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Competition in a Globalized Environment[1]

by

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The present competition laws in the Philippines[2]

Competition, as it is understood in the Philippines, is contained in the different laws as well as the Constitution. It may be said that the idea of competition in the country is in its infancy in the light of globalization. The emphasis is on penalties for perceived violations of "competition laws". However, there is no record of anyone violating any of the competition laws, no one ever been convicted and, much less put in prison. It is difficult to prove guilt "beyond reasonable doubt" in criminal cases based on economic principles. Competition rules, which are dictated by marketing forces, would be hard to legislate.

From the perspective of the Executive Department, the (Department of Justice) DOJ is in the best position to implement the competition laws by issuing EO 45. The emphasis is to create a regime of "fair treatment" among the players in order to avoid unfair market dominance of a particular player. This is one face of competition.

If the intention is to protect consumers, then the Department of Trade and Industry (DTI) must take precedence over the DOJ. This is another face of competition.

The bigger picture in competition is the over-all competitiveness of the Philippines, as compared with other countries of the world. It may be treated as the international face of competition.

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[1] The theme of the seminar is The Philippine Competition Legal Framework and Institutional Set-up. It was held at the Century Park Hotel in Manila on September 24 and 25, 2013. The lecturer was Avv. Andrea Filippo Gagliardi.

[2] Cooperation for Competition: The Role and Functions of a Competitive Authority and Sectoral Regulation Agencies, OFC Policy Paper No. 1, July 2013, Office for Competition, Department of Justice.

After everything has been said and done, the different faces of competition are inter-related.

Competition laws of the Philippines

The following are the competition laws of the Philippines, which includes the Constitution:

Note that the competition laws of the Philippines are focused on the penalty side of the whole system. It means that the focus is on companies and the prevention of mergers, monopolies and similar anti competitive practices. In this regard, it is logical to designate the DOJ as the lead government agency to implement competition laws.

Competition Laws of the Philippines

Competition Law	Description
Constitution of the Philippines, Article XII, Section 19	Prohibits and regulates monopolies, combinations in restraint of trade, and other competition practices.
RA 3247 – Act to Prohibit Monopolies and Combinations in Restraint of Trade (December 1925)	Allows treble damages for civil liability arising from anticompetitive behavior.
RA 3815 – Revised Penal Code (January 1932) Article 186 – Monopolies and Combination in Restraint of Trade	Defines and penalizes anticompetitive behavior that is criminal in nature with *prison correctional* in its minimum period, or a fine ranging from P200 to P6,000, or both.
RA 386 – The Civil Code of the Philippines (1949). Article 28	Allows the collection of damages arising from unfair competition in agricultural, commercial, or industrial enterprises, or in labor through the use of force, intimidation, deceit, machination, or any other unjust, oppressive, or highhanded method.
RA 4152 – An Act Amending the Law Prescribing the Duties and Qualifications of Legal Staff in the Office of the Secretary of Justice (1964). Section 2.	Mandates the Secretary of Justice to (a) study all laws relating to trusts, monopolies and combinations: (b) draft such legislation as necessary; (c) investigate all cases involving violations of such laws; and (d) initiate and take such preventive or remedial measures, including appropriate judicial proceedings, to prevent or restrain monopolization and allied practices or activities of thrusts, monopolies and combinations.
Executive Order No. 45 (2011)	Designates the Department of Justice as the Country's Competition Authority.

Sectoral regulatory agencies

In order to prevent practices like monopoly or market dominance of a particular company, different government agencies focus on a particular sector like: The following are the Philippine sectoral regulatory agencies:

Sectoral Regulatory Agencies	
Regulatory Agency	**Function**
Department of Trade and Industry Bureau of Trade Regulation and Consumer Protection Bureau of Food and Drugs Bureau of Product Standards	Protects consumer welfare
Intellectual Property Office	Safeguards intellectual property rights
Securities and Exchange Commission	Resolves intra-corporate disputes; regulates all forms of securities, brokers and dealers, financing companies and investment houses
Bangko Sentral ng Pilipinas	Regulates banks and financial institutions
Insurance Commission	Regulates insurance companies
Housing and Land Use Regulatory Board	Regulates land use and real estate development
National Food Authority	Regulates rice, corn, wheat and other grains and foodstuff
Sugar Regulatory Administration	Regulates the sugar industry
Philippine Coconut Authority	Regulates the coconut industry
National Telecommunications Commission	Regulates telecommunications companies
Land Transportation Franchising and Regulatory Board	Regulates common carriers for land
Civil Aeronautics Board	Regulates companies engaged in air commerce
Maritime Industry Authority	Regulates the shipping industry
Philippine Ports Authority	Regulates port operations and arrastre services
Department of Energy Energy Regulatory Commission National Power Corporation	Regulates electric power industry participants and oil companies
Local Water Utilities and Administration	Regulates water firms outside Metro Manila

Interaction between the sectoral regulatory agencies and the DOJ's Competition Authority.

Sector Regulator vs. Competition Authority[3]	
Sector Regulator	**Competition Authority**
Coverage The government regulatory agencies like the Philippine Coconut Authority, the Energy Regulatory Commission, the Bangko Sentral ng Pilipinas and the Insurance Commission set economic regulation for the pertinent industry.	The DOJ's Competition Authority regulates the relationships of the participants within the industry, focusing on matters like anti-competitive agreements, mergers and abuse of market dominance of a participant.
Standards It sets industry standards like safety and product quality.	Does not set industry standard but regulates market access in order to reduce monopoly.
Penalty It fixes prices and imposes penalties in case of monopoly.	It does not impose penalty. The Competition Authority is mandated to – *"Investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade." (EO 45)*
Behavioral conditions It imposes and monitors behavioral conditions	It imposes structural and behavioral remedies.
Ex-ante and ex-post approach It has an ex-ante prescriptive approach (before the event occurs).	It has both an ex-ante and ex-post (after the occurrence of the event) enforcement mandate. In merger cases, the ex-post enforcement is not exercised.
Information There should be frequent interventions requiring continual flow of information.	Information is gathered in case of investigations. It is more reliant on complaints.

