REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

DELTA AIR LINES, INC., Petitioner,	CTA EB No. 1113 (CTA CASE NO. 8360)
-versus-	Present:
HON. SEC. CESAR V. PURISIMA (in his capacity as Sec. of the Department of Finance) and HON. COM. KIM S. JACINTO-HENARES (in her capacity as Incumbent Commissioner of Internal Revenue, Respondents.	DEL ROSARIO, PJ; CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS and RINGPIS-LIBAN, JJ.
	Promulgated:
	SEP 10 2015 2:57 p.m.

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DECISION

FABON-VICTORINO, J.:

In this appeal[1], petitioner Delta Air Lines, Inc. assails the Decision dated August 15, 2013[2] and the Resolution dated December 18, 2013[3] of the Court in Division in CTA Case No. 8360, entitled *Delta Airlines, Inc. vs. Hon. Sec. Cesar V. Purisima (in his capacity as Incumbent Secretary of the Department of Finance) and Hon. Com. Kim S. Jacinto-Henares (in her capacity as Incumbent Commissioner of Internal Revenue).* Petitioner prays that: 1) BIR Ruling No. 99-2011 dated April 6, 2011, letter dated September 8,

[1] *En Banc* docket, pp. 40-89.
[2] *Ibid.*, pp. 102-125.
[3] *Ibid.*, pp. 128-131.

2011 issued by respondent Secretary of Finance and the Answer to Question 11 of RMC No. 46-2008 issued by respondent Commissioner of Internal Revenue (CIR), pertaining to her interpretation of Section 108(B)(4) of the Tax Code, as amended, be declared null and void; and 2) that a ruling be issued declaring that the sale of services by its VAT-registered suppliers for the accommodation/lodging of its pilots and cabin crew members during flight layovers in the Philippines is subject to VAT at zero percent (0%) pursuant to Section 108(B)(4) of the Tax Code, as amended.

THE PARTIES

Petitioner, Delta Airlines, Inc., is a foreign company under the laws of Delaware, United States of America, with principal office at 10th Floor, Philamlife Tower, 8767 Paseo de Roxas, Makati City. It was licensed by the Securities and Exchange Commission (SEC) on December 29, 2009 to establish a branch office in the Philippines to engage in international air transportation services. It is a registered taxpayer with Taxpayer's Identification No. (TIN) 288-293-147-000.

Respondent Cesar V. Purisima, on the other hand, is the Secretary of the Department of Finance (DOF) with authority to review the CIR's interpretation of the National Internal Revenue Code (NIRC) of 1997 and other tax laws, pursuant to Section 4 of the NIRC of 1997, as amended.

Respondent Kim S. Jacinto-Henares is the CIR vested with the power to interpret the provisions of the NIRC of 1997 and other tax laws, subject to review by her co-respondent Secretary of the DOF.

THE FACTS AND THE CASE

The undisputed facts are as follows:

During its operations in the Philippines, petitioner entered into Hotel Room Agreement 106750[4] with The

[4] Exhibit "F".

Peninsula Manila (Hotel) under which the latter would provide room accommodations and other hotel services to petitioner's guests including its pilots and cabin crews during flight layovers in the Philippines for consideration to be paid by petitioner.

On August 11, 2010, petitioner filed with the Law Division of the BIR a Request for VAT Ruling dated August 10, 2010[5] on the application of Section 108 (B)(4) of the NIRC of 1997, as amended, to services rendered to persons engaged in international air transport operations, such as services provided by local suppliers to petitioner for the accommodation/lodging, including meals of its pilots and cabin crews.

On May 9, 2011[6], petitioner received from respondent CIR, BIR Ruling No. 099-2011[7] dated April 6, 2011, the pertinent portion of which reads:

> "In the instant case, the services provided by the Hotel to its clients engaged in international air transport operations pertain to room accommodations and food and beverage services. As they are rendered within the Hotel's premises, they have no direct connection with the transport of goods or passengers, and as such, they cannot be considered as services directly attributable to the transport of goods and passengers from a Philippine port directly to a foreign port entitled to zero-rating. Such being the case, the sale of the foregoing services by the Hotel is not zero rated, but is appropriately subject to the 12% VAT.
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> This ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be disclosed that the facts are different, then this ruling shall be considered null and void."

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[5] Exhibit "C".
[6] Exhibit "B-1".
[7] Exhibit "B".

On June 8, 2011, petitioner elevated the matter for review[8] to respondent Secretary, who eventually sustained BIR Ruling No. 099-2011 in a letter dated September 8, 2011[9] which petitioner received on September 22, 2011[10].

On October 24, 2011, petitioner filed with the Court in Division a Petition for Review[11] impugning BIR Ruling No. 099-2011 and the letter dated September 8, 2011 issued by respondent Secretary.

In her Answer[12] filed on December 2, 2011, respondent CIR averred that BIR Ruling No. 99-2011 was a valid interpretation of the 1997 NIRC and it would remain to be such unless and until reversed or modified by the respondent Secretary. Moreover, the Court has no jurisdiction to rule on the issue of the validity of Answer 11 of RMC No. 46-2008 for failure of petitioner to exhaust all administrative remedies.

