

June 2013

# Tax bulletin



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PHILIPPINE TAX FIRM  
OF THE YEAR  
AND  
TRANSACTION TAX TEAM  
OF THE YEAR

# Highlights

## BIR Rulings

- ▶ Unutilized input Value-Added Tax (VAT) attributable to VAT zero-rated sales cannot be expensed outright (for income tax purposes) after the expiration of the two-year period to file a claim for refund. **(Page 3)**
- ▶ The transfer of properties by the Presidential Commission on Good Government (PCGG) to private individuals in a sale at public auction is exempt from income tax, withholding tax (WT), VAT and documentary stamp tax (DST). **(Page 4)**
- ▶ Any amount received by an employee from the employer as a consequence of separation from service “for any cause beyond the control of the said official or employee” shall be exempt from income tax. **(Page 4)**
- ▶ Gifts in favor of a religious corporation are exempt from donor’s tax, subject to the condition that not more than 30% of the gifts shall be used by the donee for administrative purposes.

Conveyances of realty not in connection with a sale, to trustees or other persons without consideration are not subject to DST.

If a property acquired by donation is subsequently conveyed by way of sale or exchange, the same will be subject to corporate income tax on the gain realized, which is determined by deducting from the gross selling price the historical cost, or the adjusted basis thereof, as it would be in the hands of the donor. Also, if the subsequent transfer is by way of donation to a non-exempt donee, the donor shall be subject to donor’s tax. **(Page 5)**

## BIR Issuance

- ▶ Revenue Memorandum Circular (RMC) No. 44-2013 extends the validity of unused/unissued principal and supplementary receipts/invoices printed prior to January 18, 2013. **(Page 5)**

## BSP Issuances

- ▶ Circular No. 797 prescribes enforcement actions on banks, in relation to Section 123 of Republic Act (RA) No. 7653. **(Page 6)**
- ▶ Circular No. 798 amends Section 3 of Circular No. 755 dated April 20, 2012. **(Page 6)**
- ▶ Circular No. 799 prescribes the applicable interest rate in the absence of stipulation in loan contracts. **(Page 7)**

## SEC Issuances

- ▶ SEC Memorandum Circular (MC) No. 10 prescribes certain amendments in the prescribed General Information Sheet (GIS). **(Page 7)**
- ▶ SEC MC No. 11 revises the requirements for the submission of financial statements and supporting documents when a foreign corporation applies for a license to transact business in the Philippines. **(Page 8)**

- ▶ If an educational corporation, which was incorporated prior to the effectivity of the Corporation Code on May 1, 1980, failed to amend its corporate term on or before May 1, 1982, the SEC will consider the 50-year limit on the life of the corporation as written into the Articles of Incorporation as of May 1, 1980. **(Page 8)**
- ▶ The determinative factor on whether a foreign corporation can sue or be sued before Philippine courts is if the foreign corporation is doing business in the Philippines and if it is licensed to do so. **(Page 9)**
- ▶ Section 62 of the Corporation Code expressly allows a previously incurred indebtedness to be used as consideration for the issuance of shares, provided that the valuation of the indebtedness is determined by the board of directors, subject to the approval of the SEC, in order to prevent watered stock. **(Page 10)**
- ▶ A person is qualified to be elected as an independent director provided that he or she does not own more than two percent of the shares of the covered company, its related companies or any of its substantial shareholders. **(Page 11)**
- ▶ The remaining directors or trustees can fill up Board vacancies when: (1) such vacancies were occasioned by reasons other than the removal by the stockholders or trustees or by expiration of term; and (2) such remaining directors or trustees still constitute a quorum. These conditions must concur; otherwise, filling up vacancies must be done by the stockholders or members in a regular or special meeting called for the purpose. **(Page 11)**

## Court Decisions

- ▶ A taxpayer seeking the reversal of an adverse ruling issued by the Commissioner of Internal Revenue (CIR) must file an appeal with the Secretary of Finance, not a Petition for Review with the Court of Tax Appeals (CTA).

