

# Tax bulletin

April 2016



## HIGHLIGHTS

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### Voluntary Assessment and Abatement Program

The BIR, through computerization, now has the ability to generate firm and precise data on sales underdeclarations by matching information provided by third parties (e.g., summary lists, etc) with the declarations made by taxpayers. The BIR is now giving taxpayers with underdeclarations a chance to avoid criminal prosecution through Revenue Regulations (RR) No. 12-2002 or the Voluntary Assessment and Abatement Program (VAAP), as amended by RR No. 17-2002.

## SGV Tax Bulletin

# SGV

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# Highlights

## BIR Rulings

- ▶ Importation of a cargo vessel destined for domestic transport operations shall be exempt from VAT. It is subject, however, to the MARINA's restrictions on vessel importation and requirements for the mandatory vessel retirement program. **(Page 4)**
- ▶ A non-stock non-profit corporation with purposes which are not contemplated under Section 30 (E) of the Tax Code shall be treated as an ordinary corporation which is subject to regular corporate income tax as well as other applicable internal revenue taxes. **(Page 4)**
- ▶ A US company which renders independent engineering services for more than 183 days in the Philippines shall be deemed to have a permanent establishment (PE) in the Philippines. As such, the US company shall be subject to Philippine income tax and shall be considered a foreign corporation engaged in trade or business in the Philippines, and is entitled to deduct ordinary and necessary expenses from its business or commercial profits. **(Page 5)**
- ▶ A German company which renders services in the Philippines through a local subcontractor for a period of more than 6 months within any 12-month period shall be considered to have a PE in the Philippines. It shall be allowed to deduct reasonable expenses incurred in providing the services from the computation of its taxable income which shall be subject to the 30% income tax rate. **(Page 5)**

## BIR Issuances

- ▶ Revenue Memorandum Circular (RMC) No. 37-2016 further amends the list of documentary requirements to process applications for primary registration, updates, and cancellation. **(Page 6)**
- ▶ RMC No. 43-2016 reiterates the policies on the BIR's business registration process. **(Page 9)**
- ▶ RMC No. 50-2016 warns all BIR officials and employees against the unauthorized divulgence of confidential information and reiterates the applicable penalties for such an act of violation. **(Page 10)**
- ▶ Revenue Memorandum Order (RMO) No. 12-2016 prescribes the policies, guidelines and procedures in the manual issuance of the Authority to Release Imported Goods (ATRIG) for imported automobiles already released from Bureau of Customs (BOC) custody. **(Page 10)**
- ▶ RMO No. 14-2016 prescribes the revised guidelines on the execution of a Waiver of the Statute of Limitations to extend the prescriptive period to assess or collect taxes. **(Page 11)**

## BOC Issuance

- ▶ Customs Memorandum Order (CMO) No. 7-2016A prescribes the revised rules on the importation of motorcycles and motorcycle parts located inside PEZA ecozones. **(Page 12)**

## **PEZA Issuance**

- ▶ PEZA Memorandum Circular (MC) No. 2016-014 circularizes Republic Act (RA) No. 10708, or the Tax Incentives Management and Transparency Act (TIMTA), and prescribes guidelines on the reportorial requirements for all PEZA-registered enterprises and operators/developers pending the passage of the TIMTA implementing rules and regulations (IRR). **(Page 12)**

## **SEC Issuances**

- ▶ SEC MC No. 03 enforces RA No. 9510 (Credit Information System) over financing companies. **(Page 13)**
- ▶ Calls for the payment of the balance of subscriptions may be made on installment. Stock certificates may not be issued for the equivalent of the shares partially paid. Cash or stock dividends cannot be used to pay the balance of unpaid subscriptions. **(Page 14)**
- ▶ Restaurant and gift shop operations by a hotel are not considered retail trade since those are merely incidental to the hotel operations. **(Page 14)**
- ▶ The articles of incorporation or by-laws of a non-stock corporation cannot provide for a quorum that is less than what is provided in the Corporation Code. **(Page 15)**

## **BSP Issuance**

- ▶ Circular No. 909 prescribes rules for public and/or publicly-guaranteed foreign loan agreements and other agreements which give rise to a foreign/foreign currency obligation of the public sector, and amends/revises Circular 618 dated 18 July 1978 and Annex D.2 of the Manual of Regulations on Foreign Exchange Transactions (MORFET), as amended. **(Page 15)**

## **BLGF Opinions**

- ▶ PEZA-registered enterprises are exempt from the payment of real property tax (RPT) on their buildings, machineries and equipment pursuant to Section 24 of RA No. 7916, as amended. **(Page 16)**
- ▶ Under the rule on situs of tax, 70% of the total gross receipts recorded in the principal office shall be taxable by the locality where the plant is located. **(Page 17)**

## **Court Decisions**

- ▶ For the sale of services to qualify for VAT zero-rating, the recipient of the services must be a foreign corporation engaged in business outside the Philippines. A foreign corporation which sells services to a domestic corporation is deemed engaged in business in the Philippines. **(Page 17)**
- ▶ An assessment that is contrary to law can become final and executory if the same is not appealed. A claim for refund cannot substitute for the appeal to a denial of a protest against an assessment. **(Page 18)**
- ▶ Deficiency interest may be imposed on all types of taxes. Deficiency and delinquency interest can be imposed simultaneously. **(Page 19)**

## **BIR Rulings**

### **BIR Ruling No. 92-16 dated 14 March 2016**

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Importation of a cargo vessel destined for domestic transport operations shall be exempt from VAT. It is subject, however, to the MARINA's restrictions on vessel importation and requirements for the mandatory vessel retirement program.

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**Facts:**

A Co. is a domestic corporation accredited by the Maritime Industry Authority (MARINA) to engage in the domestic shipping business. With MARINA's approval, A Co. imported a cargo vessel into the Philippines which will be used exclusively in its transport operations.

**Issue:**

Is the importation of the cargo vessel exempt from VAT?

