

Tax Bulletin

November 2018



Highlights

BIR Issuances

- ▶ Revenue Regulation (RR) No. 23-2018 further amends Sections 4 and 10 of RR No. 17-2011, as amended, implementing Republic Act (RA) No. 9505, otherwise known as the "Personal Equity and Retirement Account (PERA) Act of 2008". **(Page 4)**
- ▶ RR No. 24-2018 further amends Section 9 of RR No. 25-2003, as amended, prescribing the guidelines and procedures for the processing of requests for excise tax exemption of hybrid electric vehicles (HEV) or purely electric vehicles (EV) pursuant to the TRAIN law. **(Page 4)**
- ▶ Revenue Memorandum Order (RMO) No. 48-2018 prescribes the additional cases to be covered by a Tax Verification Notice (TVN). **(Page 5)**
- ▶ RMO No. 49-2018 authorizes Revenue Collection Officers (RCOs) to accept tax payments pertaining to One Time Transaction of Taxpayers (ONETT) availing the fast lane in view of the passage of the "Ease of Doing Business" Law. **(Page 6)**
- ▶ Revenue Memorandum Circular (RMC) No. 93-2018 announces the availability and use of the Offline Electronic BIR Forms (eBIRForms) Package Version 7.2. **(Page 6)**
- ▶ RMC No. 96-2018 amends RMC No. 50-2018 by deleting the pertinent provisions on the taxation of group health insurance premiums and director's fees. **(Page 6)**

Customs Updates

- ▶ Customs Memorandum Order (CMO) No. 19-2018 provides for the Issuance of Alert Orders. **(Page 6)**
- ▶ CMO No. 22-2018 provides for the Guidelines in the Creation of Staging Bill of Lading (B/L). **(Page 8)**
- ▶ CMO No. 24-2018 provides for the Operational Guidelines for the Intelligence Group and Enforcement Group. **(Page 9)**

BOI Update

- ▶ Executive Order (EO) No. 65, which promulgates the Eleventh Regular Foreign Investment Negative List, eases restrictions on foreign participation in certain investment areas and/or activities. **(Page 9)**

SEC Issuances and Opinion

- ▶ SEC MC No. 14 provides the Guidelines for the protection of non-profit organizations from money laundering and terrorist financing abuse ("NPO Guidelines"). **(Page 13)**
- ▶ SEC MC No. 14 provides the 2018 Guidelines on Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT Guidelines) for SEC covered institutions. **(Page 14)**

- ▶ SEC MC No. 17 requires the disclosure of beneficial owners of SEC registered corporations. **(Page 14)**
- ▶ A branch office cannot merge with a domestic corporation independently of its parent company. **(Page 14)**

BSP Issuances

- ▶ Circular No. 1019 provides for the Technology and Cyber-Risk Reporting and Notification Requirements. **(Page 15)**
- ▶ Circular No. 1020 provides for the Amendment to the Basic Standards in the Administration of Trust, Other Fiduciary Accounts and Investment Management Account. **(Page 16)**
- ▶ Circular No. 1021 provides for the Guidelines on Marking to Market of Financial Instruments. **(Page 16)**
- ▶ Circular No. 1022 provides for the Amendments to Part Eight of the Manual of Regulations for Banks (MORB)/Manual of Regulations for Non-Bank Financial Institutions (MORNBFI) and Circular No. 980 dated 6 November 2017. **(Page 17)**

Court Decisions

- ▶ The sales by an Ecozone or Freeport enterprise to customers in the customs territory, even if below 30% of its total sales, are not covered by the 5% preferential income tax rate on gross income earned. **(Page 18)**
- ▶ Before issuing the Final Assessment Notice (FAN), the BIR must wait for the lapse of 15 days from taxpayer's receipt of the Pre-Assessment Notice (PAN). Otherwise, the assessment is void for violation of due process. **(Page 19)**
- ▶ The receipt by a stockholder of real property as liquidating dividends from a dissolving corporation is not subject to Capital Gains Tax (CGT) but to ordinary income tax. **(Page 20)**

The BIR cannot revoke a ruling and apply such revocation retroactively to the prejudice of the taxpayer.

- ▶ Interest income derived from loans, which is incidental to a taxpayer's leasing business, is subject to VAT. **(Page 21)**

BIR Issuances

RR No. 23-2018 further amends Sections 4 and 10 of RR No. 17-2011, as amended, implementing RA No. 9505, otherwise known as the "PERA Act of 2008".

RR No. 23-2018 issued on 21 November 2018

- ▶ Section 4 (5) of RR No. 17-2011, as amended, is further amended to require a Contributor to submit proof of source of funds, instead of income earnings, as one of the requirements for establishing a Personal Equity and Retirement Account (PERA).
- ▶ Section 10 (B) of RR No. 17-2011, as amended, is renumbered and further amended to provide for the following instances where there will be no early withdrawal penalty to be imposed:
 1. Transfer of PERA assets to another Qualified/ Eligible PERA Investment Product and/or another Administrator within 15 calendar days from the withdrawal;
 2. Deduction of fees of the administrator, custodian and product provider (subsequent to account opening) from PERA assets, provided that such deduction is made with the consent of the Contributor.
- ▶ These regulations shall take effect immediately.

(Editor's Note: RR No. 23-2018 was published in Malaya on 23 November 2018)

RR No. 24-2018 further amends Section 9 of RR No. 25-2003, as amended, prescribing the guidelines and procedures for the processing of request for excise tax exemption of HEV or purely EV pursuant to the TRAIN law.

