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Highlights

BIR Issuances

- Revenue Regulations (RR) No. 25-2018 implement the provisions of the TRAIN Law exempting the sale of drugs and medicines prescribed for diabetes, high-cholesterol and hypertension from VAT. **(Page 4)**

- Revenue Memorandum Circular (RMC) No. 98-2018 reiterates the mandate to use the eBIRForms by identified taxpayers and introduces additional filing and payment option through the services of Tax Software Providers (TSP). **(Page 4)**

- RMC No. 99-2018 further clarifies certain provisions of RR No. 17-2011, as amended, in relation to RMO No. 42-2016, implementing the "Personal Equity and Retirement Account (PERA)" Act of 2008. **(Page 4)**

- RMC No. 102-2018 further amends RMC No. 17-2018, specifically the deadline for the processing of pending VAT refund/credit claims filed prior to the effectivity of RMC No. 54-2014. **(Page 5)**

- RMC No. 105-2018 clarifies the payment of excise tax on domestic coal pursuant to the provisions of RR No. 1-2018, amending RR No. 13-94. **(Page 5)**

BOC updates

- This Memorandum provides for the Strict Implementation of the List of Expected Imports as a Documentary Requirement for Importer Accreditation. **(Page 6)**

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BOI Update

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SEC Issuances and Opinion

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BSP Issuances

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Court Decisions

- Business expenses should be substantiated with sufficient evidence such as official receipts or other adequate records. In the absence of official receipts, other adequate records presented must be specified and any inconsistency or difference must be reconciled. **(Page 20)**

- The immunity accorded to the company from availing of the tax amnesty program will not inure to the benefit of the individual owners. The corporation has a personality separate and distinct from its individual directors, officers, or owners. **(Page 21)**

- Forwarders may only be subject to tax on the commission and/or service fees they charge to clients for services actually rendered. **(Page 22)**

BIR Issuances

RR No. 25-2018 implements the provisions of the TRAIN Law exempting the sale of drugs and medicines prescribed for diabetes, high-cholesterol and hypertension from VAT.

RR No. 25-2018 issued on 27 December 2018

- The sale by manufacturers, distributors, wholesalers and retailers of drugs and medicines prescribed for the treatment and/or prevention of diabetes, high-cholesterol and hypertension shall be exempt from VAT starting 1 January 2019.
- The importation of these drugs and medicines shall be subject to VAT under Section 107 of the NIRC, as amended.
- The "List of VAT-exempt Diabetes, High-Cholesterol and Hypertension Drugs" as identified and published by the Food and Drug Authority (FDA), shall be posted on the BIR website.
- The sale of drugs not included in the list shall be subject to VAT.
- The word "VAT-EXEMPT" shall be indicated prominently in the invoice issued for the sale of the above-described drugs.
- Any person who is convicted for violation of any provision of the regulations shall, in addition to the tax required to be paid, if any, pay a fine of not more than P1,000.00 or suffer imprisonment of not more than 6 months, or both, for each act or omission, pursuant to Section 275 of the NIRC, as amended.
- These regulations shall take effect on 1 January 2019.

(Editor's Note: RR No. 25-2018 was published in the Manila Times *on 28 December 2018.)*

RMC No. 98-2018 reiterates the mandate to use the eBIRForms by identified taxpayers and introduces additional filing and payment option through the services of TSPs.

RMC No. 98-2018 issued on 5 December 2018

- In addition to the Electronic Filing and Payment System (EFPS), taxpayers can now use another electronic filing and payment option developed by Tax Software Providers (TSPs).
- To ensure that the software being used by these TSPs are compliant with BIR data structure requirements, the BIR mandates that the tax filing and/or payment solutions are tested and certified through the "Electronic Tax Software Provider Certification (eTSPCert) System", which can be accessed by TSPs in the BIR website (www.bir.gov.ph).
- Taxpayers availing of the services of the TSPs, which have secured the required certifications, are considered compliant with the mandate to use the eBIRForms.

RMC No. 99-2018 further clarifies certain provisions of RR No. 17-2011, as amended, in relation to RMO No. 42-2016, implementing the (PERA) Act of 2008.

RMC No. 99-2018 issued on 7 December 2018

- The Qualified Employer's Contribution is not subject to fringe benefit tax (FBT) since it does not form part of the employer's gross taxable income. It is also not subject to FBT even if it is granted as benefit or in other form, regardless of whether it is given to all or only some of the employees.

- The employer is not entitled to the 5% tax credit from its contribution to an employee's Personal Equity and Retirement Account (PERA). However, the employer can claim the actual amount of contribution as a deduction from its gross income up to the maximum allowable PERA contribution of an employee.

- If an employee makes an early withdrawal of his PERA contribution, the employer will not be required to add back the contribution to its gross income.

- A PERA contributor can transfer his PERA assets to another Qualified/Eligible PERA Investment Product and/or another administrator for reasons other than the administrator's revocation of accreditation. Such transfer shall not be subject to early withdrawal penalty (EWP) as long as made within 15 calendar days from its withdrawal.

- PERA contributors are still qualified for substituted filing of their income tax return provided that they meet the conditions prescribed under RMC No. 1-2003 on Substituted Filing of Income Tax Returns of Qualified Pure Compensation Income Earners.

- The tax identification number (TIN) and Revenue District Office (RDO) Code of the employer are not required when opening a PERA account, but the contributor should have a TIN.

- The different accounts of the PERA contributor are considered as one aggregate PERA account of the contributor.

