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Highlights

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- The sale, importation or lease of passenger or cargo vessels and aircraft, including engine, equipment and spare parts thereof, for domestic or international transport operations is exempt from VAT. **(Page 4)**

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- RMC No. 75-2018 circularizes the salient points of the Supreme Court decision in the case of Medicard Philippines vs. Commissioner of Internal Revenue (G. R. No. 222743 dated 5 April 2017) on the mandatory statutory requirement of a Letter of Authority (LOA) for the validity of a tax assessment. **(Page 7)**

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Court Decisions

- Every form of compensation for services, whether paid in cash or in kind, is generally subject to income tax, and consequently, to withholding tax. The name designated to the compensation income is immaterial.

  Thus, salaries, wages, emoluments, and honoraria, allowances, commissions, fees (including director's fees, if the director is, at the same time, an employee of the employer or the corporation), bonuses, fringe benefits (except those subject to the fringe benefits tax under the Tax Code), pensions, retirement pay, and other income of a similar nature, constitute compensation income that are taxable and subject to withholding tax. **(Page 19)**

- A tax evasion case filed by the government against an erring taxpayer has, for its purpose, the imposition of criminal liability. On the other hand, a taxpayer's Petition for Review to question a deficiency tax assessment is intended to prevent it from becoming final and executory. Acquittal of the taxpayer in the criminal case will not result in the dismissal of the Petition for Review, which is not deemed instituted with the criminal case for tax evasion.

  What is deemed instituted with the criminal action is only the action to recover civil liability arising from the crime. Civil liability arising from a different source of obligation, such as when the obligation is created by law, is not deemed instituted with the criminal action. **(Page 21)**

- The 3-year prescriptive period may be extended, if a waiver was duly executed before its expiration. **(Page 23)**

- Financial or Technical Assistance Agreement (FTAA) contractors are liable to pay VAT on imported goods and services and customs duties and fees on imported products only after their recovery period. **(Page 24)**

- A "Build-To-Own" or "Build-Your-Own" scheme is not a sale of real property that is subject to Expanded Withholding Tax (EWT) and Documentary Stamp Tax (DST). **(Page 26)**

BIR Rulings

BIR Ruling No. 1168-2018 dated 6 September 2018

The gross receipts of non-bank financial intermediaries are subject to GRT and not to VAT.

Facts:

X Co., a domestic corporation, is a BSP-supervised non-bank financial institution. It is primarily engaged in the operation of an investment house where it earns income from interests, commissions and discounts. X Co. sought a confirmation from the BIR that its gross receipts are subject to GRT and not to VAT.

Issue:

Is X Co. subject to Gross Receipts Tax (GRT)?

Ruling:

Yes. X Co., being a non-bank financial intermediary, is subject to GRT under Section 122 of the Tax Code. It is not subject to VAT pursuant to Section 109 (1) (V) of the Tax Code, which exempts from VAT the services of non-bank financial intermediaries, among others,

BIR Ruling No. 1169-2018 dated 7 September 2018

The sale, importation or lease of passenger or cargo vessels and aircraft, including engine, equipment and spare parts thereof, for domestic or international transport operations is exempt from VAT.

Facts:

ABC Co. is a domestic corporation and a licensed aircraft operator authorized to perform commercial air operations. It imported 3 aircraft for use in its Domestic Non-Scheduled and International Non-Scheduled Air Transportation Services.

Issue:

Is the importation of the aircraft subject to VAT?

Ruling:

No. Section 109 (1) (T) of the Tax Code and Section 4.109 (B) (1) (t) of RR No. 16-2005, as amended, provides that the sale, importation or lease of passenger or cargo vessels and aircraft, including engine, equipment and spare parts thereof, for domestic or international transport operations shall be exempt from VAT.

BIR Issuances

RR No. 21-2018 issued on 14 September 2018

RR No. 21-2018 implements the amendments introduced by the TRAIN Law on the imposition of interest under Section 249 of the Tax Code.

- Interest at double the effective legal interest rate for loans or forbearance of money in the absence of an express stipulation as set by the Bangko Sentral ng Pilipinas (BSP) shall be assessed and collected on any unpaid amount of tax from the date prescribed for payment until the amount is fully paid.

    1. Pursuant to BSP Memorandum No. 799, Series of 2013, the interest rate for loans or forbearance of money in the absence of an express stipulation is 6%.

    2. Thus, the rate of legal interest imposable under Section 249 shall be 12%.

3. A Circular shall be issued by the Commissioner in case the BSP prescribes a new rate of interest.

- Upon the effectivity of the TRAIN Law, deficiency and delinquency interests shall, in no case, be imposed simultaneously.

  1. Deficiency interest shall be imposed on any deficiency tax due, from the date prescribed for its payment until full payment or upon issuance of a notice and demand by the Commissioner or his authorized representative, whichever comes first.

  2. Delinquency interest shall be imposed on the failure to pay:

     - The amount of the tax due on any return to be filed;
     - The amount of the tax due for which no return is required; or
     - A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner or his authorized representative until the amount is fully paid, which interest shall form part of the tax.

- For tax liabilities that became due before the effectivity of the TRAIN Law on 1 January 2018, but were fully paid after the said effectivity date, the interest rates shall be applied as follows:

Period	Applicable Interest Type and Rate
For the period up to 31 December 2017	Deficiency and/or delinquency interest at 20%
For the period 1 January 2018 until full payment of the tax liability	Deficiency and/or delinquency interest at 12%

  1. Between the date prescribed for payment until 31 December 2017, the double imposition of both deficiency and delinquency interest under Section 249 of the Tax Code prior to its amendment will still be allowed.

- These regulations are effective beginning 1 January 2018, the effectivity date of the TRAIN Law.

(Editor's Note: RR No. 21-2018 was published in the Manila Bulletin *on 17 September 2018)*

RMC No. 72-2018 reiterates and supplements the existing policies relative to the validation of sales generated from POS, CRM, SPM, Other Sales Receipting System Software, Receipting and Invoicing of CAS, including online sales transactions and from manual invoices, receipts and supplemental commercial documents.

RMC No. 72-2018 issued on 30 August 2018

- The Post Evaluation of Point of Sale (POS), Cash Register Machine (CRM), Special Purpose Machine (SPM), other sales receipting system software, including receipting or invoicing of Computerized Accounting System (CAS), may be conducted simultaneously with other enforcement activities, such as Tax Compliance Verification Drive (TCVD), surveillance, inventory stocktaking and audit or investigation.

- The inventory of all POS, CRM, SPM and other receipting machine or software, whether used for issuance of invoices or for internal control purposes, shall be taken, matched and reconciled with the list from the BIR database.

- Within 5 days from receipt of a Letter Notice on any unmatched or unaccounted machine, the taxpayer shall reconcile and explain in writing the discrepancy and account for the unmatched POS/CRM/SPM and other receipting machine or software.

