

February 2014

Tax bulletin



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PHILIPPINE TAX FIRM
OF THE YEAR
AND
TRANSACTION TAX TEAM
OF THE YEAR

Highlights

BIR Ruling

- ▶ Under Revenue Memorandum Order (RMO) No. 72-2010, a claim for any tax treaty relief should be preceded by a Tax Treaty Relief Application (TTRA) filed with the BIR's International Tax Affairs Division (ITAD) before the transaction, which is considered by the BIR as the payment of income. **(Page 4)**

BIR Issuances

- ▶ Revenue Regulations (RR) No. 3-2014 amends certain provisions of Section 10 of RR No. 10-2010, entitled "Exchange of Information Regulations". **(Page 5)**
- ▶ Revenue Memorandum Circular (RMC) No. 5-2014 clarifies in Question and Answer format the provisions of RR No. 1-2014 on the submission of the alphabetical list ("alphalist") of employees/payees of income payments. **(Page 5)**
- ▶ RMC No. 7-2014 clarifies the registration and compliance requirements of Marginal Income Earners pursuant to RR No. 7-2012. **(Page 11)**
- ▶ RMC No. 8-2014 requires the presentation of a tax exemption certificate or ruling by individuals and entities claiming exemption from withholding taxes. **(Page 11)**
- ▶ RMC No. 9-2014 defers to taxable year 2014 the implementation of the mandatory disclosure of supplemental information on BIR Form Nos. 1700, 1701 and 1702. **(Page 11)**
- ▶ RMC No. 11-2014 clarifies certain issues relative to the due process requirement in issuing a deficiency tax assessment pursuant to RR No. 12-99, as amended by RR No. 18-2013. **(Page 12)**
- ▶ Revenue Memorandum Order (RMO) No. 8-2014 amends RMO No. 10-2013 prescribing the guidelines and procedures in issuing and enforcing *Subpoenas Duces Tecum* (SDT) and the prosecution of cases for non-compliance. **(Page 12)**
- ▶ RMO No. 9-2014 prescribes the guidelines in processing requests for rulings with the Law and Legislative Division. **(Page 14)**
- ▶ RMO No. 10-2014 prescribes the policies, guidelines and procedures in accrediting importers and customs brokers. **(Page 16)**

DOF Issuances

- ▶ Department Order (DO) No. 11-2014 prescribes the guidelines and procedures in performing post-entry audit functions by the DOF's Fiscal Intelligence Unit (FIU). **(Page 20)**
- ▶ DO No. 12-2014 prescribes the new rules on accreditation of importers. **(Page 23)**
- ▶ DO No. 13-2014 prescribes the guidelines for the lifting of the suspension of accreditation of importers. **(Page 23)**

BOC Issuances

- ▶ Customs Administrative Order (CAO) No. 1-2014 prescribes the guidelines on the imposition of surcharge under Section 2503 of the Tariff and Customs Code of the Philippines (TCCP). **(Page 24)**
- ▶ Customs Memorandum Order (CMO) No. 1-2014 prescribes the revised guidelines and procedures in the accreditation of journalists and other media practitioners who cover the BOC on a regular basis. **(Page 25)**
- ▶ CMO No. 2-2014 prescribes the guidelines on implementing the Second Pilot Project for the ASEAN Self-Certification System and the Accreditation of “Certified Exporters.” **(Page 27)**
- ▶ CMO No. 4-2014 prescribes the policies, guidelines and procedures on the Accreditation of Importers and Customs Brokers pursuant to DOF DO No. 12-2014. **(Page 29)**
- ▶ This Memorandum prescribes the transition policies and guidelines on the implementation of CMO No. 4-2014. **(Page 31)**

PEZA Issuance

- ▶ PEZA Memorandum Circular (MC) No. 2014-003 announces the continued grant of the 50% reduction in all PEZA processing fees for ecozone import/export full-container load shipments to be charged or loaded at the Batangas International Port (BIP). **(Page 31)**

BSP Issuances

- ▶ Circular No. 824 amends the regulations on Long-Term Negotiable Certificates of Time Deposits (LTNCTDs). **(Page 31)**
- ▶ Circular No. 825 amends certain provisions of the Manual of Regulations for Banks (MORB) and Manual of Regulations for Non-Bank Financial Institutions (MORNBFI) on establishing other banking offices; check clearing rules for thrift banks and rural banks; composition of reserves; and housing microfinance loan. **(Page 32)**
- ▶ Circular No. 826 amends the risk disclosure requirements on loss absorbency features of capital instruments. **(Page 32)**

SEC Issuances

- ▶ SEC MC No. 2 prescribes the revised guidelines for reports on the valuation or appraisal of assets of registered corporations. **(Page 33)**
- ▶ SEC MC No. 3 requires a sworn certification from the company and its external auditor on the beginning balances of financial statements in support of its Petition to Lift Order of Revocation of Primary Registration. **(Page 35)**
- ▶ SEC MC No. 4 prescribes the guidelines in requesting for a refund and the re-application of filing fees and excess penalties with the SEC’s Company Registration and Monitoring Division (CRMD). **(Page 35)**
- ▶ SEC MC No. 5 prescribes the guidelines on the outsourcing of functions by broker dealers. **(Page 36)**

- ▶ SEC MC No. 6 requires existing corporations and partnerships whose Articles of Incorporation (AOI) or Articles of Partnership (AOP) indicate only a general address as their principal office, to file an amended AOI or AOP in order to specify their complete addresses. **(Page 37)**
- ▶ Although holding a minority and non-controlling interest in a petroleum consortium, a foreign corporation may be considered to be doing business in the Philippines even if it is not the operator of the consortium. **(Page 38)**
- ▶ A corporation's former director and corporate secretary or counsel can act as trustee of the corporation even after the expiration of the three year winding up period for the final liquidation of the dissolved corporation. **(Page 39)**

Court Decisions

- ▶ A taxpayer is not liable for deficiency income tax arising from erroneous carry-over of excess creditable withholding taxes (CWTs) from the prior year and disallowance of unsupported CWTs if, after proper adjustments, the taxpayer will still have a tax overpayment for the year. At most, the taxpayer may only be assessed in the succeeding taxable year when it enjoyed the tax benefit. **(Page 40)**
- ▶ The prior filing of a TTRA is not mandatory before a taxpayer can avail of the benefits under the treaty, provided the conditions for the availment as prescribed in the treaty are complied with. **(Page 40)**

BIR Ruling

BIR Ruling No. ITAD 016-14 dated February 12, 2014

Under RMO No. 72-2010, a claim for any tax treaty relief should be preceded by a TTRA filed with the BIR's ITAD before the transaction, which is considered by the BIR as the payment of income.

Facts:

A Co., a non-resident foreign corporation based in Japan, granted loans to B Co., a domestic corporation. Two separate Intercompany Loan Agreements dated October 13, 2010 and November 2010 were entered into by the parties. Under the terms of the agreements, B Co. agreed to pay A Co. the principal loan amount plus interest, payable semi-annually, every June 15 and December 15. On June 24, 2011 and December 21, 2011, B Co. remitted interest on the loans. The TTRA was filed on March 11, 2011.

Issues:

1. Are all the interest payments on the loan agreements entitled to relief under the RP-Japan Tax Treaty?
2. Are the loan agreements subject to DST?

Ruling:

1. No. Under RMO No. 72-2010, a claim for any tax treaty relief should be preceded by a TTRA filed with the BIR-ITAD before the transaction; that is, the payment of interest. Since the TTRA was filed only on March 11, 2011, all interest paid on or before March 11, 2011 are not entitled to the 10% preferential tax rate under Article 11 of the RP-Japan Tax Treaty. Instead, they shall be subject to the 20% tax rate under Section 28(B)(5)(a) of the Tax Code. However, interest paid on March 12, 2011 onwards are entitled to the 10% preferential tax rate.

2. Yes. The loan agreements are subject to DST at the rate of P1 on each P200 or fractional part of the issue price of the loans under Section 179 of the Tax Code.

[Editor's Note: This ruling still applies the requirement of RMO No. 1-2000 despite (1) the Supreme Court's August 19, 2013 decision in Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue (G.R. No. 188550), that the failure to strictly comply with the requirement under RMO No. 1-2000 to file a TTRA 15 days prior to availing the provisions of a tax treaty, should not deprive a taxpayer of the benefit of a tax treaty, and (2) the Supreme Court's October 23, 2013 Resolution denying with finality the Solicitor General's motion for reconsideration of the August 19, 2013 decision. See also the case of Lindberg Subic, Inc. vs. Commissioner of Internal Revenue on page 40 where the CTA First Division followed/applied the Supreme Court's decision in the Deutsche Bank case.]

BIR Issuances

RR No. 3-2014 amends certain provisions of Section 10 of RR No. 10-2010, entitled "Exchange of Information Regulations".

Revenue Regulations No. 3-2014 dated February 11, 2014

- ▶ Section 10 of RR No. 10-2010 is amended to read as follows:

"A taxpayer shall be duly notified in writing by the Commissioner that a foreign tax authority is requesting for exchange of information held by financial institutions pursuant to an international convention or agreement on tax matters within 60 days from receipt of the said request.

However, if notification within this period will undermine the chances of success of the investigation conducted by the requesting foreign tax authority, the taxpayer shall be notified within 6 calendar months from receipt of the request."

- ▶ This regulation shall take effect immediately.

(Editor's Note: RR No. 3-2014 was published in the Manila Bulletin on February 13, 2014)

RMC No. 5-2014 clarifies in Question and Answer format the provisions of RR No. 1-2014 on the submission of the alphabetical list ("alphalist") of employees/payees of income payments.