- Overseas Filipinos (OFs) are entitled to Tax Credit Certificates (TCCs), which they may use against any national internal revenue tax liabilities (except the contributor's withholding tax liabilities as withholding agent).

- OFs who do not avail of their tax credit will not be penalized with the 5% EWP, but the EWP of 20% will still apply.

- An OF, whose OF status ceases in a given year, shall be considered an OF up to the end of the calendar year.

- The tax incentives of PERA transactions do not include exemption from the stock transaction tax.

RMC No. 102-2018 further amends RMC No. 17-2018, specifically the deadline for the processing of pending VAT refund/credit claims filed prior to the effectivity of RMC No. 54-2014.

RMC No. 102-2018 issued on 11 December 2018

- This Circular amends RMC No. 17-2018, as amended by RMC No. 53-2018, by moving the deadline for the processing of all pending VAT claims filed prior to the effectivity of RMC No. 54-2014 from December 14, 2018 to 29 March 2019.

(Editor's Note: RMC No. 54-2014, which clarifies the rules on the processing of VAT claims for refund or credit pursuant to Section 112 of the Tax Code, as amended, took effect on 27 June 2014.)

RMC No. 105-2018 clarifies the payment of excise tax on domestic coal pursuant to the provisions of RR No. 1-2018, amending RR No. 13-94.

RMC No. 105-2018 issued on 19 December 2018

- As a general rule, the producer of locally produced coal is liable for excise tax. However, if the excise tax is not paid by the producer, the excise tax due shall be collected from the first buyer/possessor.

- The excise tax collected from the first buyer/possessor shall be reflected separately in the invoice issued by the producer covering the coal sold.

- The amount collected from the first buyer/possessor shall be payable to the BIR and shall not form part of the selling price of the coal.

- The excise tax due to the BIR shall be extinguished upon remittance of the same by the producer to the BIR.

- A producer subject to excise tax shall be subject to all the administrative and reportorial requirements as prescribed under applicable existing rules and regulations.

  The following are the transitory rules:

  1. The excise tax due on domestic coal removed for domestic consumption shall be collected by the producer of the domestic coal from the first buyer/possessor starting 1 January 2018.

  2. The producer shall remit by 31 December 2018 to the BIR, the excise tax on domestic coal collected from the first buyer/possessor covering the period 1 January to 30 November 2018, using BIR Form 2200 M, without surcharge and interest.

  3. Excise taxes collected by the producer on domestic coal removed and sold for domestic consumption shall be remitted within 10 days from the date of sale, transfer or disposition.

Customs Updates

This Memorandum provides for the Strict Implementation of the List of Expected Imports as a Documentary Requirement for Importer Accreditation.

Memorandum dated 4 December 2018

- This is to reiterate the strict implementation of Section 5 (c), (i), (d) of Customs Administrative Order (CAO) No. 11-2014 on the documentary requirements for the accreditation of importers, which provides:

  "d. List of Expected Imports, including, if possible, clear description in both technical and tariff terms, estimated volume and values for the incoming 12 months."

- Accordingly, the Accounts Management Office (AMO) is directed to review the files of the importers to ascertain those who have not fully complied with the aforementioned provision. AMO shall inform in writing those importers to comply on or before 31 December 2018.

- Any additional item/s or volume to the List of Expected Imports shall require the approval of the Commissioner of Customs prior to importation.

- To ensure that only items in the approved List of Expected Imports will be imported and that the same is within the accumulated volume declared therein, any Customs Official or personnel who shall process a goods declaration is enjoined to check the approved List of Expected Import before proceeding to process the goods declaration and to immediately report in writing to the AMO and to the Office of the Commissioner (OCOM) any importer who imports goods not found in the said list or whose accumulated importations are already beyond the volume declared therein.

- Any Customs Official or personnel who shall process a goods declaration covering goods not found in the approved List of Expected Imports or whose accumulated volume of importation is already beyond what is indicated therein shall be dealt with accordingly.

- This Memo shall take effect immediately.

(Editor's Note: This memo was signed by the Commissioner on 10 December 2018)

CMO No. 25-2018 provides for the Lodgement/Filing of Goods Declaration, Valuation and Other Related Matters.

Customs Memorandum Order (CMO) No. 25-2018 dated 4 December 2018

- In the exigency of the service and to meet collection targets, improve the collection efficiency of the Bureau of Customs (BOC) and ease port congestion, the following directives are hereby issued:

    1. Goods Declaration must be strictly lodged within 15 days from the date of discharge of the last package from the vessel or aircraft, pursuant to Section 407 of the Customs Modernization and Tariff Act (CMTA). This period may only be extended upon written request, filed before the expiration of the original period, on valid grounds for another period not exceeding 15 days, and only upon prior approval of the Commissioner.

    2. Provisional Goods Declaration under Section 403 of the CMTA shall be allowed only in meritorious cases.

    3. Examiners, Appraisers, Principal Appraisers, Deputy Collectors and District Collectors are directed to comply strictly with the Basis of Valuation specified under Sections 700 to 707 of the CMTA. Customs Valuation shall, except in specified circumstances, be based on the Actual Price (paid or payable) of the goods to be valued, which is generally shown in the invoice. The price plus adjustments for certain clients (e.g. royalties, commissions, assists), equals the transaction value (TV), which constitutes the first and most important method of valuation.

    4. A detailed computation of the TV of imported goods stating the applicable Tariff Heading duly signed by the Examiner, Appraiser, Principal Appraiser, Deputy Collector for Assessment and District Collector shall be submitted to the Commission on Audit (COA), Liquidation and Billing Division (LBD) and Post Clearance Audit Group (PCAG) for validation of the computation of the valuation of goods and audit the amount of taxes and duties paid.