**Ruling:**

Yes. Under Section 109(1)(T) of the Tax Code, in relation to Section 4.109-1 (B) (1)(t) of Revenue Regulations (RR) No. 16-2005, the importation of a cargo vessel destined for domestic transport operations shall be exempt from VAT, subject to the restrictions on vessel importation and the requirements of the mandatory vessel retirement program of MARINA. A Co.'s importation of the cargo vessel is deemed compliant with the said requirements since the importation has been authorized by MARINA. Thus, the importation of the cargo vessel is exempt from VAT.

### **BIR Ruling No. 101-16 dated 5 April 2016**

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A non-stock non-profit corporation with purposes which are not contemplated under Section 30 (E) of the Tax Code shall be treated as an ordinary corporation which is subject to regular corporate income tax as well as other applicable internal revenue taxes.

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**Facts:**

A Co. is a non-stock non-profit corporation organized primarily for advocating and promoting Filipino psychology (Sikolohiyang Pilipino). Its regular activities usually involve the conduct of seminars, conferences or research and training programs to promote Sikolohiyang Pilipino and the study thereof. A Co.'s income are from grants and donations, conference fees and sponsorship, membership fees, and sale of related materials such as books and pins.

**Issue:**

Is A Co.'s income exempt from income tax under Section 30(E) of the Tax Code?

**Ruling:**

No. Non-stock non-profit corporations organized and operated exclusively for religious, charitable, scientific, athletic, or cultural purposes, or for rehabilitation of veterans are exempt from income tax under Section 30(E) of the Tax Code. However, being a non-stock non-profit corporation does not, by this sole reason alone, exempt an institution from tax. The entity should prove by actual operation that it is really a corporation contemplated under Section 30 (E).

In the case of A Co., its purposes are not among those contemplated by Section 30 (E). As such, A Co. failed to prove that it is organized and operated exclusively for religious, charitable, scientific, athletic or cultural purposes, or for rehabilitation of veterans. Consequently, A Co. shall be treated as an ordinary corporation which is subject to regular corporate income tax as well as other applicable internal revenue taxes.

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### **BIR Ruling No. ITAD 06-16 dated 29 February 2016**

A US company which renders independent engineering services for more than 183 days in the Philippines shall be deemed to have a PE in the Philippines. As such, the US company shall be subject to Philippine income tax and shall be considered a foreign corporation engaged in trade or business in the Philippines, entitled to deduct ordinary and necessary expenses from its business or commercial profits.

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#### **Facts:**

A Co., a US company, entered into a professional services agreement with the then National Power Corporation (NPC) for independent engineering services in connection with the construction of a power plant in Pangasinan. In performing the services, A Co.'s personnel stayed in the Philippines for a total duration of 314 days from 1998 to 2008. For the services rendered, B Co., a domestic corporation operating the power plant, paid and remitted service fees to A Co.

#### **Issues:**

1. Does A Co. have a permanent establishment (PE) in the Philippines?
2. Are the service fees paid to A Co. subject to Philippine income tax?
3. Is A Co. considered as a foreign corporation engaged in trade or business in the Philippines and entitled to deduct ordinary and necessary business expenses?
4. Are the service fees subject to 12% VAT?

#### **Ruling:**

1. Yes. Under the RP-US Tax Treaty, the term "PE" includes a building site or construction or assembly project or supervisory activities in connection therewith, provided such site, project or activity continues for a period of more than 183 days. Accordingly, since A Co. rendered independent engineering services for a period of more than 183 days, it is deemed to have a PE in the Philippines.
2. Yes. Since A Co. has a PE in the Philippines, the service fees paid by B Co. to A Co. are subject to Philippine income tax.
3. Yes. A Co. is deemed a foreign corporation engaged in trade or business in the Philippines and entitled to deduct ordinary and necessary expenses from its business or commercial profits.
4. Yes. The service fees are subject to 12% VAT. B Co. shall withhold and remit the withholding VAT to the BIR on behalf of A Co. and may claim the VAT withheld as input VAT. On the other hand, if B Co. is not a VAT-registered taxpayer, it may treat the passed-on VAT as an asset or expense which forms part of the cost on its purchase of the services.

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### **BIR Ruling No. ITAD 07-16 dated 4 March 2016**

A German company which renders services in the Philippines through a local subcontractor for a period of more than 6 months within any 12-month period shall be considered to have a PE in the Philippines. It shall be allowed to deduct reasonable expenses incurred in providing the services from the computation of its taxable income which shall be subject to the 30% income tax rate.

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#### **Facts:**

A Co., a German company, entered into a full service and maintenance contract with the Bangko Sentral ng Pilipinas (BSP). Under the contract, A Co. will provide, among others, the daily presence on-site of two skilled and qualified local engineers and technicians to perform full service, operational assistance and maintenance work for the BSP's Bank Note Processing System. For this purpose, A Co. subcontracted C Co., a domestic corporation, to provide local engineers that will perform the services for BSP on its behalf, for a period of at least 10 years. For the services, BSP paid and remitted service fees to A Co.

**Issues:**

1. Does A Co. have a PE in the Philippines?
2. Are the service fees subject to Philippine income tax?
3. Is A Co. allowed to deduct reasonable expenses from its taxable profits from the Philippines?
4. Are the service fees subject to 12% VAT?

**Ruling:**

1. Yes. Under the RP-Germany Tax Treaty, the term "PE" includes the furnishing of services, including consultancy services, by an enterprise of a Contracting State (through employees or other personnel), where such activities continue (for the same or a connected project) within the other Contracting State for a period or periods aggregating more than 6 months within any 12-month period. Accordingly, since A Co. provided regular service and maintenance activities to BSP for a continuous period of at least 12 months, it shall be deemed to have a PE in the Philippines. This is regardless of the fact that A Co. subcontracted the services to a domestic company which will provide local engineers on-site throughout the 12-month period. These subcontracted engineers would nonetheless constitute as A Co.'s "other personnel" as contemplated in the tax treaty.
2. Yes. Since A Co. has a PE in the Philippines, the service fees paid to it by BSP shall be subject to Philippine income tax.
3. Yes. In computing A Co.'s taxable profits, it shall be allowed to deduct reasonable expenses incurred for purposes of providing services to BSP (i.e., the commission it paid to the subcontractor, C Co.). Its taxable profits shall be subject to the 30% income tax rate. As a PE of A Co., C Co. shall cause the filing of A Co.'s quarterly income tax returns and annual income tax returns.
4. Yes. The service fees are subject to 12% VAT. BSP shall withhold and remit the withholding VAT to the BIR on behalf of A Co. and may claim the VAT withheld as input VAT. On the other hand, if BSP is not a VAT-registered taxpayer, it may treat the passed-on VAT as asset or expense which forms part of the cost on its purchase of the services.

