13, 2010:

Local Bioethanol Production Capacity (ML)	Capacity (ML)	Target Date of Operation
San Carlos Bioenergy	30-40	In operation
Leyte Agri Corporation	9	In operation
Roxol Bioenergy	30	In operation
Total Domestic Production	69-79	In operation

There are on-going projects to increase the domestic production, as shown in the following figures:
Scenario: 5% bioethanol of annual volume sales by February 6, 2011

Proponent/Location	Capacity (ML)	Target Date of Operation
1. Cavite Bio Fuel Producer Incorporated Magallanes, Cavite (with DOE Certificate of Registration with Notice to Proceed under JAO 2008-1)	34.4	2011-2012
2. Green Future Innovations Incorporation San Mariano, Isabela (with DOE Certificate of Registration with Notice to Proceed under JAO 2008-1)	54	2012
3. Canlaon Alcogreen Bago City, Negros Occidental (with pending application for Certificate of Registration under JAO 2008-1)	133.4	2012-2013

Focus on Biofuels

The **Biofuels Act of 2006, RA 9367** offers new opportunities for the domestic sugar industry because sugar may be used as raw material for the production of bioethanol. Consider the following provisions of RA 9367:

*“Within four years from the effectivity of this Act (February 6, 2011), the National Biofuel Board (NBB) created under this Act is empowered to determine the feasibility and thereafter recommend to the Department of Energy (DOE) to mandate a **minimum ten per cent (10%)** blend of bioethanol by volume into all gasoline fuel distributed and sold by each and every oil company in the country”⁸*

The NBB is empowered by RA 9367 to perform the following:

“...(c) Review and recommend to the DOE the adjustment in the minimum mandated bio fuel blends subject to the availability of locally-sourced biofuels: Provided, That the minimum blend may be decreased only within the first four years from the effectivity of this Act (2010). Thereafter, the minimum blends of five per cent (5%) and two per cent (2%) for bioethanol and biodiesel, respectively, shall not be decreased...”⁹

The DOE estimates that the current bioethanol demand is 230 million liters (ML). Domestic production is only 69 to 79 ML, leaving a deficit of 151 to 161 ML.

Even with the proposed additional capacities of 133.4 ML, there is still a deficit of 17.6 to 27.6 ML. The additional demand may only be satisfied by importation.

In spite of the resurgence in sugar production, an impending problem looms in the horizon as a result of the surge of interest by foreigners to plant sugar not for the domestic market but for foreign consumption. Consider the following news items:

- **Magallanes, Cavite sugar production for the Japanese market¹⁰** - A bioethanol plant will be constructed in Sitio Lobo, Barangay Caluagan, Cavite costing P3.1 billion to supply the biofuel

requirement of a Japanese firm as well of a big domestic corporation. Because of the construction plan, the area planted to sugarcane shall be increased from the current 3,500 to 6,000 hectares.

- **Porac, Pampanga sugar production for the Chinese market¹¹** - The Escaler Group who owns Sweet Crystals Integrated Sugar Mills in Porac, Pampanga plans to increase the area planted to sugar by 1,000 hectares, availing of BOI incentives. In this regard, a Chinese conglomerate, the Wahaha Group Co. Ltd. Is willing to invest in the said expansion program for its own **beverage production in China** which is currently being sourced from Thailand and China.

The total arable area for food production is constant. Any increase in the production of any food item, like sugar diminishes the total areas for other food products. In this regard, the interest of foreigners in the production of sugar for foreign consumption would threaten food security in the Philippines.

The President of the Philippines stated in a newspaper interview (March 7, 2011) that his priority is food security. In addition, the President also looks with favor the exploitation of renewable sources of energy like wind, solar, ocean, run-of-river hydropower, and biomass, among others, in order to decrease the domestic consumption of petroleum products.

Senate Resolution 517

Senate Resolution 517, filed by former Senator Miguel Zubiri, directs the proper Senate Committees to conduct and investigation, in aid of legislation, on the reported rampant importation of sugar premixes to evade the payment of tariff on sugar. The Resolution cites the following reasons:

1. In 2010, importation of sugar premixes reached one million 50-kilo bags;
2. Premix products containing less than

⁸ Section 5.2, the Biofuels Act of 2006, RA 9367.

⁹ Section 6, the Biofuels Act of 2006, RA 9367.

¹⁰ Abello, Melpha M. Cavite town to expand sugarcane areas for bioethanol production, Manila Bulletin, February 24, 2011.

¹¹ Proposed sugar plantation viable – Panlilio, Manila Bulletin, February 22, 2011.

65% of sugar is tariff-free, while the importation of sugar premix exceeding the allowable percentage carries a tariff of 38%;

3. Tests conducted by the SRA showed the sugar premix importations contained 99.55% sugar;
4. Based on the estimate of the Confederation of Sugar Producers' Association, Inc. (CONFED), from January 2010 to March 2011, a beverage company imported one million bags of sugar premix and were declared as "*sugar containing added flavouring or coloring*" and deprived the national government of more than P750 million in revenues;
5. On March 3, 2011, the BOC Commissioner, after a meeting with SRA Administrator Ma. Regina Bautista Martin and other stakeholders in the sugar industry, issued CMO 12-2011 requiring the submission of laboratory analysis conducted by the SRA of all preparations declared as "*premixed sugar concentrates*";
6. Despite the issuance of CMO 12-2011, importations of sugar premixes with more than the allowable sugar content continue and remain unabated; and
7. If the sugar premix importations containing more than the allowable sugar content considered tariff-free remain unabated, they pose a serious threat leading to the collapse of the sugar industry and will seriously affect the livelihood and employment of millions of workers in the sugar industry and their families.

