



TAX LAW FOR BUSINESS
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Freezing tax credits

I can't help but notice how myopic and unpredictable some of our country's policies are. Some of our leaders unwittingly change the rules in the middle of the game as long as they win even for a short term, without thinking of the irreparable impression that their actions may bring to foreign investors they invite to be players in our economy.

Our country hopes to attract foreign investors who will spend billions of pesos in real-estate with the passage of the real estate investment trust (REIT) Act and its tax guidelines, Revenue Regulation (RR) 13-2011 for which, a considerable amount of taxes will be paid in advance to the government and will most probably result in the issuance of tax-credit certificates (TCCs).

Now come, RR 14-2011, which prohibit the sale, assignment or transfer of TCCs to other persons. This effectively restricts foreign investors and holders of TCCs from selling/transferring tax credits that they may have no use of because they are either given tax incentives by the government or it is more practical for them to sell if they do not expect to fully use them within the next few years.

Imposing a limitation on the immediate recovery of these taxes paid in advance by limiting the transferability or sale of TCCs is not only unfair and legally questionable but is also damaging to the image of our country that is now practically begging for foreign direct investments.

What is a tax credit? In G.R. 172598 (2010), the Supreme Court (SC) explained that the Tax Code does not have a clear definition of what a tax credit is. However, Article 21 of Executive Order (EO) 226 defines a tax credit as any of the credits against taxes and/or duties equal to those actually paid or would have been paid to evidence which a TCC shall be issued by the secretary of finance or his representative, or the Board of Investments (BOI), if so delegated by the secretary of finance. Tax credits were granted under EO 226 as incentives to encourage investments in certain businesses. A tax credit generally refers to an amount that may be subtracted directly

from one's total tax liability. It is, therefore, an allowance against the tax itself or a deduction from what is owed by a taxpayer to the government. In RR 5-2000 which RR 14-2011 amends, a tax credit is defined as the amount due to a taxpayer resulting from an overpayment of a tax liability or erroneous payment of a tax due.

Any corporation prior to the issuance of RR 14-2011 can be transferor and/or a transferee of a TCC. But unless RR 14-2011 is questioned and later on declared by the Court as void, ordinary corporations can no longer be transferors or transferees of a TCC. RR 14-2011 will remain valid and binding until the court says otherwise.

There is, however, a special law, i.e., EO 226 that governs the transfer of TCCs to BOI-registered entities that I believe RR 14-2011 cannot revoke. According to the SC, under EO 226 and Rule VII of its implementing rules, a tax credit is transferable to BOI-registered entities. Obviously, RR 14-2011 cannot amend EO 226 and its implementing rules because they are laws. Thus, if a transferee is registered with the BOI, the TCCs treated therein can still be transferred to it, notwithstanding the issuance of RR 14-2011.

Foreign investors expect consistency of rules and despise questionable changes in policies. They also hope that their right to property is respected. What will these foreign investors do now with TCCs that they can neither use nor transfer? TCCs are usually transferred because the transferor does not have a tax liability. Nor does it project that it will have a tax liability in the following years. In other words, a TCC is a dead asset unless it is sold.

Does our government seriously believe that freezing investors' money is good for business?

Some say that I should not be surprised with the issuance of RR 14-2011 because I am living in a Third-World country and it is just the way things are.

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