TAX ALERT

February 27, 2004

CONGRESS PASSES REPUBLIC ACT NO. 9243 *("R.A. 9243")* RATIONALIZING THE PROVISIONS ON THE DOCUMENTARY STAMP TAX OF THE TAX CODE OF 1997.

The following sections of the Tax Code of 1997 have been amended by R.A. No. 9243: Section 174 – Stamp Tax on Debentures and Certificates of Indebtedness has been deleted; Section 175 (now Section 174) – Stamp Tax on *Original Issue of Shares* of Stock is now ***P1.00*** on each P200.00, or fractional part thereof, of the par value of shares of stock; Section 176 (now Section 175) – Stamp Tax on *Sales, Agreements to Sell, Memoranda of Sales, Deliveries or Transfer of Shares or Certificates of Stock* is now ***P0.75*** on each P200.00, or fractional part thereof, of the par value of stock; Sections 177 to 179 (now Sections 176 to 178); Section 180 (now Section 179) – Stamp Tax on *All Debt Instruments* is ***P1.00*** on each P200.00, or fractional part thereof, of the issue price of any original issue of debt instruments, provided that for such debt instruments with terms of less than one (1) year, the stamp tax to be collected shall be of a proportional amount in accordance with the ratio of its term in number of days to 365 days, provided further that only one stamp tax shall be imposed on either loan agreement, or promissory notes issued to secure such loan; Section 180 (new Section) – Stamp Tax on *All Bills of Exchange or Drafts* is ***P0.30*** on each P200.00, or fractional part thereof, of the face value of any bill of exchange (between points within the Philippines) or draft; Section 183 – Stamp Tax on *Life Insurance Policies* is now ***P0.50*** on each P200.00, or fractional part thereof, of the amount of premium collected; Section 186 – Stamp Tax on Policies of *Annuities and Pre-Need Plans* is ***P0.50*** on each P200.00, or fractional part thereof, of the premium or contribution collected; and Section 199 – Documents and Papers Not Subject to Stamp Tax that now includes, among other transactions, the following: 1) borrowing and lending of securities executed under the Securities Borrowing and Lending Program of a registered exchange, or in accordance with regulations prescribed by the appropriate regulatory authority, and which agreement is duly registered and approved by the Bureau of Internal Revenue; 2) sale, barter or exchange of shares of stock listed and traded through the local stock exchange for a period of five (5) years from the effectivity of RA 9243; 3) assignment or transfer of any mortgage, lease or policy of insurance, or the renewal or continuance of any agreement, contract, charter, or any evidence of obligation or indebtedness, if there is no change in the maturity date or remaining period of coverage from that of the original instrument; 4) fixed income and other securities traded in the secondary market or through an exchange; 5) interbranch or interdepartmental advances with the same legal entity; and 6) transfer of property pursuant to Section 40(c)(2) of the Tax Code of 1997. ***Approved on February 17, 2004.***

BEGINNING JANUARY 1, 2004, BANKS, NON-BANK FINANCIAL INTERMEDIARIES, DOCTORS, AND LAWYERS ARE ONCE AGAIN EXEMPT FROM VAT. BUT BANKS AND NON-BANK FINANCIAL INTERMEDIARIES ARE SUBJECT TO THE GROSS RECEIPTS TAX ("GRT") ANEW.

Republic Act No. 9238 exempts from VAT services rendered by the following: (a) banks, non-bank financial intermediaries performing quasi-banking functions, and other non-bank financial intermediaries; (b) doctors of medicine duly registered with the Professional Regulation Commission (PRC); and (c) lawyers duly registered with the Integrated Bar of the Philippines. The law also re-imposes GRT on gross receipts derived from sources within the Philippines by all banks and non-bank financial intermediaries pursuant to Section 121 of the Tax Code. ***Republic Act No. 9238 [lapsed into law on February 5, 2004].***

BIR ISSUES GUIDELINES APPLICABLE TO BANKS AND NON-BANK FINANCIAL INTERMEDIARIES AS A RESULT OF THE ENACTMENT OF R.A. 9238.