RR No. 24-2018 issued on 28 November 2018

- ▶ Purely Electric Vehicles shall be exempt from the excise tax on automobiles.
- ▶ On the other hand, Hybrid Electric Vehicles shall be subject to 50% of the applicable excise tax rates on automobiles.
- ▶ Prior to the removal of the automobiles from the manufacturing plant or customs custody, the Certificate of Conformity (COC) issued by the Department of Natural Resources - Environment Management Bureau (DENR-EMB), which contains information on the vehicle's model/ make and other technical specification/ information, including the corresponding classification on fuel feed from which it can be ascertained whether the vehicle is an HEV, shall be presented by the motor vehicle manufacturer/ assembler/ importer to the BIR - Excise Large Taxpayer Regulatory Division (ELTRD).
- ▶ Instead of a COC, a Certificate of Non-Coverage (CONC) shall be presented to the ELTRD if the subject of the application for COC is an EV, stating that the vehicle applied for is an EV and has no tailpipe emission and thus, not covered by RA No. 8749 or the Philippine Clean Air Act.
- ▶ The BIR shall refer to the CONC or COC issued by the DENR-EMB as presented by the manufacturer/ assembler/ importer in determining the exemption from excise taxes of the EV or HEV.
- ▶ In validating the authenticity of the COC or CONC, the DENR-EMB shall provide the BIR a certified true copy of the COC and CONC issued to the manufacturer/ assembler/importer for new locally manufactured or imported HEV or EV.

- ▶ These regulations shall take effect on 1 January 2019, following its complete publication in the Official Gazette or in at least one newspaper of general circulation.

(Editor's Note: RR No. 24-2018 was published in the Manila Bulletin on 30 November 2018)

RMO No. 48-2018 prescribes the additional cases to be covered by a TVN.

RMO No. 48-2018 issued on 5 November 2018

- ▶ Instead of a Letter of Authority (LOA), a Tax Verification Notice can be used to verify the claims for tax refund of Job Order personnel and those arising from erroneous/double payment of taxes, which will not require an in-depth audit/ investigation.
- ▶ The verification of the following cases shall be covered by a TVN, regardless of the amount:
 1. Estate tax cases provided the taxpayer/decedent has no other tax liabilities;
 2. Claims for tax refund -
 - ▶ VAT refund pursuant to Section 112 of the Tax Code, as amended
 - ▶ Claims of Job Order personnel
 - ▶ Claims arising from erroneous/double payment of taxes, including double payment of taxes due to system error/glitch
- ▶ The report of verification shall be submitted within the following time frame:

| Case types | Number of days |
|--|--|
| Estate tax cases | 60 days from submission of complete documents |
| VAT refund filed with the following offices pursuant to Section 112 of the Tax Code: <ul style="list-style-type: none"> ▶ VAT Credit Audit Division (VCAD) ▶ Audit Divisions under the Large Taxpayers Service (LTS) ▶ Revenue District Offices under the Revenue Regions | 55 to 65 days from receipt of the application |
| Claims for tax refund of Job Order personnel | 30 days from submission of complete documents to support the claim |
| Claims for tax refund arising from erroneous/double payment of taxes | 30 days from submission of complete documents to support the claim |

- ▶ Until the TVN System is in place, the TVN shall be manually issued and signed by the Head of the Office authorized to process the estate tax return/claim for tax refund.

RMO No. 49-2018 authorizes RCOs to accept tax payments pertaining to ONETT availing the fast lane in view of the passage of the “Ease of Doing Business” Law.

RMO No. 49-2018 issued on 13 November 2018

- ▶ Revenue Collection Officers (RCOs) assigned in each RDO, which are already authorized to accept tax payments during tax deadlines, shall also be allowed to accept tax payments relative to One Time Transaction of Taxpayers under the following cases:
 1. Payment of capital gains tax, documentary stamp tax, donor’s tax, estate tax and other ONETT-related taxes; and
 2. For ONETT-related taxes above ₱20,000.00, the RCO shall only accept payment through “Manager’s or Cashier’s Check”.

RMC No. 93-2018 announces the availability and use of the Offline eBIRForms Package Version 7.2.

RMC No. 93-2018 issued on 5 November 2018

- ▶ The eBIRForms Package Version 7.2 is now available and downloadable from these sites:
 1. www.bir.gov.ph; and
 2. www.knowyourtaxes.ph
- ▶ The new eBIRForms package includes the following revised BIR Forms:
 1. BIR Form No. 1601C (Monthly Remittance Return of Income Taxes Withheld on Compensation);
 2. BIR Form No. 1602Q (Quarterly Remittance Return of Final Taxes Withheld on Interest Paid on Deposits and Deposit Substitutes/Trusts/Etc.);
 3. BIR Form No. 1603Q (Quarterly Remittance Return of Final Income Taxes Withheld on Fringe Benefits Paid to Employees Other Than Rank and File); and
 4. BIR Form No. 2551Q (Quarterly Percentage Tax Return).
- ▶ eBIRForms filers can choose between manual or online payment/ remittance.

RMC No. 96-2018 amends RMC No. 50-2018 by deleting the pertinent provisions on the taxation of group health insurance premiums and director’s fees.

RMC No. 96-2018 issued on 29 November 2018

The pertinent provisions of RMC No. 50-2018 relative to the taxation of group health insurance premiums paid for the rank and file, as well as managerial or supervisory employees, under Q7/A7 and director’s fees under Q34/A34, which were not affected by the provisions of the TRAIN law, are deleted.

Customs Updates

CMO No. 19-2018 provides for the Issuance of Alert Orders.

