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PHL tax policy through the eyes of foreign investors

IN THE RECENT Asia-Pacific Economic Cooperation Summit, President Benigno S. C. Aquino III told chief executives: "There is no better time to invest in the Philippines than now." The president cited the steady growth of the country's gross domestic product over the last four years, averaging 6.3%, as compared to 4.3% from 2006 to 2009. He said this growth partly due to increased investment and trade.

The president's invitation implies many promises that need to be backed up, and one of the areas of interest for foreign investors is tax policy.

It is not difficult to find feedback from foreign investors on the tax regime, with the value-added tax (VAT) refund process a particular sticking point. The refund on VAT inputs attributable to VAT zero-rated sales is controversial because of the Bureau of Internal Revenue's (BIR) "deemed denial" rule, in which the absence of a BIR ruling on a refund application within 120 days is deemed to constitute denial of the claim.

Considering the BIR's past performance, the 120-day rule does not give foreign investors the confidence that a reasonable decision will be forthcoming

within the given period. We have heard of decisions taking two years... three years... four years... or forever in the worst case.

The 120-day deemed denial rule should worry foreign investors because it suggests a tendency on the part of the bureau not to rule on claims. In any event, after 120 days, the claim is deemed denied. This will necessarily result in having to go to the courts, which will permit businesses to claim their refunds only years late — and even then, only, if the claim is granted.

Another observation from foreign investors is the difficulty in securing the importer's accreditation pursuant to the new rules issued this year. Although there was a subsequent modification of the rule wherein a provisional accreditation could be issued, this is effective only for six months.

According to news reports, as of Oct. 14, the BIR received 14,820 applications for clearance from importers and customs brokers, and only about 2,000 were issued

regular Importer Clearance Certificates (ICC). Foreign investors with international operations would definitely need their regular ICCs to operate their business as usual.

Thus, imagine what will happen if the applications are not promptly acted upon, leading to import disruptions that ultimately dampen economic growth. The the re-

sponse would not be encouraging.

Another tax issue that was decided last year by the Supreme Court (SC) involved applications for a tax treaty relief ruling. In 2000, the BIR issued a Revenue Memorandum Order which requires that, before a tax treaty incentive can be availed of, an application for a ruling must first be made to the BIR within a certain period.

According to the SC, the period of application for tax treaties should not operate to divest entitlement to the tax treaty relief. The SC said the BIR must not impose additional requirements that

would negate access to relief as provided under international agreements.

It is therefore surprising to see particular assessment cases which still hinge on the mere absence of an application for a tax treaty relief ruling, even though the conditions in the corresponding tax treaties are clearly met.

Some examiners say that the SC ruling applies only to tax refund cases and not to assessment cases. Ooops... Would such argument be appealing to foreign investors?

There are also a number of negative reactions to the current tax assessment process, in which BIR examiners are required to issue a Final Assessment Notice (FAN) within 15 days from receipt of the taxpayers' reply to the Preliminary Assessment Notice (PAN).

Taxpayers, including foreign investors, are asking — Can the BIR really review the letter-reply within 15 days? Do they mean "thorough" review?

The fear is that, the FAN will just be a copy paste of the PAN, only with updated interest charges. Added to this is the impression of taxpayers that the PAN findings of some examiners contain various items which were the result of mere

comparisons of identified balances without first fully checking the accuracy of the comparisons.

It might enough to drive foreign investors to ask — "Does the BIR really want us to do business in the Philippines or do they want us to close down rather than pay unreasonable tax assessment findings?"

In fairness to our government, we believe that it is well-intentioned in imposing certain tax policies. However, perhaps the means of implementing such policies could be aligned with what foreign investors expect when they come to the Philippines.

Indeed, the current administration has made a lot of progress in various aspects of governance. This should undoubtedly attract foreign investment. But it might be better to establish tax policy reforms that encourage, rather than deter, foreign investment.

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LET'S TALK TAX OLIVIER D. AZNAR

Implementing well-intentioned tax policies can be aligned with what foreign investors expect when they come to the Philippines.

BDO starts offer of Basel 3-compliant notes

BDO Unibank, Inc. tapped the bond market anew to raise capital by selling P10 billion worth of Basel 3-compliant Tier 2 notes, the Sy-led lender yesterday said in a disclosure to the Philippine Stock Exchange.

