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G.R. No. 187485 – COMMISSIONER OF INTERNAL REVENUE, Petitioner, **v. SAN ROQUE POWER CORPORATION,** Respondent.

G.R. No. 196113 – TAGANITO MINING CORPORATION, Petitioner, **v. COMMISSIONER OF INTERNAL REVENUE,** Respondent.

G.R. No. 197156 – PHILEX MINING CORPORATION, Petitioner, **v. COMMISSIONER OF INTERNAL REVENUE,** Respondent.

Promulgated:
OCTOBER 08, 2013

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CONCURRING AND DISSENTING OPINION

LEONEN, *J.*:

We undermine the operative value of the rule of law whenever we reward clearly erroneous administrative interpretation of statutes. We open the legal order to undeserved inconsistencies, and worse, we make the Commissioner of Internal Revenue vulnerable to pressure.

Inconsistency in the administrative implementation of clear statutory provisions and vulnerability of our revenue officials to rent-seeking behavior drive investors away from our markets.

Properly denying an irregular application for a tax refund would mean more funds that can be used for the social good. The beneficiaries of a social good may be too atomized that they may not have the resources to compel our tax officials to deny an improper application of refund of taxes made. In my view, this is the compelling rationale behind the principle that tax statutes are strictly construed against the taxpayer. Our legal order equalizes opportunities through its general principles.

I reiterate my concurrence with the interpretation of Section 112 (C) of the National Internal Revenue Code of 1997[1] (referred here as the 1997 Tax Code) that the 120+30 day period is mandatory and jurisdictional. It has been that way since 1997, and doubts as to what it clearly said only arose due to inconsistent issuances of the Bureau of Internal Revenue.

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[1] Republic Act No. 8424 as amended by Republic Act No. 9337.

I, however, reiterate my dissent with respect to the application of this doctrinal interpretation as We resolved the Motions for Reconsideration of the February 12, 2013 Decision of this Court filed by San Roque Power Corporation in G.R. No. 187485, and the Commissioner of Internal Revenue in G.R. No. 196113.

In my view, the text of Section 112 (C) is clear. It puts all taxpayers on notice. The interpretations made through Revenue Regulation or by Opinion by a Deputy Commissioner of the Bureau of Internal Revenue contrary to the provisions of the law are clearly *ultra vires* and should not be countenanced. If We sanction these acts, it undermines the operative value of the statute as written. It rewards erroneous interpretation and unduly grants discretion to the Commissioner of Internal Revenue, which may be abused given the pressure from million-peso claims for tax refunds.

Section 112 (C) of the 1997 Tax Code provides:

> (C) Period within which Refund or Tax Credit of Input Taxes shall be Made. – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) thereof.
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> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayers affected may, ***within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty-day period, appeal the decision or the unacted claim with the Court of Tax Appeals.*** (Emphasis provided)

There is no room for any other interpretation of the text except that resort to an appeal with the Court of Tax Appeals is made (a) only after the 120-day period from the date of submission of complete documents to support the refund or tax credit certificate with the Commissioner of Internal Revenue or (b) within the 120-day period from the time the claim has been denied or only partially granted.

In the Decision, the majority considered the issuance by the Bureau of Internal Revenue of Ruling No. DA-489-03 dated December 10, 2003 in Re: Lazi Bay Resources Development, Inc. This opinion, rendered by a Deputy Commissioner, stated that the taxpayer need not wait for the lapse of the 120-day period before seeking judicial relief. The majority deemed it equitable to except, from the strict compliance with the 120+30-day mandatory and jurisdictional periods, judicial claims filed within the period from December 10, 2003, when Bureau of Internal Revenue Ruling No. DA-489-03 was issued, to October 6, 2010, when the doctrine in *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc*.[2] was adopted. The main *ponencia* still maintains that the taxpayers cannot be faulted for relying on the Bureau's declaration.

