

Tax Bulletin

December 2019



Highlights

BIR Issuances

- ▶ Revenue Regulation (RR) No. 10-2019 further amends RR No. 4-2000, as amended by RR No. 7-2005, prescribing a new format for the BIR Notice to the Public to be exhibited at the place of business. **(Page 3)**
- ▶ Revenue Memorandum Circular (RMC) No. 124-2019 extends the deadline for submission of the Annual Information Return of Income Taxes Withheld on Compensation and Final Withholding Taxes (BIR Form Nos. 1604C and 1604F). **(Page 4)**
- ▶ RMC No. 126-2019 extends the use of the old versions of BIR Withholding Certificates/Forms - BIR Form Nos. 2306, 2307 and 2316. **(Page 4)**
- ▶ RMC No. 134-2019 circularizes the availability of Revised BIR Form No. 1702-EX (Annual Income Tax Return) January 2018 (ENCS) Version 2. **(Page 4)**
- ▶ RMC No. 135-2019 reiterates the prescribed procedures in availing the Tax Amnesty on Delinquencies (TAD) and provides additional clarification on specific issues. **(Page 5)**
- ▶ RMC No. 136-2019 circularizes the names of taxpayers who are either included or deleted from the list of top withholding agents pursuant to the new criteria prescribed under Revenue Regulations (RR) No. 7-2019 for the 1% or 2% creditable withholding taxes on purchases of goods and services. **(Page 5)**
- ▶ RMC No. 139-2019 circularizes the availability of the enhanced BIR Form Nos. 1601-EQ and 1602Q, January 2019 (ENCS). **(Page 6)**
- ▶ RMC No. 141-2019 reiterates the rules prescribed under RMO No. 14-2016 on the proper execution of Waivers of the Defense of Prescription and provides an illustration of the basic requirements. **(Page 7)**

BOC Issuances

- ▶ Customs Administrative Order (CAO) No. 16-2019 prescribes rules for the exercise of the Government's Right of Compulsory Acquisition. **(Page 8)**
- ▶ CAO No. 17-2019 clarifies the kinds, effects and treatment of abandonment. **(Page 9)**

SEC Issuances

- ▶ SEC MC No. 23 prescribes the guidelines for the filing of a petition for the revival of corporate existence. **(Page 10)**
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- ▶ Subscription commitments cannot be condoned or remitted. **(Page 13)**

- ▶ Corporations engaged exclusively in international freight forwarding are considered beyond the purview of the nationality requirement for the operation of public utilities and therefore may be up to 100% owned by foreigners. **(Page 14)**
- ▶ Incorporators of any corporation need not comply with any residency requirement as the Revised Corporation Code has removed this requirement.

A foreign national may be appointed or elected to a position involving management, operation, administration, or control, provided the company is not engaged in any nationalized activity. **(Page 15)**

Court Decisions

- ▶ A taxpayer may protest an assessment issued by the local treasurer and alternatively (1) appeal the assessment in court without having to pay the assessed tax; or (2) pay the tax, and thereafter, seek a refund.

The local treasurer may not simply collect deficiency taxes for a different taxing period by raising the tax assessment as a defense in a taxpayer's action for refund of erroneously or illegally collected taxes. **(Page 15)**

- ▶ The enumeration of direct costs, which may be allowed as deductions in computing the 5% gross income tax, is not exclusive. Expenses directly related to the PEZA-registered activity should be treated as direct costs that are allowable deductions from the gross income. **(Page 17)**
- ▶ The BIR's failure to prove the actual receipt of the Final Assessment Notice (FAN)/ Formal Letter of Demand (FLD) by the tax payer or by its authorized representative is fatal and renders the assessment void for noncompliance with the due process requirements. The receipt by security guards cannot be considered receipt by YLCI. **(Page 18)**
- ▶ The imposition and collection of compromise penalties must strictly follow the amounts stated under the Revised Schedule of Compromise Penalties and the amounts of compromise penalties incident to violations shall be itemized in a separate assessment notice/demand letter as the amounts suggested to the taxpayer to pay in lieu of criminal prosecution. **(Page 19)**

BIR Issuances

RR No. 10-2019 further amends RR No. 4-2000, as amended by RR No. 7-2005, prescribing a new format for the BIR Notice to the Public to be exhibited at the place of business.

RR No. 10-2019 issued on 02 December 2019

- ▶ A new format has been prescribed for the BIR Notice to the Public, which must be exhibited by persons required by law to issue receipts/ invoices at their place of business.
- ▶ All persons required by law to issue official receipts or sales invoices are required to post the BIR Notice to the Public under the new format in their place of business in such areas conspicuous to the public view.
- ▶ These regulations shall take effect after 15 days following their publication in newspapers of general circulation.

(Editor's Note: RR No. 10-2019 was published in the Malaya Business Insight on 3 December 2019 and The Manila Standard on 13 December 2019)

RMC No. 124-2019 extends the deadline for submission of the Annual Information Return of Income Taxes Withheld on Compensation and Final Withholding Taxes (BIR Form Nos. 1604C and 1604F).

RMC No. 124-2019 issued on 26 November 2019

- ▶ The Alphalist Data Entry and Validation Module (Version 6.1), which is the prescribed facility for accomplishing the Alphabetical List of Employees/Payees From Whom Taxes Were Withheld for purposes of submission to the BIR, is being enhanced, and its completion is still being determined.
- ▶ Thus, the submission of the Annual Information Return of Income Taxes Withheld on Compensation and Final Withholding Taxes (BIR Form Nos. 1604-C and 1604-F), including the Alphabetical List of Employees/Payees From Whom Taxes Were Withheld, is hereby extended from 30 January 2020 to 28 February 2020.