CMO No. 19-2018 dated 12 November 2018

- ▶ Alert Orders are written orders issued by the customs officers as authorized by the Commissioner on the basis of derogatory information regarding possible noncompliance with this Act [Section 1111 of the Customs Modernization and Tariff Act (CMTA)].
- ▶ Specific Guidelines:
 1. Who may issue:
 - ▶ Commissioner only - for the Port of Manila, Manila International Container Port (MICP), Ninoy Aquino International Airport (NAIA), Batangas and Cebu Ports
 - ▶ District/Port Collectors - for all other ports
 2. Derogatory information shall indicate the violations and other necessary specifics thereof. For this purpose, the following shall not be considered derogatory information:
 - ▶ General allegations of undervaluation;
 - ▶ General allegations of misclassification without providing the appropriate tariff heading and duty of the shipment to be alerted;
 - ▶ General allegations of over-quantity without indicating the source of information supporting the allegation;
 - ▶ General allegations of misdeclaration in the entry without indicating the suspected actual contents thereof; and
 - ▶ General allegations of importations contrary to law without indicating the specific law or rule to be violated.
 3. No alert order shall be issued on account of allegations of undervaluation unless said undervaluation is caused by the submission to the Bureau of Customs (BOC) of forged or spurious invoice or other commercial documents.
 4. An alert order may be issued only after lodgment of the goods declaration and prior to the release of goods from customs custody. Under no circumstances shall the suspension of the processing of goods declaration be allowed except through an alert order issued by an authorized customs officer.
 5. The costs of the physical inspection shall be borne by the BOC: Provided, that such cost shall be reimbursed by the owner prior to the release of the goods if the physical inspection results in the assessment of additional duties or taxes or the issuance of a warrant of seizure.
 6. The Commissioner shall be notified of the recommendation by the alerting officer within 24 hours from the issuance of the alert order. Alert orders 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.

7. The Commissioner shall be furnished with copies of all Alert Orders issued by the District/Port Collectors indicating the grounds therefor, together with the complete supporting documents.
 8. Alert Orders may be lifted only by the Commissioner.
- ▶ Strict compliance with Section 1400 of the CMTA (regarding the imposition of a surcharge for Misdeclaration, Misclassification, Undervaluation in Goods and Section 1401 of the CMTA on penalties imposed for unlawful importation and/or exportation such as imprisonment or fine or both) is hereby enjoined.
 - ▶ All prior issuances inconsistent herewith are hereby revoked, recalled or amended accordingly. Note that CMO No. 07-2018 dated 31 May 2018 was issued by the former BOC Commissioner which provided that the following may issue alert order:
 1. Commissioner;
 2. District Collector having jurisdiction over the goods; and
 3. Other Customs Officers duly authorized in writing by the Commissioner.

(Editor's Note: CMO No. 19-2018 was received by the UP Law Center on 13 November 2018. However, in CMO No. 20-2018 dated 14 November 2018, the implementation of CMO No. 19-2018 was suspended on the basis of exigency of service. Per BOC Cares, the suspension of the CMO No. 19-2018 would mean that CMO No. 07-2018 would be the prevailing rule.)

CMO No. 22-2018 provides for the Guidelines in the Creation of a Staging B/L.

CMO No. 22-2018 dated 22 November 2018

- ▶ Creation of a staging Bill of Lading (B/L) pertains to the establishment of a system that would allow the filing of entries without B/L (as in the case of aircraft or vessel) or previously processed B/L as in the case of local sales of Free Zones/Customs Bonded Warehouses (CBWs).
- ▶ Grounds for the creation of a Staging B/L:
 1. Payment of duties and taxes for importations of vessel and aircraft;
 2. Payment of wastages of previously processed warehousing entry;
 3. Payment of duties and taxes for over landed bulk shipments;
 4. Payment of duties and taxes for local sales of duty free importations by locators;
 5. Payment of duties and taxes for bonded to bonded transfer cargoes;
 6. Lodgment of warehousing entry for previously processed transit entry tagged release with duplicate HS code;
 7. Lodgment of warehousing entry for previously processed transit entry with technical issue on the Online Registration System (OLRS); and

8. Electronic to mobile (E2M) exceptional errors which may be resolved only through the creation of staging B/L upon certification by the Management Information System and Technology Group (MISTG).
- ▶ Operational Provisions
 1. All requests for the creation of a staging B/L shall include the following documents:
 - ▶ Pre-assessment Entry
 - ▶ Import Documents
 - ▶ Memorandum/Letter stating clearly the grounds and basis for the approval of the request
 2. It is the District Collector who shall create the staging B/L pursuant to the procedure in this Order. Once created, lodgment of entry by the declarant shall be done. The authorized customs officer shall process the entry and the payment of customs duties, taxes and other charges shall be made through the BOC accredited Authorized Agent Banks (AABs).
 - ▶ This Order shall take effect immediately and shall remain valid until revoked.

(Editor's Note: CMO No. 22-2018 was received by the UP Law Center on 26 November 2018)

CMO No. 24-2018 provides for the Operational Guidelines for the the Intelligence Group and Enforcement Group.

CMO No. 24-2018 dated 27 November 2018

- ▶ In the exigency of the service, the Administration, Operation and Production Division of Customs Intelligence and Investigation Service is hereby placed under the direct supervision of the Deputy Commissioner for Intelligence.
- ▶ The Risk Management Office, Accounts Management Office and X-ray Inspection Project (XIP) are hereby placed under the direct supervision of the Deputy Commissioner for Intelligence.

(Editor's Note: CMO No. 24-2018 was received by the UP Law Center on 29 November 2018)

BOI Update

EO No. 65, which promulgates the Eleventh Regular Foreign Investment Negative List, eases restrictions on foreign participation in certain investment areas and/or activities.

Executive Order (EO) NO. 65 Promulgating the Eleventh Regular Foreign Investment Negative List dated 29 October 2018

I. Significant Changes

The Eleventh Regular Foreign Investment Negative List introduced the following significant changes:

- ▶ No foreign equity allowed for the practice of the following professions:
 1. Marine deck officers and marine engine officers; and
 2. Teaching at higher education levels if the subject being taught is a professional subject (i.e. included in a government board or bar examination).