In its Motion for Reconsideration, San Roque argues that by the 'operative fact' principle, due recognition should be given to the fact that even prior to the issuance of Bureau of Internal Revenue Ruling No. DA-489-03, including the time when its administrative and judicial claims for refund were filed on March 28, 2003 and April 10, 2003, respectively, the Bureau and the Court of Tax Appeals in actual practice neither observed nor demanded compliance with the 120+30-day period. Thus, in the spirit of justice, fairness and equity, San Roque insists that the rule on the mandatory and jurisdictional nature of the 120+30-day period should only be applied prospectively.

On the other hand, the Commissioner of Internal Revenue argues that the Bureau of Internal Revenue Ruling No. DA-489-03 is not a valid issuance authorized under Section 4 of the 1997 Tax Code because a deputy commissioner issued it.

I maintain my position that the *Aichi* doctrine[3] as confirmed in *San Roque* should be applied to all undecided Value Added Tax or VAT refund cases, regardless of the period when the claim for refund was made.

When this Court interprets law, it declares what a particular provision has always meant. We do not create new legal obligations. We do not have the power to legislate. Interpretations of law made by courts necessarily always have a "retroactive" effect.

Once We determine that a previous interpretation of the law is erroneous, We cannot, at the same time, continue to give effect to such

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2 G.R. No. 184823, October 6, 2010, 632 SCRA 422.
3 Id.

erroneous interpretation because Ours is the duty to uphold the true meaning of the law.

A construction placed upon the law by the Commissioner, even if it has been followed for years, if found to be contrary to law, must be abandoned. To say that such interpretation established by the administrative agency has effect would be to say that this Court has the power to control or suspend the effectivity of laws. We cannot hold ourselves hostage to an erroneous interpretation. To say that equity should be considered because it has been relied upon by taxpayers would mean to underestimate or, worse, make the ordinary beneficiaries of the use of our taxes invisible. We cannot use equity only to favor large taxpayers.

We cannot justify such course of action.

Settled is the principle that an "erroneous application and enforcement of the law by public officers do not preclude a subsequent correct application of the statute, and the Government is never estopped by mistake or error on the part of its agents."[4] Similar with Our duty of upholding the Constitution when it is in conflict with a statute,[5] it is Our duty to uphold a statute when it is in conflict with an executive issuance. We ensure that clear provisions of law are not undermined by the Commissioner of Internal Revenue.[6]

Concededly, Section 4 of the Tax Code expressly grants to the Commissioner of Internal Revenue the power to interpret tax laws, thus:

> 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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4 *Philippine Basketball Association v. Court of Appeals*, 392 Phil. 133, 144 (2000).

5 CONSTITUTION, Art. V, Sec. 5 (2)(a).

6 *Philippine Petroleum Corp. v. Municipality of Pililla, Rizal,* G.R. No. 90776, June 3, 1991, 198 SCRA 82, 88.

> Well-settled is the rule that administrative regulations must be in harmony with the provisions of the law. In case of discrepancy between the basic law and an implementing rule or regulation, the former prevails.

However, the Commissioner of Internal Revenue cannot legislate guidelines contrary to the law it is tasked to implement. Hence, its interpretation is not conclusive and will be ignored if judicially found to be erroneous.

The doctrine of operative fact cannot be an excuse for Us to renege on this constitutional duty. This doctrine only refers to rights that have already been vested due to reliance on a statute or executive act that was eventually declared unconstitutional or invalid.[7]

In *Benguet Consolidated Mining Co. v. Pineda*,[8] vested right is defined as follows:

> Vested right is "some right or interest in the property which has become fixed and established, and is no longer open to doubt or controversy."
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> x x x x
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> "Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. The right must be absolute, complete, and unconditional, independent of a contingency, and a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right. So, inchoate rights which have not been acted on are not vested."[9]

There are no vested rights in procedure. Taxpayers do not have vested rights over tax refunds. Refunds need to be proven and its application raised in the right manner as required by statute. Only after a final determination of the right to refund and its amount does it become a vested right for the taxpayer.