    5. The PCAG is authorized to secure relevant documents from, and enlist the assistance of, the LBD and Import Assessment Service (IAS), Assessment and Operations Coordinating Group (AOCG) and other offices in the discharge of its audit functions. PCAG is directed to submit its audit findings to OCOM for appropriate action.

    6. For purposes of accountability, transparency and ensuring correct assessment of goods and prompt payment of duties and taxes, the IAS, AOCG is given operational control over the Principal Appraisers of all Ports/Districts. Examiners and Appraisers shall remain under the Control and supervision of the District Collectors.

    7. Any violation of these directives shall be dealt with accordingly.

(Editor's Note: CMO No. 25-2018 was received by the UP Law Center *on 6 December 2018.)*

CMO No. 26-2018 provides for the Transfer of Operational Control Over Principal Appraisers to the IAS.

CMO No. 26-2018 dated 4 December 2018

- In the exigency of the service, the operational control of all Principal Appraisers (PAs) is hereby placed under the IAS. Administrative supervision on PAs shall remain with the District and Sub-port Collectors concerned.
- All concerned PAs are hereby directed to ascertain the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.
- The IAS will closely monitor all PAs and ensure the correct valuation of goods using the applicable methods of valuation pursuant to the provisions of the CMTA. Failure to correctly value and assess the goods shall not be tolerated and shall be dealt with accordingly.
- For this purpose, the Management Information Systems and Technology Group (MISTG) shall closely coordinate with IAS and shall ensure that all data necessary for monitoring shall be provided.
- This CMO was signed by the Commissioner on 7 December 2018.

(Editor's Note: CMO No. 26-2018 was received by the UP Law Center *on 10 December 2018.)*

CMO No. 28-2018 provides for the Revised Guidelines and Procedures for the Accreditation of Importers and Customs Brokers with the BOC, in relation to CMO No. 23-2018 and CMO No. 24-2018.

CMO No. 28-2018 dated 6 December 2018

- In the exigency of the service and for operational efficiency, the following are hereby directed:

    1. All new applications for accreditation filed by importers and custom brokers including applications for renewal, re-application, reinstatement, suspension, revocation or cancellation including Client Profile Registration System (CPRS) activation of entities accredited by other government agencies shall be submitted by the AMO, duly concurred by the Deputy Commissioner for Intelligence Group (IG), for approval or disapproval of the Commissioner.
    2. The Chief, AMO shall prepare the disposition forms with the concurrence of the Deputy Commissioner, IG on all recommendations for activation or lifting of suspension including CPRS/Tax Identification Number (TIN) activation, subject to approval of the Commissioner. The final order on the matter shall be endorsed to the AMO for immediate implementation.
    3. All applications shall be processed within seven working days from receipt of said application with complete documentary requirements, pursuant to RA 11032 or the Ease of Doing Business and Efficient Government Service Delivery Act of 2018.
    4. Any orders, rules or regulations inconsistent with this CMO are hereby repealed or amended accordingly.

(Editor's Note: CMO No. 25-2018 was received by the UP Law Center *on 11 December 2018.)*

CMO No. 31-2018 provides for the PLCO.

CMO No. 31-2018 dated 19 December 2018

- This Order aims to implement a clear and effective system in the issuance of a Pre - Lodgement Control Order (PLCO) from the moment imported goods enter customs jurisdiction, as well as when goods are intended to be exported prior to lodgement of export declaration or when there is no intention to lodge an export declaration.

- Scope

    1. Goods which are foreign in origin when the goods or the carrier are within the territorial jurisdiction of the Philippines, or even when the carrier has not entered our territorial jurisdiction, if the goods are reflected in the advanced electronic manifest submitted to the BOC;

    2. Goods which are intended for export before an export declaration is lodged or when no export declaration is lodged; and

    3. Goods which are for transshipment.

- Definition of Terms

    1. PLCO — it is a written Order issued by the BOC Commissioner, District Collector or other customs officers authorized in writing by the Commissioner, before the Lodgement of Goods Declaration or when no Goods Declaration is lodged, on the basis of grounds stated in this CMO to prevent the illegal importation or their release.

    2. Lifting of the PLCO — it is an Order of Release after a finding of no discrepancy, after the physical or nonintrusive inspection.

    3. Warrant of Seizure and Detention (WSD) – it is an order in writing, issued in the name of the Republic of the Philippines, signed by the District Collector of Customs directed to the Enforcement and Security Service (ESS) or any deputized officer of a national law enforcement agency commanding him to seize any vessel, aircraft, cargo, goods, animal or any other movable property when the same is subject to forfeiture pursuant to Section 1113 of the CMTA.

- General Provisions

    1. Who May Issue a PLCO

        - Commissioner;

        - District Collectors having jurisdiction over the goods; and

        - Other customs officers authorized by the Commissioner in writing.

    2. Grounds for the Issuance

        - Unmanifested goods found on any vessel or aircraft if a manifest thereof is required;

        - Outright smuggling as defined in the CMTA;

        - Prohibited Goods;

- Restricted Goods verified with the regulatory agency to be without permits except when the regulatory agency allows the application of permits after the arrival but before physical release from customs jurisdiction; and

- The importation contains Products of Illicit Trade which poses danger to the environment, public health, safety and security.