On December 12, 2011, respondent Secretary filed his Answer[13] and counter-argued that the Petition for Review is premature for lack of an actual controversy or urgent necessity to justify judicial intervention. Petitioner also failed to show that the Court has jurisdiction over the matter raised in the Petition for Review. Further, contrary to existing jurisprudence is petitioner's claim that his interpretation that zero-rated services under Section 108(B)(4) of the NIRC are subject to the destination principle and cross border doctrine has no legal bases.

During trial, only petitioner presented evidence while respondent dispensed with presentation of any as the case allegedly involved only questions of law[14].

On August 15, 2013, the Court in Division dismissed the Petition for Review on jurisdictional ground.

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[8] Exhibit "D".
[9] Exhibit "A".
[10] Exhibit "A-1".
[11] Division docket, pp. 6-31.
[12] *Ibid.*, pp. 156-175.
[13] Division docket, pp. 188-198.
[14] Minutes of the hearing held on November 14, 2012, *ibid.*, p.448.

Petitioner moved for reconsideration on August 30, 2013 but it was denied in the similarly assailed Resolution of December 18, 2013.

Hence, the instant Petition for Review filed on January 22, 2014 with the following grounds:

> A.
> The CTA-Division erred in finding that it has no jurisdiction to rule on the validity of BIR Ruling No. 099-2011 dated 06 April 2011, DOF Letter dated 08 September 2011, and Answer 11 to Question 11 of Revenue Memorandum Circular ("RMC") No. 46-2008.
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> B.
> Petitioner complied with the procedure provided for in Department Order ("DO") No. 23-01 and Revenue Administrative Order ("RAO") No. 030-01 for the review of the BIR Ruling No. 099-2011 and with the rule on exhaustion of administrative remedies.
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> C.
> The CTA-Division erred in dismissing the Petition on the ground of technicalities without considering the substantive issues involved.

Petitioner insists that the Court has jurisdiction to rule on the validity of BIR Ruling No. 099-2011, DOF Letter dated September 8, 2011 and Q&A No. 11 of RMC No. 46-2008, as they fall under Section 7(a)(1) of Republic Act. (RA) No. 1125, as amended by RA No. 9282, which provides that the Court shall exercise appellate jurisdiction to review decisions of the CIR involving other matters arising under the NIRC or other laws administered by the BIR.

Further, the doctrine in *British American Tobacco vs. Camacho et. al.* is inapplicable since it is not questioning the constitutionality or the validity of Section 108(B)(4) but the correctness of respondent CIR's interpretation of Section 108(B)(4) of the NIRC of 1997, as amended.

Additionally, it complied with the administrative remedies in Section 4 of the NIRC of 1997, as amended, DO No. 23-01 and RAO No. 03-01 on exhaustion of administrative remedies before filing the case before the Court.

According to petitioner, the Court should have resolved the substantive issues raised in this case to avoid a repeat of erroneous interpretation of the subject provision by respondent CIR.

Lastly, petitioner reiterates that BIR Ruling No. 99-2011 and DOF Letter dated September 8, 2011 have no legal bases; that RMC No. 46-2008 is invalid; and that services rendered to persons engaged in international air transport operations, such as services provided by VAT-registered suppliers for accommodation/lodging of pilots and cabin crew members during flight layovers in the Philippines, are subject to zero percent (0%) VAT under Section 108(B)(4) of the NIRC of 1997, as amended.

In her Comment[15], respondent CIR maintains that all questions on the validity of BIR Rulings should be elevated to respondent Secretary, to the Office of the President, and eventually, before the regular courts. BIR Rulings cannot be deemed a decision on other matters arising under the NIRC or other tax laws administered by the BIR because they are only opinions in connection with the implementation of the provisions of the Tax Code.

Also under the principle of exhaustion of administrative remedies, any adverse ruling of respondent Secretary should be elevated to the Office of the President before going to the regular courts. Further, if indeed petitioner considered the BIR ruling as a decision, it should have promptly elevated it to this Court after notice.

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[15] *En Banc* docket, pp. 150-153.

Respondent Secretary, for his part counter-argues that:

I.
The CTA has no jurisdiction over the subject matter of the Petition for Review filed on October 24, 2011.

II.
The Petition is premature for lack of an actual tax dispute.

III.
Services rendered to persons engaged in international air transport operations, such as services provided by VAT-registered suppliers for accommodation/lodging of pilots and cabin crew members during flight layovers in the Philippines are subject to Twelve Percent (12%) VAT.

On May 28, 2015, the instant Petition for Review was given due course.[16]

On September 10, 2014, the case was submitted for decision.

RULING OF THE COURT *EN BANC*

The Court's jurisdiction to rule on the validity of BIR Ruling No. 099-2011, DOF Letter dated September 8, 2011, and Q&A No. 11 of Revenue Memorandum Circular No. 46-2008.

The primary issue raised by petitioner in the instant case is whether the Court has jurisdiction to rule on the validity of BIR Ruling No. 099-2011, DOF Letter dated

[16] Resolution dated May 28, 2015, *en banc* docket, pp. 162-163.

September 8, 2011 and Answer 11 to Question 11 of Revenue Memorandum Circular No. 46-2008.