- ▶ Foreigners are now allowed to practice the following professions previously restricted under the Tenth Regular Foreign Investment Negative List, provided the home country of the foreigner grants reciprocity (i.e. permits Filipinos to be similarly admitted to the practice of such professions) :
 1. Pharmacy
 2. Forestry
 3. Other professions as may be provided by law or by treaty where the Philippines is a party
- ▶ Foreigners are now allowed to practice the following professions where corporate practice is allowed:
 1. Aeronautical Engineering
 2. Agricultural and Biosystems Engineering
 3. Forestry
 4. Social Work
- ▶ Allowable foreign equity % was increased for the following:
 1. Contracts for the construction and repair of locally-funded public works: From 25% to 40% foreign equity
 2. Private radio communications network: From 20% to 40% foreign equity
- ▶ Foreign equity restrictions were removed for the following:
 1. Adjustment companies
 2. Facility operator of an infrastructure or a development facility requiring a public utility franchise
- ▶ Internet business is specifically excluded from the coverage of mass media
 1. Internet business refers to internet access providers merely serving as carriers for transmitting messages, rather than being creators or messages/information

II. Summary of the Eleventh Negative List

- ▶ The Eleventh Regular Foreign Investment Negative List provides for the following foreign equity restrictions:

List A: Foreign ownership is limited by mandate of the Constitution and specific laws;

- ▶ No foreign equity
 1. Mass media except recording and internet business
 2. Practice of the following professions:
 - ▶ Radiological and x-ray technology
 - ▶ Criminology

- ▶ Law
 - ▶ Marine deck officers and marine engine officers
 - ▶ Teaching at higher education levels where the subject being taught is a professional subject (i.e. included in a government board or bar examination)
3. Retail trade enterprises with a paid-up capital of less than US\$2,500,000
 4. Cooperatives
 5. Private detective, watchmen or security guard agencies
 6. Small-scale mining
 7. Utilization of marine resources in archipelagic waters, territorial seas, and exclusive economic zones, as well as small-scale utilization of natural resources in rivers, lakes, bays, and lagoons
 8. Ownership, operation and management of cockpits
 9. Manufacture, repair, stockpiling and/or distribution of nuclear weapons
 10. Manufacture, repair, stockpiling and/or distribution of biological, chemical and radiological weapons and anti-personnel mines
 11. Manufacture of firecrackers and other pyrotechnic devices
- ▶ Up to 25% foreign equity
 1. Private recruitment, whether for local or overseas employment
 2. Contracts for the construction of defense-related structures
 - ▶ Up to 30% foreign equity
 1. Advertising
 - ▶ Up to 40% foreign equity
 1. Contracts for the construction and repair of locally-funded public works except:
 - ▶ Infrastructure/development projects covered under in RA 7718; and
 - ▶ Projects which are foreign funded or assisted and required to undergo international competitive bidding.
 2. Exploration, development and utilization of natural resources
 3. Ownership of private lands
 4. Operation of public utilities, except power generation and supply of electricity to the contestable market and such other like business or services not covered by the definition of public utilities

5. Educational institutions other than those established by religious groups and mission boards, or for short-term high-level skills development that do not form part of the formal education system
6. Culture, production, milling, processing, trading except retailing of rice and corn and acquiring, by barter, purchase or otherwise, rice and corn and the by-products thereof
7. Contracts for the supply of materials, goods and commodities to government-owned or controlled corporation, company, agency or municipal corporation
8. Operation of deep sea commercial fishing vessels
9. Ownership of condominium units
10. Private radio communications network

List B: Foreign ownership is limited for reasons of security, defense, risk to health and moral and protection of small and medium -scale enterprises

- ▶ Up to 40% foreign equity
 1. Manufacture, repair, storage, and/or distribution of products and/or ingredients requiring Philippine National Police (PNP) clearance:
 - ▶ Firearms (handguns to shotguns), parts of firearms and ammunition therefore, instruments or implements used or intended to be used in the manufacture of firearms;
 - ▶ Gunpowder;
 - ▶ Dynamite;
 - ▶ Blasting supplies;
 - ▶ Ingredients used in making explosives: Chlorates of potassium and sodium; Nitrates of ammonium, potassium, sodium barium, copper (11), lead (11), calcium and cuprite; Nitric acid; Nitrocellulose; Perchlorates of ammonium, potassium and sodium; Dinitrocellulose; Glycerol; Amorphous phosphorous; Hydrogen peroxide; Strontium nitrate powder; Toluene; and
 - ▶ Telescopic signs, sniper scope and other similar devices.
 2. Manufacture, repair, storage, and/or distribution of products requiring Department of National Defense (DND) clearance:
 - ▶ Guns and ammunition for warfare;
 - ▶ Military ordnance and parts thereof (e.g. torpedoes, depth charges, bombs, grenades, missiles);
 - ▶ Gunnery, bombing and fire control systems and components; Guided missiles/missile systems and components; Tactical aircraft (fixed and rotary-winged), parts and components thereof;

- ▶ Space vehicles and component systems;
 - ▶ Combat vessels (air, land and naval) and auxiliaries;
 - ▶ Weapon repair and maintenance equipment;
 - ▶ Military communications equipment;
 - ▶ Night vision equipment;
 - ▶ Stimulated coherent radiation devices, components and accessories;
 - ▶ Armament training devices; and
 - ▶ Others as may be determined by the Secretary of the DND.
3. Manufacture and distribution of dangerous drugs;
 4. Sauna and steam bathhouses, massage clinics and other like activities regulated by law;
 5. All forms of gambling except those covered by investment agreements with PAGCOR;
 6. Domestic market enterprises with paid-in equity capital of less than the equivalent of US\$200,000; and
 7. Domestic market enterprises which involve advanced technology or employ at least 50 direct employees with paid-in equity of less than the equivalent of US\$100,000.

