

# Tax Bulletin

December 2016



SGV TAX BULLETINS  
(NOS. 52 - 1 TO 55 - 32)

1952 - 1955

SGV & Co  
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# TAX BULLETIN

08-99

October 1999

## HIGHLIGHTS

### BIR RULINGS

The NOLCO and excess MCIT credit balances of the corporations in a statutory merger of commonly owned companies transferred and carried over to the surviving corporation loan is subject to tax only on the final withholding tax on dividends paid in the final withholding tax return.

## HIGHLIGHTS

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**Voluntary Assessment and Abatement Program**  
The BIR, through computerization, now has the ability to generate firm and precise data on sales underdeclarations by matching information provided by third parties (e.g., summary lists, etc) with the declarations made by taxpayers. The BIR is now giving taxpayers with underdeclarations a chance to avoid criminal prosecution through Revenue Regulations (RR) No. 12-2002 or the Voluntary Assessment and Abatement Program (VAAP), as amended by RR No. 17-2002.

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# Highlights

## BIR Ruling

- ▶ A member of the private sector participating in socialized housing projects is exempt from Capital Gains Tax (CGT) on the transfer of raw lands used for such projects. All documents or contracts executed by and in favor of the National Housing Authority (NHA) are exempt from Documentary Stamp Tax (DST) and registration fees.

A project contractor whose services have been engaged by the NHA for constructing housing units is exempt from project-related income taxes and VAT. **(Page 5)**

## BIR Issuances

- ▶ Revenue Regulation (RR) No. 8-2016 amends certain provisions of RR No. 1-2016 in relation to the requirements for issuing tax clearances to persons wishing to participate in any government contract. **(Page 5)**
- ▶ RR No. 9-2016 amends Section 4 of RR No. 6-2014 relative to the list of taxpayers that are required to file returns through the Electronic BIR Forms (eBIRForms). **(Page 6)**
- ▶ RR No. 10-2016 amends Section 10.C. of RR No. 17-2011 relative to the imposition of an early withdrawal penalty under Republic Act (RA) No. 9505, otherwise known as "Personal Equity and Retirement Account (PERA) Act of 2008." **(Page 7)**
- ▶ Revenue Memorandum Order (RMO) No. 65-2016 prescribes the guidelines and procedures to streamline the process and issuance of a certificate of tax exemption (CTE) and an electronic certificate authorizing registration (eCAR) on transfer of raw lands intended for socialized housing projects to the National Housing Authority (NHA) pursuant to RA No. 7279, otherwise known as the "Urban Development and Housing Act of 1992." **(Page 7)**
- ▶ RMO No. 66-2016 amends the guidelines on the tax treatment of separation benefits received by officials and employees on account of their separation from employment due to death, sickness or other physical disability, by including other causes beyond the control of said official or employee, such as, but not limited to retrenchment, redundancy, installation of labor-saving devices and closure of business. **(Page 8)**
- ▶ Revenue Memorandum Circular (RMC) No. 122-2016 orders the non-suspension of all audit and other field operations of the BIR during the Christmas Season. **(Page 10)**
- ▶ RMC No. 124-2016 circularizes the implementing rules and regulations (IRR) of RA No. 10693 otherwise known as the "Microfinance NGOs Act." **(Page 10)**
- ▶ RMC No. 126-2016 decentralizes the issuance of the Certificate of Zonal Values of Real Properties to the Revenue District Offices (RDOs). **(Page 11)**
- ▶ RMC No. 127-2016 lifts the suspension of the effectivity of RMC Nos. 61 and 62, which were issued during the period covering 1 June to 30 June 2016. **(Page 11)**

- ▶ RMC No. 128-2016 amends certain provisions of RMO No. 22-2016 relative to the submission of mandatory documentary requirements for the reissuance of an eCAR. **(Page 11)**
- ▶ RMC No. 130-2016 clarifies the tax treatment and appropriate withholding taxes on income payments by the departments and agencies of the government, including government-owned and/or controlled corporations (GOCCs), and government financial institutions (GFIs) to individuals engaged under a job order or contract of service agreement. **(Page 12)**
- ▶ RMC No. 135-2016 circularizes the full text of the Implementing Rules and Regulations (IRR) of Republic Act No. 10754, otherwise known as "An Act Expanding the Benefits and Privileges of Persons with Disability (PWD)." **(Page 13)**
- ▶ RMC No. 136-2016 allows over-the-counter acceptance of tax returns or payments of internal revenue taxes due to unavailability of eFPS. **(Page 16)**

### **BOC Issuances**

- ▶ Customs Administrative Order (CAO) No. 5-2016 provides for guidelines on the Consolidated Shipment of Duty and Tax-Free Balikbayan Boxes. **(Page 17)**
- ▶ CAO No. 6-2016 provides guidelines on the conditionally tax and duty-exempt importation of Returning Residents and Overseas Filipino Workers (OFWs). **(Page 21)**
- ▶ Customs Memorandum Order (CMO) No. 30-2016 provides guidelines in the Implementation of an Advance Ruling System for Valuation and Rules of Origin Pursuant to CAO No. 3-2016. **(Page 24)**
- ▶ CMO No. 33-2016 provides guidelines on the implementation of CAO No. 05-2016 on consolidated shipment of duty and tax-free "Balikbayan Boxes" sent to families or relatives by qualified Filipinos while abroad. **(Page 25)**

### **BSP Issuances**

- ▶ Circular No. 931 provides for the New Service Fees for Banks' Deposit and Withdrawal Transactions and Amendments to Operational Processes under the Enhanced Cash Management Services and Guidelines on Clean Note and Coin Policy. **(Page 27)**
- ▶ Circular No. 932 provides for the Amendments to Relevant Provisions of the Manual of Regulations for Banks (MORB) on the Establishment/Relocation/Voluntary Closure/Sale of Branches. **(Page 28)**
- ▶ Circular No. 933 provides for the Amendments to the Manual of Regulations for Non-Bank Financial Institutions (MORNBFIs) applicable to Non-Stock Savings and Loan Associations (NSSLAs). **(Page 31)**

### **SEC Opinions and Issuances**

- ▶ The corporate term of stock corporations registered under the Corporation Law is counted from the date of its registration. **(Page 33)**
- ▶ A Business Process Outsourcing company engaged in internet based bookkeeping for foreign companies is not considered as engaged in nationalized activities; hence, the Anti Dummy Law does not apply. **(Page 34)**

- ▶ A foreign stockholder of a renewable energy company cannot be elected as president. **(Page 34)**
- ▶ SEC MC No. 20 clarifies the schedule for the submission of the 2016 Annual Corporate Governance Report (ACGR). **(Page 35)**
- ▶ SEC MC No. 21 adopts new and revised auditing standards and standards on assurance engagements and related services. **(Page 35)**

### **BOI Updates**

- ▶ Memorandum Circular (MC) No. 2016-006 circularizes the Board of Investments (BOI) People's Freedom of Information Manual that provides the procedure, limitations, and remedies in requesting for information from the BOI. **(Page 36)**
- ▶ MC No. 2016-007 provides additional guidelines to the BOI People's Freedom of Information Manual. **(Page 38)**

### **Court Decisions**

- ▶ A taxpayer questioning the excessiveness or reasonableness of a real property tax (RPT) assessment should first pay the tax due before his protest can be entertained.

The taxpayer has 30 days from receipt of the decision of the Local Board of Assessment Appeals (LBAA) to file his appeal before the Central Board of Assessment Appeals (CBAA). If, however, the taxpayer files a motion to have the LBAA's decision reconsidered, and the LBAA denies said motion, the taxpayer will only have the unexpired portion of the 30-day period within which to appeal to the CBAA. **(Page 42)**

- ▶ SEC MC No. 8 of 2013 adheres to the Supreme Court's pronouncement in the 2011 Gamboa Decision and its related 2012 Resolution that "full beneficial ownership of 60% of the outstanding capital stock, coupled with 60% of the voting rights is required for the State's grant of authority to operate a public utility."

The interpretation of the term "capital" in the Gamboa Decision, as referring only to voting shares, stands. **(Page 44)**

- ▶ Asset-backed securities issued pursuant to an SEC-approved securitization plan under RA 9267 are not considered deposit substitutes. The income derived by investors or bondholders from low-cost or socialized housing-related asset-backed securities is exempt from income tax and final withholding tax. **(Page 46)**
- ▶ While the BIR can resort to the Best Evidence Obtainable Rule and estimate the tax liability of a taxpayer who failed to submit its accounting records lost due to calamities, it is still required to provide sufficient evidence as basis for its deficiency tax assessment.

A Letter of Authority signed by a Revenue District Officer, in lieu of the Revenue Regional Director, renders the tax assessment null. **(Page 47)**

- ▶ An assessment should contain a computation of tax liabilities as well as a demand for payment within the prescribed period.

A valid formal assessment has to be issued and served to the taxpayer for the tax liability to arise. A Final Assessment Notice (FAN) is a substantive prerequisite to tax collection. **(Page 48)**

## **BIR Ruling**

### **BIR Ruling No. 414-2016 dated 1 December 2016**

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A member of the private sector participating in socialized housing projects is exempt from CGT on the transfer of raw lands used for such projects. All documents or contracts executed by and in favor of the NHA are exempt from DST and registration fees.

A project contractor, whose services have been engaged by the NHA for constructing housing units, is exempt from project-related income taxes and VAT.

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#### **Facts:**

Mr. X transferred a parcel of land to the NHA for development into a residential project under a housing program for the families affected by Typhoon Yolanda. Subsequently, the NHA signed a procurement contract with Y Co., a project contractor, where Y Co. committed to construct and deliver 1,000 housing units.

#### **Issues:**

1. Is the transfer of land by Mr. X to the NHA exempt from CGT, DST and registration fees?
2. Is Y Co. exempt from project-related income taxes and VAT?

#### **Ruling:**

1. Yes. Under Section 20 of RA No. 7279, a member of the private sector participating in socialized housing projects is exempt from CGT on the transfer of raw lands used for such projects. Also, under Section 19 of RA No. 7279, all documents or contracts executed by and in favor of the NHA shall be exempt from the payment of DST and registration fees, including fees required for the issuance of transfer certificates of title. The NHA's exemption from DST for any of its socialized housing projects extends to the other transacting parties (either seller or buyer).
2. Yes. Under Section 20 (D) (1) and (3) of RA No. 7279, a project contractor, whose services have been engaged by the NHA for the construction of housing units, shall be exempt from project-related income taxes and VAT. However, purchases of goods or services by the project contractor shall be subject to VAT, even if the said purchases are to be used in the socialized housing project, since VAT is an indirect tax which can be passed on by the seller of the goods or services.

## **BIR Issuances**

### **RR No. 8-2016 dated 6 December 2016**

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RR No. 8-2016 amends certain provisions of RR No. 1-2016 in relation to the requirements for issuing tax clearances to persons wishing to participate in any government contract.

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► The following are the amendments to RR No. 1-2016:

1. The tax returns and their attachments must be validated with the Large Taxpayers Service if the bidder is classified as a large taxpayer, or with the Revenue District Office (RDO) where the bidder is registered;
2. A tax clearance will be issued to any applicant who has satisfied the following criteria:
  - No unpaid annual registration fee
  - No open valid "stop-filer" cases

- ▶ A regular user of the BIR's eFPS for at least 2 consecutive months prior to the application for tax clearance in the case of new applicants or for those who were previously issued a tax clearance for bidding purposes, they are found to be regular eFPS users from the time of enrollment up to the time of filing of the application
- ▶ Not tagged as a "Cannot Be Located" taxpayer
- ▶ No pending criminal information has been filed in any court of competent jurisdiction arising from any tax or tax related cases, and
- ▶ No delinquent account
  - a. Delinquent accounts are those with outstanding tax liabilities arising from self-assessed taxes or a result of an audit or third party information through the issuance of an assessment notice, which has not been validly protested within the prescribed period.
  - b. If the tax liabilities involved in delinquent accounts are the subject of a pending application for compromise settlement or abatement of penalties, a tax clearance may still be issued to the taxpayer. The applicant, however, must fully pay the amount offered for payment under the application for compromise settlement or abatement of penalties.
  - c. If during the 1-year validity period of the tax clearance, the application for compromise settlement or abatement is denied by the BIR, the taxpayer-applicant will be informed of the denial and be given a period of 30 days within which to fully settle the unpaid tax liabilities; otherwise, the tax clearance will be revoked.
- 3. If a tax delinquency arises during the 1-year validity period of the tax clearance, the taxpayer will be notified and given a period of 30 days to settle the tax liabilities; otherwise, the tax clearance shall cease to be valid.
- 4. A tax clearance must be verified for authenticity from the list of tax clearances issued and published on the BIR website ([www.bir.gov.ph](http://www.bir.gov.ph)).
- 5. Tax clearances that have been revoked for valid reasons are also posted on the BIR website.
- 6. These regulations shall take effect after 15 days following their publication in a newspaper of general circulation.

*(Editor's Note: RR No. 8-2016 was published in the Manila Bulletin on 7 December 2016)*

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RR No. 9-2016 amends Section 4 of RR No. 6-2014 relative to the list of taxpayers that are required to file returns through the eBIRForms.

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**RR No. 9-2016 dated 8 December 2016**

- ▶ The following non-eFPS filers are required to file their returns through Electronic BIR Forms (eBIRForms):
  1. Accredited Tax Agents/ Practitioners and all their client-taxpayers;
  2. Accredited Printers of Principal and Supplementary Receipts/ Invoices;

3. One-Time Transaction (ONETT) taxpayers, such as the following, but excluding those who are filing BIR Form Nos. 1706, 1707, 1800, 1801 and 2000-OT (for BIR Form No. 1706 only):
    - ▶ Those who are classified as real estate dealers/developers
    - ▶ Those who are considered as habitually engaged in the sale of real property and regular taxpayers already covered by eBIRforms
  4. Those who shall file a “No Payment Return;”
  5. Government-Owned-or-Controlled Corporations (GOCCs);
  6. Local Government Units (LGUs), except barangays; and
  7. Cooperatives registered with National Electrification Administration (NEA) and Local Water Utilities Administration (LWUA).
- ▶ These regulations shall take effect after 15 days following their publication in a newspaper of general circulation.