The CTA has no jurisdiction to rule on the validity or constitutionality of a rule, regulation or ruling issued by the CIR. **(Page 12)**

- ▶ A waiver that does not indicate the date of acceptance by the CIR or her duly authorized representative is defective, and does not suspend the running of the three-year prescriptive period for assessment.

The date of notarization of the waiver cannot be considered as the date of acceptance by the CIR. **(Page 13)**

## BIR Rulings

### BIR Ruling No. 123-13 dated March 25, 2013

#### **Facts:**

A Co., a VAT-registered domestic corporation, enters into VAT zero-rated transactions in the ordinary course of its business. Since its transactions do not result in any output VAT liability, A Co. is not able to apply or utilize its input VAT on purchases from various suppliers. A Co. intended to file a claim for refund or tax credit of its unutilized input VAT but was not able to do so due to the expiration of the two-year period to file the claim.

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Unutilized input VAT attributable to VAT zero-rated sales cannot be expensed outright (for income tax purposes) after the expiration of the two-year period to file a claim for refund.

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**Issue:**

Can A Co. expense outright the unutilized input VAT after the expiration of the two-year period to file a claim for refund?

**Ruling:**

No. Under Section 112 (A) of the Tax Code, unutilized creditable input taxes attributable to VAT zero-rated sales can only be recovered through the application for refund or tax credit. Nowhere in the Tax Code can a specific provision be found expressly providing for another mode of recovery of unutilized input VAT, such as through outright deduction or expense for income tax purposes.

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**BIR Ruling No. 185-13 dated May 20, 2013**

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The transfer of properties by the PCGG to private individuals in a sale at public auction is exempt from income tax, WT, VAT and DST.

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**Facts:**

In *City of Pasig vs. Republic of the Philippines* (G.R. 185023 dated August 24, 2011), the Supreme Court ruled that the Republic of the Philippines is the presumptive owner for taxation purposes of certain properties voluntarily surrendered by Mr. X. Acting pursuant to its mandate, the PCGG scheduled the disposal of said properties to private individuals through public bidding.

**Issues:**

1. Is the transfer of properties by the PCGG to private individuals in a sale at public auction exempt from income tax?
2. Is the transfer also exempt from VAT and DST?

**Ruling:**

1. Yes. Section 32(B)(7)(b) of the Tax Code expressly excludes from gross income the income derived from the discharge of any essential governmental functions accruing to the Government of the Philippines or to any of its political subdivisions. Since the proposed sale at a public auction conducted by the PCGG is pursuant to its mandate or in the exercise of essential governmental functions, the said sale is exempt from income tax and, consequently, from WT.
2. Yes. The transfer of properties by PCGG to private individuals in a sale at a public auction is also exempt from VAT and DST pursuant to DOJ Opinion No. 108, dated October 16, 1987 in relation to Executive Order (EO) No. 286, which exempts the disposition of assets surrendered to the PCGG from taxes, fees and charges.

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**BIR Ruling No. 227-13 dated June 20, 2013**

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Any amount received by an employee from the employer as a consequence of separation from service "for any cause beyond the control of the said official or employee" shall be exempt from income tax.

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**Facts:**

Mr. X, an employee of A Co., received separation pay due to retrenchment.

**Issue:**

Is the separation pay received by Mr. X exempt from income tax?

***Ruling:***

Yes. Under Section 32(B)(6)(b) of the Tax Code, any amount received by an official or employee, or by his heirs, from the employer as a consequence of separation from service due to death, sickness or other physical disability or "for any cause beyond the control of the said official or employee" shall not be included in the gross income and, as such, shall be exempt from income tax.

**BIR Ruling No. 232-13 dated June 20, 2013**

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Gifts in favor of a religious corporation are exempt from donor's tax, subject to the condition that not more than 30% of the gifts shall be used by the donee for administrative purposes.

Conveyances of realty not in connection with a sale, to trustees or other persons without consideration are not subject to DST.