(Editor's Note: Published in Manila Bulletin on 1 November 2018; p.11)

SEC Issuances and Opinion

SEC MC No. 14 provides the Guidelines for the protection of NPOs from money laundering and terrorist financing abuse ("NPO Guidelines").

SEC Memorandum Circular No. 15 series of 2018 dated 7 November 2018

To ensure that non-profit organizations (NPOs) are not misused by terrorist organizations, the SEC formulates the aforesaid guidelines with the following key features:

- ▶ The adoption of a risk-based approach in applying focused measures in dealing with identified threats of terrorist financing abuse to NPOs;
- ▶ Prescribing different compliance requirements by NPOs depending on its risk rating;
- ▶ Requiring full disclosure as to registration, affiliations, areas of operations, activities, source of funds and beneficiaries of NPOs within 6 months from the effectivity of the guidelines. Failure to comply is a ground for revocation of registration.

- ▶ Requiring NPOs to establish and record the true and full identity of their donors/sources of funds from politically exposed persons or those entrusted with a prominent public position/function in the Philippines, in a foreign state or in an international organization.

(Editor's Note: Published in the Manila Bulletin and the Manila Standard on 28 November 2018)

SEC MC No. 14 provides the 2018 AML/CFT Guidelines for SEC covered institutions.

SEC Memorandum Circular No. 16 series of 2018 dated 7 November 2018

All SEC covered institutions shall comply with the Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Guidelines as follows:

- ▶ All covered institutions are required to amend their Money Laundering and Terrorist Financing Prevention Program (MLPP) to conform with the 2018 AML/CFT Guidelines within 6 months;
- ▶ Covered institutions which have not submitted their respective programs shall prepare the same in accordance with the 2018 AML/CFT Guidelines;
- ▶ All covered institutions shall provide specific procedures and policies and shall revise and reformulate their own MLPP according to their respective structures; and
- ▶ Failure to submit the revised MLPP shall be subject to a penalty of P500/day of delay.

(Editor's Note: Published in the Manila Bulletin and the Manila Standard on 28 November 2018)

SEC MC No. 17 requires the disclosure of beneficial owners of SEC registered corporations.

SEC Memorandum Circular No. 17 series of 2018 dated 27 November 2018

In pursuance of its mandate to assist the implementation of the Anti-Money Laundering Act and to ensure adequate, accurate and current information, the SEC requires all domestic to disclose their beneficial owners under the following guidelines:

- ▶ A beneficial owner shall refer to any natural person who ultimately owns or controls a corporation; it also refers to one who has ultimate effective control over the corporation.
- ▶ Ultimate effective control refers to any situation in which ownership/control is exercised through actual or chain of ownership or by means other than direct control.
- ▶ Any intermediate layers of the corporation's ownership structure should be fully identified.

(Editor's Note: Published in the Manila Standard on 28 November 2018 and the Manila Bulletin on 29 November 2018)

SEC-OGC Opinion No. 18-18 dated 16 November 2018

Facts:

A branch office cannot merge with a domestic corporation independently of its parent company.

A Co., a domestic corporation, wishes to merge with a branch office of a foreign corporation in the Philippines. The parent company abroad or the foreign corporation, however, is unwilling to merge with A Co.

Issue:

Can A Co. merge with the branch office alone?

Held:

A foreign corporation and its Philippine branch comprise one and the same entity. It is impossible for the branch office to merge independently of its parent company.

BSP Issuances

Circular No. 1019 provides for the Technology and Cyber-Risk Reporting and Notification Requirements.

BSP Circular No. 1019 dated 31 October 2018

- ▶ The following are the amendments covering technology and cyber-risk reporting and notification requirements for Bangko Sentral supervised financial institutions (BSFIs).
- ▶ Subsections X177.5 of the Manual of Regulations for Banks (MORB) and Subsections 4177Q.5, 4196S.5, 4177P.5 and 419N6N.5 of the Manual of Regulations for Non-Bank Financial Institutions (MORNBFI) on definition of terms were amended to include the following terminologies, namely: Compromised State, Data Breach, Hacking, Pharming, Reportable major cyber-related incidents, Spearphishing, and Threat actor.
- ▶ Subsections X177.8 of the MORB and 4177Q.8, 4196S.8, 4177P.8, and 4196N.8 of the MORNBFI were amended to provide for reporting and notification standards. BSFIs shall be required to submit event-driven reports, which cover all events that may jeopardize the confidentiality, integrity or availability of critical information, data, or systems of BSFIs, including their customers, and other stakeholders.
- ▶ Subsections X177.9 of the MORB and 4177Q.9, 4196S.9, 4177P.9 and 4196N.9 of the MORNBFI on sanctions and penalties were also amended by this Circular.
- ▶ Item d of Subsection X192.4 of the MORB in the preparation and submission of report on crimes/losses was also amended by this Circular
- ▶ Subsections 4177Q.7, 4196NQ.7, 4196S.7 and 4177P.7 of the MORNBFI on IT Risk Management System were amended to add that the guidelines on EMV Implementation are shown in Appendix Q75/N-17/S-13/P-16 of the MORNBFI. The guidelines on EMV Card Fraud Liability Shift Framework (ECFLSF) are in Appendix Q76/N-18/S-14 and P-17 of the MORNBFI.
- ▶ Appendix 6/Q-3/S-2/P-13/N-1 of the MORB/MORNBFI is also amended by this Circular.
- ▶ The guidelines in the electronic submission and preparation of the Annual IT Profile Report and Report on Crimes and Losses are shown in Annexes A and B of the Circular, respectively.
- ▶ 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. 1019, s. 2018 was published in The Philippine Star on 7 November 2018)

Circular No. 1020 provides for the Amendment to the Basic Standards in the Administration of Trust, Other Fiduciary Accounts and Investment Management Account.