RMC No. 126-2019 extends the use of the old versions of BIR Withholding Certificates/Forms - BIR Form Nos. 2306, 2307 and 2316.

RMC No. 126-2019 issued on 26 November 2019

- ▶ The old versions of BIR Form Nos. 2306 (Certificate of Final Tax Withheld at Source) (September 2005 ENCS), 2307 (Certificate of Creditable Tax Withheld at Source) (September 2005 ENCS), and 2316 (Certificate of Compensation Payment/Tax Withheld) (July 2008 ENCS) may be used for all transactions covering the taxable year ending 31 December 2019.
- ▶ The use of the old versions of these BIR forms is in response to the clamor of withholding agents to be allowed to use them pending the required configuration of their Computerized Accounting Systems (CAS). However, the configuration of CAS shall not extend beyond 31 December 2019.

RMC No. 134-2019 circularizes the availability of Revised BIR Form No. 1702-EX (Annual Income Tax Return) January 2018 (ENCS) Version 2.

RMC No. 134-2019 issued on 05 December 2019

- ▶ This issuance circularizes the availability of the newly-revised BIR Form No. 1702-EX (Annual Income Tax Return for Corporation, Partnership and Other Non-Individual Taxpayer Exempt under the Tax Code), January 2018 (ENCS) version 2, in relation to the provisions on Optional Standard Deduction (OSD) or Section 34 (L) of the Tax Code, as amended, and implemented by Section 8 of the Revenue Regulations (RR) No. 8-2018.
- ▶ Hence, the aforesaid return includes both the OSD and the itemized deductions, which are available to be claimed by General Professional Partnerships (GPPs).
- ▶ The revised manual return is already available on the BIR website (www.bir.gov.ph) under the BIR Forms-Income Tax Return Section and in the Offline Electronic Bureau of Internal Revenue Forms (eBIRForms) Package v7.5.
- ▶ However, the form is not yet available in the eFPS; thus, eFPS filers shall use the Offline eBIRForms Package v7.5 in filing the said return. A revenue issuance shall be issued to announce the availability of the return.
- ▶ Further, BIR Form No. 1702-RT (Annual Income Tax Return for Corporations, Partnerships and Other Non-Individual Taxpayers Subject Only to the Regular Income Tax Rate), January 2018 (ENCS), which was circularized under RMC No. 19-2019, is also available in the Offline eBIR Forms Package v7.5.

RMC No. 135-2019 reiterates the prescribed procedures in availing the TAD and provides additional clarification on specific issues.

RMC No. 135-2019 issued on 11 December 2019

- ▶ A "stop-filer" case, which merely pertains to the failure to file the required return, is not qualified for tax amnesty in the absence of an assessment.
- ▶ Tax liabilities arising from failure to pay in full and non-payment of the tax due declared per tax returns are not qualified for tax amnesty unless prior to 24 April 2019, a letter to the withholding agent or preliminary collection letter demanding remittance/payment of taxes withheld but not remitted, as declared per return, was sent by the BIR.
- ▶ Moreover, the following procedures as prescribed under Revenue Memorandum Order (RMO) No. 23-2019 must be strictly complied with:
 1. Tax Amnesty Return (TAR) (BIR Form No. 2118-DA), completely and accurately accomplished and made under oath;
 2. Acceptance Payment Form (APF) or BIR Form 0621-DA must be duly endorsed by the concerned BIR officials; and
 3. Certificate of Tax Delinquencies (CTD) must be issued and signed only by the authorized BIR officer and not by the taxpayer who is availing of the tax amnesty.
- ▶ The immunity and privileges shall only apply to the particular tax type and taxable period as indicated in the TAR and paid under a duly approved APF. Consequently, tax liability/ies for taxable period/s and/or tax types not included in the tax amnesty application will not be cancelled.
- ▶ BIR Revenue officers are instructed to deal only with taxpayers themselves or their tax agents who are duly accredited by the BIR.

RMC No. 136-2019 circularizes the names of taxpayers who are either included or deleted from the list of withholding agents pursuant to the new criteria prescribed under RR No. 7-2019 for the 1% or 2% creditable withholding taxes on purchases of goods and services.

RMC No. 136-2019 issued on 16 December 2019

- ▶ Pursuant to the new criteria prescribed under RR No. 7-2019 to qualify as a top withholding agent (TWA), the BIR recently updated the list of TWAs who are required to deduct and remit the 1% and 2% creditable withholding taxes (CWTs) from the income payments to their suppliers of goods and services. The updated list has been posted on the BIR website.
- ▶ The obligation to deduct and remit the 1% and 2% CWTs on those included in the updated list shall continue, commence or cease, as the case may be, effective 1 January 2020.
- ▶ Any taxpayer who has been deleted from the updated list of withholding agents is no longer required to deduct and remit the 1% or 2% CWT on its purchase of goods and services.

