



THE STINKING ROSE JERKS CUSTOMS **(Does a garlic cartel exist?)**

by

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During the middle of 2014, the price of garlic soared dramatically prompting the Senate to conduct public hearing in order to determine the cause of such price spike. On July 3, 2014, the Senate Committee on Agriculture held a hearing on the subject matter, together with other imported agricultural products. Senate Resolution No. 737¹ was also filed urging the Senate to conduct further hearings on the matter.

Public hearing, Committee on Agriculture

The domestic production of garlic is around 15% to 20% of domestic supply; the rest is imported. In May 2014, the retail price of the product reached P280 per kilo when the farm gate price from Ilocos Norte was only P40 per kilo. Ilocos Norte produces 8% of the total domestic production. Garlic is imported mostly from China where garlic per se is usually discarded in favor of garlic leaves which are used as cooking ingredient. Given the situation, the Chair of the Senate Committee on Agriculture, Sen. Cynthia Villar suggested the relaxation of the importation of the product in order to increase supply.

¹ Sponsored by Senator Miriam Defensor Santiago.



According to the Bureau of Plant Industry (BPI), as of May 2014, domestic production amounted to 10,390 metric tons (mt) while importation amounted to 28,690 mt. Note that domestic demand for garlic is 1.128 million tons per year. The country's imports amounted to 28,690 mt from November 2013 to May 2014. The total demand is 143,000 MT, or 143 million kilos. The BPI gave the following importation data: (a) November 2013 – 1,624 mt; (b) December 2013 – 6, 848 mt; (c) January 2014 – 6,106 mt; (d) February 2014 - 2, 440 mt; (e) March 2014 – 8,141 mt; and (f) April 2014 – 3,731 mt.

The Senate Committee on Agriculture was surprised that the Department of Agriculture (DA) imported garlic during its harvest season but did not do so during the lean months contributing to its spiralling retail price and opening the way to market manipulators. The DA defended its decision by citing the recommendation of the National Garlic Action Team (NGAT) for the need of the importers. The NGAT is composed of the traders, exporters, farmers-growers association and the pertinent government agencies. The role of the DA was to concur with the recommendation of the NGAT, and such was followed by the BPI, the implementing agency of the DA having the power to decide on garlic importation. The DA, in effect, said that it was the local traders who benefited from the high prices of garlic. Around 60% of garlic importers are cooperatives, while the remaining 40% are the traders.

The garlic cooperatives, in turn, sell their import permits for P100,000 per 50 tons, equivalent to P2.00 per kilo. Locally produced garlic becomes available domestically during the months of April or May.

The Bureau of Customs (BOC) reported during the public hearing that importers without the required import permits imported around 700 mt. The importers paid duty amounting to P5.00, CIF value of P11.00, resulting to a landing cost of P17 per kilo. The lading cost of P17 per kilo must be compared to the domestic retail price of P280 per kilo (June/July 2014 prices) and P40.00 per kilo farm gate price from Ilocos Norte.²

The Senate Committee on Agriculture estimated (during the spike of price to P280 per kilo) that the profit of garlic traders was around 26 billion pesos.

As a result of the public hearing the Chairperson, Sen. Villar suggested the following:

1. It must be the farmers, not the traders who should decide regarding the importation of garlic;
2. There must be a position paper regarding the viability of expanding garlic production in the Province of Ilocos Norte, considering that 70% of the province is uncultivated. There is a need

² In a letter-reply sent by the Bureau of Plant Industry to the Senate Tax Study and Research Office, dated August 5, 2014 the farmgate price of garlic is P94.74 per kilo as of March 2014. The high farmgate price as compared to the landed importation cost P17.00 per kilo makes garlic prone to smuggling.

for government funding support, as well as improving the water supply in the province especially in upland zones;

- Do not leave the process of importation to the cooperatives and traders. If the traders are allowed to manipulate the demand for garlic, they would have a strong influence to the

farmers due to "utang na loob". They would be forced to sell their import permits to the traders. It should be the DA that should help the garlic farmers, not the traders, because traders are businessmen, and as expected they want to maximize their profits. The traders dictate how to plant, where to plant. They also control the domestic supply of the product, which is the

Garlic Domestic Production (in metric tons)

	2009	2010	2011	2012	2013
Philippines	10,451.10	9,563.20	9,056.15	8,490.97	8,643.70
CAR	15.80	24.39	13.45	14.45	12.55
Ifugao	2.40	1.74	-	-	-
Kalinga	13.40	12.65	13.45	14.45	12.55
Ilocos Region	7,477.77	6,540.24	6,034.38	5,622.63	5,718.22
Ilocos Norte	7,223.74	6,283.50	5,756.31	5,340.70	5,435.76
Ilocos Sur	241.94	245.25	268.14	272.83	274.03
Pangasinan	12.09	11.48	9.93	9.10	8.43
Cagayan Valley	214.43	185.04	196.03	137.67	267.15
Cagayan	48.52	42.36	44.75	44.18	46.08
Isabela	9.75	3.12	3.78	3.02	0.62
Nueva Vizcaya	156.16	139.56	147.50	90.47	220.45
Central Luzon	329.11	323.5	321.04	320.40	316.70
Nueva Ecija	329.11	323.5	321.04	320.40	316.70
Calabarzon	379.61	331.59	292.51	256.76	235.36
Batangas	26.43	23.70	20.80	16.90	22.00
Cavite	37.78	38.40	35.19	15.47	17.43
Laguna	2.15	1.79	0.06	3.30	8.00
Quezon	313.25	267.70	236.46	221.09	187.93
Mimaropa	1,988.04	2,127.25	2,160.76	2,113.75	2,010.20
Marinduque	18.71	17.36	16.94	17.44	17.22
Occidental Mindoro	1,874.25	2,012.10	2,054.20	2,010.09	1,907.50
Oriental Mindoro	44.06	47.94	50.55	49.53	53.67
Romblon	51.02	49.85	39.07	36.69	31.81
Bicol Region	2.19	1.97	1.91	1.81	-
Camarines Sur	2.19	1.97	1.97	1.81	-
Western Visayas	40	35.16	32	1.5	79.56
Iloilo	40	35.1	32	19.50	79.56
Eastern Visayas	4.15	4.06	4.07	4.0	4.01
Western Samar	4.15	4.06	4.07	4.0	4.01

Source : Bureau of Plant Industry

duty of the DA, not the NGAT (National Garlic Action Team). NGAT is also composed of the traders and cooperatives.