Pegged at a minimum investment size of P500,000, with increments of P100,000, the notes will have a tenor of 10 years and three months, although the bank said it has the option to redeem them after five years and three months.

The indicative yield of the Tier 2 notes, BDO said, ranges from 5.00-5.375%, with the final rate to be announced by the end of the offer period.

The notes are on offer to the public until Nov. 28, but may

be shortened "as needed," BDO noted.

Deutsche Bank AG Manila Branch, Hong Kong and Shanghai Banking Corp. Ltd., and Standard Chartered Bank will be the joint lead arrangers and selling agents

for the transaction. Meanwhile, BDO and Multinational Investment Bancorporation will also serve as selling agents, the listed lender said.

The Sy-led bank said the issue — its first under the Basel 3 regime

— will "supplement BDO's current capital position in further support of lending growth."

Basel 3 is a set of reforms introduced by the Basel Committee on Banking Supervision in the

BDO, S2/3

BDO,
from S2/1

wake of the US-led global financial crisis.

The reforms aim to reduce the risk of system-wide shocks reminiscent of the 2008 crisis, which cost global central banks billions' worth of public funds used in bank bailouts. To avoid that scenario, holders of the Basel 3-compliant bonds must bear losses before any public funds are used to rescue the bank.

BDO is the country's largest bank in terms of assets. It made P5.7 billion in the third quarter, up 41% from a year ago, putting its year-to-date net income to P16.8 billion. BDO has set a profit target of P22.8 billion for this year.

The bank's shares closed at P106 apiece yesterday, up 30 centavos or 0.28% from P105.70 each last Friday. — **Daryll Edisson D. Saclag**

Davao townsfolk want mining firm, foreign investors probed

Residents of a Davao Oriental township have asked government agencies for a full-dress investigation into the activities of a mining company accused of violating environment laws, Davao local media have reported.

The townsfolk from Governor Generoso municipality, who for weeks have been staging demonstrations against mining activities in Barangay Tiblawan, said government through the Bureau of Immigration (BI) should also look into the foreign ownership of the mining company involved in the controversy, a report by *Mindanao Daily Mirror* said.

GMA-Davao News, meanwhile, noted that there has been a stream of complaints against the activities of TQGT Mineral Resources Development Corp. in Davao Oriental. "There were information that the mining company have certain foreign nationals involved and the people in Governor

Generoso also want this investigated," said Jun Baring of GMA-Davao's Super Radyo.

The BI in Davao had no immediate reaction to calls for an investigation of foreign nationals in the mining firm.

Davao Oriental Gov. Corazon Malanyaon had earlier called the attention of the Department of Environment and Natural Resources (DENR) to act on the complaints of the townsfolk. She said illegal mining activities in Governor Generoso town should be stopped.

TQGT Mineral Resources Development Corp. is reportedly headed by Lucilo Quijano, a Filipino, although it is well-known in Governor Generoso town that a Chinese national named Anthony Fong is part of the company. TQGT has avoided media queries and instead referred interviews to the DENR.

It may be recalled that for many years, Chinese groups have eyed

Davao Oriental for mining ventures. A delegation from Wuhan City led by Vice Mayor Yue Yong earlier met officials of Davao Oriental for mining investments.

For his part, Engineer Noel Angeles of Environmental Management Bureau in Davao Region (EMB-XI) said in a Super Radyo interview that their actions would depend on instructions that will come from the EMB national office in Manila. EMB is an attached agency of DENR.

EMB only said that the mining activities were covered by an exploration permit but this claim was disputed by residents of Governor Generoso who insist that actual mining, and not just exploration, is unfolding in their area. Another group of residents claimed that TQGT Mineral Resources Development Corp. had no approved exploration permit, but "only a pending application for an exploration permit."

Montano quizzes qualification of some of PVB shareholders

By Jason Faustino

Former Philippine National Police chief Ramon Montano questioned yesterday the board of elections of the Philippine Veterans Bank (PVB), claiming some of those elected were not qualified to be shareholders of the bank.

