

Tax Bulletin

December 2017



Highlights

BIR Rulings

- ▶ PEZA-registered enterprises are not subject to creditable withholding tax (CWT) on income derived directly in connection with its registered activities. **(Page 4)**
- ▶ For purposes of securing a Certificate of Tax Exemption, a non-stock, non-profit corporation or association has to prove by actual operation for at least three years that it is really an association exempt from income tax under Section 30 of the Tax Code. **(Page 4)**
- ▶ The giving of honoraria to the board of trustees of a non-stock, non-profit corporation constitutes private inurement, which is sufficient ground to deny such corporation tax exemption under Section 30 (E) of the Tax Code. **(Page 5)**
- ▶ The tax exemption granted to PAGCOR under PD No. 1869 extends to its licensees. **(Page 5)**

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- ▶ Revenue Memorandum Order (RMO) No. 32-2017 amends pertinent provisions of RMO No. 51-2010 on the eComplaint System. **(Page 6)**
- ▶ Revenue Memorandum Circular (RMC) No. 100-2017 clarifies the sanctions for the non-submission of the Alphabetical List of Employees/Payees of Income Payments. **(Page 7)**
- ▶ RMC No. 102-2017 clarifies the taxability of taxpayers engaged in Philippine Offshore Gaming Operations (POGO). **(Page 7)**
- ▶ RMC No. 105-2017 publishes the revised withholding tax table on compensation pursuant to the amendments to the Tax Code of 1997, as amended, as introduced by Republic Act (RA) No. 10963, otherwise known as the "Tax Reform for Acceleration and Inclusion (TRAIN) Law." **(Page 10)**

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- ▶ CMO 29-2017 provides for the amendment of CMO 14-2017 dated 31 August 2017 which covers the Authorization to Issue Alert Orders. **(Page 10)**
- ▶ CMO 31-2017 provides for the Implementation of the goods declaration verification system (GDVS). **(Page 11)**

BSP Issuances

- ▶ Circular No. 984 provides for Amendments to the Manual of Regulations on Foreign Exchange Transactions (FX Manual), as amended. **(Page 11)**
- ▶ Circular No. 985 provides for the Temporary window for registration of private sector foreign loans/borrowings. **(Page 13)**

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- ▶ A company that sells its own products exclusively in a single outlet, which is neither a nationalized or partly-nationalized activity, is not covered by the capitalization requirement under the Retail Trade Liberalization Act (RTLTA) and the Foreign Investments Act (FIA). **(Page 14)**
- ▶ SEC MC No. 14 amends and consolidates the guidelines and procedures in the registration and use of corporate and partnership names previously laid out in SEC MC No. 21-13 dated 4 December 2013 and SEC MC No. 05-15 dated 29 May 2015. **(Page 14)**
- ▶ SEC MC No. 15 introduces a new reporting system for publicly-listed companies of their Annual Corporate Governance Report to the SEC and the Philippine Stock Exchange (PSE). **(Page 15)**

PEZA Update

- ▶ PEZA Memorandum Circular No. 2017-041 circularizes the reduction in processing fees for 47 (a) (2) visa applications. **(Page 16)**

Court Decisions

- ▶ A taxpayer who remits expanded withholding tax (EWT) under the Alphanumeric Tax Codes used by Top 10,000 corporations deems itself a Top 10,000 corporation hence, its income payments on purchases of goods and services are subject to withholding tax of 1% and 2%, respectively. **(Page 16)**
- ▶ There must be a grant of authority before any revenue officer can conduct an examination or assessment. In the absence of such an authority, the assessment is a nullity. **(Page 17)**
- ▶ The BIR benchmarking program cannot be used as a basis to compute the tax liability of a taxpayer.

The purpose of the BIR's benchmarking program and of deriving the benchmarking rate is mainly to establish measurement or a set of standards to monitor the performance or compliance of taxpayers in a particular industry and improve voluntary tax compliance. **(Page 18)**

- ▶ Section 100 of the Tax Code imposes donor's tax even in the absence of donative intent for as long as property is transferred for less than adequate or full consideration, or with insufficient consideration.

In computing any internal revenue tax, the value of the property shall be whichever is higher between the Fair Market Value (FMV) as determined by the Commissioner, or the FMV as shown in the schedule of values of the Provincial and City Assessors. **(Page 19)**

BIR Rulings

BIR Ruling No. 568-2017 dated 7 December 2017

PEZA-registered enterprises are not subject to CWT on income derived directly in connection with its registered activities.

Facts:

ABC Co. is a PEZA-registered Developer/Operator entitled to establish, develop, construct, administer, manage, and operate a Special Economic Zone. It derives income from the sale of industrial and commercial lots within the economic zone to PEZA locators pursuant to RA No. 7916.

Issue:

Is the income of ABC Co. from the sale lots subject to CWT?

Ruling:

No. Under Section 24 of RA No. 7916, PEZA-registered enterprises are exempt from all local and national taxes and, in lieu thereof, are only subject to the 5% special tax on gross income. RR No. 2-98, as amended, also provides that CWT does not apply to income payments to persons enjoying exemption from payment of income taxes pursuant to the provision of any law, general or special. Since ABC Co. is an enterprise enjoying exemption from the payment of income tax pursuant to RA No. 7916, its revenues derived directly in connection with its registered activity shall not be subject to CWT.

BIR Ruling Nos. 574-2017 dated 7 December 2017

For purposes of securing a Certificate of Tax Exemption, a non-stock, non-profit corporation or association has to prove by actual operation for at least three years that it is really an association exempt from income tax under Section 30 of the Tax Code.

Facts:

A Co., a domestic non-stock, non-profit association operating for less than three years, requested for the issuance of a Certificate of Tax Exemption pursuant to Section 30 of the Tax Code.

Issue:

Is A Co. entitled to the Certificate of Tax Exemption?

Ruling:

No. The BIR cannot issue the requested Certificate of Tax Exemption because A Co. has to prove by actual operation for at least three years that it is really an association exempt from income tax under Section 30 of the Tax Code.

In the meantime, A Co. can file the necessary annual information return instead of an income tax return on or before the 15th day of the 4th month following the end of its taxable year as required under Section 24 of the Tax Code. Based on such information return, the BIR will conduct the necessary investigation on the activities undertaken during the period. The letter of exemption shall thereafter be issued depending on the result of the BIR's investigation.

BIR Ruling No. 576-2017 dated 7 December 2017

The giving of honoraria to the board of trustees of a non-stock, non-profit corporation constitutes private inurement, which is sufficient ground to deny such corporation tax exemption under Section 30 (E) of the Tax Code.

Facts:

X Co., a domestic non-stock, non-profit corporation, applied for the issuance of a Certificate of Tax Exemption pursuant to Section 30 (E) of the Tax Code. The by-laws of X Co. provides that the members of its board of trustees may receive reasonable honoraria in the performance of their duties and responsibilities.

Issue:

Is X Co. entitled to a Certificate of Tax Exemption?

Ruling:

No. RMC No. 51-2014 provides that, in order for an entity to qualify as a non-stock, non-profit corporation/association/organization exempt from income tax under Section 30 of the Tax Code, its earnings or assets shall not inure to the benefit of any of its trustees, organizers, officers, members or any person. The giving of honoraria to members of the board of trustees is considered distribution of net income of X Co. It is a form of inurement that the law prohibits in the organization and operation of a non-stock, non-profit corporation. The act violates the requirement that no part of the net income or assets of the corporation shall inure to the benefit of any individual or specific person.

BIR Ruling No. 632-17 dated 19 December 2017

The tax exemption granted to PAGCOR under PD No. 1869 extends to its licensees.

Facts:

A Co. is a domestic corporation primarily engaged in the management and operation of hotels, resorts and recreational activities. The PAGCOR issued a provisional license to A Co. for the development and construction of a resort-casino.

Issues:

1. Is the income derived by A Co., as a licensee of PAGCOR, subject to the 5% franchise tax in lieu of all taxes pursuant to PAGCOR's tax incentives under PD No. 1869?
2. Is A Co. exempt from the 12% VAT on domestic purchases of goods and services and importations under PD No. 1869?

Ruling:

1. Yes. Sec. 13 (2) (b) of PD No. 1869 provides that PAGCOR's exemption shall inure to the benefit of and extend to corporations with whom PAGCOR or operator has any contractual relationship in connection with the operations of casinos, or to those receiving compensation or other remuneration from PAGCOR or operator as a result of essential facilities furnished and/or technical services rendered to PAGCOR or operator. Thus, the income derived by A Co. from its operation of the casino is subject to the 5% franchise tax.
2. Yes. Section 109 (1) (K) of the Tax Code provides that transactions which are exempt under special laws shall be exempt from VAT. Considering that PD No. 1869 grants PAGCOR and its licensees exemption from taxes, fees and charges, all domestic purchases of goods and services as well as importations made by A Co. directly related to its gaming operation shall not be subject to the 12% VAT.

RMO No. 32-2017 amends pertinent provisions of RMO No. 51-2010 on the eComplaint System.

BIR Issuances

RMO No. 32-2017 dated November 27, 2017

- ▶ The eComplaint System is an electronic system whereby taxpayers may report and express their grievances and complaints to the BIR through an email facility, the BIR website or portal.
- ▶ The complaints can be categorized as follows:
 1. Non-issuance of Official Receipt (NO-OR) covers complaints on the non-issuance of ORs or Sales Invoices (SIs) and/or the use of ORs or SIs not duly registered with the BIR, including but not limited to fake or spurious receipts/invoices;
 2. Run After Tax Evader (R.A.T.E.) covers complaints on individuals and/or entities engaged in tax fraud or evasion activities and other criminal violations under the Tax Code of 1997, as amended;
 3. *Disiplina* covers complaints/denunciations against erring revenue officials and employees; and
 4. Other Complaints not directly classified under NO-OR, R.A.T.E. and *Disiplina* programs but related to BIR transactions or services.
- ▶ Classified complaints will be sent to the office-in-charge and through the following email facilities:

Type of Complaint	Handling, Processing and Monitoring Division	Email Facility
NO-OR	Public Information & Education Division (PIED)	no-or-complaint@bir.gov.ph
R.A.T.E.	Enforcement and Advocacy Service (EAS)	rate@bir.gov.ph
<i>Disiplina</i>	Internal Investigation Division (IID)	ecomplaint@bir.gov.ph
Other Complaints	Customer Assistance Division (CAD)	contact_us@bir.gov.ph

- ▶ The receipt of the complaint shall be acknowledged within the same day (or the next business day in case it was sent on a weekend or holiday).
- ▶ Within three days from receipt of the email, the point person shall act on the complaint as follows:
 1. Evaluate the sufficiency and the nature of the complaint;
 2. Recommend to the Division Chief the investigation of the complaint by a case officer in the unit, should the complaint be sufficient in details and was sent to the rightful office-in-charge;

3. Refer the case to the proper office having jurisdiction over the complaint, should the complaint be sufficient in details but has been sent to the wrong facility or should require action from another office;
 4. Request the complainant to provide additional information and/or documents, should the complaint be determined to be vague or insufficient in details and/or jurisdiction cannot be determined with certainty; and
 5. Determine the nature of the complaint and to which office the complaint shall be handled, upon receipt of the additional information and/or document.
- ▶ The complainant shall be informed of the action taken on the complaint within three days.

RMC No. 100-2017 clarifies the sanctions for the non-submission of the Alphabetical List of Employees/Payees of Income Payments.

RMC No. 100-2017 dated 19 December 2017

- ▶ Failure to file the Alphabetical List of Payees/Employees or to re-submit the complete and corrected Alphabetical List after the validation process conducted by the BIR shall not result in the disallowance of the pertinent expenses as income tax deductions considering that the taxes have already been withheld and remitted.
- ▶ A compromise penalty of P1,000.00 shall be imposed for each failure to make, file or submit the said information return, with the aggregate amount to be imposed for such failures during the calendar year not to exceed P25,000.00 pursuant to RMO No. 07-2015.
- ▶ Payment of the compromise penalty shall, in no way, relieve the withholding agent from the obligation to submit the required Alphabetical List or the complete or corrected Alphabetical List.

RMC No. 102-2017 clarifies the taxability of taxpayers engaged in Philippine Offshore Gaming Operations (POGO).

RMC No. 102-2017 dated 28 December 2017

- ▶ Offshore gaming is a gaming activity, which refers to the offering by a PAGCOR licensee of online games of chance via the internet, using a network and software or program, exclusively to offshore authorized players, excluding Filipinos abroad, who have registered and established an online gaming account with the licensee.
- ▶ All taxable business entities and establishments, persons who conduct or who are engaged in the business of offshore gaming operations, including their agents, shall observe and comply with the following:
 1. Register the business at the Revenue District Office (RDO) having jurisdiction over the principal place of business/head office (or residence in case of individuals) and pay the registration fee to any Authorized Agent Bank (AAB) located within the RDO;

2. File the applicable tax returns on or before due dates, pay correct internal revenue taxes, and submit information returns and other appropriate tax compliance reports in accordance with existing rules and regulations;
 3. Keep books of accounts and other business/accounting records within the time prescribed by law and such shall be made available anytime for inspection and verification by duly authorized Revenue Officer/s for the purpose of ascertaining compliance with tax rules and regulations.
- ▶ POGO taxpayers are classified as follows:
1. Licensee, which refers to a POGO duly licensed and authorized by PAGCOR to provide offshore gaming services, which may be:
 - a. Philippine-based Operator, a duly constituted business enterprise organized in the Philippines; or
 - b. Offshore-based Operator, a duly constituted business enterprise organized in any foreign country, who will engage the services of a PAGCOR-accredited Service/Support Provider for its online gaming activity.
 2. Other Entity, which refers to a POGO Licensee or any other business entity duly licensed and authorized by PAGCOR to provide a particular or specific component of the offshore gaming activities to the POGO, which may be:
 - ▶ POGO-Gaming Agent, which refers to the representative in the Philippines of Offshore-based Operator;
 - ▶ Service Provider, which refers to the entity providing components of offshore online gaming operations, which may further be:
 - a. Gaming Software/Platform Provider, for gaming systems and games, sports book, pool betting, and so on;
 - b. Business Process Outsourcing Provider, for call centers and IT-support services, excluding the taking of actual bets; or
 - c. Data/Content Streaming Provider, for real time streaming of casino games produced from a live dealer studio set-up, streamed via the internet to the website of the Licensees.
 3. Gaming Support Provider, which refers to a company that produces proprietary products and services that may or may not be found in the gaming system of the Licensee, but is an important part of the online gaming set-up (e.g., payment solutions, player registration, rewards and marketing modules).
- ▶ The income of POGO may be classified as follows:
1. Income from Gaming Operations, which refers to income or earning realized or derived from operating of gambling casinos, gaming clubs and other similar recreation or amusement places and gaming pools; and

2. Income from Other Related Services, which refers to income or earning realized or derived not from gaming operations, but from such other necessary and related services, shows and entertainment.
- ▶ The operations or activities of POGO and/or Other Entity shall be subject to the following tax treatment:
1. The entire gross gaming receipts/earnings or the agreed or pre-determined minimum monthly revenues/income from Gaming Operations under existing rules, whichever is higher, shall be subject to a 5% franchise tax, in lieu of all kinds of taxes, levies, fees or assessments of any kind, nature of description.
 2. This income is exempt from any kind of tax, income or otherwise, as well as fees, charges or levies of whatever nature, whether national or local.
 3. Income from Other Related Services and income from non-gaming operations shall be subject to normal income tax, VAT and other applicable taxes, as may be deemed appropriate.
 4. A Licensee deriving income from both gaming operations and from other related services shall be subject to 5% franchise tax on its gaming revenues and normal income tax, VAT and other applicable taxes on its non-gaming revenues.
 5. Any other Entity, specifically including the gaming agent, Service Provider and Gaming Support Provider, who is also a POGO Licensee, shall be subject to the 5% franchise tax on its gaming activities and to the normal tax rate and other appropriate taxes on its non-gaming operations.
 6. Any other Entity, who is not a POGO Licensee, deriving or earning only income from Other Related Services or from non-gaming operations, shall be subject to normal income tax, VAT and other applicable taxes on the entire revenue.
 7. Income payments made by POGO Licensee or any other business entity licensed or authorized by PAGCOR for all their purchases of goods and services shall be subject to withholding taxes as may be applicable.
 8. Compensation, fees, commissions or any other form of remuneration as a result of the services rendered to POGO Licensee or any other business entity licensed by the PAGCOR shall be subject to applicable withholding taxes under existing laws.
 9. Purchase (local or imported) and sales (local or international) of goods (tangible or intangible) or services shall be subject to existing tax laws as may be applicable.

RMC No. 105-2017 publishes the revised withholding tax table on compensation pursuant to the amendments to the Tax Code of 1997, as amended, as introduced by RA No. 10963, otherwise known as the "TRAIN Law."

RMC No. 105-2017 dated 29 December 2017

- Beginning 1 January 2018, every employer making compensation payments to their respective employees shall deduct and withhold from such compensation a tax determined in accordance with the Revised Withholding Tax Table below:

Effective January 1, 2018 to December 31, 2022						
DAILY	1	2	3	4	5	6
Compensation Level (CL)	685 and below	685	1,096	2,192	5,479	21,918
Prescribed Minimum Withholding Tax	0.00	0.00 + 20% over CL	82.19 + 25% over CL	356.16 + 30% over CL	1,342.47 + 32% over CL	6,602.74 + 35% over CL
WEEKLY	1	2	3	4	5	6
CL	4,808 and below	4,808	7,692	15,385	38,462	153,846
Prescribed Minimum Withholding Tax	0.00	0.00 + 20% over CL	576.92 + 25% over CL	2,500.00 + 30% over CL	9,423.08 + 32% over CL	46,346.15 + 35% over CL
SEMI-MONTHLY	1	2	3	4	5	6
CL	10,417 and below	10,417	16,667	33,333	83,333	333,333
Prescribed Minimum Withholding Tax	0.00	0.00 + 20% over CL	1,250.00 + 25% over CL	5,416.67 + 30% over CL	20,416.67 + 32% over CL	100,416.67 + 35% over CL
MONTHLY	1	2	3	4	5	6
CL	20,833 and below	20,833	33,333	66,667	166,667	666,667
Prescribed Minimum Withholding Tax	0.00	0.00 + 20% over CL	2,500.00 + 25% over CL	10,833.33 + 30% over CL	40,833.33 + 32% over CL	200,833.33 + 35% over CL

BOC Issuances

CMO 29-2017 provides for the amendment of CMO 14-2017 dated 31 August 2017 which covers the Authorization to Issue Alert Orders.

CMO No. 29-2017 dated 27 November 2017

- The authority given to the Deputy Commissioner, Enforcement Group (EG), to issue Alert Orders, as provided in CMO No. 14-2017 was removed.
- The following Customs Officials are hereby authorized to issue Alert Orders:
 - Customs Commissioner or his authorized representative;
 - Deputy Commissioner, Intelligence Group (IG); and
 - All District Collectors, for shipments arriving within their District.
- This Order shall take effect immediately.

[Editor's Note: CMO 29-2017 was received by the UP Law Center on 1 December 2017.]

CMO 31-2017 provides for the Implementation of the GDVS.

CMO No. 31-2017 dated 6 December 2017

- ▶ Scope: The goods declaration verification system (GDVS) shall involve import entry declarations processed by all sections, if applicable, of the port's Formal Entry Division (FED) or equivalent unit.
- ▶ Objectives: (1) To randomly assign appraisers to a given entry number; and (2) To provide brokers and importers updates on the status of their respective entries.
- ▶ The CMO shall initially cover the implementation of the GDVS at the Manila International Container Port (MICP) as the pilot site. If the implementation at MICP becomes stable, the GDVS shall be implemented subsequently at the Port of Manila.
- ▶ Operational Process
 1. Once the Import Entry Number and assigned color had been encoded in the GDVS, the system shall randomly choose the available examiner and appraiser from the FED who shall process that entry.
 2. The appraiser will assess the declared value and once done, he/she shall update the status of the entry through the GDVS. The examiner shall also update the status of the entry through the GDVS once he/she has inspected the declared goods.
 3. Display monitors and kiosk will be deployed at the port premises for BOC stakeholders to check/monitor the status and updates of their entries.
 4. In cases where additional documents are needed, the status will appear on the display monitors. The additional documents will then be submitted to a help desk assigned for that purpose who, in turn, will locate the Examiner/Appraiser in charge in the processing of the entry.
- ▶ This Order shall take effect immediately.

[Editor's Note: CMO 31-2017 was received by the UP Law Center on 12 December 2017.]

BSP Issuances

Circular No. 984 provides for Amendments to the Manual of Regulations on FX Manual, as amended.

BSP Circular No. 984 dated 22 December 2017

- ▶ Pursuant to Monetary Board Resolution No. 2115 dated 21 December 2017, the following provisions of the Manual of Regulations on Foreign Exchange Transactions (issued under Circular No. 645 dated 13 February 2009, as amended) are further revised:
 1. Part Two, Chapter 1, Section 3 (Peso Accounts of, and Sale of FX to, Non-Residents) which provides for the sale of FX to Non-residents is revised;
 2. The following sections of Chapter I: Loan Guarantees under Part Three: Capital Account Transactions are revised:
 - ▶ Section 22 (General Policy);
 - ▶ Section 23 (Public Sector Loans/Borrowings)

- ▶ Section 24 (Private Sector Loans/Borrowings)
- ▶ Section 25 (Servicing)
- ▶ Sections 26 to 29 are marked as “reserved”
- ▶ Section 30 (Guarantees and other similar arrangements)
- ▶ Section 31 (Other Financing Schemes/Arrangements)
- ▶ For purposes of the FX Manual, definition of the following terms are adopted:
 1. Foreign Currency Loans
 2. Foreign Exchange
 3. Foreign Loans
 4. Private sector loans/borrowing that are not publicly-guaranteed
 5. Publicly-guaranteed private sector loans/borrowings
- ▶ The following Appendices/Annexes to the FX Manual have been revised and/or added:
 1. Revised
 - ▶ Appendix 1
 - ▶ Appendix 20
 - ▶ Annex A
 - ▶ Annex D.1
 - ▶ Annex D.2
 - ▶ Annex D.3
 - ▶ Annex E.1
 - ▶ Annex E.2
 - ▶ Annex E.3
 2. Added
 - ▶ Appendix 1.3
 - ▶ Annex E.4
 - ▶ Annex E.5
- ▶ This Circular shall take effect on 15 January 2018.

Circular No. 985 provides for the temporary window for registration of private sector foreign loans/borrowings.

BSP Circular No. 985 dated 22 December 2017

Pursuant to Monetary Board Resolution No. 2116 dated 21 December 2017 approving a six-month temporary window for registration of private sector foreign loans/borrowings, the following guidelines are hereby issued:

1. Coverage

The temporary window shall be available for six months starting from the effectivity date of this Circular, during which unregistered private sector foreign loans/borrowings (without guarantee from the public sector) obtained without the requisite prior approval from the Bangko Sentral ng Pilipinas (BSP) that are outstanding and booked in the borrower’s records as of the date of this Circular may be applied for registration with the BSP.

2. Mechanics

The Mechanics provides for the rules wherein the Private sector loans/ borrowings may be applied for registration with the BSP within the six-month period.

3. Registration Fee

Borrower-applicants shall pay a fixed registration fee amounting to PHP20,000.00. The registration fee shall be payable to the BSP in the form of Manager’s Check or Cashier’s Check upon the filing of the application for registration.

4. Reporting

The FX selling authorized agent banks (AABs)/AAB forex corps and private sector borrowers shall report such FX sales and purchases, respectively to the BSP:

Reports	Deadline
A. By the FX selling institutions -	
<ul style="list-style-type: none"> ▶ If AAB: Schedule 4 (FX Disposition for Loans) of FX Form 1 (Consolidated FX Assets and Liabilities) ▶ If AAB forex corp: Report on Foreign Exchange Transactions 	Within five (5) banking days from end of reference week
B. By the private sector borrowers -	
<ul style="list-style-type: none"> ▶ Report on medium - and long-term (MLT) foreign borrowings (Form 2 - Annex E.2 of the FX Manual); and/or ▶ Report on short-term (ST) foreign borrowings for (ST-2 - Annex E.1 of the FX Manual) 	Within five (5) banking days after end of reference month

Non-compliance with/violations of any terms and conditions of the BSP registration, including reportorial requirements, may result in the cancellation of the BSRD, rendering the loan/borrowing ineligible for servicing using FX resources of AABs/AAB forex corps.

▶ This Circular shall take effect on 15 January 2018.

SEC Opinion and Issuances

SEC-OGC Opinion No. 17-16 dated 4 December 2017

A company that sells its own products exclusively in a single outlet, which is neither a nationalized or partly-nationalized activity, is not covered by the capitalization requirement under the RTLA and the FIA.

Facts:

G Co. is a domestic corporation engaged in the business of goat farming management and the processing, production and sale of agricultural products. It sells its own products exclusively and does not carry any other brand or product on consignment. It intends to increase its capitalization by accepting more than 40% foreign equity.