Revenue Memorandum Circular No. 5-2014 dated January 29, 2014

- ▶ *What are the modes of submission of the alphalist of employees and the list of payees on income payments subject to creditable and final withholding taxes prescribed under RR No. 1-2014?*

1. As attachment in the Electronic Filing and Payment System (eFPS);

(NOTE: The attachment of the alphalist through the eFPS is temporarily disabled and a tax advisory shall be immediately issued through the BIR website as soon as the technical issues are resolved.)

2. Through Electronic Submission (eSubmission) using the BIR's website address at esubmission@bir.gov.ph; and
3. Through Electronic Mail (email) submission at dedicated BIR email addresses using the data entry module of the BIR.

However, all taxpayers who are mandated to use the eFPS and the Inter-Active Forms (IAF) System under existing revenue regulations, including those who voluntarily enrolled with the said systems, can file only through eSubmission. Once the attachment facility of eFPS is already available, eFPS users may opt to use either the eSubmission or the attachment facility of the eFPS in the submission of their alphalists.

On the other hand, taxpayers who are neither eFPS users nor IAF-enrolled users may avail themselves of the eSubmission facility or the email submission of alphalists. The eSubmission facility for the filing of alphalists is preferred considering that the said submission facility is more convenient for both the taxpayers and the BIR as it requires no manual intervention by the concerned RDOs.

Thus, the submission of hard or physical copies of alphalists, including storage devices such as, but not limited to CD, DVD, USB shall no longer be allowed.

- ▶ *What are the distinctions between each of the 3 modes of submission of alphalist as prescribed by RR No. 1-2014?*

	eFPS Attachment	eSubmission	Email Submission
Data entry and validation module requirement	Yes	Yes	Yes
Who may avail of the 3 submission modes?	Only taxpayers enrolled with eFPS	All taxpayers, whether or not enrolled with eFPS or IAF	Taxpayers who are neither enrolled with eFPS or IAF
What is the specific manner of submission of the alphalist?	Through eFPS as attachment to the Annual Information Return	By email through a single email address at esubmission@bir.gov.ph	By email at the dedicated email address of the RDO where the taxpayer is duly registered
Where will the alphalist be initially lodged before it can be successfully uploaded and stored in the data warehouse, for purposes of considering the same as officially received by the BIR?	Revenue Data Center (RDC) where the content of the alphalist shall undergo an automated validation process	RDC where the content of the alphalist shall undergo an automated validation process	RDC where the content of the alphalist will undergo a manual validation process prior to uploading to the RDC for the automated validation process

- ▶ *What shall the taxpayer do if it fails to receive the message acknowledging/confirming the receipt of the alphalist by the BIR right after the emailed alphalist is actually sent to the RDO?*

Once the alphalist is successfully sent to the BIR, a message shall automatically pop up on the computer screen acknowledging/confirming the receipt of the submitted alphalist.

If the taxpayer fails to receive such message due to technical issues such as "high email traffic," the erroneous use of RDO email address, the alphalist is not attached to the email that was sent to the RDO, among others, the taxpayer shall exercise due diligence to ensure that the alphalist has been actually and timely received by the correct RDO, and a pop-up message indicating that the filed/submitted alphalist has been received by the RDO.

Thus, the taxpayer shall immediately check with the concerned RDO to determine whether or not the submitted alphalist through email has been received by the RDO. Otherwise, the taxpayer shall check the correctness of the previously used RDO email address and re-send the same to the correct RDO email address, as the case may be.

- ▶ *Will the taxpayer also receive an email message that the submitted alphalist has been successfully uploaded to the BIR data warehouse, or otherwise failed the prescribed BIR validation processes?*

Yes. The taxpayer shall receive an email message confirming the successful uploading to the BIR data warehouse, or the failure to comply with the prescribed BIR validation processes. The reasons on the failure of the validation processes shall likewise be indicated in the message. For this purpose, the taxpayer shall immediately address these reasons and resubmit, through eSubmission or email, as the case may be, the corrected and completely filled-out alphalist to the concerned RDO, within five days from receipt of the said message. Thus, in order that the taxpayer's email account is regularly visited and to prevent the taxpayer from denying that it failed to receive the message if the RDO has actually sent the message to the email address of the taxpayer, such message sent by the RDO is deemed received and read by the taxpayer.

- ▶ *Is there a need for taxpayers to print the computer screen displaying the acknowledgement receipt, for those using the eSubmission, or the email message, for those using the email submission, acknowledging/confirming the receipt of the emailed alphalist? Why?*

Yes. The taxpayer should print the computer screen acknowledging receipt by the BIR of the emailed alphalist. The printed copy of the computer screen display of the acknowledgement/confirmation of the BIR's receipt of the alphalist shall serve as documentary proof of filing/submission of the alphalist, in lieu of the hard or physical copy thereof, which shall be attached to the hard or physical copy of the Annual Information Returns (BIR Form No. 1604-CF and No.1604-E) upon filing with the concerned RDO.

- ▶ *Are the Annual Information Returns (BIR Form No. 1604-CF and No. 1604-E) included in the submission of the alphalist through the different modes enumerated under RR No. 1-2014?*

Except for taxpayers who are using the eFPS facility in the filing the Annual Information Returns, all other taxpayers are still required to prepare and submit the hard or physical copies thereof, together with the printed copy of the computer screen display of the acknowledgement/confirmation of the BIR's receipt of the alphalist, to the RDO where the concerned taxpayers are duly registered, considering that only the submission of alphalist through the three different modes (e.g., eFPS, eSubmission and email submission) is prescribed by the said regulations.

- ▶ *What is the presumption on the maintenance by the taxpayer of an email account for purposes of submission of the alphalist?*

The presumption is that the taxpayer is deemed the owner of the email account used in the submission of the alphalist, and the alphalist submitted to the concerned RDO is deemed submitted by the taxpayer himself. In case of violations committed in the submission of the alphalist, either through eSubmission or email, the taxpayer is the one liable to the corresponding penalties therefor.

- ▶ *Are the Monthly Alphalist of Payees (MAP) and the Summary Alphalist of Withholding Taxes (SAWT) also covered by the different modes of submission prescribed under RR No. 1-2014?*

Yes. Except for the Monthly Remittance Return for Compensation (BIR Form No. 1601-C) where the monthly list of recipients of compensation is not required to be attached to the said monthly remittance return, the submission of the alphalist of income payees, e.g., MAP and the SAWT are likewise required to be filed/submitted to the concerned RDO through the applicable modes of submission prescribed under the said revenue regulations.

However, except for taxpayers who are using the eFPS facility in filing the Monthly Remittance Returns (BIR Form No. 1601-C, etc.), as well as the ITR (quarterly and annual), VAT Declarations>Returns (BIR Form No. 2551Q), all other taxpayers are still required to prepare and submit the hard or physical copies and pay the corresponding withholding taxes due thereon, if any, together with the printed copy of the computer screen display of the acknowledgement/confirmation of the BIR's receipt of the monthly alphalist, to the Authorized Agent Bank (AAB) or RDO where the concerned taxpayers are duly registered, as the case may be.

- ▶ *What shall the taxpayers do if they have already submitted the hard or physical copies of annual information returns and alphalists, including those alphalists stored in CD, DVD, USB and other storage devices according to the prescribed CSV data file format, before the issuance and effectivity of RR No. 1-2014?*

Taxpayers who have already filed the requisite alphalist through the prescribed storage devices before the effectivity of RR No. 1-2014 shall no longer be required to submit the alphalist through any of the different modes prescribed by the same regulations, if applicable.

On the other hand, for those alphalists that were submitted in hard or physical copies to their respective RDOs, the taxpayers are still required to resubmit the said alphalist through the modes prescribed under the said regulations. However, the same shall be resubmitted to the concerned RDOs using the applicable filing facilities herein prescribed not later than March 1, 2014.

- ▶ *In order that the alphalist can be successfully uploaded into the data warehouse of the BIR and considered as duly received by the BIR, what are the requirements that all concerned taxpayers shall strictly observe?*

1. The taxpayer-withholding agent is duly registered with the concerned RDO having jurisdiction over his business as a head office or as a branch, as the case may be.
2. The alphalist is emailed to the correct email address assigned for this purpose to the RDO where the taxpayer is duly registered.

3. The email address should be the official business email address of the taxpayer in the case of corporations or partnerships, or the personal email address of the BIR-registered taxpayer in the case of sole proprietorships. For sole proprietorships, the individual registered taxpayer may authorize his subordinate employees to use their respective personal email accounts for the filing and submission, provided that the latter's submission of the alphalist is deemed the submission of the individual registered taxpayer himself. In case of violations committed by such subordinate employees in the submission of the alphalist, the individual registered taxpayer is the one liable to the corresponding penalties.
 4. The latest version of the data entry module which is version no. 3.4 shall be used in filling up the alphalist.
 5. Ensure that the file containing the alphalist is not infected by any virus.
 6. The information contained in the alphalist shall not bear special characters such as but, not limited to, "ñ", "*", "?", "&", and so on.
 7. The TINs indicated in the alphalist is/are valid and correspondingly issued by the BIR to the employee(s) or payee(s).
 8. Specify the complete name of the taxpayer(s)/payee(s) with the corresponding amount of income and withholding tax. Hence, the following word(s) "Various Employees", "Various payees", "PCD nominees" or "Others" and other similar word(s) where the total taxes withheld are lumped into one single amount are not allowed.
 9. In case of re-submission of alphalist, after due notification and requirement from the concerned BIR Office, or submission of the amended alphalist, the resubmitted or amended alphalist shall contain the complete and correct information. Resubmitted or amended alphalist containing only the changes on the affected line items in the alphalist cannot be successfully uploaded in the data warehouse.
- *In cases where an alphalist is not successfully uploaded and considered not received by the BIR pursuant the provisions of RR No. 1-2014, what is the the penalty to be imposed on the taxpayer who submitted an unsuccessfully uploaded alphalist?*

The above case is considered as a failure to make/file/submit any return or supply correct information at the time or times required by law or regulations under Section 255 of the Tax Code, as amended, and shall subject the taxpayer to a fine of not less than P10,000.00 and imprisonment of not less than 1 year but not more than 10 years, or in lieu thereof, to pay the compromise penalty.