The Court's jurisdiction is provided under Section 7(a)(1) of Republic Act (RA) No. 1125[17], as amended by RA No. 9282[18], which provides that the Court shall exercise exclusive appellate jurisdiction to review by appeal, decisions of the CIR in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the NIRC or other laws administered by the Bureau of Internal Revenue.

In relation thereto, Section 4 of the NIRC of 1997, as amended, provides that the CIR has the power to interpret the NIRC and other tax laws administered by the BIR, subject to the review of the Secretary of Finance.

In the case of *Commissioner of Internal Revenue vs. Josefina Leal*[19], the Supreme Court held that the jurisdiction to review the rulings of the CIR pertains to the Court of Tax Appeals, not to the RTC considering that BIR Rulings are actually rulings or opinions of the Commissioner implementing the Tax Code, which were issued pursuant to her powers under Section 245 of the Tax Code. Further, under RA No. 1125, as amended, such rulings of the CIR are appealable to the CTA as it involves "other matters arising under the National Internal Revenue Code or other laws or part of law administered by the Bureau of Internal Revenue".

Further, in the recent case of *The Philippine American Life and General Insurance Company vs. The Secretary of Finance and The Commissioner of Internal Revenue*[20], the Supreme Court held that while there is no provision in law that provides where exactly the ruling of the Secretary of

[17] AN ACT CREATING THE COURT OF TAX APPEALS.
[18] AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF REPUBLIC ACT NO. 1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.
[19] G.R. No. 113459, November 18, 2002.
[20] G.R. No. 210987, November 24, 2014.

Finance is appealable to, Sec. 7(a)(1) of the NIRC of 1997, as amended, addressed the seeming gap in the law as it vests the CTA, albeit impliedly, with jurisdiction on "other matters" arising under the NIRC of 1997 or other laws administered by the BIR. To expound, the Supreme Court held:

> "Admittedly, **there is no provision in law that expressly provides where exactly the ruling of the Secretary of Finance under the adverted NIRC provision is appealable to. However, We find that Sec. 7(a)(1) of RA 1125, as amended, addresses the seeming gap in the law as it vests the CTA, albeit impliedly, with jurisdiction over the CA petition as "other matters" arising under the NIRC or other laws administered by the BIR**. As stated:
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>> Sec. 7. Jurisdiction.- The CTA shall exercise:
>>
>> a. Exclusive appellate jurisdiction to review by appeal, as herein provided:
>>
>> 1. Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue.
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> **Even though the provision suggests that it only covers rulings of the Commissioner, We hold that it is, nonetheless, sufficient enough to include appeals from the Secretary's review under Sec. 4 of the NIRC.**
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> xxx xxx xxx

Indeed, to leave undetermined the mode of appeal from the Secretary of Finance would be an injustice to taxpayers prejudiced by his adverse rulings. To remedy this situation, We imply from the purpose of RA 1125 and its amendatory laws that the CTA is the proper forum with which to institute the appeal. This is not, and should not, in any way, be taken as a derogation of the power of the Office of President but merely as recognition that matters calling for technical knowledge should be handled by the agency or quasi-judicial body with specialization over the controversy. As the specialized quasi-judicial agency mandated to adjudicate tax, customs, and assessment cases, there can be no other court of appellate jurisdiction that can decide the issues raised in the CA petition, which involves the tax treatment of the shares of stocks sold. Petitioner, though, next invites attention to the ruling in *Ursal v. Court of Tax Appeals* to argue against granting the CTA jurisdiction by implication, viz:

> Republic Act No. 1125 creating the Court of Tax Appeals did not grant it blanket authority to decide any and all tax disputes. Defining such special court's jurisdiction, the Act necessarily limited its authority to those matters enumerated therein. In line with this idea we recently approved said court's order rejecting an appeal to it by *Lopez & Sons* from the decision of the Collector of Customs, because in our opinion its jurisdiction extended only to a review of the decisions of the Commissioner of Customs, as provided by the statute — and not to decisions of the Collector of Customs.
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> ... Republic Act No. 1125 is a complete law by itself and expressly enumerates the matters which the Court of Tax Appeals may consider;

> such enumeration excludes all others by implication. Expressio unius est exclusio alterius.
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Petitioner is quick to point out, however, that the grounds raised in its CA petition included the nullity of Section 7(c.2.2) of RR 06-08 and RMC 25-11. In an attempt to divest the CTA jurisdiction over the controversy, petitioner then cites British American Tobacco, wherein this Court has expounded on the limited jurisdiction of the CTA in the following wise:

> While the above statute confers on the CTA jurisdiction to resolve tax disputes in general, this does not include cases where the constitutionality of a law or rule is challenged. Where what is assailed is the validity or constitutionality of a law, or a rule or regulation issued by the administrative agency in the performance of its quasi legislative function, the regular courts have jurisdiction to pass upon the same. The determination of whether a specific rule or set of rules issued by an administrative agency contravenes the law or the constitution is within the jurisdiction of the regular courts. Indeed, the Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation in the courts, including the regional trial courts. This is within the scope of judicial power, which includes the authority of the courts to determine in an appropriate action the validity of the acts of the political departments. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine

> whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

Vis-a-vis *British American Tobacco*, it bears to stress what appears to be a contrasting ruling in *Asia International Auctioneers, Inc. v. Parayno, Jr.*, to wit:

> Similarly, in *CIR v. Leal*, pursuant to Section 116 of Presidential Decree No. 1158 (The National Internal Revenue Code, as amended) which states that "[d]ealers in securities shall pay a tax equivalent to six (6%) per centum of their gross income. Lending investors shall pay a tax equivalent to five (5%) per cent, of their gross income," the CIR issued Revenue Memorandum Order (RMO) No. 15-91 imposing 5% lending investor's tax on pawnshops based on their gross income and requiring all investigating units of the BIR to investigate and assess the lending investor's tax due from them. The issuance of RMO No. 15-91 was an offshoot of the CIR's finding that the pawnshop business is akin to that of "lending investors" as defined in Section 157(u) of the Tax Code. Subsequently, the CIR issued RMC No. 43-91 subjecting pawn tickets to documentary stamp tax. Respondent therein, Josefina Leal, owner and operator of Josefina's Pawnshop, asked for a reconsideration of both RMO No. 15-91 and RMC No. 43-91, but the same was denied by petitioner CIR. Leal then filed a petition for prohibition with the RTC of San Mateo, Rizal, seeking to prohibit petitioner CIR from implementing the revenue orders. The CIR, through the OSG, filed a motion to dismiss on the ground of lack of jurisdiction. The RTC denied the motion. Petitioner filed a

> petition for certiorari and prohibition with the CA which dismissed the petition "for lack of basis." In reversing the CA, dissolving the Writ of Preliminary Injunction issued by the trial court and ordering the dismissal of the case before the trial court, the Supreme Court held that "[t]he questioned RMO No. 15-91 and RMC No. 43-91 are actually rulings or opinions of the Commissioner implementing the Tax Code on the taxability of pawnshops." They were issued pursuant to the CIR's power under Section 245 of the Tax Code "to make rulings or opinions in connection with the implementation of the provisions of internal revenue laws, including ruling on the classification of articles of sales and similar purposes." The Court held that under R.A. No. 1125 (An Act Creating the Court of Tax Appeals), as amended, such rulings of the CIR are appealable to the CTA.
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> In the case at bar, the assailed revenue regulations and revenue memorandum circulars are actually rulings or opinions of the CIR on the tax treatment of motor vehicles sold at public auction within the SSEZ to implement Section 12 of R.A. No. 7227 which provides that "exportation or removal of goods from the territory of the [SSEZ] to the other parts of the Philippine territory shall be subject to customs duties and taxes under the Customs and Tariff Code and other relevant tax laws of the Philippines." They were issued pursuant to the power of the CIR under Section 4 of the National Internal Revenue Code....

The respective teachings in *British American Tobacco* and *Asia International Auctioneers*, at first blush, appear to bear no conflict--that when the validity or constitutionality of an administrative rule or regulation is assailed, the regular courts have jurisdiction; and if what is assailed are rulings or opinions of the Commissioner on tax treatments, jurisdiction over the controversy is lodged with the CTA. The problem with the above postulates, however, is that they failed to take into consideration one crucial point--a taxpayer can raise both issues simultaneously.

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As a result of the seemingly conflicting pronouncements, petitioner submits that taxpayers are now at a quandary on what mode of appeal should be taken, to which court or agency it should be filed, and which case law should be followed.

Petitioner's above submission is specious.

In the recent case of *City of Manila v. Grecia-Cuerdo*, the Court *en banc* has ruled that the CTA now has the power of certiorari in cases within its appellate jurisdiction. To elucidate:

> The prevailing doctrine is that the authority to issue writs of certiorari involves the exercise of original jurisdiction which must be expressly conferred by the Constitution or by law and cannot be implied from the mere existence of appellate jurisdiction. Thus, ... this Court has ruled against the jurisdiction of courts or tribunals over petitions for certiorari on the ground that there is no law which expressly gives these tribunals such power. It must be observed, however, that ... these rulings pertain not to regular courts but to tribunals exercising quasi-judicial powers. xxxx
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> The foregoing notwithstanding, while there is no express grant of such power, with respect to the CTA, Section 1, Article VIII of the 1987

> Constitution provides, nonetheless, that judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law and that judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.
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> On the strength of the above constitutional provisions, it can be fairly interpreted that the power of the CTA includes that of determining whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the RTC in issuing an interlocutory order in cases falling within the exclusive appellate jurisdiction of the tax court. It, thus, follows that the CTA, by constitutional mandate, is vested with jurisdiction to issue writs of certiorari in these cases."

Indeed, in order for any appellate court to effectively exercise its appellate jurisdiction, it must have the authority to issue, among others, a writ of certiorari. In transferring exclusive jurisdiction over appealed tax cases to the CTA, it can reasonably be assumed that the law intended to transfer also such power as is deemed necessary, if not indispensable, in aid of such appellate jurisdiction. There is no perceivable reason why the transfer should only be considered as partial, not total.