San Roque further anchors its argument on the "actual practice" by the Bureau and the Court of Tax Appeals in treating the 120+30-day period as permissive rather than directory. This contention is specious. I agree with Justice Carpio that an administrative practice is not subject to the doctrine of operative fact. "Practice, without more, no matter how long continued, cannot give rise to any vested right if it is contrary to law."[10]

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7 *See Agbayani, de v. Philippine National Bank, et al.,* 148 Phil. 443 (1971).
8 98 Phil. 711 (1956) *citing Balboa v. Farrales,* 51 Phil. 498, 502 (1928) and 16 C.J.S. 214-215.
9 Id. at 722.
10 *Baybay Water District v. Commission on Audit,* 425 Phil. 326, 342 (2002).

I regret that I cannot agree with Justice Carpio that Section 246 of the Tax Code apply in these cases. This provides:

> Section 246. Non-Retroactivity of Rulings. – Any revocation, modification or reversal of any of the rules and regulations promulgated ***in accordance with the preceding Sections*** or any of the rulings or circulars ***promulgated by the Commissioner*** shall not be given retroactive application if the revocation, modification, or reversal shall be prejudicial to the taxpayer, except in the following cases:
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> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
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> (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
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> (c) Where the taxpayer acted in bad faith.

This provision should only apply when there is a valid interpretation made by the Commissioner of Internal Revenue. In the present case, the Bureau of Internal Revenue Ruling No. DA-489-03 is *ultra vires* and was not validly issued since it was promulgated by a Deputy Commissioner.

In *Aichi*, this Court squarely addressed the particular issue on prematurity of a judicial claim based on its reasonable interpretation of the language of the 1997 Tax Code. In that case, this Court did not defer application of the rule laid down. This Court ordered the Court of Tax Appeals to dismiss *Aichi*'s appeal due to the premature filing of its claim for refund/credit of input value added tax. In *Aichi*, the administrative and judicial claims were simultaneously filed on September 30, 2004.

The Bureau of Internal Revenue Ruling is *ultra vires* and invalid not only because it contravenes the law but also because it was issued beyond the scope of the authority of the deputy commissioner. In this, I agree with Justice Velasco.

Under Section 4[11] of the 1997 Tax Code, the power to interpret the provisions of the Code and other tax laws is under the exclusive and original jurisdiction of the Commissioner of Internal Revenue, subject to review by the Secretary of Finance. Pursuant to Section 7[12] of the Tax Code, the Commissioner of Internal Revenue may delegate his or her powers to a subordinate official except, among others, the power to issue rulings of first impression[13] or to reverse, revoke or modify any existing ruling of the Bureau of Internal Revenue. The Bureau of Internal Revenue Ruling No. DA-489-03 is a ruling of first impression, declaring for the first time in written form the permissive nature of the 120-day period stated in Section 112 (C).

I, however, disagree with my esteemed colleague, Justice Velasco, in his view that the Bureau of Internal Revenue Ruling is an application of a rule already laid down and specified in Revenue Regulation No. 07-95,[14] which considered the 120-day (then 60-day) period as non-obligatory and discretionary. Nowhere in the Revenue Regulation is it expressed or implied that the 120-day (then 60-day) period is permissive. Section 4.106-2 of Revenue Regulation 07-95 provides:

> Section 4.106-2. *Procedures for claiming refunds or tax credits of input tax.* — (a) x x x.
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> x x x x

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[11] SECTION 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.
The power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals.

[12] SECTION 7. *Authority of the Commissioner to Delegate Power*. — The Commissioner may delegate the powers vested in him under the pertinent provisions of this Code to any or such subordinate officials with the rank equivalent to a division chief or higher, subject to such limitations and restrictions as may be imposed under rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner: *Provided, however*, That the following powers of the Commissioner shall not be delegated:
(a) The power to recommend the promulgation of rules and regulations by the Secretary of Finance;
(b) The power to issue rulings of first impression or to reverse, revoke or modify any existing ruling of the Bureau;
(c) The power to compromise or abate, under Sec. 204(A) and (B) of this Code, any tax liability: *x x x*; and
(d) The power to assign or reassign internal revenue officers to establishments where articles subject to excise tax are produced or kept.

[13] Rulings of first impression as defined in Revenue Administrative Order No. 2-2001, dated October 22, 2001, refer to the rulings, opinions and interpretations of the Commissioner of Internal Revenue with respect to the provisions of the Tax Code and other tax laws without established precedent, and which are issued in response to a specific request for ruling filed by a taxpayer with the Bureau of Internal Revenue. Provided, however, that the term shall include reversal, modifications or revocation of any existing ruling.