*(Editor’s Note: RR No. 9-2016 was published in the Manila Bulletin on 10 December 2016)*

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RR No. 10-2016 amends Section 10.C. of RR No. 17-2011 relative to the imposition of an early withdrawal penalty under Republic Act (RA) No. 9505, otherwise known as “PERA Act of 2008.”

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**RR No. 10-2016 issued on 27 December 2016**

- ▶ In case of early withdrawals not falling under any of the circumstances under Section 10 (B) of RR No. 17-2011, the Contributor shall pay the following early withdrawal penalties:
  1. The 5% tax credit availed of by the Contributor for the entire period of the Personal Equity and Retirement Account (PERA).
  2. A flat rate of 20% based on the total income earned by said account from the time of its opening/ creation up to the time of withdrawal.
- ▶ For full transparency, the Administrator shall fully disclose the above penalty arising from withdrawals to the Contributor prior to account opening.
- ▶ Likewise, the Administrator shall submit a quarterly report of such termination or withdrawal to the PERA Processing Office, within 60 days following the end of the quarter of the date of termination or withdrawal.
- ▶ These regulations shall take effect immediately.

*(Editor’s Note: RR No. 10-2016 was published in the Manila Bulletin on 28 December 2016)*

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RMO No. 65-2016 prescribes the guidelines and procedures to streamline the process and issuance of a CTE and an eCAR on the transfer of raw lands intended for socialized housing projects to the NHA pursuant to RA No. 7279, otherwise known as the “Urban Development and Housing Act of 1992.”

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**RMO No. 65-2016 dated 6 December 2016**

- ▶ The RMO shall only apply to the transfer of raw lands, identified and certified for development into residential projects, pursuant to the National Housing Authority (NHA)’s Housing Program intended for the families affected by calamities, clearing of waterways, esteros, infrastructure projects of the Government, and those living in danger areas.

- ▶ The following documents shall be submitted directly to the Office of the Commissioner for the issuance of the CTEs:
  1. Certified true copy of the master-list of socialized housing projects of the National Government duly issued by the Housing and Urban Development Coordinating Council (HUDCC);
  2. Certified true copy of the Deed of Sale/Donation executed by the landowner in favor of the NHA;
  3. Certified true copy of the Transfer Certificate of Title/Original Certificate of Title and latest Tax Declaration of the property sold/donated/transferred to NHA; and
  4. If the title of the property is still in the name of a deceased landowner, Extrajudicial Settlement of Estate and evidence of payment of appropriate taxes.
- ▶ The RDO concerned shall undertake to process, approve and issue the necessary eCAR within five working days from the date of submission of the CTE.
- ▶ The CTE shall be sufficient basis for the RDO to issue the eCAR, and no other document shall be required from the taxpayer requesting for the eCAR.
- ▶ The eCAR issued shall particularly state that the raw land is intended for a residential project under the Housing Program of the NHA, with a lien on the title of the land annotated by the Register of Deeds having jurisdiction over the properties.
- ▶ The BIR may conduct a post-audit evaluation and verification on whether or not the raw land has been actually developed into a residential project under the Housing Program.

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RMO No. 66-2016 amends the guidelines on the tax treatment of separation benefits received by officials and employees on account of their separation from employment due to death, sickness or other physical disability, by including other causes beyond the control of said official or employee, such as, but not limited to retrenchment, redundancy, installation of labor-saving devices and closure of business.

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**RMO No. 66-2016 dated 6 December 2016**

- ▶ Requests for ruling on the tax exemption of separation benefits due to other causes beyond the control of said official or employee, such as, but not limited to retrenchment, redundancy, installation of labor saving devices and closure of business, will now also be processed by the RDO or appropriate LT Office where the employer is registered.
- ▶ To facilitate the processing of the requests for ruling, the following non-exclusive list of documentary requirements has been added for cases of separation due to other causes beyond the control of the official or employee:
  1. *Installation of Labor-Saving Devices*
    - ▶ Written notice to the employee and the appropriate Regional Office of the Department of Labor and Employment (DOLE) at least 30 days before the effectivity of termination, specifying the ground for termination.
    - ▶ Board Resolution, in case of a juridical entity, or sworn affidavit executed by the owner, in case of sole proprietorship, stating that:

- a. There has been an introduction of machinery, equipment or other devices, with brief description of the machinery, equipment or other device;
- b. The introduction of the machinery, equipment or other device has been done in good faith and for valid reasons;
- c. There is no other option available to the employer than the introduction of machinery, equipment, or other device; and
- d. The selection of employees to be terminated has been made in accordance with fair and reasonable criteria.

## 2. Redundancy

- ▶ Written notice to the employee and the appropriate Regional Office of the DOLE at least 30 days before the effectivity of the termination, specifying the grounds for the termination.
- ▶ Board Resolution, in case of a juridical entity, or sworn affidavit executed by the owner, in case of sole proprietorship, stating that:
  - a. There have been superfluous positions or services of employees;
  - b. The positions or services are in excess of what is reasonably demanded by the actual requirements of the enterprise to operate in an economical and efficient manner;
  - c. The redundant positions have been abolished in good faith; and
  - d. The selection of employees to be terminated has been made in accordance with fair and reasonable criteria.
- ▶ Adequate proof of redundancy, such as but not limited to the new staffing pattern, feasibility studies/proposal, on the viability of the newly-created positions, job description and the approval by the management of the restructuring.

## 3. Retrenchment

- ▶ Written notice to the employee and the appropriate Regional Office of the DOLE at least 30 days before the effectivity of the termination, specifying the ground for the termination.
- ▶ Board Resolution, in case of a juridical entity, or sworn affidavit executed by the owner, in case of sole proprietorship, stating that:
  - a. The retrenchment is reasonably necessary and likely to prevent business losses;
  - b. The losses, if already incurred, are not merely *de minimis*, but substantial, serious, actual and real, or if only expected, are reasonably imminent, with appropriate supporting evidence of said losses;
  - c. The retrenchment is made in good faith for the advancement of its interest and not to defeat or circumvent the employees' right to security of tenure; and

- d. The selection of employees to be terminated has been made in accordance with fair and reasonable criteria.

#### 4. *Closure or Cessation of Operation*

- ▶ Written notice to the employee and the appropriate Regional Office of the DOLE at least 30 days before the effectivity of the termination, specifying the ground for the termination.
- ▶ Board Resolution, in case of a juridical entity, or sworn affidavit executed by the owner, in case of sole proprietorship, stating that:
  - a. The management has decided to close or cease operation of the company;
  - b. The closure or cessation of operation has been made in good faith; and
  - c. There is no other option available to the employer, except to close or cease operation.

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RMC No. 122-2016 orders the non-suspension of all audit and other field operations of the BIR during the Christmas Season.

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#### **RMC No. 122-2016 dated 28 November 2016**

- ▶ All field audit and other field operations of the BIR pursuant to a duly-issued Letter of Authority (LOA), Tax Verification Notice (TVN), Letter Notice (LN), and any other form of notices of investigation, relative to examinations, and verifications of taxpayer's books of accounts, records, and other transactions are ordered to continue even during the Christmas season.
- ▶ In addition, all policies and procedure of the BIR Audit Program under Revenue Memorandum Order No. 19-2015 must be strictly followed.

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RMC No. 124-2016 circularizes the IRR of RA No. 10693 otherwise known as the "Microfinance NGOs Act."

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#### **RMC No. 124-2016 dated 1 December 2016**

- ▶ Below are the salient provisions of the IRR:
  1. As defined in Rule 2 of RA No. 10693, a Microfinance Non-government Organization (NGO) shall refer to a non-stock, non-profit organization duly registered with the SEC, with the primary purpose of implementing a microenterprise development strategy and providing microfinance programs, products and services, such as microcredit and microsavings for poor and low-income clients.
  2. A duly-registered and accredited microfinance NGO shall pay a 2% tax based on its gross receipts from microfinance operations in lieu of all national taxes, provided that preferential tax treatment shall be accorded only to NGOs whose primary purpose is microfinance and only on their microfinance operations that cater to poor and low-income individuals.
  3. In order to be granted the 2% preferential tax treatment, the microfinance NGO must secure a Certificate of Accreditation issued by the Microfinance NGO Regulatory Council.
  4. The 2% preferential tax based on gross receipts from microfinance operations shall only refer to lending activities and insurance commissions, which are bundled and form an integral part of the qualified lending activities of the Microfinance NGOs.

5. All other income which are not generated from the lending activities and insurance commissions shall be subject to all applicable taxes.
6. Duly-registered and accredited Microfinance NGOs and their clients shall be required to have a Taxpayer Identification Number (TIN).

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RMC No. 126-2016 decentralizes the issuance of the Certificate of Zonal Values of Real Properties to the RDOs.

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**RMC No. 126-2016 dated 2 December 2016**

- ▶ RDOs are now authorized to issue the Certification of Zonal Values of Real Properties.
- ▶ The Assessment Performance Monitoring Division (APMD) in the BIR National Office may still continue to issue the certification.
- ▶ The Revenue District Officers, Assistant Revenue District Officers, or authorized representatives from the Sub-Technical Committee on Real Property shall issue the certification based on the historical or current zonal values available for download from the BIR website.
- ▶ Each certification issued shall be charged with a fee of P100.00, as well as P15.00 for documentary stamp tax.

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RMC No. 127-2016 lifts the suspension of the effectivity of RMC Nos. 61 and 62, which were issued during the period covering 1 June to 30 June 2016.

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**RMC No. 127-2016 dated 2 December 2016**

- ▶ The BIR has lifted the suspension of the following RMCs:
  1. RMC No. 61- 2016 - prescribes policies and guidelines for accounting and recording of transactions involving "Netting" or "Offsetting"
  2. RMC No. 62- 2016 - clarifies the proper tax treatment of passed-on gross receipts tax
- ▶ The above RMCs shall take effect immediately.

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RMC No. 128-2016 amends certain provisions of RMO No. 22-2016 relative to the submission of mandatory documentary requirements for the reissuance of an eCAR.

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**RMC No. 128-2016 dated 7 December 2016**

- ▶ The following documents shall no longer be required in the processing and reissuance/replacement of eCAR:
  1. The original and duplicate copies of the manually-issued CAR that is still outstanding and not presented to the Registry of Deeds and the expired CAR; and
  2. Proof of tax payments previously made, such as photocopy of Official Receipt issued to the taxpayer, or Collections and Bank Reconciliation System payment verification print-out.
- ▶ Instead, the Revenue District Officer or One-Time Transaction (ONETT) officer shall secure the information using the BIR's systems and data repositories such as, but not limited to the following:
  1. Tax Clearance (TCL) 2
  2. eCAR System
  3. ITS-CBR System

4. RDO CAR Registry Book in gathering relevant information.

- ▶ The payment of taxes must be verified and certified by the Chief, Collection Section.
- ▶ Tax payments that have been made in 1999 or prior years must be verified and certified by the Chief, Revenue Accounting Division.

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RMC No. 130-2016 clarifies the tax treatment and appropriate withholding taxes on income payments by the departments and agencies of the government, including GOCCs, and GFIs to individuals engaged under a job order or contract of service agreement.

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**RMC No. 130-2016 dated 8 December 2016**

- ▶ Under existing guidelines of the Civil Service Commission (CSC), there is no employer-employee relationship created when an individual is under a job order or contract for service with the government, and the services rendered are not considered as government services.
- ▶ For tax purposes, the remuneration or fees received by individuals under a job order shall be treated as follows:

1. *Professionals Hired Under a Contract for Services or Job Order*

- ▶ Creditable Withholding Tax - Payments to professionals are subject to creditable withholding tax on the gross professional, promotional and talent fees or any other form of remuneration for their services, including *per diems*, allowances, and any other form of income payment not subject to withholding tax on compensation at the following rates:
  - a. 15% - if the gross income for the current year exceeds P720,000.00;
  - b. 10% - if the gross income for the current year does not exceed P720,000.00;
- ▶ In general, individuals who follow an independent trade, business, or profession, offering their services to the public, are considered professionals.

2. *Non-Professionals Hired Under a Contract for Services or Job Order*

- ▶ Regular Income Tax - Payments to individuals who are not professionals shall not be subject to creditable withholding tax, but shall be subject to income tax under Section 24 of the Tax Code of 1997, as amended.

3. *Tax Treatment Common to Professionals and Non-Professionals Hired Under a Contract for Services or Job Order Basis*

- ▶ VAT or Percentage Tax - There being no "employer-employee relationship", the services performed are considered as a sale or performance of service subject to the 12% VAT.
- ▶ Payments to individuals whose annual gross receipts do not exceed P1,919,500.00 are exempt from VAT, but shall be subject to the 3% percentage tax, which shall be withheld by the government office, agency, GOCC, province, city or municipality making the money payment to such individuals
  - a. Husband and wife are considered as separate taxpayers in computing the VAT threshold amount, subject to aggregation when applicable.

RMC No. 135-2016 circularizes the full text of the IRR of Republic Act No. 10754, otherwise known as "An Act Expanding the Benefits and Privileges of PWD."

