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The Passage of the CREATE Law: The End of a Long and Winding Journey

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During the 10th Congress (1995-1998), House Bill No. 4935 [1] or "The Investments and Incentives Code" was filed in the House of Representatives. The measure – introduced in 1995 and regarded as the first ever fiscal incentives reform bill – was re-filed every year thereafter. But it was only in May 2009 during the 14th Congress when House Bill No. 5241 was approved on third reading in the Lower House and eventually transmitted to the Senate for concurrence. The HOR-approved incentives rationalization measure, however, despite being sponsored jointly at the Senate by the Committees on Economic Affairs, Trade and Commerce, and Ways and Means under Committee Report No. 784, was never tackled at the plenary.

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On September 13, 2021 during this present 18th Congress, the House of Representatives approved on 3rd Reading House Bill No. 4157 or the Corporate Income Tax and Incentives Rationalization Act (CITIRA). Upon transmittal to the Senate, the bill – the second package of the Duterte administration's Comprehensive Tax Reform Program (CTRP) – was amended and renamed the Corporate Recovery and Tax Incentives for Enterprises or CREATE. The bill was revised and restructured further in the Senate to make it more relevant and responsive to the needs of businesses negatively affected by the COVID-19 pandemic, and to improve the ability of the Philippines to attract highly desirable investments that will serve the public interest.

Senate approved CREATE Bill
Photo by senate.gov.ph

The CREATE measure was eventually approved by the Senate on November 26, 2020 and ratified by both legislative chambers on February 3, 2021. On March 26, 2021, after some twenty-five (25) years after the filing of the first incentives reform measure, and almost twelve (12) years after the approval of a similar version in the House of Representatives, President Rodrigo Roa Duterte finally signed into law Republic Act No. 11534, otherwise known as the Corporate Recovery and Tax Incentives for Enterprises Act or the CREATE law. It is instructive to note, however, that some provisions were vetoed.

Biggest Fiscal Stimulus for Enterprises

The passage of the CREATE measure is not coincidental or a mere reflex response of the government to an ailing economy. Although the law comes in the midst of great uncertainties arising from the adverse economic implications of the Covid-19 pandemic, it is actually the culmination of almost three (3) decades of initiative to restructure and modernize the fiscal incentives system in the country. The recent approval by the President of Republic Act No. 11534 or the Corporate Recovery and Tax Incentives for Enterprises (CREATE) Act – after a long and winding journey – could well be a blessing in disguise. The onset of the Covid-19 health crisis early in 2020 has prompted the framers of the law to recalibrate its context and intent, making it more relevant by refocusing its coverage and beneficial impact not just to enterprises registered with Investment Promotion Agencies (IPAs) and other incentives-administering entities but to the entire business sector especially the micro, small and medium enterprises (MSMEs).

Thus, consistent with being the first-ever revenue-eroding tax reform in the country's history, CREATE has also become the largest fiscal stimulus program for enterprises, providing about One (1) trillion pesos worth of tax relief over the next ten (10) years.[2] In particular, the law intends to (a) improve the equity and efficiency of the corporate tax system by lowering the rate, widening the tax base, and reducing tax distortions and leakages; (b) develop a more responsive and globally-competitive tax incentives regime that is performance-based, targeted, time-bound, and transparent; (c) provide support to businesses in their recovery from unforeseen events such as an outbreak of communicable diseases or a global pandemic and strengthen the nation's capability for similar circumstances in the future; and (d) create a more equitable tax incentive system that will allow for inclusive growth and generation of jobs and opportunities in all the regions of the country and ensure access and ease in the grant of these incentives especially for applicants in least developed areas.

Reduction of the Corporate Income Tax (CIT) Rate

The enactment of CREATE paved the way for the grant of the largest ever CIT rate reduction in the country. It provided an immediate 10-percentage point reduction from the current 30% CIT rate of domestic corporations with net taxable income not exceeding Five million pesos (P5,000,000.00) and with total assets not exceeding One hundred million pesos (P100,000,000.00), excluding land. All other domestic corporations and foreign corporations will now have to pay 25% CIT. Also, because of the COVID-19 pandemic, the law temporarily reduced the minimum corporate income tax (MCIT) rate from 2% to 1% from July 1, 2020 to June 30, 2023.

Senate President Vicente C. Sotto III
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The centerpiece idea to veer away from the imposition of a flat CIT rate for all corporations, and instead impose a more progressive tax rate by taking into consideration the size of the domestic corporation came from the Senate. In the deliberations, Senate President Pro-Tempore Ralph G. Recto emphasized the different kinds of domestic corporations, viz. micro, small, medium, and large, which should not be taxed with the same rate since the size of their income and assets vary. MSMEs comprise 99.5% of all businesses in the country and a mere 0.5% are large enterprises. They also employ 62% of the total work force. This idea was supported by the Chairperson of the Committee on Ways and Means, Senator Pia S. Cayetano, and the Senate-at-large. This was later on adopted by the House of Representatives with some refinements.


Senator Pia S. Cayetano
Chairperson, Committee on Ways and Means
Photo by senate.gov.ph

With the immediate reduction of the CIT rate to 20%, MSMEs are considered to be the biggest beneficiaries of the law. The immediate and substantial reduction in the CIT will provide a lifeline for struggling business affected by the ongoing COVID-19 pandemic, according to Senator Cayetano. The Senator further said that this will be a game changer for all business — both big and small — who need as much support as they can get during this time of global health and economic crisis. Businesses will have more cash at their disposal, which they can use for inventory, for capital equipment, for employee benefits and more. This change might be what our country needs to revive our severely affected economy.

Repeal of the Improperly Accumulated Earnings Tax (IAET)

As expounded by PriceWaterhouseCooper (PwC), the concept of improperly accumulated earnings tax (IAET) has been present in our jurisdiction even prior to the 1939 Tax Code. Although it was momentarily absent from our tax laws from 1986 to 1997 due to its repeal under Executive Order No. 37, IAET was reinstated 12 years after in the 1997 Tax Code. Despite its long-standing presence in our tax system, however, its application and interpretation continue to challenge our tax authorities, as well as our tax courts.

The 10% IAET is imposed on improperly accumulated taxable income of a corporation for the purpose of avoiding the income tax with respect to its shareholders, by permitting the earnings and profits of the corporation to accumulate instead of distributing them to the shareholders. The rationale is that if the earnings and profits were distributed, the shareholders would then be liable for income tax, whereas if there was no distribution, they would incur no tax with respect to the undistributed earnings and profits of the corporation. Thus, IAET is a penalty on the corporation for the improper accumulation of earnings to avoid the payment of dividends tax on the distribution to shareholders. If the failure to pay dividends is due to some other causes, however, such as the use of undistributed earnings and profits for the reasonable needs of the business, such purpose would not generally make the undistributed earnings subject to tax.

As explained by the Supreme Court (G.R. No. L-26145 dated Feb. 20, 1984), in order to determine whether profits are accumulated for the reasonable needs of the business, the controlling intention of the taxpayer is that which is manifested at the time of accumulation, not subsequently declared intentions which are mere afterthoughts. A speculative and indefinite purpose will not suffice. The mere recognition of a future problem and the discussion of possible and alternative solutions is not sufficient. Definiteness of plan coupled with action taken toward its consummation are essential. Taking these into consideration, the CREATE Act now repeals this provision by removing the 10% tax on improperly accumulated earnings of corporations.

Temporary Reduction of Tax for Proprietary Educational Institutions and Hospitals

Proprietary educational institution "is one registered with the Securities and Exchange Commission (SEC) as a private stock corporation to engage in maintaining and administering a school – pre-school, kindergarten, primary, secondary, tertiary or college, post-graduate studies, technical and vocational education". [3]


Senate Majority Leader Juan Miguel F. Zubiri
Photo by senate.gov.ph

"It is a profitable venture of a private school governed by a Board of Directors, owned by stockholders, and which issued dividends based on the results of its operations. [4] It operates like any other domestic stock corporation in the Philippines except that it has to strictly adhere to the rules and regulations applicable to educational institutions based on the permit to operate duly issued by the Department of Education (DepEd), Commission on Higher Education (CHED) and Technical Education Skills and Development Authority (TESDA)." [5]

Proprietary educational institutions were originally imposed a tax rate of 8% of their net taxable income in 1939. Starting 1953, the tax rate was increased to 10%. In 1998, their tax is still at 10%. However, there is a condition that was put in place that if their gross income from unrelated trade, business or other activity exceeds 50% of the total gross income derived from all sources, they have to pay 34%, 33% in 1999, and 32% starting 2000. Starting 2005 and before the passage of CREATE, their tax rate is 10%, and 30% if their gross income from unrelated trade or business exceeds 50%.

In this time of pandemic where most of our private schools struggled financially and some even closed down, our lawmakers saw the need to provide them with the relief that they need. Thus, reducing temporarily to 1% instead of the 10% tax starting July 1, 2020 to June 30, 2023.

Additional Transactions Exempt From The Value-Added Tax

Against a backdrop of the effects of the COVID-19 pandemic, our government continues to focus on efforts to fight the spread of the disease while keeping our economy afloat. To assist industries in terms of liquidity, CREATE opens up an opportunity for the government to share in the burden of businesses.

Aside from the VAT exemption provided for the sale or importation of prescription drugs and medicines for diabetes, high cholesterol, and hypertension, the sale or importation of prescription drugs and medicines for cancer, mental illnesses, tuberculosis, and kidney diseases has been provided VAT exemption by CREATE beginning January 1, 2021.[6] This is beneficial to Filipinos with these illnesses given the increase in the demand for such prescription drugs during the pandemic.

CREATE likewise covered businesses which engage in the prevention, treatment, and control of the dreaded COVID-19. The sale or importation of capital equipment, its spare parts and raw materials, necessary for the production of personal protective equipment components such as coveralls, gowns, surgical caps, surgical masks, N-95 masks, scrub suits, goggles and face shields, double or surgical gloves, dedicated shoes, and shoe covers, for COVID-19 prevention; all drugs, vaccines, and medical devices specifically prescribed and directly used for the treatment of COVID-19; and drugs for the treatment of COVID-19 as approved by the Food and Drug Administration (FDA) for use in clinical trials, including raw materials directly necessary for the production of such drugs, are now exempt from VAT from January 1, 2021 until December 31, 2023.[7] As elucidated by Senator Pia Cayetano in the February 1, 2021 bicameral conference committee meeting on the disagreeing provisions of CREATE and CITIRA, there is a strong chance that businesses will devote tax savings to create new jobs when complemented by a quick vaccine rollout.

For persons whose sales are exempt from VAT, specifically those whose gross annual sales and/or receipts do not exceed the amount of Three million pesos (P3,000,000) and who are not VAT-registered, they will pay a percentage tax of one percent (1%), down from 3%, effective July 1, 2020 until June 30, 2023.[8]

For the education sector that has been hard-hit by the pandemic, CREATE removed VAT from the sale, importation, printing or publication of books and any newspaper, magazine, journal, review bulletin, or any such educational reading material covered by the UNESCO Agreement on the Importation of Educational, Scientific and Cultural Materials, including digital or electronic formats thereof.[9]

For registered projects or activities under the CREATE, VAT exemption on importation and VAT zero-rating on local purchases shall only apply to goods and services directly and exclusively used in the registered project or activity by a registered enterprise.[10] Crude oil that is intended to be refined in a local refinery, including volumes that are not converted to petroleum products when it actually undergoes the refining process is likewise exempt from VAT.

The foregoing benefits provided by CREATE help us sustain, from the COVID-19 pandemic perspective, the gains we reaped from the implementation of both the Bayanihan to Heal As One Act (RA No. 11469) and Bayanihan To Recover As One Act (RA No. 11494).