Where, after conducting the required validation processes, the concerned BIR Office, shall duly inform the taxpayer of non-compliance with any of the requirements of this Circular and require the re-submission of a correct alphalist, a separate penalty shall be imposed for each incorrectly accomplished and submitted alphalist.

- *In cases where the taxpayer has no operations for the preceding taxable year, is the said taxpayer still required to submit the Annual Information Return and the alphalist?*

1. Taxpayers with no operations during the preceding taxable year are still required to file the Annual Information Returns within the prescribed deadlines with the phrase “No Operations” printed clearly on the face of the said returns. However, the filing/submission of the prescribed alphalist shall be subject to the following policies and guidelines:

- ▶ If the taxpayer totally has no business operations and at the same time did not incur any expense, including salaries and wages, for the preceding taxable year, the taxpayer shall no longer be required to file/submit the prescribed alphalist.
- ▶ If the taxpayer totally has no operational transactions but incurred expenses which are not subject to the imposition of the applicable withholding taxes during the preceding taxable year, the filing/ submission of alphalist is subject further to the following rules:
 - a. If the particular expense pertains to compensation of employee(s), the taxpayer employer is still required to file/ submit the prescribed alphalist with the accomplished pertinent schedules for employees that are exempt from withholding taxes even if the compensation of the employee(s) is/are below the taxable threshold (e.g. compensation of minimum wage earners, total personal exemptions exceed the taxable compensation, etc.)
 - b. If the expense incurred is not subject to final and/or creditable withholding taxes under existing rules and regulations, the taxpayer is not required to file/submit the prescribed alphalist.

2. If the taxpayer totally has no operational transactions but incurred expenses and actually withheld and remitted the applicable withholding taxes due thereon during the preceding taxable year, the taxpayer is still required to file/submit the prescribed alphalist.

- ▶ *If the taxpayer failed to file the alphalist, or may have filed the same but the alphalist failed the validation requirements of the BIR and the taxpayer failed to address the issues and resubmit the complete and corrected alphalist to the BIR, can the taxpayer claim the expenses arising from the alphalist for income tax purposes?*

No. The taxpayer cannot claim the expenses for income tax purposes, due to its failure to file the prescribed alphalist or its failure to resubmit the complete and corrected alphalist after the validation process conducted by the BIR.

Where the taxpayer submitted the correct alphalist and the same has been successfully uploaded in the BIR's data warehouse, but the taxpayer failed to enter some transactions that should have been entered in the previously submitted alphalist, the taxpayer should not only refile/resubmit the missing information to correct the previously submitted alphalist, but should refile/resubmit the complete and corrected alphalist to the BIR. Moreover, in cases of expenses incurred by the taxpayer that is not subject to creditable or final taxes pursuant to existing rules and revenue regulations, the taxpayer need not include such expenses in the alphalist.

RMC No. 7-2014 clarifies the registration and compliance requirements of MIEs pursuant to RR No. 7-2012.

Revenue Memorandum Circular No. 7-2014 dated February 5, 2014

- ▶ Marginal Income Earners (MIEs) shall comply with the following registration and tax compliance requirements:
 1. Registration with the BIR using BIR Form 1901 with the following minimal documentary requirements:
 - ▶ Sworn Statement of Income for the year; and
 - ▶ NSO Certified or Local Civil Registry Birth Certificate
 2. Exemption from the payment of Annual Registration Fee;
- ▶ Registration of books of accounts (e.g., two-column journal or other simplified books for daily expenses and revenues);
- ▶ Issuance of registered principal receipts/sales invoices as prescribed under RMO No. 12-2013;
- ▶ Filing and payment of Annual Income Tax Return using BIR Form 1701 similar to any other self-employed individuals; and
- ▶ Exemption from payment of business taxes (i.e., VAT or any Percentage Tax).

RMC No. 8-2014 requires the presentation of a tax exemption certificate or ruling by individuals and entities claiming exemption from withholding taxes.

Revenue Memorandum Circular No. 8-2014 dated February 6, 2014

- ▶ Withholding agents shall require all individuals and entities claiming exemption from withholding taxes (final tax, creditable/expanded withholding tax, withholding tax on compensation) to provide a copy of a valid, current and subsisting tax exemption certificate or ruling.
- ▶ The tax exemption certificate or ruling must explicitly recognize the grant of tax exemption, as well as corresponding exemption from withholding tax.
- ▶ Failure on the part of the taxpayer to present the said tax exemption certificate or ruling shall subject him to payment of appropriate withholding taxes due on the transaction.
- ▶ Failure on the part of the withholding agent to withhold, notwithstanding the lack of tax exemption certificate or ruling, shall cause the imposition of penalties under Section 251 and other pertinent sections of the Tax Code.

RMC No. 9-2014 defers to taxable year 2014 the implementation of the mandatory disclosure of supplemental information on BIR Form Nos. 1700, 1701 and 1702.

Revenue Memorandum Circular No. 9-2014 dated February 11, 2014

- ▶ The first and second paragraphs of RMC No. 57-2011 are hereby further amended to read as follows:

“This circular further amends BIR Form Nos. 1700, 1701, and 1702, previously amended under Revenue Memorandum Circular No. 40-2011. The amendment consists mainly in making the disclosure of Supplemental Information under BIR Form Nos. 1700 and 1701 optional on the part of the taxpayer on income tax filing covering and starting with calendar year 2013, due for filing on or before April 15, 2014; and renaming of BIR Form No. 1702 as a November 2011 version (now, renamed 1702-RT, 1702-EX and 1702-MX, version 2013).

Individual Income tax filers using forms No. 1700 and 1701 are however advised that for income tax filing covering and starting with calendar

year 2014, the disclosure required under the Supplemental Information portion of the said forms will be mandatory. Thus, the taxpayers are advised to demand from their payors, and properly document their BIR Form No. 2307 and other pieces of evidence for final taxes withheld. Likewise, said taxpayers should properly receipt and book their tax-exempt income”

- ▶ In any return filed with the BIR, individual taxpayers are given the option to use either (a) their community tax certificate, (b) passport, or (c) driver’s license.

RMC No. 11-2014 clarifies certain issues relative to the due process requirement in issuing a deficiency tax assessment pursuant to RR No. 12-99, as amended by RR No. 18-2013.

Revenue Memorandum Circular No. 11-2014 dated February 18, 2014

- ▶ The term “duly authorized representative”, insofar as this term is used to identify who may issue the Preliminary Assessment Notice (PAN), Formal Letter of Demand/Final Assessment Notice (FLD/FAN) and Final Decision on Disputed Assessment (FDDA) under RR No. 12-99, as amended by RR No. 18-2013, refers to Revenue Regional Directors, Assistant Commissioner-Large Taxpayers Service, and Assistant Commissioner-Enforcement and Advocacy Service.
- ▶ Thus, taxpayers shall file their responses to the PAN and protests to the FLD/FAN with the duly authorized representative of the Commissioner who signed the PAN and FLD/FAN.
- ▶ Prior to the issuance of the PAN, the taxpayer may be allowed to make voluntary payments of probable deficiency taxes and penalties.
- ▶ An FLD/FAN issued reiterating the immediate payment of deficiency taxes and penalties previously made in the PAN is a denial of the response to the PAN.
- ▶ A final demand letter for payment of delinquent taxes may be considered a decision on a disputed assessment, including a disputed PAN.
- ▶ An FLD/FAN issued beyond 15 days from filing/submission of the taxpayer’s response to the PAN shall be valid, provided that it is issued within the period of limitation to assess internal revenue taxes.
- ▶ The term “the assessment shall become final” under RR No. 12-99, as amended by RR No. 18-2013, means that the failure of the taxpayer who requested for reinvestigation to submit all relevant supporting documents within the 60-day period shall render the FLD/FAN “final” by operation of law.
- ▶ Upon finality of the assessment, the taxpayer shall be barred from disputing the correctness of the FDL/FAN by the introduction of newly discovered or additional evidence, because the taxpayer is deemed to have lost his chance to present the evidence. The BIR shall then deny the request for reinvestigation through the issuance of an FDDA.
- ▶ The notice (PAN/FLD/FAN/FDDA) shall first be served at the taxpayer’s known address, or in the alternative, may be served at the taxpayer’s registered address and known address simultaneously.

RMO No. 8-2014 amends RMO No. 10-2013 prescribing the guidelines and procedures in issuing and enforcing SDT and the prosecution of cases for non-compliance.

Revenue Memorandum Order No. 8-2014 dated January 29, 2014

- ▶ Sections 3.4, 3.5, 3.9, 3.13 and 3.14 of Paragraph III and Section 4.3 of Paragraph IV of RMO No. 10-2013 are hereby amended, to read as follows:

"III. GUIDELINES AND PROCEDURES

x x x

3.4 The issuance of *Subpoenas Duces Tecum* (SDT) shall be requested from the following:

- a) Assistant Commissioner, Enforcement and Advocacy Service - for the National Office;
- b) Assistant Commissioner, Large Taxpayers Service - for taxpayers under the jurisdiction of the Large Taxpayers Service including LTDOs;
- c) Revenue Regional Directors - for the Regional Offices;
- d) Any other officer duly delegated by the Commissioner.

The records of the case shall be attached to the Memorandum Report.