Negros Accidental Congressmen¹² filed a Resolution in the House of Representatives on June 25, 2011, to investigate the issue on importations of large volumes of premix sugar and high fructose corn syrup (HFCS) by big industrial users like Coca Cola that has prejudiced the sugar industry. The group wrote a letter to the SRA asking to "*immediately stop processing any importation of premix sugar and HFCS into the*

country."

The move of the Congressmen was prompted by the following events:¹³

1. By 2015, the sugar producing countries will be allowed to export sugar with no tariff. The domestic sugar industry needs protection in the form of high tariffs in order to handle the fierce competition in 2015; and
2. EO 850 (issued by President Gloria Arroyo) allows the importation of sugar premixes.

The Negrenses, through the Sugar Watch, an organization composed of small sugar farmers, labor organizations, sugar workers, and agrarian reform beneficiaries proposed to boycott Coca-Cola products hoping to cut the company's sales in Negros Occidental. Coca-Cola's importation from Thailand, from their point of view, has deprived the government of P17.8 billion in tariffs since 2010. Critics, however, are of the opinion that the boycott move will not be effective considering that Coca-Cola has imported enough stocks, for its future use.

As a result of the clamor, all importations of pre-mixed sugar concentrates and pre-mix sugar products will no longer be released by the BOC without a validating certification issued by the SRA.¹⁴

The then President Arroyo issued EO 850¹⁵ on December 23, 2009, which became effective on January 1, 2010. EO 850 eliminates import duties on more products coming from the five ASEAN countries, namely, Brunei Darussalam, Indonesia, Malaysia, Singapore, and Thailand. It is a Philippine commitment to the ASEAN Free Trade Area (AFTA), a free trade block aiming to increase ASEAN's competitive edge as a production base in the world market through the elimination within ASEAN of tariff and non-tariff barriers and to attract more foreign direct investments in the region.

Under the original schedule of the CEPT, highly sensitive products like rice should be phased out this year (2011). The CEPT implements AFTA's goals, meaning, that rice, the tradi-

12 The concerned Congressmen are: (1) Rep. Alfredo Maranon III (2nd District), (2) Rep. Alfredo Abelardo Benitez (3rd District), (3) Rep. Jeffrey Ferrer (4th District), (4) Rep. Ignacio Arroyo (5th District), (5) Rep. Julio Ledesma, IV (1st District), (6) Rep. Mercedes Alvarez (6th District), and (7) Rep. Anthony Rolando Golez (Bacolod).

13 Negros Solons in Joint Moves to Probe Premix, HFCS Imports, Negros Daily Bulletin, June 20, 2011.

14 <http://www.customs.goc.ph/newsView.php?id=58>

15 balita.ph/2010/01/09/eo-850-eliminates-duties-on-imports-from-asean

tional staple of the Philippines will be subject to trade liberalization if it is classified as a non-sensitive product. Because of its political and social implications, the proposal is postponed. Low tariffs on rice would mean the “death” of rice producers in the Philippines.

ASEAN countries like Thailand and Vietnam are the world’s largest exporters of rice while the Philippines is the world’s largest importer of rice. Being a new member of ASEAN, Vietnam has a different CEPT schedule to reduce tariffs on ASEAN products from zero to 5% range.

Products covered by lower tariffs within ASEAN are **manufacturing goods** and “**those falling outside the definition of unprocessed agricultural products**” approved by the board of the National Economic and Development Authority (NEDA).

As an observation, the tariff on sugar will be zero by 2015. In this regard, the domestic sugar industry must “*shape up*” in order to bring the cost of domestically produced sugar competitive in the market. If the price of sugar is higher than imported ones, industries using sugar as raw materials will naturally buy imported ones. Time is running out for the local sugar producers to modernize.

While the necessary adjustments are being made, the smuggling of sugar must be stopped in order to aid the domestic industry to modernize. The balancing act is between the following sectors:

1. The local sugar producers like the farmers and the millers should compete with the idea of globalization. International trade is being liberalized; and
2. The local producers are not the only sector to be protected domestically. The downstream industries using sugar must also be protected because they are also employers and likewise contribute to the national economy.

The point of view of small sugar planters¹⁶

Small sugar planters are farmers cultivating 25 hectares or less of cultivated lands. The

following are their sentiments:

- **A regulated regime.** The domestic industry is losing out to massive imports of sugar from countries with highly efficient, technology-wise, and heavily-subsidized sugar industries. In this regard the country must revert to a regulated regime;
- **Lack of access to capital and subsidies.** The Comprehensive Agrarian Reform Program (CARP) is a good program, but it failed because the government did not provide the poor farmers with access to capital and subsidies to make their lands productive;
- **High cost of fertilizers.** At times the price of fertilizer is even higher than a 50 kg bag of sugar;
- **Rampant smuggling.** Smuggling is the most blamed among the different reasons why the domestic industry is in such a woeful condition. The classic example is the case of Kraft Food Philippines that can import premix products at 3% tariff in clear violation of Executive Order 295 mandating all products containing 65% sugar to pay 48% tariff;
- **Weak voice.** The domestic sugar industry is dominated by the Philippine Sugar Alliance which is composed of big sugar landowners, millers and traders;
- **Concerted efforts.** Government should convene an assembly of more than 150 sugar associations nationwide, from the small to big ones, to ensure a truly broad and democratic consultation among the stakeholders in the industry; and
- **Ethanol production.** The production of ethanol from sugar will save the industry from its untimely demise. The recommendation of the small farmers is that instead to producing raw sugar as a finished product, the sugar industry should process sugar directly to ethanol fuel. The proposal would not only revive the domestic sugar industry but also mitigate the

¹⁶ The sentiment was expressed by Jose Nadie Arceo, president of the United Farmers Association of Negros-South Inc. (UNIFARMS0, an association of small sugar landowners affiliated with the United Sugar Planters Federation (UNIFED)), based in Negros. Total collapse of sugar industry by 2010 feared, Karl G. Ombion, <http://www.bulatlat.com/new3s/5-30/5-30-sugar.htm>.

adverse effects of the rising cost of petroleum product importation.