CREATE Revenue Impact

The DOF estimates a slightly negative revenue impact of around -0.03 percent of GDP annually from 2020 to 2030. While the second package of the CTRP was intended to be revenue neutral, additional provisions targeted towards the country's pandemic response, the immediate 5 to 10 percentage point CIT cut, and the imposition of the 10-year transition period for existing RBEs under the GIE regime contribute to the manageable deficit impact.[11]

Table 1. Revenue Impact, in billion pesos

Provisions	Total (2020-2030)	Average (2020-2022)	Average (2020-2030)
Lowering of CIT from existing firms	-1,016.2	-67.2	-92.4
1. Graduated CIT for domestic corporations	-963.8	-54.5	-87.6

Provisions	Total (2020-2030)	Average (2020-2022)	Average (2020-2030)
2. Income tax reduction for proprietary, non-profit institutions	-0.1	-0.0	-0.0
3. MCIT reduction	-52.3	-12.7	-4.8
Revenue enhancing measures	-34.3	-5.3	-3.1
1. Rationalization of ROHQ incentives	12.6	0.3	1.1
2. Rationalization of IPA incentives	-47.0	-5.6	-4.3
VAT and duties	-58.9	-5.6	-5.4
Percentage tax	-18.4	-4.8	-1.7
Total	-1,127.8	-83.0	-102.5
Deficit impact (% of GDP)	-0.303	-0.388	-0.303

Source: DOF (as of April 28, 2021)

Equitable and Rationalized Tax Incentives Scheme

The CREATE law introduces a new Title XIII in the National Internal Revenue Code, as amended. The provisions on tax incentives articulate the rationalized scheme covering 1) the menu of incentives and scope of the new regime; 2) the conditions and period of incentives availment; 3) the mandate and composition of the expanded Fiscal Incentives Review Board (FIRB); 4) the restructured Strategic Investment Priority Plan (SIPP); 5) the power of the President to grant incentives; 6) the qualifications of registered business enterprises; 7) the management, monitoring, evaluation, and reporting of tax incentives; and 8) the transitory provisions, among others.

Table 2. Comparative Incentives Menu

Particulars	Pre-CREATE		CREATE	
	Exporters	Domestic Market Enterprise	Exporters	Domestic Market Enterprise
Approval of Incentives	IPA	IPA	IPA or FIRB	IPA or FIRB
FIRB Oversight	None	None	All	All
Industries Covered	IPA Charter	Defined in the IPP	Activities defined in the SIPP	Activities defined in the SIPP
ITH	4-6 years	4-6 years	4-7 years	4-7 years
Extension of ITH	2 more years, and 3 years for expanding firms	2 more years, and 3 years for expanding firms	Not applicable	Not applicable
Additional incentives for relocation outside of NCR and in disaster/ conflict areas	None	None	Relocation outside of NCR: additional ITH of 3 years Relocation to areas recovering from disaster/ conflict: additional ITH of 2 years	Relocation outside of NCR: additional ITH of 3 years Relocation to areas recovering from disaster/ conflict: additional ITH of 2 years

CREATE expands the power of the current FIRB from an overseer of tax subsidies for government agencies and government-owned and controlled corporations (GOCCs) to a grand policymaker, regulator, and administrator relative to the grant of tax subsidies to government agencies and tax incentives by IPAs and other incentives-administering entities. The Secretaries of the Department of Finance and Trade and Industry shall sit as co-chairpersons of the new FIRB while the Executive Secretary of the Office of the President, the Secretary of the DBM, and the Director General of NEDA shall be its members. The FIRB assumes responsibility as approver of tax incentives for projects/ activities worth above 1 Billion pesos while the approval of those whose value is P1 Billion and below is delegated to the IPA where the application for incentives is filed. While the FIRB's power to grant incentives is limited to the aforementioned value threshold, it maintains its overall oversight and regulatory mandate over all registered business enterprises (RBEs), IPAs, and similar entities or instrumentalities.

The law likewise redefines the current Investment Priority Plan (IPP) – as structured under Executive Order No. 226 or the Omnibus Investment Code of 1987 – and renames it as the Strategic Investment Priority Plan (SIPP). The new SIPP shall be formulated by the Board of Investments (BOI), in coordination with the FIRB, IPAs, other government agencies administering tax incentives, and the private sector, subject to the President's approval. The SIPP, subject for review and amendment every three (3) years, may contain recommendations for types of non-fiscal support needed to create high-skilled jobs to grow a local pool of enterprises, particularly MSMEs, that can supply to domestic and global value chains.

The restructuring of the SIPP is consistent with the law's explicit intent to make it as the ultimate reference or basis in the grant of incentives. As provided, only projects/ activities that are identified and listed in the investment plan shall be considered in the grant of incentives. Hence, those that are not included in the SIPP shall automatically be disqualified to apply for tax incentives.

Table 3. Restructuring of Incentive Options

Particulars	Pre-CREATE		CREATE	
	Exporters	Domestic Market Enterprises	Exporters	Domestic Market Enterprises
ITH Duration	4-6 years	4-6 years	4-7 years	4-7 years
Option 1: ITH + 5% tax on gross income earned (GIE)				
SCIT/ GIE Duration	5% GIE forever	None	5% GIE for 10 years	Not applicable
ITH + SCIT/ GIE Duration	Forever	Forever	14-17 years (ITH: Up to 7 years, and GIE: 10 years)	Not Applicable
Option 2: ITH + enhanced deductions (ED)				
Enhanced Deductions Duration	None	None	10 years	5 years
ITH + Enhanced Deductions Duration	None	None	14-17 years (ITH: Up to 7 years, and ED: 10 years)	9-12 years (ITH: Up to 7 years, and ED: 5 years)

The centerpiece of the new Title XIII of the NIRC under the CREATE law is the menu of tax incentives. Unlike the previous regime, where numerous fiscal and non-fiscal incentives were granted through various laws including IPA charters, the list of incentives under the new law was framed to be leaner but otherwise targeted, time-bound, and performance-based. The scheme covering its grant was devised likewise to be simpler and less complicated, thus, easier to implement and administer. In this sense, the grant of incentives between and among qualified projects/ activities may differ not much on the kind of incentives – being constant and pre-determined – but more on the period of availment.

The fixed menu of incentives as per CREATE are as follows: (1) Income Tax Holiday (4-7 years for all industries); (2) Special Corporate Income Tax (10 years for export only after ITH); (3) Enhanced Deductions (10 years for export and 5 years for domestic after ITH); (4) Duty exemption on importation of capital equipment, raw materials, spare parts, or accessories (available for all industries); and (5) VAT exemption on importation and zero-rating on local purchases (available for all industries).

The law is more biased toward the grant of superior incentives to export industries, taking into account the substantial contribution of the sector in economic development through the inflow of foreign direct investments (FDI), employment generation, and transfer of technology, among others. Therefore, while the ITH, Enhanced Deductions, VAT and duty exemption may be granted both for export and domestic enterprises, the SCIT or 5% rate on gross income is exclusively available for export industries.

The determination of the period of availment is based both on the economic level of the location of the registered activity and on the type of the industry. The combination of these criteria, as applied to incentive applications, decides the period of years a qualified activity may enjoy the set of incentives granted. Hence, the lower the economic level of the area where the project will be located, and the more critical or significant to economic development the applied activity is, the longer period of incentives may be granted. Conversely, economically developed areas and less prioritized industries as per the SIPP shall get shorter period of incentives. Moreover, industries located in areas recovering from armed conflict or major disaster and those relocating from NCR during the duration of their incentives shall get two (2) and three (3) additional years of ITH, respectively.

Table 4. Incentives by Location

Location	Incentives	Duration of Tax Incentives by SIPP Tier and Location (Years)		
		Tier I	Tier II	Tier III
NCR	**Export market industries:** ITH for 4 to 7 years; 5% tax on GIE/SCIT or Enhanced Deductions (ED) for 10 years thereafter	4 ITH +10 ED/SCIT	5 ITH +10 ED/SCIT	6 ITH + 10 ED/SCIT
Metropolitan Areas, or Areas Contiguous and Adjacent to NCR		5 ITH + 10 ED/SCIT	6 ITH + 10 ED/SCIT	7 ITH + 10 ED/SCIT
All other areas		6 ITH + 10 ED/SCIT	7 ITH + 10 ED/SCIT	7 ITH +10 ED/ SCIT
NCR	**Domestic market industries:** ITH for 4 to 7 years Enhanced Deductions (ED) for 5 years thereafter	4 ITH + 5 ED	5 ITH + 5 ED	6 ITH + 5 ED
Metropolitan areas, or areas contiguous and adjacent to NCR		5 ITH + 5 ED	6 ITH + 5 ED	7 ITH + 5 ED
All other areas		6 ITH + 5 ED	7 ITH + 5 ED	7 ITH + 5 ED

The location of the registered project or activity shall be prioritized according to the level of development as follows: (1) National Capital Region; (2) metropolitan areas (as determined by NEDA) or areas contiguous and adjacent to the National Capital Region; and (3) all other areas. The industry of the registered project or activity shall be prioritized according to national industrial strategy specified in the SIPP, where the coverage of the tiers and conditions for eligibility of the activities are defined.

Notwithstanding the provisions covering the conditions (Section 295) and period of incentives availment (Section 296), the President is granted with authority, upon the recommendation of the FIRB, to modify the mix, period or manner of availment of incentives provided in the law, or craft the appropriate financial support package for a highly desirable project or a specific industrial activity based on defined development strategies for creating high-value jobs, building new industries to diversify economic activities, and attracting significant foreign and domestic capital or investment, and the fiscal requirements of the activity or project. This discretion by the President to grant modified set of incentives – including ITH and SCIT rate of 5% for a period not exceeding forty (40) years – was not part of the vetoed items, thus, was sustained in the law.

Table 5. Transition Period of Incentives

Particulars	CREATE	
	Exporters	Domestic Enterprises
Transition Period	Currently in ITH: Finish as per contract/ schedule Existing firms under 5% GIE incentive: 10 years @ 5% GIE	

CREATE provides a gradual if not longer transition from the current to the newly enacted incentives regime. Registered business enterprises whose projects or activities were granted an income tax holiday prior to the effectivity of the law are allowed to continue with their availment for the remaining period as specified in their registration contracts. On the other hand, those currently availing of the 5% GIE are likewise allowed to enjoy such incentives for ten more (10) years.

President Rodrigo Roa Duterte
Photo by pcoo.gov.ph

Implications of the President's Veto

When President Rodrigo Roa Duterte approved RA No. 11534 or the CREATE law on March 26, 2021, he also vetoed some of its provisions. The following are the vetoed items along with the possible implications of such disapproval, namely:

1. <u>Increasing the VAT-exempt threshold on sale of real property: Item (P) of the amended Section 109 of the NIRC, as amended, under Section 12 of the law.</u> – The veto retains the current threshold of VAT exemption for sales of house and lot and other residential dwellings valued at P2.5 Million and below, pursuant to the Tax Code, as amended by the TRAIN law. The adjustment of the VAT threshold to P4.2 Million and below as per CREATE indeed excludes from the net those taxpayers who have the capacity to spend more on real estate properties. While the deletion of the proposed adjustment would be advantageous in terms of expanding the tax base – thus, generating more revenue – and in enforcing a tax regime that is fair and not distortive, it would effectively allow for the increase in the cost of house acquisition and may adversely impact on the government's parallel effort to address the country's severe housing backlog and provide more shelter for the people.

2. <u>Mandating a ninety (90)-day period for the processing of general tax refund (Deleting the entire Section 14 of the CREATE Act).</u> – The President lauds but at the same time views the proposed 90-day threshold in the diligent processing of tax refund as difficult to implement, citing that this may compel the BIR to either act on the tax refund haphazardly or deny an application outright due to the short assessment period allowed in the CREATE law. While this may hold true, this is not entirely impossible and impractical if the BIR would have the interest and decisiveness to employ the right administrative process and system. In suggesting the creation of mechanisms that would streamline the process of tax refund, although in a separate administration bill, the President impliedly suggests his concurrence with the legislators' view that the current system is indeed flawed and needs urgent reforms.

3. <u>Definition of "Investment Capital": Item (G) of the new Section 293 of the National Internal Revenue Code of 1997, as amended, under Section 16 of the CREATE Act.</u> - The veto, which effectively sustains the inclusion of the value of land and working capital in the formula for the computation of investment capital, is convenient and advantageous to investors. While it may translate to a less stringent condition and may encourage more investments, it defeats the intent of Congress to require more considerable investment in the form of buildings, machineries, equipment, and infrastructure. Legislators deem that the willingness of investors to make huge investment in such capital outlays would indicate their sound financial capacity as well as their willingness to establish their operations in the country in the long term. Including the value of land and working capital in the formula would easily allow investors to come up with the required investments and make them eligible for better incentives – without having to spend substantially on infrastructure and machineries.