RMC No. 139-2019 circularizes the availability of the enhanced BIR Form Nos. 1601-EQ and 1602Q, January 2019 (ENCS)

RMC No. 139-2019 issued on 20 December 2019

- ▶ This Circular circularizes the availability the enhanced BIR Form Nos. 1601-EQ and 1602Q due to the implementation of the TRAIN Law and the revisions made as follows:

Form No.	Description	Reason for Revision
1601-EQ (Annex "A")	Quarterly Remittance Return of Creditable Income Taxes Withheld (Expanded)	The form is revised due to some changes in the rate of creditable withholding tax on MERALCO payments and interest income derived from any other debt instruments not within the coverage of deposits substitutes pursuant to RR No. 1-2019
1602Q (Annex "B")	Quarterly Remittance Return of Final Taxes Withheld on Interest Paid on Deposits and Yield on Deposit Substitutes/ Trusts/Etc.	The form is revised due to the implementation of RR Nos. 0620 and 1621 in remitting the tax withheld on the amount withdrawn from the decedent's deposit account.

- ▶ The revised manual returns are already available on the BIR website (www.bir.gov.ph) under the BIR Forms-Payment/Remittance Forms Section.
- ▶ However, the forms are not yet available in the eFPS and eBIRForms; thus, eFPS/eBIRForms filers shall continue to use the existing version of BIR Form Nos. 1601-EQ and 1602Q in the eFPS and the Offline eBIRForms Package v7.5 in filing and remitting the taxes due.
- ▶ Manual filers shall download the PDF version of the form, print the form and completely fill out the applicable fields; otherwise, penalties under Sec. 250 of the Tax Code, as amended, shall be imposed. Payment of the taxes due thereon, if any, shall be made through:

1. Manual Payment:

- ▶ Authorized Agent Bank (AAB) located within the territorial jurisdiction of the Revenue District Office (RDO) where the taxpayer is registered; or
- ▶ In places where there are no AABs, the return shall be filed and the tax due shall be paid with the concerned Revenue Collection Officer (RCO) under the jurisdiction of the RDO using MRCOS facility.

2. Online Payment:

- ▶ Through GCash Mobile Payment;
- ▶ Landbank of the Philippines (LBP) Linkbiz Portal, for taxpayers who have ATM account with LBP and/or holders of Bancnet ATM/Debit card; or
- ▶ DBP Tax Online, for holders of VISA/Master Credit Card and/or Bancnet ATM Debit Card.

RMC No. 141-2019 reiterates the rules prescribed under RMO No. 14-2016 on the proper execution of Waivers of the Defense of Prescription and provides an illustration of the basic requirements.

RMC No. 141-2019 issued on 20 December 2019

The following are the rules prescribed under RMO No. 14-2016 on the execution of the Waiver of the Statute of Limitations (Waiver) pursuant to Section 222 (b) and (d) of the Tax Code:

- ▶ The Waiver is a unilateral and voluntary undertaking, which shall take legal effect and be binding on the taxpayer immediately upon his execution thereof.
- ▶ The Waiver need not specify the type of taxes to be assessed nor the amount thereof.
- ▶ It is no longer required that the delegation of authority to a representative be in writing and notarized.
- ▶ The taxpayer cannot seek to invalidate his Waiver by contesting the authority of his own representative.
- ▶ It is the duty of the taxpayer to submit his Waiver to the officials listed in the said RMO prior to the expiration of the period to assess or to collect as the case may be.
- ▶ In addition to the previously authorized officials, the RDO or Group Supervisor as designated in the Letter of Authority or Memorandum of Assignment can accept the Waiver:
- ▶ The date of acceptance by the BIR Officer is no longer required to be indicated for the Waiver's validity.
- ▶ The taxpayer shall have the duty to retain a copy of the submitted Waiver.
- ▶ Notarization of the Waiver is not a requirement for its validity.
- ▶ The taxpayer is charged with the burden of ensuring that his Waiver is validly executed when submitted to the BIR. Thus, the taxpayer must ensure that his Waiver:
 1. Is executed before the expiration of the period to assess or to collect taxes;
 2. Indicates the expiry date of the extended period;
 3. Indicates the types of tax (for waiver of the prescriptive period to collect); and
 4. Is signed by his authorized representative.
- ▶ There is no strict format for the Waiver, and the taxpayer may utilize any form without affecting its validity.

CAO No. 16-2019 prescribes rules for the exercise of the Government's Right of Compulsory Acquisition.

BOC Issuances

CAO No. 16-2019

- ▶ The CAO applies to all imported goods suspected to be undervalued, including but not limited to consumption, warehousing, transshipment, consolidated goods and postal items.
- ▶ The Commissioner of Customs has the sole authority to exercise, on his own or upon the recommendation of the District Collector (DC), the power of Compulsory Acquisition (CA).
- ▶ The Commissioner may, on his own, issue the Notice of Compulsory Acquisition (NCA), when the value of the goods is determined to be unconscionably low with reference to the following "Badges of Undervaluation":
 1. Duty benchmarking;
 2. Information from reliable sources that such importation is unconscionably low; and
 3. When the Bureau of Customs (BOC), after applying all the methods of valuation, still finds a discrepancy of at least thirty percent (30%) in the value declared as against other reference.
- ▶ The issuance of an NCA based on the recommendation of a DC requires the Commissioner to act within 48 hours (24 hours for perishable goods). Non-issuance of the NCA, within the period, is deemed a denial of the DC's recommendation.
- ▶ Upon the issuance of the NCA, the goods shall immediately be transferred to a secured area or facility under the jurisdiction of the BOC.
- ▶ The CA proceedings shall be conducted within three working days after the issuance of the NCA, and a decision shall be rendered within five working days from the termination of such proceedings.
- ▶ A Warrant of Compulsory Acquisition (WCA) shall be issued when the value of the goods is determined to be unconscionably low. A notice of the decision shall be provided to the importer, and the payment shall be made in cash within 10 working days from issuance of the WCA.
- ▶ The decision may be appealed to the Secretary of Finance within 20 working days from the receipt of the WCA. If the decision is affirmed by the Secretary of Finance, the importer may appeal to the Court of Tax Appeals (CTA) within 30 calendar days from receipt of the decision.
- ▶ Reversal of the decision by the Secretary of Finance shall be final and executory.
- ▶ The WCA shall be final and executory when no appeal is taken within the prescribed period, or upon finality of the decision of the court affirming the CA.
- ▶ Goods subjected to CA shall be disposed through public auction, negotiated sale or other mode of disposition allowed under the Customs Modernization and Tariff Act (CMTA), subject to appropriate rules and regulations.