Senate bills affecting sugar importations

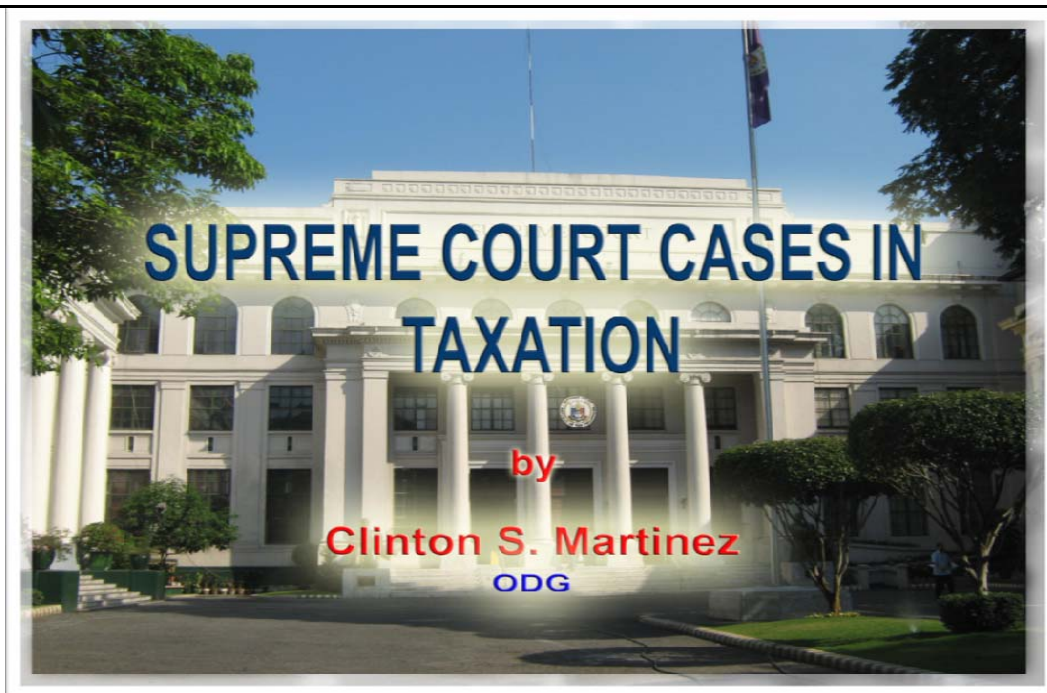
In spite of the laws already in place, new legislations are still needed to answer to new challenges in both the domestic and international markets. Senate Bill Nos. 2558 and 723 were filed.

Final Comment

For an industry to survive under the present situation, there is a need to be competitive, meaning that the production cost should at least equal to that of the competitors. Failing to do so would mean that domestic sugar may not be exported except if quota system exists like the US sugar quota. Unfortunately, import quotas are disfavored under the WTO rules because they are considered as trade barriers.

The Philippines is a member of the ASEAN. If the production cost of domestically produced sugar is not competitive, it may not be attractive to import sugar from the Philippines. It is projected that the ASEAN shall be a common market by 2015, meaning that tariffs within the ASEAN will be eliminated. It will make sugar produced from the other ASEAN countries cheaper. The tendency is for domestic industries using sugar as a raw product to import from other ASEAN countries to make their finished product competitive. In other words, there is hardly enough time for the domestic sugar industry to streamline its production in order to reduce cost.

Several laws mandated by the WTO have been enacted in order to “*even the playing field*” in the international trading arena. The anti-smuggling bills are still pending in Congress. Hopefully, the bills would be enacted into law as soon as possible in order to address the perennial problem of sugar smuggling.



1. COMMISSIONER OF INTERNAL REVENUE, *Petitioner*, vs. EASTERN TELECOMMUNICATIONS PHILIPPINES, INC., *Respondent*, GR No. 163835, July 7, 2010 (Brion, J.).

Facts:

Eastern Telecommunications Philippines, Inc. (Eastern), respondent in this case, was granted a legislative franchise to operate, install and maintain telecommunications systems in the country. From July 1, 1995 to December 1, 1996, Eastern bought imported machineries, equipment and spare parts needed in its business. The Bureau of Customs subjected the same to ten percent (10%) Value-Added Tax (VAT), which was paid by respondent.

Subsequently, or on September 19, 1997, Eastern filed with the Commissioner of Internal Revenue (CIR) a written application for tax refund or credit of unapplied input taxes it paid for taxable years 1995 and 1996 in the amount of P22,013,134.00. Eastern relied on its franchise which allows it to pay 3% of its gross receipts in lieu of all taxes on the franchise or earnings thereof. Alternatively, respondent cited Section 106(B) of the NIRC of 1997 which "x x x authorizes a VAT-registered taxpayer to claim for the issuance of a tax credit certificate or a tax refund of input taxes paid on capital goods imported or purchased locally to the extent that such input taxes have not been applied against its output taxes."

Respondent filed an appeal with the Court of Tax Appeals (CTA) on September 25, 1997 to toll the running of the two-year prescriptive period, without waiting for the CIR's decision on its request for refund.