- The Service Provider/Supplier/Contractor/Developer of machine, software or systems subjected to Post Evaluation shall assist in the extraction of sales data and/or Z-reading as required by the BIR or the taxpayer.

- Sales data shall be validated and extracted from all sources, such as but not limited to, the following:

    1. CRM/POS/other sales receipting software and CAS, consisting of Z-reading, e-Journal, back-end reports from the stand-alone system, server, middleware or consolidator depending on the system or software set-up.

    2. Sales from online transactions, unmanned bill, coin or token operated machines, unregistered machines used to record sales transactions and defective or damaged machines, which were not reported or with pending application for cancellation with the concerned LTS-Office, Division, LTDO or RDO.

    3. Sales book, accounting records and manual invoices or receipts, including unregistered or expired receipts, invoices or records, if any.

    4. All SPMs used for supplementary invoicing or receipting, such as collection and acknowledgement receipt or bills payment, without corresponding principal invoice or receipt.

- A *Subpoena Duces Tecum* (SDT) shall be issued to compel submission and presentation of documents and machines not yet available after the required compliance date.

- Failure to comply with the SDT shall warrant the use of "Best Evidence Obtainable Rule" for unregistered, unaccounted, missing, lost sales machines or manual receipts or invoices and simultaneously, the referral of the SDT to the Prosecution or Legal Division for filing of a criminal case on failure to obey *subpoena*.

RMC No. 73-2018 circularizes the availability of the new BIR Form Nos. 0619-E [Monthly Remittance Form of Creditable Income Taxes Withheld (Expanded)] and 0619-F (Monthly Remittance Form of Final Income Taxes Withheld), both January 2018 version.

RMC No. 73-2018 issued on 31 August 2018

- The following new BIR forms shall be used by the withholding agent in remitting the withholding tax of the first 2 months of every calendar quarter:

    1. BIR Form No. 0619-E - Monthly Remittance Form for Creditable Income Taxes Withheld (Expanded)

    2. BIR Form No. 0619-F – Monthly Remittance Form of Final Income Taxes Withheld

- Taxpayers shall file their respective remittance forms on the following due dates:

    1. Non-eFPS taxpayers – within 10th day of the following month in which withholding was made

    2. eFPS taxpayers – within the 15th day of the following month, depending on the industry grouping as prescribed under Revenue Regulation (RR) No. 26-2002

- The taxpayer shall file and/or pay through the following modes:

    1. Manual Return

    2. Electronic Bureau of Internal Revenue Forms (eBIRForms)

    3. Electronic Filing and Payment System (eFPS)

- The new BIR Form Nos. 0619-E and 0619-F are already available under:

    1. BIR Forms – Payment/Remittance Forms section of the BIR website (manual filers)

    2. Offline eBIRForms Package v7.1 (eBIRForms filers)

    3. eFPS system (eFPS filers)

- Manual filers and eBIRForms filers can choose between manual or online payment/remittance of the withholding tax due.

    1. Manual Payment/Remittance:

        - Over-the-counter of the Authorized Agent Bank (AAB) located within the territorial jurisdiction of the Revenue District Office (RDO) where the taxpayer is registered.

        - In places where there are no AABs, the return shall be filed and the tax due shall be paid with the concerned Revenue Collection Officer (RCO), through the mobile revenue collection officers system (MRCOS) facility, under the jurisdiction of the RDO.

    2. Online Payment/Remittance:

        - Through GCash Mobile Payment

        - Landbank of the Philippines (LBP) Linkbiz Portal, for taxpayers who have ATM accounts with LBP and/or holders of Bancnet ATM/ Debit Card

        - Development Bank of the Philippines (DBP) Tax Online, for holders of VISA/ Master Credit Card and/or Bancnet ATM/ Debit

- If the manual filer has no withholding tax due for the month, the taxpayer is still required to file and follow the existing procedure for "No Payment", which is to file through the use of eBIRForms.

RMC No. 75-2018 circularizes the salient points of the Supreme Court decision in the case of Medicard Philippines vs. Commissioner of Internal Revenue (G. R. No. 222743 dated 5 April 2017) on the mandatory statutory requirement of a LOA for the validity of a tax assessment.

RMC No. 75-2018 issued on 5 September 2018

In the case of *Medicard Philippines, Inc. vs. Commissioner of Internal Revenue (G.R. No. 222743, 5 April 2017)*, the Supreme Court held as follows:

- No tax assessments can be issued or no assessment functions or proceedings can be done without prior approval and authorization of the Commissioner of Internal Revenue (CIR) or his duly authorized representative through a Letter of Authority (LOA).

- As such, any tax assessment without an LOA violates the taxpayer's right to due process and is, therefore, "inescapably void."

- The circumstances provided under Section 6 of the Tax Code where the taxpayer may be assessed through best evidence obtainable, inventory-taking, or surveillance, among others, have nothing to do with an LOA since these are only methods of examining the taxpayer to arrive at the correct amount of taxes.

- A Letter Notice (LN) is different from an LOA. An LN is issued to notify the taxpayer of an audit while an LOA is the authority to conduct an audit or examination of the taxpayer leading to the issuance of deficiency assessments. Thus, after the LN has been served, the revenue officer should secure an LOA before proceeding with further examination and assessment of the taxpayer.

RMC No. 78-2018 provides guidelines on the registration of Philippine Offshore Gaming Operators and their accredited service providers.

RMC No. 78-2018 issued on 7 September 2018

- All operators, whether Philippine-based or foreign-based, including those who possess an Offshore Gaming License issued by PAGCOR, are required to register with the BIR upon the occurrence of any of the following events, whichever comes first:

    1. Commencement of business;

    2. Payment of any tax due; or

    3. Filing of any applicable tax return, statement or declaration as required by the Tax Code.

- Commencement of business shall be reckoned from the day when the first sale transaction occurred or within 30 calendar days from the issuance of Mayor's Permit/ Professional Tax Receipt (PTR) by the local government unit (LGU), or Certificate of Registration issued by the SEC, whichever comes earlier.

- An Offshore Gaming License is an authority granted by PAGCOR to Philippine Offshore Gaming Operators (POGO) for the establishment, maintenance and the conduct of offshore gaming operations in a specific site within the jurisdiction of PAGCOR.

- All Philippine-based and foreign-based operators, including service providers, shall register in the Revenue District Office (RDO) having jurisdiction over the place where the Head Office and/or branch or POGO Hub is located. The following are the documentary requirements for registration of non-individuals:

    1. BIR Form No. 1903

    2. SEC Certificate of Incorporation or SEC Certificate of Recording (in case of partnership) or SEC License to Do Business in the Philippines (in the case of foreign corporations):

        - In lieu of the SEC License to Do Business registration, the following may be submitted by a foreign-based operator who is not required to be registered with the SEC:

a. Consularized Certificate of Incorporation issued by the proper authority in any foreign country and/or consularized Articles of Incorporation (AOI) or its equivalent fact of establishment, creation or organization, showing its address and that gaming is one of its business purposes.

b. Certification from the Philippine SEC that the foreign corporation is or not registered to engage in business in the Philippines.