Evidently, *City of Manila* can be considered as a departure from *Ursal* in that in spite of there being no express grant in law, the CTA is deemed granted with powers of certiorari by implication. **Moreover, *City of Manila* diametrically opposes *British American***

> ***Tobacco* to the effect that it is now within the power of the CTA, through its power of certiorari, to rule on the validity of a particular administrative rule or regulation so long as it is within its appellate jurisdiction. Hence, it can now rule not only on the propriety of an assessment or tax treatment of a certain transaction, but also on the validity of the revenue regulation or revenue memorandum circular on which the said assessment is based.**"

In light of the foregoing pronouncements by the Supreme Court, it is clear that the Court has the authority to review the rulings or opinions of the CIR which were issued to interpret the provisions of the NIRC and other laws administered by the BIR as it falls under the phrase "other matters" arising under the NIRC or other laws administered by the BIR. Consequently, the Court now has the jurisdiction over the instant Petition for Review insofar as the issue of the validity of BIR Ruling No. 099-2011, DOF Letter dated September 8, 2011 and Q&A No. 11 of RMC No. 46-2008, as provided under Sec. 7(a)(1) of the NIRC of 1997, as amended.

Petitioner's compliance with the procedure provided for in Department Order No. 23-01 and Revenue Administrative Order No. 030-01 for the review of the BIR Ruling No. 099-2011 and with the rule on exhaustion of administrative remedies.

The assailed BIR Ruling and RMC were issued by respondent CIR in accordance with her power to interpret tax laws, therefore, the same shall be subject to review by the respondent Secretary, as provided under Section 4 of the NIRC of 1997, as amended, and in consonance with the doctrine of exhaustion of administrative remedies.

In relation thereto, the respondent Secretary issued Department Order (DO) No. 23-01, as implemented by

Revenue Administrative Order (RAO) Nos. 2-2001 and 3-2001, which provides the procedure for filing with the Secretary of Finance an appeal of an adverse ruling issued by the CIR.

The rules provide that the aggrieved taxpayer may file a request for review in writing and under oath, within thirty (30) days from the date of receipt of the adverse ruling of respondent CIR to the respondent Secretary.

It is undisputed that petitioner filed with the Law Division of the BIR a Request for VAT Ruling on the application of Section 108 (B)(4) of the NIRC of 1997, as amended, to services rendered to persons engaged in international air transport operations, such as services provided by local suppliers to petitioner for the accommodation/lodging, including meals of its pilots and cabin crews. Acting on the said request for VAT Ruling, respondent CIR issued BIR Ruling No. 099-2011 which petitioner received on May 9, 2011. On June 8, 2011, petitioner filed a Request for Review of BIR Ruling No. 099-2011 with respondent Secretary.

On September 22, 2011, respondent Secretary issued a letter dated September 8, 2011 addressed to petitioner affirming the BIR Ruling. Thus, on October 24, 2011, petitioner filed with the Court in Division a Petition for Review assailing BIR Ruling No. 099-2011 and the DOF letter dated September 8, 2011, which the Court denied in the assailed Decision and Resolution of August 15, 2013 and December 18, 2013, respectively, for lack of jurisdiction. Hence, petitioner filed the instant Petition for Review before the Court *En Banc*.

Evidently, petitioner was able to exhaust available administrative remedies and complied with the required procedures before it sought judicial intervention with the Court via a Petition for Review. In other words, BIR Ruling No. 099-2011 and DOF letter dated September 8, 2011 can be subject of the instant Petition.

However, with respect to RMC No. 46-2008, respondent CIR was correct when she argued that Court has no jurisdiction to rule on the issue of the validity of Answer 11 of RMC No. 46-2008 for failure of petitioner to exhaust all administrative remedies considering that petitioner did not question or elevate to respondent Secretary the validity of said RMC, as required under Section 4 of the NIRC of 1997, as amended.

As held in the case of *St. Paul College of San Rafael vs. Commissioner of Internal Revenue*[21], a party may only seek judicial intervention after availing of all administrative processes, otherwise, the case may be dismissed for lack of cause of action, thus:

> "At this juncture, before a party is allowed to seek the court's intervention, he should have availed all administrative processes. Otherwise, the premature filing of judicial action is fatal to one's cause of action. In the case of *Union Bank of the Philippines v. Honorable Court of Appeals, et al.*, the Supreme Court aptly explained that:
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>> The underlying principle of the rule of exhaustion of administrative remedies rests on the presumption that the administrative agency, if afforded a complete chance to pass upon the matter, will decide the same correctly. There are both legal and practical reasons for the principle. The administrative process is intended to provide less expensive and more speedy solutions to disputes. Where the enabling statute indicates a procedure for administrative review and provides a system of administrative appeal or reconsideration, the courts — for reason of law, comity, and convenience — will not entertain a case unless the available administrative remedies have been resorted to and the appropriate authorities have been given an opportunity to act and correct the

[21] CTA Case No. 8217, November 9, 2011.

> errors committed in the administrative forum.

A party aggrieved must not merely initiate the prescribed administrative procedure to obtain relief, but must also pursue it to its appropriate conclusion before seeking judicial intervention in order to give that administrative agency an opportunity to decide the matter by itself correctly and prevent unnecessary and premature resort to court.

Clearly, petitioner should first establish that it had already exhausted all available administrative remedies before seeking judicial recourse.