- ▶ This Order shall take effect 30 days after its complete publication in the Official Gazette or a newspaper of general circulation.

(Editor's Note: CAO No. 16 -2019 was published in The Manila Times on 06 December 2019)

CAO No. 17-2019 clarifies the kinds, effects and treatment of abandonment.

CAO No. 17-2019

- ▶ There are two kinds of abandonment of imported goods: express and implied. The District Collection shall issue a Decree of Abandonment in both cases.
- ▶ Express abandonment requires the filing of an Affidavit of Abandonment any time the imported goods are within the control of the BOC or until the payment of duties and taxes due on imported goods entered under the customs bonded warehousing regime, by the owner, importer or consignee of the goods to the DC, who shall verify the same within three calendar days from its filing. Expressly abandoned goods shall be deemed property of the government.
- ▶ Implied abandonment arises under the following cases:
 1. *Failure to lodge/file the goods declaration* within 15 days from the date of discharge of the last package from the vessel or aircraft;
 2. *Failure to pay the assessed duties and taxes* within 15 calendar days from final assessment, which will result in the assessment being undisputed and the shipment being deemed abandoned;
 3. *Failure to submit the required permit* - the importer, owner or consignee of assessed regulated goods shall submit clearances, licenses and other requirements after the arrival of the shipment within 45 calendar days from the date of lodgment or 15 calendar days from the date of final assessment, whichever comes first;
 4. *Failure to claim the goods* within 30 calendar days from payment of the assessed duties, taxes, fees interest and other charges; and
 5. *Failure to mark the goods* within 30 calendar days from receipt of Notice to Mark from the District Collector.
- ▶ Abandonment of bonded warehoused imported goods shall be governed by the CAO on Customs Bonded Warehouse.
- ▶ Once expressly abandoned, the goods shall be deemed the property of the government. All interests and property rights over expressly abandoned goods are deemed renounced by the owner, importer or consignee of the imported goods in favor of the government.
- ▶ Impliedly abandoned goods may be reclaimed by the owner, importer or consignee subject to certain conditions.
- ▶ CAO No. 17 - 2019 shall take effect 30 days after its publication at the Official Gazette or a newspaper of national circulation.

(Editor's Note: CAO No. 17 -2019 was published in The Manila Times on 03 January 2020)

SEC Issuances

SEC MC No. 23 prescribes the guidelines for the filing of a petition for the revival of corporate existence.

SEC Memorandum Circular No. 23, Series of 2019 dated 21 November 2019

I. Applicability

- ▶ The following may file a Petition for Revival of Corporate Existence:
 1. Generally, a corporation whose term has expired;
 2. A corporation whose Certificate of Registration has been revoked for non-filing of reports, such as General Information Sheet and Audited Financial Statements;
 3. A corporation whose Certificate of Registration has been suspended;
 4. A corporation whose corporate name has already been validly re-used and is currently being used by another existing corporation duly registered with SEC provided that the former shall change its corporate name within 30 days from the issuance of its Certificate of Revival of Corporate Existence.

- ▶ The following are not allowed to file a Petition for Revival of Corporate Existence:
 1. A corporation, which has completed the liquidation of its assets;
 2. A corporation whose Certificate of Registration has been revoked for reasons other than non-filing of reports;
 3. A corporation, which has been dissolved by virtue of Sections 6(c) and 6(d) of Presidential Decree No. 902-A, as amended by Presidential Decree No. 1799;
 4. A corporation, which already availed of re-registration pursuant to the Amended Guidelines and Procedures on the Use of Corporate and Partnership Names (SEC MC No. 13, Series of 2019), or other memorandum circulars issued by SEC pertaining to re-registration, except in the following cases:
 - ▶ The re-registered corporation has given its consent to the Petitioner to use its corporate name and has undertaken to undergo voluntary dissolution immediately after the issuance of the Petitioner's Certificate of Revival; and
 - ▶ The re-registered corporation has given its consent to the Petitioner to use its corporate name and has undertaken to change its corporate name immediately after the issuance of the Petitioner's Certificate of Revival.

II. General guidelines

- ▶ The required number of votes for the revival of an Expired Corporation is:
 1. For a Stock Corporation - At least a majority vote of the board of directors, and the vote of at least a majority of the outstanding capital stock.

2. For a Non-stock Corporation - At least a majority vote of the board of trustees, and the vote of at least a majority of the members,
- ▶ The revival of the corporate existence is without prejudice to the exercise of appraisal right by dissenting stockholders in accordance with the Revised Corporation Code.