3.5 The Assistant Commissioner, Enforcement and Advocacy Service; Assistant Commissioner, Large Taxpayers Service, and Revenue Regional Directors, or any other officer duly delegated by the Commissioner, as the case may be, shall evaluate the request within 2 working days from receipt, and on the basis thereof, undertake either of the following courses of action:

- a. Return the case to its origin for further documentation or action;
- b. Prepare and sign the corresponding SDT in two copies, the distribution of which shall be as follows:

Original - to be served to the taxpayer
Duplicate - attached to the docket of the case

x x x

3.9 The Assistant Commissioner, Enforcement and Advocacy Service; Assistant Commissioner, Large Taxpayers Service, and Revenue Regional Directors, or any other officer duly delegated by the Commissioner, as the case may be, shall provide a corresponding serial number for each SDT issued, to be placed on the upper right portion of the SDT. The following format shall be used:

(Office Code - Year of Issuance - Series Number, which shall begin from 01 for the first SDT, to be followed by the corresponding digit in numerical order for subsequent SDTs issued.)

The Office Codes prescribed under existing issuances shall be followed.

x x x

3.13 The SDT shall be served through personal service by delivering personally a copy of the SDT to the party at his registered or known address or wherever he may be found. A known address shall mean a place other than the registered address where business activities of the party are conducted or his place of residence.

- a. xxx xxx xxx
- b. xxx xxx xxx
- c. xxx xxx xxx

The SDT should first be served to the taxpayer's registered address before the same is served to the taxpayer's known address, or simultaneously to the taxpayer's registered address and known address.

3.14 The server mentioned at paragraph 3.10 shall accomplish the bottom portion of the SDT. He shall also make a written report under oath before a Notary Public or any person authorized to administer oath under Section 14 of the NIRC, as amended, setting forth the manner, place and date of service, the name of the person/barangay official/professional courier service company who received the same and such other relevant information. The registry receipt issued by the post office or the official receipt issued by the professional courier company containing sufficiently identifiable details of the transaction shall constitute sufficient proof of mailing and shall be attached to the case docket.

X X X

IV. ENFORCEMENT OF THE SDT

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4.3 In case there is no submission or incomplete presentation of the required books of accounts and other accounting records, the issuing office shall then forward the case to the Prosecution Division at the National Office or Legal Division at the Regional Office, as the case may be, for filing of the case. The action lawyer assigned to the case shall request the concerned revenue officers for a conference. This shall be scheduled on the 5th working day from the date set for compliance with the SDT. The revenue officers shall work jointly with the action lawyer in documenting/gathering evidence for the criminal prosecution of the individual who disobeyed the SDT."

- ▶ This RMO shall take effect immediately.

RMO No. 9-2014 prescribes the guidelines in processing requests for rulings with the Law and Legislative Division.

Revenue Memorandum Order No. 9-2014 dated February 6, 2014

- ▶ Tax rulings are official positions of the BIR on inquiries of taxpayers, who request clarification on certain provisions of the Tax Code, other tax laws, or their implementing regulations, usually for seeking tax exemptions.
- ▶ Rulings are based on particular facts and circumstances presented and are interpretations of the law at a specific point in time.
- ▶ Rulings are also issued to answer questions of individuals and juridical entities regarding their status as taxpayers, and the effect of their transactions for taxation purposes.
- ▶ The BIR does not give planning advice or "approve" tax planning arrangements or resolve an issue through a ruling if the matter can be determined through another process (i.e., appeal).
- ▶ The Law and Legislative Division will not issue a ruling in response to a request in the following instances:
 1. The taxpayer has directed a similar inquiry to another office of the BIR;

2. The same issue involving the same taxpayer or a related taxpayer is pending in a case in litigation;
 3. The same issue involving the same taxpayer is the subject of a pending investigation, ongoing audit, administrative protest, claim for refund or issuance of tax credit certificate, or collection proceeding.
- ▶ A letter request for ruling is a sworn statement executed under oath by the individual taxpayer or by the authorized official/representative of the corporation, partnership or entity containing the following:
 1. Factual background of the request for ruling;
 2. The issues/questions raised or conclusions sought to be confirmed by the taxpayer;
 3. The legal grounds and the relevant authorities supporting the position of the taxpayer;
 4. List of documents submitted; and
 5. Affirmations stating that:
 - ▶ A similar inquiry has not been filed and is not pending in another office of the Bureau;
 - ▶ There is no pending case in litigation involving the same issue/s and the same taxpayer or related taxpayer;
 - ▶ The issue/s subject of the request is not pending investigation, on-going audit, administrative protest, claim for refund or issuance of tax credit certificate, collection proceeding or judicial appeal; and
 - ▶ The documents submitted are complete and that no other documents will be submitted in connection with the request.
 - ▶ A request for ruling must be accompanied by the following documents:
 1. Certified true copy of all documents that are material to the transaction, including contracts, wills, deeds, agreements, and instruments;
 2. Proof that the taxpayer is entitled to exemption or incentive; and
 3. Special Power of Attorney or authorization in case the request is filed by a representative of the taxpayer.
 - ▶ After the letter request together with the required documents are submitted, there will be no communication with the applicant.
 - ▶ The Law and Legislative Division shall evaluate the request and if it finds that the documents submitted are insufficient or incomplete, shall deny the request and communicate in writing the reason for the denial to the taxpayer.
 - ▶ If the documents are complete, the request for ruling shall be evaluated, and a ruling shall be issued affirming or denying the request.
 - ▶ In all instances, the Commissioner of Internal Revenue (CIR) shall approve and sign any action on the request, be it denial or approval, unless delegated to another officer or official of the BIR.
 - ▶ A taxpayer may rely on a valid ruling pertaining to the transaction it was applied for.
 - ▶ A ruling shall be valid if the taxpayer fully and accurately describes the transaction in the request.
 - ▶ Tax rulings cannot be cited as precedent, but can provide useful information on how the BIR may treat a similar transaction.

- ▶ The ruling can only be used for internal revenue tax purposes.
- ▶ No ruling involving local taxes, customs duties or other taxes, fees and charges not within the powers of BIR to assess and collect shall be issued.
- ▶ A ruling may be revoked or modified for a number of reasons, such as, when the facts as represented are discovered to be different or not in accord with the current view of the CIR.

RMO No. 10-2014 prescribes the policies, guidelines and procedure in accrediting importers and customs brokers.

Revenue Memorandum Order No. 10-2014, dated February 10, 2014

- ▶ Unless otherwise exempted, all importers and customs brokers (individuals, partnerships, corporations, cooperatives and associations whether taxable or non-taxable), are required to secure a BIR Importer Clearance Certificate (BIR-ICC) or BIR Customs Broker Clearance Certificate (BIR-BCC) from the Accounts Receivable Monitoring Division (ARMD) of the BIR.
- ▶ The term "Importer" refers to any person who brings goods into the Philippines, whether or not made in the course of his trade or business. It includes non-exempt persons or entities who acquire tax-free imported goods from exempt persons, entities or agencies.
- ▶ The BIR-ICCs and BIR-BCCs shall be presented by the importers and customs brokers to the Bureau of Customs (BOC) for their BOC accreditation under the rules and regulations to be issued by the BOC¹.
- ▶ Criteria for Accreditation:

Only importers and customs brokers who satisfy the following accreditation criteria shall be accredited by the BIR:

1. Existence, at all times, of a Head Office (HO) or principal place of business for the conduct of business operations;
2. Full compliance with all the primary and secondary registration requirements of the BIR (i.e., for the HO, branch, or facility);
3. No "stop-filer" cases with the BIR or timely filing of the required tax returns and payment of the taxes due under existing internal revenue tax laws, rules, regulations, and issuances;
4. No record of any Accounts Receivable/Delinquent Account (AR/DA) with the BIR. An AR/DA refers to an outstanding tax liability arising from a tax assessment or any unpaid delinquent account which is considered final, executory, and demandable which may result from the following:
 - ▶ Failure to pay the tax due per return within the time prescribed for its payment;
 - ▶ Tax payment made through bank draft or check, but was denied by drawee-bank due to drawer-taxpayer's insufficiency of funds in his/its bank accounts, account closure, or for other reasons of dishonor under the Negotiable Instruments Law; or
 - ▶ An assessment which has been established to be final, executory, and demandable due to, among others, the failure of the taxpayer to avail of administrative and judicial remedies to contest or appeal the

¹ See *Customs Memorandum Order (CMO) No. 4-2014 dated February 21, 2014 on page 28.*

assessment, or failure of the taxpayer to receive any assessment notices because it was served in the old address indicated in the BIR's registration.

5. No record of any pending criminal complaint filed by the BIR for tax evasion and other criminal offenses under the Tax Code, whether filed in court or in the Department of Justice (DOJ) or subject of final and executory judgment by court;
 6. No unresolved issues arising from discrepancies in the declared income or expenses resulting from the matching of third-party information from the BIR's Reconciliation Lists for Enforcement RELIEF) System and Tax Reconciliation System (TRS). If any such unresolved issues exists, the non-resolution must not have been caused by or must not be attributable to the importer or customs broker;
 7. Not tagged as a "Cannot Be Located (CBL) Taxpayer" or a registered taxpayer whose whereabouts could not be located in the address given by him/it in the return filed or at the address registered/given by him/it to the BIR.
 8. No material misrepresentation in the documents submitted in applying for accreditation. In the event of any change in any material information previously provided in the application for accreditation, the importer or customs broker shall report the matter in writing to the BIR, through the ARMD, within 10 days from the occurrence thereof. Otherwise, the material change may be a ground for the cancellation or revocation of his/its accreditation. It may also be considered as evidence that the concerned importer/broker intends to use its accreditation status to commit fraud.
 9. Examples of such changes in material information include: a) change of ownership, corporate officers, members of the board, or partners; b) change of address of the HO, branch or facility; c) amendments to the Articles of Incorporation / Partnership / Cooperation, as approved by the SEC or CDA; d) corporate restructuring such as mergers or consolidation; and e) temporary or permanent closure/cessation/stoppage of business.
 10. Regular use of the eFPS in filing all the requisite tax returns and in the payment of the taxes due thereon; or regular use of the IAF system in filing all the requisite tax returns, and once the IAF payment feature is operational, in the payment of the taxes due thereon; and
 11. Regular submission of all information returns required under existing internal revenue tax laws, rules, regulations, and issuances (e.g., Summary Lists of Sales, Purchases and Importations [SLSP], Annual Alphabetical List of Employees [BIR Form 1604CF], Annual List of Payees from Whom Taxes Were Withheld [BIR Form 1604E]) electronically. These electronically filed information returns must have passed all the BIR-system validations.
- ▶ Procedure for Accreditation:
1. The applicant must present the accomplished and signed Application Form for Accreditation of Importer/Customs Broker with the required supporting documents with the ARMD.
 - ▶ If the documentary requirements are complete, the ARMD shall issue an Order of Payment.