3. When may a PLCO be Issued?

    - The moment a vessel, aircraft or other carrier enters the territorial jurisdiction of the Philippines and there is an intention to unload the subject goods within the Philippine territory, but prior to the lodgement of goods declaration, if applicable;

    - Even if the carrier has not yet entered the Philippine territory but the goods are reflected in the advance electronic manifest; and

    - When the carrier of goods for transshipment enters the Philippine territory.

4. Mandatory information (as enumerated in Section 4.4 therein) must be indicated in the PLCO Form. Issuance of PLCO shall be made in writing when no goods declaration has been lodged. It shall be dated and assigned a unique reference number in series which shall be the basis for reporting to and monitoring by the Commissioner and the Secretary of Finance.

5. If the shipment has arrived or been discharged and no Goods Declaration is lodged, the District Collector shall notify in writing the shipping lines, the port authority or terminal operator, the consignee/owner or his authorized representative and the Value - Added Service Providers (VASPs) if applicable, of the issuance of the PLCO.

6. Effects of PLCO

    The issuance of PLCO shall not prevent the Lodgement of Goods Declaration.

    - If a Goods Declaration is lodged, the PLCO shall be converted into an Alert Order without need for further action. In such instance, rules on Alert Orders shall apply.

      Within 48 hours from discharge of the last package or issuance of the PLCO, whichever is later, the District Collector shall schedule the conduct of physical or non-intrusive inspection of the goods.

      Within 48 hours, or 24 hours for Perishable Goods, the Examiner shall recommend to the District Collector either the lifting of the PLCO or the issuance of a WSD whichever is applicable, furnishing the Commissioner with a copy of the recommendation.

    - Upon recommendation of the Examiner, the District Collector within five days in case of non-Perishable Goods, or two days for Perishable Goods, from inspection, shall either: (1) Order the lifting of the PLCO in case of a negative finding subject to affirmation by the Commissioner or (2) issue a WSD upon determination of the existence of probable cause.

- In cases where the District Collector recommends the lifting of the PLCO, he shall immediately transmit all the records to the Commissioner for automatic review, within 48 hours, or within 24 hours for perishable goods. When no decision is made by the Commissioner, the release of the goods shall be deemed approved, provided that completed staff work has been undertaken to guide the Commissioner's decision.

  The District Collector shall lift the PLCO only upon the affirmation of the decision of the District Collector by the Commissioner, or after the lapse of the period of review by the Commissioner, whichever is earlier.

- In cases where the PLCO is issued against a shipment where the filing of goods declaration is not required, and after the verification of no discrepancy or violation is found and the District Collector recommends the lifting of the PLCO, preceding paragraph shall apply.

- In case where the District Collector issues a WSD, he shall immediately submit a report to the Commissioner.

The foregoing is without prejudice to the application of the rules on abandonment.

7. Period to Conduct Physical or Non-Intrusive Inspection

   - Within 48 hours from the receipt of the PLCO, when appropriate, by the Office of the District Collector.

   - Customs Officer shall be held administratively liable for the delay in the examination and submission of findings except in cases beyond their control. Examination of shipments subject of PLCO shall be given priority.

8. Conduct of Examination

   - The District Collector having jurisdiction over the goods shall determine the manner of examination depending on its nature and alleged violation committed.

     The District Collector or his duly authorized representative shall notify the importer/exporter, broker/authorized representative of the date of examination of shipments subject of PLCO, to witness the conduct of examination.

   - In case the PLCO pertains to 25 containers or more, the examination may be limited to 30% of the total number of containers. However, if in the course of the examination a violation is determined, then the entire shipment shall be subject to full examination. However, the District Collector must ensure that during the examination of the 30% of the total number of containers, the remaining 70% of the total containers must remain within the port.

   - The result of the examination shall be contained in the PLCO Report Form submitted to the District Collector within 48 hours or, 24 hours for perishable goods, from the termination of the examination.

9. Disposition of Pre-Lodgement Orders

    - Upon recommendation of the authorized customs officers, the District Collector within five days in case of non-Perishable Goods or two days for Perishable Goods, shall either: (1) recommend the lifting of PLCO, subject to review by the Commissioner, in case of negative findings or (2) issue a WSD upon determination of the existence of probable cause for violation of the CMTA.

    - In cases where the District Collector recommends the lifting of the PLCO, he shall immediately transmit all the records to the Commissioner for automatic review, within 48 hours, or within 24 hours for perishable goods. When no decision is made by the Commissioner, the recommendation for lifting of the PLCO and release of the goods shall be deemed approved, provided that completed staff work has been undertaken to guide the Commissioner's decision.

    - The District Collector shall lift the PLCO only upon the affirmation of his decision by the Commissioner, or after the lapse of the period of review by the Commissioner, whichever is earlier. In case where the District Collector issues a WSD, he shall immediately inform the Commissioner in writing of the issuance thereof.

10. The costs of the physical examination shall be borne by the BOC. The BOC shall create a Central Clearing House under the OCOM for PLCO. It shall act as repository of all records, including final disposition of the PLCO.

11. Any Customs employee who violates this CMO or causes undue delay in the examination of shipments subject of PLCO may be administratively or criminally charged.

- This Order shall take effect immediately after completion of the 15 day publication rule.

(Editor's Note: CMO No. 31-2018 was published in The Manila Times *on 21 December 2018.)*

BOI Update

Memorandum Circular No. 2018-09 circularizes the amendments to the General Policies and Specific Guidelines to Implement the 2017 Investment Priorities Plan, expanding the scope of registrable activities and laying down additional requirements.