4. The Price Act, RA 7581, carries the highest penalty of P2 million and imprisonment of 15 years. As far as the Price Act is concerned, garlic is listed as a prime commodity, however, the price of garlic can not be monitored daily because it is a fast moving item, even though DTI knew that price manipulation existed. Farmer's cooperatives sell their importation permits to the traders who actually import the product. Only the officers of the cooperatives benefit, the ordinary farmers do not know what is going on.

Senator Grace Poe suggested that the list of the cooperatives given import permits, who in turn sold their rights to the traders should be uploaded to the DTI or Senate website to protect those that did not sell their import permits. It must also be clear as to who are the traders that bought the permits.

Through the years, the great majority of garlic production comes from Ilocos Region, particularly from the province of Ilocos Norte. It is followed by Mimaropa³ region, with Occidental Mindoro as the greatest producer. The third greatest producer is the Cabarzon⁴ Region, with the province of Quezon as the biggest contributor.

The Price Act of 2012 RA 7581, as amended by RA 10623

Two laws, namely RA 7581 (1991) and RA 10623 (2012), provide for the protection of consumers by stabilizing the price of basic necessities and prime commodities. The basic necessities are goods vital for sustenance like - *"rice; corn; root crops; bread; fresh, dried or canned fish and other marine products; fresh pork, beef and poultry meat; fresh eggs; potable water in bottles and containers; fresh and processed milk; fresh vegetables and fruits; locally manufactured instant noodles; coffee; sugar; cooking oil; salt; laundry soap and detergents; firewood; charcoal; household liquefied petroleum gas (LPG) and kerosene; candles; drugs classified as essential by the Department of Health and such other goods they may be included..."*⁵

Prime commodities are not considered basic but are essential to consumers, like - *"flour; dried,*

*processed or canned pork, beef and poultry meat; dairy products not falling under basic necessities; onions, garlic, vinegar, patis, soy sauce; toilet soap; fertilizer, pesticides and herbicides; poultry, livestock and fishery feeds and veterinary products; paper; school supplies; nipa shingles; sawali; cement; clinker; GI sheets; hollow blocks; plywood; construction nails; batteries; electrical supplies; light bulbs; steel wire; all drugs not classified as essential by the Department of Health and such other goods as may be included..."*⁶

The Price Coordinating Council controls the basic necessities which shall remain effective for the duration of the condition lasting for not more than sixty (60) days. The Price Action Officer of the Council is mandated to *"coordinate the actions of all implementing agencies involved in the monitoring and investigation of abnormal price movements and shortages of basic and prime (garlic is a prime commodity)"*⁷ commodities⁸.

The Council is government-wide endeavor as reflected in its membership, thus:

1. The Secretary of Trade and Industry, as Chairman;
2. The Secretary of Agriculture;
3. The Secretary of Health;
4. The Secretary of Environment and Natural Resources;
5. The Secretary of Local Government;
6. The Secretary of Transportation and Communication;
7. The Secretary of Justice;
8. The Secretary of Energy;
9. The Director General of the National Economic and Development Authority;
10. One (1) representative from the consumers' sector;
11. One (1) representative from the agricultural sector;
12. One (1) representative from the trading sector, and
13. One (1) representative from the manufacturers' sector.

The law⁹ provides for instances of illegal price manipulation which fall under three (3) categories, namely - hoarding, profiteering and the existence of a cartel. The same law provides for a strict meaning of profiteering - *"Profiteering is the sale or offering for sale of any basic or prime commodity at a price grossly*

³ Mimaropa Region consists of the following provinces - Marinduque, Occidental Mindoro, Oriental Mindoro, Palawan, and Romblon.

⁴ The Calabarzon Region consists of the following provinces - Batangas, Cavite, Laguna, Quezon, and Rizal.

⁵ Section 3, Definition of Terms, RA 10623.

⁶ Section 3, Definition of Terms, RA 10623.

⁷ The comments inside the parenthesis are from the author.

⁸ Section 13, The Price Action Officer: Powers and Functions, RA 7581.

⁹ Section 5, Illegal Acts of Price Manipulation, RA 7581.

in excess of its true worth. A price is deemed grossly in excess of its true worth if the price thereof has been raised by more than ten percent (10%) in the immediately preceding month." It also provides for a penalties for acts of price manipulations.

Why has the price of garlic risen so much? Has the Council done its job well? Sen. Villar puts the blame on the NGAT because it decides to whom the import permit is given.¹⁰

Executive Order No. 45

On June 9, 2011, President Benigno S. Aquino III issued Executive Order No. 45, designating the Department of Justice as the **Competition Authority**. It is mandated to perform the following functions:

- a. Investigate all cases involving violations of competition laws and prosecute violations to prevent restrain and punish monopolization, cartels and combinations of trade;
- b. **Enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices;**
- c. Supervise competition in markets by ensuring that prohibitions and requirements of competitive laws are adhered to, and to this end, call on other government agencies and/or entities for submission of reports and provisions for assistance;
- d. **Monitor and implement measures to promote transparency and accountability in markets;** and
- e. Promote international cooperation and strengthen Philippine trade relations with other countries.

At first, it appears that there is an overlap between the said EO, and RAs 7581 and 10623. However, taking a closer look reveals that EO 45 was issued to respond to the current trade liberalization thrust brought about by the membership of the Philippines to the World Trade Organization (WTO). Its emphasis is on competition practices among the business entities influencing the law of demand and supply in the country. Consumer protection comes only as a consequence of mandates given to the Competition Authority. Note its last enumerated mandate – *"Promote international cooperation and strengthen trade relations with other countries"*. **Such being the case, it seems unlikely that the problem brought**

about by garlic importation would be investigated by the Authority.

It is a hint that its main mandate is to determine violations relating to competition firstly among domestic companies having similar product lines as well as the enforcement of equal treatment between imported goods and domestically produced ones. The Authority was placed under the DOJ in order to immediately respond to unfair competition arising from within and outside the country.

WTO mandated measures incorporated in the Tariff and Customs Code of the Philippines (TCCP)

In 1995, the Philippines became a member of the WTO. Ever since, we follow the WTO rules regarding importation and exportation in order to ensure a fair cross border trading.