The CIR's response to Eastern's appeal was contained in an Answer raising the following defenses:

1. "[Eastern's] claim for refund/tax credit is pending administrative investigation;
2. "[Eastern's] exempting clause x x x should be understood or interpreted as written, meaning, the 3% franchise tax shall be collected as substitute for any internal revenue taxes x x x imposed on its franchise or gross receipts/earnings thereof x x x;
3. "The [VAT] on importation under Section 101 of the [1997] Tax Code is neither a tax on franchise nor on gross receipts or earnings thereof. It is a tax on the privilege of importing goods whether or not the taxpayer is engaged in business, and regardless of whether the imported goods are intended for sale, barter or exchange;
4. "The VAT under Section 101(A) of the Tax Code x x x replaced the advance sales tax and compensating tax x x x. Accordingly, the 3% franchise tax did not substitute the 10% [VAT] on [Eastern's] importation of equipment, machineries and spare parts for the use of its telecommunication system;

5. "The tax refunds are in the nature of tax exemptions. As such, they are regarded in derogation of sovereign authority and to be construed in strictissimi juris against the person or entity claiming the exemption. The burden is upon him who claims the exemption in his favour and he must be able to justify his claim by the clearest grant of organic or statute law and cannot be permitted to exist upon vague implication x x x;
6. "Taxes paid and collected are presumed to have been made in accordance with the laws and regulations; and
7. "It is incumbent upon the taxpayer to establish its right to the refund and failure to sustain the burden is fatal to the claim for refund."

The CTA ruled in favor of Eastern taking into account Section 106(B) of the Tax Code, viz:

"SECTION 106. Refunds or tax credits of input tax.

"(b) Capital goods. - A VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. The application may be made only within two (2) years after the close of the taxable quarter when the importation or purchase was made."

Moreover, "The CIR posits that, applying Section 104(A) of the Tax Code on apportionment of tax credit, Eastern is entitled to a tax refund of only P8,814,790.15, instead of P16,229,100.00 adjudged by the CTA and the CA." Section 104(a) provides:

"SEC. 104. TAX CREDITS. -

"(a) Creditable Input tax. -

"A VAT-registered person who is also engaged in transactions not subject to the value-added tax shall be allowed input tax credits as

follows:

“(A) Total input tax which can be directly attributed to transactions subject to value-added tax; and
 “(B) A ratable portion of any input tax which cannot be directly attributed to either activity.”

Eastern avers that the CIR cannot rely on the arguments it had not raised in the Answer it filed before the CTA. “In fact, the CIR only raised the applicability of Section 104(A) of the Tax Code in his supplemental motion for reconsideration of the CTA’s ruling which, notably, was filed a month and a half after the original motion was filed, and thus beyond the 15-day reglementary period.”

Issue:

Whether the rule in Section 104(A) of the NIRC, as amended, on the apportionment of tax credits, can be applied in appreciating respondent Eastern’s claim for refund, considering that it was raised by the CIR only when he sought reconsideration of the CTA ruling.

Held:

The Supreme Court decided in favor of the Commissioner of Internal Revenue, finding its petition meritorious.

It ruled:

“The Rules of Court prohibits raising new issues on appeal; the question of the applicability of Section 104(A) of the Tax Code was already raised but the court did not rule on it. Section 15, Rule 44 of the Rules of Court embodies the rule against raising new issues on appeal:

“SEC. 15. Questions that may be raised on appeal. - Whether or not the appellant has filed a motion for new trial in the court below, he may include in his assignment of errors any question of law or fact that has been raised in the court below and which is within the issues framed by the parties.

“The general rule is that appeals can only raise questions of law or fact

that (a) were raised in the court below, and (b) are within the issues framed by the parties therein. An issue which was neither averred in the pleadings nor raised during the trial in the court below cannot be raised for the first time on appeal. X x x.

“Contrary to Eastern’s claim, we find that the CIR has previously questioned the nature of Eastern’s transactions insofar as they affected the claim for tax refund in his motion for reconsideration of the CTA decision, although it did not specifically refer to Section 104(A) of the Tax Code. We quote the relevant portions of the motion:

“[W]e maintain that [Eastern’s] claims are not creditable input taxes under [Section 104(A) of the Tax Code]. What the law contemplates as creditable input taxes are only those paid on purchases of goods and services specifically enumerated under [Section 104(A)] and that such input tax must have been paid by a VAT[-] registered person/entity in the course of trade or business. It must be noted that [Eastern] failed to prove that such purchases were used in their VAT[-] taxable business. [Eastern’s pieces of] evidence are not purchases of capital goods and do not fall under the enumeration x x x.

“It is significant to point out here that refund of input taxes on capital goods shall be allowed only to the extent that such capital goods are used in VAT[-]taxable business. X x x a perusal of the evidence submitted before [the CTA] does not show that the alleged capital goods were used in VAT[-]taxable business of [Eastern] x x x.

“That the CTA failed to rule on this question when it resolved the CIR’s motion for reconsideration should not be taken against the CIR. X x x. Eastern’s VAT returns reporting income from exempt sales are matters of record that the tax court should have considered the rule against raising new

issues on appeal is not without exceptions; it is a procedural rule that the Court may relax when compelling reasons so warrant or when justice requires it. What constitutes good and sufficient cause that would merit suspension of the rules is discretionary upon the courts. X x x.

“As applied in the present case, even without the CIR raising the applicability of Section 104(A), the CTA should have considered it since all four of Eastern’s VAT returns corresponding to each taxable quarter of 1996 clearly stated that it earned income from exempt sales, i.e., non-VAT taxable shares.