Montano warned Bangko Sentral ng Pilipinas Gov. Amando Tetangco Jr. that the bank's charter, Republic Act 3518, provides that PVB's shares of stock can only be issued to qualified individuals and the sale or transfer of stocks to unqualified people "shall not be allowed under any circumstances."

Montano asked Tetangco to protect the veterans who are the true owners and the PVB and

made it clear that he and fellow members of the Veterans Federation of the Philippines (VFP) are moving to steer the federation to the right course.

Leaders of the VFP and its affiliate veteran organizations, led by Defenders of Bataan and Corregidor Inc. national commander Rafael Evangelista, asked Defense Secretary Voltaire Gazmin to continue the reforms he has been pushing in the VFP through its new constitution and by-laws.

Among the signatories are PEFTOK Veterans Association Inc. president Col. Paterno Vitoria (retired), USAFIP-Northern Luzon president Brig. Gen. Arnulfo Banez, Magsaysay Veterans Legion president Cmdr. Ricardo Madayag, Gold Star

Mother and United Widows and Orphans Association of the Philippines Col. Juanito Recio, AFP Retired Veterans Association president Col. Simplicio Duque (retired), Philippine Veterans Legion president Capt. Marlon Dantes and Fil-American Irregular Troops, Inc. Veterans Legion national president Cmdr. William Pasiwen.

Others who supported the reforms are Lt. Gen. Raul Urgello (retired), president of Kampilan Peacemakers Inc.; Col. Cesar Pobre (retired), president of Cavaliers Association of Veterans Inc.; Brig. Gen. Miguel Villamor (retired), president of Philippine Military Academy, First Four; and Marietta Gazo, president of Philippine Association of Soldier Widows, Parents and Orphans Inc.

Bond buyers warned anew versus secondary market

By Ed Velasco

The Department of Finance (DoF), the mother agency of the Bureau of Treasury, has reissued its reminder to the public that it is not ideal to buy government-issued debt papers at the secondary market.

All government-issued debt papers must be bought from the BTr so that investors could claim entirely the interest and premium without any bank partaking from it, auction committee chairman and chief economist Gil Beltran said.

Premiums (of any debt paper) by bank are subject to equal division between them and the investor. In some cases, banks want higher percentage.

Secondary market is not a fair ground sometimes," Beltran told *The Daily Tribune*.

This is the second reminder coming from the DoF chief economist and undersecretary in relation to a universal bank's recent statement that interest in retail trade bonds are now so low, thus making it not ideal for people who want to grow their money.

Beltran countered, saying that it is the secondary market that dictates the premium and interest.

Most of these government-issued debt notes, with tenors of 20, 10 and five years, have interest ranging from four percent to 11 percent.

PLAIN VIEW

Ponzi scheme and NGO 'investors'



BY ROMEO V. PEFIANCO

LAST week in Quezon province dozens of "investors" complained to the local PNP that an "investment firm" failed to pay them the promised ROI (return on investment) of 40 percent weekly plus groceries. One young woman said she "gathered" P120,000 from her savings and loans which she invested in a company with no known office address. Their officers appeared sincere and trustworthy, but none of them, the investors, ever got close enough to get a smell of the 40 percent (weekly) ROI. None of the investors were rich kids below 18, but family men/women old enough to compute the so-called "profit and loss," statement.

Ponzi scheme

The interest of 40 percent weekly is called Ponzi scheme named in honor of Charles A. Ponzi (1882-1949), the famous Italian-born American swindler. He invented an investment scheme in which early investors were paid with sums obtained from later ones in order to create the illusion of profitability.

Artificial high returns were paid to the original investors, thus attracting more funds. Funds paid by later investors were used to pay the original "givers of capital." This month a Malaysian swindler who operated in Mindanao was released after serving a term in Malaysia for falsification. It is not clear

if he can be extradited to Mindanao to face charges of syndicated estafa worth billions a few years past. Hundreds of investors are after his neck.

Attraction to 'investors'

What most of us cannot understand is why swindlers using the Ponzi game of promising unusually high interest can still attract investors with sweet talk by agents who are grade and high school dropouts. Promoters of this form of swindle have no capital of their own but their glib tongue and fast talk about high interest given to investors.