In the case of the low import price of garlic, it is worthwhile to investigate whether the exporting country did not violate any of the WTO prohibited practices. These practices are dumping, grant of specific subsidies to the product, and in cases of import surges. Additional tariffs are imposed if any of the prohibited practices of the exporting country is present. Consider the following instances:

1. Anti-dumping law, RA 8752 (August 12, 1999)

The law¹¹ defines dumping as – *"Whenever any product, commodity or article of commerce imported into the Philippines at an export price less than its normal value in the ordinary course of trade for the like product, commodity or article destined for consumption in the exporting country is causing or is threatening to cause material injury to a domestic industry, or materially retarding the establishment of a domestic industry producing the like product, the Secretary of Trade and Industry, in the case of non-agricultural product, commodity or article, or the Secretary of Agriculture, in the case of agricultural product, commodity or article (both of whom are hereinafter referred to as the Secretary, as the case may be), after formal investigation and affirmative finding of the Tariff Commission (hereinafter referred to as the Commission), shall cause the imposition of an anti-dumping duty equal to the margin of dumping on such product, commodity or article and on like product, commodity or article thereafter imported to the Philippines under similar circumstances, in addition to ordinary duties, taxes and charges*

¹⁰ Public Hearing conducted by the Committee on Agriculture and Food; Committee on Trade and Commerce and Entrepreneurship; and Finance, 3 July 2014

¹¹ Section 301, Anti-dumping duty, The Tariff and Customs Code of the Philippines.

imposed by law on the imported product, commodity or article. However, the anti-dumping duty may be less than the margin if such lesser duty will be adequate to remove the injury to the domestic industry. Even when all the requirements for the imposition have been fulfilled, the decision on whether or not to impose a definitive anti-dumping duty remains the prerogative of the Commission. It may consider, among others, the effect of imposing an anti-dumping duty on the welfare of consumers and/ or the general public, and other related local industries.”

2. Countervailing Duty, RA 8751 (July 19, 1999)

The law¹² imposes a countervailing duty in the following situation – “Whenever any product, commodity or article of commerce is granted directly or indirectly by the government in the country of origin or exportation, **any kind or form of specific subsidy** upon the production, manufacture or exportation of such product, commodity or article, and the importation of such subsidized product, commodity or article has caused or threatens to cause **material injury to a domestic industry or has materially retarded the growth or prevents the establishment of a domestic industry** as determined by the Tariff Commission (hereinafter referred to as the “Commission”) the Secretary of Trade and Industry, in the case of non-agricultural product, commodity or article, or the Secretary of Agriculture, in the case of agricultural product, commodity or article (both of whom are hereinafter simply referred to as ‘the Secretary,’ as the case may be) shall issue a department order imposing a countervailing duty equal to the ascertained amount of the subsidy. The same levy shall be imposed on the like product, commodity or article thereafter imported to the Philippines under similar circumstances. The countervailing duty shall be in addition to any ordinary duties, taxes and charges imposed by law on such imported product, commodity or article.”

3. Safeguard Measure Law, RA 8800 (July 19, 2000)

The Tariff Commission¹³ explains special safeguard measures for agriculture as follows – “...the WTO Agreement on Agriculture allows for the application of special transitional safeguards (additional duty not exceeding one-third of the level of the effective tariff) against importations of agricultural products whose quantitative import restrictions (QRs) were converted (“tariffed”) into ordinary customs duties and agricultural products designated with the symbol “SSG” (Special

Safeguard Measures) in the GATT Schedule of Concessions.”

“Special safeguard measures may be invoked, if:

- the volume of imports exceeds a trigger level; or (but not concurrently)
- the price of imports falls below a trigger price.

In either case, injury to the domestic industry need not be established.

The purpose for the application of safeguard measures is to give the affected domestic industry time to prepare itself for and adjust to increased import competition resulting from the reduction of tariffs or the lifting of quantitative restrictions agreed upon in multilateral trade negotiations.”

RA 8178, Agricultural Tarrification Act (March 28, 1996)

On June 18, 1955, under RA 1296, it is prohibited to import garlic, together with onions, potatoes and cabbages, except for seedling purposes. It was the policy at that time when the thrust of the government is to protect domestic industries against the onslaught of imported goods.

However since the Philippines became a member of the WTO, the government stressed the importance of globalization, instead of the time honoured practice of protection of domestic products.

On March 28, 1996, Congress passed RA 8178, also called the “Agricultural Tarrification Act”, wherein all quantitative restrictions were given its tariff equivalent. Such tariff equivalent was liberalized, meaning, decreased over a period of time.

In its declaration of policy, RA 8178¹⁴ states the following - “It is the policy of the State to make the country’s agricultural sector viable, efficient and globally competitive. The State adopts the use of tariffs in lieu of non-tariff import restrictions to protect local producers...Consistent with the constitutional mandate of protecting Filipino firms against unfair trade, it is furthermore the policy of the State to employ anti-dumping and countervailing measures to protect local producers from unfair trade practices, rather than use quantitative import restrictions. To help the agricultural sector compete globally, the State shall seek to raise farm productivity levels by providing the necessary support services such as, but not limited to,

¹² Section 301, Countervailing Duty, Tariff and Customs Code of the Philippines.

¹³ A Primer on New Developments in Trade and Tariff Policy, Philippine Tariff Commission, August 2010, Quezon City, Safeguard Measures, page 58.

¹⁴ Section 2, Declaration of Policy, RA 8178.

irrigation, farm-to-market roads, post-harvest equipment and facilities, credit, research and development, extension services, other market infrastructure and market information.”

Furthermore, the law¹⁵ provides for the following – “In lieu of quantitative restrictions, the maximum bound rates committed under the Uruguay Round Final Act shall be imposed on the agricultural products whose quantitative restrictions are repealed by this Act. The President shall issue the corresponding tariffs beginning 1996 up to year 2000: Provided, That the schedule of the initial and final applied rates shall be consistent with the country’s tariff binding commitments.” In other words the importation of garlic is now fully liberalized considering that the duration of tariffication was from 1996 until the year 2000.