- ▶ If the documentary requirements are incomplete, it shall not accept the application and shall notify the applicant in writing to submit the lacking requirements before the same may be accepted and processed.
- 2. After payment of the non-refundable processing fee of P2,000, the ARMD will receive the Application Form for Accreditation of Importer/Customs Broker and the required supporting documents. The application must be filed directly and by personal appearance to the ARMD.
- 3. The ARMD will verify the accuracy of the applicant's TIN in the BIR's Registration System and the existence of any outstanding tax liability (OTL) in the BIR's AR/DA database.
- 4. The ARMD will send a Request for Verification to the following BIR offices:
 - ▶ Revenue Regional Director (for further indorsement to the concerned RDO where the applicant is registered and the Regional Collection Division), or to the Assistant Commissioner-Large Taxpayers Service (for further indorsement to the Large Taxpayers Audit and Investigation Division [LTAID]/Large Taxpayers District Office [LTDO] where the applicant is registered and the Large Taxpayers Collection and Enforcement Division [LT-CED]) to verify whether the applicant complied with all the BIR primary and secondary requirements; uses the EFPS or IAF system in filing tax returns and paying taxes; is considered a CBL taxpayer; verify if the principal place/HO of business address indicated in the applicant's COR is correct and actually occupied by the applicant based on ocular inspection conducted; verify the existence of any unresolved "stop filer" cases, AR/DA, any unresolved issues arising from discrepancies in the declared income or expenses resulting from the matching of third-party information from the BIR RELIEF System and TRS; or if the applicant and other courses of action as may be necessary to verify the compliance of the applicant.
 - ▶ Revenue Regional Director (for further indorsement to the Regional Legal Division) or the Assistant Commissioner- Enforcement and Advocacy Service (for further indorsement to the Prosecution Division) to verify the existence and details of any criminal complaint filed by the BIR against the applicant in court or in the DOJ or subject of final and executory judgment by court.
- 5. The above BIR offices shall submit to the ARMD, within 10 working days from their receipt of the ARMD's request for verification, the signed written reports bearing the results of their verification (in hard copies).
- 6. As far as practicable, the application for accreditation shall be processed within 15 working days from acceptance of the Application Form for Accreditation of Importer/Customs Broker with the complete supporting documents and upon receipt of the written report bearing the results of verification with the other BIR offices. If the application is approved, the ARMD Chief shall sign and issue the corresponding BIR-ICC or BIR-BCC which is valid for a period of 3 years from the date of its issuance, unless sooner revoked or cancelled. In case of denied applications, the ARMD shall prepare and issue a Notice of Denial of Application for Accreditation as an Importer/Broker (BIR-NDAIB) clearly indicating the reason(s) for the denial of the application for accreditation.

7. The issuance of a BIR-NDAIB is without prejudice to the importer's or customs broker's filing of another application for accreditation when the circumstances that lead to the denial of the previous application are no longer existing.
8. Applicants may file a request for reconsideration with the Assistant Commissioner-Collection Service on any decision of the Chief, ARMD. Applicant may also file a request for reconsideration with the Commissioner of Internal Revenue on any decision of the ACIR-Collection Service.
9. The ARMD shall transmit the BIR-ICCs, BIR-BCCs and BIR-NDIBs issued to the BOC. The lists shall be transmitted promptly thru electronic mail (until such time that the National Single Window [NSW] facility is capable for data transmissions) so as to enable the BOC to proceed with the conduct of the second phase of the accreditation process of the applicants.

▶ **Renewal of BIR-ICCs/BCCs:**

BIR-ICCs and BIR-BCCs may be renewed upon filing of a subsequent Application Form for Accreditation of Importer/Customs Broker, under the same requirements and procedure provided herein. Otherwise, the BIR-ICC or BIR-BCC shall be deemed revoked or cancelled upon its expiration. The new BIR-ICC or BIR-BCC shall be valid for another period of 3 years from the date of its issuance, unless sooner revoked or cancelled.

▶ **Conduct of Periodic Verification of Compliance, Cancellation or Revocation of Importer's Accreditation:**

The ARMD will conduct a periodic verification of the compliance of importers and customs brokers issued with BIR-ICCs or BIR-BCCs with the accreditation criteria.

▶ **Preliminary Notice of Dis-accreditation (BIR-PND):**

In case of any finding of non-compliance with any of the accreditation criteria, the ARMD shall notify the concerned importer or customs broker of such findings by sending a BIR-PND signed by the Chief, ARMD. The BIR-PND shall state the particular criteria that is violated or not complied with.

The importer or customs broker is given 30 working days from receipt of the BIR-PND to undertake all the necessary actions to rectify the error/s, omission/s or violation/s and/or to submit proof of his/its rectification.

▶ **Notice of Dis-accreditation as an Importer/Customs Broker (BIR-NDIB):**

If the ARMD determines that there is continued non-compliance, or if the importer or customs broker fails to submit any proof of his/its rectification within the prescribed 30-working day period, the ARMD shall issue a BIR-NDIB signed by the Chief, ARMD, and copy furnished the BOC.

▶ **Re-Application for Importer Accreditation:**

After the lapse of 1 year from the effective date of dis-accreditation, the importer or broker may file another application for BIR-ICC/BIR-BCC when the circumstances that lead to the cancellation or revocation of the previous accreditation are no longer existing.

▶ BIR Audit of Importers:

The BOC shall provide the BIR-ARMD with the list of importers and customs brokers that passed the BIR accreditation requirement but were nevertheless disqualified under the second phase of accreditation or whose accreditations were suspended or cancelled/revoked.

Thereafter, the ARMD shall forward the list to the National Investigation Division (NID) for purposes of determining if there is *prima facie* evidence of tax fraud or tax evasion committed by the concerned importer or customs broker.

In cases where there is no finding of any *prima facie* evidence of tax fraud or tax evasion, the NID shall forward the list of the subject importers and customs brokers to the RDO, LTAID, or LTDO having jurisdiction over them for purposes of conducting regular tax audit.

▶ Validity of Accreditation Certificates issued by the BOC:

Valid accreditation certificates issued by the BOC's Interim Customs Accreditation and Registration Unit (ICARE Unit) shall remain valid until their expiry dates indicated therein. However, holders of accreditation certificates issued by the BOC are required to file their applications for renewal of accreditation with the BIR and at least 3 months prior to the expiry date indicated in therein.

All applications for accreditation filed with the BOC's ICARE Unit shall be transmitted to the BIR-ARMD and shall be covered by the new accreditation policies and procedure. The ARMD shall immediately notify the concerned applicants of any incomplete or lacking requirements to be submitted within 15 working days from receipt of the notice. Otherwise, the application shall be denied.

[Editor's Note: The transitory provision of this RMO, which provides that "Valid accreditation certificates issued by the BOC's ICARE Unit prior to the effectivity of this Order shall remain valid until their expiry dates indicated therein. Holders thereof shall be required to file their applications for renewal of accreditation with the BIR at least 3 months prior to the expiry date indicated therein," appears to be in conflict with DOF Department Order (DO) No. 12-2014 dated February 6, 2014 and Customs Memorandum Order (CMO) No. 4-2014 dated February 21, 2014 (see pages 23 and 29 below) which require all importers and customs brokers to submit their BIR-ICC or BIR-BCC with the application for accreditation within 90 days from the issuance of the BIR and BOC orders; otherwise the existing accreditation of the importer or customs broker shall be deemed automatically expired after the lapse of the said period."]

DOF Issuances

DOF Department Order No. 11-2014 dated February 5, 2014

▶ Record-Keeping:

1. All importers are required to keep at their principal place of business, for a period of 10 years from the date of filing of the import entry, all records of importations, including documents to the extent that they are relevant for the verification of the accuracy of the transaction value declared on the import entry and necessary for the purpose of collecting the proper duties and taxes on imports.

DO No. 11-2014 prescribes the guidelines and procedures in performing post-entry audit functions by the DOF's Fiscal Intelligence Unit (FIU).

2. All customs brokers are also required to keep at their principal place of business, for a period of ten 10 years from the date of importation, copies of the importation records in whatever form covering transactions that they handle.
 3. The term “*importer*” shall include the importer or record/consignee, beneficial owner, agent of the person effecting the importation in question or any person or entity who knowingly causes the goods to be imported.
 4. The phrase “*knowingly causes the goods to be imported*” covers, among others, domestic transactions where: (1) the terms and conditions of the importation are controlled by the person placing the order with the importer; or (2) technical data, molds, equipment, other production assistance, material, components, or parts are furnished by the person placing the order with the importer with knowledge that they will be used in the manufacture or production of imported goods.
- ▶ Records to be kept by importers:
 1. Company or entity structure
 2. Ordering and purchase documentation including sales and other related agreements
 3. Shipping, importation, exportation, and transportation documentation
 4. Manufacturing, stock and resale documentation
 5. Bank documents, financial statements and other accounting information;
 6. Charts and codes of accounts, ledgers, financial statements, accounting instruction manuals, and systems and program documentation that describes the accounting system used by the importer;
 7. Whenever applicable, papers, books, registers, discs, films, tapes, sound tracks, and other devices or things in or on which information contained in the records above-described are recorded or stored;
 8. Documents in foreign language presented to the DOF-FIU must be accompanied with a translation in English or Filipino, certified correct under oath by the translator.
 - ▶ Scope of Post-entry Audit:
 1. The audit of importers shall be undertaken by the DOF-FIU in, among others, the following instances:
 - ▶ When firms are selected by a computer-aided risk management system;
 - ▶ When errors in the import declaration are detected; and
 - ▶ When firms voluntarily request to be audited, subject to the approval of the Commissioner of Customs (CoC), upon the recommendation of the FIU.
 2. The selection of importers to be audited shall be based on, among others, the following objective and quantifiable data:
 - ▶ Relative magnitude of customs revenue from the firm;
 - ▶ The duty rates of the firm’s imports;
 - ▶ The compliance track record of the firm; and
 - ▶ An assessment of the risk to revenue of the firm’s import activities.
 3. Brokers shall be audited to validate audits of their importer clients and/or fill in information gaps revealed during audit of their importer clients.