BSP Circular No. 1020 dated 7 November 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).
- ▶ Appendix 83/Q-48 of the MORB/MORNBFI now provide that a client is classified as conservative if a client wants an investment strategy where the primary objective is to prevent the loss of principal and where the fund is invested in securities issued by the National Government and/or deposits with local banks/branches of foreign banks operating in the Philippines and/or with financial institutions in any foreign country.
- ▶ This Circular incorporated the following provision as footnote to the second paragraph of Appendix 83-Q-48 on Part III.A.2 Item (a) (a) Minimum Information required for Client Suitability Assessment (CSA):

Trust entities (TE) may already invest their existing money market unit investment trust funds (UITFs) for conservative clients in securities issued by the National Government: Provided, That the amended plan rules have been approved by the TE's board of directors, and that existing participants in the said money market UITFs shall be immediately notified and shall be allowed to withdraw their participations within reasonable time prior to such investment but in no case less than 10 banking/business days from notification.

The Bangko Sentral shall be notified of the amendments to the Plan Rules within 30 banking/business days from approval of the amendments by the board of directors of the TE. The notice and the amendment to the Plan Rules shall be considered as "Category A-3" reports.

- ▶ This Circular shall take effect immediately.

(Editor's Note: BSP Circular No. 1020, s. 2018 was published in The Philippine Star on 12 November 2018)

Circular No. 1021 provides for the Guidelines on Marking to Market of Financial Instruments.

BSP Circular No. 1021 dated 15 November 2018

- ▶ The following are the guidelines on marking to market of financial instruments to align existing regulations with the provisions of Philippine Financial Reporting Standards 13 on Fair Value Measurement.
- ▶ Subsection X191.4 on "Accounting treatment of financial securities" of the Manual of Regulations for Banks (MORB), Section 4391N and Subsection 4388Q.5 on "Investments in debt and marketable equity securities" of the Manual of Regulations for Non-Bank Financial Institutions (MORNBFI) were amended. It states that financial instruments that are required to be classified and measured at fair value, within the scope of Philippine Financial Reporting Standards (PFRS) 9 under Appendix 33/Q-20, shall be marked-to-market in accordance with the provisions of PFRS 13 on Fair Value Measurement and the related rules and regulations issued by the Securities and Exchange Commission. The marked-to-market guidelines for debt and equity securities are set out in Appendix 33a/Q-20a. BSFIs and the concerned officers found to have violated the provisions of these regulations shall be subject to the enforcement actions under Section 4161N/Subsec. X191.3/4191Q. 3."

- ▶ Subsections X410.10 of the MORB and 4410Q.10 of the MORNBF1 on other related guidelines on valuation of allowable investments were also amended by this Circular.
- ▶ Appendix 33a and Appendix Q-20a on the establishment of the market benchmarks/reference prices and computational methodology used to mark-to-market debt and marketable equity securities were amended by this Circular.
- ▶ 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. 1021, s. 2018 was published in The Philippine Star on 22 November 2018)

Circular No. 1022 provides for the Amendments to Part Eight of the MORB/MORNBF1 and Circular No. 980 dated 6 November 2017.

BSP Circular No. 1022 dated 26 November 2018

- ▶ The following are the amendments to Part Eight of the Manual of Regulations for Banks, (MORB) and Manual of Regulations for Non-Bank Financial Institutions (MORNBF1), and Circular No. 980 dated 6 November 2017
- ▶ Section X801/4801Q of the MORB/MORNBF1 on declaration of policy on anti-money laundering was amended.
- ▶ Section X802/X4802Q of the MORB/MORNBF1 on scope of regulations was amended by this Circular.
- ▶ Section X803/4803Q of the MORB/MORNBF1 on definition of terms was also amended by this Circular.
- ▶ Subsection X805.1/4805Q.1 of the MORB/MORNBF1 was amended to provide for the board and senior management oversight functions.
- ▶ Subsection X805.5/4805Q.5 of the MORB/MORNBF1 on risk assessment is renumbered to Subsection X805.2/4805Q.2 and amended to state, among others, that the institutional risk assessment shall be conducted at least once every two years or as often as the Board or senior management may direct, depending on the level of risks identified in the previous risk assessment, or other relevant AML/CFT developments that may have an impact on the covered person's operations.
- ▶ Subsection X805.2/4805Q.2 on Money Laundering and Terrorist Financing Prevention Program (MTPP) of the MORB/MORNBF1 is renumbered to Subsection X805.3/4805Q.3 and is amended to provide that covered persons shall adopt a comprehensive and risk-based MTPP which shall be consistent with AMLA, as amended, TFPSA, their respective RIRR and the provisions set out in this Part.
- ▶ Subsection X805.3/4805Q.3 and X805.4/4805Q.4 of the MORB/MORNBF1 of the MORB/MORNBF1 are renumbered by this Circular to X805.4/4805Q.4 and X805.5/4805Q.5, respectively.

- ▶ Section X806/4806Q of the MORB/MORNBF1 on customer due diligence and Subsection X806.1/4806.1Q of the MORB/MORNBF1 on customer acceptance and identification policy were also amended by this Circular
- ▶ Subsection X806.2/4806Q.2 of the MORB/MORNBF1 on customer identification was amended to align the regulations with the Revised Implementing Rules and Regulations (RIRR), as amended, and international standards.
- ▶ Subsections X806.3/4806Q.3 of the MORB/MORNBF1 on on-going monitoring of customers, accounts and transactions by Covered persons was also amended by this Circular.
- ▶ Section X808/4808Q of the MORB/MORNBF1 on record keeping and Subsections X808.1/4808Q.1 of the MORB/MORNBF1 on closed accounts and terminated relationships, X808.4/4808.4Q of the MORB/MORNBF1 on form of records were also amended by this Circular.
- ▶ Section X810/4810Q of the MORB/MORNBF1 on Bangko Sentral Authority to check compliance with the AMLA, amended.
- ▶ The provisions of item c (4) of Subsections X1205.5/41205Q.5/4705S.5/4705P.5/4805N.5 are hereby deleted by this Circular
- ▶ All reference to the term MLPP shall be replaced with MTPP.
- ▶ This Circular shall take effect immediately after its publication either in the Official Gazette or in a newspaper of general circulation.