In determining whether petitioner had exhausted all administrative remedies, this Court finds instructive Section 4 of the 1997 NIRC, as amended, which reads:

> "SEC. 4. Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases. — The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.
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Considering that the subject BIR Ruling interpreted the provisions of the 1997 NIRC, as amended, this Court finds that the said Ruling was issued in the exercise of the Commissioner's power to interpret tax laws. Consequently, the administrative remedy available to petitioner is to appeal the adverse ruling with the Secretary of Finance as provided for under the first paragraph of Section 4 of the 1997 NIRC, as amended.

It must also be noted that the Secretary of Finance issued Department Order No. 23-01, which provides for the guidelines in

> implementing the first paragraph of Section 4 of the 1997 NIRC, as amended. The said Department Order specifically enumerated the procedure for filing with the Secretary of Finance an appeal of an adverse ruling issued by the Revenue Commissioner. xxxx
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> Xxx xxx.
>
> Let it be reiterated that under the doctrine of exhaustion of administrative remedies, recourse through court action cannot prosper until after all such administrative remedies have first been exhausted. If remedy is available within the administrative machinery, this should be resorted to before resort can be made to courts. It is settled that non-observance of the doctrine of exhaustion of administrative remedies results in lack of cause of action, which is one of the grounds in the Rules of Court justifying the dismissal of the complaint."

The validity of issuance of BIR Ruling No. 099-2011 dated April 6, 2011 and DOF Letter dated September 8, 2011.

Petitioner claims that BIR Ruling No. 099-2011 dated April 6, 2011 has no legal basis because respondent CIR failed to consider that the amendment introduced by RA No. 9337 to Section 108(B)(4) of the NIRC of 1997 changed the type of transaction subject to zero-rating from "services rendered to <u>vessels</u> engaged in international shipping or international air transport services, including leases of property for use thereof" to "services rendered to <u>persons</u> engaged in international shipping or international air transport services, including leases of property for use thereof". With the change introduced by RA No. 9337 to Section 108(B)(4) of the NIRC of 1997, respondent CIR no longer has any legal basis to impose the requirement that services to local suppliers to petitioner must be rendered to the aircraft itself for purposes of zero-rating. Respondent CIR cannot insist on the interpretation of Section 108(B)(4) as originally worded because to do so will render nugatory the amendments introduced by the legislature.

Petitioner further argues that respondent CIR limited the services covered by VAT zero-rating to services performed on/to the aircraft itself and concluded that since the subject services are rendered within the Hotel's premises, they have no direct connection with the transport of goods or passengers, as such, they cannot be considered as services directly attributable to the transport of goods and passengers from a Philippine port directly to a foreign port entitled to zero-rating. Respondent CIR disregarded the fact that petitioner is a person engaged in international air transport operations and services were provided by local VAT suppliers in the Philippines. Moreover, the accommodation and lodging of petitioner's pilots and cabin crews in the Philippines are reasonable and necessary business expenses of petitioner.

Petitioner also contends that the additional imposition or requirement limiting the application of Section 108(B)(4) of the NIRC of 1997, as amended, clearly amounts to invalid subordinate legislation. By construing Section 108(B)(4) of the NIRC of 1997, as amended, in the assailed BIR Ruling to be limited to services rendered to the aircraft itself when no such express qualification is found in the law, respondent CIR changed the clear and plain import of the law contrary to the rule that administrative issuances cannot modify the law they seek to implement.

Moreover, petitioner points out that in order to be entitled to VAT zero-rating under Section 108(B)(4) of the NIRC of 1997, as amended, only two(2) requisites must be complied with, namely:

(a) The service is performed or rendered in the Philippines by a VAT-registered service provider; and
(b) The service is rendered to persons engaged in international shipping or international air transport operations.

Therefore, as long as two requisites are complied with, the services provided by local VAT-registered suppliers to petitioner, such as services for accommodation and lodging of its pilots and cabin crews during flight layovers in the Philippines are entitled to VAT zero-rating pursuant to Section 108(B)(4) of the NIRC of 1997, as amended.

Finally, while the Philippine VAT system generally follows the Destination Principle and Cross Border Doctrine, Section 108(B)(4) of the NIRC of 1997, as amended, provides the exemption.

Respondent CIR counters that the sale of services rendered by the Hotel in the form of accommodation/lodging and food and beverage services to petitioner's pilots and cabin crews during flight layovers in the Philippines is subject to 12% VAT. Section 108(B)(4) of the NIRC of 1997, as amended, must be read in conjunction with Section 4.108-5(b)(4) of Revenue Regulations (RR) No. 16-2005, as amended by RR No. 4-2007. Further, zero-rating and tax exemption in terms of VAT computation are practically the same[22] and therefore, zero-rating is strictly construed against the claimant who must discharge such burden convincingly.[23] In the instant case, petitioner failed to discharge such burden and failed to substantiate its allegations.

Moreover, interpretations of administrative agencies in charge of enforcing a law are entitled to great weight and consideration by the courts, unless such interpretations are in a sharp conflict with the governing statute or the Constitution and other laws.[24] As in the instant case, BIR Ruling No. 099-2001 is in perfect harmony with the Constitution and the laws it seeks to implement.

Petitioner's arguments failed to convince the Court.

BIR Ruling No. 099-2001, as affirmed by DOF Letter dated September 8, 2011, applied and interpreted Section 108(B)(4) of the NIRC of 1997, as amended. Section 108(B)(4) of the NIRC of 1997, as amended, provides:

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[22] *Commissioner of Internal Revenue vs. Seagate Technology*, G. R. No. 153866, February 11, 2005.
[23] *Commissioner of Internal Revenue vs. S.C. Johnson and Son, Inc., et. al.*, G.R. No. 127105, June 25, 1999.
[24] *Nestle Philippines, Inc. vs. Court of Appeals*, G.R. No. 86738, November 13, 1991.

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* –
>
> xxx xxx xxx
>
> (B) *Transactions Subject to Zero Percent (0%) Rate.* – The following services performed in the Philippines by VAT-registered persons shall be subject to zero-percent (0%) rate:
>
> xxx xxx xxx
>
> (4) Services rendered to persons engaged in international shipping or international air transport operations, including leases of property for use thereof;"

The foregoing provision must be read in conjunction with Section 4.108-5(b)(4) of Revenue Regulations (RR) No. 16-2005, as amended by RR No. 4-2007, which states:

> "SEC. 4.108-5. *Zero-Rated Sale of Services.* –
>
> xxx xxx xxx
>
> (b) *Transactions Subject to Zero Percent (0%) VAT Rate.* – The following services performed in the Philippines by a VAT-registered person shall be subject to zero-percent (0%) VAT rate:
>
> xxx xxx xxx
>
> (4) Services rendered to persons engaged in international shipping or air transport operations, including leases of property for use thereof: *Provided, however,* That the services referred to herein shall not

> pertain to those made to common carriers by air and sea relative to their transport of passengers, goods or cargoes from one place in the Philippines to another place in the Philippines, the same being subject to twelve percent (12%) VAT under Sec. 108 of the Tax Code starting February 1, 2006."

It is therefore clear that the services performed in the Philippines by a VAT-registered person to persons engaged in international shipping or air transport operations, including leases of property for use thereof are generally subject to zero percent (0%) VAT. However, RR No. 16-2005, as amended by RR No. 4-2007, provides that when the services performed in the Philippines by a VAT-registered person are rendered to common carriers by air and sea relative to their transport of passengers, goods or cargoes from one place in the Philippines to another place in the Philippines, the same shall already be subject to twelve percent (12%) starting February 1, 2006.

It is undisputed that the services provided by the Hotel to petitioner were rendered within the Hotel's premises, they have no direct connection with the transport of goods or passengers, and as such, they cannot be considered as services directly attributable to the transport of goods and passengers from a Philippine port directly to a foreign port to be entitled to zero-rating.

The BIR merely interpreted the law and the rules in the assailed BIR Ruling and held that the sale of services by the Hotel to petitioner is subject to the 12% VAT given that the services provided by the Hotel to petitioner pertain to room accommodations and food and beverage services to its pilots and crew members during flight layovers in the Philippines, which have no direct connection with the transport of goods or passengers. Hence, the same cannot be considered as services directly attributable to the transport of goods and passengers from a Philippine port directly to a foreign port entitled to zero-rating.

Clearly, the interpretation of respondent CIR was well within the parameters of what was provided by the law and rules from which such ruling was based.

Finally, the Court recognizes the doctrine that interpretations of administrative agencies in charge of enforcing a law are entitled to great weight and consideration by the courts, unless such interpretations are in a sharp conflict with the governing statute or the Constitution and other laws,[25] which is not obtaining in the present case.

WHEREFORE, the Petition for Review filed by petitioner Delta Air Lines, Inc. on January 22, 2014 is hereby **DENIED**. Accordingly, the interpretation in BIR Ruling No. 99-2011 dated April 6, 2011, as affirmed by the DOF Letter dated September 8, 2011 pertaining to the interpretation of Section 108(B)(4) of the Tax Code, as amended, is **VALID**. Consequently, the sale of services rendered by VAT-registered suppliers for the accommodation/lodging of pilots and cabin crew members of petitioner during flight layovers in the Philippines is subject to twelve percent (12%) VAT.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

(With Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

[25] *Nestle Philippines, Inc. v. Court of Appeals, Supra*, Note 29.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen
MA. BELEN RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation among the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court *En Banc*.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

DELTA AIR LINES, INC.,
Petitioner,

-versus-

HON. SEC. CESAR V. PURISIMA (in his capacity as incumbent Secretary of The Department of Finance) and HON. KIM S. JACINTO-HENARES (in her capacity as Incumbent Commissioner of Internal Revenue,
Respondents.

CTA EB NO. 1113
(CTA Case No. 8360)

Present:

DEL ROSARIO, *PJ,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

SEP 1 0 2015
2:57 p.m.

x -- x

DISSENTING OPINION

DEL ROSARIO, PJ.:

With due respect, I hesitate to give my assent to the *ponencia* insofar as it made a pronouncement that the services provided by the Hotel to petitioner have no direct connection with the transport of goods or passengers from a Philippine port directly to a foreign port to be entitled to zero-rating. I submit that services pertaining to room accommodations, food and beverage to pilots and crew members during flight layovers in the

Philippines rendered by hotels are directly related to air transport operations and are thus subject to VAT at 0%, based on the following ratiocinations:

- Under Section 108(B)(4) of Republic Act (RA) No. 8424, as amended by RA No. 9337, services rendered to **persons engaged in international shipping or international air transport operations**, including lease of property for their use, are subject to VAT at 0%;

- RA No. 9337 and Revenue Regulations (RR) No. 16-2005, as amended by RR No. 4-2007, do not specifically enumerate the types of services that must be rendered to persons engaged in international air transport operation to qualify for VAT zero-rating. In the absence of a specific enumeration of the type of services, and for as long as the services do not pertain to the transport of passengers, goods or cargoes from one place in the Philippines to another place in the Philippines, services rendered to persons engaged in international shipping or international air transport operations, which are directly used in, or attributable to the international transport of goods and passengers, shall be subject to VAT at 0%;

- Prior to its amendment by RA No. 9337, Section 108(B)(4) of RA No. 8424 provides that services rendered to vessels engaged exclusively in international shipping shall be subject to VAT at zero percent (0%). RA No. 9337 changed the phrase "services rendered to vessel" to "services rendered to persons engaged in international shipping or international air transport operations. Thus, it is of no moment if at the time the hotel services were rendered that the vessel or aircraft is in the Philippine territory. **The services that are being subjected to VAT at 0% rate are supposedly rendered not to the vessel but to the persons engaged in international shipping or international air transport operations**;

- Since transport of passengers and cargo by air or sea vessels from the Philippines to a foreign country is specifically subject to 0% VAT under Section 108(B)(6) of RA No. 8424 as amended by RA No. 9337, persons engaged in international shipping or international air transport operations will, generally, not have any use for the **input VAT** that will be passed on to them, if services rendered to them will be subjected to VAT. This situation will not be consistent with the legislative intent of reducing the costs of international shipping or

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international air transport as the 12% input VAT paid by persons engaged in international shipping or international air transport for services rendered to them will be inevitably passed to their customers as part of their ticket price;

- Revenue Memorandum Circular (RMC) No. 046-08 dated February 1, 2008 states that the VAT zero-rating "is limited to goods, supplies, equipment, fuel and services pertaining to or attributable to the transport of goods and passengers from a port in the Philippines directly to a foreign port without docking or stopping at any other port in the Philippines to unload passengers and/or cargoes loaded in and from another domestic port". **Parenthetically, pilots, flight attendants and cabin crew of persons engaged in international air transport operations are indispensable in air transport operations.** Thus, services for accommodation/lodging rendered to these personnel (during flight layovers in the Philippines) are services rendered to persons engaged in international air transport operations which are attributable to the international transport of goods and passengers; and

- The Civil Aviation Regulations Part 8 on Operations[1] issued by the Civil Aviation Authority of the Philippines mandates petitioner to provide accommodation/lodging of its pilots and cabin crew members during the flight layovers in the Philippines. Petitioner is engaged in long haul flights from the USA to the Philippines. In fact, the pertinent regulations provide for flight time, duty and rest periods of flight and cabin crews, *viz:*

> "8.11.1.10.2 FLIGHT TIME, DUTY AND REST PERIODS: AIRCRAFT TYPE CERTIFICATED FOR TWO PILOTS AND ONE OTHER FLIGHT CREW MEMBER
>
> (a) No scheduled and non-scheduled international operator may schedule any flight crew member and no flight crew member may accept an assignment for flight time in commercial flying if that flight crew member's total flight time in all flying will exceed:

[1]http://www.caap.gov.ph/index.php/downloads/finish/8-civil-aviation-regulation-car/198-008-part-8-operations-8-2014, last accessed on September 9, 2015.

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(1) 12 hours during any 24 consecutive hours;
(2) 120 hours during any 30 consecutive days;
(3) 300 hours during any 90 consecutive days; or
(4) 1,000 hours during any calendar year.

(b) A rest period of twice the number of hours flown since the last rest period or 12 hours, whichever is greater, shall be scheduled following any flight segment.

(c) If a flight crew member has flown 20 or more hours during any 48 consecutive hours or 24 or more hours during any 72 consecutive hours, he must be given at least 18 hours of rest before being assigned to any duty with the operator.

To be sure, petitioner's pilots and cabin crew are not allowed to immediately fly back to the USA upon the aircraft's arrival in the Philippines; as afore-stated, the pilots are required to take a rest for at least twice the number of hours flown and 18 hours for cabin crew. Since petitioner is duty bound to provide accommodation and lodging to its pilot and crew, the services rendered for such purpose must necessarily be attributable to the "international air transport operations" within the context of Sec. 108(B)(4) of the NIRC of 1997, as amended.

For the reasons afore-stated, I **VOTE** to **GRANT** the Petition for Review and accordingly **DECLARE** that the sale of services rendered by VAT-registered suppliers for the accommodation/lodging of pilots and crew members of petitioner during flight layovers in the Philippines is subject to zero percent (0%) VAT.

ROMAN G. DEL ROSARIO
Presiding Justice