“X x x. Even if we were to consider the CIR’s acts as a lapse in the observance of procedural rules, such lapse does not work to entitle Eastern to a tax refund when the established and uncontested facts have shown otherwise. Lapses in the literal observance of a rule of procedure may be overlooked when they have not prejudiced the adverse party and especially when they are more consistent with upholding settled principles in taxation.”

2. PETRON CORPORATION, *Petitioner*, vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent*, GR No. 180385, July 28, 2010 (Perez, J.).

Facts:

Petitioner (Petron) in this case, is a corporation engaged in the production of petroleum products registered with the Board of Investment (BOI) pursuant to the provisions of the Omnibus Investment Code, with the proper Certificates of Registration having been issued.

Petron has acquired Tax Credit Certificates (TCCs) from several BOI-registered enterprises/ assignees which “ x x x were subject to the following conditions, to wit:

“1. Post-audit and subsequent adjustment in the event of computational discrepancy;

“2. A deduction for any outstanding account/obligation of claimant with the BIR and/or BOC; and

“3. Revalidation with the Center¹ in case the TC is not utilized for payment within one (1) year from the date of issuance/date of last utilization.”

Petron used the TCCs to pay its excise tax liabilities for the years 1993 to 1997. Furthermore, Petron issued Credit Notes (CNs) in favor of its assignors which used said CNs to avail of fuel products from petitioner.

However, the transfer of the TCCs to Petron was later on questioned as violative of the law.

During the pendency of said appeal before the Court of Appeals, the Center conducted a post-audit and declared (Assessment) that Petron procured the TCCs fraudulently. Petron brought said case to the CTA due to CIRs inaction on the protest it has filed, based on the following grounds:

1. Petron’s right to due process was violated;
2. That the Assessment was void;
3. That the legality of its right had been upheld by the CTA; and
4. Respondent’s right to collect the delinquencies had already expired.

For its part, the CIR, denying the material allegations of the petition, submitted the following answers:

1. The cancellation of the TCCs rendered them valueless;
2. That Petron was informed of the cancellation of the TCCs;
3. The government’s right to collect taxes had yet to prescribe; and
4. It is presumed that the Assessment was issued correctly.

The CTA Second Division denied Petron’s petition for lack of merit. The CTA En Banc affirmed the Second Division’s decision, based on the ensuing findings:

“(a) The subsequent cancellation of the TCCs resulted in the non-payment of the excise tax liabilities since the post-audit partook the nature

¹ Department of Finance One-Stop Shop Inter-Agency Tax Credit and Duty Drawback Center. NB: RA 9282 Expanded the Jurisdiction of the Court of Tax Appeals (April 23, 2004). RA 9503 (July 8, 2008) enlarged the organizational structure of the CTA.

of a suspensive condition to the effectiveness of Petron's use thereof;

"(b) The Center's finding of fraud in the procurement of the TCCs by the grantees rendered the same worthless, even in the hands of an assignee like Petron;

"(c) The evidence adduced in the case which showed misrepresentation in the levels of fuel oil use by the grantees and the non-delivery of petroleum products by Petron also indicate that fraud also attended the transfer of the TCCs;

"(d) The Center acted within its mandate in declaring TCCs fraudulently issued and transferred; and

"(e) The resultant delay in the payment of Petron's excise tax liabilities justified the imposition of the 25% surcharge and annual interest of 20% pursuant to Sections 248A(3) and 249 of the Tax Code."

Issues:

Petron assails the CTA decision ordering it to pay deficiency taxes for taxable years 1995 to 1997, together with surcharge, interest and delinquency interest, stressing that:

"I. The Court of Tax Appeals En Banc committed grave reversible error when it ruled that the subsequent cancellation by the DOF Center of the tax credit certificates previously used to pay Petron's tax liabilities had the effect of non-payment of Petron's excise taxes allegedly because the subsequent cancellation of the TCCs results in non-payment of Petron's excise tax liabilities considering that: A. Post-Audit of the tax credit certificates is not in the nature of a suspensive condition to effect payment. B. There was no fraud in the transfer of the subject tax credit certificates. C. Being a purchaser in good faith, Petron cannot be prejudiced by a subsequent finding of fraud in the grant and transfer of the tax credit certificates.

"II. The Court of Tax Appeals En Banc committed grave reversible error when it ruled that the tax credit certificates were fraudulently transferred from the grantees to Petron considering that: A. The TCCs were assigned to Petron in accordance with the law and the assignments were approved by the appropriate government agencies. B. Petron fulfilled its obligation to issue Credit Notes under the deeds of assignment. C. The Credit Notes were availed by the assignors and fuel and other petroleum products were delivered upon the order of the assignors. D. Affidavits of general managers attached to the Cancellation Memorandum allegedly denying deliveries of fuel and petroleum products are hearsay. E. Validity of Petron's payments of excise taxes thru the use of assigned TCCs upheld by the Court of Tax Appeals in CTA Case No. 5657, 'Petron Corporation vs. Commissioner of Internal Revenue, Et Al.'

"III. The Court of Tax Appeals En Banc committed grave reversible error when it ruled that the Department of Finance Center is the competent authority to declare the Tax Credit Certificates as fraudulently issued and transferred.

"IV. The Court of Tax Appeals En Banc committed grave reversible error when it ruled that Petron is liable to pay Twenty-five percent (25%) late payment surcharge pursuant to Section 28(A) of the National Internal Revenue Code of 1997 and Twenty percent (20%) interest pursuant to Sections 248 and 249 of the National Internal Revenue Code of 1997."

Held:

The Supreme Court (SC) ruled in favor of petitioner, Petron Corporation.