(Editor's note: No publication yet)

Court Decisions

Clark Water Corporation vs. CIR

CTA (*En Banc*) Case No. 1608 promulgated 5 October 2018

The sales by an Ecozone or Freeport enterprise to customers in the customs territory, even if below 30% of its total sales, are not covered by the 5% preferential income tax rate on gross income earned.

Facts:

Respondent CIR assessed Petitioner Clark Water Corporation (CWC) for alleged deficiency income tax and VAT for taxable year 2010 on sales to enterprises within the customs territory. Although CWC is located within the Clark Freeport Zone and enjoys the 5% preferential income tax in lieu of all national and local taxes, the BIR alleged that sales to customers outside the freeport zone are considered technical importations, hence subject to VAT. The BIR also insisted that CWC is liable for deficiency income tax on sales within the customs territory.

CWC argued that its sales to customers in the customs territory constituted only 7.65% of its total revenues in 2010. Not having breached the 30% threshold prescribed under DOF Department Order No. 003-08, CWC claims its sales derived from outside the freeport zone are not subject to regular corporate income tax and VAT.

Upon issuance of a Final Assessment Notice, CWC protested and due to the inaction of the BIR, it filed a Petition for Review with the CTA.

The CTA Third Division denied CWC's petition and upheld the deficiency assessments.

Issues:

1. Is the 5% special tax regime applicable to CWC's sales to customers in the customs territory?
2. Is CWC liable to VAT?

Rulings:

1. No, the 5% special tax does not apply to CWC's sales in the customs territory.

The CTA *En Banc* interpreted DOF Order No. 003-08 to contemplate 2 scenarios:

- (a) If the Ecozone or Freeport Enterprise wants to avail of incentives under the 5% special tax regime, it may generate income from the customs territory of up to 30% of its total income from all sources; and,
- (b) If the income of an Ecozone or Freeport Enterprise exceeds said 30% threshold, then all of its income shall be subject to the relevant taxes under the National Internal Revenue Code.

CWC's case falls under scenario (a). The above provisions, however, should be applied in harmony with other provisions of the regulations. Section 5 of DOF Department Order No. 03-05 prescribes that the basis of the 5% preferential tax is the gross sales or gross revenues derived from business activities within the Ecozone or Freeport. Considering that 7.65% of CWC's sales was derived in the customs territory, the said sales were properly excluded from the computation of the 5% special tax.

2. Yes. The CTA *En Banc* sustained the decision of the CTA Division and held that if services are performed or rendered outside the Freeport zone or within the customs territory, such sale of services is considered technical importation and subject to 12% VAT. As CWC did not present evidence to dispute that its sales to customers outside the Freeport are subject to VAT, the BIR's assessment was presumed correct and made in good faith.

CIR vs. Pacific Bayview Properties, Inc.

CTA (*En Banc*) Case No. 1677 promulgated 8 October 2018

Before issuing the FAN, the BIR must wait for the lapse of 15 days from taxpayer's receipt of the PAN. Otherwise, the assessment is void for violation of due process.

Facts:

Petitioner CIR assessed Respondent Pacific Bayview Properties, Inc. (PBPI) for alleged deficiency income tax and VAT for taxable year 2007. The BIR issued the Preliminary Assessment Notice (PAN) on 5 January 2011, which was received by PBPI on 10 January 2011. PBPI filed a reply to the PAN on 25 January 2011. The BIR issued a Final Assessment Notice (FAN) on 24 January 2011, which PBPI received on 2 February 2011. PBPI filed a protest against the FAN on 3 March 2011.

Upon receipt of the Final Decision on Disputed Assessment partially denying the protest, PBPI filed a Petition for Review at the CTA. The CTA Second Division cancelled the deficiency assessments for violation of PBPI's right to due process, prompting the BIR to elevate the case to the CTA *En Banc*.

The BIR insisted that the issuance of the FAN a day before the expiration of the period to respond to the PAN should not be deemed a deprivation of the taxpayer's

right to procedural due process. It stressed the PBPI received both the PAN and the FAN and was duly informed of the factual and legal basis of the assessments and was able to intelligently respond to the notices.

Issue:

Is the assessment void for failure of the BIR to comply with due process requirements?

Ruling:

Yes. The assessment is void for failure of the BIR to observe due process requirements.

Section 228 of the Tax Code gives taxpayers 15 days from receipt of the PAN to file a reply with the BIR. If during the said period, no protest to the PAN is filed, it is only then that the BIR can consider the taxpayer in default and can issue the FAN.

The BIR is duty bound to wait for the expiration of the 15 days from the date of the receipt of PAN before issuing the FAN. Such procedure is part of the due process requirements in the issuance of deficiency assessments.

CIR vs. Belle Corporation

CTA (*En Banc*) Case No. 1684 promulgated 10 October 2018

The receipt by a stockholder of real property as liquidating dividends from a dissolving corporation is not subject to CGT but to ordinary income tax.

The BIR cannot revoke a ruling and apply such revocation retroactively to the prejudice of the taxpayer.

Facts:

Respondent Belle Corporation (Belle) filed a claim for refund with the BIR for erroneously paid capital gains tax (CGT) from its receipt of real property by way of liquidating dividends. Belle Bay City Corporation (BBCC) shortened its corporate life until 31 January 2004, which was approved by the SEC. On 12 November 2012, a Deed of Conveyance was executed distributing the lots as liquidating dividends to BBCC's shareholders, including Belle.