BOI Memorandum Circular No. 2018-09 dated 19 November 2018

I. Background

- BOI Memorandum Circular (MC) No. 2017-004 titled "General Policies and Specific Guidelines to Implement the 2017 Investment Priorities Plan" was approved by the Board and published on 18 June 2017.

- Article 30 of Executive Order No. 226 empowers the Board to add additional areas in the plan, alter any terms of an investment area or designation of measured capacities, or terminate the status of preference.

    1. The Board reviewed MC No. 2017-004 to consider recent developments in the industry

II. Amendments to 2017 IPP

- Locational Restriction in NCR

  1. Except as provided, projects in NCR are no longer entitled to fiscal incentives (previously, limited to only Income Tax Holiday)

- Definition of terms

  1. Consumer Durables (new term)

     - Refers to manufactured products that have relatively long useful life and do not have to be purchased frequently. They are durable goods acquired by households for final repeated or continuous consumption over a period of a year or more.

  2. New Project (revised definition)

     - An existing enterprise may be considered to have a New Project for the same activity if it:

       (a) Will establish a new complete line

         - "New Complete Line" refers to new facilities used in the production of the registered product/service. This line may use a common facility such as but not limited to warehouse or laboratory and others as may be determined by the Board.

         - "New Facility" refers to the space or area, physical structure and equipment provided for a particular purpose or segment of the production process/service activity.

       (b) Will have new investment in fixed assets and working capital

  3. Start of Commercial Operations (clarification)

     - Export traders are not qualified for registration under this IPP, and thus, this SCO definition is not applicable to export traders.

- Preferred Activities

  1. Under Manufacturing Activities

     - Criteria for Halal or Kosher manufacturing qualified for ITH was revised

       (a) Will adhere to Halal or Kosher standards for food manufacturing, as certified by any certifying body. For Halal, the certifying body must be accredited by any appropriate international accreditation body until such time that PAB's Halal Accreditation System is implemented.

- Prior to start of commercial operation, the registered enterprise must submit a copy of the License to Operate, Product Registration or endorsement, whichever is applicable, issued by an appropriate government agency; or Certification on the product's safety from duly recognized and reputable local or international organization prior to the availment of ITH.

2. Under Strategic Services

   - Coverage for creative industries / knowledge-based services qualified for ITH was expanded to include the following revenues of start-ups:

     a. Ad-based revenue models – refer to the use of digital real-estate (i.e. websites, games, apps and other virtual spaces) as advertisement space.

     b. In-app purchase models – refer to revenues coming from charging additional fees for apps or content used within the basic app that may be owned by app maker or third parties.

     c. Perpetual license – refer to a one-time fee for the rights to use the software perpetually.

     d. Platform-based fees or Marketplace Models – refer to revenues derived by being the provider of the digital infrastructure or software to allow others to provide digital or physical goods and services through the platform.

     e. Premium-Freemium models – refer to business models where the basic service/access is free, but the user pays for additional features, extensions, functions, etc.

     f. Services/support fees – refer to revenue models where the digital product is free but revenue comes from providing support services (i.e. implementation services, customization support, etc.).

     g. Transactional revenue – refer to fixed or variable fee for access, sale or use of digital or physical goods or services (reservations/booking, queuing, access to info, documents, sale of physical goods, etc.).

     h. Use of digital assets – refer to revenue/sales derived from the use of digital assets / digital content that can be used in the application.

3. Under Healthcare Services

   - Prior to start of commercial operation, the registered enterprise must submit the License to Operate/Accreditation/Certification, whichever is applicable, issued by the DOH.

4. Under Infrastructure and Logistics

   - Coverage for water transport was expanded to include towing services.

- For training/learning facilities supporting the aviation industry, a copy of its aviation training organization certificate and Certificate of airworthiness for its training aircrafts issued by CAAP prior to each ITH availment for the ITH period must be submitted

5. Under Publication or Printing of Books/Textbooks

    - Coverage was expanded to include other emerging formats
    - Revision and succeeding editions of existing titles may qualify for registration provided at least 25% of its content is new
    - Publication projects locating in NCR may qualify for registration

III. Others

- MC No. 2018-09 shall take effect immediately upon complete publication

(Editor's Note: Published in The Philippine Daily Inquirer *on 24 November 2018; p. A4.)*

SEC Issuances and Opinion

SEC-OGC Opinion No. 18-19 dated 21 November 2018

A pending intra-corporate dispute may bar a corporation from conducting an annual stockholders' meeting and election of officers and members of the board.

Facts:

The board of trustees of U Corp. has been on a holdover capacity since 2008 and no stockholders meeting and election have been held. The chairman justified the inability to conduct a stockholders' meeting due to a pending intra-corporate dispute before the Regional Trial Court.

Issue:

Can a pending intra-corporate dispute bar a corporation from conducting its annual stockholders' meeting and election of officers?

Held:

The SEC did not categorically rule on the case due to insufficient facts and information. But the SEC cited precedent cases wherein a pending intra-corporate dispute barred the conduct of stockholders' meeting and election of officers. Issues involving proper identification of stockholders, questions as to which stock and transfer book should be followed, and change of financial period were held valid reasons for postponement as these issues must necessarily be resolved before a valid election may take place.

SEC-OGC Opinion No. 18-20 dated 21 November 2018

The control test does not apply to corporations that are subject to the strictest nationality requirement.