Competition-related legislations

There are competition related laws in the Philippines. Some of them are dictated by international agreements like the World Trade Organization (WTO). The WTO mandated laws are actually trade laws affecting the movement of goods among countries. Examples of these laws are the anti-dumping law (RA 8752), Intellectual Property Code (RA 8293), Customs Valuation Law (RA 8181), Countervailing Measures (RA 8751), and Safeguard Measures (RA 8800). According to the WTO rules, a domestic product must be treated in the same manner as an imported product, setting aside all protectionist laws in the country.

However, the Philippines still have protectionist laws as mandated by the Constitution particularly those relating National Economy and Patrimony (Article XII of the Constitution of the Philippines). An example of the restrictive provisions of the Constitution is the following:

"Section 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise nor right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all executive and managing officers of such corporation or association must be citizens of the Philippines."

[3] Cooperation for Competition: The Role and Functions of a Competition Authority and Sectoral Regulatory Agencies, OFC (Office for Competition) Policy Paper No. 1, July 2013, page 11.

Competition-related Legislations	
Special Laws	**Description**
RA 8752, Anti Dumping Act of the Philippines (1999)	Protects Filipino enterprises against foreign competition and trade practices
RA 8293, Intellectual Property Code of the Philippines (1997)	Protects patents, trademarks, and copyrights, and provides for the corresponding penalties for infringements
BP 178, Revised Securities Act (1982)	Prohibits and penalizes manipulation of security prices and insider trading
RA 7581 , Price Act (1991)	Aims to stabilize prices of basic commodities through price controls and ceiling mechanisms, and prescribes measures against abusive price increases during emergencies and critical situations in order to protect consumers
RA 7494, Consumer Act of the Philippines (1992)	Prescribes consumer product quality and safety standards, and delineates deceptive and unfair sales practices like weight and measures as well as product and service warranties
RA 8479, Downstream Oil Industry Deregulation Act (1998)	Deregulates the downstream oil industry to ensure a competitive market, encourage fair pricing, and ensure adequate and continuous supply of environmentally clean petroleum products
RA 9136, Electric Power Industry Regulation Act (2001)	Restructures the electric power industry and provides rules for the privatization of the assets of the National Power Corporation

According to the UNCTAD[4], "The adoption of competition systems implies the consolidation of market principles, involving the transition from state ownership, vertically integrated monopolies and strong state intervention to a situation in which the interaction of economic agents can take place more freely".

Competition policy

Competition policy, in its broadest sense, is the set of government policies that affect the nature and extent of competition in the economy. It encompasses all policies that seek to facilitate effective competition to promote efficiency and ensure growth while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives.[5]

Among the various acts hampering competition the formation of cartels, abuse of dominant position and monopoly most adversely affects competition.

Consider the following definitions[6]:

1. **Cartel** – It refers to a combination of firms, providing goods in relevant markets, acting or joined together to obtain a shared monopoly to control production, sale and price, or to obtain control in any particular industry or commodity, or a group of firms that agree to restrict trade. It also refers to firms or sections of firms having common interest designed to promote the exchange of knowledge resulting from scientific and technical research, exchange of patent rights and standardization of products among themselves with the intent of preventing, restricting or distorting competition;

[4] The quotation was taken from the presentation of Atty. Rodolfo A. Salalima, Chief Legal Counsel, Senior Advisor and Spokesperson of Globe Telecom, Inc. during the AVID Thought Leadership Forum, on December 5, 2011, in Mandarin Oriental Hotel. (UNCTAD Secretariat, Objectives of competition law and policy: Towards a coherent strategy for promoting competition and development)

[5] The definition of competition policy was presented by Undersecretary Zenaida Cuison Maglaya of the Department of Trade and Industry during the AVID Thought Leadership Forum, December 5, 2011, Ballrooms 1 and 2, Mandarin Oriental Hotel, Makati City.

[6] The definition of cartels, dominant position and monopoly are from the Section 4 -Definition of Terms , HB 4835.

2. **Dominant position** – It refers to a situation where a firm, either by itself or acting in collusion with other firms, is in a position to control a relevant market for the sale of a particular good or service by fixing its prices, excluding competitor firm, or controlling the market in a specific geographical area; and

3. **Monopoly** – It refers to a privilege or undue advantage of one or more firms, consisting in the exclusive right to carry on a particular business or trade, and or manufacture of a particular product, article or object of trade, commerce or industry. It is a form of market structure in which one or a few firms dominate the total sales of a product or service.

In implementing an actual competition, legislation entails the consideration of certain factors and realities like: (a) the lack of general understanding on the benefits of competition, (b) resource constraints, and the lack of expertise and skilled staff. In the creation of a competition agency/body there is a need that such body is independent and apart from other government agencies. There must a continuous review of existing laws and policies. Concerned authorities need to be strengthened to further enhance the enforcement and implementation of competition-related laws and policies. There is a need to pursue competition policy advocacy, information and education campaign.

Trade complications (Directly affecting trade, indirectly affecting competition)

The main objective of the WTO is to simplify trade among its member countries. The WTO also allows the creation of free trade areas (FTAs). Under the FTAs, WTO member countries may devise a special low tariff among its members giving rise to complications. A country like, the Philippines have FTAs with the ASEAN (Association of South East Asian Nations), Japan, Korea, India, and China, among others. As result, the Philippines have different set of tariffs applicable to each FTAs, and an MFN (most favoured nation clause) for WTO member countries that do not have FTA agreements with the Philippines.

One of the FTA's is the PJEPA (Philippine Japan Economic Partnership Agreement). Currently, there is clamor to review its provisions because some sectors of the economy are of the opinion that some PJEPA provisions are disadvantageous to the Philippines. In order to asses the effectivity of the PJEPA, the DTI (not the DOJ, as per the mandate of EO 45)

spearheads the evaluation in order to achieve a unified international trade strategy for the country[7]. The following are the steps taken by the DTI: (a) institutionalization of an efficient and effective consultative system for enhancing and sustaining public engagement in trade policy formulation, (b) intensification of trade policy analysis and expanding the network of institutions involved in trade policy research by establishing the Trade and Industry Policy Research Network, and enhancing the effectiveness of trade-related inter-agency coordination and communication called – One Country, One Team.