BBCC earlier secured BIR Ruling No. DA-316-2007 confirming that the transfer of lots are exempt from income tax, withholding tax, and documentary stamp tax since BBCC will not realize any taxable gain or loss during the process of liquidation.

In its 2012 Annual Income Tax Return, Belle recognized the liquidating gain as part of its other taxable income, which it subjected to the 30% regular corporate income tax. Belle, however, paid under protest CGT on the transfer of the lots and later on filed a claim for refund with the BIR. Due to the BIR's inaction, Belle filed a Petition for Review at the CTA.

The CTA Third Division granted the refund, ruling that the mere distribution of liquidating dividends to a corporation should not be treated as a sale that is subject to CGT. It held that CGT is a tax on the gain from sale of taxpayer's property forming part of capital assets. In the absence of income from or the absence of sale, disposition or conveyance of real property, the CTA Third Division ruled that the imposition of CGT does not arise.

The CIR filed a Petition for Review at the CTA *En Banc*. It posited that Belle clearly realized a gain from its receipt of liquidating dividends from BBCC, as indicated on its ITR. It also claims that considering the gain was realized from the exchange of real properties held by BBCC with Belle's surrender of shares of stocks, the transaction is an "exchange" subject to CGT under Section 27(D)(5) of the Tax Code.

Issues:

1. Is Belle entitled to a refund of erroneously paid CGT?
2. Can the BIR revoke a ruling in favor of a taxpayer and apply the revocation retroactively?

Rulings:

1. Yes. The receipt by a stockholder of liquidating dividends from a dissolving corporation is not subject to CGT but to ordinary income tax. Since Belle had recognized the liquidating gain as part of its "Other Taxable Income Not Subjected to Final Tax" in its ITR and paid the corporate income tax for the gain derived, the subsequent payment of CGT for the same income is erroneous and should be refunded. Section 73(A) of the Tax Code provides that any gain derived, or any loss sustained by a stockholder from its receipt of liquidating dividends shall be treated as taxable income or deductible loss, as the case may be.

Citing the decision of the Supreme Court in *Wise vs. Meer*, GR No. 48231 promulgated on 30 June 1947 and *Fernando vs. Spouses Lim*, GR No. 176282 promulgated on 22 August 2008, the CTA *En Banc* held that the surrender of shares by stockholders in exchange for assets distributed by the corporation upon dissolution and liquidation of its assets and liabilities is treated as sale by a stockholder of its shares in the dissolved corporation. Any gain derived by the stockholders from such transaction is subject to ordinary income tax.

Even if it is presumed that there was a sale, there was no indication that the lots transferred by BBCC to Belle were classified as capital assets to warrant the imposition of CGT.

2. No. The CTA *En Banc* ruled that Belle relied in good faith on the BIR ruling subjecting the gain to ordinary corporate income tax. The BIR cannot revoke such ruling and consider the transaction as an exchange subject to CGT and apply such revocation retroactively. Sec. 246 of the Tax Code provides that reversal of the BIR regulation or ruling cannot generally prejudice a taxpayer.

McDonald's Philippines Realty Corporation vs. CIR

CTA (*En Banc*) Case No. 1638 promulgated 11 October 2018

Interest income derived from loans, which is incidental to a taxpayer's leasing business, is subject to VAT.

Facts:

Respondent CIR assessed Petitioner McDonald's Philippines Realty Corporation (MPRC) for alleged deficiency VAT on rental income and interest income from loans extended to Golden Arches Development Corporation (GADC) for taxable year 2007. Upon denial of its protest and the issuance of the Final Decision on Disputed Assessment, MPRC filed a Petition for Review at the CTA.

At the CTA, MPRC sought the cancellation of the deficiency VAT assessment, arguing that (1) the right of the BIR to assess has prescribed; and (2) the interest income is not subject to VAT as it was not incurred in the ordinary course of trade of business. It averred that it is engaged in the business of leasing real properties, not lending money for profit.

The CIR insisted that since MPRC substantially underdeclared its gross receipts by more than 30%, the prescriptive period is 10 years, not 3 years, reckoned from the discovery of the filing of the false or fraudulent returns. It also posited that MPRC

is a lender investor whose gross receipts relating to interest income should be subjected to VAT.

The CTA Third Division held that MPRC's interest income is subject to VAT. It also sustained the BIR's position that MPRC's VAT returns were false, thus the BIR has 10 years to assess from the discovery of the falsity.

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

Issues:

1. Is MPRC's interest income from loans subject to VAT?
2. Did MPRC substantially underdeclare its interest income to warrant the 10-year prescriptive period?

Rulings:

1. Yes. MPRC's interest income from loans are considered incidental to its business hence, subject to VAT.

MPRC established its Philippine branch office for the purpose of acquiring and leasing back two existing McDonald's restaurants to GADC and developing new McDonald's restaurant sites which will then be leased to McGeorge Foods, Inc.

MPRC's grant of loans was in pursuit of its leasing business with GADC. Citing the decision of the Supreme Court in *Mindanao II Geothermal Partnership Vs. CIR*, GR Nos. 193301 and 194637 promulgated on 11 March 2013, the CTA *En Banc* ruled that the interest income that MPRC derived from the loan, being incidental to its leasing business, is deemed a transaction in the course of trade or business, which is subject to VAT pursuant to Section 105 in relation to Section 108 (A) of the Tax Code.

2. Yes. The failure of MPRC to declare its VATable interest income resulted in more than 30% underdeclaration of receipts to the total declared VAT receipts, which justifies the use of the 10-year prescriptive period for falsified returns. While the underdeclaration did not arise from a deliberate attempt to evade tax, the deviation from the truth or falsity warrants the application of the extraordinary prescriptive period of 10 years.

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

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