Facts:

B Co., engaged in retail business, is 100% Filipino-owned. On the other hand, A Co. is a 60% Filipino-owned corporation and it intends to invest in B Co. A Co. posited that by applying the control test, as long as A Co. is 60% Filipino-owned, its existing and would-be shareholding in B Co. shall be considered owned by Filipinos for purposes of computing the required Filipino equity of the latter.

Issue:

May the control test be applied in determining the nationality of a corporation engaged in nationalized business?

Held:

No. The control test merely creates the legal fiction that when a corporation is at least 60% Filipino-owned, it is considered or presumed to be Filipino. However, the principle does not apply to corporations that are required by law to be 100% Filipino-owned.

SEC-OGC Opinion No. 18-22 dated 28 November 2018

A post production facility is not considered engaged in the business of mass media if it does not disseminate information in the Philippines.

Facts:

A post production facility has the following business process workflow:

1. Television programs are imported into the Philippines from the global television market;
2. The content will be re-edited, packaged and exported via Globe Telecom Fiber Optic Link to the clients;
3. The post production facility will not create or produce the content or transmit the same to the general public.

Issue:

Based on the above workflow, is a post-production facility engaged in mass media?

Held:

No, provided that the television content edited and packaged by the post-production facility will not be distributed in the Philippines.

Mass media, as referred to in the Constitution, is defined as any medium of communication designed to reach the masses and that tends to set the standards, ideals and aims of the masses, and is distinctively characterized by the dissemination of information and ideas, whether in whole or in part, to the public. It must be 100% Filipino-owned. For the constitutional prohibition to apply, the mass media material produced must be distributed in the Philippines.

A foreign national cannot be an officer in a corporation engaged in nationalized or partly-nationalized activity.

SEC-OGC Opinion No. 18-23 dated 6 December 2018

Facts:

S Co. is engaged in the business of mining. It intends to appoint one of its two foreign stockholders as President because he has specialized knowledge in onshore mining techniques.

Issue:

May a foreign national be appointed as President in a mining company?

Held:

No. Mining, which involves the "exploration, development and utilization of natural resources", is a partly nationalized activity under the Constitution. In this relation, Commonwealth Act No. 108, as amended, bans foreigners from being elected or appointed to management positions of corporations engaged in nationalized or partly nationalized activities.

BSP Issuances

Circular No. 1023 provides for the guidelines on the adoption of PFRS 9 – Financial Instruments under management of Trust Entities

BSP Circular No. 1023 dated 4 December 2018

- The following are the amendments to Appendices 33/Q-20, 97/Q-56/N-16, T-1, and Section 4161N of the Manual of Regulations for Banks (MORB)/Manual of Regulations for Non-Bank Financial Institutions (MORNBFI), as amended under Circular No. 1011 dated 14 August 2018, on the guidelines governing the adoption of PFRS 9 – Financial Instruments under the management of Trust Entities (TEs).

- The provisions of Appendix 33 of the MORB and Appendix Q-20 of the MORNBFI, including their Annexes, regarding the guidelines on the adoption of PFRS 9 – Classification and Measurement are amended by this Circular. The TE shall adhere to the provisions of Sections 1 to 4 of these guidelines to the extent applicable to trust operations. Prudential reports shall be prepared using the existing templates of the Financial Reporting Package (FRP)/FRP for Trust Institutions (FRPTI).

- The provisions of Appendix 97 of the MORB and Appendix Q-56/N-16 of the MORNBFI regarding the guidelines on the adoption of PFRS 9 Financial Instruments – Impairment are also amended by this Circular. The board of directors shall approve policies and guidelines relative to the impairment of financial assets under management of the TE. Moreover, the TE shall adhere to the requirements of PFRS 9 on impairment and the guidelines provided herein to the extent applicable to the trust operations.

- The provisions of Section 4161N of the MORNBFI are further revised as follows:

  "Section 4161N Philippine Financial Reporting Standards (PFRS).

  xxx

  e. Enforcement Actions. Consistent with Sec. 4009Q of the MORNBFI, the Bangko Sentral reserves the right xxx."

- The provisions of Appendix T-1 of the MORNBFI are amended as follows:

  "List of Appendices of MORB/Q Regulations Applicable to Trust Corporations

Appendix		Reference in T Regulations
xxx		
Q-20	Guidelines on the Adoption of PFRS 9 – Classification and Measurement	Sec. 4304T Applicable Regulations on Credit and Investment Operations
		Sec. 4388Q Purchase of Receivables and Other Obligations

- The Financial Reporting Package (FRP) for Trust Corporations and FRP for Trust Institutions (FRPTI), respectively, required under Section 4191T of the MORNBFI and X421/4421Q of the MORB/MORBNBFI, including the affected prudential reports, are amended to align the same with the suggested account titles under PFRS 9. Pending the issuance of the revised FRP/FRPTI template and other prudential reports, the TEs shall adopt the mapping matrix provided under Annex A of Appendix 33 of the MORB and Annex A of Q-20 Of the MORNBFI effective for the reporting period ending December 2018.

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

(Editor's Note: BSP Circular No. 1023, s. 2018 was published in The Philippine Star *on 10 December 2018.)*

Circular No. 1024 provides for the Philippine Adoption of the Basel III Countercyclical Capital Buffer.

BSP Circular No. 1024 dated 6 December 2018

- The following are the amendments to Appendix 83/Q-48 of the Manual of Regulations for Banks (MORB)/Manual of Regulations for Non-Bank Financial Institutions (MORNBFI).