4. <u>Redundant incentives for domestic enterprises: Portions of the new Sections 294, 295, and 196 of the Tax Code, under Section 16 of the CREATE Act.</u> – The veto of the President further reduces the incentives granted to domestic enterprises as compared to those offered to export industries. The President's veto 1) removes the distinction between a critical and non-critical domestic activity and simply classifies them as domestic market enterprise/activity; and 2) retains the 4-7 years of ITH for domestic market enterprises as well as the 5 years of Enhanced Deductions thereafter, but removes the grant of SCIT/5% GIE as an option after ITH expiration. The removal of the SCIT or 5% GIE incentives for domestic enterprises will have no greater impact on the country's domestic enterprises considering that E.O. No. 226 or the Omnibus Investment Code of 1987 does not grant the 5% GIE as an incentive to its locators, which are mostly domestic industries.

5. <u>Allowing existing registered activities to apply for new incentives for the same activity: Provisions under the new Section 296 of the Tax Code under Section 16 of the CREATE Act.</u> – The veto clarifies and sustains the grant of incentives to "qualified expansion or entirely new project" by both export and domestic enterprises, subject to the qualifications provided in the SIPP and performance evaluation by the FIRB. While it supports allowing export enterprises – registered prior to the effectivity

of the law – to have the option to reapply and avail of the incentives granted under Section 294(B) for the same period as provided in said Section, it removes the other option that explicitly allows for an extension for a maximum of 10 years. But even with the deletion of the provision “and may still be extended for a certain period not exceeding 10 years at any one time”, it is our view that said export industries may still apply and be eligible for incentives as long as the registered activities being applied for are qualified expansion or entirely new projects.

6. Limitations on the power of the FIRB: Proviso under the new Section 297 of the Tax Code under Section 16 of the CREATE Act. – The deletion of this provision affirms the stand of the President that although IPAs have the delegated power to grant incentives at a certain threshold (P1 Billion and below), the FIRB remains to be the highest and central policy-making body as far as administration of fiscal incentives in the country is concerned. The veto affirms further the FIRB’s oversight function on all IPAs and particularly over RBEs regardless whether the set of incentives of an RBE was granted either by the FIRB or the concerned IPA based on investment threshold.

7. Specific industries named under activity tiers: Provisions in the new Section 296(B) of the Tax Code, under Section16 of the CREATE Act. – The veto on the specific activities specified under Tiers 1 and 2 in Section 296(B) basically allows for flexibility of the CREATE law in the grant of incentives. Policy thrusts and priorities indeed change overtime and as such, the President views that explicit listing of activities should not be included in the law to allow discretion for future administrations to determine what industries should be given priority and support in terms of incentives. Without the veto, future administrators would have difficulty in revising the legislated listing and would have to depend on Congress in amending the CREATE law for the purpose of accommodating revisions, which may be necessary and relevant to the changing times.

8. Provision granting the President the power to exempt any investment promotion agency from the reform: Provisions under Section 301 of the Tax Code under Section 16 of the CREATE Act. – The veto denies the President with the discretion to fully exempt any IPA, upon its request, from the coverage particularly of Section 297 or from the expanded power of the FIRB to approve and grant incentives to registered business enterprises, and the power to modify the policy on thresholds for FIRB approval, subject to conditions. The CREATE law has already given the President the power to modify the mix, period or manner of availment of incentives provided under this Code or craft the appropriate financial support package for a highly desirable project or a specific industrial activity, subject to stringent and pertinent conditions. Further expanding such power to the extent of completely exempting IPAs from the coverage of the tax incentive provisions of CREATE is indeed unnecessary if not insensible, taking into consideration the risks of exposing the law to undue discretions and self-serving interests of public authorities.

9. Automatic approval of application for incentives: Proviso under the new Section 297(B) of the Tax Code. – The President’s veto is deemed to allow sufficient time for the FIRB to review the application for tax incentives given that such perks are not rights but otherwise, privileges granted by the state. The President may have viewed the proposed twenty (20) days approval period as inadequate for the FIRB to approve or disapprove applications based on merits and regards such processing period limit as tantamount to sacrificing diligence over expediency. In the deletion of the subject provision, business registered enterprises may just have to be vigilant in monitoring the progress of their applications and likewise be prompt in filing complaints relative to acts that may be deemed in violation of RA No. 11032 or the Ease of Doing Business and Efficient Government Service Delivery Act of 2018. Otherwise, the removal of the threshold may encourage delay in the action on applications and worse, may pave the way for corruption arising from undue or abusive discretion by approving authorities.

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4 Ibid.

5 Ibid.

6 Section 109 (AA)

7 Section 109 (BB). Institutionalizes Revenue Regulations No. 6-2020, which implemented the tax exemption provision under Section 4(o) of Republic Act No. 11469, otherwise known as the “Bayanihan To Heal As One Act.”

8 Section 116

9 Section 109 (R)

10 Section 294 (E)

11 The revenue estimates are based on expected cash-flows, as dictated by the filing dates per tax type. For income tax, the revenue impact is 3/4 of the current year, and the balance will spill-over to the succeeding year. For value-added tax and percentage tax, the revenue impact is 11/12 of the current year and the balance will spill-over to the succeeding year. Under cash-flow based revenue estimates, there is no revenue impact for 2020.

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Give GUIDE to the MSMEs

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A little over a year since the pandemic began and not much has changed.

The strict enforcement of the Enhanced Community Quarantine had its second season on the so-called NCR Plus Bubble [1] curfew hours are again in place, and many businesses, especially micro, small and medium enterprises (MSMEs) are still having difficulty to stay afloat – while some have already drowned. The enactment of Republic Act Nos. 11469 and 11494, widely known as the Bayanihans 1 and 2, provided initial buffer to the harrowing effects of the pandemic. However, much more must be done for the country to recover.

A triumvirate of measures are being championed by the Department of Finance to achieve a strong recovery for the domestic economy being battered by the pandemic. These measures include the Corporate Recovery and Tax Incentives Act (CREATE); and the Financial Institutions' Strategic Transfer (FIST) which have already been enacted into laws. The FIST law intends to strengthen the financial sector by enabling banks and financial institutions to extend more credit to more sectors. The CREATE law, on the other hand, intends to attract more investment in the country by lowering the corporate tax rate to 25% from the current 30%, and the same time rationalized the incentives being enjoyed by businesses registered under investment promotion agencies. The passage of the third measure, the Government Financial Institutions Unified Initiatives to Distressed Enterprises for Economic Recovery (GUIDE) bill, is still underway as four bills (Senate Bills No. 1646, 2003, 2048 and House Bill No. 7749) are to be consolidated into one substitution bill.

As drafted, one major feature of the GUIDE bill is the creation of a Special Holding Company (SHC) with the capital infusion from the Land Bank of the Philippines (LBP) and Development Bank of the Philippines (DBP) of P7.5 billion and P2.5 billion, respectively. The SHC shall assist in rehabilitating strategically important companies (SICs) affected by the COVID-19 pandemic which are experiencing temporary solvency issues. SICs are nationally significant companies with high economic returns and high employment potential that must be able to have upstream and downstream linkages. [2] These upstream and downstream linkages are mainly MSMEs that are supplying or are being supplied to by the SICs.

Another proposal under the GUIDE bill is to expand the Loan Assistance Programs of the LBP and DBP for MSMEs as covered under the Bayanihan 2. These MSMEs should be engaged in infrastructure, service industry, and manufacturing for the DBP, and activities under the agribusiness value chain for the LBP.

Tax provisions under the bill propose tax exemptions and fee privileges to cover the following taxes:

- Documentary stamp tax;
- Capital gains tax;
- Creditable withholding tax;
- Value added tax;
- Gross receipts tax; and
- Other taxes under the NIRC, as amended.

These incentives cover the expanded loan assistance program, rediscounting and other programs of the DBP and the LBP, and transactions of the SHC, such as the subscription or acquisition of shares; execution of convertible loans or purchase of convertible bonds; investment in such other securities as may be issued by the Investee corporations, acceptable to DBP and LBP; and acquisitions of assets of an investee company.

The tax reliefs provided under the GUIDE bills are actually similar to the provisions in *Bayanihan* 2 except that tax and fee exemptions were also added to the loan programs of the LBP and DBP. Tax reliefs are a general theme of many government economic stimulus programs. The objective of granting such tax and fee exemptions, particularly for MSME lending, is to reduce the cost of borrowing. According to the Asian Development Bank [3], obtaining bank finances has always been a factor that hampers MSME growth. Since 2013, the share of MSME credit to total bank credit has been less than 10%. In 2020, it fell to a measly 6.1%. This should not be the case as MSMEs comprise of 99.5% of business establishments, and 62.4% of total employment in the country. [4] The Association of Filipino Franchisers Inc. [5] stated that one of the reasons why MSMEs do not borrow from GFIs is the tedious requirements in loan application.

Keeping the MSMEs' woes in mind, the STSRO recommends that consultation with intended beneficiaries is vital regarding the 3-year validity period of the tax exemptions is enough or if they need additional years to secure their businesses' success rate.[6] This is considering that there is still uncertainty surrounding the end of the pandemic.

The STSRO also proposes that the phrase "*such other taxes*" should be limited to the type of taxes that are generally levied on loan transactions, such as the *gross receipts tax* (GRT), which banks sometimes pass on to their clients.[7] Although it should also be noted that the passed on GRT is considered a form of other fees and charges pursuant to the implementing rules issued by the Bangko Sentral ng Pilpinas (BSP).[8]

Based on the initial Public Hearing for the GUIDE bills, it would seem that SICs will benefit more than MSMEs due to the creation of the SHC. However, the meticulously added tax exemptions make GUIDE truly beneficial to the MSMEs instead of being just a motherhood statement plastered on the explanatory notes. It is hoped that these exemptions will encourage more MSMEs and other qualified local businesses to apply for the financial assistance that will enable them to revive or continue their operations. Give GUIDE to the MSMEs and the overspill effects shall ripple to the domestic economy.

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A Look at NOLCO and MCIT

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Section 4 of RA 11494, otherwise known as Bayanihan II, lists the various Covid-19 response and recovery interventions. Sub-section (bbbb) provides for an extended period of availment of the net operating loss carry-over (NOLCO) from three (3) years to five (5) years, covering the net operating losses for taxable years 2020 and 2021. The provision reads:

> *"(bbbb) Notwithstanding the provision of existing laws to the contrary, the net operating loss of the business or enterprise for taxable years 2020 and 2021 shall be carried over as a deduction from gross income for the next five (5) consecutive taxable years immediately following the year of such loss: Provided, That this subsection shall remain in effect even after the expiration of this Act; and"*

Meanwhile, under the CREATE law (RA 11534), the minimum corporate income tax (MCIT) under Section 27(E) for domestic corporations and Section 28(A)(2) for resident foreign corporations of the National Internal Revenue Code of 1997, as amended, was reduced to one percent (1%) from July 1, 2020 to June 30, 2023.

<u>Implications of the NOLCO with MCIT</u>

The NOLCO provision in Bayanihan II effectively amends Section 34 of the Tax Code. The extension by two (2) years in the availment of NOLCO for distressed business or enterprise is to ensure the recovery of losses.[1]

The MCIT occurs when the minimum income tax is greater than the tax computed under the said sections. The concept of MCIT came about as a result of the perceived inadequacy of the present self-assessment system in capturing the true income of firms that should be subject to tax. The MCIT is expected to provide a reasonable measure of the actual corporate income tax that a corporation ought to be paying on the basis of its available resources.[2] The MCIT is imposed whenever such corporation has zero or negative taxable income or whenever the amount of minimum corporate income tax is greater than the normal income tax due from such corporation.[3] In other words, despite periods of operating losses, a corporation has to pay a minimum corporate income tax based on gross income.

The continued presence of the MCIT in the Tax Code, despite its reduction by 1-percentage point until June 30, 2023 under the CREATE law, puts to naught the noble intention of Bayanihan II that allows business enterprises a longer period to "carry over" their net operating losses.

The Tax Code authorizes the Finance Secretary to suspend the imposition of the MCIT on any corporation which suffers losses on account of prolonged labor dispute, force majeure, or legitimate business reverses [Section 27(E)(3)]. The existence of the Covid-19 pandemic should have been the most appropriate timing for the exercise of such authority. Moreover, application for relief is not automatic. The taxpayer would still need to file an application, and securing the approval is a long and tedious process.[4]

The illustration below seeks to amplify the foregoing analysis.