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## **BIR Issuances**

### **Revenue Memorandum Circular No. 37-2016 dated 22 March 2016**

The list of documentary requirements needed to process applications for BIR registration, updates and cancellation has been further updated to include the following additional documents.

- ▶ *For self-employed, professionals, and mixed income earners:*
  1. Original or Certified True Copy of their National Statistics Office (NSO) Birth Certificate;
  2. If place of business is owned - Photocopy of Official Receipt (OR) of Real Property tax for the current year or the Transfer/Original Certificate of Title (TCT/OCT);

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RMC No. 37-2016 further amends the list of documentary requirements to process applications for primary registration, updates, and cancellation.

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3. If place of business is rented - Contract of Lease and Lessor's Permit; and
  4. If no rental is paid - consent from the owner of the place of business with ID and proof of ownership;
  5. Contract of Service;
  6. Two valid Government-Issued IDs (for professionals not registered with the Philippine Regulatory Commission or other regulatory body) or a Barangay clearance in lieu thereof;
  7. Original NSO Birth Certificate of declared dependents or Certified True Copy of Birth Certificate with Civil Registry Number (for dependents born from July to December of the current year).
- ▶ *For Branch/Facility types:*
    1. If place of business is owned - Photocopy of OR of Real Property Tax for the current year or the TCT/OCT;
    2. If place of business is rented - Contract of Lease and Lessor's Permit;
    3. If no rental is paid - consent from the owner of the place of business with ID and proof of ownership.
  - ▶ *For new applications for Authority to Print (ATP):*
    1. Job order;
    2. Final and clear sample of principal and supplementary receipts/invoices.
  - ▶ *For new registration of Books of Accounts:*
    1. Manual Books of Accounts;
    2. New sets of permanently bound books of accounts;
    3. Official Appointment Book (for professionals only); and
    4. Current year proof of payment - Annual Registration Fee (BIR Form No. 0605).
  - ▶ *For Manual Loose-Leaf Books of Accounts and/or ORs or Sales Invoices:*
    1. Permit to Use Loose-Leaf Books of Accounts and/or Official Receipts or Sales Invoices;
    2. Permanently bound Loose-Leaf Books of Accounts and/or Official Receipts or Sales Invoices;
    3. Affidavit attesting to the completeness, accuracy and correctness of entries in the Books of Accounts and/or Official Receipts or Sales Invoices and the number of Loose-Leaf used for the period covered; and
    4. Current year proof of Payment - Annual Registration Fee (BIR Form No. 0605).
  - ▶ *For Computerized Books of Accounts:*
    1. Computerized Accounting System (CAS)/Computerized Books of Accounts (CBA) and/or its Components Permits;
    2. DVDs containing Electronic Books of Accounts and Records;
    3. Affidavit attesting to the completeness, accuracy and appropriateness of the computerized accounting books/records, in accordance with the keeping of books of accounts and records for internal revenue tax purposes; and
    4. Current year proof of payment - Annual Registration Fee (BIR Form No. 0605).

- ▶ *For securing a permit to use the following:*
  1. *Manual Loose Leaf Book of Accounts/Receipts and Invoices:*
    - ▶ Letter of request to use Manual Loose Leaf Books of Accounts/ Computerized Books of Accounts/ORs or Sales Invoices;
    - ▶ Application for Permit to Use Manual Loose-Leaf/Computerized Books of Accounts/ORs or Sales Invoices; and
    - ▶ Sample Format and print-out to be used
  2. *CAS/CBA and/or its Components:*
    - ▶ Duly accomplished BIR Form No. 1900;
    - ▶ Photocopy of previously issued Permit to Use CAS/CBA and/or its components, if applicable;
    - ▶ Proof of ownership or License Agreement, whichever is applicable;
    - ▶ Location map of the place of business;
    - ▶ List of branches that will use CAS/CBA and or its components, if any;
    - ▶ Certification that the branches use the same CAS/CBA and/or its components with that of the head office, if applicable;
    - ▶ Additional requirements in case of affiliated companies, franchises and branches:
      - a. Photocopy of previously issued permit of affiliate company, another branch using the same system, if applicable;
      - b. Certification from the NAB, which previously evaluated the approved system, if applicable.
- ▶ *For employees:*
  1. *Local employees:*
    - ▶ Original or Certified True Copy of their NSO Birth Certificate;
    - ▶ Original NSO Birth Certificate of declared dependents or a Certified True Copy of Birth Certificate with Civil Registry Number (for dependents born from July to December of the current year).
  2. *Alien employees:*
    - ▶ Passport; and
    - ▶ Work permit.
- ▶ *For corporations, partnerships, cooperatives, associations (whether taxable or non-taxable), and their branches and facilities:*
  1. *Corporations/partnerships:*
    - ▶ SEC Certificate of Incorporation/Certificate of Recording and Articles of Incorporation/Articles of Partnership, as the case may be;
    - ▶ Proof of ownership or legal possession of the place of business.
- ▶ *For Tax Identification Number (TIN) issuance:*
  1. An individual applicant shall submit any identification issued by an authorized government body that shows the name, address and birthdate of the applicant.