Garlic Importation Tariff rates

The tariff rates for garlic differ in accordance from where it is imported. Consider the following:

1. **Most Favored Nation Treatment (MFN)** – It applies to countries except those countries not covered by Free Trade Agreements (FTAs). The current MFN rate for dried garlic (HS 0712.90.10) is 3%¹⁶, and 40%¹⁷ for fresh or chilled garlic (HS 0703.20.90).
2. **EO 71, The FTA between the ASEAN (Association of Southeast ASEAN Nations and China, also called the ACFTA [ASEAN-China Free Trade Area])** – The tariff rate for fresh or chilled garlic is 40%, starting January 1, 2015. The ACFTA considers garlic as “highly sensitive” product.
3. **EO 850, Common Effective Preferential Tariff [CEPT] Scheme for the ASEAN Free Trade Area [AFTA/ASEAN Trade in Goods Agreement [ATIGA]** – Garlic imported from any ASEAN member country will have a 0% tariff for any kind of imported garlic beginning January 1, 2010.
4. **EO 851, The ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)** – Fresh or chilled garlic imported from Australia and New Zealand have the following tariff rates: 15% for 2014, 13% for 2015, 10% for 2016, 8% for 2017, 5% for 2018%, 5% for 2019, 5% for 2020.
5. **EO 767, Philippine-Japan Economic Partnership Agreement (PJEPA)** – Fresh or chilled garlic imported from Japan will have the

following tariff rates: 15% for 2014, 11% for 2015, 7% for 2016, 4% for 2017, and 0% for 2018.

6. **EO 852, The Agreement on the Comprehensive Economic Partnership among the Member-States of the Association of SOUTHEAST Asian Nations (ASEAN) and Japan** - It has the same schedule of tariff reductions as in EO 767 (PJEPA).
7. **EO 73, ASEAN-Korea Free Trade Agreement (AKFTA)** – Fresh and chilled garlic imported from Korea will have a tariff rate of 32% starting January 1, 2016.

Ordinarily, the peak period in garlic importation is during the Christmas season when the demand is at its greatest. However, if there is a perceived shortage of supply, the NGAT relaxes the issuances of import permits.

This was the reason why NGAT issued Resolution No. 2, Series of 2013. It recommends to the Secretary of the Department of Agriculture the issuance of 582 Sanitary and Phytosanitary clearances for garlic to avoid the possible acute supply for the period covering November 20, 2013 up to April 30, 2014. The NGAT considered the following –

- (a) total of 7,156 metric tons of garlic remains in the various storages nationwide as of October 25, 2013;
- (b) based on the 1.42 kg per capita consumption, the available supply was estimated to last for 18 days only;
- (c) the upcoming harvest for garlic showed that the expected harvest shall still be in the first week of April 2014 and not earlier;
- (d) considering the coming Christmas season (2013), there is an impending need for the country to curtail the coming shortage by allowing the import of 58,240 metric tons of garlic to satisfy the market requirement from November 2013 to March 2014, which is equivalent to the issuance of 1,165 Sanitary and Phytosanitary (SPS) Clearances of 50 metric tons per import clearance;
- (e) in order not to unduly prejudice the protection of our local garlic industry, the NGAT agreed to be conservative in the issuance of SPS clearances for garlic and agreed that only 50% of the required SPS clearances shall be allowed to satisfy the

¹⁵ Section 6, Tariffication, RA 8178.

¹⁶ HS 0712.90.10, dried garlic, MFN duty for 2012 and 2015.

¹⁷ HS 0703.20, fresh or chilled garlic, MFN duty 2012 and 2015.

protected demand for five (5) months and that the imported garlic should arrive in the country not later than April 30, 2014; and

- (f) to guarantee that the farmers will be the ones who will benefit from the issuance of the SPS Clearances, the NGAT suggested that 70% of the SPS Clearances be issued to farmers cooperatives/associations while 30% be issued to legitimate importers.

On a yearly basis, the following is the historical import volume:

In general, the Philippines imports garlic from China. Out of 388,740 mt of garlic imported only 33 mt was imported from India.

The Internal Revenue Code of 1997

The law¹⁸ exempts the importation of garlic from the payment of 12% ad valorem Value Added Tax (VAT) because it is an agricultural product in its original state, thus –

“Sale or importation of agricultural and marine food products in their original state, livestock and poultry of a kind generally used as, or yielding or producing foods for human consumption; and breeding stock and genetic materials therefore.”

“Products classified under this paragraph shall be considered in their original state even if they have undergone the simple processes of preparation or preservation for the market such

as freezing, drying, salting, broiling, roasting, smoking or stripping. Polished and/or husked rice, corn grits, raw cane sugar and molasses, ordinary salt, copra shall be considered in their original state.”

Comment

The Senate had conducted several meetings regarding abnormal movements in the prices of needed agricultural products. One of the products investigated was the smuggling of rice. The Senate found out that one of the root causes in the anomaly was that the import permits issued to the private sector was manipulated by importers and traders. Such import permits were used over and over again until such time that the proper government authorities came to know about the modus operandi. Worse is that the farmers were used by the cooperatives in order to get hold of the import permits intended for the farmers. In the end, it was the traders and the farmers' cooperatives who profited from the scheme, not the farmers themselves.

The NGAT issued Resolution No. 2, stating – *“That seventy percent (70%) of the SPS Clearances be allocated/issued to farmers cooperatives/associations and the remaining thirty percent (30%) SPS Clearances be issued to legitimate importers.”*

Is it not a case of history repeating itself?



Importation of Garlic from 2008-2014

Year	Total number of Import permits issued for fresh garlic	Total Volume Applied (MT)	Volume in mt imported from India, an exemption to the general rule
2008	1,781	89,050	1
2009	1,405	70,250	7
2010	1,616	80,800	4
2011	1,685	84,250	7
2012	714	35,700	14
2013-2014	582	28,690	
	Total in 7 years:	888,740	33

Source: Bureau of Plant Industry

¹⁸ Sec. 109, Exempt Transactions, The National Revenue Code of 1997.



1. “Customs take declining, says DOF exec”

“The head of the Department of Finance’s (DOF) Revenue Operations and Legal Affairs Group has disputed the Bureau of Customs’ (BOC) claim of increased revenue collections in the first five months of the year.

“In a confidential memo, Finance Undersecretary Carlo Carag told Finance Secretary Cesar Purisima there had been a decline in the collections of the BOC, a finance department-attached agency.

“In the July 1 memo, a copy of which was obtained by the Inquirer, Carag disclosed the negative development, “considering all the growth factors (tariff and foreign exchange rates and import values) versus the actual percentage growth for January to May 2014 compared to the same period in 2013.”