III. Procedure

- ▶ Petitioner shall file a verified Petition for the Revival of Corporate Existence in accordance with the SEC Rules of Procedure as follows:
 1. The Petition for Revival may be filed with the SEC's Company Registration and Monitoring Department (CRMD), any SEC Satellite Office, or any SEC Extension Office.
 2. The Petition shall be verified in the same manner as the Verified Answer under Section 3-3, Rule III of Part II of the 2016 Rules of Procedure of the SEC.
- ▶ Within 15 days from filing, petitioner shall publish in a newspaper of general circulation, its Petition for Revival, stamped received by the SEC, with the corresponding docket number. Petitioner shall also provide proof of publication of the Petition for Revival to the SEC.
- ▶ Interested parties may file a verified Opposition to the Petition for Revival, with a clear statement of the grounds relied upon, within 15 days from the date of publication of the Petition for Revival.
- ▶ The SEC may call the parties for a Clarificatory Conference to clarify factual and legal issues.
- ▶ If the SEC finds that the Petition is meritorious, it shall grant the Petition and issue a Certificate of Revival of Corporate Existence.
- ▶ The Certificate of Revival shall provide for a perpetual term of existence unless a specific corporate term is stated by the applicant corporation in the Petition.

IV. Effectivity

- ▶ The Memorandum Circular shall take effect immediately upon its publication in a newspaper of general circulation.

(Editor's Note: SEC MC No. 23, Series of 2019, was published in The Manila Times and the Philippine Star on 06 December 2019)

SEC MC No. 24 circularizes the Code of Corporate Governance for Public Companies and Registered Issuers.

SEC MC No. 24, Series of 2019 dated 19 December 2019

I. Background

- ▶ To promote the development of strong corporate governance and pursuant to its regulatory powers under the Revised Corporation Code, the SEC has resolved to adopt the Code of Corporate Governance for Public Companies and Registered Issuers (CG Code for PCs and RIs).

- ▶ The CG Code for PCs and RIs supersedes the following SEC Memorandum Circulars:
 1. SEC MC No. 6, Series of 2009 (Revised Code of Corporate Governance);
 2. SEC MC No. 9, Series of 2014 (Amendment to the Revised Code of Corporate Governance); and
 3. SEC MC No. 4, Series of 2017 (Term Limits of Independent Directors).

The above MCs shall remain in effect for other covered companies, when applicable.

- ▶ All other relevant MCs on corporate governance shall remain in force and effect until further notice.

II. Salient provisions of the Code

- ▶ The Code adopts the “comply or explain” approach, which combines voluntary compliance with mandatory disclosure.
- ▶ The Code is arranged as follows:
 1. **Principles** are high-level statements of corporate governance good practices and are applicable to all companies.
 2. **Recommendations** are the objective criteria that are intended to identify the specific features of corporate governance good practices that are recommended for companies covered by this Code.
 3. **Explanations** strive to provide companies with additional information on the recommended best practice.

- ▶ Below is the general outline:

1. The Board's Governance Responsibilities

- ▶ Establishing a competent board
- ▶ Establishing clear roles and responsibilities of the board
- ▶ Establishing board committees
- ▶ Fostering commitment
- ▶ Reinforcing board independence
- ▶ Assessing board performance
- ▶ Strengthening board ethics

2. Disclosure and Transparency

- ▶ Enhancing company disclosure policies and procedures
- ▶ Strengthening external auditor's independence and improving audit quality
- ▶ Increasing focus on non-financial and sustainability reporting
- ▶ Promoting a comprehensive and cost-efficient access to relevant information

3. Internal Control and Risk Management Frameworks

- ▶ Strengthening internal control and risk management systems

4. Cultivating a Synergic Relationship with Shareholders/Members

- ▶ Promoting shareholder/member rights

5. Duties to Stakeholders

- ▶ Respecting rights of stakeholders and effective redress for violation of stakeholder's rights
- ▶ Encouraging employees' participation
- ▶ Encouraging sustainability and social responsibility

III. Effectivity and transitory provision

- ▶ The Memorandum Circular shall take effect 15 days after its publication in two newspapers of general circulation.
- ▶ All public companies and registered issuers shall submit a new Manual on Corporate Governance within 6 months from the effectivity of this MC.
- ▶ Despite the issuance of the CG Code for PCs and RIs, public companies and registered issuers shall submit a Compliance Officer Certification on the extent of the company's compliance with the Revised Code of Corporate Governance and Corporate Secretary Certification on record of attendance in board meetings for the covered year 2019 not later than 30 January 2020.

(Editor's Note: SEC MC No. 24, Series of 2019 was published in The Manila Standard on 28 December 2019)

SEC Opinions

SEC-OGC Opinion No. 19-50 dated 11 October 2019

Subscription commitments cannot be condoned or remitted.

Facts:

P Corporation is a company whose shares are listed with the Philippine Stock Exchange. A significant number of P Corporation's outstanding shares were only partially paid and as such, are not immediately tradeable.

Issues:

1. Can P Corporation condone the subscription receivable due from its shareholders?
2. Can P Corporation consider the portion paid by a partially-paid shareholder as full payment of the corresponding number of shares and cancel the subscription as to the rest?

Rulings:

1. No. Subscription commitments cannot be condoned or remitted.

Upon the acceptance of a stock subscription by a corporation, the subscription becomes a binding contract from which the subscriber cannot withdraw. Neither does the corporation have the power to release an original subscriber from its subscription.

To do so would violate the Trust Fund Doctrine, which considers the subscribed capital as a trust fund for the payment of the debts of the corporation, to which the creditors may look for satisfaction. Until the liquidation of the corporation, no part of the subscribed capital stock may be returned or released to the stockholder (except in the redemption of redeemable shares) without violating this principle.