The SC stressed, in response to the first issue:

“As correctly pointed out by Petron, x x x, the issue about the immediate validity of TCCs and the use thereof in payment of tax liabilities and duties are not matters of first impression for this Court. Taking into consideration the definition and nature of tax credits and TCCs, this Court’s Second Division definitely ruled in the x x x Pilipinas Shell case that the post audit is not a suspensive condition for the validity of TCCs, thus:

“Art. 1181 tells us that the condition is suspensive when the acquisition of rights or demandability of the obligation must await the occurrence of the condition. However, Art. 1181 does not apply to the present case since the parties did NOT agree to a suspensive condition. Rather, specific laws, rules, regulations govern the subject TCCs, not the general provisions of the Civil Code. Among the applicable laws that cover the TCCs are EO 226 or the Omnibus Investment Code, Letter of Instructions No. 1355, EO 765, RP-US Military Agreement, Sec. 106 (c) of the Tariff and Customs Code, Sec. 106 of the NIRC, BIR Revenue Regulations (RRs), and others. Nowhere in the aforementioned laws is it provided that a TCC is issued subject to a suspensive condition.

“X x x (T)he TCCs are immediately valid and effective after their issuance. As aptly pointed out in the dissent x x x, this is clear from the Guidelines and instructions found at the back of each TCC, which provide:

“1. The Tax Credit Certificate (TCC) shall entitle the grantee to apply the tax credit against taxes and duties until the amount is fully utilized, in accordance with the pertinent tax and customs laws, rules and regulations.

“4. To acknowledge application of payment, the One-Stop-Shop Tax Credit Center shall issue the corresponding Tax Debit Memo (TDM)

to the grantee.

“The authorized Revenue Officer/ Customs Collector to which payment/ utilization was made shall accomplish the Application of Tax Credit at the back of the certificate and affix his signature on the column provided.”

With respect to the allegation of fraud in the acquisition of the TCCs, the SC pronounced:

“Not being privy to the issuance of the subject TCCs and having already used them in paying its own tax liabilities, Petron also correctly points out that it cannot be prejudiced by the fraud which supposedly attended the issuance of the same. More so, when it is borne in mind that, as ground for the cancellation of said TCCs, fraud was not adequately established by respondent with clear and convincing evidence showing that the grantees had not, indeed, manufactured and exported at the volumes which served as bases for the grant of the subject TCCs. Rather than presenting oral and documentary evidence to prove said material fact, the record shows that respondent simply relied on the findings and conclusions the Center cited in support of the cancellation of the TCCs as well as those embodied in the Report of the Senate Committee on Ways and Means and Committee on Accountability of Public Officers and Investigation which jointly delved into the irregularities reported to have attended the Center’s issuance of TCCs in favor of corporations in the textile industry, including petitioner’s assignors.

“While the CTA is not governed strictly by technical rules of evidence on the principle that rules of procedure are not ends in themselves but are primarily intended as tools in the administration of justice, respondent’s presentation of evidence to prove the fraud which attended the issuance of the subject TCCs is not a mere procedural technicality which may be disregarded considering that it is the very basis for

the claim that Petron's payment of its excise tax liabilities had been avoided. It cannot be over-emphasized that fraud is a question of fact which cannot be presumed and must be proven by clear and convincing evidence by the party alleging the same. Without even presenting the documents which served as bases for the issuance of the subject TCCs from 1994 to 1997, respondent miserably failed in discharging his evidentiary burden with the presentation of the Center's cancellation memoranda to which were simply annexed some of the grantees' original registration documents and their Financial Statements for an average of two years.

"For a party charged with the burden of proving the same, respondent did not even come close to establishing the fraud which purportedly attended both the issuance of the subject TCCs and the transfer thereof in favor of Petron."

On another issue, the SC adjudged:

"As for the government agency vested with the authority to cancel the subject TCCs, the ruling in the *Pilipinas Shell* is to the effect that, x x x, the Center has concurrent authority to do so alongside the BIR and the BOC. Given the nature of the TCC's immediate effectiveness and validity, however, said authority may only be exercised before the TCC has been fully utilized by a transferee which had no participation in the preparation of fraud in the issuance, transfer and utilization thereof. Once accepted by the BIR and applied towards the satisfaction of such a transferee's tax obligations, a TCC is effectively used up, debited and canceled such that there is nothing left to avoid or to cancel anew. Considering the protection afforded to transferees in good faith and for value, it was held that the remedy of the Government is to go after the grantees alleged to have perpetrated fraud in the procurement of the subject TCCs."

Finally, the Court declared:

"Viewed in the light of the foregoing disquisition, respondent had no legal basis to once again assess the excise taxes Petron already paid with the use of the TCCs assigned in its favor, much less to impose the 25% late payment surcharge pursuant to Section 248(A) of the National Internal Revenue Code of 1997 and the 20% interest provided under Section 249 of the same Code."

The Court invalidated the CIR's Assessment of Petron's deficiency excise taxes for the years 1995 to 1997 for lack of legal bases.

3. ASIAWORLD PROPERTIES PHILIPPINE CORPORATION, *Petitioner*, vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent*, G.R. No. 171766, July 29, 2010 (Carpio, J.).

Facts:

Petitioner is a domestic company involved in the real estate development industry. On April 2002, petitioner filed with the Bureau of Internal Revenue (BIR), Revenue District Office (RDO) No. 52 (Region VIII) a request for refund of its alleged excess creditable tax withheld for the year 2001, professing that it is entitled to the refund of its unapplied creditable withholding taxes.

Subsequently, to toll the running of the two-year prescriptive period, and before the BIR RDO could reply on its claim for refund, Asia-world Properties Philippine Corporation filed a Petition for Review with the Court of Tax Appeals (CTA). The CTA denied the petition of the petitioner. The CTA declared:

"While we agree with the findings of the commissioned independent CPA that petitioner has unapplied creditable withholding taxes at source x x x, still the excess payment cannot be refunded.

