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TAX LAW FOR BUSINESS
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Of tax credits and cash refunds

For decades, I have been advocating for a fair and equitable tax system. My writings and stand on issues have always reflected that. And today, I am reminded again to write about this in view of the recently issued regulations (Revenue Regulations 14-2011) by the Department of Finance (DOF) prohibiting the transfer or assignment of a tax-credit certificate (TCC) which, to my mind, is a classical case of unfairness not only in the tax system but in the administration of taxes, as well.

Any tax that is not due but otherwise paid to the government, as in the case of erroneously or excessively paid taxes, is not a property of the government. Hence, it does not acquire a right over it and is duty-bound to return it to the rightful owner—a basic application of the principle of solutio indebiti. Erroneous or excessive tax payments could arise if the amount of tax paid is more than what is due, as when the quarterly income taxes paid are more than the final annual tax return, or when taxes withheld on income are more than the taxes due at the end of the year. Unused excess input tax is also an excessively paid tax, hence, should be returned to the owner.

The government allows taxpayers to recover erroneously or excessively paid taxes by allowing them as a direct credit against future tax payments, or by way of a claim for tax refund, which could be in the form of a TCC or an outright cash refund. In practice, taxpayers prefer a TCC to a cash refund, notwithstanding that a cash refund is more liquid than a TCC. This is because, there is a higher certainty of getting a TCC compared to a cash refund, which first requires a funding from the Department of Budget and Management (DBM). Of course, the law provides a mechanism to recover erroneously paid taxes. But whether this mechanism, when implemented, affords fairness to taxpayers is another matter.

The processing time to get a TCC either with the Bureau of Internal Revenue (BIR), the courts or the one-stop-shop of the DOF takes about three to 10 years on the average. Such is the gravity of delays in the grant of refunds. And for every minute the TCC or refund is delayed, the taxpayer loses the value of his money and is deprived of the income that would have been generated by that money. Meantime that the government reaps the benefit of using that money, the lawful owner of that property (the taxpayer) is unfairly robbed of opportunities from the use of his money.

In other jurisdictions, a taxpayer is paid interest for every day a lawful claim for refund is delayed. Our tax laws do not provide the same relief. To my mind, the absence of a similar provision in our laws could be the root cause for the significant delays in the grant of refunds. In sharp contrast, a taxpayer found to have shortchanged the government with unpaid taxes is slapped with a penalty interest of 20 percent annually, a rate considered usurious and way above the prevailing market interest rate on borrowings. Such unfairness is as clear as a sunny day.

The recent issuance (RR 14-2011), which prohibits the transfer or assignment of TCCs further added to what I call unfairness in the grant and use of TCCs. While many court decisions equate a claim for refund or TCC to a claim for exemption, which must be strictly construed, it is different when that claim is already granted. When a claim for refund is already granted and a TCC is issued, that TCC is now a property of the taxpayer entitled to the full attributes of ownership, including the right to use, transfer or assign. A prohibition on the transfer or assignment of that TCC is a restrain on the use or utilization of that property—a right guaranteed by no less than the Constitution.

But perhaps, RR 14-2011 is only a prelude to the government's move to shift to a full-cash refund system, thus eliminating TCCs, which are a source of tax leakages. (I read this from the newspapers but I have yet to see any official issuance.) This is a novel move. A cash refund as a replacement for TCC is more than welcome. First, it is liquid and you get the benefit right away. unlike a TCC that requires a BIR approval first before you can apply it against tax liabilities. Second, a cash refund can be used for whatever purpose, such as for operating capital, unlike TCCs, which can be used only for payment of taxes.

However, in shifting from TCC to cash refunds, the rules should provide a smooth transition by providing an exit mechanism for current holders of TCCs, such as allowing the conversion of unused TCCs to cash. Timely grant of refunds should be assured by providing for a yearly full funding of existing claims by the DBM. There is also a need to streamline the procedures, providing timelines for approval and penalties for delays.

My friends, if it is true that we are in a transition from a TCC system to a full-cash refund system, then we are in exciting times. This is a development that we look forward to. But I encourage taxpayers, especially those belonging to industries heavily affected (such as exporters, those with zero-rated sales and grantees of incentives) to stay vigilant, and to participate in the drafting of the rules, make your concerns known and protect your rights.

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