**RMC No. 135-2016 issued on 28 December 2016**

- ▶ The following are the salient provisions of the IRR:
  1. Persons with disability are entitled to a grant of 20% discount and VAT exemption on purchases of certain goods and services from all establishments for their exclusive use.
  2. If the purchases of goods and services are not subject to VAT, the purchases shall be subject to the applicable percentage tax.
  3. Subsequent purchases by PWD on the same day from the same establishments will still be granted a 20% discount and will be VAT-exempt.
  4. Under the No Double Discounts Rule, in the purchase of goods and services which are on promotional discount, PWDs can avail of the establishment's offered discount or the 20% discount granted under this RMC.
  5. If the PWD is also a senior citizen entitled to a 20% discount, the PWD shall use either his or her PWD ID Card or Senior Citizen ID card to avail of the 20% discount.
  6. The 20% discount and VAT exemption may be availed of in the following establishments:

<b>Lodging Establishments</b>	<ul style="list-style-type: none"> <li>▶ Applicable to room accommodation and other amenities offered by the establishments, such as but not limited to massage parlor, sauna bath, food, drinks, and other services offered.</li> <li>▶ The discount will only apply to the PWD.</li> <li>▶ Academic institutions must ensure that dormitories under their jurisdiction will grant the 20% discount and VAT-exemption to students with disabilities.</li> </ul>
<b>Restaurants</b>	<ul style="list-style-type: none"> <li>▶ Applicable to the purchase of food, drinks, beverages, dessert and other consumable items served by the establishment, including value meals and other similar food counters, fast food, cooked food and short orders and take outs.</li> <li>▶ The orders should be limited only to the consumption of the concerned PWD.</li> </ul>

<p><b>Recreation Centers</b></p>	<ul style="list-style-type: none"> <li>▶ Applicable to admission fees of PWDs charged by theaters, cinema houses, concert halls, circuses, carnivals and other places of culture and leisure.</li> <li>▶ The discount and exemption will apply to charges in the utilization of services, including rentals of facilities and equipment and other accessories and gadgets to be used, enjoyed or availed of by PWDs.</li> </ul>
<p><b>Purchase of Medicines and Foods for Special Medical Purposes</b></p>	<ul style="list-style-type: none"> <li>▶ Applicable to the purchase of prescribed generic and branded drugs or medicines, as well as food for special medical purposes in all drugstores for the exclusive use or availment of PWDs.</li> </ul>
<p><b>Medical and Dental Services, Diagnostic and Laboratory Fees and Professional Fees of Attending Doctors</b></p>	<ul style="list-style-type: none"> <li>▶ Applicable to the availment of medical and dental services, including diagnostic and laboratory fees by PWD in government facilities or private hospitals and medical facilities.</li> </ul>
<p><b>Domestic Air and Sea Travel</b></p>	<ul style="list-style-type: none"> <li>▶ Covers the actual fare for domestic air and sea travel.</li> <li>▶ For promotional fares, the rule on No Double Discounts is applicable.</li> </ul>
<p><b>Land Transportation Travel</b></p>	<ul style="list-style-type: none"> <li>▶ Applicable to actual fare for land transportation vehicles such as, but not limited to public utility buses or jeepneys, taxis, Asian Utility Vehicles (AUVs), shuttle services, public railways, including Light Rail Transit, Metro Rail Transit and Philippine National Railways and Transportation Network Vehicle Services, such as Grab, Uber and the like.</li> <li>▶ Land transport groups shall place signages within the foregoing vehicles to inform PWDs that they are entitled to the benefit or privilege.</li> </ul>

<p><b>Funeral and Burial Services for the Death of PWD</b></p>	<ul style="list-style-type: none"> <li>▶ The beneficiary or any person who shall shoulder the funeral and burial expenses of the deceased person with disability shall claim the discount for the deceased PWD upon presentation of the following: <ul style="list-style-type: none"> <li>▶ Death certificate with the PWD's identification card, or</li> <li>▶ Original or certified true copy of the proof of registration from the issuing local government unit.</li> </ul> </li> <li>▶ The expenses cover the casket, urn, embalming hospital morgue, transport of the body to intended burial site in the place of origin, but obituary publication and cost of memorial lot are excluded.</li> </ul>
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7. Educational assistance will also be granted to PWDs to pursue primary, secondary, tertiary, post-tertiary, as well as vocational or technical education in both public and private schools and authorized technical vocational institutions through the provision of the following:
  - ▶ Scholarships
  - ▶ Grants
  - ▶ Financial aid
  - ▶ Subsidies
  - ▶ Other incentives for qualified persons with disability including support for books, learning materials and uniform allowance.
  - ▶ PWDs must meet the minimum admission requirements set by the Department of Education, Commission on Higher Education and TESDA and the Unified Student Financial Assistance System for Tertiary Education Board for PWDs who wish to pursue tertiary education by means of scholarships, grants-in-aid and student loans.
  - ▶ Primary education shall include kindergarten, whether in private or public schools.
8. The benefits and privileges extended by the GSIS, SSS and *Pag-ibig* to PWD will be based on their respective charters.
9. The government may also grant special discounts on special programs for PWD on the purchase of basic necessities and prime commodities.

10. The benefits and privileges provided above are available to PWDs who are Filipino citizens. However, they must submit the following as proof of entitlement:
  - ▶ Identification Card issued by the Persons with Disability Affairs Offices (PDAO) of the City or Municipal Social Welfare and Development Office (C/MSWDO) of the place where the PWD resides
  - ▶ Passport of the concerned PWD, or
  - ▶ Identification card issued by the National Council on Disability Affairs.
11. The benefits and privileges may also be granted to Filipinos who hold foreign passports, but are registered as dual citizens and Filipinos who have re-acquired their Filipino citizenship.
12. Establishments may claim the discounts as tax deduction based on the net cost of the goods sold or services rendered.
  - ▶ The cost of the discount will only be allowed as a deduction from the gross income for the same taxable year that the discount is granted.
  - ▶ The total amount of claimed tax deduction, net of VAT, if applicable, must be included in the gross sales/ receipts for tax purposes and subject to proper documentation.
  - ▶ The records of sales of the establishments claiming tax deductions must contain the following:
    - a. Name of the person with disability
    - b. His or her PWD identification card number, and if applicable,
    - c. His or her TIN.
  - ▶ Failure to include such details will result in the disallowance of the 20% sales discount claimed as deduction and the input tax attributable to VAT-exempt sale claimed as cost or expense.
13. Those caring for and living with the PWD up to the 4<sup>th</sup> degree of affinity and consanguinity shall be granted tax incentives by being allowed to treat the PWDs as dependents and claim personal exemption under Section 35 (b) of the National Internal Revenue Code (NIRC).

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RMC No. 136-2016 allows over-the-counter acceptance of tax returns or payments of internal revenue taxes due to unavailability of eFPS.

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**RMC No. 136-2016 issued on 28 December 2016**

- ▶ Due to the unavailability of the BIR's eFPS since 26 December 2016, all concerned taxpayers are allowed until December 29, 2016, to file BIR Form Nos. 2550Q, 2550M and 2551M and to pay "over-the-counter" with the AABs where they are enrolled, without the corresponding penalties for late filing.
- ▶ The returns may be filed using either BIR official printed forms, copies of system-generated Filing Reference Number (FRN) or Tax Return Receipt Confirmation respectively generated by eFPS and eBIRForms facility, photocopies or computer generated or electronically filed tax returns.

- ▶ For eFPS-mandated taxpayers who opted to file manually, the tax returns should be re-filed through the eFPS upon its availability.

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## BOC Issuances

CAO No. 5-2016 provides for guidelines on the Consolidated Shipment of Duty and Tax-Free Balikbayan Boxes.

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### Customs Administrative Order No. 5-2016 dated 2 December 2016

- ▶ CAO No. 5-2016 covers consolidated shipments of Balikbayan Boxes entered through any port of entry and sent to families or relatives by Qualified Filipinos While Abroad. Balikbayan Boxes brought in through means other than consolidated shipments shall be covered by a different CAO.
- ▶ The objective of this CAO is to prescribe simplified procedures for the consolidated shipment of Balikbayan boxes, facilitate customs clearance for these without sacrificing revenue collection and border protection, and adopt clear and transparent rules on this matter, consistent with international standards and customs best practices.
- ▶ Definition of Terms. For purposes of this CAO, the following terms are defined:
  1. **Availment** - refers to the determination by the Bureau or by qualified senders that the Balikbayan Boxes brought in or sent are counted as first, second or third within a calendar year and thus entitled to duty and tax exemption pursuant to the CMTA. Any amount in excess of the allowable non-dutiable and non-taxable value shall be subject to the applicable duties and taxes.

Shipments that are above the *de minimis* threshold shall be automatically considered as one availment. *De minimis* importation shall not be included in the counting of availment; provided that the Qualified Filipinos While Abroad can only send to one ultimate consignee in one consolidated shipment.
  2. **Balikbayan Box** - refers to a corrugated box or other container or receptacle up to a maximum volume of two hundred thousand (200,000) gross cubic centimeters without regard as to the shape of the container or receptacle. For purposes of duty and tax exemption, the Balikbayan Box should contain only personal and household effects that shall neither be in commercial quantities nor intended for barter, sale or for hire. They are sent by qualified Filipinos while abroad and often shipped, either by sea or air, by freight forwarders specializing in Balikbayan Boxes.
  3. **Commercial Quantity** - refers to the quantity for a given kind or class of articles which are in excess of what is compatible with and commensurate to the person's normal requirements for personal use. For a single sender with multiple ultimate consignees, commercial quantity of a given class shall be determined based on the total quantity thereof sent by the sender to all the consignees.
  4. **Family and Relatives** - refer to relatives up to the fourth (4<sup>th</sup>) civil degree of consanguinity or affinity.
  5. **FCA** - means "Free Carrier," which means that the seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place. The parties are well advised to specify as clearly as possible the point within the named place of delivery, as the risk passes to the buyer at that point.

6. **Deconsolidator** - refers to a local freight forwarder or consolidator's agent that provides services to ungroup or deconsolidate shipments, orders, goods, etc. to facilitate distribution.
  7. **Household effects** - refer to furniture, dishes, linens, libraries, and similar household furnishing for personal use.
  8. **Non-resident Filipinos** - Filipinos who have established permanent residency abroad but have retained Filipino citizenship, whether or not they have availed of the benefits under Republic Act No. 9225 or Citizenship Retention and Re-acquisition Act of 2003.
  9. **Overseas Filipino Worker (OFW)** - refers to a holder of a valid passport issued by the Department of Foreign Affairs and certified by the Department of Labor and Employment and the Philippine Overseas Employment Agency for overseas employment purposes. This covers all Filipinos working in a foreign country under employment contracts, regardless of their professions, skills or employment status in a foreign country.
  10. **Personal Effects** - refer to commodities whether new or used, for personal use or consumption and not for commercial purposes, such as wearing apparel, personal adornments, electric gadgets, toiletries, or similar terms.
  11. **Qualified Filipinos While Abroad** - a collective term used to refer to Non-resident Filipinos, OFWs, and Resident Filipinos.
  12. **Resident Filipinos** - refers to Resident Filipino citizens who temporarily stay abroad which may include holders of student visa, holders of investors' visa, holders of tourist visa and similar visas which allow them to establish temporary stay abroad.
  13. **Ultimate Recipient or Consignee** - refers to the Family Member or Relative of the Sender of the Balikbayan Box who will be the ultimate beneficiary of the same.
- ▶ Qualified Filipinos while abroad are allowed to send to their families or relatives in the Philippines which shall be exempt from the payment of duties and taxes, up to three times in a calendar year; provided that Balikbayan Boxes brought in by qualified Filipinos from abroad as accompanied or unaccompanied baggage as passengers shall be included in counting the availment; and, provided further, that *de minimis* importations shall not be included in the counting. A shipment that is above P 10,000 shall automatically considered as one availment.
  - ▶ Balikbayan Boxes shall contain personal and household effects only and shall neither be in commercial quantities nor intended for barter, sale or for hire, and that the total FCA value for all Balikbayan Boxes per sender in any calendar year shall not exceed P 150,000.
  - ▶ Duty and tax-free importation of Balikbayan Boxes is limited to qualified Filipinos while abroad. Sole proprietorships and juridical entities are not qualified to avail of the benefit under this CAO.
  - ▶ Balikbayan Boxes brought in through means other than consolidated shipments shall be covered by a different CAO, but shall be included in counting the frequency of availment of the privilege.

- ▶ For purposes of counting the frequency of availment of the privilege, shipment of Balikbayan Boxes sent by a qualified sender, regardless of the number of ultimate consignees and number of Balikbayan Boxes in one consolidated shipment, shall be considered as one availment.
- ▶ Balikbayan Boxes or portion thereof which are compliant with existing rules and regulations are entitled to immediate release. However, when consolidated Balikbayan Boxes or portions thereof are subject to alert or any enforcement intervention, the boxes or portions thereof which are compliant shall be segregated and processed separately.
- ▶ A processing fee equivalent to P250, inclusive of a legal research fee of P10, shall be required for the availment of the privilege under CAO No. 5 - 2016.
- ▶ In case of consolidated shipments of Balikbayan Boxes for which no goods declaration has been lodged or which remain unclaimed, the Bureau shall undertake measures to identify the names of the individual consignees and their addresses and send them Notice to File Entry or Claim within 15 days from receipt of the Notice.
- ▶ **Obligations of Qualified Filipinos While Abroad:**
  - a. Ensure that only personal effects and household goods are sent through consolidated shipments of Balikbayan Boxes.
  - b. Accomplish, sign, and submit the required Information Sheet, which contains basic information.
  - c. Submit the photocopy of the pertinent page of the passport, and invoice, receipt or equivalent document covering the goods contained in the Balikbayan box, if any.
- ▶ **Obligations of the Deconsolidator**
  1. To apply for registration with the Bureau, in addition to the registration requirements imposed by other agencies, together with a duly filled-up application form, and a copy of the service contract with annexes.
  2. To ensure that principals abroad are made fully aware of the requirement to provide information and documents to enable the expeditious processing of goods.
  3. To transmit to the Bureau the Information Sheet and supporting documents submitted by the sender in a secured electronic format before the arrival of goods in the Philippines and within the period prescribed below:
    - ▶ For shipments by sea:
      - ▶ Three - day shipping time: 24 hours prior to arrival;
      - ▶ Seven - day shipping time: 48 hours prior to arrival; and
      - ▶ Coming from America, Europe, Middle East, and other parts of the world whose shipping time does not fall under the above: 10 days prior to arrival.

For shipments by air:

- ▶ Those coming from Asia - one hour before arrival; and
  - ▶ Those coming from countries - six hours prior to arrival.
4. To establish, within one year from the effectivity of this CAO, its own Customs Facility and Warehouse equipped with CCTVs and baggage x-ray machine for the conduct of examination, as may be required by the Bureau.
- ▶ The following acts shall constitute violations of this CAO, the penalties for which may range from a warning, fines, criminal prosecution, or cancellation of registration as importer or broker, depending on the specific offense:
    1. Using the Balikbayan Box duty and tax-exempt privilege as a conduit for smuggling or other fraudulent customs practice;
    2. Failure of the deconsolidator to advise senders of the need to provide basic information in advance;
    3. Failure of the deconsolidator or broker to lodge the goods declaration or to claim goods within the prescribed period without valid justification; and
    4. Failure to comply with all other obligations under this CAO.