If a property acquired by donation is subsequently conveyed by way of sale or exchange, the same will be subject to corporate income tax on the gain realized, which is determined by deducting from the gross selling price the historical cost, or the adjusted basis thereof, as it would be in the hands of the donor. Also, if the subsequent transfer is by way of donation to a non-exempt donee, the donor shall be subject to donor's tax.

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***Facts:***

A Co. and B Co. are both non-stock, non-profit religious corporations organized as corporate soles. In 2010, A Co. donated a piece of land in favor of B Co.

***Issues:***

1. Is the donation exempt from donor's tax?
2. Is the donation subject to DST?
3. Will there be any taxes on the subsequent transfer of the donated property by B Co.?

***Ruling:***

1. Yes. Under Section 101(A)(3) of the Tax Code, gifts in favor of a religious corporation are exempt from donor's tax, subject to the condition that not more than 30% of the gifts shall be used by the donee for administrative purposes. For donations of real property, the Register of Deeds shall annotate the condition at the back of the Transfer Certificate of Title covering the land, because failure to do so shall be a ground for the revocation of the donation.
2. No. Under Section 185 of the Revised DST Regulations, conveyances of realty not in connection with a sale, to trustees or other persons without consideration are not subject to DST. However, the deed of donation is subject to DST of Php15.00 under Section 188 of the Tax Code.
3. Yes. If a property acquired by donation is subsequently conveyed by way of sale or exchange, the same will be subject to corporate income tax on the gain, which is determined by deducting from the gross selling price the historical cost, or the adjusted basis thereof, as it would be in the hands of the donor. If the subsequent transfer is by way of donation to a non-exempt donee, the donor shall be subject to donor's tax pursuant to Section 98 of the Tax Code.

**BIR Issuance**

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RMC No. 44-2013 extends the validity of unused/unissued principal and supplementary receipts/invoices printed prior to January 18, 2013.

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**Revenue Memorandum Circular No. 44-2013 dated June 11, 2013**

- ▶ All unused/unissued principal and supplementary receipts/invoices printed prior to January 18, 2013 shall remain valid until August 30, 2013.
- ▶ The deadline for filing an application for the printing of new receipts to replace all unused/unissued principal supplementary receipts/invoices printed prior to January 18, 2013 was on April 30, 2013.

- ▶ All applications for printing received after April 30, 2013 shall be considered late applications and the penalties for late filing shall be imposed.
- ▶ All unused/unissued principal and supplementary receipts/invoices printed prior to January 18, 2013 shall be surrendered to the Regional District Office where the taxpayer is registered on or before the 10<sup>th</sup> day after the date of printing stated in the new principal and supplementary receipts/invoices.
- ▶ The date of the new principal and supplementary receipts/invoices is the expiration date of the validity of the period of the unused/unissued receipts/invoices.
- ▶ After August 30, 2013, all principal and supplementary receipts/invoices printed prior to January 18, 2013 shall no longer be valid. Issuance of said receipts/invoices shall be deemed as an issuance of an invalid receipt or as if no receipts were issued, and is therefore a violation of the Tax Code. Transactions with said receipts are also deemed not properly substantiated and may not be allowed as a deduction.

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## **BSP Issuances**

Circular No. 797 prescribes enforcement actions on banks, in relation to Section 123 of RA No. 7653.

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### **BSP Circular No. 797 dated May 22, 2013**

- ▶ The Monetary Board approved the following enforcement actions against banks, which will release, in full or partial amounts, borrowings of the government within the Philippines or any of its political subdivisions or instrumentalities, without the submission by the borrower of the Monetary Board opinion on the probable effects of the proposed borrowings on monetary aggregates, the price level and the balance of payments:
  1. *First Offense* - Monetary penalty computed in accordance with Appendix 67 of the Manual of Regulations for Banks (MORB), with stern warning that subsequent offenses shall be dealt with stiffer and non-monetary sanctions;
  2. *Second Offense* - Suspension of lending operations to the government or any of its political subdivisions or instrumentalities for a period of six months, and written reprimand to the officer/s or members of the committee and/or board of directors who approved the loan; and
  3. *Third Offense* - Suspension of lending operations to the government or any of its political subdivisions or instrumentalities for one year.
- ▶ This Circular shall take effect within 15 days from its publication in a newspaper of general circulation.