Gross sales (2020)		P5,000,000
Less: Sales returns, discounts and allowances	P100,000	
Cost of goods sold	2,000,000	2,100,000
Gross income		2,900,000
Less: Allowable deductions		3,000,000
Taxable income (Net operating loss)		P(100,000) =========

NOLCO under Bayanihan II
The net operating loss of P100,000 may be carried over for 5 years, i.e., from 2021 to 2025, say on equal annual amount of P20,000.

MCIT under CREATE
Since the MCIT was not suspended or repealed – just reduced from 2% to 1% up to June 30, 2023, the corporation still needs to pay P29,000 (P2,900,000 x 1% of gross income).

The above example shows that a "distressed" corporation still has to pay a certain amount of "minimum" tax even if it was allowed to "carry over" its net operating loss for a longer term.

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The Tourism Infrastructure and Enterprise Zone Authority

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The Tourism Infrastructure and Enterprise Zone Authority

Tourism is an indispensable component of the national economy and an industry of national importance, which must be harnessed as a mechanism of socio-economic development and cultural support. The tourism sector is considered a priority area that is able to drive efforts to encourage inclusive growth, reduce poverty, promote private sector participation and preserve natural and cultural heritage. Achievement in tourism initiatives can be seen through various government schemes.

The huge potential of tourism as driver of growth was further strengthened by the passage of Republic Act No. 9593 also known as "The Tourism Act of 2009". The law declares tourism as an engine of investment, employment, growth and national development. Aside from strengthening the mandate and jurisdiction of the Department of Tourism (DOT) and its attached agencies, the law created the Tourism Infrastructure and Enterprise Zone Authority (TIEZA). The agency/government corporation acts as the DOT's implementing arm in providing support infrastructures and facilitating investments throughout the Philippines. It supports the establishment of Tourism Enterprise Zones (TEZs) to be the centers of tourism development nationwide. Tourism enterprises are facilities, services, and attractions primarily engaged in whole or in part in tourism and for the purpose of attracting visitors to and within the country.

The primary functions of TIEZA are 1) building tourism infrastructure; 2) designation, regulation and supervision of Tourism Enterprise Zones (TEZs); 3) operation and management of TIEZA assets; and 4) collection of the Philippine Travel Tax.

The travel tax collection share of TIEZA fuels the priority tourism projects, activities and programs. Travel tax is a levy imposed by the Philippine government on individuals who are leaving the country irrespective of the place where the air ticket is issued and the form or place of payment, as provided for by Presidential Decree 1183, as amended. Pursuant to Section 73 of RA No. 9593, fifty percent (50%) of the proceeds from travel tax collections shall accrue to the TIEZA, forty percent (40%) shall accrue to the Commission on Higher Education (CHED) for tourism-related educational programs and courses, and ten percent (10%) shall accrue to the National Commission for Culture and Arts (NCCA).

TIEZA-Registered Enterprises and Activities Eligible for Incentives

The eligibility criteria for TIEZA registration are as follows: a) must locate business in a Tourism Enterprise Zone (TEZ) and register with TIEZA; or b) must engage in tourism activities included in the Investment Priority Plan (IPP) of the Board of Investments (BOI).

- The Primary Tourism Enterprises refer to facilities and services that are directly related to tourism such as, but not limited to travel and tour services; inbound travel agencies and tour operators, local tour operators, ecotour operators, and tour guides; tourist transport services whether for land, sea, and air transport; accommodation establishments such as but not limited to hotels, resorts, apartment hotels, tourist inns, motels, pension houses, private homes used for homestay, ecolodges, condotels, serviced apartments, and bed and breakfast facilities; hotel and tourism estate management services; meetings, incentives, conventions and exhibition organizers and facilities; sports and recreational facilities such as but not limited to dive shops, amusement parks, and adventure and ecotourism facilities; and foreign exchange dealers and such enterprises as may be identified by the Secretary, after due consultation with concerned sectors.

- Secondary Tourism Enterprises refer to facilities and services that may be related to tourism such as, but not limited to restaurants; specialty shops and department stores; sports facilities and recreational centers such as museums and galleries, theme parks, zoos; health and wellness facilities such as but not limited to spas, tertiary hospitals, ambulatory clinics, and medical concierge; rest areas in gas stations; agri-tourism farms and facilities; tourism training centers or institutes, including tourism trainers; outbound travel agencies; and other enterprises as may be identified by the Secretary after due consultation with concerned sectors.

Fiscal and Non-Fiscal Incentives for Registered Tourism Enterprises

These are the various incentives granted by TIEZA to qualified registered activities: Income Tax Holiday; Net Loss Carry Over; Gross Income Taxation; Tax and Duty-Free Importation of Capital Investment and Equipment, Transportation Equipment and Spare parts and Goods and Services; Tax Credit; Social Responsibility Incentive; Employment of Foreign Nationals; Special Investor's Resident Visa; Lease of Land; and Right to Foreign Currency Transactions.

Incentives for Enterprises Outside TEZs, which shall undertake substantial expansion or upgrade of its facility, may similarly be granted with Income Tax Holiday; and Tax and Duty-Free Importation on Capital Investment and Equipment.

Amendment to RA No. 9593 and the CREATE Law

On April 10, 2019, President Rodrigo Roa Duterte signed into law RA No. 11262 which amended RA No. 9593. Said law gave TIEZA sole and exclusive jurisdiction to grant incentives to tourism businesses. This in effect extended the implementation of the incentive scheme for tourism enterprises zones for another 10 years, until December 31, 2029.

However, the enactment of RA No. 11534 or the Corporate Recovery and Tax Incentives for Enterprises (CREATE) Act on March 26, 2021 has repealed the incentive provisions of the charters of all Investment Promotion Agencies (IPAs) including TIEZA. The law, aside from adjusting the Corporate Income Tax rate, the VAT rates of certain transactions, and introducing various amendments to the Tax Code, has rationalized and modernized the grant of tax incentives for registered business enterprises. Upon its full implementation, all IPAs and other incentives administering entities shall cease to grant incentives to registered activities based on their respective charters and shall commence compliance to the provisions of the new Title XIII of the NIRC, with respect to the grant of fiscal incentives.

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Franchise Tax Applied to Philippine Offshore Gaming Operators (POGOs): A New Rule or Not

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Attention has been drawn to Philippine Offshore Gaming Operators (POGOs) due to the proliferation of foreign workers in the Philippines and the pursuit by the government of their outstanding taxes (corporate and personal income taxes) amounting to P20 billion [1] a year. These recent developments raise the question: how are POGOs taxed?

The Congressional Policy and Budget Research Department (CPBRD) of the House of Representatives defined "POGO" [2] as an entity that offers and participates in offshore gaming services by providing games to players, taking bets, and paying the winning players. The gaming activity refers to online games of chance, using a network and software, exclusively for offshore-authorized players who have registered and established an online gaming account with the Philippine Amusement and Gaming Corporation (PAGCOR)-licensed POGO. Filipino citizens, even while overseas, are not allowed to play." [3]

"POGO service providers" as defined by PAGCOR are "corporations which are registered in the Philippines that provide support to the operations of licensed operators in various areas of operations including customer relations, strategic support, IT support, and gaming software platform providers and live studio and streaming providers. They are classified under Business Process Outsourcing (BPO)." [4]

What is a Franchise Tax?

The term "franchise tax" [5] generally refers to a tax paid by certain enterprises that want to do business in some states. Also called a privilege tax, it gives the business the right to be chartered and/or to operate within that state.

In the Philippines, gas and water utilities pay franchise tax of 2% on annual gross receipts, radio and/or television broadcasting companies whose annual gross receipts of the preceding year do not exceed PhP10M pay franchise tax of 3%, and the National Grid Corporation of the Philippines pay 3% on all its gross receipts derived from its operation covered by law.

Taxation of POGOs

Presidential Decree (PD) No. 1869, which took effect on July 11, 1983, and also known as the PAGCOR charter, aimed to consolidate all previously [6] enacted legal instruments concerning the operations of PAGCOR and to regulate all games of chance through an appropriate institution either authorized by an existing franchise or permitted by law.

Sections 13 and 14 of PD 1869 provided for exemptions and other conditions for a franchise to operate gambling casinos, gaming clubs, and other similar recreation or amusement places and gaming pools within the country. The franchise's customs duties are exempt from taxes, fees or charges of any kind if it is gambling-related. The franchises' vessels or accessories for the use of casinos or for the use of operations and requirements of the casinos will also be exempt from any taxes or fees. Moreover, a franchise grantee does not have to pay a tax on income, since it is considered as a government company. Under PD 1869, as amended by Republic Act No. 9487, franchise holders need only to pay 5% franchise tax on the gross revenue or earnings derived from its operations, in lieu of all taxes.

On December 27, 2017, the Bureau of Internal Revenue (BIR) issued **Revenue Memorandum Circular (RMC) No. 102-17** on the ***"Taxation of Taxpayers Engaged in Philippine Offshore Gaming Operations"***, clarifying the taxability of POGOs and their gaming components. Notably,

1. The entire gross gaming receipts/earnings, or the agreed or pre-determined minimum monthly revenues or income from gaming operations, whichever is higher, shall be subject to a franchise tax of five percent (5%), in lieu of all kinds of taxes.

2. Income from non-gaming operations shall be subject to normal income tax, value-added tax (VAT) and other applicable taxes, as may be deemed appropriate.

3. POGO operators are not relieved of their liabilities as tax withholding agents. Hence, compensation, fees, commissions, or any other remuneration for services rendered to a POGO by its employees and service providers (e.g., consultants, contractors) are subject to withholding tax on compensation or to the expanded withholding taxes.

Under RMC No. 102-17, POGO taxpayers can either be a licensee or classified under "other entity". A "licensee" refers to a POGO duly licensed and authorized by PAGCOR to provide offshore gaming services. On the other hand, "other entity" refers to a POGO licensee or any other business entity duly licensed and authorized by PAGCOR to provide a particular or specific component of the offshore gaming activities to the POGO.

RMC No. 102-17 likewise required POGOs to file applicable tax returns and information returns on or before their due dates, pay the correct internal revenue taxes, keep books of accounts and other accounting or business records, and register the business at the Revenue District Office (RDO) of the BIR having jurisdiction over their principal place of business or head office.

Compliance Requirements

On September 18, 2018, the BIR issued RMC No. 78-2018 to provide guidelines in the registration of business entities and persons who will engage in the business of offshore gaming operations, including their agents and service providers, licensed by PAGCOR. Under the said Circular, POGOs and service providers are required to register with the BIR on or before the commencement of business, before payment of any tax due, or before or upon filing of any applicable tax return, statement or declaration as required by the Tax Code, as amended, whichever comes earlier.

The "commencement of business" shall be reckoned from the day when the first sale transaction occurred, or within 30 calendar days from the issuance of the Mayor's Permit or Professional Tax Receipt (PTR) by the local government unit or the Certificate of Registration issued by the Securities of Exchange Commission (SEC), whichever comes first.

All foreign-based and Philippine-based operators, including those that have already been issued a license to operate, are required to register with the RDO having jurisdiction over the principal place of business on or before the commencement of business.

The minimum documentary requirements to prepare and submit are BIR Form No. 1903, SEC Certificate of Incorporation or License to Do Business in the Philippines, Articles of Incorporation, Mayor's Business Permit, Payment of Registration Fee, BIR Form No.1906, a final and clear sample of principal receipts or invoices, and the appointment letter of the Local Gaming Agent.

If a POGO transfers its registered address to a new location, it is the duty of the operator or its Local Gaming Agent to file a BIR registration update (BIR Form No. 1905) on the transfer to the new business address.

RMC No. 78-2018 further clarified that online gaming activity is sufficient to constitute doing business in the Philippines for a foreign corporation. Thus, a foreign POGO is considered a resident foreign corporation engaged in business in the Philippines, and is not considered a non-resident foreign corporation.

Based on the PAGCOR website [7], www.pagcor.ph, there are thirty-two (32) POGOs with Authority to Resume Operations, while there are 119 Accredited Local Gaming Agent and Service Providers as of March 16, 2021.