Ideally, the WTO is concerned only in trade. This is the reason why quantitative restrictions were abolished and are given tariff equivalents. The tariff equivalents are liberalized (lowered) through a pre-determined schedule for an eventual minimal tariff rate. However, some FTAs like the European Union insist that the principle of "human rights" be included in their dealings with other WTO member countries. Non trade matters like "respect to human rights" complicates international trade relations.

If one of the ways to liberalize trade is through the decrease in tariff, the Philippines will not attain full liberalization. Even if the tariff rate is zero percent (0%), the Philippines impose a VAT (value-added tax) of 12% ad valorem in addition to other specific taxes in accordance with the National Internal Revenue Code of the Philippines. Furthermore, the Philippines, as a developing country, depends partly on importation revenues. The Bureau of Customs (BOC) is the second biggest source of government revenue, next only to the Bureau of Internal Revenue (BIR).

Although the WTO concerns itself to international trade, it also mandates that imported products are to be treated equally with those products produced locally. In other words, any implementation of

[7] Adrian Cristobal, Jr., Undersecretary for Industry Development and Trade Policy (DTI), in a letter sent to the STSRO dated December 19, 2011

competition laws like the prevention of mergers and monopolies will affect imports in the Philippines.

Pre-WTO era
1970 to 1980

The years 1970 to 1980 was an era characterized by economic policies concentrated on the protection of domestic industries. By protecting domestic industries, jobs would be created contributing to the development of the country. Patronizing local produce was considered a patriotic thing to do. However, the domestic consumers were deprived of cheaper quality goods.

The government as a matter of policy promotes quantitative restrictions, imposing a ban on importation, or the imposition of high protective tariffs.

More often than not, the following logic was followed in the pursuit of a protective policy:

1. If an import is a not manufactured in the Philippines, lower tariffs and taxes are imposed in order to satisfy the desire of the consumers;

2. The second case is when an import was partially manufactured in the Philippines. The importation of raw materials was scrutinized whether such imports were available or manufactured domestically. If such raw materials were available or manufactured locally the government would pursue the "domestic content rule". Locally available/produced raw materials would have a preferential treatment by imposing a high tariff on equivalent imported product; and

3. Importations directly competing with domestically produced products received the most protection. It was evident in the case of agricultural products. During that era, local products competing with imports had the most protection in the form of non-tariff barriers and the usual high tariffs and taxes. Non-tariff barriers meant import quotas.

January 1, 1995 onwards

The Philippines ratified the GATT-Uruguay Final Round in 1994, paving the way towards its membership to the World Trade Organization (WTO) starting January 1, 1995. Membership to the WTO means that the Philippines would adhere to all its trade agreements, a "take it or leave it basis" proposition. As a consequence, such WTO[8] membership also means a repeal of several laws enacted during the protectionist era. During the Senate debates on the ratification of the GATT-Uruguay Round, the following suggestions were presented "safety nets[9]" in preparation for the adverse impact of a liberal international trade:

1. Allowing a presumptive input tax on agricultural products used by processors;

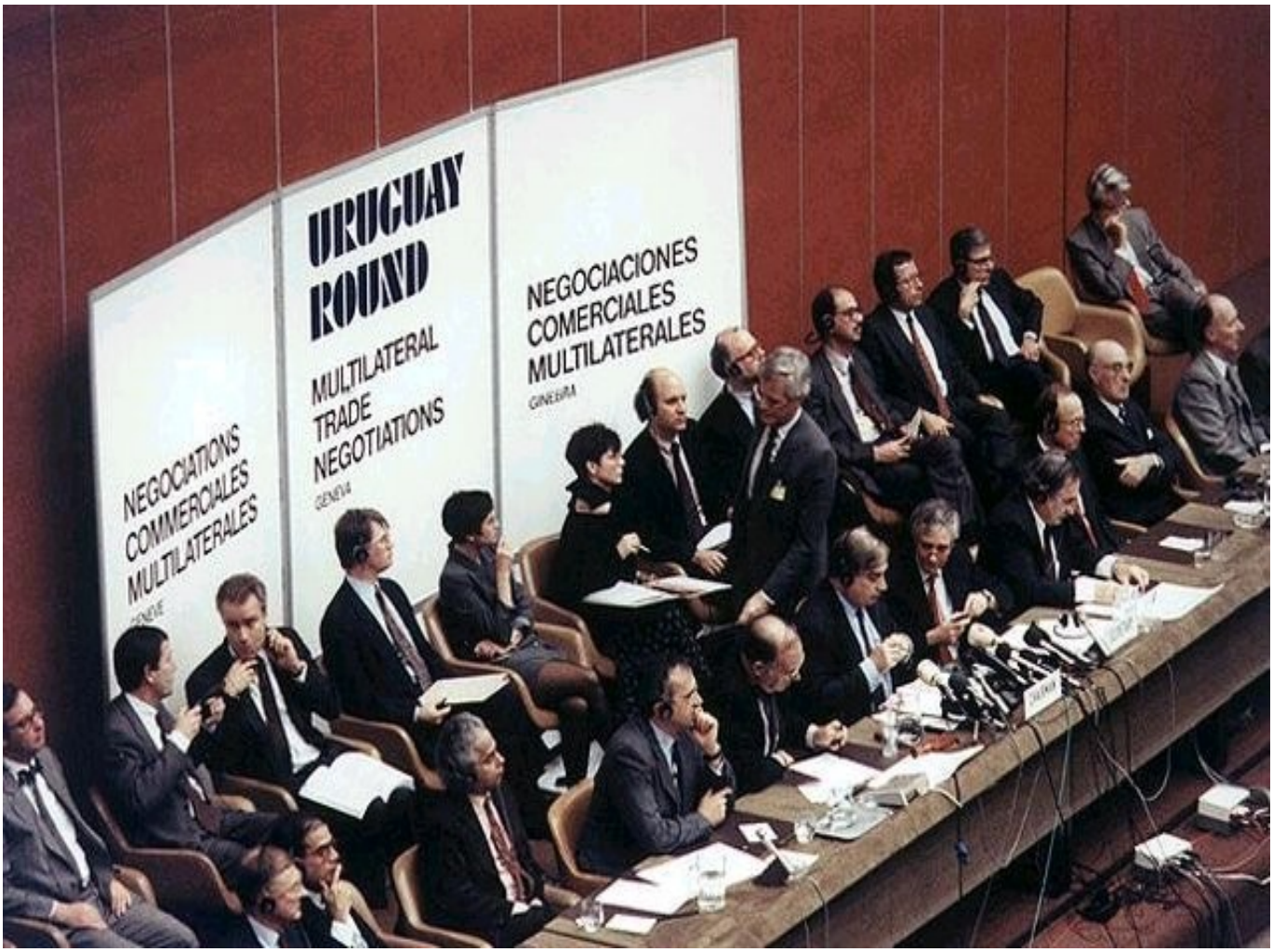
2. Amending the Agri-Agra law to plug the loopholes within the law which tend to divert credit away from the agricultural sector;