Banks and non-bank financial intermediaries who have issued VAT receipts for services rendered prior to February 16, 2004 (date of publication of RA 9238) are required to file a VAT return and remit the output VAT to the BIR without any deduction except for the creditable VAT withheld from banks and non-bank financial intermediaries. However, recognizing that banks and non-bank financial intermediaries issued VAT invoices before publication of the law, they are provided with an opportunity to refund the VAT paid and remitted to the BIR for the said transactions provided the VAT receipts are surrendered to the bank, and the bank cancels the same and issues a non-VAT invoice in place thereof. Banks shall also report and pay gross receipts tax on transactions entered into from January 2004. ***Revenue Memorandum Circular No. 9-2004, dated February 19, 2004.***

BIR EXEMPTS AGRICULTURAL SUPPLIERS WHO ARE "MARGINAL INCOME EARNERS" FROM 1% CREDITABLE WITHHOLDING TAX.

These regulations exempt "marginal income earners" from 1% creditable withholding tax on income payments made to agricultural suppliers such as those, but not limited to, payments made by hotels, restaurants, resorts, caterers, food processors, canneries, supermarkets, livestock, poultry, fish and marine product dealers, hardwares, factories, furniture shops, and all other establishments. "Marginal income earners", as defined in Revenue Regulations No. 11-2000, refer to individuals not otherwise deriving compensation as an employee under an employee-employer relationship, but who are self-employed and deriving gross sales/receipts not exceeding P100,000.00 during any 12-month period. ***Revenue Regulations No. 1-2004, dated January 14, 2004.***

BUT AGRICULTURAL SUPPLIERS QUALIFIED AS MARGINAL INCOME EARNERS MUST FIRST REGISTER WITH BIR AS SUCH.

All agricultural suppliers who are marginal income earners are required to be registered with the BIR. RDOs should issue Certificate of Registration clearly and specifically indicating therein that taxpayer-registrant is a "marginal income earner". The conditions for exemption from 1% creditable withholding tax are as follows: (a) as a general rule, buyers of agricultural products from agricultural suppliers shall withhold 1% creditable withholding tax; (b) however, buyers of agricultural products from agricultural suppliers who are registered as marginal income earners shall not withhold 1% creditable withholding tax from their income payments provided such agricultural suppliers present a copy of their Certificate of Registration showing that they are registered as marginal income earners; (c) all buyers shall report all information regarding income payments made to agricultural suppliers who are marginal income earners following strictly the format under Part III Schedule 3 of BIR Form 1604-E. ***Revenue Memorandum Order No. 4-2004, dated January 30, 2004.***

A TAXPAYER IS NOT LIABLE FOR THE FAILURE OF THE WITHHOLDING AGENT TO REMIT TAXES WITHHELD.

The Tax Code provisions on withholding tax are mandatory. The taxpayer should not answer for the non-performance by the withholding agent of its legal duty to withhold tax unless there is collusion or bad faith. The taxpayer could not be deemed to have evaded the tax had the withholding agent performed its duty. ***Manila Bankers Life Insurance Corporation vs. Commissioner of Internal Revenue, C.T.A. Case No. 6558, December 12, 2003.***

A MORTGAGOR AND A MORTGAGEE MAY EXTEND THE STATUTORY ONE-YEAR PERIOD OF REDEMPTION WITHOUT ATTRACTING CAPITAL GAINS TAX AND DOCUMENTARY STAMP TAX.

Facts: Spouses P obtained a loan from ABC Bank, mortgaging their real property as security. Spouses P defaulted on the loan thereby constraining ABC Bank to extra-judicially foreclose the real property. Being the highest bidder, a Certificate of Sale was issued in favor of Spouses P. Before the expiration of the statutory one-year redemption period, Spouses P requested ABC Bank for an extension of the redemption period, which was granted by the latter. Within the extended redemption period agreed upon, Spouses P redeemed the foreclosed real property and subsequently sold the same to Spouses G. The BIR assessed ABC Bank for deficiency capital gains tax and documentary stamp tax on the extra-judicial foreclosure sale on account of the purported non-redemption of the real property within the statutory one-year redemption period, as well as creditable withholding tax and documentary stamp tax on the sale of real property to Spouses G. *Held:* The assessments are void. The Rules of Court grants the debtor-mortgagor the opportunity to re-aquire or redeem foreclosed real property within one year from registration of the Certificate of Sale. If the mortgagor and the mortgagee agree to extend the redemption period, redemption within the extended period agreed upon prevents the mortgagee from consolidating its title over the foreclosed real property and likewise prevents the foreclosure from being subjected to capital gains and documentary stamp taxes on account of the non-redemption. Since ownership of the real property was not consolidated in the name of ABC Bank, the taxable event that would give rise to the imposition of capital gains and documentary stamp taxes did not arise. ***Planters Development Bank vs. Commissioner of Internal Revenue represented by Danilo A. Duncano – Regional Director and Clavelina S. Nacar, Revenue District Officer, Revenue Region No. 7, Revenue District Office No. 40, CTA Case No. 6574, November 18, 2003.***

PAYMENTS OF SALARIES AND WAGES ARE EXEMPT FROM VAT.