*[Editor's Note: Circular No. 797 was published in the Manila Standard Today on May 29, 2013.]*

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Circular No. 798 amends Section 3 of Circular No. 755 dated April 20, 2012.

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### **BSP Circular No. 798 dated June 18, 2013**

- ▶ The last sentence of paragraph 3, Section 3, is amended by specifying a nominal registration fee of Php2,000.00 from all credit-granting entities (CGEs) applying for registration. The fee is waived for existing CGEs that

will avail of the registration facility up to June 30, 2013. The fee shall be collected from registering CGEs beginning July 1, 2013 whether or not they are established after July 1, 2012 (the effectivity of Circular No. 755).

- ▶ The last sentence of paragraph 6, Section 3, is amended such that the renewal period for the Acknowledgment of Registration is changed from the anniversary month of original registration to on or before expiration.
- ▶ This Circular shall take effect within 15 days following its publication either in the Official Gazette or in a newspaper of general circulation.

*[Editor's Note: Circular No. 798 was published in the Malaya Business Insight on June 24, 2013.]*

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Circular No. 799 prescribes the applicable interest rate in the absence of stipulation in loan contracts.

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### **BSP Circular No. 799 dated June 21, 2013**

- ▶ In its Resolution No. 796 dated May 16, 2013, the Monetary Board amended Section 2 of Circular No. 905, Series of 1982, which governs the interest rate in the absence of stipulation in loan contracts.
- ▶ The rate of interest for loan or forbearance of any money, goods, or credits and the rate allowed in judgments, in the absence of an express contract as to such rate of interest, shall be six percent per annum.
- ▶ With this revision, Subsection X035.1 of the MORB, and Sections 4305Q.1, 4305S.3 and 4304P.1 of the Manual of Regulations for Non-Bank Financial Institutions are amended accordingly.
- ▶ This Circular shall take effect on July 1, 2013.

*[Editor's Note: Circular No. 799 was published in the Business Mirror on June 27, 2013.]*

## **SEC Issuances**

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SEC MC No. 10 prescribes certain amendments in the prescribed GIS.

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### **SEC Memorandum Circular No. 10 dated May 31, 2013.**

- ▶ The Commission *En Banc* approved the following amendments to the existing General Information Sheet (GIS):
  1. The number of copies to be submitted is reduced from five to four;
  2. The Tax Identification Number for foreign nationals who are directors/ trustees, officers, stockholders/members and resident agents of both domestic and foreign corporations, must be indicated instead of the passport;
  3. Inclusion of "Gender/Sex" in the page for directors, trustees and officers; and
  4. Inclusion of page I-A pursuant to Anti-Money Laundering Act, as amended.

*[Editor's Note: SEC MC No. 10 was published in the Manila Bulletin and Manila Standard Today on June 5, 2013.]*

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SEC MC No. 11 revises the requirements for the submission of financial statements and supporting documents when a foreign corporation applies for a license to transact business in the Philippines.

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**SEC Memorandum Circular No. 11 dated June 6, 2013.**

- ▶ During its meeting on May 30, 2013, the SEC resolved to revise the requirements on financial statements and supporting documents that a foreign corporation must submit when it applies for a license to do business in the Philippines, as follows:
  1. For those whose home country requires audited financial statements (AFS), the applicant shall submit the AFS as of date not exceeding one year immediately prior to the filing of the application.
  2. If the date of the AFS exceeds the one-year requirement, the following shall be submitted:
    - a. AFS that are available as of date of filing of the application; and
    - b. Unaudited financial statements (UFS) as of date not exceeding one year immediately prior to the filing of the application.
  3. For those whose home country does not require AFS, the applicant shall submit UFS as of a date not exceeding one year immediately prior to the filing of the application.
    - a. The UFS shall be accompanied by a certification signed under oath by an officer of a responsible regulatory institution, or by the applicant's legal counsel, that the applicant is not required to prepare and submit AFS, with a citation of the law or regulation on which it is based.
    - b. The AFS and UFS must be signed under oath by the president or any other person authorized by the corporation. No authentication shall be necessary if the signatory to the said financial statements is the same as that in the corporation's application.
  4. The applicant's financial statements must show that it is solvent and in sound financial condition.