[14] Consolidated Value-Added Tax Regulations.

> (c) Period within which refund or tax credit of input taxes shall be made. — In proper cases, the Commissioner shall grant a tax credit/refund for creditable input taxes within sixty (60) days from the date of submission of complete documents in support of the application filed in accordance with subparagraphs (a) and (b) above.
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> In case of full or partial denial of the claim for tax credit/refund as decided by the Commissioner of Internal Revenue, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from the receipt of said denial, otherwise the decision will become final. However, **if no action on the claim for tax credit/refund has been taken by the Commissioner of Internal Revenue *after* *the sixty (60) day period* from the date of submission of the application but before the lapse of the two (2) year period from the date of filing of the VAT return for the taxable quarter, the taxpayer may appeal to the Court of Tax Appeals**.
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> x x x x

On the contrary, it is clear from the provision cited above that the appeal to the Court of Tax Appeals may be made only after the lapse of the 60-day (now 120-day) period without action by the Commissioner of Internal Revenue on the administrative claim. A rule or regulation cannot go beyond the terms and provisions of the basic law.[15] Revenue Regulation No. 07-95, therefore, cannot go beyond the provisions of the Tax Code.

Even assuming, without conceding, that Justice Velasco's interpretation of the Revenue Regulation is correct, it will still be *ultra vires* in the light of the clear provisions of the law.

San Roque further argues that strict adherence to procedural rules is exacted at the expense of substantive justice considering its clear entitlement to a refund. Such contention is misguided. Again, a value added tax refund is not a refund of an excessively, illegally or erroneously collected tax. A value added tax refund claim may be made because it is specifically allowed and

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[15] CIVIL CODE, Art. 7.
x x x x
Administrative or executive acts, orders and regulations shall be valid only when they are not contrary to the laws or the Constitution.

provided for by law, *i.e.*, Section 110 (B)[16] and Section 112 (A)[17] of the National Internal Revenue Code, as amended. Similar in nature to a tax exemption, it must be construed strictly against the taxpayer. Hence, strict compliance with *both* substantive and procedural requirements is required for a value added tax refund claim to prosper.

The 120+30-day period is not a mere procedural technicality that can simply be disregarded if the claim is otherwise meritorious, but a mandatory and jurisdictional condition imposed by law. "Failure to comply with [these] requisite[s] is fatal because it has been repeatedly held that no action for the recovery of a tax paid can be maintained without strictly complying with each and every one of the conditions required by the law to that effect."[18]

Even handed justice requires that the new rule be applied retroactively to all who are similarly situated, including the claims of San Roque and Taganito, which are subject of the present case. Reiterating Our view expressed in the separate Opinion in the Decision: "the provisions that We have just reviewed already put the private parties within a reasonable range of interpretation that would serve them notice as to the remedies that are available to them. That is, that resort to judicial action can only be done after a denial by the Commissioner or after the lapse of 120 days from the date of submission of complete documents in support of the administrative claim for refund."

Finally, San Roque's argument that the retroactive application of the

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[16] SECTION 110. *Tax Credits*. — x x x
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(B)*Excess Output or Input Tax*. — If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters: *Provided*, That the input tax inclusive of input VAT carried over from the previous quarter that may be credited in every quarter shall not exceed seventy percent (70%) of the output VAT: *Provided, however*, That any input tax attributable to zero-rated sales by a VAT-registered person may at his option be refunded or credited against other internal revenue taxes, subject to the provisions of Section 112.
x x x x

[17] SECTION 112. *Refunds or Tax Credits of Input Tax*. —
(A)*Zero-Rated or Effectively Zero-Rated Sales*. — Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: *Provide, however*, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (b) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): *Provided, further*, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales: *Provided, finally*, That for a person making sales that are zero-rated under Section 108(B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.
x x x x

[18] *Wee Poco & Co., v. Posadas*, 64 Phil. 640, 648 (1937).

subject Decision would have detrimental effects to the flow of investments, especially foreign, into our country and hampering the growth and development of our national economy, is inaccurate.