The Supreme Court Steps In

In the case of *Marco Polo Enterprises Limited, MG Universal Link Limited, OG Global Access Limited, Pride Fortune Limited, et al, vs. the Secretary of Finance, et al.*, the Supreme Court (SC) issued **G.R. No. 254102** on January 5, 2021, a temporary restraining order against a provision of RA No. 11494 or the Bayanihan to Recover as One Act, which imposes 5% franchise tax on the gross bets from gaming operations of POGOs. The temporary restraining order (TRO) was issued following the Supreme Court's regular *en banc* session with a vote of 13-1. The Supreme Court resolved to issue a TRO, *"effective immediately and continuing until further orders, enjoining the implementation of (i) Section 11(f) and (g) of Republic Act No. 11494, (ii) Revenue Regulation No. 30-20 of the Department of Finance and Bureau of Internal Revenue (BIR), and (iii) Revenue Memorandum Circular No. 102-17 and (iv) Revenue Memorandum Circular No. 78-2018, both of the BIR"*, among others.

According to a published news report [8], the Order was issued to avoid 'grave and irreparable injury' to the rights of POGO operators who filed a Petition for Certiorari against the contested provisions, which are measures to address the COVID-19 pandemic by raising more funds and collecting more taxes from POGOs.

Current Tax Treatment of POGOs Not A New Rule

The BIR maintains its stand that no rules were changed despite the claim of PAGCOR that the five percent (5%) franchise tax on foreign-based Philippine Offshore Gaming Operators (POGOs) was not previously imposed.

In response to the memorandum sent by PAGCOR to the Office of the President, the Department of Finance (DOF) said that they support the BIR's comment [9] that foreign-based POGOs should be paying the 5-percent franchise tax, as clearly stated RMC No. 102-17 issued by the agency back in 2017.

BIR Commissioner Dulay likewise corrected the erroneous claim that POGO operators are being assessed and are paying their corporate income taxes, and VAT. He explained that POGO licensees or operators are not being assessed nor paying income tax and other taxes because the BIR's RMC 102-17 clearly states that in lieu of such taxes, they are only subject to the franchise tax. Only POGO service providers are subject to the regular taxes, such as income tax and VAT. However, the compensation incomes of employees who earn compensation income of either POGO operators and service providers should be subject to withholding tax which shall then be remitted to the BIR.

The DOF added that PAGCOR mentioned in its memo that the 5% franchise tax was not previously imposed by the BIR, citing the opinion issued last December 19, 2018 by the Office of the Solicitor General (OSG) as the basis. In response to this, the BIR sent a letter to OSG on 26 April 2019 reiterating the BIR's stand and basis for the imposition of the 5% franchise tax to offshore-based licensed operators.

The Bureau pointed out that the legal opinion issued by the OSG on the said issue "is not binding" because under Sec. 4 of the National Internal Revenue Code, As Amended, it states that:

> *"The power to interpret provisions of the Tax Code and other tax laws shall be under the exclusive and original jurisdiction of the BIR Commissioner subject to review by the Secretary of Finance."*

Resolution on the Interpretations of the DOF and OSG

The DOF and the Office of the Solicitor General (OSG) came to an agreement on the tax obligations of resident POGOs and their employees.

"Foreign-based Philippine offshore gaming companies generating income offshore as it caters to foreign gamblers are indeed not subject to local taxes"[10], according to the DOF and OSG.

In a letter by Solicitor-General Jose C. Calida to Finance Secretary Carlos G. Dominguez III, he clarified the following matters on POGO taxability:

- Gaming operators "strictly and exclusively" deriving income outside the country are not subject to Philippine tax;
- Revenue of Philippine-based POGOs and Philippine service providers are subject to Philippine tax;
- Philippine service providers are companies that employ foreigners here in the Philippines, handle the recording and live streaming of such games, and perform IT support services. Live-streamed games are then sold to foreign-based POGOs, which collect bets from clients through online platform and earn from such activity. The Philippines can then tax the service providers' fees from foreign POGOs, which constitute its revenue;
- The OSG recognizes the BIR's authority to interpret tax laws; and
- In rendering legal opinion, the OSG is performing its mandate under the Administrative Code as the statutory counsel of government and all its departments, bureaus, agencies, and instrumentalities. Thus, OSG's legal opinion on the taxability of POGOs was issued on Dec. 19, 2018 at PAGCOR's request.

On the other hand, DOF Secretary Dominguez provided the following information:

- If the POGO is located outside the Philippines catering to foreign gamblers, then it is not subject to tax in the Philippines. However, the service providers of the POGO located in the Philippines, through its workers/employees residing in the country, is subject to tax and VAT on its fees charged to the non-resident POGO.
- If the actual gaming operator is located in the Philippines and duly licensed by the PAGCOR, its revenue is subject to a 5% franchise tax.

Legislative Initiatives

POGOs are a relatively new online gambling activity and an emerging industry in the country especially during this period where Filipinos are becoming "digital immigrants". The proliferation of POGOs in the country need measures that clarify the tax treatment for these facilities and associated services, through amendments in the NIRC of 1997, As Amended, and will once and for all address the confusion on the taxation of this industry.

In an interesting development, there are initiatives by both Houses, the House of Representatives and the Senate of the Philippines, to introduce the five percent (5%) franchise tax on POGOs into the Tax Code, as amended. <u>This is because currently, the 5% franchise tax on industry is not mentioned in the Tax Code and the basis for imposing the same is the franchise granted to POGOs.</u>

House Bill No. 5777 and Senate Bill No. 2076 seek to address the taxability of POGOs through amendments in the National Internal Revenue Code, as amended. Among others, the proposed measure requires foreign individuals employed by Offshore Gaming Licensees (OGL) to pay personal income tax of 25% on gross income received.

These bills also introduce a 5% gaming tax based on gross revenues or receipts to be remitted directly by the PAGCOR or by the concerned Special Economic Zone Authority to BIR.

In addition, HB 5777 and SBN 2076 also clarify that OGLs shall be considered engaged in doing business in the Philippines, hence liable to payment of proper taxes.

Senate Bill No. 1295 imposes a 30% income tax rate to POGO operators, local gaming agents and service providers and franchise tax equivalent to 5%

of gross receipts.

Our legislators' objective in drafting these bills is to nurture the industry while collecting the proper taxes therefrom. As enunciated by Sen. Franklin M. Drilon during the March 4, 2021 hearing [11] on the POGO Tax Regime, *"If we include and reiterate Section 11 in the proposed measure that we are now hearing, that can no longer be covered by the TRO because certainly, since the bill is an amendment to the National Internal Revenue Code, it cannot be considered a rider"*.

With different government agencies' affirming their support for this measure, the efficient collection of the right taxes from POGOs may be fulfilled.

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Photo by Mike Gonzalez (commons.wikimedia.org)

Digest of Supreme Court Cases in Taxation

by **Clinton S. Martinez**
Director II, Legal and Tariff Branch

BLOOMBERRY RESORTS AND HOTELS, INC., *Petitioner*, v. **BUREAU OF INTERNAL REVENUE (BIR), REPRESENTED BY COMMISSIONER KIM S. JACINTO-HENARES**, *Respondent.* **[G.R. No. 212530, August 10, 2016-PEREZ, J.]**

Facts

The Philippine Amusement and Gaming Corporation (PAGCOR) granted petitioner Bloomberry Resorts and Hotels, Inc. (Bloomberry) a provisional license to establish and operate an integrated resort and casino complex at the Entertainment City.

Bloomberry and its parent company, Sureste Properties, Inc., own and operate Solaire Resort and Casino. As a PAGCOR licensee, petitioner only pays PAGCOR license fees in lieu of all taxes consistent with PAGCOR's Charter, Presidential Decree (PD) No. 1869. which provides the exemption from taxes of persons or entities contracting with PAGCOR in casino operations.

When Republic Act (RA) No. 9337 took effect, it amended Section 27(C) of the NIRC of 1997, which excluded PAGCOR from the enumeration of government-owned or controlled corporations (GOCCs) exempt from paying corporate income tax.

Consequently, in implementing the aforesaid amendments made by RA No. 9337, respondent issued RMC No. 33-2013 dated 17 April 2013 declaring that PAGCOR, in addition to the five percent (5%) franchise tax of its gross revenue under Section 13(2)(a) of PD No. 1869, is now subject to corporate income tax under the NIRC of 1997, as amended. In addition, a provision therein states that PAGCOR's contractees and licensees, being entities duly authorized and licensed by it to perform gambling casinos, gaming clubs and other similar recreation or amusement places, and gaming pools, are likewise subject to income tax under the NIRC of 1997, as amended.

Aggrieved, as it is now being considered liable to pay corporate income tax in addition to the 5% franchise tax, petitioner immediately elevated the matter through a petition for certiorari and prohibition before this Court.

Issues

(i) Whether or not the assailed provision of RMC No. 33-2013 subjecting the contractees and licensees of PAGCOR to income tax under the NIRC of 1997, as amended, was issued by respondent CIR with grave abuse of discretion amounting to lack or excess of jurisdiction; and

(ii) Whether or not said provision is valid or constitutional considering that Section 13(2)(b) of PD No. 1869, as amended (PAGCOR Charter), grants tax exemptions to such contractees and licensees.

Ruling

After a thorough study of the arguments and points raised by the parties, the Supreme Court resolved to sustain [PAGCOR's] contention that its **income from gaming operations is subject only to five percent (5%) franchise tax under PD No. 1869, as amended**, while its income from other related services is subject to corporate income tax pursuant to PD No. 1869, as amended, as well as RA No. 9337. This is demonstrable.

First. Under PD No. 1869, as amended, [PAGCOR] is subject to income tax only with respect to its operation of related services. Accordingly, the income tax exemption ordained under Section 27(c) of RA No. 8424 clearly pertains only to [PAGCOR's] income from operation of related services. **Such income tax exemption could not have been applicable to [PAGCOR's] income from gaming operations as it is already exempt therefrom under PD No. 1869, as amended**, to wit:

> SECTION 13. Exemptions.–
>
> x x x
>
> (2) Income and other taxes. — (a) Franchise Holder: ***No tax of any kind or form, income or otherwise, as well as fees, charges or levies of whatever nature, whether National or Local, shall be assessed and collected under this Franchise from the Corporation; nor shall any form of tax or charge attach in any way to the earnings of the Corporation, except a Franchise Tax of five (5%) percent of the gross revenue or earnings derived by the Corporation from its operation under this Franchise***. Such tax shall be due and payable quarterly to the National Government and shall be in lieu of all kinds of taxes, levies, fees or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial, or national government authority.

Indeed, the grant of tax exemption or the withdrawal thereof assumes that the person or entity involved is subject to tax. This is the most sound and logical interpretation because [PAGCOR] could not have been exempted from paying taxes which it was not liable to pay in the first place. **This is clear from the wordings of PD No. 1869, as amended, imposing a franchise tax of five percent (5%) on its gross revenue or earnings derived by [PAGCOR] from its operation under the Franchise in lieu of all taxes of any kind or form, as well as fees, charges or levies of whatever nature, which necessarily include corporate income tax**.

In other words, **there was no need for Congress to grant tax exemption to [PAGCOR] with respect to its income from gaming operations as the same is already exempted from all taxes of any kind or form, income or otherwise, whether national or local, under its Charter, save only for the five percent (5%) franchise tax. The exemption attached to the income from gaming operations exists independently from the enactment of RA No. 8424**. To adopt an assumption otherwise would be downright ridiculous, if not deleterious, since [PAGCOR] would be in a worse position if the exemption was granted (then withdrawn) than when it was not granted at all in the first place. (Emphasis supplied)

Second. Every effort must be exerted to avoid a conflict between statutes; so that if reasonable construction is possible, the laws must be reconciled in the manner.

As we see it, there is no conflict between PD No. 1869, as amended, and RA No. 9337. The former lays down the taxes imposable upon [PAGCOR], as follows: (1) a five percent (5%) franchise tax of the gross revenues or earnings derived from its operations conducted under the Franchise, which shall be due and payable in lieu of all kinds of taxes, levies, fees or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial or national government authority; and (2) income tax for income realized from other necessary and related services, shows and entertainment of [PAGCOR]. **With the enactment of RA No. 9337, which withdrew the income tax exemption under RA No. 8424, [PAGCOR's] tax liability on income from other related services was merely reinstated**.