4. The audit of importers shall include the conduct of examination, inspection, verification and/or investigation of the importer's document flow, financial flow, goods inventory, and other business processes necessary or relevant in determining the adequacy and integrity of the manual or electronic system/s by which such records are created and stored.
- ▶ Post-entry Audit Process:
1. The FIU shall inform the CoC in writing of a particular importer selected for post-entry audit examination.
 2. Within 15 days from receipt of notice from the FIU, the CoC shall issue an Audit Notification Letter (ANL) to the importer concerned and its broker/s, authorizing the conduct of audit examination, inspection, verification and/or investigation of all records pertinent to the importations made by the importer for the period of three years from the date of final payment/settlement of duties.
 3. The notice from the FIU and the ANL shall state the names of the members of the audit team, date, time and venue of the pre-audit conference, and the date of commencement of audit proper.
 4. The documents to be submitted by the importer and/or broker shall be certified by the importer and/or broker to be true copies of the same.
 5. Denial of full and free access to importation records during the conduct of the post-entry audit shall create a presumption of inaccuracy in the transaction value declared for imported goods.
- ▶ Penal Provisions:
1. An importer or broker who refuses to give an authorized FIU officer full and free access to its importation records may be liable for contempt after proper notice and hearing, in addition to the fines and penalties imposed for failure to keep or maintain importation records. Moreover, such refusal shall create a presumption of inaccuracy in the transaction value declared for imported goods and shall constitute a ground for the re-assessment of such goods using the alternate methods of valuation as applicable.
 2. An importer found to have incurred deficiency in duties and taxes shall be subject to administrative fine ranging from 1/2 to 8 times the revenue loss, depending on the degree of culpability. In addition to the foregoing, criminal prosecution may be instituted under Section 3611 of the Tariff and Customs Code of the Philippines (TCCP).
 3. The decision of the CoC, upon proper hearing, to impose penalties may be appealed in accordance with Section 2402 of the TCCP.
 4. Except in cases of fraud and/or unless otherwise specified by law, when the importer makes a voluntary and full disclosure of the deficiency prior to the commencement of the audit as stated in the ANL, the CoC may compromise the imposition of the above fines, subject to the approval of the Secretary of Finance as recommended by the FIU. The compromise shall only be to the extent of the voluntary disclosure made.

- ▶ DO No. 11-2014 shall take effect 15 days after publication

(Editor's Note: DO No. 11-2014 was published in the Manila Standard Today on February 13, 2014.)

DO No. 12-2014 prescribes the new rules on accreditation of importers.

DOF Department Order No. 12-2014 dated February 6, 2014

- ▶ The BIR, upon filing of an application, shall issue the necessary BIR Importer Clearance Certificate (BIR-ICC) in favor of the applicant, subject to the documentary requirements and verification procedures to be determined by the Commissioner of Internal Revenue (CIR).
- ▶ An applicant desiring to register with the BOC as an importer must then present the BIR-ICC issued by the BIR to the concerned customs office.
- ▶ The BIR and BOC shall issue their rules and regulations pursuant to DOF DO No. 12-2014 within 15 days from issuance hereof.
- ▶ All importers shall be given 90 days from the issuance of said rules to comply with the same; otherwise, the accreditation of said importer shall be deemed automatically expired upon lapse of said 90-day period
- ▶ DO No. 12-2014 shall take effect immediately.

(Editor's Note: BIR RMO No. 10-2014 was issued by the BIR on February 10, 2014 [see page 16], while CMO No. 4-2014 was issued by the BOC on February 21, 2014 [see page 29]. These issuances implement DO No. 12-2014.)

DO No. 13-2014 prescribes the guidelines for the lifting of the suspension of accreditation of importers.

DOF Department Order No. 13-2014 dated February 6, 2014

- ▶ The DOF's FIU shall process and evaluate requests for provisional lifting of suspension of importers' accreditation which are pending as of December 2013.
- ▶ In determining the propriety of the provisional lifting of suspension of importers' accreditation, the FIU shall refer to the guidelines/criteria and BIR-ICC.
- ▶ The recommendation by the FIU shall be subject to, among others, the following conditions:
 1. The FIU shall continue to have authority to conduct audit of the importer concerned, and
 2. The recommendation shall be without prejudice to the enforcement by BOC of its rules and regulations.
- ▶ The FIU shall make the necessary recommendation to the BOC, which in turn shall decide whether the suspension of accreditation of importer may be lifted.
- ▶ The provisional lifting of suspension shall be valid for a period of 60 days from the date the BOC's decision is received by the importer concerned. Should the 60-day provisional lifting of suspension granted by the BOC to the importer lapse without any further action from the FIU and/or BOC, the said suspension shall be deemed permanently lifted. This is without prejudice to the subsequent exercise by BOC of its authority to suspend importer's accreditation for any ground specified under applicable rules and regulations.

- ▶ In case the shipments of an importer left the port of origin before the importer's suspension of accreditation took effect, the shipment/s shall continue to be processed by BOC, provided the importer is able to prove that the shipment/s indeed left the port of origin before the effectivity of the suspension of its accreditation.
- ▶ DO No. 13-2014 shall take effect immediately.

BOC Issuances

CAO No. 1-2014 prescribes the guidelines on the imposition of surcharge under Section 2503 of the Tariff and Customs Code of the Philippines (TCCP).

Customs Administrative Order No. 1-2014, dated January 22, 2014

- ▶ The Collector of Customs shall impose surcharge in the following cases:

1. For Misclassification:

Where the percentage difference in misclassification is 10% or more but not exceeding 30%, the amount of surcharge shall be as follows:

- ▶ When the percentage difference is 10% or more but does not exceed 20%, a one-time surcharge in the amount of the difference in customs duty shall be imposed.
- ▶ When the percentage difference exceeds 20% but does not exceed 30% a surcharge of two times the difference in customs duty shall be imposed.

2. For Undervaluation, Misdeclaration in Weight, Measurement or Quantity:

Where the percentage difference in undervaluation/misdeclaration in weight, measurement or quantity is 10% or more, but does not exceed 30%, a surcharge of two times the difference in customs duty shall be imposed.

An undervaluation, misdeclaration in weight, measurement or quantity of more than 30% between the value, weight, measurement or quantity declared in the entry, and the actual value, weight, measurement or quantity shall constitute a *prima facie* evidence of fraud penalized through seizure proceedings under Section 2530 of the TCCP.

- ▶ Determination of Percentage Difference in Undervaluation, Misclassification and Misdeclaration:

1. For Undervaluation - The percentage difference in undervaluation shall be determined using this formula:

$$\frac{(\text{Duty using valuation as found} - \text{Duty using valuation as declared})}{\text{Duty using valuation as found}}$$

2. For Misclassification - The percentage difference in misclassification shall be determined using this formula:

$$\frac{(\text{Duty using classification as found} - \text{Duty using classification as declared})}{\text{Duty using classification as found}}$$

3. For Misdeclaration in weight, measurement or quantity - The percentage difference in misdeclaration shall be determined using this formula:

(Duty using weight, measurement or quantity as found – Duty using weight, measurement or quantity as declared)
Duty using weight, measurement or quantity as found

- ▶ Imposition of the surcharge is mandatory except in the following cases:
 1. For Misclassification - When the entered tariff classification is based on an advance tariff classification ruling issued by the Tariff Commission which had not been reversed by the Secretary of Finance as of the time of the entry of such tariff classification, but which is subsequently reversed by the Secretary of Finance at any time between the time the tariff classification was entered but before final liquidation of import.
 2. For errors under certain circumstances - When the undervaluation, misclassification, and misdeclaration in entry is either discovered before any payments are made on the entry, or the result of either of the following:
 - ▶ Manifest clerical error made in an invoice or entry;
 - ▶ Error in return of weight, measure, or gauge, duly certified to under penalties of falsification or perjury by the surveyor or examining official; or
 - ▶ An error in the distribution of charges on invoices not involving any question of law, certified to under penalties of falsification or perjury by the surveyor or examining official.
- ▶ The imposition of surcharge may not be subject of compromise. Surcharge properly imposed cannot be waived. Good faith on the part of the importer is not a valid defense.
- ▶ CAO No. 1-2014 shall take effect immediately upon publication.

(Editor's Note: CAO No. 1-2014 was published in the Manila Times and in Malaya on February 26, 2014.)

CMO No. 1-2014 prescribes the revised guidelines and procedures in accrediting journalists and other media practitioners who cover the BOC on a regular basis.