- AOI or Articles of Partnership (AOP)
- Mayor's Business Permit or duly received application for Mayor's Business Permit, if the former is still in process with the LGU
- Proof of payment of Registration Fee (RF)
- BIR Form No. 1906
- Final and clear sample of principal receipts/ invoices

3. In addition, the following documentary requirements must be submitted, if applicable:
   - Appointment letter of the Local Gaming Agent
   - Special Power of Attorney (SPA) and ID

- The Local Gaming Agent shall register in the RDO having jurisdiction over the place where the head office and/or branch is situated.

1. Below is the list of documentary requirements for registration:

Individual	Non-Individual
▸ BIR Form No. 1901 and 1906	▸ BIR Form No. 1903 and 1906
▸ Any ID issued by an authorized government body (e.g., Birth Certificate, Passport, Driver's License, Community Tax Certificate) that shows the name, address and birthdate of the applicant	▸ Photocopy of SEC Certificate of Incorporation or SEC Certificate of Recording (in case of partnership) or SEC License to Do Business in the Philippines (in case of foreign corporation)
▸ Photocopy of Mayor's Business Permit or duly received application for Mayor's Business Permit if the former is still in process with the LGU and/ or Professional Tax Receipt/ Occupational Tax Receipt issued by the LGU	▸ Photocopy of Mayor's Business Permit or duly received application for Mayor's Business Permit if former is still in process with the LGU
▸ Proof of Payment of RF if with existing TIN or if applicable after TIN issuance	▸ Proof of payment of RF
▸ Final and clear sample of principal receipts/invoices	
	▸ AOI or AOP

2. In addition, the Board Resolution indicating the name of the authorized representative and the Secretary's Certificate or SPA and ID of the authorized person, in the case of the authorized representative who will transact with the BIR, must be submitted, if applicable.

- The Books of Accounts of Operators, Service Providers and Local Gaming Agents must be registered within 30 days from the date of its registration.

- All existing POGO Licensees prior to the issuance of this Circular shall register with the RDO having jurisdiction over the place where the Head Office and/ or branch or POGO Hub is located and submit the following documentary requirements:

    1. BIR Form No. 1903;

    2. Copy of AOI/ AOP or Certificate of Incorporation issued by the proper authority in any foreign country;

    3. Proof of Payment of RF;

    4. BIR Form No. 1906;

    5. Final and clear sample of principal receipts/ invoices; and

    6. SPA and ID of authorized person, in the case of an authorized representative who will transact with the BIR.

- In case of the transfer of the registered address to a new location, the POGO Licensee or its Local Gaming Agent must inform the RDO where it is registered of such fact by fling the prescribed BIR Form specifying the complete address where it intends to transfer.

Customs Updates

CMC No. 176-2018 provides for the Temporary Lifting of the SSD on Onions covered by Tariff Heading 0703.10.19.

Customs Memorandum Circular (CMC) No. 176-2018 dated 31 August 2018

- With reference to the letter request dated 23 August 2018 from Secretary Emmanuel F. Piñol, Department of Agriculture, the Commissioner of Customs temporarily lifted the imposition of the Special Safeguard Duty (SSD) on onions to cushion the impact of rising prices and mitigate the impact of soaring inflation.

(Editor's Note: CMC No. 176-2018 was signed by the Commissioner of Customs on 3 September 2018)

CMO No. 13-2018 provides for the Decentralization of the MISTG Non- IT Functions.

Customs Memorandum Order (CMO) No. 13-2018 dated 4 September 2018

- The objective of this CMO is to promote efficiency in the accreditation and Client Profile Registration System (CPRS) activation process and strengthen accountability by allowing Management Information System and Technology Group (MISTG) to concentrate on its IT role in the Bureau of Customs (BOC) by transferring non-IT functions currently being performed by MISTG to other authorized groups/agencies whose primary roles are more aligned with such functions.

- The responsibility for activation in the electronic to mobile (E2M) – CPRS shall be done by the respective authorized group as outlined below:

STAKEHOLDERS	ACCREDITING AGENCY	CPRS ACTIVATION
Importers/Brokers	BOC	Account Management Office (AMO)
Super Green Lane (SGL) Importers	BOC	Assessment and Operations Coordinating Group (AOCG) SGL Committee
Once a year Importers/ Exporters	BOC	District Collectors Office
Value Added Service Provider	BOC	AOCG
Airlines	Civil Aeronautics Board	AMO
Arrastre Operators	Philippine Ports Authority	AOCG
Customs Bonded Warehouses	BOC	AOCG
Customs Facilities and Warehouses	BOC	AOCG
Shipping Lines	Maritime Industry Authority	AMO
Exporters Registered with Investment Promotions Agencies	Board of Investments	
Philippine Economic Zone Authority		
Clark Development Corporation		
Subic Bay Metropolitan Authority		
Cagayan Special Economic Zone Authority		
Zamboanga City Special Economic Zone Authority		
Tourism Infrastructure and Enterprise Zone Authority	AMO	
Other Exporters	Philippine Exporters Confederation, Inc.	AMO
Surety Companies	BOC	Revenue Collection Monitoring Group (RCMG) - Collection Service
Authorized Agent Banks	Bankers Association of the Philippines	AOCG

- The activation of Authority to Release Imported Goods (ATRIG) to specific Tariff Codes shall be the AOCG's responsibility.

- This CMO shall take effect 15 days after its complete publication in the Official Gazette or a newspaper of general circulation.

(Editor's Note: CMO No. 13-2018 was published in the Manila Times *on 6 September 2018)*

CMO No. 14-2018 provides for the Guidelines on the Implementation of the FTA between the EFTA States and the Philippines.

CMO No. 14-2018 dated 17 September 2018

- Executive Order (EO) No. 61 dated 2 August 2018 was issued by the President of the Philippines and became effective immediately after its complete publication on 10 August 2018 in order to modify import duties, including necessary changes in classification and other import restrictions as are required or appropriate to carry out and promote the Philippines-European Free Trade Association Free Trade Agreement (PH-EFTA FTA).

- This CMO was issued to facilitate the processing of importations and exportations of goods coming to and from the Party under PH-EFTA FTA, to provide the procedure for granting preferential treatment on goods covered by an Origin Declaration, and to establish appropriate mechanisms in accrediting exporters/producers/ manufacturers as an "Approved Exporter."

- General Provisions

    1. "Origin Declaration (OD)" refers to the proof of origin required under the PH-EFTA FTA in the form of a declaration sufficient to ascertain the originating status of the goods. The declaration must be completed on an invoice, packing list, delivery note or any other relevant commercial document that identifies the exporter and the originating goods.

    2. Exporters and their representatives shall be allowed to make an OD as Proof of Origin.

    3. Importers sourcing from EFTA States shall be allowed to claim preferential tariff treatment to originating goods on the basis of the OD.