It cannot be gainsaid, therefore, that the nature of taxes imposable is well defined for each kind of activity or operation. There is no inconsistency between the statutes; and in fact, they complement each other.

Third. Even assuming that an inconsistency exists, PD No. 1869, as amended, which expressly provides the tax treatment of [PAGCOR's] income prevails over RA No. 9337, which is a general law. **It is a canon of statutory construction that a special law prevails over a general law — regardless of their dates of passage — and the special is to be considered as remaining an exception to the general**. x x x

x x x Where a general law is enacted to regulate an industry, it is common for individual franchises subsequently granted to restate the rights and privileges already mentioned in the general law, or to amend the later law, as may be needed, to conform to the general law. However, if no provision or amendment is stated in the franchise to effect the provisions of the general law, it cannot be said that the same is the intent of the lawmakers, for repeal of laws by implication is not favored.

In this regard, **SC agrees with [PAGCOR] that if the lawmakers had intended to withdraw [PAGCOR's] tax exemption of its gaming income, then Section 13(2)(a) of PD 1869 should have been amended expressly in RA No. 9487, or the same, at the very least, should have been mentioned in the repealing clause of RA No. 9337. However, the repealing clause never mentioned [PAGCOR's] Charter as one of the laws being repealed**. On the other hand, the repeal of other special laws, namely, Section 13 of RA No. 6395 as well as Section 6, fifth paragraph of RA No. 9136, is categorically provided under Section 24(a) (b) of RA No. 9337, x x x.

x x x

When [PAGCOR's] franchise was extended on June 20, 2007 without revoking or withdrawing its tax exemption, it effectively reinstated and reiterated all of [PAGCOR's] rights, privileges and authority granted under its Charter. Otherwise, Congress would have painstakingly enumerated the rights and privileges that it wants to withdraw, given that a franchise is a legislative grant of a special privilege to a person. **Thus, the extension of [PAGCOR's] franchise under the same terms and conditions means a continuation of its tax exempt status with respect to its income from gaming operations.** Moreover, all laws, rules and regulations, or parts thereof, which are inconsistent with the provisions of PD 1869, as amended, a special law, are considered repealed, amended and modified, consistent with Section 2 of RA No. 9487, thus:

> SECTION 2. Repealing Clause. – All laws, decrees, executive orders, proclamations, rules and regulations and other issuances, or parts thereof, which are inconsistent with the provisions of this Act, are hereby repealed, amended and modified.

It is settled that where a statute is susceptible of more than one interpretation, the court should adopt such reasonable and beneficial construction which will render the provision thereof operative and effective, as well as harmonious with each other.

Given that [PAGCOR's] Charter is not deemed repealed or amended by RA No. 9337, [PAGCOR's] income derived from gaming operations is subject only to the five percent (5%) franchise tax, in accordance with PD 1869, as amended.

Image by 123rf.com

COMMISSIONER OF INTERNAL REVENUE (CIR), *Petitioner*, v. **GOODYEAR PHILIPPINES, INC.**, *Respondent*. **[G.R. No. 216130, August 03, 2016 - PERLAS-BERNABE, J.]**

Facts

Respondent Goodyear Philippines is a domestic corporation duly organized and existing under Philippine laws and registered with the Bureau of Internal Revenue (BIR) as a large taxpayer. Its preferred shares were solely and exclusively subscribed by Goodyear Tire and Rubber Company (GTRC), a foreign company organized and existing under American laws and unregistered in the Philippines. The Board of Directors of respondent authorized the redemption of GTRCs preferred shares. Subsequently, it filed with the BIRs International Tax Affairs Division an application for relief from double taxation to confirm that the redemption was not subject to tax as per Philippines – US Tax Treaty. Additionally, respondent withheld and remitted the sum to the BIR representing 15% final withholding tax (FWT).

Subsequently it filed an administrative claim for refund or issuance of tax credit certificate (TCC) representing 15% FWT. Thereafter, respondent filed a judicial claim before the Court of Tax Appeals (CTA).

The Commissioner of Internal Revenue (CIR) denied the same reasoning out that: (a) it failed to exhaust administrative remedies by prematurely filing its petition before the CTA; and (b) it failed to submit complete supporting documents before the BIR. The CTA Division and En Banc ruled in favor of respondent Goodyear Philippines.

Issues

(a) Whether or not the judicial claim of respondent should be dismissed for non-exhaustion of administrative remedies; and

(b) Whether or not the CTA En Banc correctly ruled that the gain derived by GTRC was not subject to 15% FWT on dividends.

Held

The High Court said the appeal is devoid of merit. The Supreme Court (SC) said: "Section 229 of the Tax Code states that judicial claims for refund must be filed within two (2) years from the date of payment of the tax or penalty, providing further that the same may not be maintained until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue (CIR)."

Section 229 provides:

"SEC. 229. Recovery of Tax Erroneously or Illegally Collected. – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid."

Both claims for refund by respondent were clearly filed within the two-year prescriptive period quoted above, this even though they were done only 13 days from each other. *"It bears stressing that respondent could not be faulted for resorting to court action, considering that the prescriptive period stated therein was about to expire. Had respondent awaited the action of petitioner knowing fully well that the prescriptive period was about to lapse, it would have resultantly forfeited its right to seek a judicial review of its claim, thereby suffering irreparable damage."*

On the second issue, the High Court stressed:

"It must be noted, however, that GTRC is a non-resident foreign corporation, specifically a resident of the US. Thus, pursuant to the cardinal principle that treaties have the force and effect of law in this jurisdiction, the RP-US Tax Treaty complementarily governs the tax implications of respondent's transactions with GTRC.

"Under Article 11 (5)41 of the RP-US Tax Treaty, the term "dividends" should be understood according to the taxation law of the State in which the corporation making the distribution is a resident, which, in this case, pertains to respondent, a resident of the Philippines. Accordingly, attention should be drawn to the statutory definition of what constitutes "dividends," pursuant to Section 73 (A)42 of the Tax Code which provides that "[t]he term 'dividends' x x x means any distribution made by a corporation to its shareholders out of its earnings or profits and payable to its shareholders, whether in money or in other property."

"In light of the foregoing, the Court therefore holds that the redemption price representing the amount of P97,732,314.00 received by GTRC could not be treated as accumulated dividends in arrears that could be subjected to 15% FWT. Verily, respondent's AFS covering the years 2003 to 2009 show that it did not have unrestricted retained earnings, and in fact, operated from a position of deficit. Thus, absent the availability of unrestricted retained earnings, the board of directors of respondent had no power to issue dividends. Consistent with Section 73 (A) of the Tax Code, this rule on dividend declaration – i.e., that it is dependent upon the availability of unrestricted retained earnings – was further edified in Section 43 of The Corporation Code of the Philippines which reads:

"Section 43. Power to Declare Dividends. – The board of directors of a stock corporation may declare dividends out of the unrestricted retained earnings which shall be payable in cash, in property, or in stock to all stockholders on the basis of outstanding stock held by them: Provided, That any cash dividends due on delinquent stock shall first be applied to the unpaid balance on the subscription plus costs and expenses, while stock dividends shall be withheld from the delinquent stockholder until his unpaid subscription is fully paid: Provided, further, That no stock dividend shall be issued without the approval of stockholders representing not less than two-thirds (2/3) of the outstanding capital stock at a regular or special meeting duly called for the purpose.

"It is also worth mentioning that one of the primary features of an ordinary dividend is that the distribution should be in the nature of a recurring return on stock46 which, however, does not obtain in this case. As aptly pointed out by the CTA En Banc, the amount of P97,732,314.00 received by GTRC did not represent a periodic distribution of dividend, but rather a payment by respondent for the redemption of GTRC's 3,729,216 preferred shares."

Lastly, the SC declared that the amount received by GTRC from respondent for the redemption of its preferred shares were not accumulated dividends in arrears. It is therefore not subject to 15% FWT on dividends in accordance with Section 28 (B) (5) (b) [Intercorporate Dividends] of the Tax Code.

Photo by the Court of Tax Appeals (http://cta.judiciary.gov.ph/)

CTA Tax Case Digest

by **Johann Francis A. Guevarra**
LSO III, Legal and Tariff Branch

CTA Case No. 9619
Promulgated: March 16, 2021

RUEL ORDUÑA, under the name and style of GRUPO ENTABLADO STAGE BUILDERS vs. COMMISSIONER OF INTERNAL REVENUE

Facts

Petitioner formerly did business under the name and style of Grupo Entablado Stage Builders, duly registered with the Bureau of Internal Revenue (BIR) and with the Department of Trade and Industry, with address at No. 40 M.H. Del Pilar, Pinagbuhatan, Pasig City.

The following antecedent facts followed:

- October 31, 2013 – BIR issued Letter of Authority for the examination of petitioner's books of accounts and other accounting records for all internal revenue taxes including documentary stamp tax (DST) and other taxes for the period January 1, 2012 to December 31,2012.
- December 21, 2015 - BIR issued Preliminary Assessment Notice (PAN) assessing petitioner for deficiency income tax, value-added tax (VAT) and expanded withholding tax (EWT), including increments for TY 2012 in the aggregate amount of P10,844,379.91.
- January 11, 2016 - Respondent BIR issued the Formal Letter of Demand for the aforesaid taxes.
- November 7, 2016 - Respondent BIR a Warrant for Distraint and Levy (WDL) in view of petitioner's failure and refusal to pay the aforesaid taxes.
- November 8, 2016 - Petitioner appealed for the immediate lifting and withdrawal of the WDL and reiterated that he did not receive the assessment notice covering deficiency taxes for TY 2012.
- Petitioner filed a Petition for Review
- Petitioner argued on the following points:
  - ◊ Failure to comply with the due process requirement under Sec. 228 of the NIRC, as amended
  - ◊ WDL should be cancelled and withdrawn for failure of the BIR to serve assessment notice
  - ◊ Assessment did not become final, executory and demandable
- Respondent BIR filed its Answer on August 29, 2017, interposing the following special and affirmative defenses:
  - ◊ Court has no jurisdiction to take cognizance of the instant Petition on the ground that the subject assessment had already become final, executory and demandable for petitioner's failure to file an administrative protest to the FLD/FAN.
  - ◊ An assessment must first be disputed by the taxpayer and ruled by the CIR to warrant a decision appealable to the CTA. Respondent argued that the due process requirement in the issuance of deficiency tax assessment against petitioner was also strictly observed.

Issues

- Whether or not the due process requirement under Section 228 of the NIRC, as amended was complied with;

- Whether or not the warrant of distraint and/or levy should be cancelled; and
- Whether or not the Petitioner is liable for deficiency taxes as aforesaid.

Ruling

The jurisdiction of the CTA is not limited to decisions of the CIR involving disputed assessments, but also includes "other matters" arising under the NIRC or other laws administered by the BIR. In the instant case, what is being appealed by petitioner is the validity of the WDL dated November 7, 2016.

While the CTA has jurisdiction to pass upon the validity of the WDL issued by respondent BIR, the same is subject to the timely filing of a Petition for Review.

Based on **Section 11 of RA 1125 as amended by RA 9282 (*Act Creating the Court of Tax Appeals*) and Section 3(a) Rule 8 of the Revised Rules of the Court of Tax Appeals**, in appeals from the decision, ruling, or inaction of respondent CIR, a Petition for Review must be filed with the CTA within thirty (30) days from receipt of a copy of the decision or ruling, or the expiration of the period fixed by law for respondent CIR to act on the disputed assessment.

A perusal of the subject WDL reveals that it was served to petitioner on November 7, 2016. Thus, petitioner had thirty (30) days therefrom or until December 7, 2016, to appeal and challenge its validity with the CTA. However, petitioner only filed the instant Petition for Review on June 21, 2017 which is clearly beyond the reglementary period provided by law, rules and regulations.

Time and again, it has been held that the 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.

The right to appeal is not a natural right nor a part of due process. It is merely a statutory privilege, and may be exercised only in the manner and in accordance with the provisions of the law. Correspondingly, in view of petitioner's failure to timely file its Petition for Review, this Court did not acquire jurisdiction over the instant case.

Petition for Review is hereby DISMISSED for lack of jurisdiction.