*[Editor's Note: SEC MC No. 11 was published in the Philippine Daily Inquirer on June 12, 2013.]*

**SEC-OGC Opinion No. 13-01 dated March 21, 2013**

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If an educational corporation, which was incorporated prior to the effectivity of the Corporation Code on May 1, 1980, failed to amend its corporate term on or before May 1, 1982, the SEC will consider the 50-year limit on the life of the corporation as written into the Articles of Incorporation as of May 1, 1980.

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**Facts:**

PCA, an educational corporation, was registered with the SEC on March 6, 1958, prior to the promulgation of the present Corporation Code. During that time, PCA's corporate term was perpetual since the old Corporation Law (Act No. 1459) did not require a maximum corporate term for educational corporations. However, with the passage of the new Corporation Code on May 1, 1980, a maximum period of 50 years was provided for corporate existence. Section 148 of the new Corporation Code provides that corporations lawfully existing and doing business in the Philippines and are affected by the new requirements of the Code shall, unless otherwise provided, be given a period not more than two years from effectivity within which to comply with the same.

**Issue:**

Should PCA's 50-year corporate term commence on the date of its registration on March 6, 1958?

**Ruling:**

No. The 50-year period should be counted from May 1, 1980.

In case of failure on the part of affected corporations to amend their Articles of Incorporation on or before May 1, 1982 (the expiry date of the two-year period), to comply with the applicable provisions of the new Corporation Code, the SEC will consider the provisions therein as written into the Articles of Incorporation as of May 1, 1980, the date of effectivity of the Corporation Code. Hence, the 50-year period should be counted from May 1, 1980 and not from its registration on March 6, 1958.

This interpretation will not prejudice public interest; rather, it would enable educational corporations registered under the Corporation Law to continue serving the needs of the locality where the schools are located. For the SEC to rule otherwise would lead to manifest injustice which is not within the intent and purpose of the Legislature in enacting the Corporation Code.

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**SEC-OGC Opinion No. 13-02 dated April 5, 2013**

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The determinative factor on whether a foreign corporation can sue or be sued before Philippine courts is if the foreign corporation is doing business in the Philippines and if it is licensed to do so.

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**Facts:**

A foreign corporation is doing business in the Philippines but it only obtained from the SEC a license to transact business as a representative office, and not as a branch office. Said certificate specified the purpose of said representative office, which is "to deal directly with the clients or customers of the applicant company in undertaking activities such as, but not limited to, information dissemination and promotion of the company's products as well as quality control of the products."

**Issues:**

1. May the foreign corporation with a representative office maintain any suit in the Philippines against its competitor?
2. May the foreign corporation apply for a permit or license from the Food and Drugs Administration (FDA) or any government agency to advertise in the Philippines its products being sold in the Philippines and defend the said application in court or from a government agency?

**Ruling:**

1. Yes. A foreign corporation that is both (i) registered with the SEC and (ii) is doing business in the Philippines as a representative office may bring and defend suits before Philippine courts and other government agencies in order to protect its rights and interests. It does not really matter for purposes of determining "whether a foreign corporation may sue or be sued before Philippine courts" if such corporation is doing business in the Philippines through a branch office or a representative office. Whether a foreign corporation is doing business in the Philippines through a branch or representative office only determines the extent allowed by law as to what such foreign corporation can do in the Philippines. Instead, the determinative factor for purposes of deciding whether a foreign corporation can sue or be sued before Philippine courts is whether the foreign corporation is doing business in the Philippines and if it is licensed to do so.