- Subsection X115.1 of the MORB is deleted and Section X115/4115Q of the MORB/ MORNBFI regarding Basel III Risk-Based Capital are amended by this Circular as follows:

  "These guidelines apply to all Universal Banks (UBS) and Commercial Banks (KBs) as well as their subsidiary banks and QBs. The risk-based capital ratio of a bank, expressed as a percentage of qualifying capital to risk-weighted assets, shall not be less than ten percent (10%) for both solo basis (head office plus branches) and consolidated basis (parent bank plus subsidiary financial allied undertakings, but excluding insurance companies). Other minimum capital ratios include Common Equity Tier (CET) 1 ratio and Tier 1 capital ratios of six percent (6.0%) and seven and a half percent (7.5%), respectively. With respect to the CETI requirement, in addition to the minimum, the following capital buffers shall likewise be imposed:

  1. Capital conservation buffer (CCB) Of two and a half percent (2.5%); and

  2. Countercyclical capital buffer (CCyB) of zero percent (0%) subject to upward adjustment to a rate determined by the Monetary Board when systemic conditions warrant but not to exceed two and a half percent (2.5%). Any increase in the CCyB rate shall be effective 12 months after its announcement. Decreases shall be effective immediately.

The prescribed ratios shall be maintained at all times.
Existing capital instruments as of 31 December 2010 xxx"

- Subsection X136.2 and Appendices 3, 107, 107a, and 114 of the MORB, and Subsection 4136Q.2 and Appendices Q-62 and Q-68 of the MORNBFI are also amended by this Circular to reflect the Common Equity Tier 1 requirement of the countercyclical capital buffer.

- Appendix 63b and Q-46 of the MORB and MORNBFI, respectively, are also amended by this Circular to contain the guidelines on countercyclical capital buffer and include the countercyclical capital buffer in the required disclosure related to the banks' capital structure and capital adequacy.

  1. The guidelines on countercyclical capital buffer which shall be included in to Appendix 63b/Q-46 of the MORB/MORNBFI are contained in Part IV. Effectively, the contents of the respective appendices are renumbered.

  2. Further, the required disclosures on banks' capital structure and capital adequacy was also amended by this Circular. It amended the provision as follows:

     "A. Capital structure and capital adequacy

     3. The following information with regard to banks' capital structure and capital adequacy shall be disclosed in banks' Annual Reports, except Item "j" below which should also be disclosed in banks' quarterly published Balance Sheet:

        a) xxx;

        f) Countercyclical capital buffer;
        g) Capital requirements for credit risk (including securitization exposures);
        h) Capital requirements for market risk;
        i) Capital requirements for operational risk; and
        j) Total CAR, Tier I. and CET1 ratios on both solo and consolidated bases.

        xxx"

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

(Editor's Note: BSP Circular No. 1024, s. 2018 was published in The Manila Bulletin *on 20 December 2018.)*

Circular No. 1025 provides for the Amendment to Regulations on Reserves Against TOFA-Others

BSP Circular No. 1025 dated 13 December 2018

- The following is the amendment to Subsection X405.5/4405Q.5 of the MORB/MORNBFI.

- Subsection X405.5/4405Q.5 on Reserves against trust and other fiduciary accounts (TOFA) – Others of the MORB/MORNBFI was amended by this Circular to read as follows:

  "In addition to the basic security deposit, banks/institutions authorized to engage in trust and other fiduciary business shall maintain reserves on

TOFA — Others, except accounts held under (1) Administratorship; (2) Trust Under Indenture; (3) Custodianship and Safekeeping; (4) Depository and Reorganization; (5) Employee Benefit Plans Under Trust; (6) Escrow; (7) Personal Trust (testamentary trust); (8) Executorship; (9) Guardianship; (10) Life Insurance Trust; (11) Pre-need Plans (institutional/individual); (12) Personal Equity and Retirement Account (PERA); (13) Legislated and Quasi-Judicial Trust; and (14) **Specialized Institutional Accounts under Trust.**
xxx"

- The subsection X405.5 was amended to include "(14) Specialized institutional Accounts under Trust."
- This Circular shall take effect 15 calendar days after its publication either in the Official Gazette or in a newspaper of general circulation.

([Editor's Note: BSP Circular No. 1025, s. 2018 was published in The Manila Bulletin *on 18 December 2018.)*

Court Decisions

Organizational Change Consultants International Center for Learning, Inc. vs. CIR
CTA (*En Banc*) Case No. 1679 promulgated 19 November 2018

Business expenses should be substantiated with sufficient evidence such as official receipts or other adequate records. In the absence of official receipts, other adequate records presented must be specified and any inconsistency or difference must be reconciled.

Facts:

Respondent CIR assessed Petitioner Organizational Change Consultants International Center for Learning, Inc. (OCCICL) for various deficiency taxes for taxable year 2009. OCCICL protested the assessments. Upon denial of its protest, OCCICL filed a Petition for Review at the Court of Tax Appeals.

The BIR argued that the OCCICL's claimed deduction should be disallowed for failure to present as evidence the official receipts. OCCICL countered that it presented adequate records to substantiate its deductions, including vouchers and Certificates of Creditable Tax Withheld At Source (BIR Form 2307).

The CTA Second Division partly granted OCCICL's petition, cancelling the DST assessment and the compromise penalty. However, the deficiency income tax, VAT, and EWT assessments were upheld. The CTA Division held that even considering the adequate records, OCCICL failed to reconcile the difference in the claimed expenses. Upon denial of its Motion for Partial Reconsideration, OCCICL filed a Petition for Review at the CTA *En Banc*.

Issue:

Did OCCICL properly substantiate its business expense deductions?