Facts: X Co. enters into a service contract with Y Co. to provide manpower services to the latter to manage and operate its various shopping centers. X Co. provides such services exclusively to, and did not charge any VAT on the amounts it received from, Y Co. However, it subsequently paid deficiency VAT upon assessment by BIR. Prior to its payment of deficiency VAT, X Co.'s employees formed a labor union and contended that their direct employer was Y Co. Later, the DOLE and Supreme Court ruled that Y Co. was in effect the actual employer of the employees. In light of these developments, X Co. filed a claim for refund representing erroneously paid VAT on services. ***Issue:*** Whether payments received by X Co. from Y Co. constituted payments for services pursuant to an employer-employee relationship. ***Held:*** The Court adhered to the resolutions of the DOLE and Supreme Court and ruled that X Co.'s employees who comprised the labor union were indeed employees of Y Co. Thus, payments for services received from Y Co. are exempt from VAT pursuant to Section 109(o) of the Tax Code of 1997. ***DFP Services, Inc. vs. Commissioner of Internal Revenue, CTA Case Nos. 5981, 6023, 6115, and 6118, promulgated on October 7, 2003.***

IN A JUDICIAL REFUND CLAIM FOR UNUTILIZED INPUT VAT ARISING FROM ZERO-RATED SALES, THE ZERO-RATED SALES MUST BE SUBSTANTIATED WITH BIR-REGISTERED INVOICES OR RECEIPTS EXPRESSLY INDICATING THAT THE SALES ARE ZERO-RATED.

The absence of an authority to print or BIR permit number in the invoice is fatal to such refund claim as the court cannot consider the sales invoices as valid proof of export sales subject to 0% VAT. As regards computer-generated invoices, the authority to use computer-generated form of invoices issued by the BIR should be produced as part of the claimant's evidence. The sales invoice must also indicate the word "zero-rated" for transactions covering zero-rated export sales.

Intel Philippines Manufacturing, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6170, November 24, 2003. Of course, the export invoices must likewise contain the company's Taxpayer's Identification Number and indicate that the taxpayer is VAT-registered (TIN-V). ***Intel Technology Philippines, Inc. vs. Commissioner of Internal Revenue, C.T.A. Case No. 6039, December 17, 2003.***

MOREOVER, RECEIPTS TO PROVE TAXABLE SALES, ZERO-RATED SALES AND EXEMPT SALES MUST BE PRESENTED IN EVIDENCE TO ENABLE THE COURT TO PROPERLY ALLOCATE THE INPUT VAT ATTRIBUTABLE TO ZERO-RATED SALES.

A taxpayer having taxable sales, zero-rated sales and exempt sales must not only present the official receipts issued for zero-rated sales but must likewise present VAT official receipts for taxable sales and non-VAT official receipts for exempt sales to enable the court to properly allocate the verified input taxes among the taxable, zero-rated and exempt sales and determine the amount that may ultimately be refunded to the taxpayer. ***Eastern Telecommunications Philippines, Inc. vs. Commissioner of Internal Revenue, C.T.A. Case No. 6019, November 19, 2003.***

COURT OF TAX APPEALS DENIES A REFUND CLAIM FOR ERRONEOUSLY PAID OUTPUT AND INPUT VAT ON SALES TO A PEZA-REGISTERED ENTERPRISE PRIOR TO THE EFFECTIVITY OF RMC 74-99 ON ACCOUNT OF THE ABSENCE OF AN APPROVED APPLICATION FOR ZERO RATING AND ON THE GROUND OF ESTOPPEL.