2. Yes. It necessarily follows that such a foreign corporation may also apply for a permit or license from the FDA or any government agency to advertise in the Philippines its products being sold in the Philippines, since the promotion of the products of its parent company is actually the underlying function of a representative office.

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**SEC-OGC Opinion No. 13-03 dated April 17, 2013**

Section 62 of the Corporation Code expressly allows a previously incurred indebtedness to be used as consideration for the issuance of shares, provided that the valuation of the indebtedness is determined by the board of directors, subject to the approval of the SEC, in order to prevent watered stock.

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**Facts:**

B Co. and C Co. are shareholders in A Co., a publicly listed company. A Co. will conclude separate loan transactions denominated as "Term Loan Facilities" with B Co. and C Co., whereby the latter will be extending loans to assist A Co. in meeting its funding requirements. A Co. is contemplating a stock rights offering (SRO) by way of pre-emptive rights sometime in the first half of 2013, and B Co. and C Co. will be offered rights shares pursuant to the SRO. Instead of shelling out additional money to pay for their respective subscriptions, B Co. and C Co. intend to convert the principal amount of the loans under the Term Loan Facilities as payments for rights shares under the SRO. While B Co. and C Co. will be allowed to pay through the conversion of liabilities into equity, the other stockholders participating in the SRO will pay in cash.

**Issues:**

1. Can the previously incurred indebtedness be used as payment for subscription for shares?
2. Is the proposed structure of the SRO (e.g., wherein one block of stockholders is allowed to pay by conversion and others by cash) permissible under relevant laws?

**Ruling:**

1. Yes. Section 62 of the Corporation Code expressly allows a previously incurred indebtedness to be used as consideration for the issuance of stocks, provided that the valuation of the indebtedness is determined by the board of directors, subject to approval of the SEC, in order to prevent watering of stocks. Watering of stocks is a situation wherein the consideration for subscription is not a fair valuation equal to the par or issue value of the stock. The amount of the indebtedness or liabilities to be settled should be at least equal to the par value of the shares of stock which the corporation intends to issue. However, there must first be an indebtedness incurred so that a liability maybe converted into a subscription payment.
2. Yes. A preemptive right under Section 39 of the Corporation Code refers to the right of a stockholder of a stock corporation to subscribe to all issues or disposition of shares of any class, in proportion to their respective shareholdings, *and on equal terms with other holders of the original stocks*, before subscriptions are received from the general public. In this case, the payments of B Co. and C Co. for the subscriptions shall be in the form of conversion of the previously incurred indebtedness, while the payments of the other stockholders for their subscriptions shall be in cash. However, even when payment of the debt is required to be made by the corporation in terms of money or cash, a setoff of the debt without going through this unnecessary formality is equivalent to a payment for the stock in cash. Thus, it appears that the proposed structure of the SRO would not violate the requirement that the offer must be on the same terms to all stockholders.

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**SEC-OGC Opinion No. 13-04 dated April 18, 2013**

A person is qualified to be elected as an independent director provided that he or she does not own more than two percent of the shares of the covered company, its related companies or any of its substantial shareholders.

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**Facts:**

The Securities Regulation Code (SRC) defines an independent director as “a person other than an officer or employee of the corporation, its parent or subsidiaries, or any other individual having a relationship with the corporation, which would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.” To implement the said provision, the SEC issued MC No. 16 in 2002, which provides that a substantial shareholder means any person who is directly or indirectly the beneficial owner of more than 10% of any class of its equity security.

Thereafter, on December 30, 2003, the SEC amended the SRC Implementing Rules and Regulations (Amended IRR), to provide that the independent director’s beneficial security ownership must not exceed two percent of the outstanding capital stock of the company where he is such a director. SEC MC No. 5, Series of 2012 reiterated this provision by stating that independent directors may participate in Employees’ Stock Option Plans, provided their shareholdings in the company do not exceed two percent of the outstanding shares of the corporation.

**Issue:**

What is the current limit on the shareholdings of an Independent Director (i.e., two percent or 10%)?

**Ruling:**

It is clear from the Amended IRR that an independent director’s shareholdings in the covered company and/or in its related companies or in any of its substantial shareholders should now not exceed two percent. It is also clear that the term “substantial stockholder” used in the first phrase of MC No. 16 was not carried into the Amended IRR. Consequently, the 10% limit on beneficial ownership in the covered company’s equity security in which an independent director is to be elected no longer holds true.

In other words, a person is qualified to be elected as an independent director, provided he is independent of management and free from any business or other relationship which could, or could reasonably be perceived to, materially interfere with his exercise of independent judgment in carrying out his responsibilities as a director in any covered company, and includes, among others, any person who does not own more than two percent of the shares of the covered company and/or its related companies or any of its substantial shareholders. The 10% limit is used only to determine whether or not a person (natural or juridical) is a substantial shareholder of a covered company.

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The remaining directors or trustees can fill up Board vacancies when: (1) such vacancies were occasioned by reasons other than the removal by the stockholders or trustees or by expiration of term; and (2) such remaining directors or trustees still constitute a quorum. These conditions must concur; otherwise, filling up the vacancies must be done by the stockholders or members in a regular or special meeting called for the purpose.

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**SEC-OGC Opinion No. 13-06 dated May 6, 2013****Facts:**

KMBI, a domestic corporation, stipulated in its Articles of Incorporation and By-Laws that its Board of Trustees shall consist of nine members who shall serve for a fixed term of one year. However, due to the resignation of five of the trustees and the demise of another, KMBI’s Board is currently composed of only three trustees.

**Issue:**

Do the three remaining members of the Board of Trustees of KMBI have the authority to function legally, conduct regular business and fill up the vacancies of the Board?

**Ruling:**

No. Of the nine-member Board of Trustees of KMBI, the presence of five members would be required for a majority. It becomes apparent, therefore, that the three remaining members of the Board of Trustees of KMBI do not constitute the required quorum and, hence, have no authority to transact corporate business on behalf of KMBI. Also, the three remaining members of the Board do not have the authority to fill up the vacancies in the said Board.

The remaining directors or trustees can fill up the vacancies in the Board when: (1) such vacancies were occasioned by reasons other than the removal by the stockholders or trustees or by expiration of term; and (2) such remaining directors or trustees still constitute a quorum. These conditions must concur; otherwise, the filling-up of the vacancies must be done by the stockholders or members in a regular or special meeting called for the purpose.

## Court Decisions

**St. Paul College of San Rafael vs. Commissioner of Internal Revenue**

Court of Tax Appeals (*En Banc*) EB No. 874 promulgated May 27, 2013

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A taxpayer seeking the reversal of an adverse ruling issued by the CIR must file an appeal with the Secretary of Finance, not a Petition for Review with the CTA.

The CTA has no jurisdiction to rule on the validity or constitutionality of a rule, regulation or ruling issued by the CIR.

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**Facts:**

On December 13, 2010, Respondent Commissioner of Internal Revenue (CIR) issued BIR Ruling No. 143-2010, which held that Petitioner St. Paul College of San Rafael (SPC) may be held liable for DST on school diplomas. On January 13, 2011, SPC filed a Petition for Review with the Court of Tax Appeals (CTA) praying for the reversal of BIR Ruling No. 143-2010.

On June 19, 2011, the Court in Division dismissed SPC's petition on the ground of failure to exhaust administrative remedies and lack of jurisdiction. Upon denial of its Motion for Reconsideration, SPC appealed to the CTA *En Banc*.

**Issues:**

1. Did SPC fail to exhaust the administrative remedies prescribed by law?
2. Does the CTA have jurisdiction to reverse the ruling of the CIR?

**Ruling:**

1. Yes. SPC failed to exhaust the administrative remedies before seeking judicial intervention. The proper remedy was to file an appeal with the Secretary of Finance.