Customs Memorandum Order (CMO) No. 1-2014, dated January 2, 2014

- ▶ "Accreditation" means recognition by the BOC of *bona fide* media professionals for the purpose of access to sources of information news materials released by, or on behalf of, the BOC's Public Information and Assistance Division (PIAD).
- ▶ Accreditation is valid for 1 year and is renewable.
- ▶ Applications for accreditation shall be submitted in writing with the PIAD for media practitioners covering Metro Manila and media entities with nationwide reach or circulation; and with the nearest District Collector/Port for regional and provincial correspondents of national publications / broadcast media entities and members of the news / editorial staff of the publications / broadcast media entities with regional, provincial, city or municipality reach or circulation. Upon approval, PIAD shall prepare and issue BOC Identification Cards to the accredited media practitioners to be signed by the Commissioner within 5 days from date of accreditation, subject to the schedule of ID cards issuances by the Internal Administration Group of the BOC.
- ▶ Only two journalists/media practitioners per media organization/publication can be accredited per year, which includes photographers. In the case of re-

assignment, resignation or any other circumstance that creates a vacancy in the accredited media practitioners for a particular media organization/ publication within a given year, the PIAD can process accreditation for their replacements.

- ▶ *Bona fide* journalists and other media practitioners from *bona fide* media organizations or entities who do not cover the BOC on a regular basis are allowed entry to BOC premises nationwide through the issuance of an *Ad Hoc/Temporary Pass*, provided that the journalists have a specific purpose for entering BOC premises, and that media organizations who are doing documentaries and other special reports on the BOC submit a synopsis of the report, list of crew and equipment, and shot list.
- ▶ The PIAD must be satisfied that the applicants are *bona fide* media professionals representing *bona fide* business organizations. Applications are considered on a case-to-case basis and decisions of the PIAD on the denial of accreditation are final.
- ▶ The BOC reserves the right to cancel, revoke or withdraw accreditation of journalists / media practitioners whose activities run counter to ethical practices, or who abuse their privileges, or put the accreditation to improper use. The following are grounds for cancellation or revocation of accreditation:
 1. Violation of any of these guidelines;
 2. Violation of the Philippine Journalists' Code of Ethics;
 3. Involvement in smuggling activities;
 4. Involvement in altercations inside BOC premises;
 5. Use of accreditation as proof of professional qualifications or as authorization or credential to conduct any other transaction with the BOC;
 6. Wilfully allowing another person to use his/her BOC-issued ID; and
 7. Other offenses similar to the above-mentioned.
- ▶ Any interested party may file a valid complaint with the PIAD for the cancellation or revocation of accreditation of an accredited journalist/media practitioner. The PIAD, after due notice and hearing, shall render its decision on the basis of evidence presented and the testimonies/statements of the parties concerned.
- ▶ The accreditation shall be subject to the following specific terms and conditions:
 1. Wearing of BOC-issued IDs
 2. Privileges include the use of the BOC Media Lounge and its facilities, access to the PIAD office for research purposes, inclusion in the email / text list of the PIAD for Media Advisories and invitation to BOC events, press releases and other external communication, and access to photographs and other video materials cleared for release by the PIAD. Accredited journalists / media practitioners may request BOC officials and other key personnel for interviews, provided these are pre-arranged to avoid disruption of work.
 3. All journalists / media practitioners are not authorized to enter any office / area within BOC premises, aside from the Media Lounge and PIAD office. Prior authorization for access to any office / area is to be given on a case-to-case basis.
 4. Required information provided to the PIAD by the applicants is to be used solely for accreditation and record-keeping purposes.
- ▶ CMO No. 1-2014 shall take effect immediately.

CMO No. 2-2014 prescribes the guidelines on implementing the Second Pilot Project for the ASEAN Self-Certification System and the Accreditation of "Certified Exporters."

Customs Memorandum Order No. 2-2014 dated January 13, 2014

- ▶ General Provisions:
 1. Only exporters in good standing with the BOC shall qualify for accreditation.
 2. The BOC may authorize an exporter who makes shipments of products to make Invoice Declarations with regard to the originating status of the goods concerned.
 3. An exporter seeking such authorization must apply in writing or electronically or must offer to the satisfaction of the BOC all guarantees necessary to verify the originating status of the goods for which an Invoice Declaration was made out.
 4. A Self-Certification Implementation & Monitoring Secretariat (SCIMS) shall be established to implement, supervise and manage all activities pertaining to the 2nd pilot project for self-certification.
- ▶ Operational Provisions:
 1. Manufacturers/exporters must apply in writing or electronically to be accredited as a "certified exporter", addressed to the Deputy Commissioner Assessment & Operations Coordinating Group, together with the following documents:
 - ▶ Latest Income tax returns;
 - ▶ URN as exporters;
 - ▶ Business permit/s;
 - ▶ SEC/DTI registration, where applicable;
 - ▶ List of official/s and their positions in the company authorized to sign the Invoice Declaration with their respective specimen signatures;
 - ▶ An illustration of the manufacturing process (for product specific rule) or the accounting process (for the general rule) per good to be exported; and
 - ▶ List of products applied for authorization to make invoice declaration.
 - ▶ The head of SCIMS shall forward the application to the Export Coordination Division (ECD) who shall evaluate the same based on the following criteria:
 1. Exporter is a legitimate manufacturer/producer, who must have been transacting with the BOC for more than 1 year;
 2. Exporter must have been exporting products with ASEAN member states for at least 1 year;
 3. Exporter must have -
 - ▶ Responsible officer/s or person/s authorized to sign the Invoice Declaration;
 - ▶ Sufficient knowledge;
 - ▶ Competence in Rules of Origin ("ROO") application;
 - ▶ Undergone training on the implementation of Self-Certification System conducted by the BOC.
 4. Exporter must be willing to be subjected to regular monitoring and inspection to determine the correctness of its declaration with respect to the goods exported.

- ▶ After evaluation, the ECD shall forward its findings and recommendation to the SCIMS within 7 working days for its consideration.
- ▶ If SCIMS finds the application to be meritorious, it shall grant the “Certified Exporter” status through the issuance of a written authorization. If not, it shall issue a letter of disapproval stating the reasons for the denial.
- ▶ A Certified Exporter has the following obligations:
 1. Allow the BOC access to records and premises during a period of at least 3 years from the date of the declaration;
 2. Undertake to make the Invoice Declaration only for goods that such exporter produces and for which he has all appropriate documents proving the originating status of the goods concerned at the time of the declaration;
 3. Undertake to ensure that the person(s) responsible for making the Invoice Declarations knows and understands the ROO;
 4. Assume full responsibility for all Invoice Declarations made out on behalf of the company, including any misuse;
 5. Submission of a quarterly summary report of all Invoice Declarations made during the same period to the ECD.
- ▶ In the case of goods satisfying the ROO criteria of the ASEAN Trade in Goods Agreement (ATIGA), the Certified Exporter shall declare in the Commercial Invoice that the products satisfy ROO to be declared as ASEAN originating products under the ATIGA. The Commercial Invoice should also describe the goods in sufficient detail, and the declaration should be signed by hand.
- ▶ For shipments availing of the preferential rate under the ATIGA from participating member states the existing customs import procedures shall still apply. For Certified Exporters of participating member states, they have the option to claim tariff preference under ATIGA by submitting an invoice declaration in lieu of a CO Form D.
- ▶ The Certified Exporter authorization given shall be valid until December 31, 2015, unless the Memorandum of Understanding (MOU) on the Second Pilot Project is terminated.
- ▶ Grounds for Suspension or Revocation:
 1. When the Certified Exporter no longer offers the guarantees referred to in Rule 12A(1) of the Original Certification Procedure (OCP) of the MOU on the Second Pilot Project; or
 2. When the Certified Exporter no longer fulfills the conditions referred to in Rule 12A(2) of the OCP of the MOU on the Second Pilot Project; or
 3. When the Certified Exporters violates the rules herein.
- ▶ Penalties range from suspension for 3 months for the first offense, 6 months for the second offense, and revocation of the Accreditation for the third offense. The penalties shall be without prejudice to the imposition of other penalties under the TCCP and other applicable rules and regulations.
- ▶ CMO No. 2-2014 shall take effect immediately.

CMO No. 4-2014 prescribes the policies, guidelines and procedures on the Accreditation of Importers and Customs Brokers pursuant to DOF DO No. 12-2014.

Customs Memorandum Order No. 4-2014 dated February 21, 2014

- ▶ CMO No. 4-2014 shall apply to all importers and customs brokers intending to or transacting with the BOC, except:
 1. Once-a-year importation;
 2. Importation by parcel post or by informal entry;
 3. Importation of the Philippine Government, its agencies and instrumentalities; and
 4. Importation of foreign embassies, consulates, legations, agencies of other foreign governments and international organizations with diplomatic status and recognized by the Philippine government.

- ▶ An importer shall be allowed to accredit with the BOC upon submission of the following documents with the Account Management Office (AMO, formerly I-CARE):
 1. Application Form;
 2. BIR Importer Clearance Certificate (BIR-ICC);
 3. List of Importables with clear description in both technical and tariff terms including estimated volume and values for the incoming 12 months. In case the list of importables includes regulated items, the corresponding accreditation/license/permit from the government agency concerned shall also be submitted;
 4. Sworn undertaking to accept notice by electronic mail and to strictly abide with existing rules and regulations on the Statement of Full Description of Imported Articles covered by entry declarations;
 5. Corporate Secretary Certificate or Special Power of Attorney for Designated in the import entries;
 6. For sole proprietorship, original copy of NBI Clearance issued within the last 3 months prior to the date of the application for accreditation. In case of corporations, the responsible officers and majority stockholder shall also submit the original copy of the NBI Clearance;
 7. For new individual applicants, bank statement for the last 3 months prior to the date of application for accreditation, when applicable;
 8. Two valid government ID with picture; and
 9. Printed Client Profile Registration System ("CPRS") Application profile of applicant.

- ▶ In case of customs brokers, the following shall be submitted to the AMO:
 1. Application Form;
 2. BIR Customs Broker Clearance Certificate (BIR-BCC);
 3. Sworn undertaking to accept notice by electronic mail and to strictly abide with existing rules and regulations on the Statement of Full Description of Imported Articles covered by entry declarations;
 4. Sample Original Signature; and
 5. Sworn undertaking that the broker has actual knowledge of the contents of the declaration and attests to its truthfulness.