“Notwithstanding the reported increase in the average tariff rate, foreign exchange and value considered as the growth factors during the period, the growth in the bureau’s collection effort has been on a steady decline since January, with a negative growth of -14.38 percent declining further to -16 percent in May,” he said.

“He also referred to data from the Statistics Division of the BOC that showed the agency was still behind in its collection target for January to May 2014 by at least 12 percent despite the double-digit increase in its 2014 collection vis-a-vis that in 2013. The greatest shortfall was incurred in May at negative -18 percent.

“Citing a recent news report, Carag noted that “imports in the first quarter of 2014 grew by 24.7 percent in January, 1.7 percent in February and 9.6 percent in March, with total imports during the first quarter of 2014 amounting to \$16.16 billion, a 12-percent increase from the \$14.43-billion recorded during the comparable period last year.”

“Noticeable from the data obtained from the Statistical Division of the bureau is the 36.3 percent increase in the volume of imports classified as nondutiable for January to March 2014 compared to the same period in 2013 while the volume of imports assessed as dutiable or taxable decreased by 4.5 percent,” he said.” (Source: Philippine Daily Inquirer, July 14, 2014)

¹ This ‘Tax News Digest’ shall endeavor to provide the reader the latest information and events relevant to taxation and appurtenant issues, as published in leading daily newspapers and other pertinent sources. Compiled by Clinton S. Martinez, Indirect Taxes Branch.



2. **“BIR eases rules for professionals, self-employed”**

“The Bureau of Internal Revenue (BIR) instructed yesterday its revenue district officers (RDOs) nationwide to immediately approve applications for registration and printing of receipts and invoices issued by professionals and self-employed individuals even if they have still unsettled accounts.

“BIR Deputy Commissioner for Operations Nelson M. Aspe issued the instruction in an unnumbered memorandum so as ‘not to delay the taxpayers’ regular practice of their profession, occupation and calling.

“He said all taxpayer-applicants with existing open, top-filer, audit and account receivable and other delinquent cases will not be prevented from the registration, processing and the issuance of Authority to Print (ATP) official receipts for services and invoices for goods.” (Source: Manila Bulletin, July 24, 2014)

3. **“Deficiency tax assessments. Professional, business groups appeal for BIR reconsideration”**

“Several professional and business groups have urged the Bureau of Internal Revenue (BIR) to reconsider the agency’s new rules on the issuance of deficiency tax assessments.

“In a joint position paper submitted by the groups, which is led by the Tax Management Association of the Philippines (TMAP), they said that the government’s main tax agency

should be considerate to the taxpayer’s right to due process.

“The groups include the American Chamber of Commerce (AMCHAM), the Association of Certified Public Accountants in Public Practice (ACPAPP), the Integrated Bar of the Philippines (IBP), and the Philippine Institute of Certified Public Accountants (PICPA).

“Business groups the Philippine Chamber of Commerce, Inc. (PCCI) and the Makati Business Club (MBC), likewise supported the call for due process.

“The groups’ complaint stemmed from the BIR’s Revenue Regulations No. 18-2013, which amended the rules on due process requirement in the issuance of deficiency tax assessments.” (Source: Manila Bulletin, July 24, 2014)

4. **“BIR expects tax stamps to raise revenues”**

“The Bureau of Internal Revenue (BIR) expects an increase in revenue collections from so-called ‘sin’ products following the implementation of the tax stamps on cigarettes.

“On the sidelines of the bureau’s anniversary, BIR Commissioner Kim S. Jacinto-Henares said that the implementation of Internal Revenue Stamps Integrated System (IRSIS) project should capture illicit cigarette trade and raise tax collections.

“The BIR launched yesterday the IRSIS project during the agency’s 110th anniversary. The tax stamp on cigarettes is aimed to ensure tax compliance of all cigarette manufacturers in the country.”

“For this year, the BIR is looking at a 22 percent increase in excise tax collection from tobacco products and alcoholic drinks to P104.79 billion from P85.93 billion last year.” (Source: Manila Bulletin, August 2, 2014)

5. **“De Lima appeals oil smuggling case ruling”**

“The government would seek reconsideration of the Court of Appeals’ decision dismissing the P6-billion smuggling charges



filed against a Davao City-based oil firm, its president and customs broker, Justice Secretary Leila de Lima said on Sunday.

“We will definitely appeal that decision. I will ask the Office of the Solicitor General to file a motion for reconsideration,” De Lima said in a text message.

“Last Friday, the Court of Appeals Former Special 10th Division reversed the Justice Secretary’s decision to indict Phoenix Petroleum Philippines Inc., its president and chief executive officer Dennis Uy and customs broker Jorlan Cabanes, for violations of the Republic Act No. 1937, or the Tariff and Customs Code of the Philippines (TCCP).

“The appeals court ruled that Uy and Cabanes were deprived of due process when De Lima set aside the earlier resolution issued by Justice Undersecretary Francisco Baraan III that recommended the dismissal of the case against the respondents.

“The court noted that in reversing Baraan’s resolution based on the new pieces of evidence and allegations presented by the Bureau of Customs, De Lima committed grave abuse of discretion by failing to give Uy and Cabanes the opportunity to refute the new allegations.

“This court cannot simply shut its eyes to the obvious fact that new arguments and allegations, much more new documents, were improperly raised in the BOC’s reply since

these matters substantially amended the charges and accusations against Cabanes and Uy,” the decision stated.” (Source: Philippine Daily Inquirer, August 4, 2014)

5. “BIR rule seen to trigger capital flight. Groups claim submission of taxpayers’ list contrary to law”

“Nine of the country’s most influential business groups—including the entire banking and capital market industry—have warned of capital flight arising from a new Bureau of Internal Revenue (BIR) regulation requiring the submission of an alphabetical list (alphalist) of payees of income payments subject to withholding taxes.

“Apart from being “prejudicial” to investors and infringing on the right to privacy, a seven-page position paper drawn up by the business sectors dated July 21 and sent to the BIR last week said the alphalist regulation was in violation of the principle of uniformity of taxation and existing legal requirements, was “impossible” to comply with and would “not serve any useful purpose.”

