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| MediaTitle | The Philippine Star | | |
| Date | 20 Jun 2017 | Language | English |
| Section | Business | Journalist | Ana Margarita Mortel |
| Page No | B6 | Frequency | Daily |
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What's in a name? Revisiting the doctrine on documentary stamp taxes and intercompany advances

Intercompany advances are transactions entered into by related parties, usually for purposes of extending financial assistance to affiliates. This extension of financial assistance ordinarily puts such transactions within the ambit of borrowing and lending, and are akin to loans as defined in Art. 1933 of the Civil Code (i.e. simple loans are contracts where one party delivers to another money or other consumable thing upon the condition that the same amount of the same kind be paid).

Ordinarily, parties to loan agreements will have formal instruments drawn up as safeguards. After all, these formal instruments conveniently evidence the demandable obligations of the parties under the corresponding contract. However, one must consider that intercompany advances are entered into between related parties. Thus, it is not uncommon for such advances to be unsupported by formal debt instruments. These kinds of arrangements are not usually flanked by formalities attendant to regular loan contracts.

TOP OF MIND



ANA MARGARITA MORTEL

The question that arises from such a situation is whether intercompany advances, unsupported as they are by formal debt instruments or agreements, are subject to documentary stamp taxes.

It must be recalled that pursuant to Section 173 of the Tax Code, documentary stamp taxes are imposed upon documents, instruments, loan agreements and papers, acceptances, assignments, and sales and transfers of obligations, rights or properties. They are in the nature of excise taxes, and levied upon the exercise by certain persons of privileges conferred by law for the creation, revision, or termination of specific legal relationships through the execution of specific documents. Contrary to what the name suggests, current jurisprudence holds that documentary stamp taxes are not imposed upon the literal document. Instead, they arise with the transaction that the relevant document is able to establish.

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As applied to intercompany advances, the case of Commissioner of Internal Revenue v. Filinvest Development Corp., promulgated on July 19, 2011, is controlling.

In the said case, Filinvest Development Corp. extended advances to its affiliates, which advances are evidenced only by instructional letters, and journal and cash vouchers. Despite the absence of a formal instrument, the BIR assessed Filinvest for deficiency documentary stamp taxes on the strength of the abovementioned documents only. Filinvest filed its opposition, claiming that the said memos and vouchers are not promissory notes or certificates of obligations and thus not subject to documentary stamp taxes.

In upholding the position of the BIR, the Supreme Court ratiocinated that instructional letters as well as journal and cash vouchers evidencing intercompany advances qualify as loan agreements upon which documentary stamp taxes may be imposed. The Supreme Court correlated Section 180 (now Section 179) of the Tax Code to the provisions of Revenue Regulations 9-94. Pertinently, said provisions state that loan agreements are contracts in writing where one of the parties delivers to another money or other consumable thing, upon the condition that the same amount of the same kind and quality shall be paid. The said regulation further provides that the term "loan agreement" includes credit facilities which may be evidenced by credit memos, advices or drawings. Further, where no formal agreements have been executed to cover credit facilities, the documentary stamp tax shall be based on the amount of drawings or availments of credit facilities, which may be evidenced by credit/debit memo, advice, or drawings by any form of check or withdrawal slip. Thus, for purposes of determining whether documentary stamp taxes will arise from intercompany advances, it is more important to determine the nature of such advances rather than the existence of the literal loan agreement covering the same. As noted above, other documents may be introduced to establish the existence of the taxable transaction.

This decision of the Supreme Court has since been circularized through the issuance of Revenue Memorandum Circular (RMC) 48-2011. BIR employees engaged in audit and review of similar cases have been enjoined to assess deficiency documentary stamp tax on such transactions, if so warranted.

The Court of Tax Appeals found it proper as well to apply the Filinvest doctrine in a number of subsequent cases. Recently, the said court found a taxpayer liable for documentary stamp taxes on intercompany advances established merely by the notes appearing in the taxpayer's audited financial state-

ments. Particularly, the Court of Tax Appeals reiterated that documentary stamp taxes are actually excise taxes imposed on transactions rather than documents. The court mentioned that these taxes may be imposed even in the absence of debt instruments, as long as the taxable transactions are clearly established. Thus, documentary stamp taxes may be imposed on intercompany advances on the basis merely of notes appearing in the relevant audited financial statements.

The court also found in the said case that the interpretation of the Supreme Court in Filinvest is effective as of the date that the relevant law was passed. This law was identified to be Republic Act 7660, which was enacted on Dec. 23, 1994. While there have been amendments to the said law, the provision imposing documentary stamp taxes on loan agreements have been retained. Thus, the said provision and its corresponding interpretation have been in effect since its enactment in Dec. 23, 1994. The doctrine on prospectivity of laws cannot be invoked considering that there is no previous Supreme Court ruling or doctrine to be overturned and replaced.

Notably, the taxpayers in the abovementioned cases relied upon previous rulings of the BIR which stated that documentary stamp taxes may not be imposed upon intercompany advances covered merely by intercompany memos. These rulings are in direct contrast with what the BIR itself in the above assessments enunciated. However, since the High Court has already spoken, its word on the matter must be upheld. Whether the abovementioned BIR rulings will one day become doctrine is difficult to say at this point. For now, what taxpayers should remember is that in so far as documentary stamp taxes are concerned, Shakespeare's famous rhetoric must be answered in the negative - there is not much in a name, after all. Notwithstanding its denomination, documentary stamp taxes are not literal taxes on documents. It is the substance, nature, and character of the transaction that must define and determine the corresponding imposition.

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