2. A non-individual applicant must provide any official documentation issued by an authorized government body that includes the name and the address of its principal office.
  3. In transactions involving One-Time Taxpayer (ONETT), particularly in the transfer of properties by succession through self-adjudication, the Extrajudicial Settlement of the Estate or Affidavit of Self Adjudication must be submitted.
- ▶ *For updates/transfer of records/transfer of registration to another RDO:*
    1. *For update of Book of Accounts:*
      - ▶ New sets of permanently bound books of accounts; and
      - ▶ Current year proof of payment - Annual Registration Fee (BIR Form No. 0605)
  - ▶ *For Change in Accounting Period:*
    1. Letter request addressed to the RDO having jurisdiction over the place of business of the taxpayer indicating:
      - ▶ The original accounting period and the proposed new accounting period to be adopted;
      - ▶ The reasons for desiring to change accounting period.
    2. Duly filled-up BIR Form No. 1905;
    3. Certified True Copy of the SEC Certificate of Filing of Amended By-Laws showing the change in accounting period;
    4. Sworn certification of "non-forum shopping" stating that such request has not been filed or previously acted upon by the BIR National Office, signed by the taxpayer or duly authorized representative; and
    5. Sworn undertaking by a responsible officer of the taxpayer to file a separate final or adjusted return for the period between the close of the original accounting period and the date designated as the close of the new accounting period on or before the 15th day of the fourth month following the end of the period covered by the final/adjusted return.

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RMC No. 43-2016 reiterates the policies on the BIR's business registration process.

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**Revenue Memorandum Circular No. 43-2016 dated 7 April 2016**

- ▶ It is mandatory for the BIR district offices to simultaneously process and issue the taxpayer's Certificate of Registration (COR) and Authority to Print (ATP), as well as to register the books of accounts immediately after registration and complete submission of requirements.
- ▶ The COR, ATP and books of accounts must be issued upon commencement of the taxpayer's business.
- ▶ An application for ATP manual receipts/invoices, registration of manual books of accounts and issuance of the COR may be issued in one day or within eight hours, provided the complete documentary requirements must be submitted during the registration of the business. This is to facilitate the use by the taxpayer of Cash Register Machines (CRM)/Point of Sale (POS) Machines; Computerized Accounting System (CAS); and Computerized Book of Accounts (CBA) upon the commencement of the business.

- ▶ Registration forms may be downloaded from the BIR website and the Annual Registration Fee can be paid through mobile payments such as GCash or other ePayment modes.
- ▶ The CRM/POS machines, CAS or CBA must be bought or acquired from accredited BIR suppliers with the corresponding Permit to Use (PTU).
- ▶ Taxpayers may still secure manual receipts/invoices which may be applied for after primary registration with the BIR.

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RMC No. 50-2016 warns all BIR officials and employees against the unauthorized divulgence of confidential information and reiterates the applicable penalties for such act of violation.

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**Revenue Memorandum Circular No. 50-2016 issued on 22 April 2016**

- ▶ The unauthorized disclosure or divulgence of official or confidential information by BIR personnel is criminally and administratively punishable by law and existing revenue issuances, specifically the following:
  1. Section 270 of the Tax Code, as amended, imposes a fine of not less than P50,000.00 but not more than P100,000.00, or imprisonment of not less than 2 years but not more than 5 years, for the unlawful divulgence of trade secrets by internal revenue officers. The same penalties apply to any BIR officer who divulges to any person information obtained from banks and financial institutions.
  2. Section 19(A) of the Revised Code of Conduct for BIR Officials and Employees considers the unlawful disclosure of official information, as well as confidential information regarding the business of a taxpayer, as a grave offense punishable by law.

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RMO No. 12-2016 prescribes the policies, guidelines and procedures in the manual issuance of the ATRIG for imported automobiles already released from the BOC's custody.

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**Revenue Memorandum Order No. 12-2016 dated 4 April 2016**

- ▶ For automobiles already released from the BOC's custody without an Authority to Release Imported Goods (ATRIG), a duly notarized application signed by the importer/registered owner or his duly authorized representative or registered owner of the automobile, with the prescribed documentary stamp affixed thereon, shall be filed not later than 30 April 2016 with the Excise LT Regulatory Division (ELTRD);
- ▶ Thereafter, no application for the ATRIG shall be accepted for imported automobiles already released from customs' custody.
- ▶ No ATRIG shall be issued unless the correct excise tax and VAT, including the 50% surcharge and 20% interest, are paid within the above deadline. The interest shall be reckoned from the date of issuance of the Final Import Entry and Internal Revenue Declaration (IEIRD)/ Single Administrative Document (SAD).
- ▶ The amount of excise tax and VAT paid in previous ATRIGs, as evidenced by the Certificate of Payment issued by the BOC, shall be credited against the amount of taxes that should have been paid before the computation of surcharge and interest.
- ▶ Previous ATRIGs should clearly identify that it is issued for the same automobile subject of the application.

- ▶ The payment of the excise tax and VAT, as well as the surcharge and interest shall be made through the Electronic Filing Payment System (eFPS), or through e-BIR Form No. 0605 (Payment Form), and should indicate that the payment is for deficiency excise tax/ VAT.
- ▶ All applications for ATRIGs shall be reconciled by the ELTRD with the BOC to determine that the Certificate of Payment that had been submitted is true and accurate, and that any deficiency duties and tariffs have been properly paid.
- ▶ Not later than 31 May 2016, the ELTRD shall obtain from the BOC a certification on the following:
  1. Truthfulness and accuracy of the Certificate of Payment submitted; and/or
  2. Any resulting deficiency duties and tariffs and the payment thereof.
- ▶ The issued Manual ATRIG Form (BIR Form No. 1918) shall be signed by the Commissioner of Internal Revenue (CIR) upon compliance with all the requirements.
- ▶ The "one ATRIG-one automobile" policy shall be complied with to ensure that importation of automobiles is fully accounted for.
- ▶ ATRIGs that have been issued may still be subject to a post audit or review by any office authorized by the Commissioner of Internal Revenue (CIR).
- ▶ Automobiles released from customs' custody without the payment of the required taxes may be detained by any revenue officer and if warranted, subsequently forfeited, with the responsible persons being liable for unlawful possession or removal of articles without payment of tax.