    4. An "Approved Exporter (AE)" refers to a producer, manufacturer, or trader authorized by the respective customs authority of the Parties (the Philippines, Iceland, Norway or the customs territory of Switzerland) to complete the OD without signature after complying with the requirements of the CMO.

    5. An AE is not required to sign the OD but must indicate its Customs Authorization Number (CAN). A non-AE must affix the signature above the printed name of its authorized signatory and leave the field on CAN blank.

- Operational Provisions

    1. Producers, manufacturers, or traders may submit, in writing or electronically, to the Deputy Commissioner of AOCG, through the Export Coordination Division (ECD), its intention to be accredited as an AE, together with the other required documents.

2. Exporters may opt not to apply with the BOC as an AE. However, the OD must indicate the complete name and bear the original signatures of its signatory. A non-AE may have a higher risk of retro-verification compared to an AE.

3. For shipments availing of the preferential tariff treatment under the PH-EFTA FTA, the existing customs import procedures shall still apply, except that the import documents must be accompanied by an OD which must be presented prior to the release of the goods.

4. If an importer is not in possession of an OD at the time of importation, the importer may present it at a later stage subject to the rules on tentative release of goods. An OD must be submitted to the BOC within 12 months from its completion.

5. For importation by installments, only one OD is required which must be submitted upon the importation of the first installment.

6. The BOC shall carry out the verifications of ODs upon the request of customs authorities of importing EFTA parties. In relation to this, importers and exporters benefitting from the PH-EFTA FTA must cooperate with the BOC, in accordance with their obligations enumerated in the CMO.

7. The ECD shall conduct an audit and evaluation of the exporter's premises and shall make the necessary communication to the EFTA Secretariat about the results of its origin verification within 6 months from the date of the verification request.

8. Penalties: If proven to have committed fraud in compliance with the CMO:

    - Importers shall not be allowed to avail of the preferential tariff rates.

    - Exporters shall be suspended as an AE.

    Imposition of the above penalties shall be without prejudice to possible filing of criminal cases under the applicable provisions of the Customs Modernization and Tariff Act (CMTA) and the Revised Penal Code.

- This CMO shall take effect immediately.

(Editor's Note: CMO No. 14-2018 was received by the UP Law Center on 21 September 2018)

SEC Issuances and Opinion

SEC MC No. 11 provides for the rules governing the administration of the Philippine Peso-Denominated GS Benchmarks.

SEC Memorandum Circular No. 11 series of 2018 dated 31 August 2018

In line with the policy of the State to promote the development of the capital market and protection of the investors, the SEC issues rules to govern Philippine-Peso Government Securities (GS) with the following key features:

- Rules apply to a legal person who intends to generate an index in relation to government securities and which will obtain license to perform GS Benchmark Administration.

- A legal person should apply for an Administrator license to administer the GS Benchmark;
- Continuing Reporting Requirements: Administrators are required to report to the SEC any disruption, business continuity activation, or any other event that could affect the integrity of the benchmark determination process;
- Notification Requirement: Administrators are required to report suspected market manipulation of the benchmark;
- Administrators are primarily responsible for all aspects of the benchmark determination process and are required to disclose any existing or potential conflicts of interest;
- The data on which the benchmark is constructed should have been based on sufficient and reliably representative interest measured by the benchmark;
- The methodology should be documented and published; it should provide sufficient detail to allow stakeholders to understand how the benchmark is derived;
- There should be appropriate internal controls over data collected from external sources; and
- The Administrator is required to establish a complaints procedure, appoint an audit and compliance reviewer and maintain an audit trail.

(Editor's Note: Published in the Manila Bulletin *& the* Manila Times *on 31 August 2018)*

SEC MC No. 12 provides the guidelines on the issuance of green bonds under the ASEAN Green Bonds Standards in the Philippines.

SEC Memorandum Circular No. 12 series of 2018 dated 22 August 2018

In recognition of the importance of green finance and the increasing demand for green investments, the Philippines adopts the ASEAN Green Bonds Standards summarized as follows:

- ASEAN Green Bonds can only be issued by a corporation incorporated in the ASEAN or the green project is in an ASEAN country.
- ASEAN Green Bonds issuance must originate from an ASEAN member country.
- The proceeds of ASEAN Green Bonds must be exclusively applied to finance or refinance existing eligible Green Projects.
- To be eligible, a designated green project must have clear environmental benefits that have been assessed and quantified.

(Editor's Note: Published in the Manila Bulletin *and the* Manila Standard *on 11 September 2018)*

The nationality requirement for an investment house refers only to the stocks entitled to vote.

SEC-OGC Opinion No. 18-17 dated 5 September 2018

Facts:

On 22 May 2013, the SEC released Memorandum Circular No. 08-13 or the Guidelines on Compliance with the Filipino-Foreign Ownership Requirements in the Constitution and/or Corporations Engaged in Nationalized and/or Partly Nationalized Activities.

U Co., an investment house, has the following ownership structure:

100% of the preferred non-voting shares of UBS Philippines - held by UBS AG, a Swiss national.
40% of common voting shares - Filipino
60% of common voting shares - Foreign

Issues:

Whether an investment house is covered under MC No. 08-13 and whether there is a need to revise or amend the current ownership structure of UBS Philippines pursuant to MC No. 08-13.

Ruling:

No, U Co. need not revise or amend its current ownership structure pursuant to MC No. 08-13.

Sec. 2 of MC No. 08-13 excludes from its coverage corporations covered by special laws. MC No. 08-13 specifically identified the Lending Company Regulation Act of 2000 and the Financing Company Act of 1998, and the Investment Houses Law.

Under the Investment Houses Law, at least 40% of the voting stock of an investment house shall be owned by citizens of the Philippines. In determining compliance with the nationality requirement, the basis is only the voting stock and not the two-tiered test mentioned in MC No. 08-13 (i.e. the total number of outstanding shares of stock entitled to vote in the election of directors and the total number of outstanding shares of stock, whether or not entitled to vote).

BSP Issuances

Circular No. 1012 provides for Revised Rules of Procedure on Administrative Cases involving Directors and Officers of BSP-Supervised Financial Institutions.

BSP Circular No. 1012 dated 12 September 2018

- The following Revised Rules of Procedure on Administrative Cases Involving Directors and Officers of BSP-Supervised Financial Institutions (the Rules) were approved by the Monetary Board pursuant to Section 37 of Republic Act No. 7653 (*The New Central Bank Act*), and Sections 16 and 66 of Republic Act No. 8791 (*The General Banking Law of 2000*).

- Section 1 of Rule I on title provides that the Rules shall be known as the Bangko Sentral ng Pilipinas (BSP) Revised Rules of Procedure on Administrative Cases Involving Directors and Officers of BSP – Supervised Financial Institutions.