The imposition of the penalties shall be on a per House Bill of Lading or House Airway Bill basis and without prejudice to the action of the Fair Trade Enforcement Bureau of the Department of Trade and Industry (“FTEB-DTI”) to blacklist the deconsolidator pursuant to its own rules and regulations.

- ▶ The following shipments shall be excluded from duty and tax exemption and / or simplified clearance procedure:
  1. Shipment of Balikbayan Box, the contents of which have FCA value exceeding P 150,000;
  2. Shipments of a qualified Filipino while abroad, whose total availments for any calendar year has exceeded P 150,000, even without exceeding the maximum number of availments per year;
  3. Shipments of a qualified Filipino while abroad who has availed of the privilege three (3) times in a calendar year, even if the total for all availments has not exceeded P 150,000 for the said year;
  4. Goods in commercial quantity, except if qualified as *de minimis* importation;
  5. Regulated Goods in commercial quantity;
  6. Donations;
  7. Container mixed with other types of goods; and
  8. Failure of the sender to comply with any of the required obligations.
- ▶ Unless otherwise provided, this CAO shall be reviewed every three years and be amended or revised, if necessary.
- ▶ This CAO specifically amends or repeals previously issued CAOs and CMOs, which are inconsistent with the provisions herein stated. If any part of this CAO is declared unconstitutional or contrary to existing laws, the other parts not so declared shall remain in full force and effect.
- ▶ This Order shall take effect 15 days after its publication.

*(Editor’s Note: CAO No. 5-2016 was published in The Manila Times on 10 December 2016)*

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CAO No. 6-2016 provides guidelines on the conditionally tax and duty-exempt importation of Returning Residents and OFWs.

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### **Customs Administrative Order No. 6-2016 dated 13 December 2016**

- ▶ CAO No. 6-2016 covers conditionally tax and/or duty-exempt importations of personal and household effects belonging to “Returning Residents” and OFWs, as well as additional tax and duty exemption privileges of OFWs for home appliances and other durables in an amount not exceeding P 150,000.
- ▶ This CAO is issued to provide the conditions for the availment of additional tax and duty-free privileges and other durables brought in by OFWs, facilitate customs clearance for these without sacrificing revenue collection and border protection, and adopt clear and transparent rules on this matter, consistent with international standards and customs best practices.
- ▶ Definition of Terms. For purposes of this CAO, the following terms are defined:
  1. **Availment** - refers to the determination by the Bureau or by a qualified “returning resident” or OFW that the personal or household effects brought in or sent, are entitled to duty and / or tax exemption. Any amount in excess of the allowable non-dutiable value shall be subject to the applicable duties and taxes.
  2. **Certificate of Identification** - refers to a document secured upon departure and issued by the District Collector or authorized customs officer identifying goods to be exported and subsequently brought back to the Philippines.
  3. **Commercial Quantity** - refers to the quantity for a given kind or class of articles which are in excess of what is compatible with and commensurate to the person’s normal requirements for personal use.
  4. **Durables** - refers to goods, such as household appliances, machinery, or sports equipment that may be used repeatedly or continuously over a period of a year or more, assuming a normal average rate of physical usage.
  5. **FCA** - means “Free Carrier,” which means that the seller delivers the goods to the carrier or another person nominated by the buyer at the seller’s premises or another named place. The parties are well advised to specify as clearly as possible the point within the named place of delivery, as the risk passes to the buyer at that point.
  6. **FOB** - means “Free on Board” or that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already delivered. The risk of loss or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.
  7. **House Airway Bill (HAWB)** - refers to an airway bill covering a single, individual shipment or consignment issued by the freight forwarder or consolidator to the consignor or sender, containing the detailed specific description of goods shipped through air.
  8. **House Bill of Lading (HBL)** - refers to a bill of lading covering a single, individual shipment or consignment issued by the freight forwarder to the consignor, containing the detailed specific description of goods shipped through sea.

9. **Master Airway Bill (MAWB)** – refers to an airway bill issued by a common air carrier to a consolidator covering a consolidated shipment.
10. **Master Ocean Bill of Lading (MBL)** – refers to an ocean bill of lading issued by a common ocean carrier to a consolidator covering a consolidated shipment.
11. **Overseas Filipino Worker (OFW)** – refers to a holder of a valid passport issued by the Department of Foreign Affairs (DFA) and certified by the Department of Labor and Employment (DOLE) or the Philippine Overseas Employment Administration (POEA), and covers all Filipinos working in a foreign country under employment contracts, regardless of their professions, skills or employment status in a foreign country.
12. **Personal and Household Effects** – refer to commodities, whether new or used, for personal use or consumption and not for commercial purposes, such as wearing apparel, personal adornments, electronic gadgets, toiletries or similar items, furniture, dishes, linens, libraries, and similar household furnishing for personal use, and instruments related to one's profession and analogous personal or household effects.
13. **Returning Resident** – refers to a Filipino national who has stayed abroad for a period of at least six months and returning to the Philippines. For purposes of availment of the privilege, it shall be understood that “returning resident” includes spouse and dependent children.
14. **Tax Exemption Certificate (TEC)** – refers to a document issued by the Department of Finance (DOF) that grants exemption to particular persons of a particular class from payment of duties and taxes, including excise taxes, which persons and other entities are generally obliged to pay.
  - ▶ Household appliances, jewelry, precious stones, and other goods of luxury which were previously exported from the Philippines shall be exempt from duties and taxes when covered by a Certificate of Identification (CI) issued by the District Collector or duly authorized customs officer, before departure from the Philippines. Upon importation of the exported goods, the Customs Examiner shall verify the identity of the goods brought in as against the CI.
  - ▶ To be exempt from duties, taxes and other charges, personal and household effects normally used for the comfort and convenience of the returning residents or OFWs during their stay abroad, must accompany them on their return, or arrive within a reasonable time which, barring unforeseen and fortuitous events, shall not exceed 60 calendar days after the owner's return.
  - ▶ To expedite cargo clearance formalities, the returning resident, OFW or his authorized representative shall accomplish, sign and submit a Personal and Household Effects Declaration Form in advance to the Bureau.
  - ▶ For shipments arriving as accompanied baggage, the returning resident or OFW shall submit the printed copy of the Form upon arrival. For unaccompanied shipments, the returning resident or OFW shall secure a Duty and Tax Exemption Certificate (TEC) to avail of the privilege.
  - ▶ Importation of excisable articles, such as but not limited to, distilled spirits, wines, cigars and cigarettes, perfumes, toilet waters, in excess of the allowable quantity to be prescribed by the Bureau shall be subject to payment of duties, taxes, and other charges.

- ▶ Physical examination or non-intrusive inspection shall be conducted subject to existing regulations and based on established risk management schemes.
- ▶ As far as practicable, Information and Communication Technology (ICT) shall be used in the processing, monitoring and control of the avilment of the privileges under this CAO. An online registration facility shall be made available where parties can accomplish and submit the forms electronically to the Bureau.
- ▶ For shipments covered by HBLs or HAWBs, a processing fee of P310 must be paid for each individual bill of lading. This also covers MBLs and MAWBs in case of shipments where HBL or HAWB is issued.
- ▶ A returning resident or OFW shall have tax and duty exemption on personal and household effects not exceeding the following FCA and FOB values:
  1. P350,000 for those who have stayed in a foreign country for at least 10 years, and have not availed of this privilege within 10 years prior to arrival;
  2. P250,000 for those who have stayed in a foreign country for at least 5 years but not more than 10 years, and have not availed of this privilege within 5 years prior to arrival;
  3. P150,000 for those who have stayed in a foreign country for less than 5 years, and have not availed of this privilege within 6 months years prior to arrival;

Any amount in excess of this threshold shall be subject to the corresponding duties and taxes.

- ▶ A returning OFW shall have additional duty and tax exemption privileges for home appliances and other durables not exceeding P150,000 subject to the following conditions:
  1. The goods shall be limited to one of each kind. Any excess in the allowed number of appliances shall be subject to payment of corresponding duties and taxes.
  2. The privilege may only be availed once in a given calendar year.
  3. Such goods are brought in as accompanied baggage or arriving before or after but not later than 60 days from the date of return of the OFW, barring unforeseen or fortuitous events;
  4. The amount of appliances in excess of FCA value of P150,000 shall be subject to corresponding duties and taxes.
- ▶ Luxury items, vehicles, watercrafts, aircrafts, animals, donations, goods intended for barter, sale or hire, goods in commercial quantity, regulated goods in excess of limits allowed by regulations, and prohibited and restricted goods are excluded from the privileges under this CAO.
- ▶ A returning resident or OFW, through an authorized representative, may request for pre-verification of qualification to avail of the privilege, including in the amount covered, not earlier than 30 days from the date of the intended return. The request should be supported by documents showing travel history and registration with the Overseas Workers Welfare Administration (OWWA), if applicable. Where the pre-verification procedure is not availed of, the returning resident or OFW shall secure a TEC upon arrival.
- ▶ Shipments arriving in advance of the date of return of a returning resident or OFW, which did not undergo pre-verification, shall be tentatively and conditionally assessed upon posting of a cash bond equivalent to 100% of the

assessed duties and taxes due. Within 45 days from arrival, but not exceeding 60 days from release of the shipment, the returning resident or OFW must submit the TEC issued by the DOF to the Bureau to support entitlement to the privilege. Otherwise, the Bureau shall forfeit the bond to answer for the payment of the duties and taxes due. The same procedure may be availed of for accompanied baggage or those arriving after the date of return, if the clearance is not yet secured from the Commissioner.

- ▶ The returning resident or OFW or an authorized representative who makes or attempts to make any entry of imported goods by means of any false or fraudulent statements in order to avail of the privilege shall be subject to sanctions and penalties.
- ▶ Unless otherwise provided, this CAO shall be reviewed every 3 years and be amended or revised, if necessary.
- ▶ This CAO specifically amends or repeals previously issued CAOs and CMOs, which are inconsistent with the provisions herein stated. If any part of this CAO is declared unconstitutional or contrary to existing laws, the other parts not so declared shall remain in full force and effect.
- ▶ This Order shall take effect 15 days after its publication.

*(Editor's Note: CAO No. 6-2016 has not yet been published.)*

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CMO No. 30-2016 provides guidelines in the Implementation of an Advance Ruling System for Valuation and Rules of Origin Pursuant to CAO No. 3-2016.

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#### **Customs Memorandum Order No. 30-2016 dated 28 November 2016**

- ▶ The request for Advance Rulings shall be submitted to the Bureau electronically and application fees shall be paid through bank payment. Standard procedures and the required application forms for Advance Rulings shall be published on the Bureau's website. These forms shall be used for all Advance Ruling requests.
- ▶ Advance Rulings shall be published in the Bureau's website. Any information that is claimed to be confidential shall be redacted.
- ▶ A non-refundable application fee in the amount of P1,500 shall be collected by the Bureau for each request which must relate only to one product or item.
- ▶ Upon receipt of the request for advance ruling, the Bureau shall acknowledge receipt in writing, through electronic means. The Bureau may request the requesting person to supply additional information it deems necessary. Until such time that the requested document/information is submitted or the Bureau receives a written manifestation that it cannot be submitted, the period of 30 working days will not toll.
- ▶ A request for advance ruling shall contain all information necessary to process the request, including the details of the requesting person, details on the goods to be imported, and whether any information is to be treated as confidential.
- ▶ A request regarding origin shall include additional documents, such as the country of origin envisioned for the goods, applicable basis for claiming origin, samples or other documents on the composition of the goods, among others.
- ▶ A request for valuation method shall include the additional documents, such as the valuation method envisioned for the goods, legal basis for the claimed method, description of the nature of the transaction, any relationship between the parties, among others.

- ▶ A Requesting Person may withdraw the request any time before the Bureau decides on the application, which shall not prohibit the filing of another request on the same subject.
- ▶ The Advance Ruling shall be issued within 30 working days from the date of receipt of request, or from submission of additional documents, as the case may be. Advance Rulings shall be issued in writing addressed to the Requesting Person, redacting those matters considered as confidential, with a notification of the right to appeal.
- ▶ The issuance of an Advance Ruling may be declined in the following cases:
  1. The issue involves a matter that is pending before the courts or is the subject of an administrative review, or under post clearance audit;
  2. A request for advance ruling on the same goods is already filed by the same Requesting Party; however, an earlier request filed by an agent shall be declined if a latter request is filed by the principal;
  3. An Advance Ruling on the same goods has been issued to the same Requesting Person;
  4. The request is based on hypothetical situation.

In all cases, if the issuance of an Advance Ruling is declined, the Bureau shall promptly notify the Requesting Person in writing, through electronic means, clearly stating the reasons.

- ▶ Intentional misrepresentation of any material fact regarding an application for advance ruling, and submission of counterfeit or otherwise false or inaccurate supporting documents, shall be penalized by rejection of the request or revocation of an issued advance ruling if has already been issued. Revocation of an advance ruling shall be of retroactive application. The imposition of these penalties shall be without prejudice to other penalties under applicable laws, rules, or regulations.
- ▶ The Requesting Person shall keep all supporting records relating to the request for advance ruling for not less than 3 years from the date of submission of the request.
- ▶ CMO No. 30-2016 takes effect immediately.

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CMO No. 33-2016 provides for the guidelines on the implementation of CAO No. 05-2016 on consolidated shipment of duty and tax-free "Balikbayan Boxes" sent to families or relatives by qualified Filipinos while abroad.

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**Customs Memorandum Order No. 33-2016 dated 23 December 2016**

- ▶ Deconsolidators shall apply for registration every two years with the Account Management Office ("AMO") of the Bureau, in addition to the registration requirements imposed by other government agencies.
- ▶ The submission of the Electronic-Inward Foreign Manifest ("e-IFM") shall be governed by provisions of existing rules and regulations of the Bureau relative to the submission of cargo manifests. The words "CONSOLIDATED BALIKBAYAN SHIPMENT" shall be indicated in the field for description of goods in the Master Bill of Lading.