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RMO No. 14-2016 prescribes the revised guidelines on the execution of a Waiver of the Statute of Limitations to extend the prescriptive period to assess or collect taxes.

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**Revenue Memorandum Order No. 14-2016 dated 18 April 2016**

- ▶ To be valid, a Waiver of the Statute of Limitations has to comply with the following requirements:
  1. The waiver is executed before the expiration of the period to assess or to collect taxes, as the case may be;
  2. It provides for the following material dates: (i) the date of execution by the taxpayer or his authorized representative; and (ii) the expiry date agreed upon within which the BIR may assess or collect taxes, as the case may be;
  3. It is signed by the taxpayer himself or his duly authorized representative, or any responsible official in the case of a corporation.
- ▶ The taxpayer shall ensure that the waiver is validly executed by his authorized representative, and such authority to execute the waiver shall not be contested to invalidate the waiver;
- ▶ The waiver may be notarized, but it is sufficient that it is in writing;
- ▶ Except in cases where the waiver is executed to extend the period to collect taxes, the waiver need not specify the particular taxes to be assessed or the amount thereof, and may simply state "all internal revenue taxes."
- ▶ The waiver, being a voluntary act of the taxpayer, takes legal effect and becomes binding upon its execution.

- ▶ The taxpayer is required to submit the duly executed waiver to the CIR or to the BIR officials previously designated in existing issuances, who shall indicate acceptance by signing the waiver before the expiration of the period to assess or to collect taxes, as the case may be.

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## **BOC Issuance**

CMO No. 7-2016A prescribes the revised rules on importation of motorcycles and motorcycle parts located inside PEZA ecozones.

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### **Customs Memorandum Order No. 7-2016A dated 8 April 2016**

- ▶ This CMO prescribes the procedures for the importation of completely knocked-down (CKD) motorcycles by participants in the Motor Vehicle Development Program (MVDP) located inside PEZA areas, and the rules for the treatment of completely built units (CBUs).
- ▶ This CMO also covers importation of CKD motorcycle parts by PEZA-registered MVDP participants who also have motorcycle manufacturing facilities inside ecozones.
- ▶ A factory enterprise which is a participant in the MVDP and is a PEZA export enterprise shall be accredited with the BOC as importer/participant upon submission of a Certificate of Registration from the Board of Investments (BOI) and all other necessary documents. If it elects to avail itself of the privileges granted to a participant in its importation of CKDs, it must secure a Certificate of Authority to Import (CAI) from the BOI prior to importation. Duties at the rate of 1% and other proper taxes shall be paid prior to the release of imported CKDs under MVDP.
- ▶ Importations not covered by a CAI from the BOI shall be treated as an importation of a PEZA export enterprise and shall be subject to the rules governing PEZA locators.
- ▶ CBUs assembled from imported CKDs by a PEZA export enterprise shall, upon withdrawal for local consumption, be assessed the corresponding CKD tariff rates, provided that the withdrawal for local consumption shall not exceed the threshold permitted for such withdrawals pursuant to existing laws, rules and regulations. In case withdrawals exceed the threshold, the units withdrawn shall be assessed the corresponding tariff rates for CBUs.
- ▶ Existing rules applicable to MVDP participants and PEZA export enterprises not inconsistent with this CMO shall remain in full force and effect. All rules inconsistent with this CMO are deemed repealed, superseded or modified accordingly.
- ▶ CMO 7-2016A takes effect immediately.

## **PEZA Issuance**

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PEZA MC No. 2016-014 circularizes Republic Act (RA) No. 10708, or the TIMTA, and prescribes guidelines on the reportorial requirements for all PEZA-registered enterprises and operators/developers pending the passage of the TIMTA IRR.

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### **Memorandum Circular No. 2016-014 dated 11 April 2016**

- ▶ The Tax Incentives Management and Transparency Act (TIMTA) requires all PEZA-registered enterprises and developers/operators to submit annual reports to PEZA on the amount of incentives claimed for the year. PEZA will in turn submit an annual consolidated report to the BIR.

- ▶ The 1<sup>st</sup> annual report on duty and tax exemptions claimed will cover year 2015. This includes all fiscal years (FYs) ending in any month of 2015 (i.e., from FY ending 31 January 2015 up to CY ending 31 December 2015).
- ▶ The submission to PEZA of the (i) Annual Report, in the current prescribed format; (ii) Report on Details on Taxes Paid and Revenue; and (iii) Report on Other Income is deferred for PEZA enterprises and developers/operators with accounting period ending 31 December 2015 and subsequent accounting periods.
- ▶ A separate PEZA Memorandum Order will be issued after the passage of the IRR to fix the new due date for submission of the above-mentioned reports; and circularize a new Annual Report format compliant with the data requirements under TIMTA.
- ▶ All PEZA-registered enterprises and developers/operators must still submit to PEZA a copy of the following:
  1. Final (Annual) Income Tax Return (ITR) as filed with the BIR, with proof of payment of income tax due, if any;
  2. Corresponding Audited Financial Statements with proof of receipt by the BIR; and,
  3. For those availing themselves of the 5% Gross Income Tax (GIT), proof of payment of the 2% portion as paid to the concerned Treasurer of the Municipality or City where it is located within 30 days from the statutory deadline for filing the annual ITR with the BIR.
- ▶ All PEZA-registered enterprises and developers/operators are required to file their tax returns and pay their tax liabilities using the BIR's electronic filing and payment system (eFPS), unless the BIR allows manual filing and/or payment via a BIR-issued memorandum. Penalty provisions of the TIMTA will apply to enterprises that do not file via eFPS.
- ▶ In preparation for the TIMTA-mandated reports, all PEZA-registered enterprises and developers/operators are advised to compute and indicate their Income Tax Due on Net Income (based on 30% Regular Corporate Income Tax Rate) in their returns for purposes of computation of the income tax exemption claimed for the year.

## **SEC Issuances**

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SEC MC No. 03 enforces RA No. 9510 (Credit Information System) over financing companies.