- Section 2 of Rule I on applicability provides that the Rules shall apply to administrative cases filed with the Office of Special Investigation (OSI), BSP, involving directors and officers of BSP-supervised financial institutions, and administrative cases arising out of the fact-finding investigations conducted by the OSI. The Rules shall not apply to complaints against BSP-supervised financial institutions (as a juridical entity), and supervisory and enforcement actions.

- Section 3 of Rule I provides that the proceedings under the Rules shall be summary in nature and that the pertinent provisions of the Rules of Court may be applied suppletorily.

- Section 4 of Rule I on appearance of counsel provides that parties may be assisted or represented by counsel.

- Section 5 of Rule I on confidentiality of proceedings provides that the proceedings under the Rules shall be confidential, except to the extent as may be provided under existing laws.

- Section 6 of Rule II provides that the terms in the Manual of Regulations are adopted in the Rules.

- Section 7 of Rule III on complaint provides that the same must be in writing, and subscribed and sworn to by the complainant. No anonymous complaint shall be entertained.

- Section 8 of Rule III provides that the complaint shall be filed with OSI.

- Section 9 of Rule III on contents of the complaint provides that the complaint shall contain the ultimate facts of the case, and shall include the items enumerated in this Section.

- Section 10 of Rule III on action on the complaint provides that when a complaint is sufficient in form and substance, OSI shall issue a notice requiring the respondent to file a sworn answer to the complaint. If otherwise, the OSI shall dismiss the complaint, without prejudice, or take such appropriate action as may be warranted.

- Section 11 on answer provides that within 10 days from the receipt of the notice to file an answer and a copy of the complaint, respondent shall submit a sworn answer, copy of which shall be furnished to the complainant. The failure of the respondent to file an answer within the prescribed period shall be considered as a waiver of the respondent's right to file the same, and the case shall be resolved based solely on the evidence presented by the complainant.

- Section 12 of Rule III on prohibited pleadings and motions enumerates the following prohibited pleadings and motions, namely, Motion to dismiss (except on the ground of lack of jurisdiction), Motion for bill of particulars, Motion for the issuance of subpoena *duces tecum* and/or *ad testificandum*, provisional remedies, modes of discovery, and similar reliefs, Dilatory motions, and Other pleadings or motions of a similar nature.

- Section 13 of Rule IV on modes of service provides that pleadings, motions, orders, or processes may be made by personal delivery, registered mail, courier, or other modes of service.

- Section 14 of Rule IV on other modes of service provides that service may also be made by electronic mail or other electronic form that provides a record of delivery.
- Section 15 of Rule V provides for completeness of service.
- Section 16 of Rule V on the acquisition of jurisdiction over the respondent provides that it is acquired once service of the notice to file answer and a copy of the complaint is completed.
- Rule VI of the Rules on proceedings before the hearing officer covers the submission of position papers, and comments, and the issuance of clarificatory orders.
- Rule VII of the Rules on resolution of the case covers the submission of report, issuance and finality of resolution, motion for reconsideration, and enforcement.
- Rule VIII of the Rules on appeal provides that an appeal from the resolution of the Monetary Board may be filed before the Court of Appeals within the period and in the manner provided under Rule 43 of the Rules of Court. The appeal shall not stay the enforcement of the resolution sought to be reviewed, unless the Court of Appeals shall direct otherwise upon such terms as it may deem just.
- Rule IX on miscellaneous provision covers the repeal, separability clause, effectivity, and transitory provision.

(Editor's Note: BSP Circular No. 1012, s. 2018 was published in The Philippine Star *on 18 September 2018)*

Circular No. 1013 provides for Amendments to the Rules Governing Prejudicial Acts, Practices, or Omissions of NSSLA.

BSP Circular No. 1013 dated 17 September 2018

- The following are the amendments to the provisions of the Manual of Regulations for Non-Bank Financial Institutions (MORNBFI) on the rules governing prejudicial acts, practices or omissions of Non-Stock Savings and Loan Associations (NSSLA).
- Item b (1) of Subsection 4184S.1 of the MORNBFI was amended to add a provision that a service fee is considered unreasonably high if the service fee rate exceeds 50% of the annual nominal interest rate charged on a loan.
- Item b (3) of Subsection 4184S.1 of the MORNBFI was amended to provide that non-disclosure to borrowers of borrowing costs shall be considered acts, practices, or omissions prejudicial to the interest of members.
- Item b (4) of Subsection 4184S.1 of the MORNBFI was amended to provide that adopting and implementing policies that are discriminatory (e.g. limiting capital contributions of members that has the effect of concentrating control to a particular family) shall be considered acts, practices, or omissions prejudicial to the interest of members. For this purpose, a family refers to the employee-member and/or retiree-member and their relatives up to second degree of consanguinity or affinity.

- Item b (5) of Subsection 4184S.1 of the MORNBFI was amended to provide that granting of unauthorized compensation to trustees and/or officers shall be considered acts, practices, or omissions prejudicial to the interest of members. For this purpose, compensation shall be considered unauthorized when not allowed in the By-Laws or not approved by authorized bodies such as the members in a general assembly or the Board of Trustees.

- Item b (6) of Subsection 4184S.1 of the MORNBFI was amended to provide that granting new or additional loans to borrowers who have insufficient paying capacity or poor credit history shall be considered acts, practices, or omissions prejudicial to the interest of members

- Item b (7) of Subsection 4184S.1 of the MORNBFI was amended to provide that collecting payments from members even after full payment of their loans, including failure to refund over-collections to members shall be considered acts, practices, or omissions prejudicial to the interest of members.

- Item b (8) of Subsection 4184S.1 of the MORNBFI was amended to provide that charging and/or paying material unauthorized disbursements, including expenses, or engaging in the practice of charging and/or paying unauthorized disbursements even if not material but when aggregated, result in material financial loss to the NSSLA shall be considered acts, practices, or omissions prejudicial to the interest of members.

- Item b (9) of Subsection 4184S.1 of the MORNBFI was amended to provide that allowing the use of NSSLA's properties or privileges without due compensation shall be considered acts, practices, or omissions prejudicial to the interest of members.

- Subsection 4184S.2 of the MORNBFI on enforcement actions was amended to provide, among others, that the Monetary Board may order the suspension or revocation of an NSSLA's license to operate as such if the prejudicial acts, practices, or omissions amount to willful violations. For this purpose, the act, practice, or omission is deemed willful if, despite a BSP directive to stop the said act, practice, or omission, the NSSLA and/or its trustees and/or officers continue to commit the same or related acts. The term "related acts" refer to specific acts which result in the same prejudicial act, practice or omission.

- This Circular shall take effect 15 days after its publication either in the Official Gazette or in a newspaper of general circulation.

(Editor's Note: BSP Circular No. 1013, s. 2018 was published in The Philippine Star *on 24 September 2018)*

Circular No. 1014 provides for the CRPP Facility.

BSP Circular No. 1014 dated 24 September 2018

- The following provisions were created in the Manual of Regulations for Banks (MORB) to provide for the revised guidelines for the Currency Rate Risk Protection Program (CRPP) Facility.