Section 4 of the Tax Code provides that the Secretary of Finance has the power to review rulings of the CIR interpreting the provisions of the Tax Code and other tax laws. The Secretary of Finance issued Department Order No. 23-01 prescribing the guidelines for appeal by taxpayers of adverse rulings issued by the CIR. Under the said order, a taxpayer may seek the review of an adverse ruling issued by the CIR within 30 days from receipt thereof.

SPC's claim that it is exempt from the rule on exhaustion of administrative remedies as the petition allegedly raises purely questions of law has no merit. The Supreme Court previously ruled that a party cannot, in the guise of raising pure questions of law, seek judicial intervention without exhausting the available administrative remedies. The premature invocation of the court's intervention is lethal to one's cause of action. In the absence of waiver or estoppel, the case can be dismissed for failure to state a cause of action.

2. No. The CTA has no jurisdiction to rule on the validity or constitutionality of a rule, regulation or ruling issued by the CIR.

The Supreme Court previously ruled that while the law confers on the CTA jurisdiction to resolve tax disputes in general, this does not include cases where the constitutionality of a law or rule is challenged. The determination of whether a set of rules issued by an administrative agency contravenes the law or the constitution is within the jurisdiction of the regular courts.

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**Commissioner of Internal Revenue vs. East Asia Power Resources Corporation**  
Court of Tax Appeals (*En Banc*) EB Case No. 879 promulgated June 17, 2013

A waiver that does not indicate the date of acceptance by the CIR or her duly authorized representative is defective, and does not suspend the running of the three-year prescriptive period for assessment.

The date of notarization of the waiver cannot be considered as the date of acceptance by the CIR.

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**Facts:**

On December 8, 2008, Respondent East Asia Power Resources Corporation (East Asia) received a Formal Letter of Demand from Petitioner CIR assessing deficiency income tax and expanded withholding tax for taxable year 2003. On January 6, 2009, East Asia protested the assessment. As the CIR failed to act on the protest within the prescribed period of 180 days from receipt of the protest letter, East Asia filed a Petition for Review with the CTA on August 4, 2009.

East Asia argues that the right of the CIR to assess deficiency taxes for 2003 has prescribed as the assessments were issued beyond the three-year period provided by law. East Asia asserts that while it executed two "Waivers of the Defense of Prescription under the Statute of Limitations of the National Internal Revenue Code", the same did not suspend the running of the prescriptive period since they were not made in accordance with RMO No. 20-90. East Asia submits that the waivers are defective because the date of acceptance of the CIR was not indicated therein.

The CTA Second Division cancelled the assessments against East Asia for being barred by prescription. Upon denial of its Motion for Reconsideration, the CIR appealed to the CTA *En Banc*.

The CIR argues that the waivers were validly executed. The CIR asserts that the date of notarization may also be considered as the date of acceptance, considering that when the waivers were notarized, it can be presumed that the parties, appeared, signed and swore before the notary public.

**Issue:**

Did the waivers suspend the running of the three-year prescriptive period for assessment?

***Ruling:***

No. The waivers executed by East Asia are defective for failure to indicate the date of acceptance by the CIR. The waivers did not suspend the running of the three-year prescriptive period for assessment accordingly.

RMO No. 20-90 prescribes the procedures to be followed in the proper execution of waivers. The RMO provides, among others, that after the waiver is signed by the taxpayer, the CIR or authorized revenue official shall also sign and indicate that the BIR has accepted and agreed to the same. The date of acceptance is necessary to fix with certainty if the waiver was actually agreed upon before the expiration of the three-year prescriptive period.

The date of notarization of the waivers cannot be regarded as the date of acceptance of the waiver by the CIR or the authorized revenue official. The rules categorically require that the CIR or her authorized representative sign the waivers, indicating that the BIR has accepted and agreed to the waiver. The date of the BIR's acceptance should be indicated.

The act of the notary public is distinct from that of the CIR who is authorized by law to accept waivers. Moreover, the notarization in this case relates to the execution by the taxpayer, and not by the CIR, of the waivers. This is pursuant to the rule that the BIR cannot accept a waiver unless the same is duly notarized - referring to notarization of the execution by the taxpayer of the waiver.

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