“Instead, the groups warned that the selldown on preferred shares has started, resulting in P2.12 billion in net foreign selling in the first semester even when the overall market had posted a net foreign buying of P45.67 billion for the period. The paper reported that while the total market capitalization of the local stock market had grown by 11.9 percent so far this year, the market capitalization of preferred shares had retreated by 3.12 percent.” (Source: Philippine Daily Inquirer, August 4, 2014)





Fort Bonifacio Development Corporation, *Petitioner*, vs. Commissioner of Internal Revenue and Revenue District Officer, Revenue District No. 44, Taguig and Pateros, Bureau of Internal Revenue, *Respondents* (G.R. No. 173425; September 4, 2012), Del Castillo, J.

Facts:

Three (3) parties are directly involved in this case. Petitioner Fort Bonifacio Development Corporation (FBDC), is a domestic entity duly registered and engaged in the development and sale of real property. BCDA or the Bases Conversion Development Authority, created under Republic Act (RA) No. 7227, owns forty five percent (45%) of FBDC's issued and outstanding capital stock. Bonifacio Land Corporation (BLC) owns fifty five percent (55%) of the remaining issued and outstanding capital stock.

On February 8, 1995 FBDC bought from the government a part of the Fort Bonifacio reservation. Said portion is now known as the Fort Bonifacio Global City (FBGC).

On January 1, 1996, RA 7716 was passed restructuring the value-added tax (VAT) scheme by amending some provisions of the Tax Code. Said amendatory law extended the scope of VAT to real properties which are held primarily for sale or held for lease, in the ordinary course of trade or business.

FBDC, on September 19, 1996, submitted to the Bureau of Internal Revenue (BIR) an inventory of its real properties, the book value thereof totaling *P71,227,503,200.00*. Relying on Section 105 of the old Tax Code, petitioner filed a claim with the BIR of transitional input tax credit in the amount of *P5,698,200,256.00*.

In October of the same year, FBDC began selling its lot at FBGC.

Petitioner garnered the sum of P3,685,356,365.95 from its sales and lease of lots covering the first quarter of 1997. Of said amount, FBDC's payable VAT totaled P368,535,653.00. Petitioner paid said amount in cash (P359,652,009.47) and via its unutilized input tax credit (P8,883,644.48) on purchases of goods and services.

On November 17, 1998, thinking that its transitional input tax credit was not used in computing its output VAT for the first quarter of 1997, petitioner filed with the BIR a claim for refund of the sum of P359,652,009.47. A *Petition for Review* was elevated to the Court of Tax Appeals (CTA) on November 17, 1998, due to the inaction of the BIR. The Court of Tax Appeals (CTA) denied FBDC's petition stating that: "X x x the benefit of transitional input tax credit comes with the condition that business taxes should have been paid first." The Court of Appeals (CA) affirmed the decision of the CTA.

Issue:

Whether FBDC has the right to refund the amount of P359,652,009.47 erroneously paid as output VAT for the initial quarter of 1997.

Held:

The Supreme Court (SC) decided in favor of petitioner FBDC. The court ruled that "prior payment of taxes is not required for a taxpayer to avail of the 8% transitional input tax credit." The SC said that there is nothing in the letter of the old Section 105 (now Sec. 111) that requires previous payment of taxes as a necessary condition for one to avail of the 8% (now 2%) transitional input tax credit.

Section 105 of the old Tax Code states:

"SEC. 105. Transitional input tax credits. A person who becomes liable to value-added tax or any person who elects to be a VAT-registered person shall, subject to the filing of an inventory as prescribed by regulations, be allowed input tax on his beginning inventory of goods, materials and supplies equivalent to 8% of the value of such inventory or the actual value-added tax paid on such goods, materials and supplies, whichever is higher, which shall be creditable against the output tax."

The ruling said that "X x x limiting the value of the beginning inventory only to goods, materials, and supplies, where prior taxes were paid, was not the intention of the law. Otherwise, it would have specifically stated that the beginning inventory

excludes goods, materials, and supplies where no taxes were paid." Citing the Concurring Opinion of retired Justice Consuelo Ynares-Santiago, the SC explained: "If the intent of the law were to limit the input tax to cases where actual VAT was paid, it could have simply said that the tax base shall be the actual value-added tax paid. Instead, the law as framed contemplates a situation where a transitional input tax credit is claimed even if there was no actual payment of VAT in the underlying transaction. In such cases, the tax base used shall be the value of the beginning inventory of goods, materials and supplies." The SC added that prior payment of taxes is not required to avail of the transitional input tax credit because it is not a tax refund per se but tax credit. The SC went on to cite provisions of the NIRC, as amended, allowing tax credits sans the previous payment of taxes (Sections 110; 111[B]; 112[A]; 28[B][5][b]).

The SC rationalized:

"It is apparent that the transitional input tax credit operates to benefit newly VAT-registered persons, whether or not they previously paid taxes in the acquisition of their beginning inventory of goods, materials and supplies. During that period of transition from non-VAT to VAT status, the transitional input tax credit serves to alleviate the impact of the VAT on the taxpayer. At the very beginning, the VAT-registered taxpayer is obliged to remit a significant portion of the income it derived from its sales as output VAT. The transitional input tax credit mitigates this initial diminution of the taxpayer's income by affording the opportunity to offset the losses incurred through the remittance of the output VAT at a stage when the person is yet unable to credit input VAT payments."

In addition to the Tax Code, the SC also mentioned Tax Treaties entered into by the Philippines with other countries, explaining that:

"Under the treaties in which the tax credit method is used as a relief to avoid double taxation, income that is taxed in the state of source is also taxable in the state of residence, but the tax paid in the former is merely allowed as a credit against the tax levied in the latter. Apparently, payment is made to the state of source, not the state of residence. No tax, therefore, has been previously paid to the latter."

Under the New Tax Code, the SC cited the following example in support of its decision:

"X x x. If the goods or properties are not acquired from a person in the course of trade or

business, the transaction would not be subject to VAT under Section 105. The sale would be subject to capital gains taxes under Section 24 (D), but since capital gains is a tax on passive income it is the seller, not the buyer, who generally would shoulder the tax.

If the goods or properties are acquired through donation, the acquisition would not be subject to VAT but to donor's tax under Section 98 instead. It is the donor who would be liable to pay the donor's tax, and the donation would be exempt if the donor's total net gifts during the calendar year does not exceed P 100,000.00.

If the goods or properties are acquired through testate or intestate succession, the transfer would not be subject to VAT but liable instead for estate tax under Title III of the New NIRC. If the net estate does not exceed P 200,000.00, no estate tax would be assessed.

In finally disposing of this particular issue, the SC said "X x x, we find petitioner entitled to the 8% transitional input tax credit provided in Section 105 of the old NIRC. The fact that it acquired the Global City property under a tax-free transaction makes no difference as prior payment of taxes is not a pre-requisite."

On another issue, the SC said that Section 4.105-1 of Revenue Regulation (RR) No. 7-95 is inconsistent with Section 105 of the old National Internal Revenue Code (NIRC), as amended, as the same contravenes its provision, in relation to Section 100, which defines "goods or properties". They have declared in a previous ruling that said RR is a nullity, in so far as it limits the transitional input tax credit to the value of the improvement of the real properties. The applicable proviso provides:

"SEC. 100. Value-added tax on sale of goods or properties. (a) Rate and base of tax. There shall be levied, assessed and collected on every sale, barter or exchange of goods or properties, a value-added tax equivalent to 10% of the gross selling price or gross value in money of the goods or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor.

"(1) The term "goods or properties" shall mean all tangible and intangible objects which are capable of pecuniary estimation and shall include:

"(A) Real properties held primarily for sale to customers or held for lease in the ordinary

course of trade or business; x x x"

The SC added, reminding that:

"While administrative agencies, such as the Bureau of Internal Revenue, may issue regulations to implement statutes, they are without authority to limit the scope of the statute to less than what it provides, or extend or expand the statute beyond its terms, or in any way modify explicit provisions of the law. Indeed, a quasi-judicial body or an administrative agency for that matter cannot amend an act of Congress. Hence, in case of a discrepancy between the basic law and an interpretative or administrative ruling, the basic law prevails."

The Court recapitulated that the 8% (now 2%) transitional input tax credit should not be limited to the value of the improvements on the real property but should also include the value of the real properties. Thus, a refund in the sum of P359,652,009.47 in favor of petitioner Fort Bonifacio Development Corporation was granted.

In relation to the above, cited below are the present provisions of the Tax Code concerning the case:

SEC. 106. Value-Added Tax on Sale of Goods or Properties. -

(A) Rate and Base of Tax. - *There shall be levied, assessed and collected on every sale, barter or exchange of goods or properties, value-added tax equivalent to ten percent (10%) of the gross selling price or gross value in money of the goods or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor: Provided, That the President, upon recommendation of the Secretary of Finance, shall, effective January 1, 2006, raise the rate of value-added tax to twelve percent (12%), after any of the following conditions has been satisfied.*

(i) Value-added tax collection as a percentage of Gross Domestic Product (GDP) of the previous year exceeds two and four-fifths percent (2 4/5%); or

(ii) National government deficit as a percentage of GDP of the previous year exceeds one and one-half percent (1 ½%).

(1) The term "goods" or "properties" shall mean all tangible and intangible objects which are capable of pecuniary estimation and shall include: (a) Real properties held primarily for sale to customers or held for lease in the

ordinary course of trade or business; (b) The right or the privilege to use patent, copyright, design or model, plan, secret formula or process, goodwill, trademark, trade brand or other like property or right; (c) The right or the privilege to use in the Philippines of any industrial, commercial or scientific equipment; (d) The right or the privilege to use motion picture films, tapes and discs; and (e) Radio, television, satellite transmission and cable television time.

The term "**gross selling price**" means the total amount of money or its equivalent which the purchaser pays or is obligated to pay to the seller in consideration of the sale, barter or exchange of the goods or properties, excluding the value-added tax. The excise tax, if any, on such goods or properties shall form part of the gross selling price.

SEC. 111. Transitional/Presumptive Input Tax Credits. - (A) **Transitional Input Tax Credits.** - A person who becomes liable to value-added tax or any person who elects to be a VAT-registered person shall, subject to the filing of an inventory according to rules and regulations prescribed by the Secretary of Finance, upon recommendation of the Commissioner, be allowed input tax on his beginning inventory of goods, materials and supplies equivalent to two percent (2%) of the value of such inventory or the actual value-added tax paid on such goods, materials and supplies, whichever is higher, which shall be creditable against the output tax.

(B) **Presumptive Input Tax Credits.** - Persons or firms engaged in the processing of sardines, mackerel and milk, and in manufacturing refined sugar and cooking oil and packed noodle-based instant meals, shall be allowed a presumptive input tax, creditable against the output tax, equivalent to four percent (4%) of the gross value in money of their purchases of primary agricultural products which are used as inputs to their production.

As used in this Subsection, the term "**processing**" shall mean pasteurization, canning and activities which through physical or chemical process alter the exterior texture or form or inner substance of a product in such manner as to prepare it for special use to which it could not have been put in its original form or condition.

It has been opined that: "The transitional input tax credit aims to avoid any inequity or potential burden resulting from the change in status of a person who

becomes liable to VAT for the first time or elects to be a VAT-registered person without recognizing the VAT it/he paid on related inputs before becoming VAT-registered." (De Leon, Hector S.: The National Internal Revenue Code Annotated, p. 147) In the case of *CIR vs. Cebu Toyo Corp.*, GR No. 149073 [February 17, 2005], the SC discussed the difference between zero rating and exemption, viz:

(a) A zero-rated sale is a taxable transaction but does not result in an output tax while an exempted transaction is not subject to the output tax;

(b) The input VAT on the purchases of a VAT-registered person with zero-rated sales may be allowed as tax credits or refunded while the seller in an exempt transaction is not entitled to any input tax on his purchases despite the issuance of a VAT invoice or receipt.

(c) Persons engaged in transactions which are zero-rated, being subject to VAT, are required to register while registration is optional for VAT-exempt persons. (Cited in Vitug and Acosta: Tax Law and Jurisprudence, p.246).



2. **Asia International Auctioneers, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent (G.R. No.179115; September 26, 2012), Perlas-Bernabe, J.**

Facts:

This is a Petition for Review filed by Asia International Auctioneers, Inc. (AIA) for its alleged failure to protest on time the Commissioner of Internal Revenue's (CIR) tax assessment.