- Section 1603 of the MORB was added to provide for the CRPP Facility which is a non-deliverable USD/PHP forward contract (NDF) between the Bangko Sentral ng Pilipinas and a universal/commercial bank (the "Bank") in response to the request of bank clients desiring to hedge their eligible foreign currency obligations. Transactions under the CRPP facility are considered part of banks' Generally Authorized Derivatives Activities (GADA). Moreover, banks' exposures arising from NDF transactions under the CRPP facility shall not be included in

the computation of total gross NDF exposures for the purpose of determining compliance with the limit prescribed in Appendix 101. In addition, the market risk capital charge for the net open position for NDFs under this facility shall be calculated by applying the standard 125 percent multiplication factor instead of the 187.5 percent factor prescribed for other NDFs under Appendix 46.

- Subsection 1603.1 of the MORB was added to provide for the coverage that eligible obligations under the CRPP Facility are the *unhedged* foreign currency obligations in amounts of not less than US$50,000.00 that are current and outstanding as of the date of application. Past due foreign currency obligations are not eligible. The maximum tenor of the CRPP contract is 90 days. For this purpose, *unhedged obligations* shall refer to those without outstanding hedge either through forward contracts, options or matched foreign currency assets. Partially hedged foreign exchange obligations shall be evaluated on a case-to-case basis.

- Subsection 1603.2 – 1603.4 of the MORB was reserved

- Subsection 1603.5 of the MORB was added to provide for the BSP's supervisory enforcement actions. It states that the BSP reserves the right to deploy its range of supervisory tools to promote adherence to the requirements set forth in the guidelines and bring about timely corrective actions and compliance.

- The terms, conditions, and the reporting requirements of the CRPP Facility will be covered by a separate issuance on the implementing guidelines of the CRPP Facility.

- The Circular repeals Circular No. 470, as well as parts of other circulars inconsistent herewith.

- This Circular shall take effect 15 calendar days following its publication either in the Official Gazette or in a newspaper of general circulation in the Philippines.

(Editor's Note: No publication yet as of date)

Every form of compensation for services, whether paid in cash or in kind, is generally subject to income tax and consequently to withholding tax. The name designated to the compensation income is immaterial.

Thus, salaries, wages, emoluments, and honoraria, allowances, commissions, fees (including director's fees, if the director is, at the same time, an employee of the employer or the corporation), bonuses, fringe benefits (except those subject to the fringe benefits tax under the Tax Code), pensions, retirement pay, and other income of a similar nature, constitute compensation income that are taxable and subject to withholding tax.

Court Decisions

Consolidated Cases of Confederation for Unity, Recognition and Advancement of Government Employees et al. vs. Commissioner, Bureau of Internal Revenue, et al. and Judge Armando A. Yanga, in his personal capacity and in his capacity as President of the RTC Judges Association of Manila, et al. vs. Hon. Commissioner Kim S. Jacinto-Henares, in her capacity as Commissioner of the Bureau of Internal Revenue
Supreme Court (*En Banc*) G.R. Nos. 213446 and 213658, promulgated 3 July 2018

Facts:

On 20 June 2014, Respondent Commissioner of Internal Revenue (CIR) issued Revenue Memorandum Order (RMO) No. 23-2014 to clarify the responsibilities of the public sector to withhold taxes on its transactions as customer (on its purchases of goods and services) and as employer (on compensation paid to its officials and employees) under the Tax Code and special laws.

Petitioner-organizations and unions of employees from various government agencies questioned the constitutionality of the RMO and asked that paragraphs A, B C and D of Section III (enumeration of various benefits and allowances of government employees which are considered compensation subject to income tax), Sections IV (enumeration of non-taxable compensation income of public sector), VI (persons responsible for withholding) and VII (penalty for non-compliance by the named government officials of their obligation as withholding agents) be declared null, void and unconstitutional.

Petitioners alleged that the RMO classified as taxable compensation various allowances, bonuses, and compensation for services granted to government employees such as those in the legislative branch and judiciary, which are considered by law as non-taxable fringe and *de minimis* benefits.

Petitioners also allege that the imposition of withholding tax on these allowances, bonuses and benefits, which have been allotted by the Government to its employees free of tax for a long time, violates the prohibition on non-diminution of benefits under Article 100 of the Labor Code.

Issue:

Are the questioned provisions of RMO No. 23-2014 valid?

Ruling:

Section III (enumeration of various benefits and allowances of government employees which are considered compensation subject to income tax) and Section IV (enumeration of non-taxable compensation income of public sector) of RMO No. 23-2014 are valid and do not charge any new or additional tax.

The provisions simply reinforce the rule that every form of compensation for personal services received by all employees is deemed subject to income tax and, consequently, to withholding tax, unless specifically exempted or excluded by the Tax Code, and also the duty of the Government, as an employer, to withhold and remit the correct amount of withholding taxes due.

Under the Tax Code, every form of compensation for services, whether paid in cash or in kind, is generally subject to income tax and consequently to withholding tax. The name designated to the compensation income is immaterial. Thus, salaries, wages, emoluments, and honoraria, allowances, commissions, fees (including director's fees, if the director is, at the same time, an employee of the employer or the corporation), bonuses, fringe benefits (except those subject to the fringe benefits tax under Section 33 of the Tax Code), pensions, retirement pay, and other income of a similar nature, constitute compensation income that are taxable and subject to withholding.

The term employee "covers all employees, including officers and employees, whether elected or appointed, of the Government of the Philippines, or any political subdivision thereof or any agency or instrumentality" while an employer "embraces not only an individual and an organization engaged in trade or business, but also includes an organization exempt from income tax, such as charitable and religious organizations, clubs, social organizations and societies, as well as the Government of the Philippines, including its agencies, instrumentalities, and political subdivisions."

While Section III enumerates certain allowances which may be subject to withholding tax, it does not exclude the possibility that these allowance may fall under the exemptions in Section IV. Sections III and IV articulate in general and broad language the Tax Code provisions on the forms of compensation income deemed subject to withholding tax and those exempted from income tax.

Section VII (on penalties for non-compliance by the named government officials of their obligation to withhold) of RMO No. 23-2014 is valid while Section VI (persons responsible for withholding) contravenes, in part, the Tax Code provisions and its implementing rules.

Section VII does not define a crime and prescribe a penalty, but simply mirrors the relevant provisions of the Tax Code on penalties for failure of the withholding agent to withhold and remit correct amount of taxes.

However, with respect to Section VI, the CIR overstepped the boundaries of his authority to interpret provisions of the Tax Code.

The Government, or any of its political subdivisions or agencies, or any government-owned or – controlled corporation (GOCC), as an employer, is constituted by law as the withholding agent, mandated to deduct, withhold and remit the correct amount of taxes on the compensation income received by its employees.