Photo by the Bureau of Customs PH (www.facebook.com/BureauOfCustomsPH)

In This Corner:

Revenue Operations Group (Mabuhay Group)

by **Romeo E. Regacho**
LSO III, Legal and Tariff Branch

On May 13, 1994, the DOF issued Department Order No. 29-94 creating the OPLAN: "The Mabuhay Lane", which is tasked to expeditiously process applications for tax and duty exemption exemption of six (6) sectors of importers, namely: Export-Oriented firms (BOI), etc.; Returning residents; Non-Profit, Non-stock educational institutions; Books and Periodicals; DOE Contractor, Contractor, etc.; 105(r) Livestocks.[1]

Finance Secretary Carlos Dominguez III has approved the inclusion of all importations of COVID-19 vaccines in the "Mabuhay" or express lane of the DOF to allow the quick processing of the tax and duty exemptions of these vital shipments.[2] This *Mabuhay lane* allows for a faster processing time for tax and duty applications within 24 hours.[3] Under DOF Department Order (DO) No. 54-2000, the Secretary of Finance is authorized to include additional sectors that may avail of the express service under the *Mabuhay Lane.*[4]

In order to further expedite the government's vaccination program, the filing fees for the vaccine applications under the *Mabuhay Lane* have been waived, and these applications will be processed using the Tax Exemption System (TES) Online Filing Module.[5] As per reports, filing fees in the *Mabuhay Lane* range from P200 (for imports worth P100,000) to P1,000 (for imports worth more than P1 million).[6]

Usec. Antonette Tionko is the head of DOF's Revenue Operations Group (ROG). She recommended the inclusion in the *Mabuhay Lane* of COVID-19 vaccine imports, "regardless of the applicable legal basis," to "allow for the expedited processing of the tax and exemption of such applications."[7]

"We add that the *Mabuhay Lane* currently processes all Relief Consignment under Section 120 in relation to 121 of the Customs Modernization and Tariff Act (CMTA). The Lane is expected to process all COVID-19 vaccines which may qualify as relief consignment," Tionko said. [8]

> "***SEC. 120. Relief Consignment.*** – Goods such as food, medicine, equipment and materials for shelter, donated or leased to government institutions and accredited private entities for free distribution to or use of victims of calamities shall be treated and entered as relief consignment. xxx "
>
> "***SEC. 121. Duty and Tax Treatment.*** – Relief consignment, as defined in Section 120, imported during a state of calamity and intended for a specific calamity area for the use of the calamity victims therein, shall be exempt from duties and taxes."

- The following may avail the service under Mabuhay Lane pursuant to Customs Modernization and Tariff Act (CMTA):

    a) ***Importers of Books/Magazines*** - pursuant to Section 800(t) of the CMTA, and Section 109(R) of NIRC, both as amended and Educational Materials under UNESCO Florence Agreement;

    "SEC. 800. Conditionally Tax and/or Duty-Exempt Importation. *– x x x:*

    x x x

    (t) Economic, technical, vocational, scientific, philosophical, historical and cultural books or publications, and religious books like bibles, missals, prayer books, the Koran, Ahadith and other religious books of similar nature and extracts therefrom, hymnal and hymns for religious uses: Provided, That those which may have already been imported but are yet to be released by the Bureau at the effectivity of this Act may still enjoy the privilege herein provided upon certification by the DepEd that such imported books and/or publications are for economic, technical, vocational, scientific, philosophical, historical or cultural purposes or that the same are educational, scientific or cultural materials covered by the International Agreement on Importation of Educational Scientific and Cultural Materials (IAESCM) signed by the President of the Philippines on August 2, 1952, or other agreements binding upon the Philippines. Educational, scientific and cultural materials covered by international agreements or commitments binding upon the Philippine government so certified by the DepEd."

    b) **Filipino Balikbayan** - pursuant to Section 800 (f) of the CMTA, and Section 109 (C) of the National Internal Revenue Code (NIRC), both as amended;

    SEC. 800. Conditionally Tax and/or Duty-Exempt Importation. *– x x x:*

    x x x

    (f) Personal and household effects belonging to returning residents including household appliances, jewelry, precious stones, and other goods of luxury which were formally declared and listed before departure and identified under oath before the District Collector when exported from the Philippines by such returning residents upon their departure therefrom or during their stay abroad; personal and household effects including wearing apparel, goods of personal adornment, toilet goods, instruments related to one's profession and analogous personal or household effects, excluding luxury items, vehicles, watercrafts, aircrafts and animals purchased in foreign countries by residents of the Philippines which were necessary, appropriate, and normally used for their comfort and convenience during their stay abroad, accompanying them on their return, or arriving within a reasonable time which, barring unforeseen and fortuitous events, in no case shall exceed sixty (60) days after the owner's return."

    c) **Filipino Balikbayan Holder of Dual Citizenship, 13(g), 13(a) And Expatriates Holder of Different Visa Status** - pursuant to Section 800 (i) of the CMTA, and Section 109(D) of the National Internal Revenue Code (NIRC), both as amended;

    "SEC. 800. Conditionally Tax and/or Duty-Exempt Importation. *– x x x:*

    x x x

    (i) Professional instruments and implements, tools of trade, occupation or employment, wearing apparel, domestic animals, and personal and household effects belonging to persons coming to settle in the Philippines or Filipinos or their families and descendants who are now residents or citizens of other countries, such parties hereinafter referred to as overseas Filipinos, in quantities and of the class suitable to the profession, rank or position of the persons importing said items, for their own use and not for barter or sale, accompanying such persons, or arriving within a reasonable time: Provided, That the Bureau may, upon the production of satisfactory evidence that such persons are actually coming to settle in the Philippines and that the goods are brought from their former place of abode, exempt such goods from the payment of duties and taxes: Provided, fur-

ther, That vehicles, vessels, aircrafts, machineries and other similar goods for use in manufacture, shall not fall within this classification and shall therefore be subject to duties, taxes and other charges;"

d) **Entities Endorsed by National Economic Development Authority (NEDA)** - pursuant to Section 105[r] of the Tariff and Customs Code and Section 4,109-1-B[a] of Republic Act No. 9337, as implemented by Revenue Regulations No. 16-2005 dated September 01, 2005; [9] and

*"**SEC. 800. Conditionally Tax and/or Duty-Exempt Importation.** – x x x:*

x x x

(m) Imported goods donated to or, for the account of the Philippine government or any duly registered relief organization, not operated for profit, for free distribution among the needy, upon certification by the DSWD or the Department of Education (DepEd), or the Department of Health (DOH) as the case may be." [10]

e) **Expatriates without Visa and Foreign Consultant of Government Agency** - pursuant to Section 800(h) of the CMTA;

*"**SEC. 800. Conditionally Tax and/or Duty-Exempt Importation.** – x x x:*

x x x

(h) x x x

Personal and household effects and vehicles belonging to foreign consultants and experts hired by, or rendering service to, the government, and their staff or personnel and families accompanying them or arriving within a reasonable time before or after their arrival in the Philippines, in quantities and of the kind necessary and suitable to the profession, rank or position of the person importing said items, for their own use and not for barter, sale or hire: Provided, That the Bureau may require either a written commitment or a security in an amount equal to one hundred percent (100%) of the ascertained duties, taxes and other charges thereon, upon the goods classified under this subsection; conditioned for the exportation thereof or payment of the corresponding duties, taxes and other charges within three (3) months after the expiration of their term or contract: Provided, however, That the Bureau may extend the time for exportation or payment of duties, taxes and other charges for a term not exceeding three (3) months from the expiration of the original period;"

- The documentary requirements must be on a three (3) complete sets. The common documentary requirements are the import shipping documents (AWB/BL) and the import commercial documents (Invoice & Packing List).[11]
- The issuance of certificate of COVID-19 vaccine duty/tax exemption applications under Mabuhay Lane will be processed within 24 working hours.[12]
- These tax exemption policies will be incorporated in the inter-agency guidelines on the implementation of a One-Stop Shop for International Donations and Government Procured COVID-19 Vaccines that is being prepared by the DOF, Department of Health (DOH), Department of Foreign Affairs (DFA), Bureau of Customs (BOC), and the Food and Drug Administration (FDA).[13]

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Summary of BIR Revenue Regulations Implementing Provisions of RA No. 11534 Corporate Recovery and Tax Incentives for Enterprises (CREATE) Act

by **Elsie T. Jesalva**, SLSO II, Indirect Taxes Branch
Angelique M. Patag, LSO V, Tax Policy and Administration Branch
Zenaida G. Sanchez, LSO III, Direct Taxes Branch

No. of Issuance	Salient Features
RR No. 2-2021 Issued on April 8, 2021	• RR No. 2-2021 was issued on April 8, 2021 to amend certain provisions of RR No. 2-98, as amended, to implement the amendments introduced by RA No. 11534 or the CREATE Act to the NIRC of 1997, as amended. • It implements the new final tax rates on certain passive incomes of individuals and corporations. • Winnings of non-resident aliens, except winnings of P10,000 or below from PCSO, is subjected to a 20% withholding tax. • Interest income derived from a depository bank under the Expanded Foreign Currency Deposit System is imposed a 15% tax. • A Capital gains tax of 15% is imposed from sale of shares of stock not traded in the Stock Exchange of both resident and non-resident foreign corporation • Income derived from all sources within the Philippines by a non-resident foreign corporation will be subjected to a 25% tax starting January 1, 2021 • The tax credit rate on intercorporate dividends received by a non-resident foreign corporation from a domestic corporation is adjusted from 25% to 15% • Purchases made by GOCCs, NGAs, LGUs, and other government instrumentalities, from persons/entities subject to percentage tax, shall be subject to 1% withholding tax for the period July 1, 2020 to June 30, 2023.
RR No. 3-2021 Issued on April 8, 2021	• RR No. 3-2021 has been promulgated to implement Section 3 of RA No. 11534 or the CREATE Act, amending Section 20 of the NIRC of 1997, as amended; • This is in particular to the submission by the Commissioner of Internal Revenue of the tax-related information to the Department of Finance relative to the grant of incentives; • Section 20 of the National Internal Revenue Code of 1997, as amended: *"SEC. 20. Submission of Report and Pertinent Information by the Commissioner. –* *"(A) x x x* *"(B) Submission of Tax-Related Information to the Department of Finance. – The Commissioner shall, upon the order of the Secretary of Finance specifically identifying the needed information and justification for such order in relation to the grant of incentives under Title XIII, furnish the Secretary pertinent information on the entities receiving incentives under this Code: Provided, however, That the Secretary and the relevant officers handling such specific information shall be covered by the provisions of Section 270 unless the taxpayer consents*

No. of Issuance	Salient Features
RR No. 3-2021	*in writing to such disclosure.* *"(C) x x x"* • The manner in which tax related and pertinent information shall be prepared, submitted and reported is contained therein; • Tax-related information refers to tax returns and any amendments thereof, including pertinent information directly or indirectly associated with a particular taxpayer, as regards business income, work operations and equipment/machinery of any manufacturer or producer; • Similarly, the procedures on the request for tax related and pertinent information, as well as how the responses should be dealt with are likewise discussed; and • The liability for disclosure of tax-related information shall be covered by the provisions of Section 270 of the Tax Code, to wit: *"SEC. 270. Unlawful Divulgence of Trade Secrets. - Except as provided in Section 6(F) and 71 of this Code and Section 26 of Republic Act No. 6388, any officer or employee of the Bureau of Internal Revenue who divulges to any person or makes known in any other manner than may be provided by law information regarding the business, income or estate of any taxpayer, the secrets, operation, style or work, or apparatus of any manufacturer or producer, or confidential information regarding the business of any taxpayer, knowledge of which was acquired by him in the discharge of his official duties, shall upon conviction for each act or omission, be punished by a fine of not less than Fifty thousand pesos (P50,000) but not more than One hundred thousand pesos (P100,000), or suffer imprisonment of not less than two (2) years but not more than five (5) years, or both.* *Any officer or employee of the Bureau of Internal Revenue who divulges or makes known in any other manner to any person other than the requesting foreign tax authority information obtained from banks and financial institutions pursuant to Section 6(F), knowledge or information acquired by him in the discharge of his official duties, shall upon conviction, be punished by a fine of not less than Fifty thousand pesos (P50,000) but not more than One hundred thousand pesos (P100,000), or suffer imprisonment of not less than two (2) years but not more than five (5) years, or both."*
RR No. 4-2021 Issued on April 8, 2021	• The Bureau of Internal Revenue on 08 April 2021 issued Revenue Regulations No. 4-2021 implementing the provisions on Value-Added Tax (VAT) and Percentage Tax under Republic Act (RA) No. 11534 (Corporate Recovery and Tax Incentives for Enterprises Act or CREATE Act), which further amended the National Internal Revenue Code (NIRC) of 1997, as amended, as implemented by Revenue Regulations (RR) No. 16-2005 (Consolidated VAT Regulations of 2005), as amended. • Pursuant to the provisions of the CREATE law, Sections 12 and 13 of the CREATE law amends Sections 109 and 116 of the NIRC of 1997, as amended. Relative thereto, BIR issued RR 4-2021 amending Sec. 4.109-1 of RR No. 16-2005 on **VAT-Exempt Transactions** stating that: Beginning this year, *"the VAT exemption shall only apply to sale of real properties not primarily held for sale to customers or held for lease in the ordinary course of trade or business; sale of real property utilized for socialized housing as defined by RA No. 7279, as amended; and, sale of house and lot, and other residential dwellings with selling price of not more P2 million, as adjusted in 2011 using the 2010 Consumer Price Index values: Provided, further, That every three (3) years thereafter, the amounts stated herein shall be adjusted to its present*