"Upon scrutiny of the records of the case, this court noted that the amount sought to be refunded x x x actually

represents petitioner's excess creditable withholding taxes for the year 1999 which petitioner opted to apply as tax credit to the succeeding taxable year x x x. Under x x x the Tax Code, petitioner is precluded to claim the refund or credit of the excess income tax payment once it has chosen the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding years."

Issue:

The question to be resolved in this case is "X x x whether the exercise of the option to carry-over the excess income tax credit, which shall be applied against the tax due in the succeeding taxable years, prohibits a claim for refund in the subsequent taxable years for the unused portion of the excess tax credits carried over."

Held:

The Supreme Court denied the petition and affirmed the Decision and Resolution of the CTA.

The SC ruled that the case involves the proper interpretation of Section 76 of the National Internal Revenue Code (NIRC) of 1997, as amended, which provides:

"SEC. 76. - Final Adjustment Return. - Every corporation liable to tax under Section 27 shall file a final adjustment return covering the total taxable income for the preceeding calendar or fiscal year. If the sum of the quarterly tax payments made during that said taxable year is not equal to the total tax due on the entire taxable year, the corporation shall either:

- "(A) Pay the balance of tax still due;
- or
- "(B) Carry-over the excess credit;
- or
- "(C) Be credited or refunded with the excess amount paid, as the case may be.

"In case the corporation is entitled to a tax credit or refund of the excess

estimated quarterly income taxes paid, the excess amount shown on its final adjustment return may be carried over and credited against the estimated quarterly income tax liabilities for the taxable quarters of the succeeding taxable years. Once the option to carry-over and apply the excess quarterly income tax against income tax due for the taxable quarters of the succeeding taxable years has been made, such option shall be considered irrevocable for that taxable period and no application for cash refund or issuance of a tax credit certificate shall be allowed therefore."

The SC proclaimed that: "X x x, under Section 76 of the NIRC of 1997, the application of the option to carry-over the excess creditable tax is not limited only to the immediately following taxable year but extends to the next succeeding taxable years. The clear intent in the amendment under Section 76 is to make the **option, once exercised, irrevocable** for the succeeding taxable years." [Emphasis supplied]

Finally, the SC declared:

"Thus, once the taxpayer opts to carry-over the excess income tax against the taxes due for the succeeding taxable years, such option is irrevocable for the whole amount of the excess income tax, thus, prohibiting the taxpayer from applying for a refund for that same excess income tax in the next succeeding taxable years. The unutilized excess tax credits will remain in the taxpayer's account and will be carried over and applied against the taxpayer's income tax liabilities in the succeeding taxable years until fully utilized." [Underscoring supplied]

4. AT&T COMMUNICATIONS SERVICES PHILIPPINES, INC., *Petitioner*, vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent*, G.R. No. 182364, August 3, 2010 (Carpio-Morales, J).

Facts:

Petitioner AT&T Communications Services Philippines, Inc., a domestic corporation engaged primarily in "x x x providing information, promo-

tional, supportive and liaison services to foreign corporations x x x, an enterprise registered with the Philippine Economic Zone Authority (PEZA)", seeks for a tax refund and/or tax credit with the herein respondent Commissioner of Internal Revenue (CIR).

The request for a refund and/or credit was supported with several documents together with the Summary of Zero-Rated Sales inclusive of other documents; value-added tax (VAT) invoices, stamped "zero-rated" and bank credit advices; Service Agreements copies; and the report of the certified public accountant (CPA) commissioned for the case.

The basis for the claim is quoted hereunder:

"For the calendar year 2002, petitioner incurred input VAT when it generated and recorded zero-rated sales in connection with its Service Agreements x x x. Petitioner also incurred input VAT from purchases of capital goods and other taxable goods and services, and importation of capital goods.

"Despite the application of petitioner's input VAT against its output VAT, an excess of unutilized input VAT x x x remained. As petitioner's unutilized input VAT could not be directly and exclusively attributed to either of its zero-rated sales or its domestic sales, an allocation of the input VAT was made which resulted x x x as petitioner's claim attributable to its zero-rated sales."

Petitioner filed a petition for review with the Court of Tax Appeals (CTA) [First Division] for purposes of preventing the running of the prescriptive period. The CTA First Division denied AT&T's petition "for lack of substantiation." The CTA *En Banc* affirmed the First Division's decision.

Issue:

Did AT&T comply with the requirements provided under the National Internal Revenue Code (NIRC), as amended, in its petition for tax refund

and/or tax credit?

Held:

The Supreme Court decided that AT&T's "X x x petition is impressed with merit."

The SC declared:

"A taxpayer engaged in zero-rated transactions may apply for tax refund or issuance of tax credit certificate for unutilized input VAT, subject to the following requirements: (1) *the taxpayer is engaged in sales which are zero-rated (i.e., export sales) or effectively zero-rated;* (2) *the taxpayer is VAT-registered;* (3) *the claim must be filed within two years after the close of the taxable quarter when such sales were made;* (4) *the creditable input tax due or paid must be attributable to such sales, except the transitional input tax, to the extent that such input tax has not been applied against the output tax;* and (5) *in case of zero-rated sales under Section 106(A)(2)(a)(1) and (2), Section 106(B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof have been duly accounted for in accordance with BSP rules and regulations.*" [Italics supplied]

The SC continued:

"Revenue Regulations No. 3-88 amending Revenue Regulation No. 5-87 provides the requirements in claiming tax credits/refunds:

"Sec. 2. Section 16 Of Revenue Regulations 5-87 is hereby amended to read as follows: x x x

"(c) Claims for tax credits/refunds - Application for Tax Credit/Refund of Value-Added Tax Paid (BIR Form No. 2552) shall be filed with the Revenue District Office of the city or municipality where the principal place of business of the applicant is located or directly with the Commissioner, Attention: VAT Division.