The withholding tax regulations identify the Provincial Treasurer in provinces, the City Treasurer in cities, the Municipal Treasurer in municipalities, Barangay Treasurer in barangays, Treasurers of GOCCs, and the Chief Accountant or any person holding similar position and performing similar function in national government offices as persons required to deduct and withhold the appropriate taxes on the income payments made by the government.

Nowhere in the Tax Code or in the regulations would one find the Provincial Governor, Mayor, Barangay Captain and the Head of Government Office or the "Official holding the highest position" in an Agency or GOCC as one of the officials required to deduct, withhold and remit the correct amount of withholding taxes. Section VI of RMO No. 23-2014 is declared null and void insofar as it names these officers as persons required to withhold and remit taxes.

A tax evasion case filed by the government against an erring taxpayer has, for its purpose, the imposition of criminal liability. On the other hand, a taxpayer's Petition for Review to question a deficiency tax assessment is intended to prevent it from becoming final and executory. Acquittal of the taxpayer in the criminal case will not result in the dismissal of the Petition for Review, which is not deemed instituted with the criminal case for tax evasion.

What is deemed instituted with the criminal action is only the action to recover civil liability arising from the crime. Civil liability arising from a different source of obligation, such as when the obligation is created by law, is not deemed instituted with the criminal action.

Macario Lim Gaw, Jr. vs. Commissioner of Internal Revenue (CIR)
Supreme Court (First Division) G.R. No. 222837, promulgated 23 July 2018

Facts:

Macario Lim Gaw, Jr. sold 10 parcels of land for which he paid Capital Gains Tax (CGT) and Documentary Stamp Tax (DST). The BIR issued the corresponding Certificates Authorizing Registration and Tax Clearance Certificates.

Subsequently, the Commissioner of Internal Revenue (CIR) opined that Gaw was not liable for the 6% CGT but for the 32% regular income tax and 12% Value Added Tax (VAT) because the properties sold were ordinary, and not capital assets. The CIR found that Gaw misdeclared his income, misclassified the properties, and used multiple tax identification numbers to avoid being assessed the correct taxes.

The CIR issued a Letter of Authority to audit Gaw's tax account and also filed a Joint Complaint affidavit for tax evasion before the Department of Justice (DOJ).

The DOJ filed two criminal informations for tax evasion against Gaw. Halfway through trial, the CIR issued her Final Decision on Disputed Assessment (FDDA), assessing Gaw deficiency income tax and VAT for taxable years 2007 and 2008.

Gaw filed a Petition for Review with the Court of Tax Appeals (CTA) for the 2007 deficiency tax assessment.

For the 2008 deficiency tax assessment, which involved the same tax liabilities sought to be recovered in the pending criminal case, Gaw filed a motion with the CTA to clarify whether he has to file a separate petition to question the deficiency assessment.

The CTA held that the recovery of the civil liabilities was deemed instituted with the consolidated criminal cases, without prejudice to the right of Gaw to avail of whatever additional legal remedy he may have to prevent the 2008 FDDA from becoming final and executory. Gaw filed a Petition for Review *Ad Cautelam* (with a Motion for Consolidation with the CTA criminal cases) docketed as CTA Case No. 8503, upon which the clerk of court assessed zero filing fee.

The CTA acquitted Gaw in the criminal cases and directed the litigation of the civil aspect in the tax evasion case. The CIR asked for the dismissal of the petition in CTA Case No. 8503 because the CTA First Division lacked jurisdiction due to Gaw's non-payment of filing fees, which the CTA granted. Hence, Gaw appealed to the Supreme Court.

Issues:

1. Is the civil action to question the 2008 FDDA deemed instituted with the criminal case for tax evasion?

2. Is the CTA correct in dismissing the case for failure of Gaw to pay docket fees?

Rulings:

1. No, the civil action filed by Gaw to question the 2008 FDDA is not deemed instituted with the criminal case for tax evasion.

   What is deemed instituted with the criminal action is only the action to recover civil liability arising from the crime. Civil liability arising from a different source of obligation, such as when the obligation is created by law, is not deemed instituted with the criminal action.

   The taxpayer's obligation to pay the tax is an obligation created by law and does not arise from the offense of tax evasion and as such, the same is not deemed instituted in the criminal case.

   An acquittal in a criminal case cannot operate to discharge the taxpayer from the duty of paying the tax which the law requires to be paid since that duty is imposed by statute prior to, and independently of any attempt by the taxpayer to evade payment.

   While the tax evasion case is pending, the BIR is not precluded from issuing an FDDA, such as in the present case. To prevent the assessment from becoming final, executory and demandable, the law allows the taxpayer to file a Petition for Review with the CTA within 30 days from receipt of the decision or the inaction of the CIR.

The tax evasion case filed by the government against the erring taxpayer has, for its purpose, the imposition of criminal liability. On the other hand, the Petition for Review filed by Gaw was aimed to question the 2008 FDDA and to prevent it from becoming final. Hence, the Petition for Review *Ad Cautelam* is not deemed instituted with the criminal case for tax evasion.

2. No. The case should not have been dismissed by the CTA.

   While the court acquires jurisdiction over a case only upon the payment of the prescribed docket fees, its non-payment at the time of filing the initiatory pleading, the Petition for Review in this case, does not automatically cause its dismissal so long as the docket fees are paid within a reasonable period, and that the party had no intention to defraud.

   Gaw relied in good faith on the CTA's advice that he is no longer required to pay the docket fees. The CTA should have directed the clerk to assess the correct docket fees and ordered Gaw to pay the amount within a reasonable period.

   The issue on whether the transaction is one involving capital or ordinary assets should be properly resolved by the CTA since the Supreme Court is not a trier of facts. The case is returned to the CTA for further proceedings.

Commissioner of Internal Revenue vs. Coral Bay Nickel Corporation
CTA (*En Banc*) Case No. 1652 promulgated 14 August 2018

The 3-year prescriptive period may be extended, if a waiver was duly executed before its expiration.

Facts:

Petitioner CIR assessed Respondent Coral Bay Nickel Corporation (CBNC) for, among others, alleged deficiency final withholding tax (FWT) for 2007. CBNC protested the assessment. Upon the CIR's denial of its protest, CBNC filed Petition for Review with the CTA.

At the CTA, CBNC argued that the waiver is not valid. CBNC executed a waiver on 20 April 2010 extending the period to assess until 31 December 2010, which was accepted by the BIR on 30 April 2010. It executed a second waiver on 12 November 2010 and thereafter, 3 more waivers extending the period to assess until 31 December 2011, 31 October 2012 and 30 June 2013. All waivers were executed by CBNC's President.

CNBC argued that the CIR's right to assess the deficiency FWT for January to March 2007 had prescribed as it had only until 15 February 2010, 10 March 2010, and 16 April 2010 to assess for deficiency EWT for January to March 2007. It also insisted that a prior Tax Treaty Relief Application is not required to avail of the preferential rates under the applicable tax treaty, pursuant to the Supreme Court's ruling in *Deutsche Bank AG Manila Branch vs. CIR, GR 188550 promulgated on 19 August 2013*.