Ruling:

No. To be entitled to a claim of deduction, the taxpayer must competently establish the factual and documentary bases of its claim. Section 34(A)(1)(b) of the NIRC requires, among others, that deductions from gross income must be substantiated with sufficient evidence such as official receipts or other adequate records. The CTA *En Banc* ruled that OCCICL failed to present as evidence the official receipts. And while OCCICL is allowed under the rules to present adequate records as evidence, it failed to specify these records and to reconcile the inconsistencies found by the court.

Business expenses can be substantiated by evidence other than official receipts, such as vouchers, provided that the proper reconciliation is also presented. In the instant case, the CTA ruled that vouchers alone, without addressing the noted differences, are insufficient to support the payment of fees for facilitators and consultants.

CIR vs. Priscila J. Cruz and Jocelyn Cruz-Delos Reyes
CTA (*En Banc*) Case Nos. 1646 and 1650 38 promulgated 13 November 2018

The immunity accorded to the company from availing the tax amnesty program will not inure to the benefit of the individual owners. The corporation has a personality separate and distinct from its individual directors, officers, or owners.

Facts:

Petitioner CIR assessed Spouses Julio and Priscila Cruz for deficiency income tax, 50% surcharge and interest for taxable years 1992 to 2004. The Cruzes protested the assessments. Upon denial of the protest, they filed a Petition for Review with the Court of the Tax Appeals.

The CTA First Division cancelled the assessments for taxable years 1992 to 2003 for lack of a valid Letter of Authority but ordered the payment of the deficiency income tax, with increments, for 2004. Both the Cruzes and the CIR moved for reconsideration of the decision, which were both denied, prompting the parties to elevate the case to the CTA *En Banc*.

The Cruzes argued that they availed of the tax amnesty covering 2005 and prior years under Republic Act 9480.

The CIR claimed that contrary to the CTA Division's ruling, the LOA need not specify the years covered for an investigation to be valid. The CIR alleged that the unspecified years prior to or after the year specified in the LOA (i.e., 2004) may also be validly investigated pursuant to Revenue Memorandum Order 24-2008, if the investigation of such unspecified years is "to determine or trace continuing transactions entered into in the covered year and concluding thereafter."

Issues:

1. Did the Cruzes validly avail of the tax amnesty?

2. Can the BIR investigate other taxable periods not mentioned in the LOA?

Rulings:

1. No. J.S. Cruz Construction and Development Inc. (JSCCD), through Julio Cruz, allegedly availed of the tax amnesty program in 2005. The CTA *En Banc* ruled that there was no proof of application and grant of tax amnesty.

   Assuming it was granted, the immunity accorded to the company from the payment of taxes will not inure to the benefit of the Spouses Cruz. The corporation has a personality separate and distinct from its individual directors, officers, or owners. Such grant of amnesty is construed against the taxpayers; hence the Cruzes cannot take refuge under the said grant of tax amnesty in favor of JSCCD.

2. No. An LOA can only authorize the examination of 1 taxable period and any other unspecified periods are not covered. Thus, any assessment for the unspecified periods not validly covered by the LOA is deemed the result of an unauthorized examination and, therefore void. A valid LOA is required to conduct investigation on any taxpayer, regardless of whether the latter voluntarily submitted or opened their books of account and other accounting records to the BIR.

   In the instant case, while the assessment covering 2004, which is indicated on the LOA, was upheld by the CTA, the assessment for 1992 to 2003 was voided as there were no valid LOAs covering these years.

Kuehna + Nagel, Inc. vs. City of Paranaque and Jesusa E. Cuneta, in her capacity as the City Treasurer of Paranaque
CTA (Special First Division) AC Case No. 189 promulgated 15 November 2018

Forwarders may only be subject to tax on the commission and/or service fees they charge to clients for services actually rendered.

Facts:

Respondent Paranaque City Treasurer assessed Petitioner Kuehna +Nagel, Inc. (KNI) for deficiency LBT for 2001 to 2005 on account of the difference between the gross receipts vis-à-vis the actual receipts declared by KNI.

KNI, a freight forwarder, protested the assessments, contending that the payments it made for arrastre, wharfage fees, documentation, trucking, handling charges, storage fees, duties and taxes, among others, which were advanced on behalf of its customers, should not form part of the gross receipts for purposes of computing LBT, fees, and charges. Upon denial of its protest, KNI filed a Petition for Review with Paranaque Regional Trial Court. The RTC ruled in favor of the City Treasurer. It also denied the Motion for Reconsideration.

Aggrieved, KNI filed a Petition for Review with the Court of Tax Appeals.

Issue:

Should KNI's reimbursable expenses form part of its gross receipts for LBT purposes?

Ruling:

No. Under Section 131 of the Local Government Code, the tax base for LBT purposes on income payments to entities involved in freight forwarding business is the gross commissions received.

While the CTA ruled that KNI is a common carrier exempt from LBT as it is subject to the 3% common carrier's tax, it nonetheless expounded the definition of gross sales or receipts.

In the shipment of goods from one place to another, it is not actually the forwarder that renders all the services but some of which are rendered by third-party service providers. Hence, the payments received by the forwarder from its clients which are intended for third-party service providers cannot be considered as part of its gross receipts for tax purposes. Forwarders may only be subject to tax on the commission and/or service fees they charge to clients for services actually rendered.

The CTA held that KNI's service fees were accounted and identified separately from the reimbursable expenses. There is no economic benefit that redounded to KNI that would warrant the payments received from its clients to form part of its taxable gross receipts.

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