2. No. P Corporation cannot issue certificates of stock for the portion of the subscription that is paid and cancel the portion which remains unpaid.

Section 63 of the Revised Corporation Code enunciates the Doctrine of Indivisibility of Subscription Contracts, which provides that a subscription is one, entire, and indivisible whole contract.

SEC-OGC Opinion No. 19-55 dated 19 November 2019

Corporations engaged exclusively in international freight forwarding are considered beyond the purview of the nationality requirement for the operation of public utilities and therefore may be up to 100% owned by foreigners.

Facts:

S Corporation, a company located in Japan, intends to engage in business related to logistics by providing the following services: 1) acting as a logistics coordinator and/or cargo agent of the customer; 2) arranging the needed mode of transportation for the efficient transfer of goods, products, merchandise, items, etc. through outsourcing all relevant services to subcontractors, suppliers, and service providers; 3) negotiating with suppliers for cargo space and paying freight cost on behalf of the customer; 4) packing of goods on behalf of the local and overseas shipper.

Issue:

Is S Corporation allowed to establish a 100% foreign-owned domestic corporation engaged in international freight forwarding and non-vessel operating common carrier (NVOCC) business activities under the Foreign Investments Act?

Ruling:

Yes, S Corporation may establish a 100% foreign-owned domestic subsidiary provided that the said corporation shall engage exclusively in international freight forwarding.

In general, a freight forwarding corporation is considered an operator of a public utility. As such, it must comply with Article XII, Section 11 of the Constitution which limits foreign ownership at 40% for the operation of public utilities.

However, corporations engaged exclusively in international freight forwarding are considered beyond the purview of the nationality requirement for the operation of public utilities and, therefore, may be up to 100% owned by foreigners.

SEC-OGC Opinion No. 19-59 dated 13 December 2019

Incorporators of any corporation need not comply with any residency requirement as the Revised Corporation Code has removed this requirement.

A foreign national may be appointed or elected to a position involving management, operation, administration, or control, provided the company is not engaged in any nationalized activity.

Facts:

Some foreign nationals intend to incorporate a travel and tours business in the Philippines, which would be 40% owned by foreign nationals and 60% by Filipinos, with a paid-up capital of US\$200,000. The company will engage in travel and tours operation, marketing of travel services local and abroad, and inbound and outbound marketing of travel packages.

Issues:

1. Are incorporators of a company engaged in a travel and tours business required to comply with the residency requirement under the Revised Corporation Code?
2. Can foreign nationals occupy the position of President and/or Treasurer for a travel and tours business?

Rulings:

1. No, the incorporators of any corporation need not comply with any residency requirement. The Revised Corporation Code has removed this requirement. Currently, only the treasurer and the corporate secretary are required to be residents of the Philippines.
2. Yes, a foreign national may be appointed or elected as President or Treasurer, or to any position involving management, operation, administration, or control, provided the company is not engaged in any nationalized activity.

The intended travel and tours business will not be a nationalized activity if it is an export enterprise or a domestic enterprise with a paid-up capital of US\$200,000. In such a case, it may be 100% foreign-owned.

Court Decisions

City Treasurer of Manila vs. Philippine Beverage Partners, Inc., substituted by Coca-Cola Bottlers Philippines

Supreme Court (Second Division) G.R. No. 233556, promulgated 11 September 2019

A taxpayer may protest an assessment issued by the local treasurer and alternatively (1) appeal the assessment in court without having to pay the assessed tax; or (2) pay the tax, and thereafter, seek a refund.

The local treasurer may not simply collect deficiency taxes for a different taxing period by raising the tax assessment as a defense in a taxpayer's action for refund of erroneously or illegally collected taxes.

Facts:

On 17 January 2007, the City Treasurer of Manila issued a Statement of Account (SOA) to Philippine Beverage Partners, Inc. (or PBPI) for local business taxes (LBT) and regulatory fees for the first quarter of 2007.

PBPI protested the assessment and argued that Tax Ordinance Nos. 7988 and 8011 amending the Revenue Code of Manila (RCM) have been declared null and void, and that the collection of LBT under both Sections 21 and 14 of the RCM constitutes double taxation.

Upon denial by the City Treasurer of the protest, PBPI paid the amount in the SOA and filed a written claim for refund of erroneously/illegally collected tax with the City Treasurer. PBPI also filed a Complaint for Revision of SOA (Preliminary Assessment) and for Refund or Credit of LBT Erroneously/Illegally Collected with the Manila Regional Trial Court (RTC).

The RTC ordered the refund of the overpaid taxes and ruled that PBPI is already taxed under Section 14 of the RCM and should no longer be subjected to tax under Section 21 of the RCM. The RTC also ruled that the claim for refund was properly filed within two years from payment of the tax.

On appeal, the Court of Tax Appeals (CTA) ruled that PBPI complied with the requisites for entitlement to a refund/credit of local taxes. The CTA also ruled that City Treasurer's defense that PBPI's claim should be offset by its tax deficiency for the years 2006 and 2007 is waived by the failure of the City Treasurer to raise the defense before the trial court.

The City Treasurer appealed to the Supreme Court.

Issues:

1. May PBPI file a judicial claim for refund after it has protested an assessment?
2. May PBPI's claim for refund be offset by its alleged deficiency taxes?

Ruling:

1. Yes, PBPI may file a judicial claim for refund after it has protested an assessment.

Sections 195 and 196 of the Local Government Code (LGC) set forth the procedures for protesting an assessment issued by the local treasurer and for recovering an erroneously paid or illegally collected tax, respectively.

Upon receiving a notice of assessment, a taxpayer may proceed in two ways. First, the taxpayer may file a written protest before the local treasurer within 60 days and appeal the decision in court. Second, the taxpayer may opt to pay the assessed tax after its protest has been denied and file a judicial claim for refund of the tax paid, instead of filing an appeal of the local treasurer's decision.

In the second instance, the taxpayer is deemed to have paid the tax believing it to be erroneous or illegal. Thus, a claim under Section 196 of the LGC may be made.

PBPI opted to proceed with its claim under the second instance.

Thus, after receiving the assessment, PBPI protested it within the 60-day period under Section 195 of the LGC before the City Treasurer. Upon receipt of the denial of its protest, PBPI paid the tax assessed. Within the 30-day period under Section 195 of the LGC (for appeal to the court for a denial of a protest) and within the two-year period under Section 196 of the LGC (for filing a claim for erroneously paid or illegally collected tax), PBPI filed a claim for refund before the RTC.

Thus, PBPI's judicial claim for refund was properly instituted.

2. No, PBPI's claim for refund may not be offset against its alleged deficiency taxes.

Section 195 of the LGC requires the Local Treasurer to issue a notice of assessment stating the nature of the tax and the amount of deficiency whenever it finds that correct taxes have not been paid.

The local treasurer may not simply collect deficiency taxes for a different taxing period by raising it as a defense in a taxpayer's action for refund of erroneously or illegally collected taxes.

Moog Controls Corporation - Philippine Branch vs. Commissioner of Internal Revenue

CTA (*En Banc*) Case No. 1809-10 promulgated 14 November 2019

The enumeration of direct costs, which may be allowed as deductions in computing the 5% gross income tax, is not exclusive. Expenses directly related to the PEZA-registered activity should be treated as direct costs that are allowable deductions from the gross income.

Facts:

Respondent CIR assessed Petitioner Moog Controls Corporation - Philippine Branch ("Moog") for deficiency income tax for fiscal year ending October 3, 2009, disallowing certain items of expenses in computing the 5% Gross Income Tax (GIT). The BIR argued that the following deductions are not direct costs related to the PEZA-registered activities of Moog: (a) repairs and maintenance; (b) data processing; (c) insurance; and (d) outside services.

The BIR argued that the enumeration of allowable deductions from gross income in Rule XX of the Implementing Rules and Regulations (IRR) of RA 7916 of the PEZA Law, as implemented by Revenue Regulation 11-2005, is exclusive. Since Moog's reported costs of sales were not expressly included in the enumeration of allowable deduction for GIT purposes, the BIR posited that these were correctly disallowed in computing its income tax liability.

Moog protested the deficiency assessment, contending that the criterion in determining whether the item should be considered as a direct cost is its direct relation to the rendition of the PEZA-registered services, i.e. if the item or cost or expense can be directly attributed to providing the PEZA-registered services, then it should be treated as direct cost and deductible even if that it is excluded from the list.

It maintained that considering the list under RR 11-2005 as exclusive is a limited and narrow interpretation of the PEZA law and defeats the purposes of the incentives granted to PEZA-registered enterprises.

Upon the issuance of Final Decision on Disputed Assessment (FDDA) denying its protest, Moog filed a Petition for Review. The CTA Second Division ruled that except for repairs and maintenance, the other enumerated expenses are not direct costs. Aggrieved, Moog elevated the case to the CTA *En Banc*.

Issue:

Are repairs and maintenance, data processing, insurance and outside services considered direct costs related to Moog's PEZA-registered activities and deductible in computing the 5% GIT?

Ruling:

Yes. The CTA *En Banc* ruled that the enumeration of the allowable deductions is not exclusive. Citing the case of *CIR vs. Lear Automotive Services (Netherland) B.V. - Philippine Branch, CTA EB 1346, promulgated on June 2, 2016*, the CTA *En Banc* sustained the CTA Second Division when it held that the IRR did not limit but merely enumerate the allowable deductions. The CTA *En Banc* said that by deleting the phrase “consists only” and rephrasing it to “the following direct costs are included in the allowable deductions,” RR 11-2005 removed the exclusivity of the allowable deductions from gross income under RR 2-2005.

Thus, the CTA *En Banc* set aside the decision of the CTA Second Division considering only repairs and maintenance as deductible cost. It said that expenses directly related to the PEZA-registered activity - such as data processing, insurance, and outside services in the case of Moog - should be treated as direct costs that are allowable deductions from the gross income.

Data processing expense represents the allocated charge for the use of a global mechanism designed to monitor the process of production from the time the work commences from a small piece up to the time it is finally assembled into an airplane part. Building business insurance are costs allocated to the portion of the building, machinery and equipment devoted for the manufacture, assembly, and fabrication of parts and components for use in aerospace and industrial applications, which is Moog’s PEZA-registered activity. Outside services, meanwhile, are payments and fees in connection with the procurement of the appropriate accreditation by the proper authorities (like the civil aeronautics/aviation board) before Moog is allowed to enter into any transactions with clients and customers.

The CTA *En Banc* held that Moog was able to prove that the disallowed deductions were directly incurred or are directly related to the manufacture and assembly of the registered products. Hence, they are deductible in computing the 5% GIT.

Commissioner of Internal Revenue vs. Yusen Logistics Center, Inc.

CTA (*En Banc*) Case No. 1953 promulgated 9 December 2019

The BIR’s failure to prove the actual receipt of the FAN/FLD by the tax payer or by its authorized representative is fatal and renders the assessment void for noncompliance with the due process requirements. The receipt by security guards cannot be considered receipt by YLCI.

Facts:

Petitioner CIR assessed Respondent Yusen Logistics Center, Inc. (“YSLI”) for various deficiency taxes for taxable year 2010. YSLI filed a Reply to the Preliminary Assessment Notice (PAN) but was unable to protest the Final Assessment Notice/ Formal Letter of Demand (FAN/FLD), which it argued it did not receive. It also averred that a portion of the assessment has prescribed without the execution of a valid waiver in favor of the BIR.

The BIR issued the Preliminary Collection Letter and thereafter, the Final Notice Before Seizure (FNBS) and finally, the Warrant of Distraint and/or Levy (WDL). Upon receipt of the WDL, YSLI filed a Petition for Review at the CTA.

The BIR insisted that the assessment became final and demandable due to YSLI’s failure to timely protest the FAN/FLD, which was sent through registered mail and received by certain security guards.

The CTA Third Division cancelled the assessment, holding that the BIR did not prove the actual receipt of the FAN/FLD by YSLI or by its authorized representative. It also ruled that the Expanded Withholding Tax (EWT) assessment has prescribed even with the issuance of a waiver, which was not duly accepted by the CIR within the 3-year prescriptive period. Upon denial of its Motion for Reconsideration, the BIR elevated the case to the CTA *En Banc*.

Issues:

1. Does the CTA have jurisdiction over cases involving cancellation and withdrawal of a WDL and the validity of the waiver?
2. Did the BIR comply with the due process requirement and sufficiently establish receipt of the FAN/FLD by YSLI to make the assessment valid?

Rulings:

1. Yes. The CTA can decide on "other matters arising under the National Internal Revenue Code or other laws administered by the BIR" under Section 7(a)(2) of Republic Act 9282. The cancellation of the WDL and the validity of the waiver fall within the category of other matters arising under the Tax Code or other laws administered by the BIR.
2. No. The registry receipt and the certification from the postmaster indicated that the FAN/FLD were received by the security guards. The BIR did not prove the actual receipt of the FAN/FLD by YLCI or by its authorized representative, which is fatal and renders the assailed assessment void. While the government has an interest in the swift collection of taxes, the BIR must perform its duties in accordance with law, its own rules of procedure and always with regard to the basic tenets of due process.

Dunlevy Food Corporation vs. Commissioner of Internal Revenue

CTA (2nd Division) Case No. No. 9361 promulgated 11 December 2019

The imposition and collection of compromise penalties must strictly follow the amounts stated under the Revised Schedule of Compromise Penalties and the amounts of compromise penalties incident to the violations shall be itemized in a separate assessment notice/demand letter as the amounts suggested to the taxpayer to pay in lieu of criminal prosecution.

Facts:

Petitioner Dunlevy Food Corporation ("DFC") filed for a refund of P7.8 Million, representing penalties allegedly erroneously collected by the BIR. The BIR issued a Mission Order in March 2014 to conduct an audit on DFC to verify its compliance with the registration and bookkeeping requirements and validation of its permit to use Cash Register Machines (CRM) and/or Point of Sale (POS) systems.

The BIR assessed, and DFC paid, for the following alleged violations: (1) no books; (2) no official receipts; (3) no back end report; and (4) unaccounted POS. The penalties amount to P2.1 Million for the first 3 violations and P1.5 Million for the last violations.

DFC requested for the refund of the compromise penalties. To toll the running of the 2-year prescriptive period, it filed a Petition for Review with the CTA.

At the CTA, the BIR argued that the penalties were neither excessive nor wrongfully collected. These were in the nature of a compromise penalty and paid by DFC to avoid criminal prosecution and imposition of administrative sanctions.

DFC averred that it properly maintained its books of accounts as required by law and regulations, secured the appropriate official receipts, and registered all its POS machines. It insisted that taxpayers are not required to maintain "back-end reports" much less submit these to the BIR.

Issue:

Was the collection of the compromise penalties without authority, excessive or wrongful and may be subject of a refund claim pursuant to Sec. 229 of the NIRC?

Ruling:

Yes. Sec. 229 allows the recovery by a taxpayer from BIR of any penalty, including compromise penalties, collected without authority or any sum alleged to have been excessively or wrongfully collected.

The payment of a suggested compromise penalties must conform with the schedule of compromise penalties provided under Revenue Memorandum Circular (RMC) 1-90, as amended by Revenue Regulations 12-99 and Revenue Memorandum Order (RMO) 19-2007.

RMO 19-2007 provides the rules on the imposition and collection of compromise penalties, namely:

- a) It shall strictly follow the amounts stated under Annex A of the RMO; and
- b) All amounts of compromise penalties incident to the violations shall be itemized in a separate assessment notice/demand letter as the amounts suggested to the taxpayer to pay in lieu of criminal prosecution.

In the case of DFC, the supposed criminal violations were not clearly shown as falling under any of the items stated in the Revised Schedule of Compromise Penalties and it could not be said that the imposition of the penalties strictly followed the schedule. The BIR also made DFC pay without the issuance of any assessment notice or demand letter.

(Editor's Note: RMO 7-2015 issued on 22 January 2015 provides for the Revised Consolidated Schedule of Compromise Penalties for Violations of the NIRC)

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