3. Enactment of plant variety registration and protection law;

4. Amending the laws on patents, trademarks, copyright, and reprinting;

[8] The GATT (General Agreement on Tariff and Trade)-Uruguay Round is the also called the final round containing all the previous agreements under GATT. Once the "critical mass" of GATT members ratify the GATT Uruguay Round, a new international organization would be created, the World Trade Organization (WTO). The Philippines is an original member of the WTO starting January 1, 1995.

[9] The enumeration of the safety nets was discussed during the Senate ratification of the WTO on October 12, 1994.



5. Enactment of laws on geographical indications, topographies of integrated circuits, and protection of undisclosed information;

6. Amending the Garments and Textiles Export Board in view of the phase out of the garment export quotas within the next ten years;

7. Amending the Omnibus Investment Code (EO 226) to incorporate new package of incentives;

8. Amending the Labor Code to allow the issuance of employment permits to non-resident aliens, and to amend provisions on labor-only contracting and job-only contracting;

9. Enacting a law on unemployment assistance insurance and on training and retraining; and

10. Enactment of ancestral domain law and codes on environment, mining, forestry, and land management.

The enumeration reflects both the coverage and the apprehension of the adversely affected sectors. It is clear that competition assumed a widened signification to cope with the demands of the WTO rules.

The following comments reinforce the complex nature of competition:

1. The WTO agreements will exert tremendous demand on the Philippines **to revise the Constitution** in order to remove obstacles to the performance of its obligations based on the national treatment principles of the agreements. While the Philippines may be able to maintain a standstill policy at present without being obliged to give concession upon the effectivity of the WTO, **it would be a matter of time for Philippine commitments to clash with the constitutional safeguards of economic protection.** (Dean Merlin Magallona, UP College of Law);

2. The ratification of the WTO (GATT-Uruguay Round) would amount to a wholesale undue delegation of powers not

only on the part of the President, but also of the Congress tantamount to surrendering sovereignty on the part of the Philippines of their prerogatives. A treaty can repeal or supplant a statute in the same manner that a statute can alter or repeal a treaty. A treaty can replace a statute only if the treaty is constitutional. (Prof. Esteban Bautista, UP College of Law);

3. The WTO will remove all quantitative restrictions imposed by the Philippine laws on the entry of foreign agricultural products, at the same time, it will preserve the quantitative restrictions imposed by rich countries against the entry of labor from countries like the Philippines. It therefore imposes unfair competition and trade practices against Philippine enterprises and trade arrangements that are not based on equity and reciprocity. The WTO runs counter to the constitutional provisions regarding unfair trade practices. (Jeremias Montemayor, Federation of Free Farmers);

4. The traditional forms of protection envisioned by the framers of the Constitution take the form of tariff protection, quantitative restrictions, import prohibitions, and market protection, all of which are now **obsolete** because of the WTO. (Atty. Mervin Encanto, Integrated Bar of the Philippines); and

5. The development strategy consists essentially in controlling, managing, manipulating and harnessing market forces to achieve both economic and non-economic goals; national self sufficiency and economic self-reliance; the integrity of sovereignty; a modernized military; full employment; administrative control of inflation; promotion of social justice and the installation of economic democracy which political democracy is a charade. (Alejandro Lichauco, UP Law Center).

Philippine Competitiveness Ranking[10]

The Philippines ranked 65th among the countries (a total of 148 countries) of the world in terms of competitiveness. It is one of the countries showing the **most improvement** this year. It has advanced 22 places since its lowest mark in 2009. It makes progress in the following areas:

a. public institutions – 94th place, up by 23 places,
b. trust in politicians – 94th place, up 23 places,
c. corruption issues – 108th, up 11 places,
d. red tape – 108th place, up 18 places,
e. macroeconomic environment – 38th place, up 18 places,
f. market size – 35th place,
g. financial sector 58th place, up 13,
h. infrastructure – 120th,
i. air transport – 112th, and
j. labor market – 103rd

Although the Philippines shows marked improvement in terms of competitiveness, still much must be done in order to be competitive internationally.

[10] The Global Competitiveness Index 2012–2013: Country Profile Highlightshttp://www3.weforum.org/docs/CSI/2012-13/GCR_CountryHighlights_2012-13.pdf

PHILIPPINE NATIONAL BANK (PNB), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE (CIR), Respondent, G.R. No. 172458, December 14, 2011, Leonardo-De Castro, J.

Facts:

This case between PNB and the CIR involves the proper implementation of the rules on appeal as contained in the Court of Tax Appeals' (CTA) Revised Rules and the Revised Rules of Court of the Philippines, as amended.

The CTA issued two Resolutions (January 27, 2006 and April 19, 2007) in CTA En Banc No. 145 dismissing outright the Petition for Review filed by PNB (December 27, 2005) for being filed four days beyond the additional 15 days granted to submit the same to the court.

Issues:

Petitioner PNB submits the ensuing positions:

"The honorable Court of Tax Appeals En Banc erred in failing to consider the explanation submitted by PNB in its Motion for Reconsideration with Manifestation of compliance with respect to the filing of the petition on December 23, 2005 (The due date for filing thereof) via LBC service instead of registered mail with return card.

"The procedural lapse observed by the Honorable Court of Tax Appeals should be liberally construed in the interest of substantial justice, as postulated in various Supreme Court decisions.

By: Clinton S. Martinez
SLSO - II

"The petition filed by PNB before the CTA En Banc raises a meritorious legal defense warranting judicial resolution."

Held:

The Supreme Court (SC) ruled in favor of respondent CIR. The SC said:

"The only issue to be resolved here is whether or not this Court should require the CTA En Banc to give due course to C.T.A. E.B. No. 145 despite PNB's failure to comply with the formal requirements of the Revised Rules of the Court of Tax Appeals and the Rules of Court in filing a petition for review with the CTA En Banc.

"Not having been successfully convinced by PNB, we answer the above issue in the negative." (Underscoring provided)

Stating that the Rules of Court applies suppletorily to the CTA Revised Rules, the SC said:

*"To recall, PNB filed its petition with the CTA En Banc four days beyond the **extended** period granted to it to file such petition. PNB argues that it was filed on time since it was mailed on the last day of the extended period, which was on December 23, 2005. It has been established that a pleading "filed by ordinary mail or by private messengerial service x x x is deemed filed on the day it is actually received by the court, and not on the day it was mailed or delivered to the messengerial service."*

The Court likewise cited Section 7, Rule 13 of the Rules of Court in pointing out that service should be made by registered mail, as a rule, to wit:

***"Sec. 7. Service by mail**. Service by registered mail shall be made by depositing the copy in the post office, in a sealed envelope, plainly addressed to the party or his counsel at his office, if known, otherwise at his residence, if known, with postage fully pre-paid, and with instructions to the postmaster to return the mail to the sender after ten (l0) days if undelivered. **If no registry service is available in the locality of either the sender or the addressee, service may be done by ordinary mail**."* (Emphasis ours.)

Furthermore, the SC ruled that the *"Petition was not accompanied by the required duplicate originals or certified true copies of the decision and resolution being assailed, and Affidavit of Service."*

The Court quoted the pertinent provisions of the Revised Rules of the CTA, viz:

"*SEC. 2. **Petition for review; contents**. - The petition for review shall contain allegations showing the jurisdiction of the Court, a concise statement of the complete facts and a summary statement of the issues involved in the case, as well as the reasons relied upon for the review of the challenged decision. The petition shall be verified and must contain a certification against forum shopping as provided in Section 3, Rule 46 of the Rules of Court. **A clearly legible duplicate original or certified true copy of the decision appealed from shall be attached to the petition**.* (Emphasis supplied, Rule 6)

"Sec. 4(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court en banc shall act on the appeal." (Rule 8)

The SC also cited Rule 43, Section 6 of the Rules of Court:

***'Sec. 6.** Contents of the petition. The petition for review shall (a) state the full names of the parties to the case, without impleading the court or agencies either as petitioners or respondents; (b) contain a concise statement of the facts and issues involved and the grounds relied upon for the review; **(c) be accompanied by a clearly legible duplicate original or a certified true copy of the award, judgment, final order or resolution appealed from,** together with certified true copies of such material portions of the record referred to therein and other supporting papers; and (d) contain a sworn certification against forum shopping as provided in the last paragraph of section 2, Rule 42. The petition shall state the specific material dates showing that it was filed within the period fixed herein."* (Emphasis ours.)

The SC said that non-compliance with proof of service of the petition and the contents of and the documents which should accompany the same shall be sufficient ground for dismissal (Section 7, Rules 43, Rules of Court). It likewise emphasized that it is mandatory to attach duplicate originals or certified true copies of the questioned decision, to a petition for review.

Under Section 13, Rule 13 of the Revised Rules of Court, it is provided:

> ***"Sec. 13.*** *Proof of service. Proof of personal service shall consist of a written admission of the party served, or the official return of the server, or the affidavit of the party serving, containing a full statement of the date, place and manner of service. If the service is by ordinary mail, proof thereof shall consist of an affidavit of the person mailing of facts showing compliance with section 7 of this Rule. If service is made by registered mail, proof shall be made by such affidavit and the registry receipt issued by the mailing office. The registry return card shall be filed immediately upon its receipt by the sender, or in lieu thereof the unclaimed letter together with the certified or sworn copy of the notice given by the postmaster to the addressee."*

Based on the above proviso, the SC ruled:

> *"It is an accepted tenet that rules of procedure must be faithfully followed except only when, for persuasive and weighting reasons, they may be relaxed to relieve a litigant of an injustice commensurate with his failure to comply with the prescribed procedure. Concomitant to a liberal interpretation of the rules of procedure, however, should be an effort on the part of the party invoking liberality to adequately explain his failure to abide by the rules."*

Finally, the Supreme Court declared:

> *"Procedural rules setting the period for perfecting an appeal or filing an appellate petition are generally inviolable. It is doctrinally entrenched that appeal is not a constitutional right but a mere statutory privilege. Hence, parties who seek to avail of the privilege must comply with the statutes or rules allowing it. The requirements for perfecting an appeal within the reglementary period specified in the law must, as a rule, be strictly followed. Such requirements are considered indispensable interdictions against needless delays, and are necessary for the orderly discharge of the judicial business. For sure, the perfection of an appeal in the manner and within the period set by law is not only mandatory, but jurisdictional as well. Failure to perfect an appeal renders the judgment appealed from final and executory.*
>
> *"X x x.*
>
> *"While PNB may believe that it has a meritorious legal defense, this must be weighed against the need to halt an abuse of the flexibility of procedural rules. It is well established that faithful compliance with the Rules of Court is essential for the prevention and avoidance of unnecessary delays and for the organized and efficient dispatch of judicial business."*

Petition of PNB was denied for lack of merit.

SILKAIR (SINGAPORE) PTE. LTD., Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE (CIR), Respondent, G.R. No. 166482, January 25, 2012, Villarama,Jr., J.

Facts:

> "*Stare decisis et non quieta movere. Follow past precedents and do not disturb what has been settled*."

Petitioner (Silkair) is a foreign company authorized to do business in the Philippines, as an on-line international air carrier. Silkair bought aviation fuel from Petron Corporation (Petron) and settling the excise taxes thereon. The payment of excise taxes was advanced by Singapore Airlines, Ltd., on behalf of Silkair.

An administrative claim for refund was later on filed by Silkair, representing excise taxes on the purchase of aviation fuel, pursuant to Section 135(a) of the 1997 National Internal Revenue Code (NIRC). The pertinent portion of said law provides:

> *"SEC. 135.* ***Petroleum Products Sold to International Carriers and Exempt Entities or Agencies****. – Petroleum products sold to the following are exempt from excise tax:*
>
> *"(a)* ***International carriers of Philippine or foreign registry*** *on their use or consumption outside the Philippines: Provided, That the petroleum products sold to these international carriers shall be stored in a* ***bonded storage tank*** *and may be disposed of only in accordance with the rules and regulations to be prescribed by the Secretary of Finance, upon*

recommendation of the Commissioner;

"(b) Exempt entities or agencies covered by ***tax treaties, conventions and other international agreements*** *for their use or consumption: Provided, however, That the country of said foreign international carrier or exempt entities or agencies exempts from similar taxes petroleum products sold to Philippine carriers, entities or agencies; and, "x x x x"* (Emphasis supplied.)

Petitioner likewise alluded to Article 4(2) of the Air Transport Agreement between the Philippines and Singapore. The proviso reads:

ART. 4

"x x x x

"2. Fuel, lubricants, spare parts, regular equipment and aircraft stores introduced into, or taken on board aircraft in the territory of one Contracting Party by, or on behalf of, a designated airline of the other Contracting Party and intended solely for use in the operation of the agreed services shall, with the exception of charges corresponding to the service performed, be exempt from the same customs duties, inspection fees and other duties or taxes imposed in the territory of the first Contracting Party, even when these supplies are to be used on the parts of the journey performed over the territory of the Contracting Party in which they are introduced into or taken on board. The materials referred to above may be required to be kept under customs supervision and control."

Petitioner filed a Petition for Review with the Court of Tax Appeals (CTA) due to the inaction of the respondent.

The CTA denied Silkair's claim of refund for the reason that it failed to prove that the aviation fuel delivered by Petron came from the latter's bonded storage tank. The case was elevated by petitioner to the CA, assailing the CTA in not ruling that there are distinct and separate instances of exemptions under Section 135 of the Tax Code. The CA proclaimed that while Silkair is exempt from paying the excise tax on petroleum products, petitioner is not the proper party to ask for the refund.

Issue:

Who has the legal personality to claim the refund of excise tax?

Held:

The Supreme Court (SC) decided that Silkair does not have legal personality to claim the refund, citing its previous rulings involving similar set of facts. The SC said:

"Excise taxes, which apply to articles manufactured or produced in the Philippines for domestic sale or consumption or for any other disposition and to things imported into the Philippines, is basically an indirect tax. While the tax is directly levied upon the manufacturer/importer upon removal of the taxable goods from its place of production or from the customs custody, the tax, in reality, is actually passed on to the end consumer as part of the transfer value or selling price of the goods, sold, bartered or exchanged. In early cases, we have ruled that for indirect taxes (such as valued-added tax or VAT), the proper party to question or seek a refund of the tax is the statutory taxpayer, the person on whom the tax is imposed by law and who paid the same even when he shifts the burden thereof to another. Thus, in Contex Corporation v. Commissioner of Internal Revenue, we held that while it is true that petitioner corporation should not have been liable for the VAT inadvertently passed on to it by its supplier since their transaction is a zero-rated sale on the part of the supplier, the petitioner is not the proper party to claim such VAT refund. Rather, it is the petitioner's suppliers who are the proper parties to claim the tax credit and accordingly refund the petitioner of the VAT erroneously passed on to the latter."

"X x x.

"*Even if the tax is shifted by Petron to its customers and even if the tax is billed as a separate item in the aviation delivery receipts and invoices issued to its customers,* ***Petron remains the taxpayer because the excise tax is imposed directly on Petron as the manufacturer. Hence, Petron, as the statutory taxpayer, is the proper party*** **that can claim the refund of the excise taxes paid to the BIR.**" (Emphasis supplied)

In answering petitioner's allegation that the CTA and CA rulings would negate the exemption extended under Section 135(b) of the 1997 Tax Code and Article 4 of the Agreement, the SC said that petitioner is required to timely deliver to seller of aviation fuel a valid exemption certificate for the purchase (Par. 11.3, Supply Contract). Silkair should, at the outset, invoke its tax exempt status to Petron, but it is the latter which remains the statutory taxpayer on the excise taxes.

The Court also made reference to Revenue Regulations (RR) No. 3-2008, viz:

> *"Revenue Regulations No. 3-2008 (RR 3-2008) provides that "subject to the subsequent filing of a claim for excise tax credit/refund or product replenishment, all manufacturers of articles subject to excise tax under Title VI of the NIRC of 1997, as amended, shall pay the excise tax that is otherwise due on every removal thereof from the place of production that is intended for exportation or sale/delivery to international carriers or to tax-exempt entities/agencies." The Department of Finance and the BIR recognize the tax exemption granted to international carriers but they consistently adhere to the view that manufacturers of articles subject to excise tax are the statutory taxpayers that are liable to pay the tax, thus, the proper party to claim any tax refunds.*
>
> *"The above observation remains pertinent to this case because the very same provision in the General Terms and Conditions for Aviation Fuel Supply Contract also appears in the documentary evidence submitted by petitioner before the CTA. Except for its bare allegation of being "placed in a very complicated situation" because Petron, "for fear of being assessed by Respondent, will not allow the withdrawal and delivery of the petroleum products without Petitioner's pre-payment of the excise taxes," petitioner has not demonstrated that it dutifully complied with its contractual undertaking to timely submit to Petron a valid certificate of exemption so that Petron may subsequently file a claim for excise tax credit/refund pursuant to Revenue Regulations No. 3-2008 (RR 3-2008). It was indeed premature for petitioner to assert that the denial of its claim for tax refund nullifies the tax exemption granted to it under Section 135 (b) of the 1997 Tax Code and Article 4 of the Air Transport Agreement."*

In finally disposing of the case, the SC pronounced: "*Once a case has been decided one way, any other case involving exactly the same point at issue, as in the case at bar, should be decided in the same manner.*"

The Petition for review on certiorari was denied by the Court.

In relation to the above, in the case of *Resins, Inc. vs. Auditor General* (25 SCRA 754), the SC opined that "*a refund partakes of the nature of an exemption, and the same cannot be allowed unless granted in the most explicit and categorical language.*" (Cited in Umali, Roman M.: Reviewer in Taxation, p. 71).

Additionally, the present Tax Code provides:

> *"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 collected without authority, or 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 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."* (Section 229, Recovery of Tax Erroneously or Illegally Collected)

by

JOAN KAREN DP. CORONEL
LSA- II, Direct Tax Branch

RR No. 1-2013

This expands the coverage of taxpayers required to pay taxes through the Electronic Filing and Payment System (eFPS) initially introduced in 2001 in line with the government's policy of providing fast and convenient manner of transacting with government offices. BIR identified taxpayers mandated to make use of eFPS such as:

1. Large Taxpayers duly notified by the BIR;
2. Top 20,000 Private Corporations duly notified by the BIR;
3. Top 5,000 Individual Taxpayers duly notified by the BIR;
4. Taxpayers who wish to enter into contract with government offices;
5. Corporations with paid-up capital stock of P10 Million;
6. PEZA-registered entities and those located within Special Economic Zones; and
7. Government Offices, in so far as remittance of withheld VAT and business tax is concerned.

With the eFPS, taxpayers can avail of a paperless tax filing experience and can also pay their taxes online through the convenience of an internet-banking service via debit facility from their enrolled bank account. In addition, since eFPS is available on the internet, taxpayers can file and pay for their taxes anytime and anywhere as long as they are using a computer with internet connection.

With eTRA System, transparency and efficiency in revenue collection reporting and reconciliation will be enhanced as all concerned parties can view and record on real time the remittances made by the NGAs.

With this Revenue Regulation, the base of taxpayers mandated to use eFPS is expanded to include all National Government Agencies (NGAs) through the existing eFPS of the bureau.

Date of Issue: January 23, 2013

RR No. 2-2013

This prescribes the transfer pricing guidelines, particularly the guidelines in applying the arm's length principle for cross-border and domestic transactions between associated enterprises, which are largely based on the arm's length methodologies set out under the Organization for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines.

Pursuant to Section 50 of the Tax Code, the Commissioner is authorized to distribute, apportion or allocate gross income or deductions between or among two or more organizations, trades or businesses (whether or not incorporated and whether or not organized in the Philippines) owned or controlled directly or indirectly by the same interest, if he determines that such distribution, apportionment or allocation is necessary in order to clearly reflect the income of any such organization, trade and business. Thus, the Commissioner is authorized to make transfer pricing adjustments, in line with the purpose of Section 50 to ensure that taxpayers clearly reflect income attributable to controlled transactions and to prevent the avoidance of taxes with respect to such transactions.

The Bureau of Internal Revenue (BIR) hereby adopts and the use of arm's length principle as the most appropriate standard to determine transfer prices of related parties. It is the internationally recognized standard for transfer pricing between associated enterprises. Paragraph 1 of Article 9 of Philippines tax treaties is virtually identical to Paragraph 1 of Article 9 of the OECD Model Tax Convention on Income and Capital, which is considered, in the international arena, as the authoritative statement of the arm's length principle.

Date of Issue: January 23, 2013

RR No. 5-2013

This prescribes the "advance payment of probable taxes due" scheme in the sale of jewelry, gold and other metallic minerals to a non-resident alien individual not engaged in trade or business within the Philippines or to a non-resident foreign corporation.

It has been observed that jewelry, gold and other metallic minerals are being sold to alien individuals or foreign entities that come to the Philippines for a limited period of time for purposes of purchasing in cash jewelry, gold and other metallic minerals, in whatever nature or form. These have escaped taxation since it is difficult to track them down or to compel them to pay the rightful taxes due to the government which necessitates the Bureau to plug revenue leakages and to tap additional revenue source which is through the *advance payment of probable taxes due.*

Sellers of jewelry, gold and other metallic minerals are hereby required to pay business tax (VAT or Percentage Tax), Income Tax and Excise Tax, if applicable, in advance through the assigned Revenue Collection Officers (RCO) of the Revenue District Office (RDO) having jurisdiction over the place where the subject transaction occurs regardless of whether or not said sellers are duly registered with the BIR.

Date of Issue: April 22, 2013

RR No. 6-2013

This amends certain provision of RR No. 6-2008.