Difference between Ponzi and NGO

What's the difference between investment in a Ponzi scheme and asking an NGO to make PDAF funds grow and grow. The NGOs familiar to most of us have better chances of making investments grow faster and bigger for three reasons: 1) the sums invested in NGOs are a lot bigger (in billions) coming from the national treasury, 2) the investors have no money of their own to invest even for a fair return, and 3) huge ROI is given to investors in big sums.

The NGO's stockholders are household helpers, drivers, and poor cousins. They were trained by "experts" of low rank in one government department how to prepare papers to be processed in order to get and divert public funds legally and fast.

Loose change

Ponzi was loose change compared to the new NGO promoters and shareholders, who move around with high government officials and prominent politicians. Swindling cannot be stopped for as long as promoters can find investors, who are just waiting for the right opportunity to "invest."

But NGOs may run out of investors using tax money if one of them runs out of luck and joins fellow jailbirds serving a jail term with a maximum 40-years (reclusion perpetua).

Greed is higher

Swindlers of the Ponzi type know human character and nature by heart - that greed in humans is higher than logic and intelligence. The swindlers' syllogism over the years has yielded profit to himself without fail and suffering to investors to reward their greed.

High risk

In the case of NGO-style of swindling, the gains are higher but the risk of getting caught and jailed for more than 20 years is also high.

Deceit and greed are two traits present in most humans. They were never outnumbered even once, and that's the reason investors cry in the Ponzi game but get a good laugh from NGO promoters. *(Comments are welcome at roming@pefianco.com)*

Tuesday, November 18, 2014

Scam suspects arrested

ISULAN, Sultan Kudarat— Police arrested over the weekend two suspected ring members involved in the selling of a fake golden Buddha statue to a couple here in the amount of P250, 000.

Isulan police chief Joefel Siason identified the arrested suspects as Dan Yaten, 38 and Alber Cayugan, 23, both residents of T'boli, South Cotabato.

Siason said the suspects were arrested after couple Datu Muti and Adraida Ali of Barangay Kalawag here complained that they were gypped by the suspects into buying a fake golden Buddha statue.

The victims said they had already paid P250, 000 but the suspects were still asking for an additional P50, 000.

Siason immediately dispatched a team led by Insp. Harun Sumensil to entrap the suspects.

When frisked, the suspects claimed that the P250, 000 was no longer in their possession, adding the money was given to their cohorts who are residents of Antipas, North Cotabato.

Police are set to file charges for swindling against the suspects. (Joseph Jubelag)

PSE-PDS merger pushed back anew to 2015

By E. C. GIONI

THE much-vaunted merger between the Philippine Stock Exchange (PSE) and the Philippine Dealing Systems Holdings Corp. (PDS) may have to be pushed back to 2015 instead of this year as board approval of the other significant owners have yet to be obtained.

"The original plan was to close it by the end of the year. That might be a challenge right now," said PSE President and Chief Executive Officer Hans Sicat.

Although, the Bankers Association of the Philippines (BAP) has already "signed" the agreement to sell its holdings in PDS while Singapore Exchange Ltd. (SGX) has yet to obtain a board approval for the disposition of its ownership.

BAP and SGX combined own 45 percent of PDS.

"BAP signed. A couple of the other owners are evaluating the bid... everyone. So we gave the term sheet to everyone and a few more have already told us verbally that...but they have to run it through the process - board approvals," Sicat explained.

PSE, for now, owns 20 percent of PDS.

After the ownership acquisition, PSE will have to address the integration of the workforce and, more importantly the functions, thus, the deadline for the physical merger may be delayed in contrast to the original schedule.

"That will take a little bit more time," Sicat said.

According to the PSE president, the timetable may be by the "beginning of next year because we have to have all these guys do full due diligence."

Amidst the setback, Sicat remains optimistic the deal will be consummated sometime next year. The transaction is expected to enhance the operating structure of the bourse.

From the structural perspective, Sicat said integration of the "depository function" is the "most important part" of the deal as this will promote "efficiency" as well the introduction of other financial products.

"Cross collateralization of both equity and debt instruments become a lot easier," he said, adding that "as a market operator we are bulkier. Suddenly we can have a fuller suite."