Investment is the process of exchanging income for goods that are expected to produce earnings at a later time.[19] Investments are not only composed of private investments (local or foreign). There are also public investments. Public investments include building infrastructure such as roads, ports, power, water, and telecommunication facilities.[20] These kinds of investments are as important to private investors as it is to the general population. National investment is an aggregate of both public and private investments in reality.

Prospective application of the new doctrine may lead to some private savings for refund-seekers. However, not all private savings may not be reinvested immediately for the public to experience some form of welfare gain.[21] Hence, private savings might not be enough to offset the government's deficit in its revenues caused in the reduction of the collected tax.[22] Since the government deficit is greater than private savings, national savings (or its economic equivalent of national investments) is actually reduced.[23]

On the other hand, public savings (from government revenue) translate to investments in public goods that benefit the majority of the population,[24] such as major infrastructure projects like roads and bridges, education, police and fire protection, to name a few.

For many foreign investors eyeing developing countries as a potential investment ground, infrastructure is also a critical issue.[25] According to Dwight Perkins, et al., "Countries with poor infrastructure often cannot attract investment."[26] Since the Philippines is stricter compared to other countries in the region in terms of labor standards and wages, we will be in serious trouble if our government does not have enough revenue to sustain

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19 Encyclopedia Britannica. <http://global.britannica.com/EBchecked/topic/292475/investment> (visited September 25, 2013).

20 D. PERKINS, S. RADELET, and D. LINDAUER, ECONOMICS OF DEVELOPMENT, 401 (Sixth Edition, 2006).

21 This concept in economics is referred to as the relative inelasticity of private savings. For a more technical explanation, refer to J. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 584-586 (Third Edition, 2000).

22 Id. at 584.

23 Id.

24 "The basic economic rationale for public investment is to finance projects for which the benefits accruing to a private investor are too small to make the venture profitable but benefits to society more broadly can be quite large." D. PERKINS, S. RADELET, and D. LINDAUER, ECONOMICS OF DEVELOPMENT 400-401 (Sixth Edition).

25 Id. at 411.

26 Id.

infrastructure projects. These projects also benefit private investment in the form of reduced transaction costs.

To reiterate, tax is only one aspect of the costs of doing business. Good infrastructure translates to reduced costs in more business-related aspects, such as transportation, communication, and other utilities.

Investors also are concerned with macroeconomic and political stability, and the quality of institutions and governance,[27] such as the judiciary's performance. When investors have the impression that court systems are unpredictable, they tend to move their investments elsewhere.[28] Systems can become unpredictable if unbridled discretion is rewarded among those that are tasked to implement the law. On the other hand, investor confidence is gained through a consistent application of the rule of law.[29]

Understandably, petitioners marshall arguments in support of their needs. Justice requires that We consider them carefully but weigh this in relation to the public interest. In doing so, We should always abide by Our understanding of the concept of the rule of law and always appropriately take the longer view. All these We can do so elegantly in this case with a plain, straightforward reading of what the law has always been providing since 1997.

WHEREFORE, I vote to:

1. DENY the Motion for Reconsideration of San Roque Power Corporation in G.R. No. 187485; and

2. GRANT the Motion for Reconsideration of the Commissioner of Internal Revenue in G.R. No. 196113.

MARVIC MARIO VICTOR F. LEONEN
Associate Justice

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[27] D. PERKINS, S. RADELET, and D. LINDAUER, ECONOMICS OF DEVELOPMENT, supra at 411-414.

[28] D. PERKINS, S. RADELET, and D. LINDAUER, ECONOMICS OF DEVELOPMENT, supra at 412.

[29] The World Bank has been aggregating data for indicators of governance and institutions, and one of the things they measure is Rule of Law, which is defined as "perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and **the courts**, as well as the likelihood of crime and violence." *See* D. KAUFMANN, A. KRAAY, AND M. MASTRUZZI, *Governance Matters VIII: Aggregate and Individual Governance Indicators 1996-2008,* p. 6. <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/06/29/000158349_20090629095443/Rendered/PDF/WPS4978.pdf> (visited May 27, 2013).