No. of Issuance	Salient Features
RR No. 4-2021	*value using the Consumer Price Index as published by the Philippine Statistics Authority (PSA)."* **(Sec. 109(1)(P) of the NIRC of 1997, As Amended)** • The proposal to increase the VAT-exempt threshold on sale of residential lot from ₱1.5 Million to ₱2.5 Million and house and lot from ₱2.5 Million to ₱4.2 Million was vetoed by President Rodrigo Duterte. The rationale behind this is that it will result in a tax exemption that is highly distortive and exacts a heavy price on the taxpaying community. VAT exemption on housing shall generally be given to buyers of socialized housing. Increasing the threshold will benefit those who can easily afford proper housing and will be an avenue for abuse. The provision is also prone to abuse since increasing the threshold will benefit those who can easily afford proper housing. • While the veto communication mentioned that the VAT exemption shall remain at P2.5 million as stated under the Tax Reform for Acceleration and Inclusion (TRAIN) law, this however is inaccurate as the threshold under the TRAIN law went down to P2 million beginning 01 January 2021. • Also exempted from VAT are the sale, importation, printing or publication of books, and any newspaper, magazine, journal, review bulletin, or any such educational reading material covered by the United Nations Educational, Scientific and Cultural Organization Agreement on the importation of educational, scientific and cultural materials, including the digital or electronic format thereof. In relation to this exemption, said materials should not be biased to the publication of paid advertisements and in compliance with the requirements set forth by the National Development Board pursuant to RA No. 8047. **(Sec. 109(1)(R) of the NIRC of 1997, As Amended)** • Another exemption is the sale or importation of prescription drugs and medicines for diabetes, high cholesterol and hypertension, and on the sale or importation of medicines for cancer, mental illness, tuberculosis, and kidney diseases, VAT exemption will take effect on 1 January 2021 instead of 1 January 2023. This exemption only applies to the sale or importation by the manufacturers, distributors, wholesalers and retailer of drugs and medicines included in the "list of approved drugs and medicines" issued by the Department of Health (DOH). **(Sec. 109(1)(AA) of the NIRC of 1997, As Amended)** • The sale or importation of capital equipment necessary for coronavirus disease 2019 (COVID-19) prevention; drugs, vaccines and medical devices specifically prescribed and directly used for the treatment of COVID-19; and drugs for the treatment of the virus approved by the Food and Drug Administration for use in clinical trials, including raw materials directly necessary for the production of such drugs, are also VAT exempt from 1 January 2020 to 31 December 2023. **(Sec. 109(1)(BB) of the NIRC of 1997, As Amended)** • Pursuant to the provisions of the CREATE law, RR 4-2021 amends Sec. 4.116-1 of RR No. 16-2005 on **Tax on Persons Exempt from VAT**, declaring that: Any person whose gross sales or receipts do not exceed the value-added tax (VAT)-exempt threshold of P3 million under Section 116 of the NIRC of 1997, as amended, will only pay 1% percentage tax instead of the previously imposed 3% from 1 July 2020 to 30 June 2023. **(Sec. 116 of the NIRC of 1997, As Amended)** • With these changes in rates effective July 1, 2020, taxpayers will have to compute their corporate income tax payable differently this year. The actual manner of computation, however, will depend on the instructions of the Bureau of Internal Revenue (BIR). • *This too, shall pass.* Against a backdrop of the ill effects of the COVID-19 pandemic, the government continues its efforts in keeping the economy afloat by helping businesses ease their burdens through reasonable incentives. The

No. of Issuance	Salient Features
RR No. 4-2021	government has since passed two laws under Bayanihan, and CREATE is expected to sustain the gains of these laws with the view of eventually surpassing these challenging times.
RR No. 5-2021 Issued on April 8, 2021	• RR 5-2021 was issued on April 8, 2021 to implement the new Income Tax rates on the regular income of corporations, on certain passive incomes, including additional allowable deductions from Gross Income of persons engaged in business or practice of profession pursuant to RA No. 11534 or the CREATE Act, which further amended the NIRC of 1997, as amended. • The matrix below shows the new Income Tax rates applicable to the regular taxable income of corporations:

Type of Corporation	The higher between the "Regular" or "Minimum Corporate Income Tax (MCIT)" rates			
	Regular		MCIT	
	Rate	Effectivity	Rate	Effectivity
Domestic Corporation				
Domestic corporations, in general	25%	July 1, 2020	1% 2%	July 1, 2020 to June 30, 2023 July 1, 2023
For corporations with net taxable income not exceeding P5M and total assets not exceeding P100M, excluding land on which the particular business entity's office, plant and equipment are situated	20%	July 1, 2020	1% 2%	July 1, 2020 to June 30, 2023 July 1, 2023
Proprietary Educational Institutions and Hospitals	1% 10%	July 1, 2020 to June 30, 2023 July 1, 2023	Not Applicable	

No. of Issuance	Salient Features
RR No. 5-2021	

Type of Corporation	The higher between the "Regular" or "Minimum Corporate Income Tax (MCIT)" rates			
	Regular		MCIT	
	Rate	Effectivity	Rate	Effectivity
Foreign Corporation [on taxable income (e.g. net or gross income, as applicable) derived from all sources within the Philippines]				
Resident Foreign Corporation	25%	July 1, 2020	1% 2%	July 1, 2020 to June 30, 2023 July 1, 2023
Offshore Banking Unit (OBUs) (Note: OBUs shall now be taxed as resident foreign corporation upon effectivity of the CREATE)	25%	Upon the effectivity of the CREATE	1% 2%	Upon the effectivity of the CREATE until June 30, 2023 July 1, 2023
Regional Operating Headquarters (ROHQs)	25%	January 1, 2022	1% 2%	January 1, 2022 to June 30, 2023 July 1, 2023
Non-Resident Foreign Corporation	25%	January 1, 2021	Not Applicable	

- The MCIT is imposed beginning on the fourth taxable year immediately following the year in which such corporation commenced its business operations, when it is greater than the regular Income Tax computed for the taxable year.

- Domestic corporations shall account separately in their Annual Financial Statements (AFS) the cost of the land on which the particular business entity's office, plant and equipment are situated, and shall not lump the same in one account title nor consolidate its cost with other fixed asset accounts.

- In the case of proprietary educational institutions or hospitals, if the gross income from "unrelated trade, business or other activity" (as defined under Section 2 of this Regulations) exceeds fifty percent (50%) of the total gross income derived by such educational institutions or hospitals from all sources, the tax prescribed for domestic corporations shall be imposed on the entire taxable income.

- GOCCs, agencies and instrumentalities, except the Government Service Insurance System (GSIS), Social Security System (SSS), Home Development Mutual Fund (HDMF),Philippine Health Insurance Corporation (PHIC), and the local water districts, shall pay such rate of tax upon their taxable income as are imposed upon corporations or associations engaged in a similar business, industry, or activity.

No. of Issuance	Salient Features
RR No. 5-2021	• The matrix below shows the new Income Tax rates applicable to certain passive incomes of individuals and corporations:

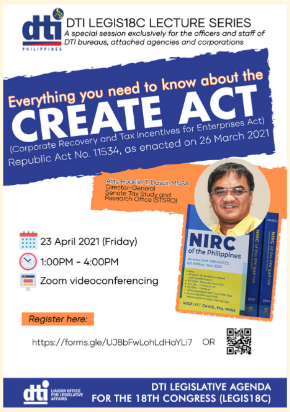
Type of Individual Corporation	Nature of Income	Rate	Effectivity
Non-resident Alien Individual	Winnings from PCSO games amounting to more than P10,000.00	20%	Upon the effectivity of the CREATE
	Winnings from PCSO games amounting to P10,000.00 and below	Exempt	
Domestic Corporation	Inter-corporate Dividends (domestic and foreign source dividends)	From another domestic corporation – EXEMPT From non-resident foreign corporation – 25% or 20%, as the case may be	For foreign source dividends, these will be exempt from Income Tax upon the effectivity of the CREATE, subject to the conditions imposed under Section of this Regulations
Resident Foreign Corporation	Interest income from a depositary bank under the expanded foreign currency deposit system	15%	Upon the effectivity of the CREATE
	Capital gains from sale of shares of stock not traded in the stock exchange	15%	Upon the effectivity of the CREATE
Non-resident Foreign Corporation	Gross income received from all sources within the Philippines, such as interests, dividends, rents royalties, salaries, premiums (except reinsurance premiums), annuities, emoluments or other fixed or determinable annual, periodic or causal gains, profits and income, and capital gains, except capital gains from sale of shares of stock not traded in the stock exchange	25%	January 1, 2021
	Intercorporate dividend received from	25%	January 1, 2021

No. of Issuance	Salient Features
RR No. 5-2021	(see table and note below)

Type of Individual Corporation	Nature of Income	Rate	Effectivity
	a domestic corporation, in general However, if the country in which the non-resident foreign corporation is domiciled, allows a tax credit equivalent to the difference between the regular income tax rate of 25% under Section 28(B)(1) of the Tax Code and the (15%) tax on intercorporate dividends or does not impose a tax on dividends, the rate to be imposed shall be 15%	15%	January 1, 2021
	Capital gains from sale of shares of stock not traded in the stock exchange	15%	Upon the effectivity of the CREATE

- The improperly accumulated earnings tax shall no longer be imposed on corporations upon the effectivity of the CREATE onwards. This shall apply to the entire taxable year for all fiscal years/taxable years ending after the effectivity of CREATE.

WEBINARS ATTENDED



STSRO Director General Rodelio T. Dascil, MNSA was the stand-out lecturer on the features of the CREATE law to the officers and staff of DTI bureaus, attached agencies, and corporations, and other stakeholders during the DTI-sponsored Webinar dubbed "Everything you need to know about the CREATE Act" on April 23, 2021 via Zoom Video Conferencing.

The virtual audience, numbering close to 500, benefitted from DG Dascil's dissection of the CREATE law provisions, including the line-item veto, and the implications of the provisions to Philippine business during this extraordinary time and the prospects in the long term.

Q&A followed the lecture, with further elucidation via email responses to the concerned participants.

PH-EITI
Philippine Extractive Industries Transparency Initiative

On April 23, 2021, the Philippine Extractive Industries Transparency Initiative (PH-EITI) hosted an online consultation via Google Meet in relation to the 2021 EITI Validation of the Philippines. It was attended by Atty. Ma. Lourdes M. Arbas, Dir. Vivian A. Cabiling, and Atty. Sherry Anne C. Salazar of the STSRO, a stakeholder of the Philippine extractives sector.

Through the validation process, the progress of an EITI implementing country in meeting the EITI Standard is assessed and it also serves as an avenue for stakeholders to communicate their views on the value, effectiveness, and sustainability of EITI implementation.

In 2017, the Philippines was declared as the first among more than 50 EITI implementing countries in the world to have achieved “satisfactory progress” in implementing the EITI Standard. Hence, the PH-EITI hopes to retain the Philippines status and reputation as a leading EITI implementing country as it undergoes revalidation this year.

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