AIA is a corporation engaged in the importation of used motor vehicles and heavy equipment which it sells to the public via auction. It operates inside the Subic Special Economic Zone (SSEZ). Petitioner

received from the CIR a Formal Letter of Demand with an assessment for deficiency value-added tax (VAT) and excise tax, inclusive of penalties and interest, in the amount of ₱106,870,235.00 for auctions it previously conducted. For failure of the CIR to act on its protest, AIA filed a Petition for Review at the Court of Tax Appeals (CTA). The CIR filed its Answer of said petition. Subsequently, the CIR filed a Motion to Dismiss citing lack of jurisdiction for alleged failure of AIA to timely file its protest, rendering the assessment final and executor. The CIR denied having received the protest letter. AIA submitted evidence to prove its claim.

The CTA First Division decided in favor of the CIR saying that:

"while a mailed letter is deemed received by the addressee in the course of the mail, still, this is merely a disputable presumption, subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter indeed was received by the addressee."

The CTA En Banc affirmed the Ruling of the First Division.

On January 30, 2008, AIA filed a Manifestation and Motion with Leave to Defer or Suspend further proceedings on the ground that it had availed of the Tax Amnesty Program under Republic Act (RA) No. 9480, also known as the Tax Amnesty Act of 2007. A Certification of Qualification on said availment issued by the Bureau of Internal Revenue (BIR) was submitted by AIA.

Issue:

What is the effect of a Tax Amnesty law on a pending collection case?

Held:

The Supreme Court (SC) at the outset discussed the nature of a tax amnesty law.

"A tax amnesty is a general pardon or the intentional overlooking by the State of its authority to impose penalties on persons otherwise guilty of violating a tax law. It partakes of an absolute waiver by the government of its right to collect what is due it and to give tax evaders who wish to relent a chance to start with a clean slate.

"A tax amnesty, much like a tax exemption,

is never favored or presumed in law. The grant of a tax amnesty, similar to a tax exemption, must be construed strictly against the taxpayer and liberally in favor of the taxing authority."

The SC denied the petition for being moot and academic due to the availment of AIA of the provisions of RA 9480 or the Tax Amnesty Law of 2007. The deficiency taxes of AIA are deemed fully settled.

The CIR alleges that AIA cannot avail itself of the provisions of the amnesty law because it is considered a *withholding agent* for the deficiency taxes, as stated under Section 8(a) of the law, to wit:

"Section 8. Exceptions. The tax amnesty provided in Section 5 hereof shall not extend to the following persons or cases existing as of the effectivity of this Act:

"(a) Withholding agents with respect to their withholding tax liabilities;

"(b) Those with pending cases falling under the jurisdiction of the Presidential Commission on Good Government;

"(c) Those with pending cases involving unexplained or unlawfully acquired wealth or under the Anti-Graft and Corrupt Practices Act;

"(d) Those with pending cases filed in court involving violation of the Anti-Money Laundering Law;

"(e) Those with pending criminal cases for tax evasion and other criminal offenses under Chapter II of Title X of the National Internal Revenue Code of 1997, as amended, and the felonies of frauds, illegal exactions and transactions, and malversation of public funds and property under Chapters III and IV of Title VII of the Revised Penal Code; and

"(f) Tax cases subject of final and executory judgment by the courts. (Emphasis supplied)

The SC found the argument of the CIR untenable. Said the court:

"The CIR did not assess AIA as a withholding agent that failed to withhold or remit the deficiency VAT and excise tax to the BIR under relevant provisions of the Tax Code. Hence, the argument that AIA is "deemed" a withholding agent for these deficiency taxes is fallacious.

"Indirect taxes, like VAT and excise tax, are different from withholding taxes. To distinguish,

in indirect taxes, the incidence of taxation falls on one person but the burden thereof can be shifted or passed on to another person, such as when the tax is imposed upon goods before reaching the consumer who ultimately pays for it. On the other hand, in case of withholding taxes, the incidence and burden of taxation fall on the same entity, the statutory taxpayer. The burden of taxation is not shifted to the withholding agent who merely collects, by withholding, the tax due from income payments to entities arising from certain transactions and remits the same to the government. Due to this difference, the deficiency VAT and excise tax cannot be "deemed" as withholding taxes merely because they constitute indirect taxes. Moreover, records support the conclusion that AIA was assessed not as a withholding agent but, as the one directly liable for the said deficiency taxes."

The CIR further contends that being an accredited investor/taxpayer located at the SSEZ, AIA should have taken advantage of RA 9399 rather than RA 9480. The SC did not agree with this view. The SC stressed:

"RA 9399 was passed prior to the passage of RA 9480. RA 9399 does not preclude

taxpayers within its coverage from availing of other tax amnesty programs available or enacted in futuro like RA 9480. More so, RA 9480 does not exclude from its coverage taxpayers operating within special economic zones. As long as it is within the bounds of the law, a taxpayer has the liberty to choose which tax amnesty program it wants to avail."

Finally, the SC took judicial notice of the Certification of Qualification issued by a BIR employee. The court said:

"Lastly, the Court takes judicial notice of the "Certification of Qualification" issued by Eduardo A. Baluyut, BIR Revenue District Officer, stating that AIA "has availed and is qualified for Tax Amnesty for the Taxable Year 2005 and Prior Years" pursuant to RA 9480. In the absence of sufficient evidence proving that the certification was issued in excess of authority, the presumption that it was issued in the regular performance of the revenue district officer's official duty stands."





SEMINAR



**ROLE / IMPORTANCE OF POLITICAL PARTIES
IN A WORKING PARLIAMENT**

**Held at Senate of the Philippines, Pasay City
November 24 to 26, 2014**

Participant : Mr. Clinton S. Martinez, SLSO II



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SENATOR AQUILINO "KOKO" PIMENTEL III
 PDP LABAN

December 16, 2014

ATTY. RODELIO T. DASCIL, MNSA
Director General
SENATE TAX STUDY AND RESEARCH OFFICE
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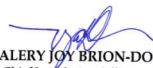
Re: 28th Issue Volume V of the Senate Tax Bits

Dear Atty. Dascil,

We confirm receipt of the furnished copy of the 28th Issue Volume V of the Senate Tax Bits.

On behalf of Senator Aquilino "Koko" Pimentel III, we would like to thank you for sharing with us this vital legislative tool.

Very truly yours,


ATTY. VALERY JOY BRION-DOLOJAN
Chief Legislative Officer



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