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### **SEC Memorandum Circular No. 03 dated 5 April 2016**

SEC MC No. 03 requires financing companies to submit to their Credit Information Corporation their basic credit data, namely: their 5-year historical data and their current data, on or before August 31, 2016.

*[Editor's Note: SEC MC No. 03 was published in the Philippine Daily Inquirer on 19 April 2016 and The Manila Times on 21 April 2016.]*

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### **SEC Opinion No. 16-05 dated 31 March 2016**

Calls for the payment of the balance of subscriptions may be made on installment. Stock certificates may not be issued for the equivalent of the shares partially paid. Cash or stock dividends cannot be used to pay the balance of unpaid subscriptions.

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#### ***Facts:***

The Board of Directors of a Bank is contemplating to make a call for the payment of subscriptions by all stockholders on installment basis. Likewise, a certain percentage of the unpaid subscriptions shall be declared as due and payable at different dates.

#### ***Issues:***

1. Can the calls for the payment of the balance of the subscriptions be made on installment?
2. Can stock certificates be issued for the equivalent of partially-paid shares even if the subscription is not yet fully paid?
3. Can cash or stock dividends be used to pay the balance of the unpaid subscriptions?

#### ***Ruling:***

1. Yes, calls for the payment of the balance of the subscription may be made on installment because Section 67 of the Corporation Code provides that the contract of the subscription or the call by the board of directors, as the case may be, may require the payment of the entire unpaid subscription or only a certain percentage thereof on the date specified for payment.
2. No, the SEC has consistently opined that a stockholder shall only be entitled to the issuance of his certificate of stock upon payment of the full amount of his subscription together with interest and expenses. This is pursuant to the doctrine of indivisibility of subscription contract under Section 64 of the Corporation Code.
3. No. Cash dividends cannot be withheld from the subscribers who have not fully paid their subscriptions unless they are delinquent on their unpaid subscriptions since its balance is not yet due and demandable. Likewise, stock dividends cannot be applied to unpaid subscription since a stockholder's indebtedness to a corporation under a subscription contract cannot be compensated with the amount of his shares in the same corporation, there being no relation of creditor and debtor with regard to such share. The Corporation Code also provides that stock dividends shall be withheld from the delinquent stockholder until his unpaid subscription is fully paid. In other words, it is not allowed to apply stock dividends to unpaid subscriptions.

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### **SEC Opinion No. 16-06 dated 1 April 2016**

Restaurant and gift shop operations by a hotel are not considered retail trade since those are merely incidental to the hotel operations.

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#### ***Facts:***

A corporation which owns and operates a hotel also owns and operates a restaurant and gift shop within the hotel. The restaurant and gift shop are open to the public and are not limited to the exclusive use of the hotel guests.

#### ***Issue:***

Are the restaurant and gift shop operations in the hotel considered engaged in retail trade?

***Ruling:***

No. Sales from the restaurant and gift shop operations by a hotel, as long as incidental to the hotel operations, are not considered retail. The SEC has ruled that engaging in the selling of merchandise as an incident to the primary purpose of a corporation does not constitute retail trade. The Retail Trade Nationalization Law excludes from the term "retail business" the operation of a restaurant by a hotel-owner or keeper since the same does not constitute the act or habitually selling direct to the general public merchandise, commodities or goods for consumption. Likewise, the same holds true as to the establishment of a gift shop. Establishing a gift shop within the hotel premises where hotel guests, as well as the public, may be able to purchase souvenirs and other gift items easily and without the hassle of having to venture outside the hotel, the hotel is merely adding a feature that is incidental to its hotel operations in line with providing quality service.

**SEC Opinion No. 16-07 dated 4 April 2016**

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The articles of incorporation or by-laws of a non-stock corporation cannot provide for a quorum that is less than what is provided in the Corporation Code.

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***Facts:***

The Board of Trustees of a non-stock corporation has 5 members, 2 of whom will be nominated and appointed by 3 original members. The by-laws also provide that only majority of the 3 original members of the Board shall be necessary at all meetings to constitute a quorum.

***Issue:***

Can the by-laws of a non-stock corporation provide that a mere majority of the 3 original members of the Board of Trustees shall constitute a quorum?

***Ruling:***

No. The articles of incorporation or the by-laws of a non-stock corporation cannot provide for a lesser number than the majority provided in the Corporation Code. To provide that only a majority of 3 original members would be necessary to constitute a quorum would be repugnant to the directive of the Code. Thus, if there are 5 members of the Board as fixed in the articles of incorporation, the majority should be one half of 5 plus one, hence at least 3. If what was provided for in the by-laws would be followed, the majority of 3 original members of the board would only be 2, which is lesser than the majority of the whole number of the trustees, as contemplated by law.

**BSP Issuance**

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Circular No. 909 prescribes rules for public and/or publicly-guaranteed foreign loan agreements and other agreements which give rise to a foreign/foreign currency obligation of the public sector, and amends/revises Circular 618 dated 18 July 1978 and Annex D.2 of the MORFET, as amended.

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**BSP Circular No. 909 dated 30 March 2016**

► Circular 618 dated July 1978 is amended to read as follows:

"Effective immediately, no public and/or publicly-guaranteed foreign loan, deferred payment or any other agreements which give rise to a foreign/foreign currency obligation or liability of the public sector (whether primarily or subsidiarily), including promissory notes or guarantees issued in connection therewith submitted to the Bangko Sentral ng Pilipinas for approval and/or registration under the provisions of pertinent laws, circulars, rules and regulations shall be approved and/or registered if the covering agreements/documents are notarized or otherwise evidenced by a public instrument."

- ▶ Annex D.2 of the MORFET is further amended to read as follows:

“3. Additional Documents Required for Applications for Registration

Copy of signed loan/credit agreement and other related documents (guarantee/surety agreement, fee letters, final offering circular, underwriting and paying agency agreement, subscription agreement, promissory notes, etc.) For private sector accounts that are publicly-guaranteed, the covering foreign loan agreement, deferred payment or any other agreements which give rise to a foreign/foreign currency obligation or liability of the public sector (whether directly or indirectly, including promissory notes or guarantees issued in connection therewith) submitted to the BSP for approval and/or registration under the provisions of pertinent laws, BSP circulars, rules and regulations must not be notarized”

- ▶ The provisions of Circular No. 618 dated 14 July 1978 and Annex D.2 of the MORFET are hereby repealed.
- ▶ This Circular shall take effect 15 calendar days after its publication either in the Official Gazette or in a newspaper of general circulation.