Section 7 of RR No. 6-2008 is hereby amended to read as follows:

"SEC. 7. Sale, Barter or Exchange of Shares of Stock Not Traded Through a Local Stock Exchange Pursuant to Secs. 24 (C), 25 (A) (3), 25 (B), 27 (D) (2), 28 (A) (7) (C), 28 (B) (5) (C) of the Tax Code, as Amended.—

xxx xxx xxx

(c.2) Definition of "fair market value" of the Shares of Stock.—For purposes of this Section, "fair market value" of the shares of stock sold shall be:

(c.2.2) In the case of shares of stock not listed and traded in the local stock exchanges, the value of the shares of stock at the time of sale shall be the fair market value. In determining the value of the shares, the Adjusted Net Asset Method shall be used whereby all assets and liabilities are adjusted to fair market values. The net of adjusted asset minus the liability values is the indicated value of the equity. For purposes of this section, the appraised value of real property at the time of sale shall be the higher of--

The fair market value as determined by the Commissioner, or

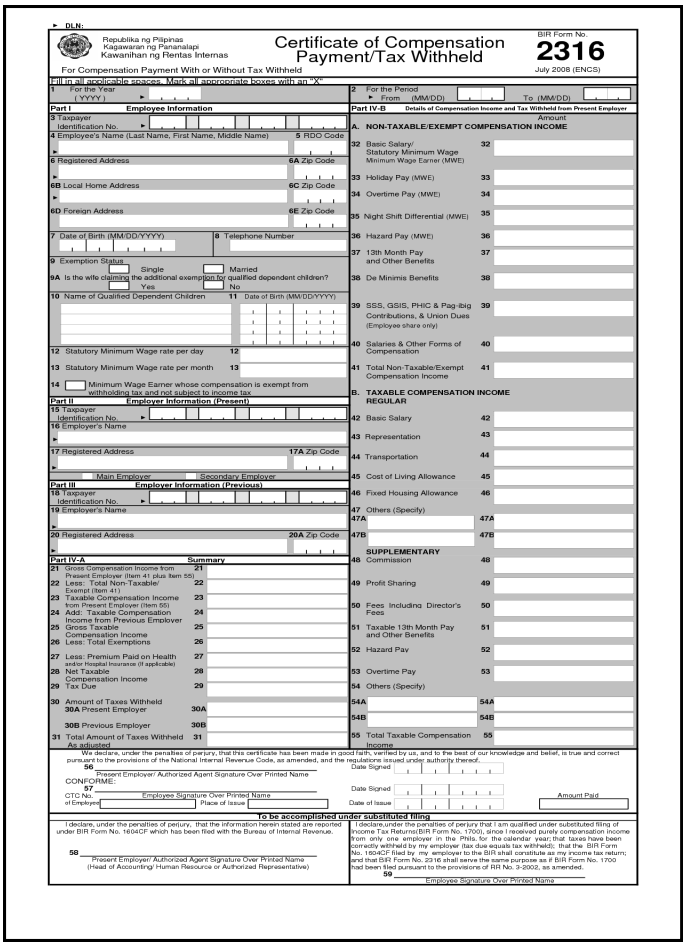
The fair market value as shown in the schedule of valued fixed by the Provincial and City Assessors, or

The fair market value as determined by Independent Appraiser."

Date of Issue: April 22, 2013

RR No. 11-2013

This prescribes the filing/submission of hard copy of the Certificate of Compensation Payment/Tax Withheld (BIR Form 2316) covering employees who are qualified for substituted filing, amending RR No. 2 -98, as last amended by RR No. 10-08. Sec. 2.83.1. Employees Withholding Statements (BIR Form No. 2316). – In general, every employer or other person who is required to deduct and withhold the tax on compensation including fringe benefits given to rank



and file employees, shall furnish every employee from whose compensation taxes have been withheld the Certificate of Compensation Payment/Tax Withheld (BIR Form No. 2316) on or before January 31 of the succeeding calendar year, or if employment is terminated before the close of such calendar year, on the day on which the last payment of compensation is made. Failure to furnish the same shall be a ground for the mandatory audit of payor's income tax liabilities (including withholding tax) upon verified complaint of the payee.

Employers of MWE are still required to issue BIR Form No. 2316 (June 2008 Encs version) to the MWEs on or before January 31 of the following year.

Date of Issue: June 6, 2013

STSRO CORNER

10th Annual Meeting of the Asia-Pacific Tax Forum

October 2-4, 2013, Siam Kempinski Hotel Bangkok, Thailand

Dear Rodelio,

Thank you for your contribution to the *Asia-Pacific Tax Forum* (APTF) **as a speaker**. We received excellent feedback from your comments.

This was one of our best attended (133 delegates and speakers) meetings with the most diverse/strongest technical agenda. Our sessions helped chart a path for the pressing indirect tax reforms that need to be considered in advance of AEC 2015. We also discussed key direct taxation issues, in the context of BEPS, and the important contribution the Asia region countries must contribute to this process. As I said in my opening remarks, your voice is essential to the BEPS reform process. It must not be dominated by Washington and Paris. ITIC and APTF look forward to continuing to actively contribute to this process and ensure an Asia-Pacific voice is heard.

Attached is the *Bangkok Agenda*, a consensus of the action items agreed upon at our meeting. Our three-days in Bangkok have stimulated an active research and reform-driven work program for the next 18 months.

Additionally, all presentations from the APTF meeting have been posted on ITIC's new website. The documents can be downloaded from: http://www.iticnet.org/programs/asia-pacific/APTF10.

As in prior years, ITIC will publish a special edition ITIC *Bulletin* reporting on the APTF meeting held in Bangkok. We will send you a copy once it is published.

Thank you for all of your personal support and involvement with APTF. I look forward to our continued cooperation and friendship.

Best regards,

Daniel A. Witt
President

STSRO CORNER

Participant:
Atty. Rodelio T. Dascil, MNSA
Director General

Participants :
Dir. Vivian A. Cabiling
(Indirect Taxes Branch)
Dir. Elvira P. Crudo
(Direct Taxes Branch)

STSRO CORNER

STAFF MILESTONE ACHIEVEMENT

Congratulations to

Ms. Adoracion M. Cuevas

"2012 Senate Secretariat Exemplary Employee Award"

Nominee and Finalist, OSEC

October 21, 2013

Congratulations to

Bonifacio R. Joson

Senate Mini Olympics Champion! OSEC
- Lawn Tennis, Singles, Gold
- Lawn Tennis, Doubles, Gold
- Lawn Tennis, Mixed Doubles, Bronze

October 9, 2013

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