"A photocopy of the **purchase invoice or receipt evidencing the value added tax paid** shall be submitted together with the application. The original copy of the said invoice/receipt, however shall be presented for cancellation prior to the issuance of the Tax Credit Certificate or refund. X x x. (emphasis and underscoring supplied)

"X x x.

"Parenthetically, to determine the validity of petitioner's claim as to unutilized input VAT, an invoice would suffice provided the requirements under Sections 113² and 237³ of the Tax Code are met."

Finally, to further buttress the view that sales invoices are necessarily appurtenant to everyday business dealings, the SC pronounced:

"Sales invoices are recognized commercial documents to facilitate trade or credit transactions. They are proofs that a business transaction has been concluded, hence, should not be considered bereft of value. Only the preponderance of evidence threshold as applied in ordinary civil cases is needed to substantiate a claim for tax refund proper."

5. COMMISSIONER OF INTERNAL REVENUE, *Petitioner*, vs. FORT BONIFACIO DEVELOPMENT CORPORATION, *Respondent*, G.R. No. 167606, August 11, 2010 (Mendoza, J.).

Facts:

This case centers on the requirements of a valid appeal. Petitioner Commissioner of Internal Revenue (CIR) in this case seeks the reconsideration of the decision of the Court of Appeals (CA) wherein the CIR failed to follow the rules on appeal citing "plain oversight, the motions for extension of time and the petition for review that it filed were erroneously titled."

Respondent countered, among others, that: (1) the title of the above-entitled case is erroneous; (2) motion for extension had already expired; (3) lack of compelling reason; (4) "it is not

accompanied by a clearly legible duplicate original or a certified true copy of the award, judgment, final order or resolution appealed from, together with certified true copies of such material portions of the record referred to therein and other supporting papers"; (5) lack of material dates on appeal.

Issue:

"Whether or not the Court of Appeals correctly dismissed the original Petition for Review, and denied admission of the Amended Petition for Review."

Held:

The Supreme Court (SC), in deciding in favor of respondent Fort Bonifacio Development Corporation (FBDC), and finding the CA correct, ruled:

"The right to appeal is not a natural right. It is also not part of due process. It is merely statutory privilege and may be exercised only in the manner and in accordance with the provisions of the law. Thus, one who seeks to avail of the right to appeal must comply with the requirements of the Rules. Failure to do so often leads to the loss of the right to appeal. The failure to timely perfect an appeal cannot simply be dismissed as a mere technicality, for it is jurisdictional. Thus: Nor can petitioner invoke the doctrine that rules of technicality must yield to the broader interest of substantial justice. While every litigant must be given the amplest opportunity for the proper and just determination of his cause, free from the constraints of technicalities, the failure to perfect an appeal within the reglementary period is not a mere technicality. It raises a **jurisdictional** problem as it deprives the appellate court of jurisdiction over the appeal. **The failure to file notice of appeal within the reglementary period is akin to the failure to pay the appeal fee within the prescribed period. In both cases, the appeal is not perfected in due time.**" [Emphasis supplied]

2 Invoicing and Accounting Requirements for VAT-Registered Persons.

3 Issuance of Receipts or Sales or Commercial Invoices.

“It has been ruled that **perfection of an appeal** in the manner and within the period laid down by law is **not only mandatory but also jurisdictional**. The failure to perfect an appeal as required by the rules has the effect of defeating the right to appeal of a party and precluding the appellate court from acquiring jurisdiction over the case. X x x.

“Public policy and sound practice demand that judgments of courts should become final and irrevocable at some definite time fixed by law. Such rules are necessary incidents to the

proper, efficient and orderly discharge of judicial functions. Just as the losing party has the privilege to file an appeal within the prescribed period, so does the winner also have the correlative right to enjoy the fruits of his victory. Failure to meet the requirements of an appeal deprives the appellate court of jurisdiction to entertain any appeal. Undeniably, there are exceptions to this rule. Petitioner, however, did not present any circumstances that would justify the relaxation of said rule.”

Petition of the Commissioner of Internal Revenue was denied.



TAX BITS is an official publication of the Senate Tax Study and Research Office (STSR) located at Rm. 524, Senate of the Philippines, Financial Center, Pasay City.
 Website: <http://www.senate.gov.ph>
 Email: attydascil@yahoo.com, taxbits@yahoo.com
 Telefax No.: 552-6849 ; Tel. No. : 552-6850

Editors and Contributing Writers

Atty. RODELIO T. DASCIL, MNSA
 Director General

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

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

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

VIVIAN A. CABILING
 Director III, Indirect Taxes

JULIETA M. FONTIVEROS
 Director II, Legal & Tariff

NORBERTO M. VILLANUEVA
 Director II, Tax Policy & Admin

ELVIRA P. CRUDO
 Director II, Direct Taxes

Director II
 (Vacant)

MA. AURALIZ MIDI B. SABANGAN
 LSO-III, Direct Taxes Branch

CLINTON S. MARTINEZ
 LSO-I, ODG

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

The Articles were principally prepared by the authors, under the supervision of STSR Directors and the overall guidance of its Director-General. The views and opinions expressed are those of STSR and do not necessarily reflect those of the Senate, its leadership, or its individual members. For comments and suggestions, please email us at attydascil@yahoo.com, or taxbits@yahoo.com.