- ▶ All importers and customs brokers shall pay a processing fee of P 1,000 upon submission of the application.

- ▶ Accreditation of importers and customs brokers shall be approved by the Chief, AMO. A request for reconsideration of an adverse decision by the Chief, AMO may be elevated to the Deputy Commissioner, Revenue Collection Monitoring Group (RCMG) for proper disposition, which shall be final and executory.

- ▶ Accreditation of the importer or customs broker through the BOC-CPRS shall be valid unless its accreditation as importer or customs broker is revoked or cancelled as provided in CMO No. 4-2014 or upon expiration, revocation or cancellation of the BIR-ICC or BIR-BCC.
- ▶ The AMO shall be responsible for the CPRS registration of importers and customs brokers. In case of importers and customs brokers located outside Metro Manila, the application, together with the supporting documents, may be coursed through the Office of the District Collector/Port Collector concerned, who shall then indorse said application to the AMO.
- ▶ Operational Provisions:
 1. All importers and customs brokers shall submit their BIR-ICC or BIR-BCC with the application for accreditation, within 90 days from issuance of CMO No. 4-2014; otherwise, the existing accreditation of the importer or customs broker shall be deemed automatically expired after the lapse of said period. Within 30 days prior to the expiration of the existing and current accreditation, all importers and customs brokers shall submit their application for accreditation.
 2. All importers and customs brokers are required to apply for registration under the CPRS.
 3. An importer or customs broker shall revise its registration in the CPRS within 30 days from substantial change in material information previously submitted to the CPRS. Failure to change the registration information can be a ground for suspension, revocation or cancellation of registration.
 4. The accreditation of the importer or customs broker may be suspended, revoked or cancelled based on any of the following grounds:
 - ▶ Violation of the Sworn Undertaking to strictly abide with existing rules and regulations on the Statement of Full Description of Imported Articles covered by entry declarations;
 - ▶ Failure to change registration information within the period required;
 - ▶ Submission of false information and/or material misrepresentation;
 - ▶ Failure to report to the proper customs authorities any fraud upon customs revenue which has come to the importer's knowledge or cognizance, or knowingly assisting or abetting the importation or exportation or entry of prohibited or any article the importation of which is contrary to law; and
 - ▶ Commission of any act in violation of the TCCP.
- ▶ The accreditation of importers or customs brokers who fail to make a valid transaction with the BOC for the past 12 months shall automatically be cancelled.
- ▶ Any complaint or recommendation for suspension, revocation or cancellation and reactivation of the accreditation of the importer or customs broker shall be filed with the Legal Service, RCMG.
- ▶ Any order, rule or regulation contrary or inconsistent with CMO No. 4-2014 is repealed or amended accordingly.

This Memorandum prescribes the transition policies and guidelines on the implementation of CMO No. 4-2014.

BOC Memorandum dated February 26, 2014

- ▶ All importers with existing I-CARE accreditation expiring between March 1, 2014 and May 31, 2014 shall be allowed automatic extension of their existing accreditation until May 31, 2014.
- ▶ In the interim period, these importers and brokers shall secure their BIR-ICC and BIR-BCC pursuant to RMO No. 10-2014 and secure approval of their application for accreditation from the Account Management Office (AMO) under CMO No. 4-2014 until May 31, 2014.

PEZA Issuance

PEZA Memorandum Circular (MC) No. 2014-003 announces the continued grant of the 50% reduction in all PEZA processing fees for ecozone import/export full-container load shipments to be charged or loaded at the BIP.

Memorandum Circular No. 2014 - 003 dated January 20, 2014

- ▶ The 50% reduction in all PEZA processing fees for ecozone import/export full-container load shipments via the Batangas International Port (BIP) is extended for another year from January to December 2014.
- ▶ The extension was made to bring in more container volumes, to enhance the trade facilitation services at the BIP, and to balance the port container traffic distribution by shifting their CALABARZON-destined shipments from Manila ports to the BIP.

BSP Issuances

Circular No. 824 amends the regulations on LTNCTDs.

BSP Circular No. 824 dated January 30, 2014

- ▶ An application for authority on each issue/issue program of Long-Term Negotiable Certificates of Time Deposits (LTNCTDs) shall be filed with the Supervision and Examination Sector (SES) of the BSP. Any portion of an approved LTNCTD that is not issued within 6 months of the approval of the Monetary Board (MB) will be deemed forfeited.
- ▶ LTNCTDs are now required to be listed on an accredited exchange within 30 calendar days after their approval by the MB. Banks which fail to do so shall not be allowed to further issue LTNCTDs.
- ▶ The maximum issue size and aggregate ceiling on the issuance of LTNCTDs have been deleted.
- ▶ The required reserve against LTNCTDs has been increased from 3% to 6%.
- ▶ The Circular applies prospectively and does not cover approved applications and outstanding LTNCTDs as of its effectivity.
- ▶ This Circular shall take effect 15 calendar days following its publication either in the Official Gazette or in a newspaper of general circulation.

[Editor's Note: Circular No. 824 was published in Business Mirror on February 7, 2014.]

Circular No. 825 amends certain provisions of the MORB and MORNBF on establishing other banking offices; check clearing rules for thrift banks and rural banks; composition of reserves; and housing microfinance loan.

BSP Circular No. 825 dated February 7, 2014

- ▶ The application for establishment of other banking offices requires an undertaking signed by the president of the bank or officer of equivalent rank that said other bank offices shall not accept deposits and/or service withdrawals thru tellers or other authorized personnel.

Prior to the above amendment, Loan Collection and Disbursement Points (LCDPs) of microfinance/Barangay Micro Business Enterprise (BMBE)-oriented branches of banks may accept deposits solely from existing microfinance/BMBE borrowers. This has been deleted.

- ▶ Sections 2205 (Check Clearing Rules for Thrift Bank Authorized to Accept Demand Deposit) and 3205 (Check Clearing Rules for Rural Banks who are Members of the Philippine Clearing House Corporation) of the MORB have been deleted.
- ▶ Reserve Deposit Account maintained by quasi-banks with the BSP which are used as compliance with the liquidity reserve requirement as of 06 April 2012 shall continue to be eligible as compliance with the reserve requirement until they mature.
- ▶ The following has been added to the risk management elements that must be highlighted and embedded in the housing microfinance product, as enumerated in Subsection X361.5 of the MORB:
 1. Client's ability to repay based on cash flow analysis and affordability, especially new clients.
- ▶ This Circular shall take effect 15 calendar days following its publication either in the Official Gazette or in a newspaper of general circulation.

[Editor's Note: Circular No. 825 was published in Malaya Business Insight on February 17, 2014.]

Circular No. 826 amends the risk disclosure requirements on loss absorbency features of capital instruments.

BSP Circular No. 826 dated February 14, 2014

- ▶ The provisions of Circular No. 786 dated 15 February 2013, clarifying the applicability of the risk disclosure requirements with regard to the place of issuance of capital instruments, are now incorporated in Appendix 63b and Appendix 46b of the MORB and MORNBF, respectively.
- ▶ The amendment provides for the following:
 1. When marketing, selling and distributing Additional Tier 1 and Tier 2 instruments eligible as capital under the Basel III framework, banks/quasi-banks must do the following:
 - ▶ Subject investors to a client suitability test to determine their understanding and ability to absorb the risks of the investment;
 - ▶ Provide the appropriate Risk Disclosure Statement for the issuance of Additional Tier 1 and Tier 2 capital instruments;
 - ▶ Secure a written certification from each investor stating that the investor:
 - a. Was provided a Risk Disclosure Statement;
 - b. Read and understood the terms and conditions of the issuance;

- c. Is aware of the risks associated with the capital instruments; and
 - d. Said risks include permanent write-down or conversion of the debt instrument into common equity at a specific discount;
2. Make available to the BSP, as may be required, the:
- ▶ Risk Disclosure Statement;
 - ▶ Certification cited in item 3 above signed by the investor; and
 - ▶ Client Suitability Test of the investor.
- ▶ For offshore issuances of Additional Tier 1 and Tier 2 capital instruments, the risk disclosure requirements shall be governed by the applicable rules and regulations of the country where these instruments are issued.

The subsequent sale and/or distribution of Additional Tier 1 and Tier 2 capital instruments in the Philippines, originally issued overseas, shall comply with all the risk disclosure requirements for issuance in the Philippines.

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

[Editor's Note: Circular No. 826 was published in The Manila Times on February 20, 2014.]

SEC Issuances

SEC MC No. 2 prescribes the revised guidelines for reports on the valuation or appraisal of assets of registered corporations.

SEC Memorandum Circular No. 2 dated January 31, 2014

- ▶ The following corporations shall engage the services of an SEC-accredited appraisal company, if the asset involved is a real estate, or a Public Services Organization (PSO) if the asset is other than real estate:
 1. Public companies and secondary licensees of the SEC;
 2. Issuers of securities to the public or public companies that propose to transfer their asset to another entity in exchange for shares of stock or asset;
 3. Public companies and secondary licensees and their significant subsidiaries that adopt the fair value model in measuring their real properties pursuant to the Philippine Financial Reporting Standards (PFRS);
 4. Public companies and secondary licensees of the SEC covering the asset that would be declared as dividend or the non-financial assets that they would receive arising from a business combination; and
 5. Such other entities and transactions that the SEC may determine as requiring the services of an appraisal company.
- ▶ For corporations that are not public companies or secondary licensees and the asset involved is real property, they shall engage the services of an appraiser or valuer who is licensed by the Professional Regulation Commission (PRC).
 1. The appraisal report of an appraiser or valuer shall indicate his complete name, office address, the validity periods and numbers of license and registration with PRC and PRBRES, respectively, Accredited Professional Organization (APO), Receipt Number, Professional Tax Receipt (PTR) