Tax Bulletin

April 2018

A member firm of Ernst & Young Global Limited

Highlights

BIR Issuances

- Revenue Regulation (RR) No. 14-2018 amends Sections 2 and 14 of RR No. 11-2018, specifically the creditable withholding tax (CWT) rate on professional, promotional and talent fees received by value-added tax (VAT)-registered individual payees and the deadline for the submission of certain reportorial requirements prescribed under RR 11-2018. **(Page 3)**

- RR No. 15-2018 amends Section 13 of RR No. 8-2018, specifically the deadline for updating the registration from VAT to non-VAT of VAT-registered taxpayers whose gross sales/ receipts and other non-operating income do not exceed the VAT threshold of P3 million in the preceding year. **(Page 4)**

- Revenue Memorandum Circular (RMC) No. 21-2018 circularizes Memorandum Circular No. 16-2018 dated 15 March 2018 regarding the imposition of surcharge, interest and compromise penalty for filing an amended tax return. **(Page 4)**

- RMC No. 24-2018 prescribes the guidelines in the filing, receiving and processing of the 2017 Income Tax Returns (ITRs), including their attachments. **(Page 5)**

BOC Update

- The BOC Memorandum provides for the Deferment of Memorandum No. 2018-04-002 dated 12 March 2018 requiring the Submission and Counter-Checking of the List of Importables. **(Page 8)**

BOI Update

- The Announcement reminds all BOI-registered enterprises on the deadline and guidelines for submission of the annual reportorial requirements. **(Page 8)**

BSP Issuance

- Circular No. 1000 provides for the Guidelines on the Settlement of Instant Retail Payments. **(Page 9)**

SEC Opinions and Issuances

- A mere board resolution or approval cannot enforce the qualification/ disqualification of a director of a corporation. **(Page 10)**

- The power to amend corporate by-laws may be delegated to the board of directors if duly voted for by the stockholders. **(Page 11)**

- SEC MC No. 6 adopts new and amended accounting standards as part of its rules and regulations on financial reporting. **(Page 11)**

- SEC MC No. 7 provides for the amendment to the requirements on nomination and election of independent director under the Implementing Rules and Regulations of the Securities Regulation Code. **(Page 11)**

- SEC MC No. 8 provides for new rules for publicly-listed companies as to their choice of external auditor and audit committee composition. **(Page 12)**

Court Decisions

- Section 249 of the Tax Code, as amended by the Tax Reform for Acceleration and Inclusion (TRAIN) Law, prescribes that in no case shall the deficiency and delinquency interest be imposed simultaneously. **(Page 12)**

- A "Build-To-Own" or "Build-Your-Own" scheme, which is actually a sale of real property under the circumstances, is subject to expanded withholding tax (EWT) and documentary stamp tax (DST). **(Page 13)**

- When a corporation overpays its income tax liability at the close of the taxable year, it has two options: (1) to be refunded or issued a Tax Credit Certificate (TCC), or (2) to carry over such overpayment to the succeeding taxable quarters to be applied as tax credit against income tax due.

  The carry-over option, once taken, becomes irrevocable such that the taxpayer cannot later on change its mind to claim a cash refund or issuance of a TCC for the overpayment or excess income tax credit. **(Page 14)**

BIR Issuances

RR No. 14-2018 amends Sections 2 and 14 of RR No. 11-2018, specifically the CWT rate on professional, promotional and talent fees received by VAT-registered individual payees and the deadline for the submission of certain reportorial requirements prescribed under RR 11-2018.

RR No. 14-2018 dated 5 April 2018

- As amended, Section 2 of RR 11-2018 now imposes a 10% CWT on gross professional, promotional and talent fees or any other form of remuneration, regardless of amount, for services rendered by VAT-registered individual payees.

- Section 14 has also been amended as follows:

  1. Income payees subject to withholding tax under Section 2 of RR No. 11-2018 and seeking exemption from the prescribed withholding tax rates, shall submit on or before 20 April 2018, a duly accomplished "Income Payee's Sworn Declaration of Gross Receipts/Sales," together with a copy of the Certificate of Registration (COR), to the income payor/ withholding agent.

  2. The income payor/withholding agent, who/which received the "Income Payee's Sworn Declaration of Gross Receipts/ Sales" and the copy of the payee's COR, shall submit on or before 30 April 2018, a duly accomplished "Income Payor/ Withholding Agent's Sworn Declaration," together with the List of Payees, who have submitted "Income Payee's Sworn Declaration of Gross Receipts/Sales" and copies of CORs.

3. The list of payees, who are subject to refund either due to the change of rates of withholding or due to the qualification to avail of exemption from withholding tax (e.g. income recipient/ payee submitted "Income Payee's Sworn Declaration of Gross Receipts/ Sales" and copy of COR), shall likewise be attached to the first quarter return, which shall be filed on or before 30 April 2018.

- The regulations shall take effect immediately.

(Editor's Note: RR No. 14-2018 was published in the Manila Bulletin *on 7 April 2018)*

RR No. 15-2018 amends Section 13 of RR No. 8-2018, specifically the deadline for updating the registration from VAT to non-VAT of VAT-registered taxpayers whose gross sales/ receipts and other non-operating income do not exceed the VAT threshold of P3 million in the preceding year.

RR No. 15-2018 dated 5 April 2018

- Section 13 of RR No. 8-2018 has been amended to extend the deadline of registration updates as follows:

  1. All existing VAT registered taxpayers whose gross sales/ receipts and other non-operating income in the preceding year did not exceed the VAT threshold of P3 million shall have the option to update their registration to non-VAT until 30 April 2018, following the existing procedures on registration updates and the inventory and surrender/cancellation of the unused VAT invoices/receipts.

  2. After the said date, existing VAT-registered taxpayers who have not exceeded the threshold for the immediately preceding three years, may opt to update their registration to non-VAT, following rules on registration updates, verification and the inventory and cancellation of VAT invoices/ receipts.

- The regulations shall take effect immediately.

(Editor's Note: RR No. 15-2018 was published in the Manila Bulletin *on 7 April 2018)*

RMC No. 21-2018 circularizes Memorandum Circular No. 16-2018 dated 15 March 2018 regarding the imposition of surcharge, interest and compromise penalty for filing an amended tax return.

RMC No. 21-2018 dated April 5, 2018

In reply to an email sent to the Deputy Commissioner for Operations regarding the inconsistencies in the imposition of penalty and interest for filing an amended return, the Commissioner of Internal Revenue issued Memorandum Circular No. 16-2018, which provides as follows:

- In case a tax return is amended and an additional tax is computed, the 20% interest and 25% penalty shall be imposed on the additional tax to be paid per the amended return.

- For the compromise penalties, the BIR has issued Revenue Memorandum Order (RMO) No. 7-2015 to update the schedule of compromise penalties specified under RMO No. 19-2007. If the taxpayer refuses to pay the suggested compromise penalty, the violation shall be referred to the appropriate office for criminal action.

RMC No. 24-2018 prescribes the guidelines in the filing, receiving and processing of the 2017 ITRs, including their attachments.

RMC No. 24-2018 dated 13 April 2018

- Manner of filing of returns

1. Taxpayers who are mandated to use eBIRForms/ eFPS, and those who opted to file manually shall file and pay in accordance with the following guidelines:

Manner of Filing	Where to File and Pay	Required Attachments	
		Where to Submit	When to Submit
With Payment			
1. Manual Filing	‣ Authorized Agent Bank (AAB) located within the Revenue District Office (RDO) where the taxpayer is registered ‣ Revenue Collection Officer (RCO) through the MRCOS facility under the jurisdiction of the RDO in places where there are no AABs	‣ AAB ‣ RDO	Upon filing
2. eFPS Facility	‣ Use the eFPS facility for ITRs available in the eFPS facility ‣ eBIRForms System for filing of ITRs not available in the eFPS facility, but submit and pay using the eFPS facility, or ‣ File through the eFPS facility and pay through the PhilPass facility of the Bangko Sentral ng Pilipinas (BSP) for banks availing the said payment facility	Concerned Large Taxpayer Division (LTD)/ RDO	Within 15 days from the deadline of filing, or date of electronic filing of the return, whichever comes later

Manner of Filing	Where to File and Pay	Required Attachments	
		Where to Submit	When to Submit
3. eBIRForms System	Electronically file using eBIRForms Package and pay to any of the following: ▸ AAB located within the RDO where the taxpayer is registered ▸ RCO through the MRCOS facility under the jurisdiction of the RDO in places where there are no AABs ▸ For electronic payment using the following facilities: 1. GCash Mobile Payment 2. Landbank of the Philippines (LBP) Linkbiz Portal, for taxpayers who have an ATM account with LBP and/or for holders of Bancnet ATM/ Debit Cards 3. Development Bank of the Philippines (DBP) Tax Online for holders of Visa/ Master Credit Cards and/or Bancnet ATM/Debit Cards	▸ AAB ▸ RDO	Within 15 days from the deadline of filing, or date of electronic filing of the return, whichever comes later
No Payment Returns			
1. eFPS Facility	▸ Use the eFPS facility for ITRs available in the eFPS facility ▸ eBIRForms Systems for filing of ITRs not available in the eFPS facility	Concerned LTD/ RDO	Within 15 days from the deadline of filing or date of electronic filing of the return, whichever comes later
2. eBIRForms System	Electronically file using eBIRForms Package	▸ RDO	Within 15 days from the deadline of filing, or date of electronic filing of the return, whichever comes later

- If both the eFPS facility and eBIRForms System are unavailable, the following guidelines shall be observed:

Type of Taxpayers	Where to File and Pay	Required Attachments	
		Where to submit	When to submit
With Payment Returns			

Non- LTS registered taxpayers mandated to use the facilities of eFPS and eBIRForms	▸ AAB located within the territorial jurisdiction of the RDO where the taxpayer is registered
	▸ RCO thru the MRCOS facility under the jurisdiction of the RDO in places where there are no AABs, the return shall be filed and the tax shall be paid with the concerned
	▸ If the tax will be paid through the following electronic facilities, the ITR, together with the proof of payment generated by the above facilities, shall be filed with the RDO where the taxpayer is duly registered:
	  ▸ GCash Mobile Payment
	  ▸ LBP Linkbiz Portal, for taxpayers who have ATM account with LBP and/or for holders of Bancnet ATM/Debit Card
	  ▸ Development Bank of the Philippines (DBP) Tax Online for holders of Visa/Master Credit Cards and/or Bancnet ATM/Debit Cards
		▸ AAB
		▸ RDO
			Within 15 days from the deadline of filing or date of electronic filing of the return whichever comes later

For LTS-registered taxpayers	Any branch of LBP and DBP nearest to the LTS-registered taxpayer's Head Office	Concerned LTS office where the taxpayer is duly registered	Upon filing
With No Payment Returns			
For both non-LTS and LTS-registered taxpayers	LTS office/ RDO where the concerned taxpayer is duly registered.	Concerned LTS office/ RDO where the taxpayer is duly registered	Upon filing

- If the eFPS facility is unavailable, all taxpayers mandated to use the facilities of eFPS and eBIRForms shall file their returns through the eBIRForm facility, print the submitted ITRs in three copies for purposes of payment of the income tax due through the appropriate payment channels described above.

- Should the eFPS facility and/or eBIRForms System subsequently become available, all the mandated users shall resubmit their manually filed returns with the eFPS or eBIRForms System, as the case may be, within 5 days from the issuance of the relevant BIR Advisory on this.

- The disclosure of Supplemental Information under BIR Forms 1700 and 1701 is optional to the individual taxpayer filing the ITR covering and starting with calendar year 2017 due for filing on or before 16 April 2018.

BOC Update

The BOC Memorandum provides for the Deferment of Memorandum No. 2018-04-002 dated 12 March 2018 requiring the Submission and Counter-Checking of the List of Importables.

Memorandum No. 2018-04-018 dated 13 April 2018

- BOC Memorandum No. 2018-04-002 dated 12 March 2018 was issued requiring:

  1. All Importers/Consignees/Brokers to submit a copy of the list of importables submitted and approved by the Accounts Management Office (AMO) upon registration/accreditation, to relevant BOC offices to eliminate "consignees for hire."

  2. All District and Subports Collectors, Deputy Collectors for Assessment, Chiefs and Personnel of the Formal Entry Division (FED), and all others concerned, to countercheck with the approved list before proceeding to process an import entry and report to the AMO any importer who imports any goods not found on the list for imposition of sanctions to ensure that only commodities or items on the approved list is imported by consignee.

  3. Additional items on the list of importables require approval from the AMO prior to importation.

- Implementation of BOC Memorandum No. 2018-04-002 was deferred for a month effective on 12 April to 11 May 2018 due to the sheer volume of importers requesting for relevant documents.

(Editor's Note: Signed by the BOC Commissioner on 16 April 2018)

BOI Update

The Announcement reminds all BOI-registered enterprises on the deadline and guidelines for submission of the annual reportorial requirements.

- The deadline of submission of annual reportorial requirements for Taxable Year (TY) 2017 are as follows:

Report	Deadline
BOI Form S-1	April 30
Audited Financial Statements (AFS)	30 days from electronic filing with the BIR
Income Tax Return (ITR)	30 days from electronic filing with the BIR

- Guidelines –

  1. For the BOI Form S-1:

     - The 25 April 2017 version of the BOI Form S-1 should be used.

     - The Form should be prepared on a per project registration basis.

       a. Consolidated reports shall not be accepted.

- All mandatory fields (highlighted) of the BOI Form S-1 shall be duly filled out.

  a. Incomplete BOI Form S-1 shall not be accepted.

- The duly filled BOI Form S-1 (1) in Excel format saved in CD or DVD, and (2) hard copy, shall be submitted to BOI.

  a. The BOI Form S-1 submitted on or before 30 April 2018 with incomplete or missing information or unfilled items or fields shall be provisionally accepted.

  b. The revised BOI Form S-1, together with the provisionally accepted BOI Form S-1, may be submitted within 5 working days from such provisional acceptance. Any submission beyond the said 5 working days shall be penalized for late submission.

2. For the AFS/ITR:

   - The scanned copy of AFS and ITR in PDF format saved in CD or DVD shall be submitted.

     a. Hard copies are no longer required for submission.

3. Non-compliance with any of the requirements shall result in:

   - The non-acceptance of any submission, and

   - The application of the corresponding penalty allowed under the relevant laws and rules and regulations.

BSP Issuance

Circular No. 1000 provides for the Guidelines on the Settlement of Instant Retail Payments.

BSP Circular No. 1000 dated 23 April 2018

- The following provisions were created in the Manual of Regulations for Banks (MORB)/Manual of Regulations for Non-bank Financial Institutions (MORNBFI) to provide guidelines on settlement of instant retail payments.

- Sections X1206/41206Q/4706S/4706P/4806N are added to provide for the policy statement on the settlement of instant retail payments that it is the thrust of the Bangko Sentral to ensure efficiency of payment systems in the country. In line with this thrust, the Bangko Sentral requires BSP-supervised Financial Institutions (BSFIs) participating in an automated clearing house (ACH) for instant retail payments to ensure that this ACH provides for certainty of settlement of the multilateral clearing obligations of the clearing participants. For the purpose of these Sections, an instant retail payment, otherwise known as fast payment, is defined as an electronic payment in which the transmission of the payment message and the availability of "final" funds to the payee occur in real time or near-real time on as near to a 24-hour and seven day (24/7) basis as possible[1].

[1] Based on the paper *"Fast payments – Enhancing the speed and availability of retail payments"* of the Committee on Payments and Market Infrastructures, Bank for International Settlements

- Subsections X1206.1/41206Q.1/4706S.1/4706P.1/4806N.1, which provide for the minimum requirements for the operation of a settlement mechanism for instant retail payments, are also added by this Circular.

- Subsection X1206.2/41206Q.2/4706S.2/4706P.2/4806N.2 on risk management are added to provide that the BSFIs participating in the instant retail payment ACH shall ensure that they have the necessary operational and liquidity risk management measures in place. The designs of the measures shall be in accordance with Section and Subsections X179/4179Q/4198N of the MORB/MORNBFI on Operational Risk Management and Section and Subsections X176/4176Q/4195S/4195N on Liquidity Risk Management of the MORB/MORNBFI.

- Subsection X1206.3/41206Q.3 are added to provide that the demand deposits accounts (DDAs) maintained with the BSP for the settlement of net clearing obligations arising from instant retail payment transactions shall form part of the banks/QBs reserves against deposit and deposit substitute liabilities pursuant to Section X354/4254Q of the MORB/MORNBFI.

- Subsection X1206.4/41206Q.4/4706S.4/4706P.4/4806N.4 are added to provide for supervisory enforcement actions that the Bangko Sentral may deploy to promote compliance with the requirements set forth in these Sections.

- This Circular shall take effect immediately upon its publication either in the Official Gazette or in a newspaper of general circulation.

(Editor's Note: BSP Circular No. 1000, s. 2018 was published in the Philippine Star *on 25 April 2018)*

SEC Opinions and Issuances

SEC-OGC Opinion No. 18-07 dated 27 March 2018

A mere board resolution or approval cannot enforce the qualification/ disqualification of a director of a corporation.

Facts:

The board of directors of P Co. passed a resolution to upgrade the qualifications of the candidates for its board membership without amending its by-laws.

Issue:

May a corporation, through its board of directors, impose additional qualifications for the members of the board?

Held:

No. A mere board resolution or approval is not sufficient to legally enforce a qualification/ disqualification of a director because it has to be clearly provided for in the corporate by-laws. Unlike a board resolution, by-laws are relatively permanent and considered as continuing rules of action adopted by the corporation for its own government. If a corporation wants to require additional qualifications for a director, it must amend its by-laws.

SEC-OGC Opinion No. 18-08 dated 20 April 2018

The power to amend corporate by-laws may be delegated to the board of directors if duly voted for by the stockholders.

Facts:

B Co. seeks to amend its by-laws by including a provision wherein the board of directors alone can amend the said by-laws. The provision shall read: ".. *the power to amend, modify, repeal or adopt new by-laws may be delegated to the Board of Directors by the affirmative vote of stockholders representing not less than 2/3 of the outstanding capital stock[.]*"

Issue:

May the proposed provision be allowed?

Held:

Yes. The proposed amendment merely gives the stockholders authority to delegate the power to amend its by-laws if voted for by at least 2/3 of the owners of the outstanding capital stock. This is allowed under Sec. 48 of the Corporation Code since the proposed amendment does not provide for the actual or automatic delegation of such power. To operationalize the delegation, owners of at least 2/3 of the outstanding capital stock shall pass the appropriate resolution in a stockholders' meeting.

SEC Memorandum Circular No. 6 series of 2018 dated 6 April 2018

SEC MC No. 6 adopts new and amended accounting standards as part of its rules and regulations on financial reporting.

The SEC approved the adoption of the following pronouncements to the Philippine Financial Reporting Standards:

- Philippine Financial Reporting Standard (PFRS) 16 – to be applied for annual periods beginning on or after 1 January 2019;
- Disclosure Initiative [amendments to Philippine Accounting Standard (PAS) 7]; and
- Recognition of Deferred Tax Assets for Unrealized Losses (Amendments to PAS 12).

(Editor's Note: Published in the Manila Standard *and* Philippine Daily Inquirer *on 12 April 2018)*

SEC Memorandum Circular No. 7 series of 2018 dated 20 April 2018

SEC MC No. 7 provides for the amendment to the requirements on nomination and election of an independent director under the Implementing Rules and Regulations of the Securities Regulation Code.

The SEC has resolved to amend Rule 38.2.7 of the SRC rules by providing a two-year limit on the disqualification of a nominee for independent directorship who has previously engaged in a transaction with a covered company, or any of its related companies, where he seeks to be nominated.

(Editor's Note: Published in the Manila Bulletin *and* The Manila Times *on 26 April 2018)*

SEC MC No. 8 provides for new rules for publicly-listed companies as to their choice of external auditor and audit committee composition.

SEC Memorandum Circular No. 8 series of 2018 dated 20 April 2018

In order to improve the ranking of the Philippines in the 'Protecting the Minority Investors' indicator of the Ease of Doing Business Report, the SEC has resolved to adopt the following rules requiring all publicly-listed companies to:

- Seek shareholders' approval on any change/s in the company's external auditor; and
- To have an audit committee that is exclusive to board members.

(Editor's Note: Published in the Manila Bulletin *and* The Manila Times *on 26 April 2018)*

Court Decisions

Moog Controls Corporation – Philippine Branch vs. CIR
CTA (Second Division) Case Nos. 9077 promulgated 22 February 2018

Section 249 of the Tax Code, as amended by the TRAIN Law, prescribes that in no case shall the deficiency and delinquency interest be imposed simultaneously.

Facts:

Respondent CIR assessed Petitioner Moog Controls Corporation – Philippine Branch (Moog) for alleged deficiency income tax for fiscal year ended 3 October 2009. Moog protested the assessment which was denied by the CIR on 8 June 2015. Moog filed a Petition for Review at the CTA to dispute the BIR's adverse decision.

The CTA Second Division, in its original decision dated 3 January 2018, partially granted the petition and reduced the deficiency tax assessment and penalties. Both parties filed a Motion for Reconsideration. Moog, in particular, argued that the simultaneous imposition of both deficiency and delinquency interest is already prohibited under the provisions of Republic Act 10963 or the TRAIN Law.

Issue:

Can deficiency and delinquency interest be imposed simultaneously?

Ruling:

No. Section 249 of the Tax Code, as amended by the TRAIN Law, prescribes that in no case shall the deficiency and delinquency interest be imposed simultaneously.

The CTA agreed that the provisions of TRAIN have an impact on the interests imposed on Moog's amount payable but only insofar as that portion of interest that will run starting 1 January 2018 onwards. The deficiency interest is imposed on the unpaid amount of tax from the time prescribed for its payment by law until the amount is fully paid while the delinquency interest is imposed on the delay in payment of the unpaid amount which consists of the basic tax, surcharge and deficiency interest and runs from the time prescribed for their payment until full payment of the unpaid amount.

The running or charging of interest for both types of interest stops from full payment. In the instant case, full payment will happen only after 3 January 2018, the promulgated date of the original assailed CTA decision.

Thus, in addition to the basic deficiency tax, Moog was ordered to pay (a) 20% deficiency interest from 15 February 2010 until 31 December 2017, (b) 20 % delinquency interest from 8 June 2015 until 31 December 2017, and (c) 12% delinquency interest from 1 January 2018 until the amount is fully paid.

(Editor's Note: In Pangasinan III Electric Cooperative, Inc. vs. Commissioner of Internal Revenue, CTA Case Nos. 8915 promulgated 19 March 2018, the CTA First Division applied the 12% rate for deficiency and delinquency interest even before the effectivity of the TRAIN Law on 1 January 2018)

CIR vs. G & W Architects, Engineers and Project Consultants Co.
CTA (*En Banc*) Case Nos. 1449 promulgated 21 March 2018

A "Build-To-Own" or "Build-Your-Own" scheme, which is actually a sale of real property under the circumstances, is subject to EWT and DST.

Facts:

Petitioner CIR assessed Petitioner G&W Architects, Engineers and Project Consultants, Co. (G&W) for alleged deficiency EWT and DST for 2004 covering the transfer of 340 units in four condominium projects.

G&W protested the assessment based on four BIR rulings issued between 2003 and 2007, where the BIR confirmed that its "Build-To-Own" or "Build-Your-Own" scheme is not a taxable transaction as it does not constitute a sale or disposition of real property. Under the arrangement, unit owners pool their funds for the construction of condominium units and execute the following agreements:

a. Contract to Manage and Execute the Construction between G&W and the unit owners;
b. Trust Agreement established by the unit owners naming a trustee to hold in trust the pooled funds of the unit owners and the land where the project will be located; and,
c. Depository and Disbursing Agreements between the trustee and the unit owners.

As the CIR failed to act on the protest, G&W filed Petitions for Review with the CTA.

At the CTA, the CIR alleged that under the so-called co-development/building-to-own/build-your-own and similar schemes, the developer simply made it appear that it merely managed the construction of the condominium projects and that the funds as contributed by the individual investors were management fees only. The assignment and delivery of the developed units to individual investors were supposedly not taxable being merely a transfer of property held in trust by the trustee for the individual trustors. The CIR claims that the build-to-own concept is considered pre-selling that should have been subjected to EWT and DST. The CIR also noted that it issued RMC 55-2010 stating that G&W misrepresented facts in the request for ruling, declared the rulings as void, and ordered a tax investigation.

The CTA First Division ruled that the transaction between G&W and the unit owners was for a sale of services, not a sale of property. G&W only earned fees for the management and construction of the units. It held the CIR failed to establish the fact of actual sale of the condominium units from G&W to the unit owners. The construction funding which the BIR considered as payment for the sale of the condominium units is actually held in trust by the trustee bank under the Agreement/Depository and Disbursement Agreement, which will be exclusively used for the construction of the project and the purchase of the land. It added that G&W had no complete control over the said amount, hence, no part of the said fund can be considered as payment for the transfer of the condominium units from which the assessed EWT can be deducted.

Aggrieved, the BIR filed a Petition for Review at the CTA *En Banc*.

Issue:

Is the "Build-To-Own" or "Build-Your-Own" scheme considered a sale of real property that is subject to EWT and DST?

Ruling:

Yes. The CTA *En Banc* reversed the ruling of the CTA First Division and held that G&W is not merely the project manager of the condominium projects but the owner thereof, who is liable for EWT and DST.

G&W's claim that it is merely a project manager is belied by its own evidence, particularly the Contract to Manage and Execute the Construction, which provides that G&W has the authority to terminate the contract in any of the events of default and identify a substitute client or buyer who will assume the corresponding remaining obligation. Such right to terminate was not similarly given to G&W's clients.

The CTA *En Banc* concurred with the conclusion of Presiding Justice Roman G. Del Rosario, who registered his dissenting opinion in the CTA Division's decision and insisted that G&W's subsequent or contemporaneous acts must be considered to reveal its true intention. G&W advertised the condominium units in its website, consistent with the seller's act. It also secured a license to sell from the Housing and Land Use Regulatory Board, which would have been unnecessary if it was just a contractor or project manager.

When a corporation overpays its income tax liability at the close of the taxable year, it has two options: (1) to be refunded or issued a TCC, or (2) to carry over such overpayment to the succeeding taxable quarters to be applied as tax credit against income tax due.

The carry-over option, once taken, becomes irrevocable such that the taxpayer cannot later on change its mind to claim a cash refund or issuance of a TCC for the overpayment or excess income tax credit.

University Physicians Services Inc. – Management Inc. vs. CIR
Supreme Court (Third Division) G.R. No. 205955, promulgated 7 March 2018

Facts:

Petitioner University Physicians Services Inc. – Management Inc. (UPSI-MI) filed its Annual Income Tax Return (ITR) for the year ended 31 December 2006 and chose the option "To be issued a tax credit certificate" for its excess creditable taxes of P5.1 million.

UPSI-MI changed its taxable period from calendar to fiscal year, and filed an Annual ITR for the short period ended 31 March 2007, where it declared the 2006 excess creditable taxes as "Prior Year's Excess Credit." On the same day, UPSI-MI filed an amended Annual ITR for the short period ended 31 March 2007, where it removed P2.9 million of the excess creditable taxes from "Prior Year's Excess Credit," which represented creditable withholding taxes (CWTs) for the fourth quarter of 2006.

UPSI-MI then filed a claim for refund and/or issuance of a Tax Credit Certificate (TCC) with the BIR of this P2.9 million unutilized 2006 CWTs. As the BIR did not act on the claim, UPSI-MI filed a Petition for Review with the Court of Tax Appeals (CTA).

The court denied the claim and ruled that UPSI-MI's inclusion of the 2006 CWTs in its 2007 original ITR as Prior Year's Excess Credit, although allegedly inadvertent, showed that it carried over the amount to the succeeding taxable period. The CTA explained that the amendment of the 2007 ITR cannot undo UPSI-MI's actual exercise of the carry-over option in the original 2007 ITR. As UPSI-MI exercised the carry-over option under Section 76 of the National Internal Revenue Code (NIRC) of 1997, it is barred from claiming a refund of its 2006 CWTs.

Issue:

Is UPSI-MI entitled to the refund of its 2006 CWTs?

Ruling:

No, UPSI-MI is not entitled to the refund.

Under Section 76 of the NIRC, there are two options available to the corporation whenever it overpays its income tax for the taxable year: (1) to carry over and apply the overpayment as tax credit against the estimated quarterly income tax liabilities of the succeeding taxable year until fully utilized; and (2) to apply for a cash refund or issuance of a TCC within the prescribed period.

Once a taxpayer opts to carry over its excess creditable tax, it may not subsequently elect a refund or issuance of TCC, as the carry-over option is irrevocable.

The rationale of the rule is to avoid confusion and complication that could be brought about by the flip-flopping of options. It addresses the situation whereby a taxpayer, after claiming a cash refund or applying for the issuance of a TCC, and during the pendency of such claim or application, carries over the same excess creditable taxes and applies it against the income tax liabilities of the succeeding year. The rule not only eases tax administration but also obviates double recovery of the excess creditable tax.

The irrevocability rule is limited to the option of carry-over. Hence, if a taxpayer opted for a refund, it may subsequently change its choice to a carry-over of the excess creditable taxes in the following taxable year. But once it shifts to a carry-over, it may no longer revert to its original choice of refund due to the irrevocability rule.

Despite its initial option in the 2006 Annual ITR to refund its 2006 excess CWTs, UPSI-MI subsequently carried over the 2006 excess CWTs to the following period, as indicated in its 2007 short-period ITR. UPSI-MI constructively chose the option of carry-over, and thus, the irrevocability rule forbade it to revert to its initial choice.

It does not matter that UPSI-MI had not actually benefited from the carry-over on the ground that it did not have a tax due in its 2007 short period ITR. It may neither insist that the insertion of the carry-over in the 2007 ITR was by mere mistake or inadvertence as the irrevocability rule admits no qualifications or conditions.

UPSI-MI, however, remains entitled to the benefit of carry-over and, thus, may apply the 2006 overpaid income tax as tax credit in succeeding taxable years until fully exhausted. This is because, unlike the remedy of refund or TCC, the option of carry-over under Section 76 is not subject to any prescriptive period.

About SGV & Co.
SGV is the largest professional services firm in the Philippines that provides assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities. SGV & Co. is a member firm of Ernst & Young Global Limited.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients.

For more information about our organization, please visit www.ey.com/PH.

© 2018 SyCip Gorres Velayo & Co.
All Rights Reserved.
APAC No. 10000339
Expiry date: no expiry

SGV & Co. maintains offices in Makati, Cebu, Davao, Bacolod, Cagayan de Oro, Baguio, General Santos and Cavite.

For an electronic copy of the Tax Bulletin or for further information about Tax Services, please visit our website
www.ey.com/ph

We welcome your comments, ideas and questions. Please contact
Victor C. De Dios via e-mail at
victor.c.de.dios@ph.ey.com or at telephone number 8910307 loc. 7929 and
Reynante M. Marcelo via e-mail at
reynante.m.marcelo@ph.ey.com or at telephone number 894-8335 loc. 8335.

This publication contains information in summary form and is therefore intended for general guidance only. It is not intended to be a substitute for detailed research or the exercise of professional judgment. Neither SGV & Co. nor any other member of the global Ernst & Young organization can accept any responsibility for loss occasioned to any person acting or refraining from action as a result of any material in this publication. On any specific matter, reference should be made to the appropriate advisor.