Issues:

1. Is G Co. exempted from the capitalization requirement of USD2.5M under the Retail Trade Liberalization Act (RTLA)?
2. Is G Co. covered by the foreign equity restrictions under the Foreign Investment Act (FIA)?
3. Can it elect foreign citizens to the Board and/or as officers?

Ruling:

1. Yes. Under the RTLA, sales to the general public, through a single outlet owned by a manufacturer of products manufactured, processed or assembled in the Philippines regardless of capitalization, is not considered retail. Thus, G Co. is not covered by the said requirement provided that it sells its products in one outlet.
2. No. The FIA is applicable only to corporations engaged in either nationalized or partly-nationalized activities. The business of G Co. is neither a nationalized or partly-nationalized industry, thus, it can have more than 40% foreign equity.
3. Yes. The prohibition under the Anti-Dummy Law does not apply to corporations that are not engaged in any nationalized or partly nationalized activity. Hence, G Co. may elect foreign nationals as part of its Board of Directors and/or as officers.

SEC MC No. 14 amends and consolidates the guidelines and procedures in the registration and use of corporate and partnership names previously laid in SEC MC No. 21-13 dated 4 December 2013 and SEC MC No. 05-15 dated 29 May 2015.

SEC Memorandum Circular No. 14 dated 8 December 2017

To keep abreast with developments in business and information technology, the SEC adopts additional guidelines and procedures in the registration of corporate and partnership names. It provides, among others, that:

- ▶ A non-stock, non-profit corporation engaging in microfinance activities shall use the word "Microfinance" or "Microfinancing" in its corporate name and must state in its Articles of Incorporation that it shall conduct microfinance operations pursuant to Republic Act No. 8425 or the Social Reform and Poverty Alleviation Act;

- ▶ The name of a corporation or partnership that has been dissolved or whose registration has been revoked shall not be used by another corporation except in meritorious cases as determined by the SEC *En Banc*. Under the old guidelines, the name of a dissolved corporation may not be used within 3-6 years from the date of revocation of registration unless approved by the stockholders, members or partners at the time of dissolution or such revocation;
- ▶ The hold-over corporate secretary of an expired corporation applying for re-registration must state in an affidavit that (a) there is no pending intra-corporate dispute or claim involving the same expired corporation, and (b) that the expired corporation has no derogatory information with the SEC at the time of application for re-registration. These are in addition to the attestations required under the former guidelines.

[Editor's Note: Published in the Manila Bulletin on 15 December 2017.]

SEC MC No. 15 introduces a new reporting system for publicly-listed companies of their Annual Corporate Governance Report to the SEC and the PSE.

SEC Memorandum Circular No. 15 dated 15 December 2017

To facilitate the disclosure of publicly-listed companies' (PLCs) compliance and/ non-compliance with the recommendations provided under the Code of Corporate Governance for PLCs and to harmonize the corporate governance requirements of the SEC and the PSE, all PLCs are mandated to submit an Integrated Annual Corporate Governance Report (I-ACGR) subject to the following:

- ▶ All PSE-listed companies by 31 December of a given year shall submit their I-ACGR on 30 May of the following year and for every year that the company remains listed in the PSE;
- ▶ The I-ACGR shall cover all relevant information from January to December of the given year;
- ▶ At least one copy of the I-ACGR filed with the SEC shall bear original and manual signatures of the required signatories;
- ▶ The companies shall no longer be required to file updates and changes on their I-ACGR within 5 days from the occurrence of the reportable changes;
- ▶ The companies shall no longer be required to file consolidated changes in the I-ACGR within 10 days from the end of the year; and
- ▶ Late, incomplete or non-submission of the I-ACGR shall be subject to penalties.

[Editor's Note: Published in The Manila Times and the Manila Bulletin on 28 December 2017.]

PEZA Memorandum Circular No. 2017-041 circularizes the reduction in processing fees for 47 (a)(2) visa applications.

PEZA Update

PEZA MEMORANDUM CIRCULAR No. 2017-041 dated 10 November 2017

- ▶ Processing fee for 47(a)(2) visa is PHP 4,815.00 per foreign national, consisting of:

Department of Justice (DOJ) Visa Filing Fee	PHP 2,525.00
Bureau of Immigration (BI) Visa Implementation Fee (inclusive of PHP 500 express fee)	1,510.00
PEZA Visa Processing Fee	780.00
Total	PHP 4,815.00

- ▶ In early May 2017, the Office of BI Commissioner directed that the PHP 500 express fee will no longer be collected by BI.
 1. PEZA only implemented lowered processing fee of PHP 4,315.00 effective 16 November 2017.
 2. PEZA will refund the PHP 500 express fee to foreign nationals who have paid the amount of PHP 4,815 for the period 9 May 2017 to 15 November 2017.
 3. PEZA ZAs/ZMs/OICs will inform concerned enterprises of their foreign nationals to whom a refund is due, together with the procedures and requirements for claiming said refund.
- ▶ All claims for refund must be filed from 1 December 2017 up to 15 January 2018.

Note: BI advised express fee may soon be subsequently restored.

Court Decisions

FSM Cinemas, Inc. vs. CIR

CTA (*En Banc*) Case No. 1445 promulgated 16 November 2017

Facts:

Respondent CIR assessed FSM Cinemas for, among others, deficiency income tax and withholding tax for taxable year 2008 for its failure to withhold tax on its purchases of goods and services as a Top 10,000 corporation pursuant to Section 2.57.2 (M) of Revenue Regulations 2-98, as amended by RR 17-2003.

FSM argued that it did not receive notice from the BIR as a Top 10,000 taxpayer hence, it cannot be classified as such simply by its erroneous withholding of the tax. It posited that the criteria provided under RR 17-03 must first be satisfied, including the requirement to be duly notified, in writing, by the Commissioner that it has been selected as one of the top 10,000 corporations.

Upon the issuance of a Final Decision on Disputed Assessment by the BIR, FSM filed a Petition for Review at the CTA. The CTA Second Division ruled in favor of the CIR, citing that FSM failed to prove that the corresponding withholding tax on income payments were deducted and paid to the BIR.

Aggrieved, FSM elevated the case to the CTA *En Banc*.

A taxpayer who remits EWT under the Alphanumeric Tax Codes used by Top 10,000 corporations deems itself a Top 10,000 corporation hence, its income payments on purchases of goods and services are subject to withholding tax of 1% and 2%, respectively.

Issue:

Can a taxpayer be considered a Top 10,000 corporation (now 20,000) even without the required notice from the CIR?

Ruling:

Yes. The CTA *En Banc* held that based on the records, it was obvious that FSM's Monthly Remittance Return of expanded withholding tax and the Monthly Alphanumeric List of Payees submitted to the BIR include remittance of EWT with Alphanumeric Tax Codes (ATC) WC 158 and WC 160, which represent income payments of a Top 10,000 corporation for its purchases of goods and services, respectively.

Thus, when FSM remitted the EWT under the ATCs of WC 158 and W160, it deemed itself a Top 10,000 corporation. Accordingly, the income payments of FSM on its purchases of goods and services are subject to withholding tax in accordance with Section 2.57.2 (M) of Revenue Regulations 2-98, as amended by RR 17-2003.

[Editor's Note: Justices Manahan and Ringpis-Liban dissented with the majority decision and noted that under RR 2-98, as amended, classification as a Top 10,000/20,000 corporate taxpayer requires the determination and notification from the CIR.]

CIR vs. Ithiel Corporation

CTA (*En Banc*) Case No. 1551 promulgated 17 November 2017

There must be a grant of authority before any revenue officer can conduct an examination or assessment. In the absence of such an authority, the assessment is a nullity.

Facts:

Petitioner CIR assessed Ithiel Corporation (Ithiel) for various deficiency taxes for taxable year 2006. The tax audit on Ithiel was conducted based on an undated Letter of Authority, which it received on August 10, 2007.

A group of examiners conducted an audit on Ithiel, for which a Preliminary Assessment Notice and a Final Assessment Notice were issued. Upon Ithiel's filing of a protest to the FAN and request for reinvestigation, the case was reassigned to another Revenue Officer. A Final Decision on Disputed Assessment was subsequently issued based on the reinvestigation conducted by the new Revenue Officer.

Ithiel filed a Petition for Review at the CTA, arguing, among others, that the right of the BIR to assess has prescribed. The CTA Third Division, however, cancelled the assessment on the ground that the person who conducted the reinvestigation of Ithiel's books of accounts and other accounting records were not armed with a Letter of Authority.

Aggrieved, the CIR filed a Petition for Review with the CTA *En Banc*.

The CIR argued that there is no need for the issuance of a new LOA if the audit examination was reassigned only to another revenue officer or group supervisor, citing Revenue Memorandum Orders 8-06 and 62-10.

Issue:

Can the BIR dispense with the issuance of a new LOA in case of reassignment of tax audit to a new examiner?

Ruling:

No. An assessment is void when the officer who conducts the examination or assessment has no authority to do so.

RMO 8-06 contemplates a situation where reassignment is a consequence of transfer, resignation, or retirement of both the original Revenue Officer and Group Supervisor assigned under the LOA while RMO 62-10 applies where only the Revenue Officer has transferred, resigned or retired. There is no showing that the circumstances are the same in the instant case that may warrant the reassignment for the continuation of an audit investigation without need of a new LOA.

Considering that the reassignment of the audit investigation did not conform with the BIR's own rules, i.e. there was no transfer, resignation or retirement of both the original Revenue Officer and Group Supervisor under RMO 8-06 or the Revenue Officer alone, pursuant to RMO 62-10, it necessarily follows that the reinvestigation by the examiners who subsequently issued the Final Decision on Disputed Assessment, was conducted without authority.

Quoting the Supreme Court's decision in *CIR vs. Sony Philippines, G.R. No. 178697 dated November 17, 2010*, the CTA *En Banc* sustained the CTA Third Division and ruled that there must be a grant of authority before any revenue officer can conduct an examination or assessment. In the absence of such an authority, the assessment is a nullity.

Wellform Trading Corporation vs. CIR

CTA (Second Division) Case No. 9086 promulgated 27 November 2017

The BIR benchmarking program cannot be used as a basis to compute the tax liability of a taxpayer.

The purpose of the BIR's benchmarking program and of deriving the benchmarking rate is mainly to establish measurement or a set of standards to monitor the performance or compliance of taxpayers in a particular industry and improve voluntary tax compliance.

Facts:

Respondent CIR assessed Petitioner Wellform Trading Corporation for, among others, deficiency VAT for January to June, 2012, alleging it had sales not subjected to VAT amounting to nearly P100 Million. The CIR computed Wellform's sales by comparing its gross sales based on the industry benchmark rate under Revenue Memorandum Order 5-2012 with the sales reported per VAT returns. The CIR averred that the assessment was based on best evidence obtainable as Wellform failed and refused to submit records despite the issuance of a *subpoena duces tecum*.

Wellform opposed the computation and argued that the industry benchmark cannot be used as the best evidence to support an assessment of a deficiency tax.

Issues:

1. Can the BIR use the benchmark rate in computing the VAT liability of Wellform?
2. Is the use of the benchmark rate justified under the power of the CIR to use the best evidence obtainable in assessing tax deficiency?

Rulings:

1. No. The purpose of the BIR's benchmarking program is mainly to establish measurement or a set of standards to be used to monitor the performance or compliance of taxpayers in a particular industry and improve voluntary tax compliance. There is nothing in the benchmarking program under RMO 5-2012 to show that the benchmark rate should be used in computing the tax liability of a taxpayer.

While the benchmarking program may be used in recommending enforcement actions such as the immediate issuance of a Letter of Authority for the BIR to audit a taxpayer, conduct of post-evaluation of cash register machines/point of sales machines, placing the establishment under surveillance, or conduct of inventory stock taking, audit activities and processes under Revenue Regulations 12-99 should still be complied with in coming up with an assessment notice.

The use of the benchmark rate in computing Wellform's VAT liability has no legal basis. The CTA held that the BIR should have assessed based on its own investigation pursuant to the electronic Letter of Authority issued, and not merely used the benchmark rate in arriving at the alleged computed VATable sales.

2. No. Although the CTA recognized the BIR's power to assess based on the best evidence obtainable, the approximation in the calculation of the taxes due should not be arrived at arbitrarily and capriciously. In the instant case, there was no showing on how the benchmark rate was derived and merely assumed that the VATable sales of other wholesaling companies is the same with the VATable sales of Wellform.

Vesta Property Holdings, Inc. vs CIR

CTA (Second Division) Case No. 9234 promulgated 28 November 2017

Section 100 of the Tax Code imposes donor's tax even in the absence of donative intent for as long as property is transferred for less than adequate or full consideration, or with insufficient consideration.

In computing any internal revenue tax, the value of the property shall be whichever is higher between the FMV as determined by the Commissioner, or the FMV as shown in the schedule of values of the Provincial and City Assessors.

Facts:

Respondent CIR assessed Petitioner Vesta Property Holdings, Inc. (Vesta) for deficiency donor's tax covering the sale in 2009 of two parcels of land in Laguna. Vesta sold the property at P882 per square meter, arguing that the higher zonal value of P1,200 per sq.m. does not apply as the lots are undeveloped and raw, located at the interior and not along the road.

Vesta filed a Petition for Review upon the issuance of a Final Decision on Disputed Assessment by the CIR.

At the CTA, the CIR argued that since the fair market value (FMV) of the property exceeded the value of the consideration, Vesta is liable for donor's tax under Sections 100 and 99 (B) of the Tax Code. The CIR averred that the arm's length transaction is not a defense and donative intent is not necessary to be liable for donor's tax.

Issue:

Is Vesta liable to donor's tax?

Ruling:

Yes. Section 100 of the Tax Code provides that donor's tax can be imposed, even in the absence of a donative intent for as long as property is transferred for less than adequate or full consideration, or with insufficient consideration.

The CTA noted that the legislative intent of the deemed gift provision under Section 100, as amended, is to discourage parties in a transaction from controlling their selling price in order to reduce taxes to be paid to the government. Hence, the difference between the FMV and the selling price is automatically treated as gift subject to donor's tax.

In computing any internal revenue tax, the value of the property shall be whichever is higher between the FMV as determined by the Commissioner, or the FMV as shown in the schedule of values of the Provincial and City Assessors.

The CTA ruled that if no zonal valuation has been prescribed for a particular classification of real property in a particular street or subdivision in a barangay, the zonal value prescribed for the same classification of real property located in an adjacent barangay of similar conditions must be applied.

In the instant case, Vesta failed to refer to any valuation of real property in an adjacent barangay or to provide any document that can be the basis of the correct, albeit lower, valuation.

Since the FMV of the property is P1,200 per sq.m. as determined by the CIR and no lower valuation was provided either in the schedule of values under Department of Finance Order No. 50-2000 or by Vesta, the value of the property is the value as determined by the CIR.

[Editor's Note: Republic Act 10963 or the Tax Reform for Acceleration and Inclusion, which became effective on January 1, 2018, has amended Section 100 of the NIRC to provide that "a sale, exchange or other transfer of property made in the ordinary course of business (a transaction which is a bona fide, at arm's length, and free from any donative intent) will be considered as made for adequate and full consideration in money or money's worth."]

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