*[Editor's Note: Circular No. 909 was published in the Manila Bulletin on 6 April 2016.]*

## **BLGF Opinions**

### **BLGF Opinion dated 18 January, 2016**

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PEZA-registered enterprises are exempt from the payment of RPT on their buildings, machineries and equipment pursuant to Section 24 of RA No. 7916, as amended.

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**Facts:**

S Co. is a domestic corporation registered with the PEZA as an Information Technology Enterprise. As a PEZA-registered entity, it is entitled to the 5% Gross Income Tax (GIT) incentive, in lieu of all other national and local taxes. It requested confirmation of its exemption from the payment of Real Property Tax (RPT) on its building, machineries and equipment.

**Issue:**

Are the building, machineries and equipment owned by a PEZA-registered entity exempt from RPT?

**Ruling:**

Yes. PEZA-registered enterprises enjoying the 5% GIT are exempt from the payment of RPT on land, buildings, machineries and other improvements.

Section 24 of RA No. 7916, as amended by RA No. 8748, specifically provides that “[e]xcept for real property taxes on land owned by developers, no taxes, local and national, shall be imposed on business establishments operating within the Ecozone, in lieu thereof five percent cent (5%) of the gross income earned by all business enterprises operating in the Ecozone shall be paid and remitted, as follows: xxx.”

The exemption of PEZA-registered enterprises from RPT has been clarified by the Department of Finance in its letter dated August 26, 1997 as follows:



“The law cannot be clearer than what it already is. By stating that ‘no taxes local and national shall be imposed’ on subject operators and that ‘in lieu’ of paying taxes, five percent (5%) of the gross income earned shall be remitted to the national government, the law covers all taxes. The IRR filled in the word ‘all’ in implementing this fiscal incentive in recognition of the clear mandate of the law. Verily, the IRR defined the nature of the 5% imposition as a ‘final tax’ which, in essence, is a tax that precludes the application of other taxes on the subject. X x x”

### **BLGF Opinion (2nd Indorsement) dated 19 February 2016**

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Under the rule on situs of tax, 70% of the total gross receipts recorded in the principal office shall be taxable by the locality where the plant is located.

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#### **Facts:**

H Co. owns a hydro power plant operated and located in S Municipality. On the other hand, it sources the water it uses in operating its hydro power plant from the rivers of three barangays in B Municipality. The tapping point of the electric power transmission to the main plant is also located in B Municipality.

#### **Issue:**

Is B Municipality entitled to the payment of business taxes from H Co?

#### **Ruling:**

No. Section 150 of the Local Government Code, as implemented by Article 243 (b) (3) of the Implementing Rules and Regulations, provides that “in cases where there is a factory, project office, plant or plantation in pursuit of business, thirty percent (30%) of all sales recorded in the principal office shall be taxable by the city or municipality where the principal office is located and seventy percent (70%) of all sales recorded in the principal office shall be taxable by the city or municipality where the factory, project office, plant or plantation is located.”

Thus, 30% of the total gross receipts of H Co. recorded in the principal office shall be taxable by the locality where such principal office is located and the remaining 70% shall be taxable by S Municipality, where the hydro power plant is located.

Since the operation of the hydro power plant is in S Municipality, B Municipality may not share in the taxes, fees or charges that H Co. is paying to S Municipality.

### **Court Decisions**

#### **Amadeus Marketing Philippines, Inc. vs. Commissioner of Internal Revenue** CTA (First Division) Case No. 8628 promulgated January 22, 2016

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For sale the of services to qualify for VAT zero-rating, the recipient of the services must be a foreign corporation engaged in business outside the Philippines. A foreign corporation who sells services to a domestic corporation is deemed engaged in business in the Philippines.

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#### **Facts:**

Petitioner Amadeus Marketing Philippines, Inc. (AMPI) filed with Respondent Commissioner of Internal Revenue (CIR) a claim for refund for unutilized input VAT attributable to zero-rated sales of services for the year 2011 to Amadeus IT Group S.A. (AIGS), a corporation organized under the laws of Spain.

As the CIR failed to act on the claim within the 2-year prescriptive period, AMPI filed a Petition for Review with the Court of Tax Appeals (CTA). The CIR argued, among others, that AMPI's sales are not considered VAT zero-rated as it failed to prove that AIGS is a foreign corporation doing business outside the Philippines.

**Issue:**

Is AMPI entitled to the claim for refund?

**Ruling:**

No. AMPI is not entitled to the claim for refund since AIGS is considered engaged in business in the Philippines.

Quoting the Supreme Court's decision in *CIR vs. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.*, GR 153205 promulgated on January 22, 2007, the CTA held that for services to be considered VAT zero-rated under Section 108 (B)(2) of the Tax Code, the foreign corporation who is the recipient of the services must be engaged in business outside the Philippines.

While the Articles of Association of AIGS and the Certificate of Non-Registration issued by the Securities and Exchange Commission (SEC) established that AIGS is a foreign entity incorporated in Spain, the CTA ruled that AIGS conducts business in the Philippines.

AMPI's quarterly VAT returns show that it also reported input VAT on services rendered by AIGS. AIGS is therefore the entity that *both* provided services to AMPI and to whom AMPI claims to have made its zero-rated sales. Since AIGS is engaged in business in the Philippines, AMPI's sales to AIGS cannot be considered VAT zero-rated hence, the claim for refund has no legal basis.

**National Transmission Corporation vs. Municipality of Labrador**

CTA (*En Banc*) Case No. 1250 promulgated April 8, 2016

**Facts:**

The Municipality of Labrador assessed Petitioner National Transmission Corporation (TRANSCO) for deficiency local business tax (LBT) covering the years 1999 to 2002, 2006 to 2007, and 2008.