3 top operators of investment scam in Lucena face complaints

By Delfin T. Mallari Jr.
Inquirer Southern Luzon

LUCENA CITY—Some officials of South Luzon Multipurpose Cooperative-Grand Alliance of Business Leaders Association Inc. (SLMC-Gabai) here have come out in the open to file complaints against the "Top 3" operators of the discredited investment plan.

Supt. Allen Rae Co, Lucena police chief, said Roberta Rafa, account executive, and Arnel Guevarra and Jimwell Medrano, both employees, came to the police station separately last week and claimed innocence over the criminal charges filed against them.

The three also filed complaints against three top SLMC-Gabai leaders—Luzardo Lucido, Gabai chair and SLMC administrator; Gerald Murillo, account manager/marketing officer; and his wife Jenelle, cashier—for also duping them of their own personal investments.

"They all pointed to the Top 3 as the only ones who handle and have the final say on the millions of cash deposits," Co said.

The three top scam leaders continue to remain in hiding.

Last week, Camille Bautista, sales officer, and Jennylyn Elbo, teller, also filed their complaints against SLMC-Gabai and said they were also duped of their investments.

One of the police investigators handling the case said the formal complaints filed by

SLMC-Gabai employees against their superiors indicated only that no more money would be returned to the investors.

"The officials themselves believe that they can no longer reclaim their own deposits; that's why they filed their complaints," said the investigator, who requested anonymity as he was not authorized to speak to the media.

The investigator said Lucido occasionally communicated with some officials by phone and had appealed against drastic actions.

"He also made a promise that everything will be back to normal because a foreign investor will infuse fresh funds. But no one believes in him," the police said.

As of Monday, police had only 11 formal complainants against 14 SLMC-Gabai officials on charges of estafa and economic sabotage.

The investigator said there were only a few complainants because most scam victims didn't want the public to know that they became victims.

"They want to save face," he said.

Another investigator also disclosed that numerous victims were members of the Iglesia ni Cristo (INC), the same religion of the three top SLMC-Gabai leaders.

An INC member said the sect had a policy that members should not file a criminal complaint against fellow members, as the INC leadership has a process to resolve the conflict outside the court.

Index edges up on selective buying

Local share prices edged higher yesterday on the back of selective buying, analysts said.

The main-share Philippine Stock Exchange index gained 12.38 points or 0.17 percent to close at 7,229.72 with 2.75 billion shares valued at P6.16 billion changing hands.

Investors have become more selective in buying with some foreign investors heading out of the market, dealers said.

Despite the PSEi's rise, market breadth was negative as decliners edged out advancers 96 to 72 while 50 issues were unchanged.

By ZINNIA B. DELA PEÑA

All counters ended higher with the mining/oil index posting the biggest gains followed by the industrial sector.

Accord Capital Equities Corp.'s Jun Calaycay said he expects volatility to rein in the market with the earnings season about to unwind and the mixed results of corporate earnings in January to September.

"The handful of disappointments, ranging from weaker-than-expected to surprise numbers (on the downside) has shaken an earlier

confidence hinged on strong corporate profits to propel share prices higher," Calaycay said.

Meanwhile, global shares fell and the oil price slid yesterday after data showed Japan had slipped into recession, raising concerns about global growth.

European shares opened lower. They followed Tokyo's Nikkei index which lost three percent, its biggest one-day drop since August on news that the world's third-largest economy unexpectedly shrank by an annualised 1.6 percent in the third quarter.

- With Reuters

TOP OF MIND

By ELAINE P. DE GUZMAN

When grandfather rules: Test in determining the nationality of a corporation

Foreign investments are vital to the economic growth of the Philippines. The government encourages foreign investments to curb unemployment through job-generation and to increase revenue. While foreign investors are welcome, the Philippine Constitution however, reserves some activities or industries to Filipinos only. These 'nationalized' or 'partly-nationalized' industries require zero or a limited percentage of foreign participation. In these types of industries or activities, the nationality of the investors is critical.



One activity which is nationalized is the exploration, development and utilization of natural resources under Article XII, Section 2 of the Philippine Constitution. Under the Constitution, these activities must be under the full control and supervision of the State. The State, however, may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, corporations, or associations. For corporations or associations, the fundamental law requires that at least 60 percent of its capital is owned by Filipinos.

The determination of the 60 percent Filipino ownership in a corporation is, thus, essential when engaging in activities reserved for Filipinos, such as the exploration, development and utilization of natural resources. The Supreme Court of the Philippines recently had the occasion to rule on the determination of the nationality of corporations interested in engaging in mining activities in the Philippines. In the case of *Narra Nickel Mining and Development, Tesoro Mining and Development, Inc. and MacArthur Mining, Inc. vs. Redmont Consolidated Mines Corp.* (GR No. 195580), the Supreme Court discussed the tests used to determine whether a corporation is effectively Filipino-owned.

This subject case stemmed from a dispute over the mining and exploration of certain areas in Palawan. The respondent Redmont Consolidated Mines, Inc. ("Redmont") questioned the nationality of the three petitioner corporations, which are prior applicants for Mineral Production and Sharing Agreements (MPSA) on the same area. Redmont alleged that these three corporations are not qualified as they do not meet the "at least 60% owned by Filipinos" requirement under the Constitution. It further argued that at least 60% of the capital stock of Narra Nickel, Tesoro and MacArthur are owned and controlled by MBMI Resources, Inc., which is a 100% Canadian corporation.

In this case, the Supreme Court acknowledged that there are two tests previously used in determining the nationality of a corporation, the "control test" and the "grandfather rule". The court quoted Paragraph 7 of the DOJ Opinion No. 020, Series of 2005 wherein it provides that as follows:

"Shares belonging to corporations or partnerships, at least 60 percent of the capital stock of which is owned by Filipino citizens, shall be considered as of Philippine nationality, but if the percentage of Filipino ownership in the corporation or partnership is less than 60 percent, only the number of shares corresponding to such percentage shall be counted as of Philippine nationality. XXX"

The High Court explained that the first part of the quoted paragraph pertains to the control test or the liberal rule, while the second part refers to the stricter and more stringent grandfather rule. In applying these rules to the present case, the Court did not limit the application of the grandfather rule to instances when the Filipino stockholdings are less than 60 percent. It stated that when there is doubt over the 60-40 Filipino equity ownership, the grandfather may be applied, contrary to the allegations by the petitioners that the control test should be used as it was the test applied under Republic Act 7042 as amended (otherwise known as the Foreign Investments Act or FIA).

In applying the grandfather rule, the Supreme Court looked into the actual ownership of MBMI in each of the three corporations by further checking the actual structure of the other shareholder corporations of each company. In MacArthur Mining Corporation, MBMI has 3998 shares while Madrideojos Mining which is a Filipino corporation, has 5,997 shares. On its face, it would seem like the Filipino corporation owns at least 60 percent of MacArthur. However, upon closer look on the ownership of Madrideojos, it can be seen that MBMI also has substantial shares in it.

In this case, the Supreme Court acknowledges that while corporate layering is allowed by the FIA, such practice becomes illegal if used to circumvent the Constitution and pertinent laws.

Through the application of the grandfather rule, the Supreme Court held that petitioners Narra Nickel, Tesoro and MacArthur Mining are not considered Philippine nationals since MBMI, a 100 percent Canadian corporation, owns 60 percent or more of their equity shares interests. Hence, as non-Philippine nationals, they are disqualified to participate in the exploitation, utilization and development of the Philippines' natural resources.

While the Supreme Court applied the grandfather rule instead of the control test in this subject case, it must be clarified that the Court did not totally abandon the control test. The Court concluded that the control test is still the prevailing mode of determining the nationality of a corporation, within the ambit of the Constitution, as to who is entitled to participate in the exploration, development and utilization of the natural resources of the Philippines. The grandfather rule would only apply if based on the surrounding facts and circumstances, there is doubt on the 60-40 required Filipino-equity ownership in the corporation.

As doubt may arise from several factors, it would therefore be prudent to ensure that any corporate layering resorted to by an entity would not result to the contravention of the Constitution. Although this may prove to be quite difficult, it would always be better to be on the side of caution.

Elaine P. de Guzman is a supervisor from the tax group of R.G. Manabat & Co. (RGM&Co.), the Philippine member firm of KPMG International.

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