Facts: X Co. contracted with a PEZA-registered utilities enterprise for the engineering, construction and commissioning of a diesel power station. When X. Co. tried to pass on the VAT for its services, the PEZA-registered enterprise refused payment thereof on account of its 5% in-lieu-of-all-taxes incentive. While X Co. was aware that Rev. Regs. No. 7-95 required it to secure an approved application for VAT zero-rating, it did not do so because of the policy of the BIR then to deny applications for effective zero-rating relative to sales to PEZA-registered enterprises which were not directly engaged in export activities. X Co. instead took the conservative approach and reported its sales to the PEZA-registered enterprise as VAT taxable sales subject to 10% output VAT. When X Co. learned that the BIR would soon issue clarificatory guidelines with respect to the VAT treatment of sales to PEZA registered enterprises, it filed an Application/Certificate for Zero-Rate and obtained the BIR's approval on the same date. Subsequently, RMC No. 74-99 was issued declaring that any sale of goods, property or services by a VAT-registered supplier from the Customs Territory to any PEZA-registered enterprise, regardless of the class or type of the latter's PEZA registration, is legally entitled to the 0% VAT. X Co. now seeks a refund of the output VAT paid prior to having secured an approved Application for Zero-Rate and prior to the issuance of RMC No. 74-99. *Held:* RMC No. 74-99 cannot be given retroactive effect. Prior thereto, Rev. Rev. Regs. No. 7-95 applied, which required persons, other than those engaged in actual export, to secure prior approval for VAT zero-rating before they may subject its sales to 0% VAT. Moreover, in failing to apply for zero-rating and taking the conservative approach by treating its sales as subject to 10% VAT, X Co. is now estopped from claiming a refund thereof. ***Caterpillar Motoren GmbH & Co. KG (Philippine Branch) vs. Commissioner of Internal Revenue, C.T.A. Case No. 6290, November 18, 2003.***

BIR ISSUES GUIDELINES AND PROCEDURES IN IMPLEMENTING REV. REGS NO. 29-2003 ON THE ADVANCE PAYMENT OF VALUE ADDED TAX ON THE SALE OF FLOUR.

The VAT on the sale of flour milled from imported wheat shall be paid in advance by the flour miller at the AAB of the LTS/LTDO/RDO where the flour miller is registered. The importation of wheat by any trader shall be exempt from the payment of advance VAT but he shall be required to secure ATRIG from the BIR. The importer of wheat, whether miller or trader, is required to comply with the requirements of Section 4 of Rev. Regs. No. 8-2002 in the submission of summary list of sales, purchases and importations of wheat. For wheat imported by flour millers, the 10% Advance VAT shall be computed on 75% of the sum of (a) invoice value multiplied by the current exchange rate as of the date of payment; (b) estimated customs duties and other charges prior to release from customs custody except VAT; and (c) a 5% mark-up on the sum of (a) and (b). ***Revenue Regulations No. 5-2004, dated December 29, 2003.***

COURT OF TAX APPEALS DENIES THE REFUND CLAIM OF AN INTERNATIONAL AIRLINE FOR EXCISE TAXES PASSED ON TO IT BY AN OIL COMPANY FOR FAILURE TO PROVE THAT THE JET FUEL ON WHICH EXCISE TAXES WERE PAID CAME FROM A BONDED STORAGE TANK.

See however dissenting opinion of Judge E. D. Acosta who argued that the sale of the aviation fuel must nonetheless be exempt by reason of the exemption under the Air Transport Agreement between the Philippines and Singapore in relation to Section 135(b) of the NIRC. ***Silkair (Singapore) Pte. Ltd. vs. Commissioner of Internal Revenue**, **C.T.A. Case No. 6217, November 5, 2003 and Silkair (Singapore) Pte. Ltd. vs. Commissioner of Internal Revenue**, **CTA Case No. 6290, November 18, 2003.***

CTA REAFFIRMS THAT THE LAST PARAGRAPH OF REV. REGS. NO. 17-99 HAS NO LEGAL BASIS.