- ▶ The Deconsolidator shall submit an electronic copy of the consolidated manifest containing the individual House Bills of Lading (HBLs) and House Airway Bills (HAWBs) to the Bureau through the advanced manifest system (“AMS”) within the period prescribed by the Bureau.
- ▶ The sender may request copies of the Information Sheet from the Consolidator or may download copies from the website of the Bureau of Customs ([www.customs.gov.ph](http://www.customs.gov.ph)) or from certain Value Added Service Providers (VASPs).
- ▶ The Deconsolidator, upon filing with the Informal Entry Division (IED) or its equivalent unit, must submit the soft copy of the Information Sheet details using the prescribed format together with the prescribed requirements. Based on information sheets submitted by the Consolidator in advance, the Bureau shall determine whether the sender is qualified to avail of the tax and duty exemption under the *de minimis* scheme or of the privilege of the expedited clearance of Balikbayan boxes.
- ▶ Until such time that the Bureau has implemented an electronic processing system for clearance of consolidated shipments of Balikbayan boxes, cargo clearance shall be done as follows:
  1. The Deconsolidator shall lodge separate informal entries for Balikbayan Boxes falling under each type of avilment on a per container basis.
  2. The individual HBLs or HAWBs together with the Information Sheets which shall serve as the packing lists and invoices, and all other documentary requirements shall be attached to the goods declaration.
  3. The IED or its equivalent unit shall verify the completeness of the submitted documentary requirements, match the submitted BL/AWB/HBL/HAWB with the Manifest System and/or Manifest Data, assign the entry number and forward the same to the Assessment section.
  4. The COO III shall match the declaration against the Information sheet electronically submitted to check the veracity and to determine if there are inconsistencies.
  5. All consolidated Balikbayan shipments processed under this order shall be subject to mandatory non-intrusive inspection by, or under the supervision of, BOC personnel.
  6. The COO V shall review the entry documents, tariff classification, appraisal, computation of duties, taxes and other charges, affix his signature on the goods declaration and return the same to the COO III for preparation of the Order of Payment.
  7. The COO III shall prepare the Order of Payment for those service fees and for the duties, taxes and other charges, if any and present the same to the BOC cashier or to the In-house bank for payment using the e2m Cash-Miscellaneous Module. For air shipment, the goods declaration shall be forwarded by the IED to the BOC Cashier for payment.
  8. The transmittal Clerk from the BOC Cashier shall forward the gate pass to the wharfinger or warehouseman for his signature to effect physical release of shipments of Balikbayan Boxes.

9. The COO III shall verify payment in the e2m Cash-Miscellaneous Module. After verifying that the appropriate payment has been collected, the COO III retrieves the data corresponding to the MBL of the IIIDE. The COO III shall select from the e-manifest menu the operation "Manual Discharge" to perform manual write-off of the MBL. Only one (1) Order of Payment shall be prepared by the COO III for the MBL or MAWB.
- ▶ Shipments declared as consolidated Balikbayan Boxes but are found to be otherwise shall be considered as misdeclared and subjected to seizure and forfeiture proceedings.
  - ▶ This CMO specifically amends or repeals previously issued CMOs which are inconsistent with these provisions.
  - ▶ This CMO shall take effect immediately.

## BSP Issuances

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Circular No. 931 provides for the New Service Fees for Banks' Deposit and Withdrawal Transactions and Amendments to Operational Processes under the Enhanced Cash Management Services and Guidelines on Clean Note and Coin Policy

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### BSP Circular No. 931 dated 09 December 2016

- ▶ Section X954 of the MORB shall be amended to read as follows:
 

**Section X954 Service Fee for Transactions with the Bangko Sentral.** The succeeding subsections provide the guidelines on the imposition of service fee on transactions of banks with the Cash Department (CD), Currency Management Sub-Sector (CMSS) and the Regional Offices and Branches, Regional Monetary Affairs Sub-Sector (RMAS). The guidelines and procedures governing currency deposits and withdrawals of banks are provided in Appendix 80, as revised herein.
- ▶ Subsection X954.1 of the MORB is hereby added to provide the fee structure under the Cash Management (ECM) Services Offered by the Cash Department (CD), Currency Management Sub-Sector (CMSS).
- ▶ This Circular also adds Subsection X954.2 of the MORNBF1 which provides for the fee structure for transactions with the Bangko Sentral Regional Offices and Branches, RMAS.
- ▶ Appendix 80 of the MORB on Guidelines and Procedures Governing Currency Deposits and Withdrawals of Banks for Credit to and Debit from their Demand Deposit Accounts with the Bangko Sentral is amended by this Circular.
- ▶ Subsection X950.5 of the MORB shall be amended to read as follows:
 

**Subsection X950.5 (2008 - X610.5) Clean note and coin policy.** As part of banks' duties to effect an expeditious withdrawal from circulation of unfit Philippine currency notes classified under Subsection X950.6, banks and their branches shall observe the guidelines and procedures governing currency deposits and withdrawals of banks provided in Appendix 80.

Provincial branches of banks may make direct deposits of currency notes, duly identified and sorted, with the nearest Bangko Sentral Regional Office/Branch. In areas where there are no Bangko Sentral Regional Offices/Branches, provincial branches of banks shall arrange with their respective Head Offices the shipment of their unfit or dirty notes for deposit with the CD, Bangko Sentral in Quezon City. Cost of shipment and other related expenses to be incurred shall be solely for the account of the bank concerned.

Coins submitted by banks to Bangko Sentral for deposit/determination of redemption value shall be packed/bagged in accordance with the following procedure:

xxx xxx xxx

- ▶ Section X955 of the MORB is hereby added which requires the Board of Directors to adopt a Clean Note and Coin Policy which is consistent with the principles and guidelines issued by the Bangko Sentral.
- ▶ This Circular also adds the following Subsections of the MORB: X955.1, which provides for the inclusion of the Clean Note and Coin Policy in compliance program; X955.2, which provides for the internal audit in relation to the Clean Note and Coin Policy; and X955.3, which provides for the supervisory enforcement action of the Bangko Sentral in relation to the compliance with the Clean Note and Coin Policy.
- ▶ This Circular shall take effect 15 calendar days following its publication in the Official Gazette or in a newspaper of general circulation.

*(Editor's Note: Circular 931 was published in The Philippine Star on 13 December 2016.)*

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Circular No. 932 provides for the Amendments to Relevant Provisions of the MORB on the Establishment/Relocation/Voluntary Closure/Sale of Branches

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#### **BSP Circular No. 932 dated 16 December 2016**

- ▶ Section X151 and its Subsections of the MORB are hereby amended to read as follows:

**"Sec. X151 Establishment/Relocation/Voluntary Closure/Sale of Branches.**

"x x x

"Extension office shall refer to any permanent office or place of business in the Philippines other than the head office or a branch, where deposits are accepted and/or withdrawals are serviced by tellers or other authorized personnel. It does not maintain a complete set of books of accounts as its transactions are taken-up directly in the books of the head office or a branch to which it is attached. It shall be treated as a branch for purposes of this Section and its Subsections *as well as in determining compliance with the applicable minimum capital requirement under Subsection X111.1.*

"x x x

"(c) The bank's compliance program shall take into account MF-OBO/MBOs and their activities.

"Cities previously considered as restricted areas refer to the cities of Makati, Mandaluyong, Manila, Paranaque, Pasay, Pasig, Quezon and San Juan.<sup>1</sup>"

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<sup>1</sup> The branching restriction in the cities of Makati, Mandaluyong, Manila, Paranaque, Pasay, Pasig, Quezon and San Juan which were previously considered as restricted areas, was fully lifted effective on 1 July 2014.

**“Subsection 151.1 Prior Monetary Board approval. x x x”**

**“Subsection 151.2 Pre-requisites for the grant of authority to establish a branch.** With prior approval of the Monetary Board, banks may establish branches subject to the following pre-qualification requirements:

- “a. The bank has complied with the minimum capital requirement under Subsection X111.1;
- “b. The bank’s risk-based CAR at the time of filing the application is not lower than twelve percent (12%);

“x x x

- “e. The bank has no major supervisory concerns outstanding on safety and soundness as indicated by the following during the period immediately preceding the date of application or as of the date of application:

“x x x

“In the case of branches to be established in cities previously considered as restricted areas, neither the bank nor any of its subsidiary banks is under Prompt Corrective Action (PCA) or if under PCA, it shall be compliant with PCA resolution guidelines.

- “f. The bank has been operating profitably for the year immediately preceding the date of application, or in the case of newly-established banks, the submitted projection showed that profitability will be attained on the third year of operations, at the latest; and
- “g. Additional requirements for the establishment of microfinance/BMBE-oriented branches of banks which are not microfinance/BMBE-oriented are as follows:

x x x”

**“Subsection X151.3 Application for authority to establish branches, x x x”**

**“Subsection X151.4 Branching guidelines.** Branches may be established, subject to the following guidelines:

- “a. A bank may apply to establish as many branches as its capital, as defined under Sec. X111 and Subsection X111.1, can support, taking into account any approved but unopened branch/es outstanding at the time of application.
- “b. Only applications submitted with complete documentary requirements enumerated in Subsection X151.3 shall be accepted.
- “c. As a general rule, banks shall be allowed to establish branches anywhere in the Philippines, including in cities previously considered as restricted areas: Provided, That, if TBs/RBs/Coop Banks will establish branches in cities/municipalities of a higher classification than their head office, the applicable minimum required capital under Subsection X111.1 will be that of the city/municipality of the higher classification, regardless of where the head office is located.

Branches of microfinance-oriented banks or microfinance-oriented branches of banks which are not microfinance-oriented, may be established anywhere, subject to compliance with, among other requirements, the minimum capital requirement under Subsection X111.1.

- ▶ Subsection X151.4 also provides for guidelines for Coop banks.
- ▶ This Circular amends the following Subsections of the MORB: X151.5, which provides for the branch processing and special licensing fees; X151.6, which provides for the establishment of other banking offices; and X151.7, which provides for the opening of banking offices.
- ▶ Subsections X151.9 and X151.10 of the MORB are hereby amended to read as follows:

**“Subsection X151.9 Relocation of branches/other banking offices<sup>2</sup>.** Relocation of existing branches/OBOs, whether to be opened at the new site on the next banking day or within one (1) year from the date of closure of the branch/OBO, shall be allowed in accordance with the following procedures:

“x x x

“e. Branches/OBO may be relocated anywhere, subject to the branching guidelines under Subsection X151.4: Provided, That branches located outside the cities previously considered as restricted areas as defined under Sec. X151 which will be relocated therein shall be subject to the special licensing fee under Subsection X151.5; and

“f. x x x”

**“Subsection X151.10 Temporary closure<sup>3</sup>, permanent closure and surrender of branch/other banking office license, and sale/acquisition of branches/other banking offices**

“x x x

“c. Sale/acquisition of branches/OBOs. Sale/acquisition of existing/operating branches/ OBOs may be allowed with prior approval of the Monetary Board in accordance with the following procedures:

“x x x

“(5) Request for Monetary Board approval to acquire the branch/other banking office signed by the president of the bank or officer of equivalent rank, together with a certified true copy of the resolution of the bank’s board of directors authorizing the acquisition shall be submitted by the acquiring bank to the appropriate department of the SES. The acquiring bank shall likewise comply with the following:

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<sup>2</sup> With additional special regulatory relief in areas affected by Tropical Depression “Yolanda” as provided under Appendix 89a (Circular No. 820 dated 06 December 2013).

<sup>3</sup> With additional special regulatory relief in areas affected by Tropical Depression “Yolanda” as provided under Appendix 89a (Circular No. 820 dated 06 December 2013).

“(a) Minimum capital requirement under Subsection X111.1;

“x x x

“A bank may purchase/acquire branches/OBOs anywhere, including in Metro Manila subject to compliance with the applicable minimum capital requirement under Subsection X111.1.

“(6) The acquiring bank shall pay a licensing fee per branch/OBO acquired, as follows:

“xxx”

- ▶ Section X152 of the MORB on the relocation of the head offices is hereby amended as follows:

“**Sec. X152 Relocation of Head Offices.** Relocation of a bank’s head office shall require prior approval of the Monetary Board in accordance with the following procedures:

“xxx

c. x x x

“A bank’s head office may be relocated anywhere it is allowed to establish branches as provided in Subsection X151.4 on branching guidelines: *Provided*, That head offices located outside the cities previously considered as restricted areas as defined under Section X151 which will be relocated therein shall be subject to the special licensing fee under Subsection X151.5 upon approval of the relocation.

“x x x”

- ▶ Subsections X102.3 and X111.1 of the MORB on microfinance-oriented banks and minimum capitalization are amended by this Circular.
- ▶ Appendix 38 of the MORB on Rules and Regulations for Cooperative Banks is also amended by this Circular.
- ▶ This Circular shall take effect fifteen (15) calendar days following its publication either in the Official Gazette or in a newspaper of general circulation.

*[Editor’s Note: Circular 932 was published in Malaya on 23 December 2016.]*

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Circular No. 933 provides for the Amendments to the MORNBF1 applicable to NSSLAs.

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#### **BSP Circular No. 933 dated 16 December 2016**

- ▶ Pursuant to Monetary Board Resolution No. 2020 dated 11 November 2016, the following guidelines shall be observed in implementing Section 2(a) to (d) of Republic Act No. 8367, otherwise known as “The Revised Non-Stock Savings and Loan Association Act of 1997,” in order to prevent acts, practices or omissions considered prejudicial to the interest of NSSLA members.

- ▶ Section 4184S and its Subsections of the Manual of Regulations for Non-Bank Financial Institutions applicable to Non-Stock Savings and Loan Associations (MORNBFIS Regulations), are hereby added to read as follows:

**“Section 4184S Rules Governing Prejudicial Acts, Practices or Omissions.** In line with the policy of the State to regulate and supervise the activities of Non-Stock Savings and Loan Associations (NSSLAs) through issuance of minimum requirements and standards resulting to judicious utilization of credit; to place their operations on a sound, stable and efficient basis so they may provide for the establishment of additional savings and credit facilities in a fair manner to their members; to curtail or prevent acts, practices or omissions of these NSSLAs which are prejudicial to their members’ interest and to maximize the protection of members of NSSLAs against misfeasance and malfeasance of the trustees and officers thereof, the following rules and regulations on prejudicial acts, practices or omissions are hereby issued.”

**Subsection 4184S.1 Acts, practices or omissions considered prejudicial to the interest of members.**

- a. In determining whether a particular act, practice or omission may be deemed as prejudicial to the interest of members, the Monetary Board, upon report of the head of appropriate supervision and examination department, based on the finding in an examination or a complaint, shall consider the following circumstances:
  - (1) The act, practice or omission is contrary to the generally accepted standards of prudent operation resulting in, or if continued, may result in abnormal risk, damage or loss to the NSSLA; or
  - (2) The act, practice or omission unduly burdens the members of the NSSLA and/or provide unwarranted benefit to the NSSLA to the advantage or preference of particular parties or groups thereof; or
  - (3) The act, practice or omission has resulted or may result in material loss, damage or undue injury to members.
- b. Acts, practices or omissions which may be considered as prejudicial to the interest of members, include, but are not limited to the following:
  - (1) Charging of unreasonably high service fees in the grant of loans;
  - (2) Recognizing as income unused insurance premiums instead of refunding and/or crediting the same to borrowers;
  - (3) Non-disclosing of costs related to services rendered by agents/sales representatives and consultants in the financials and management reports;
  - (4) Limiting the capital contributions of members in a discriminatory manner that has the effect of concentrating control to a family or group of members;
  - (5) Granting excessive compensation/benefits to trustees and/or officers without due consideration of the NSSLA’s financial health, or when neither allowed in the by-laws nor approved by a general assembly called for the purpose, or when not commensurate to the assigned duties and responsibilities;
  - (6) Granting of loans to borrowers who have insufficient paying capacity or poor credit history;

- (7) Continuously deducting loan amortizations from the members' salary even after the loan has been fully paid;
- (8) Paying unauthorized disbursements or unsupported expenses; or
- (9) Allowing third parties to use the NSSLA's properties or privileges without due compensation.

The Monetary Board may from time to time, consider any other acts, practices or omissions as prejudicial to the interest of members.

**Subsection 41845.2 Enforcement Actions.** Based on the seriousness and materiality of the prejudicial acts, practices or omissions, the NSSLA, its trustees and officers shall be subject to administrative sanctions under Section 37 of R.A. No. 7653 or "The New Central Bank Act" and/or other applicable enforcement actions. The Monetary Board, pursuant to its authority under Section 22 of R.A. No. 8367 and subject to due process, may also order the revocation of an NSSLA's license to operate as such if the prejudicial acts, practices or omissions are found to be persistent and grossly disadvantageous to the interest of the majority of its members. Moreover, the above is without prejudice to the filing of appropriate criminal charges against culpable persons as provided for under Section 23(c) of R.A. No. 8367.

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

## SEC Opinions and Issuances

### SEC-OGC Opinion No. 16-27 dated 23 November 2016

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The corporate term of stock corporations registered under the Corporation Law is counted from the date of its registration.

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**Facts:**

R Co., a stock corporation, was registered in 20 March 1967 under the Corporation Law (Act No. 1459). Since then, the corporate term of R Co. has not been extended, as no application was filed to amend Article IV of its Articles of Incorporation (AOI) which provides an original 50-year term.

**Issue:**

Should the 50-year corporate term of R Co. be counted from its registration (20 March 1967) or from the effectivity date of the Corporation Code (1 May 1980)?

**Held:**

The corporate term of R Co. should be counted from the date of its registration. Section 7 of the Corporation Law prescribes a corporate term of 50 years for stock corporations to wit:

*"Section 7. Articles of Incorporation of stock corporations, unless otherwise provided, shall be sufficient if they comply substantially with the following form:*

xxx

*FOURTH. That the term for which said corporation is to exist is 50 years from and after the date of incorporation"*

In compliance therewith, R Co. adopted a 50-year term in its AOI. Further, upon the effectivity of the Corporation Code, the 50-year term is not a new requirement for stock corporations that are not education corporations. Thus, the original corporate term of R Co., therefore, must be retained and counted from the date of its registration, which was on 20 March 1967.

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#### **SEC-OGC Opinion No. 16-28 dated 23 November 2016**

A BPO company engaged in internet based bookkeeping for foreign companies is not considered as engaged in nationalized activities; hence, the Anti-Dummy Law does not apply.

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**Facts:**

E Co. is a domestic corporation and export enterprise which is authorized to engage in business process outsourcing (BPO). E Co. mainly provides internet based bookkeeping and other related services to foreign companies and earns intermediation fees for its activities.

E Co. claims that it was informed by the SEC Compliance and Monitoring Division (CMD) that it needs to amend its General Information Sheet (GIS) on the grounds that the Anti Dummy Law disallows the appointment of a foreign national as President of the corporation, which is 60% Filipino owned. Moreover, E Co. was advised to increase its foreign equity to more than 40% in order to be allowed to elect a foreign national as its president.

**Issue:**

Is the Anti-Dummy Law applicable to a BPO company engaged in internet based bookkeeping for foreign companies?

**Held:**

No. A review of the 10<sup>th</sup> Foreign Investment Negative List (FINL) shows that engaging in business process outsourcing that provides internet based bookkeeping to foreign companies, is neither a wholly nationalized nor partially nationalized activity. As such, the Anti Dummy Law is inapplicable to E Co.

Accordingly, the appointment of a foreign national as director and his election as President, are allowed. Also, a foreign national may assume a managerial position since E Co. is not engaged in nationalized activities.

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#### **SEC-OGC Opinion No. 16-29 dated 25 November 2016**

A foreign stockholder of a renewable energy company cannot be elected as president.

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**Facts:**

A Co. is a corporation venturing into Renewable Energy, particularly Energy From Waste projects. A Co. is currently 88% owned by Australian stockholders. However, a Department of Energy Circular requires a Renewable Energy company to be a Filipino corporation with at least 60% of its capitalization owned by Filipinos. As such, A Co plans to restructure its capitalization and invite Filipino investors to comply with the 60% Filipino-ownership requirement. After the restructuring, A Co. intends to elect as its President one of its Australian stockholders.

**Issue:**

May an Australian stockholder be elected as president of A Co, a renewable energy company?

**Held:**

No. Pursuant to the 1987 Constitution, the 10<sup>th</sup> FINL limits foreign participation in the exploration, development, and utilization of natural resources to a maximum of 40% equity. In the same vein, a DOE Circular No. DC2009-07-0011 requires applicants for the issuance of a Renewable Energy Service/Operating Contracts to be a Filipino or a Filipino corporation with at least 60% of its capitalization owned by Filipinos.

In view of the foregoing, A Co.'s act of electing an Australian stockholder as its President is governed by the Anti-Dummy Law. The SEC has previously held that the said law prohibits aliens from being appointed to management positions as president, vice president, etc. or corporations engaged in wholly or partially nationalized activities or in business activities where there is a constitutional or statutory provision imposing a specific nationality requirement as a requisite for the exercise or enjoyment of a right, franchise or privilege.

Accordingly, A Co. cannot elect one its Australian stockholders as its President because it is engaged in a partially nationalized activity wherein election of foreigners in management position is expressly prohibited by law.

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SEC MC No. 20 clarifies the schedule for the submission of the 2016 ACGR.

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**SEC MC No. 20 dated 8 December 2016**

In connection with SEC MC No. 5, series of 2013 and SEC MC No. 12, series of 2014, the SEC has resolved the following:

- ▶ The 2016 ACGR shall be submitted to the SEC on or before 30 May 2017 using the SEC Form - ACGR. The same report shall also be posted on publicly-listed companies' websites within 5 business days from submission.
- ▶ The 2016 ACGR will be the last one based on the Revised Code of Corporate Governance. The 2017 and succeeding ACGRs will be based on the recently released Code of Corporate Governance for Publicly Listed Companies.
- ▶ Publicly-listed companies shall not be required to post on their websites the Consolidated Changes in the ACGR for 2016 on or before 10 January 2017. Likewise, they shall not be required to attach the same to their 2016 Annual Report (SEC Form 17-A).

*Note: This MC has not yet been published.*

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SEC MC No. 21 adopts new and revised auditing standards and standards on assurance engagements and related services.

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**SEC Memorandum Circular No. 21 dated 9 December 2016**

The SEC approved the adoption of the following new and revised auditing standards and standards on assurance and engagements and other related services as part of the SEC's rules and regulations on financial reporting:

- ▶ Philippine Standard on Auditing (PSA) 610 (Revised), Using the Work of Internal Auditors and Related Conforming Amendments;
- ▶ PSA 260 (Revised), Communication with Those Charged with Governance;
- ▶ PSA 570 (Revised), Going Concern;
- ▶ PSA 700 (Revised), Forming an Opinion and Reporting on Financial Statements;
- ▶ PSA 701, Communicating Key Audit Matters in the Independent Auditor's Report;
- ▶ PSA 705 (Revised), Modifications to the Opinion in the Independent Auditor's Reports;

- ▶ PSA 706 (Revised), Emphasis of Matter Paragraphs and Other Matter Paragraphs in the Independent Auditor's Report;
- ▶ PSA 720 (Revised), The Auditor's Responsibilities Relating to Other Information;
- ▶ Philippine Standard on Assurance Engagements (PSAE) 3410, Assurance Engagements on Greenhouse Gas Statements;
- ▶ Philippine Standard on Related Services (PSRS) 4410 (Revised), Compilation Engagements; and
- ▶ Philippine Standard on Review Engagements (PSRE) 2400 (Revised), Engagements to Review Historical Financial Statements.

*Note: This MC has not yet been published.*

## **BOI Updates**

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MC No. 2016-006 circularizes the BOI People's Freedom of Information Manual that provides for the procedure, limitations, and remedies in requesting for information from the BOI.

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### **Memorandum Circular No. 2016-006 dated 5 October 2016**

#### ▶ **Background**

1. The President of the Philippines issued Executive Order (E.O.) No. 2 series of 2016 on 23 July 2016, operationalizing in the Executive Branch the people's constitutional right to information and the state policies of full public disclosure and transparency in the public services.
2. The E.O. requires each government agency to adopt a People's Freedom of Information Manual.

#### ▶ **Definition of terms used**

1. Publicly available information - Information is publicly available if published in the BOI website, Official Gazette, and newspaper of general circulation, among others.
2. Confidential information - Information is confidential if protected or considered confidential pursuant to laws, rules, regulations, policies, international agreements. Confidential information includes, but is not limited to:
  - ▶ All applications under E.O. No. 226 or Omnibus Investments Code of 1987, and their supporting documents;
  - ▶ Information classified as confidential, the disclosure of which would prejudice legitimate commercial interests or the competitive position of the investor or its investment;
  - ▶ Advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated and which is covered by the deliberative process privilege;
  - ▶ Personal information (e.g. individual's race, ethnic origin, age, religion, health condition) in the possession of BOI; and
  - ▶ Other confidential information listed in the enumeration of exceptions to E.O. No. 2 by the Department of Justice (DOJ) and Office of the Solicitor General (OSG).
3. Service - The BOI office responsible for the production, receipt, or keeping of the requested information.

#### ▶ **Scope of Right to Information**

1. The right to information under the Manual covers information, official records, public records, which are produced, received, or kept under the control of BOI and which are not publicly available, to the exclusion of confidential information.

▶ **Manner of filing requests**

1. The request shall be filed with any of the following Contact Points:
  - ▶ BOI Main Office - Office of the Division Chief of the General Services Division;
  - ▶ Cebu City Extension Office - Office of the Division Chief;
  - ▶ Cagayan de Oro Extension Office - Office of the Division Chief;
  - ▶ Davao City Extension Office - Office of the Division Chief;
  - ▶ Email: [foi@boi.gov.ph](mailto:foi@boi.gov.ph) with subject line "Request for Access to Information."
2. Schedule of filing requests for information is 8:00 AM to 5:00 PM on Tuesdays and Fridays only.
3. The Contact Point shall inform the Requester of the decision or availability of the documents within 15 days from receipt of the request.
  - ▶ In case of an extension, the total period to act shall not exceed 20 working days unless exceptional circumstances warrant a longer period.
  - ▶ All follow ups shall be directed to the Contact Point and not to the Service.

▶ **Process flow**

1. The Requester shall submit the following documentary requirements to the Contact Point:
  - ▶ Complete Request Form;
  - ▶ Photocopy of the Requester's valid identification card;
  - ▶ Authorization letter; and
  - ▶ If the requested information is confidential, a Notarized Waiver of Confidentiality issued by that entity whose information is the subject of the request.
2. The Contact Point shall provide the Requester a stamped received copy of the submitted request.
3. The Contact Point shall endorse the request to the Director of the Service within 24 hours from receipt of the request.
4. The Service shall review the nature of the request, determine if access to such information or documents is permissible, and act on the request. The Service may:
  - ▶ Grant the request, and transmit the documents and the Order of Payment;
  - ▶ Extend the 15 working day period to respond by issuing a Notice of Extension of Time to Respond under the following circumstances:
    - a. Inquiry requires extensive search of the government office's records facilities;
    - b. Inquiry requires the examination of voluminous records;
    - c. Occurrence of fortuitous events; and
    - d. Other analogous cases.
  - ▶ Deny the request by issuing a Notice of Denial based on the following grounds:
    - a. Information is not produced, received, or kept under the control of BOI based on the updated inventory of data and documents;
    - b. Information is publicly available;
    - c. Request is repetitious (i.e., requested by same person and acted upon by BOI within six months prior to the date of the second request);
    - d. Request entails disclosure of confidential information or is included in the DOJ and OSG's list of exceptions; and
    - e. Document has been lost or destroyed and can no longer be reproduced.

5. The Service shall inform the Contact Point, which will in turn inform the Requester of the decision / availability of documents.
  - ▶ Modes of conveyance of the decision:
    - a. Notice of Approval via electronic mail;
    - b. Notice of Extension of Time to Respond via electronic mail; and
    - c. Notice of Denial via registered mail or electronic mail.
  - ▶ In the case of a denial by reason that the information requested is in the custody of another government agency, the Contact Point shall indicate so in the Notice and transfer the request to said government agency.
6. The Requester shall pay the required fees at the Cashier and present the receipt.
7. The Contact Point shall release the information upon payment of fees:
  - ▶ Photocopy - P5 per page;
  - ▶ Retrieval fee:
    - a. For documents retrievable within 1 day: P150;
    - b. For documents which require more than 1 day to 1 week to retrieve: P300;
    - c. For documents requiring more than 1 week to retrieve: P500.
8. In case of a denial, Requester may appeal to the Managing Head:
  - ▶ The appeal must be:
    - a. In writing and shall set forth why the ground cited should be reviewed;
    - b. Filed with the Managing Head within 15 calendar days from receipt of Notice of Denial; and
    - c. Accompanied by payment of an appeal fee of P1,000.
  - ▶ The decision of the Managing Head, which shall be embodied in a Notice of Final Decision, shall be final and binding upon the Requester.
    - a. Failure of the Managing Head to act on appeal within 30 working days shall be deemed a denial of the appeal.

*[Editor's Note: Published in The Philippine Star on 7 December 2016; p.13].*

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MC No. 2016-007 provides additional guidelines to the BOI People's Freedom of Information Manual.

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#### **Memorandum Circular No. 2016-007 dated 23 November 2016**

##### **▶ Definition of terms**

1. FOI Receiving Office - Refers to the offices designated as FOI Receiving Office (FRO) in the Manual.
2. Information - Refers to any records, documents, papers, reports, letters, contracts, minutes and transcripts of official meetings, maps, books, photographs, data, research materials, films, sound and video recording, magnetic or other tapes, electronic data, computer stored data, any other like or similar data or materials recorded, stored or archived in whatever format, whether offline or online, which are made, received, or kept in or under the control and custody of any government office pursuant to law, executive order, and rules and regulations or in connection with the performance or transaction of official business by any government office.
3. Official Record/s - Refers to information produced or received by a public officer or employee, or by a government office in an official capacity or pursuant to a public function or duty.
4. Personal Information - Refers to the personal information protected under Republic Act (R.A.) No. 10173 or the Data Privacy Act.
5. Public Records - Includes information required by laws, executive orders, rules, or regulations to be entered, kept and made publicly available by a government office.

6. Requester - Refers to a person filing a request on its own behalf or on behalf of an association, partnership, cooperative or corporation.
7. Service - Refers to the BOI Service which made, received, or has control and custody of the information, official record or public record.

▶ **Scope of Right to Information**

- ▶ Includes access to information, official records, public record and documents and papers pertaining to official acts, transaction or decisions, except the following:
  - a. All applications under E.O. No. 226 or Omnibus Investments Code of 1987, and their supporting documents;
  - b. Information classified as confidential, the disclosure of which would prejudice legitimate commercial interests or the competitive position of the investor or its investment;
  - c. Advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated and which is covered by the deliberative process privilege;
  - d. Personal information (e.g. individual's race, ethnic origin, age, religion, health condition) in the possession of BOI; and
  - e. Other confidential information listed in the enumeration of exemptions provided by the Office of the President.
- ▶ Does not include the right to compel the BOI to prepare lists, abstracts, summaries, and the like.
- ▶ The Manual and its Implementing Details exclude the following:
  - a. Information which are publicly available; and
  - b. Repetitious requests (i.e. requested by same person and acted upon by BOI within six months prior to the date of the second request).

▶ **Guidelines on the procedure**

1. A request shall be made by filling out the Request Form and submitting the same with the other documentary requirements to the FRO.
  - ▶ Incomplete request forms shall not be accepted.
2. Third party intervention:
  - ▶ If the BOI evaluates that the disclosure of information subject of the request will prejudice legitimate commercial interests or the competitive position of a third party, it shall provide written notice of the request to the third party within five working days from receipt of the request.
    - a. If the request is accompanied by a Notarized Waiver of Confidentiality, the third party is deemed to have waived this requirement.
  - ▶ The third party shall have 5 working days to explain in writing why the information should not be disclosed.
    - a. Failure to respond shall be deemed approval of the disclosure on the part of the third party.
  - ▶ The Service shall decide the third party's intervention within 5 working days from receipt thereof.
3. Action on the Request - Upon review of the request, the BOI shall within 15 working days from receipt thereof, act on the request by:
  - ▶ Approving the request.
    - a. Upon approval, the Requester shall settle the administrative fees prior to the release of the information.

- ▶ Denying the request.
    - a. Grounds for denial:
      - ▶ Information is not produced, received, or kept under the control of BOI based on the updated inventory of data and documents;
      - ▶ Document has been lost or destroyed and can no longer be reproduced;
      - ▶ Information is publicly available; or
      - ▶ Request is repetitious.
    - b. Failure of BOI to provide access to information within 15 days is a deemed denial of the request.
    - c. In case of a partial denial, the part of the request which is accessible shall be disclosed.
  - ▶ Transferring the request to the appropriate agency.
  - ▶ Extending the time to respond.
    - a. Grounds for extension:
      - ▶ Inquiry requires extensive search of the government office's records facilities;
      - ▶ Inquiry requires the examination of voluminous records;
      - ▶ Delay is due to the occurrence of fortuitous events; or
      - ▶ Other analogous cases.
    - b. The extension may only go beyond 20 working days in exemplary cases.
    - c. The Requester must be notified in writing of the extension.
  - 4. Service of notices and decisions
    - ▶ By electronic email:
      - a. Notice of Approval of Request
      - b. Notice of Extension of Time to Respond
      - c. Notice of Transfer of Request
    - ▶ By registered mail or electronic email (depending on mode requested):
      - a. Notice of Denial
      - b. Notice of Final Decision
  - 5. Review by the Managing Head
    - ▶ The Requester may appeal to the Managing Head the denial of its request. The appeal, which must be verified, should:
      - a. Be filed within 15 calendar days from receipt of notice of denial;
      - b. Set forth the material dates and the reason why the ground for denial cited in the notice should be reviewed;
      - c. Be accompanied by copies of the request for access to information and the notice of denial; and
      - d. Be accompanied by the payment of the filing fee.
    - ▶ The decision of the Managing Head, which shall be embodied in a Notice of Final Decision, shall be final and binding upon the Requester.
      - a. Failure of Managing Head to act on appeal within 30 working days shall be deemed a denial of the appeal.
- ▶ **Responsibilities of the BOI offices**
1. FRO
    - ▶ The Main Office FRO shall consolidate the Inventory of Information and Records received from all Services, and furnish copies to the Extension Office FROs.

- ▶ Upon receipt of the request, the FRO shall endorse the request to the appropriate Service within 24 hours from receipt thereof.
  - a. The determination of the appropriate Service shall be based on the Inventory of Information and Records.
  - b. If the information requested is not in the Inventory, the request shall be emailed to all Services, which must each confirm or deny custody within 24 hours.
  - c. If all Services deny the existence of the information or records, the FRO shall endorse the request to the Legal and Compliance Service within 24 hours and the Legal Division shall prepare a Notice of Denial based on the FRO's report.
- ▶ The FRO shall serve notices and decisions to the Requester within 15 working days from the filing of the request.
- ▶ The FRO shall establish an FOI request tracking system and shall keep a full and updated record of all requests to ensure prompt and immediate response.

## 2. Service

- ▶ Every Service shall prepare an inventory of information, documents, and records which are produced, received, or kept under their control.
  - a. The list shall indicate if the information is readily available or, if not, the time required to produce the same.
  - b. The updated lists shall be submitted the BOI Main Office FRO every 15<sup>th</sup> day of January.
- ▶ The Service shall thoroughly review all requests and act on them within 13 days from receipt from the FRO. The approval, denial, transfer, or extension of time to respond must be conveyed to the FRO on or before the 14<sup>th</sup> day from receipt of the endorsement.
  - a. In case of the approval of request, the Service shall also assess the related fees.
- ▶ In allowing access to information, public records, and official records, the Service shall ensure protection of private information.
  - a. The Service shall ensure the no Confidential Information shall be disclosed.
  - b. The Service shall ensure that personal information is disclosed or released only if material or relevant to the subject matter of the request and its disclosure is permissible under existing law, rules or regulations.
  - c. The Service shall also inform any person, whose personal information is subject to the request, of the name of the requesting person, the reason for the request, the date of request, and the action taken.
  - d. Each Service shall protect personal information by making reasonable security arrangements against unauthorized access, leaks, or premature disclosure.

*[Editor's Note: Published in The Philippine Star on 7 December 2016; p.13].*

## Court Decisions

### **National Power Corporation vs. The Provincial Treasurer of Benguet, et al**

Supreme Court Third Division, GR No. 209303 promulgated 14 November, 2016

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A taxpayer questioning the excessiveness or reasonableness of a RPT assessment should first pay the tax due before his protest can be entertained.

The taxpayer has 30 days from receipt of the decision of the LBAA to file his appeal before the CBAA. If, however, the taxpayer files a motion to have the LBAA's decision reconsidered, and the LBAA denies said motion, the taxpayer will only have the unexpired portion of the 30-day period within which to appeal to the CBAA.

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#### **Facts:**

In May 2000, respondent Municipal Assessor of Itogon, Benguet assessed Petitioner National Power Corporation (NPC) for real property tax (RPT) on properties located within the Binga Hydro-Electric Power Plant. In March 2006, Respondent OIC-Provincial Treasurer of Benguet demanded payment of the RPT from NPC.

On 20 April 2006, NPC challenged before the Local Board of Assessment Appeals (LBAA) the legality of the assessment and the authority of the respondents Municipal and Provincial Assessors and Treasurers to assess and collect RPT from it. It asserts that its properties are exempt from RPT pursuant to Section 234 (b) and (c) of the Local Government Code (LGC).

Previously, in letters dated 3 September 2000 and 19 April 2001, NPC filed its requests for exemption from RPT before the Municipal Treasurer, which the latter has not acted upon.

On 9 August 2006, NPC received the LBAA's Order deferring the proceedings conditioned upon NPC's payment under protest of the assessed amount, or upon filing of a surety bond to cover the disputed RPT. On 25 August 2006, NPC filed a Motion for Reconsideration (MR) of the LBAA's order, which was denied by the LBAA.

NPC filed a petition for review with the Central Board of Assessment Appeals (CBAA), where it claimed that payment under protest was not required before it could challenge the authority of respondents to assess RPT on tax-exempt properties. The CBAA dismissed the appeal for being filed out of time.

NPC then appealed to the Court of Tax Appeals (CTA) *En Banc*, but the same was denied for lack of merit. The CTA ruled that Section 252 of the LGC requires payment under protest before a written protest against the assessment may be filed before the LBAA.

NPC filed its petition for review before the Supreme Court, and alleged that payment under protest is required when the reasonableness of the amount assessed is being questioned, and not, as in the present case, when the taxpayer challenges the very authority and power of the assessor to impose the assessment.

#### **Issues:**

1. Is NPC's payment of the RPT under protest a condition prior to appeal to LBAA?
2. Was the appeal before the CBAA filed out of time?

#### **Rulings:**

1. Yes. When a taxpayer/real property owner questions the excessiveness or reasonableness of the assessment, Section 252 of the LGC directs that the taxpayer should first pay the tax due before his protest can be entertained.

It is only after the taxpayer has paid the tax due that he may file a protest in writing within 30 days from payment of the tax to the Provincial or Municipal Treasurer, who shall decide the protest within sixty days from receipt. The local treasurer is not obliged to entertain the protest unless the tax due has been paid.

There was nothing in the petition before the LBAA which supports petitioner's claim regarding the respondents' alleged lack of authority. Instead, the petition raised a question of fact, including whether the machineries and equipment are actually, directly and exclusively used by NPC in the generation and transmission of electricity. Though couched in terms which challenge the validity of the assessment and authority of the respondents, NPC essentially anchors its petition based on a claim of exemption from RPT.

A claim for RPT exemption not actually questions the assessor's authority to assess and collect such taxes, but pertains to the reasonableness or correctness of the assessment by the local assessor, a question of fact which should be resolved, at the very first instance, by the LBAA.

Under Section 206 of the LGC, a person claiming RPT exemption shall file with the provincial, city or municipal assessor within 30 days from the date of the declaration of real property sufficient documentary evidence in support of such claim. If the required evidence is not submitted within the 30-day period, the property shall be listed as taxable in the assessment roll. However, if the property shall be proven to be tax-exempt, it shall be dropped from the assessment roll.

There was no evidence to show that, within 30 days from the filing of its Tax Declaration, NPC filed with the Municipal Assessor an application for exemption or any supporting documentary evidence of the exempt status of its properties. Since the properties were not dropped from the assessment roll upon NPC's failure to comply with the requirements, the Municipal Assessor assessed NPC's properties for RPT.

NPC's failure to comply with the mandatory requirement of payment under protest in accordance with Section 252 of the LGC was fatal to its appeal.

2. Yes, the appeal to CBAA was filed out of time.

Under Section 229 (c) of the LGC, the taxpayer has 30 days from its receipt of the assailed order of the LBAA to file its appeal before the CBAA.

On 9 August 2006, NPC received the LBAA's Order postponing the hearing subject to the condition that payment of the RPT should first be made, and on 25 August 2006, or on the sixteenth day from its receipt of the LBAA's Order, NPC filed a MR. When NPC received, on 17 October 2006, the Resolution of the LBAA denying its MR, it only had 14 days left within which to appeal to the CBAA.

The filing of the appeal before the CBAA through registered mail on November 16, 2006, which was received by the CBAA on 22 November 2006, was already late.

The “fresh period rule” which gives the appellant a fresh period within which to appeal covers judicial proceedings and not administrative appeals, such as the present case.

The case is remanded to the LBAA for further proceedings subject to payment under protest of the assailed assessment.

**Jose M. Roy III vs. Chairperson Teresita Herbosa, the Securities and Exchange Commission, et al**

Supreme Court (*En Banc*), G.R. No. 207246 promulgated on 22 November 2016

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SEC MC No. 8 of 2013 adheres to the Supreme Court’s pronouncement in the 2011 Gamboa Decision and its related 2012 Resolution that “full beneficial ownership of 60% of the outstanding capital stock, coupled with 60% of the voting rights is required for the State’s grant of authority to operate a public utility.”

The interpretation of the term “capital” in the Gamboa Decision, as referring only to voting shares, stands.

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**Facts:**

On 28 June 2011, the Supreme Court promulgated its decision in the case of ***Wilson P. Gamboa vs. Finance Secretary Margarito B. Teves, et al*** (or the ***Gamboa Decision***) on what constitutes the term “capital” as this is used to determine ownership in a public utility as provided in the Constitution, which limits foreign ownership to 40%.

Section 11 of Article XII of the 1987 Constitution provides that no franchise for the operation of a public utility shall be granted except to “citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty per centum of whose capital is owned by such citizens xxx.”

The Court, in the ***Gamboa Decision***, ruled that capital refers only to shares of stock entitled to vote in the election of directors.

In its ***9 October 2012 Resolution*** on the motions to reconsider said decision, the Court ruled that the Constitutional requirement of 60% Filipino ownership of public utility companies applies not only to voting control but also to beneficial ownership of the corporation. The ***Resolution*** further provides that this requirement must apply uniformly and across all classes of shares, regardless of nomenclature and category, comprising the capital of a corporation.

On the basis of the ***Gamboa Decision and Resolution***, the SEC issued SEC-MC No. 8 on 20 May 2013, which provides guidelines on compliance with the Filipino-Foreign ownership requirements prescribed in the Constitution and/or existing laws by corporations engaged in nationalized and partly nationalized activities, the relevant portion of which follows:

“Section 2. All covered corporations shall, at all times, observe the constitutional or statutory ownership requirement. For purposes of determining compliance therewith, the required percentage of Filipino ownership shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.

Corporations covered by special laws which provide specific citizenship requirements shall comply with the provisions of said law.”

Petitioner Jose M. Roy III questioned the validity of the SEC circular as being unconstitutional for not conforming to the letter and spirit of the ***Gamboa Decision and Resolution***. Hence, Roy seeks to apply the 60-40 Filipino ownership requirement separately to each class of shares of a public utility corporation, whether common, preferred non-voting, preferred voting or any other class of shares.

**Issue:**

Did the **Gamboa Decision and Resolution** interpret the law to mean that the 60-40 Filipino ownership requirement shall apply separately to each class of shares of a public utility corporation?

**Ruling:**

No. As ruled in the **Gamboa Decision**, the term “capital” in Section 11, Article XII of the Constitution refers only to shares of stock entitled to vote in the election of directors, and thus pertains only to common shares and not to the total outstanding capital stock comprising both common and non-voting preferred shares. Considering that common shares have voting rights which translate to control, as opposed to preferred shares which usually have no voting rights, the term “capital” in Section 11, Article XII of the Constitution refers only to common shares.

However, if the preferred shares also have the right to vote in the election of directors, the term “capital” shall include such preferred shares because the right to participate in the control or management of the corporation is exercised through the right to vote in the election of directors. In sum, the term “capital” in Section 11, Article XII of the Constitution refers only to shares of stock that can vote in the election of directors.

The State policy, as reflected in the 1987 Constitution, is to develop an economy “effectively controlled” by Filipinos. The right to vote in the election of directors coupled with full beneficial ownership of stocks translates to effective control of a corporation.

The questioned SEC circular clearly incorporates the Voting Control Test or the controlling interest requirement of the **Gamboa Decision** and adheres to the Court's pronouncement of “full beneficial ownership of 60% of the outstanding capital stock, coupled with 60% of the voting rights is required.”

Although the SEC Circular does not expressly mention the full beneficial ownership test in the Foreign Investments Act (FIA), it is not rendered invalid as it does not follow that the SEC will not apply this test in determining whether the shares claimed to be owned by Philippine nationals are Filipino, i.e. are held by them by mere title or in full beneficial ownership. The SEC will also apply the FIA, the Securities Regulation Code and their respective Implementing Rules and Regulations requiring the same.

Petitioner's position of applying the 60-40 Filipino ownership requirement separately to each class of shares of a public utility corporation, whether common, preferred non-voting, preferred voting or any other class of shares, goes beyond the contemplation of the 1987 Constitution. The **Gamboa Decision and Resolution** did not require the application of the controlling interest and beneficial ownership tests in reference to “each class of shares.” The pronouncement in the **Gamboa Resolution** that the constitutional requirement shall apply “uniformly to and across the board to all classes of shares, regardless of nomenclature and category, comprising the capital of a corporation” is an *obiter dictum* (or something said in passing) that cannot override the Court's unequivocal definition of the term “capital” in both the **Gamboa Decision and Resolution**.

**Bahay Bonds 2 Special Purpose Trust vs. Commissioner of Internal Revenue**  
CTA (First Division) Case 8944, promulgated 5 November 2016

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Asset-backed securities issued pursuant to an SEC-approved securitization plan under RA 9267 are not considered deposit substitutes. The income derived by investors or bondholders from low-cost or socialized housing-related asset-backed securities is exempt from income tax and final withholding tax.

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**Facts:**

The National Home Mortgage Finance Corporation (NHMFC) filed a claim for refund with the BIR for erroneously paid final withholding tax on the interest income derived from the asset-backed securities (ABS) or the so-called “Bahay Bonds” issued pursuant to Republic Act 9627 or the Securitization Act of 2004.

NHMFC securitized receivables worth P600 Million from long-term secured low cost and socialized housing loans by transferring on a ‘true sale’ and without recourse basis these loans at book value to Petitioner Bahay Bond 2 Special Purpose Trust (SPT). All loans did not exceed P400,000 and were within the loan ceiling for low-cost and socialized housing packages. To fund the purchase of the loans, SPT issued the Bahay Bonds for investment by retail investors, primary institutional lenders and NHMFC. The notes and corresponding expenses will be funded by collections from the residential loans held by SPT.

In July 2012, NHMFC filed a request for ruling with the BIR seeking confirmation that the interest earned by SPT from note holders, including NHMFC, is exempt from income and withholding tax under Section 33 of RA 9267 being income from low-cost and socialized housing-related ABS. The CIR issued BIR Ruling No. 516-2012 and held that the ABS are “deposit substitutes” subject to, among others, the 20% final withholding tax. NHMFC filed a request for reconsideration from the BIR but pending a decision, SPT reported and paid the quarterly FWT from November 2012 to May 2014.

On 29 October 2014, NHMFC requested for a refund of the FWT paid. SPT filed a Petition for Review at the CTA arguing that the ABS is exempt from income and withholding taxes pursuant to Section 33 of RA 9267 and Section 19 of RA 8763 or the Home Guaranty Corporation Act of 2000. On the other hand, the CIR argued that mere issuance of government debt instruments and securities is within the coverage of “deposit substitutes” subject to tax.

**Issues:**

1. Are Bahay Bonds issued pursuant to RA 9627 considered deposit substitutes?
2. Is the income derived from Bahay Bonds exempt from income and withholding tax?

**Rulings:**

1. No. The Bahay Bonds are not deposit substitutes covered by Section 22 (Y) of the Tax Code, as amended. Section 31 of RA 9267 expressly declared that ABS issued by a special purpose entity pursuant to an SEC-approved securitization plan is not considered as deposit substitutes under the Tax Code. The express declaration in RA 9267 which is a more recent law than the Tax Code of 1997, as amended, shows that Congress clearly carved out an exception with respect to ABS.
2. Yes. The income or yield derived by investors or bondholders from Bahay Bonds, which are low-cost or socialized housing-related asset-backed securities, is exempt from income tax and final withholding tax.

Under Section 27 of RA 9267, a special purpose entity like SPT is generally subject to income tax in accordance with Section 61 of the Tax Code, as amended. However, to promote the securitization of the mortgage and housing-related receivables of the government housing agencies, Section 33 of RA 9267 exempts from income tax the yield or income of the holders of ABS from any low-cost or socialized housing-related ABS.

The CTA ordered the refund of the FWT withheld and remitted by SPT to the BIR.

### **Commissioner of Internal Revenue vs. Farcon Marketing Corporation**

CTA (*En Banc*) Case 1306 promulgated 21 November 2016

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While the BIR can resort to the Best Evidence Obtainable Rule and estimate the tax liability of a taxpayer who failed to submit its accounting records lost due to calamities, it is still required to provide sufficient evidence as basis for its deficiency tax assessment.

A Letter of Authority signed by a Revenue District Officer, in lieu of the Revenue Regional Director, renders the tax assessment a nullity.

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#### **Facts:**

Petitioner CIR issued a Tax Verification Notice to Respondent Farcon Marketing Corp. (Farcon) to verify its supporting documents and pertinent records relative to all its revenue taxes for taxable year 2007. When required to present its books of accounts and accounting records, Farcon claimed it cannot comply as the documents were destroyed and damaged by typhoons *Ondoy* and *Pepeng*.

The CIR assessed Farcon for alleged deficiency income tax for taxable year 2007 arising from disallowed expenses, such as gas and oil, postage, telephone and telegraph, and other purchases. Farcon protested the assessment. Upon denial of its protest, Farcon filed a petition for review with the CTA.

Farcon argued that the assessment is without factual and legal bases and that its failure to submit the required documents was not willful but due to reasonable and justifiable causes, i.e. records were destroyed by the flood caused by typhoons. Farcon also claimed that it was able to submit to the BIR reconstructed worksheets and schedule of purchases and expenses to support its protest, which were not considered by the BIR.

The CIR countered that Farcon's failure to submit the required supporting documents within the prescribed period justifies the BIR's resort to the Best Evidence Obtainable Rule under Section 6 (B) of the Tax Code. The CIR argued that Farcon failed to substantiate the expenses claimed as deduction from gross income as provided under Section 34 (A)(1) of the Tax Code.

The CTA 2<sup>nd</sup> Division held that the law allows the BIR wide latitude to resort to the Best Evidence Obtainable Rule to make an assessment. The BIR may determine Farcon's tax liability through estimation considering the absence of accounting records, which were destroyed by the typhoons. But while the approximation in the calculation of the taxes due is justified, the CTA 2<sup>nd</sup> Division ruled that such estimation should still be based on sufficient evidence.

Aggrieved, the CIR elevated the case to the CTA *En Banc*.

#### **Issues:**

1. Was the deficiency income tax assessment valid based on the 'Best Evidence Obtainable'?
2. Can the Revenue District Officer authorize the examination of a taxpayer's records in lieu of the Regional Director?

**Rulings:**

1. No. While the BIR can resort to the Best Evidence Obtainable Rule and estimate the tax liability of taxpayers who failed to submit its accounting records, it is still required to provide sufficient evidence as basis for its deficiency tax assessment.

The CIR did not follow the requirements under Section 6(B), which authorizes him to amend what may be deemed a false or fraudulent return based on his own knowledge and from such information as he can obtain through testimony, among others, which shall be presumed correct and sufficient.

The CTA *En Banc* held that the CIR cannot use Farcon's ITR as the factual basis for the deficiency income tax assessment as tax returns filed with the BIR are presumed to have been filed in accordance with the law. Moreover, the ITR did not prove that there were unsupported expenses, for it merely showed Farcon's operation in 2007 and the income tax due for the year.

2. No. Pursuant to Section 13 of the NIRC, a Revenue Officer assigned to perform assessment functions in any district may examine taxpayers pursuant to a Letter of Authority issued by the Revenue Regional Director. Quoting the Supreme Court's decision in *CIR vs. Sony Philippines, Inc.*, GR No. 178697 dated 17 November 2010, the assessment or examination is a nullity in the absence of such authority. In the instant case, only the Revenue District Officer, not the Regional Director, signed the Tax Verification Notice to conduct the examination and verification.

*[Editor's Note: This decision affirms the CTA's ruling in CTA (Second Division) Case 8367 promulgated on 3 February 2015, which was published in the February 2015 issue of Tax Bulletin.]*

**Commissioner of Internal Revenue vs. 3M Philippines, Inc.**

CTA (*En Banc*) Case 1330 promulgated 21 November 2016

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An assessment should contain a computation of tax liabilities as well as a demand for payment within the prescribed period.

A valid formal assessment has to be issued and served to the taxpayer for the tax liability to arise. A FAN is a substantive prerequisite to tax collection.

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**Facts:**

Petitioner CIR assessed Respondent 3M Philippines, Inc. (3M) for, among others, deficiency income tax, withholding tax, and expanded withholding tax, for taxable year 2002. 3M received an advance copy of the Preliminary Assessment Notice (PAN) through fax on 14 August 2008. 3M paid the alleged deficiency taxes on the same day to stop the continuous accrual of interest charges but reserved the right to file a formal protest upon receipt of the Formal Assessment Notice (FAN). After 3M filed its reply to the PAN, the BIR neither acted on it nor issued a FAN.

On 24 June 2010, 3M filed with the BIR a claim for refund of the amount paid based on the PAN. It argued that the period for BIR to assess had prescribed and the taxes it paid were erroneously or illegally collected. To toll the running of the 2-year prescriptive period, 3M filed a Petition for Review at the CTA.

At the CTA, the BIR contended that the payment in response to the PAN dispensed with the need for the issuance of the FAN. It also posited that 3M's actions after the PAN issuance, particularly the payment of the assessed deficiency, support the view that it recognized and treated the PAN as a FAN. Moreover, the BIR argued that 3M should not be permitted to use a refund petition when it lost its right to contest the assessment.

The CTA 3<sup>rd</sup> Division ordered the refund of the erroneously paid deficiency income tax and withholding taxes, VAT and FBT, prompting the CIR to elevate the case to the CTA *En Banc*.

**Issues:**

1. Can taxes paid based on the PAN be considered erroneously or illegally collected which can be subject of a refund?
2. Is there a need to issue a FAN even if 3M voluntarily paid the deficiency taxes alleged in the PAN?

**Rulings:**

1. Yes. Erroneously paid taxes may come in the form of amounts that should not have been paid. In this case, the CTA held that it was not shown that what 3M paid was legally due nor was 3M legally bound to pay the amount.

An assessment contains not only a computation of tax liabilities, but also a demand for payment within the prescribed period. A cursory reading of the PAN revealed that while there was a computation of 3M's supposed tax liabilities, there was no demand for payment thereof. The demand had yet to be made and, as stated in the PAN, only after the BIR fails to hear from 3M will such demand be issued.

There was no assessment to speak of which may create a liability to pay tax on the part of 3M.

2. Yes. A FAN is necessary. For the tax liability to arise, an assessment has to be issued and served to the taxpayer. The issuance of a valid formal assessment is a substantive prerequisite to tax collection. Due process requires that it must be served on and received by the taxpayer to enable the taxpayer to determine the remedies thereon.

The CTA ruled that, contrary to the CIR's claim, payment was made not to extinguish 3M's supposed tax liability but to "stop the accrual of interest charges" and "without prejudice to the right to file a formal protest upon receipt of the FAN." The intention was supported by the 3M's subsequent filing of the protest to the PAN and the filing of the refund claim.

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