TRANSCO protested the assessments arguing, among others, that local governments cannot impose taxes, fees, or charges of any kind on government agencies and instrumentalities. The municipality denied the protests and instituted collection cases against TRANSCO. Two of TRANSCO's depository banks complied with the LGU's order, debited the tax due from TRANSCO's accounts and turned these over to the Municipal Treasurer. The municipality considered the assessments as "paid under protest."

TRANSCO subsequently wrote the Municipal Treasurer to claim a refund for the LBT allegedly illegally collected from the banks. Upon denial of its claim, TRANSCO appealed to the Lingayen Regional Trial Court (RTC) which ruled in its favor and ordered the refund.

TRANSCO elevated the case to the CTA. The CTA Second Division reversed the ruling of the RTC due to TRANSCO's failure to appeal the LBT assessments at the RTC within the prescriptive period. Upon its Motion for Reconsideration was denied, TRANSCO appealed to the CTA *En Banc*.

**Issues:**

1. Is TRANSCO entitled to the refund?
2. Can a void assessment become final if the taxpayer fails to appeal?

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An assessment that is contrary to law can become final and executory if the same is not appealed. A claim for refund cannot substitute for the appeal to a denial of a protest against an assessment.

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**Ruling:**

1. No. When TRANSCO received the local treasurer's denial of its protest, its remedy was to file an appeal with the court of competent jurisdiction, i.e. the RTC, within 30 days. It cannot thereafter file a claim for refund and raise the very same arguments it should have raised in the appeal on the denial of its protest against the assessment.

A taxpayer who disagrees with a tax assessment issued by a local treasurer may file a written protest to contest the assessment within 30 days. In the event the protest is denied, or after the lapse of the 60-day prescriptive period for the local treasurer to resolve the protest, the taxpayer has 30 days within which to appeal with the RTC; otherwise, the assessment becomes conclusive and unappealable pursuant to Section 195 of the Local Government Code.

2. Yes. An assessment which is contrary to law can attain finality if the same is not appealed.

Instead of disguising its failure to appeal in the form of a refund claim, TRANSCO should have raised its defenses by filing an appeal with the courts to prevent the assailed assessments from becoming final and executory.

Citing the ruling of the Supreme Court in *Zamboanga Forest Managers Corporation vs. Pacific Timber and Supply Co.*, GR No. 173342, October 13, 2010, the CTA *En Banc* ruled that once a decision attains finality, it becomes the law of the case irrespective of whether the decision is erroneous or not.

The Court also said that the case of *Philippine Journalist, Inc. vs. CIR*, GR No. 162852, December 16, 2004, wherein the Supreme Court ruled that the assessment issued beyond the prescriptive period cannot attain finality, does not apply in this case. It was correct to rule that there was no assessment to speak of since it was issued beyond the prescriptive period.

In TRANSCO's case, the assessments were issued well within the prescriptive period. TRANSCO had the opportunity to appeal and raise its arguments before the courts but failed to do so. With TRANSCO having lost the remedy of appeal, the assessment became final and executory.

**Commissioner of Internal Revenue vs. Philippine Tobacco Flue-Curing and Redrying Corporation**  
CTA (*En Banc*) Case No. 1218 and 1220 promulgated April 11, 2016

**Facts:**

Petitioner CIR assessed Respondent Philippine Tobacco Flue-Curing and Redrying Corporation (PTFC) for deficiency income tax, VAT, withholding tax on compensation (WTC), expanded withholding tax (EWT), final withholding tax (FWT), documentary stamp tax (DST), and inspection fees. PTFC protested the assessments and after reinvestigation, the BIR issued a Final Decision on Disputed Assessment (FDDA) reducing the tax deficiency.

PTFC filed a Petition for Review with the CTA. The CTA First Division reduced the BIR's deficiency tax assessment and imposed penalties including 25% surcharge, 20% deficiency interest, and 20% delinquency interest. Aggrieved, PTFC elevated the case to the CTA *En Banc*.

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Deficiency interest may be imposed on all types of taxes. Deficiency and delinquency interest can be imposed simultaneously.

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### **Issues:**

1. Can the 20% deficiency interest be imposed on all types of taxes?
2. Can deficiency interest and delinquency interest be imposed simultaneously?

### **Ruling:**

1. Yes, the Tax Code authorizes the imposition of deficiency interest on all tax types.

Section 247(a) of the Tax Code provides that the imposition of additions to the tax applies to all taxes. The authority to impose additions [such as surcharges under Section 248, deficiency interest under Section 249 (B), delinquency interest under Section 249 (C) and interest on extended payment under Section 249 (D)] extends to all taxes regardless of the title under which they are classified. The law does not limit these additions only to income tax, estate tax and donor's tax.

Accordingly, the additions to the deficiency tax such as, surcharge, deficiency interest, and delinquency interest, are applicable to the deficiency income tax, VAT, WTC, EWT, DST and inspection fees of PTFC.

2. Yes, the Tax Code authorizes the simultaneous imposition of deficiency interest and delinquency interest.

The CTA *En Banc* held that a plain reading of Section 249 of the Tax Code justifies the simultaneous imposition of deficiency interest and delinquency interest. Section 249 (B) and (C) are clear that both deficiency interest and delinquency interest are to be reckoned from the date prescribed for their payment and until the full payment thereof.

*[Editor's Note: In Liguigaz Philippines Corporation vs. CIR, CTA (En Banc) Case 1117 promulgated 21 September 2015, it was held that there are only 3 instances where the Tax Code defines the term "deficiency." Deficiency interest under Section 249(B) of the Tax Code should only be imposed whenever there is deficiency income tax, deficiency estate tax, and deficiency donor's tax.]*

*Presiding Justice Roman G. Del Rosario and Associate Justice Erlinda P. Uy dissented and maintained their position in the Liguigaz case that deficiency interest only applies to income tax, estate tax and donor's tax.]*

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