Facts: On January 1, 1997, *R.A.* No. 8240 took effect and subjected certain cigarette brands to specific tax under Section 145 of the Tax Code of 1997. Section 145 of the Tax Code of 1997 provided that – "[t]he excise tax from any brand of cigarettes within the next three (3) years from the effectivity of R.A. No. 8240 shall not be lower than the tax, which is due from each brand on October 1, 1996." It further stated that – "[t]he rates of excise tax on cigars and cigarettes under paragraphs (1), (2), (3), and (4) hereof, shall be increased by twelve percent (12%) on January 1, 2000." To implement the provision for a 12% increase of excise tax on January 1, 2000, the Secretary of Finance issued Rev. Regs. No. 17-99, dated December 16, 1999. The last paragraph of Rev. Regs. No. 17-99 stated – "[p]rovided, however, that the new specific tax rate for any existing brand of cigars, cigarettes packed by machine, distilled spirits, wines and fermented liquors shall not be lower than the excise tax that is actually being paid prior to January 1, 2000". Company F argued that the last paragraph of Rev. Regs. No. 17-99 was an illegal extension for an indefinite period of time of the three-year transitory provisions of R.A. No. 8240 incorporated in Section 145 of the Tax Code of 1997. It argued that the three-year period within which it was to be operated reckoned from January 1, 1997 expired on December 31, 1999. Thereafter, effective January 1, 2000, the correct base of the 12% increase are the rates prescribed under paragraphs (1), (2), (3), and (4) of Section 145 of the Tax Code of 1997. *Held:* The CTA agreed with Company F. The BIR, in issuing Rev. Regs. No. 17-99, went beyond the legal parameters that defined the boundaries of its authority. Declaring the questioned Rev. Regs. valid would put to naught the provisions of Section 145 of the Tax Code of 1997. ***Fortune Tobacco Corporation vs. Commissioner of Internal Revenue, C.T.A. Case No. 6612, December 4, 2003.***

A LOCAL BANK'S CABLE INSTRUCTIONS TO A FOREIGN BANK TO REMIT DOLLARS TO FEDERAL RESERVE BANK, WHICH WILL BE REMITTED TO BSP, IS IN THE NATURE OF A TELEGRAPHIC TRANSFER SUBJECT TO DST.

Facts: Bank A entered into SWAP Transactions and/or arrangements whereby it sold to the Central Bank dollars at the guiding rate/cross rate subject to the stipulation that it would buy back the dollar sold upon the maturity date of the SWAP arrangement at a specified rate. In effecting the transfer of funds to the Central Bank, Bank A first advises through cable instruction the foreign bank where it maintains a deposit to remit the dollar amount of the SWAP to the Federal Reserve Bank, which, in turn, credits the account of the Central Bank of the Philippines. ***Issue:*** Whether Bank A's cable instructions to its foreign correspondent bank is in the nature of a telegraphic transfer subject to DST under Section 195 (now 182) of the Tax Code. ***Held:*** The Court ruled in the affirmative. Section 182 mentions "foreign bills of exchange and letters of credit" that are "drawn in but payable out of the Philippines." Obviously, it is not money that is being drawn in the Philippines (as Bank A contended) but bills of exchange and letters of credit. Thus, such telegraphic transfers are proper subjects for the imposition of DST. ***Allied Banking Corp. vs. Commissioner of Internal Revenue, CTA Case No. 6505, October 13, 2003, citing BPI vs. Commissioner of Internal Revenue, CTA Case No. 4481, dated May 31, 1994.***

A TAXPAYER'S DENIAL OF RECEIPT OF A FINAL ASSESSMENT NOTICE SHIFTS THE BURDEN OF PROVING THE FACT OF SUCH RECEIPT TO THE GOVERNMENT.

Citing Republic v. Court of Appeals, et. al., L-38540, April 30, 1987, the Court of Tax Appeals ruled that where the taxpayer has disputed the fact of receipt of the Final Assessment Notice, the burden of proving that a Final Assessment Notice has in fact been sent to and received by the taxpayer is shifted to the Government. ***Corporate Information Solutions, Inc. vs. Commissioner of Internal Revenue, C.T.A. Case No. 5919, December 1, 2003.***

NOTE:

The information provided herein is general and may not be applicable in all situations. It should not be acted upon without specific legal advice based on particular situations. If you have any questions, please feel free to contact any of the following at telephone number (632) 633-9418, facsimile number (632) 633-1911, or at the indicated e-mail address:

Atty. Carlos G. Baniqued — cgbaniqued@baniquedlaw.com
Atty. Laura Victoria A.S. Yuson-Layug — lvyusonlayug@baniquedlaw.com
Atty. Ma. Carlota Christina G. Laiño-Santiago — cglaino@baniquedlaw.com
Atty. Suzette A. Celicious — sacelicious@baniquedlaw.com