The BIR countered that its right to assess has not prescribed, alleging that CBNC filed a false or fraudulent FWT returns, justifying the application of the 10-year prescriptive period. It also argued that CBNC is estopped from questioning the validity of the waiver it voluntarily executed, citing the Supreme Court's decision in *CIR vs. Next Mobile, Inc., GR 212825 promulgated on 7 December 2015*. It likewise took the position that the period of limitation to assess and collect deficiency taxes under Section 203 of the NIRC only extends to assessment of all internal revenue taxes and not from assessment of penalties on a withholding agent for failure to remit the proper amount of taxes withheld.

The CTA Third Division cancelled and set aside the FDDA for deficiency FWT, prompting the CIR to elevate the case to the CTA *En Banc*.

Issues:

1. Has the right of the BIR to assess prescribed?

2. Does the period of limitation apply to withholding taxes?

3. Is CBNC liable to FWT?

Ruling:

1. Yes, the BIR's right to assess for deficiency FWT for January to March 2007 has prescribed. The 3-year prescriptive period may be extended if a waiver was duly executed before its expiration. The first waiver became effective only on 30 April 2010 when the waiver was accepted by the BIR. The last day to assess the deficiency FWT for March 2007 was on 16 April 2010.

   The "*in pari delicto*" principle in the *Next Mobile* case, where it was held that if both the BIR and the taxpayer are equally at fault in executing and accepting defective waivers then the taxpayer will bear the consequence of such deliberate act, is not applicable in this case. CBNC is not estopped from questioning the validity of the waiver as it was not remiss in asserting its right.

2. Yes. In a plethora of cases, the Supreme Court has consistently and uniformly applied the 3-year prescriptive period on the assessment of withholding taxes, without qualification or distinction.

   Since Section 203 of the NIRC applies to all internal revenue taxes and that no restriction or qualification is indicated as to its application on certain taxes, there is no basis not to apply the rule on prescription to withholding taxes.

3. No. CBNC correctly applied the preferential tax rates on its income payments to Japanese non-resident foreign corporations pursuant to the Philippines-Japan Tax Treaty. A prior application for tax treaty relief is not required before a taxpayer can avail of the preferential rates following the Deutsche Bank case.

FCF Minerals Corporation vs. Commissioner of Customs
CTA (*En Banc*) Case No. 1620 promulgated 14 August 2018

FTAA contractors are liable to pay VAT on imported goods and services and customs duties and fees on imported products only after their recovery period.

Facts:

Petitioner FCF Minerals Corporation (FMC) filed with Respondent Commissioner of Customs an application for refund of alleged erroneously paid Value-Added Tax (VAT) and customs duties and fees on its importation of capital equipment. FMC entered into a Financial or Technical Assistance Agreement (FTAA) with the government in September 2009 for the gold-molybdenum project in Nueva Vizcaya pursuant to Republic Act 7942 or the Philippine Mining Act.

FMC argued that it is not liable to pay VAT and customs duties and fees on imported capital equipment, citing RA 7942 which provides that the "government share" in the FTAAs of mining companies, which includes VAT and customs duties on

importation of capital goods, shall be collected only after the FTAA contractor has fully recovered its pre-operating expenses and exploration and development expenditures.

It also contended that Revenue Memorandum Circular 17-2013 which requires FTAA contractors to pay national taxes during and after their recovery period violates RA 7942.

Due to the COC's inaction on the refund application, FMC filed a Petition for Review at the CTA.

The CTA Third Division ruled that VAT on imported goods and services and customs duties and fees on imported products must be paid only after the recovery period. However, the Third Division held that FMC failed to establish that the taxes for refund were paid during its recovery period or that it has not yet recovered its pre-operating expenses.

Upon the denial of its Motion for Reconsideration, FMC filed a Petition for Review at the CTA *En Banc*.

Issue:

Is FMC entitled to refund the VAT and customs duties and fees paid during its recovery period?

Ruling:

Yes. The taxes and duties collected during the recovery period are eligible for refund. VAT on imported goods and services and customs duties and fees on imported products must be paid only after the recovery period, as provided under Department of Environment and Natural Resources (DENR) Administration Order (DAO) 2007-12.

The recovery period is for a maximum of 5 years or at a date when the aggregate of the net cash flows from the mining operations is equal to the aggregate of its pre-operating expenses, reckoned from the date of commencement of commercial production, whichever comes first.

Although the FTAA was signed in 2009, the Declaration of Mining Project Feasibility (DMPF) was approved only on 18 October 2011. The shipments that were erroneously subjected to VAT were made in 2013. It was only on 9 September 2016 or 5 years after the DMPF and 3 years after the shipments, that the Declaration of Commencement of Commercial Operations (DCCO) was filed by FMC. The CTA *En Banc* ruled that 9 September 2016 is not even the start of the recovery period as this was only the filing of the DCCO and not yet approved by the Regional Office.

The CTA *En Banc* held that with the submission of the DCCO, it was established that the period to collect taxes has not yet begun as commercial operations have not even started. The case was remanded to the CTA Third Division for further proceedings to determine and rule on the merits of the refund claim.

Commissioner of Internal Revenue vs. G & W Architects, Engineers & Project Development Consultants Co.
CTA (*En Banc*) Case No. 1449 promulgated 29 August 2018

A "Build-To-Own" or "Build-Your-Own" scheme is not a sale of real property that is subject to EWT and DST.

Facts:

Petitioner CIR assessed Respondent 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. As explained by the Division, G&W only earned fees for the management and construction of the units. As G&W had no complete control over the funds, no part of such funds can be considered as payment for the transfer of the condominium units from which the assessed EWT can be deducted.

The CTA *En Banc* subsequently 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.

G&W filed a Motion for Reconsideration of the decision of 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:

No. The transaction was for a sale of services to clients, not a sale of property. G&W merely earned professional fees equivalent to 4% of the construction funding. In the Amended Decision, the CTA *En Banc* held that the true intent of the parties is clearly expressed in the contracts and there is nothing to show that G&W would be the lawful owner of the condominium projects and the land on which these were built. G&W merely acts for and on behalf of its clients whenever it exercises its obligations as project manager, trustee and attorney-in-fact of its clients.

According to the CTA *En Banc*, it can be gathered that while all necessary contracts and/or documents arising out of or as a consequence of the construction of the project may have been executed by and in the name of G&W, the execution shall be understood to be for and on behalf of the clients.

Under Section 57 of the NIRC and Revenue Regulations 2-98, the withholding agent is responsible to file the return, withhold the tax and remit the same to the BIR. Since G&W is not a withholding agent, it cannot be held liable for the non-filing of the withholding taxes. Further, no evidence was presented to prove that the entire contract price was paid to G&W, if it is indeed the seller.

(Editor's Note: The CTA En Banc voted 4-4 with Presiding Justice Roman G. Del Rosario dissenting on the amended decision)

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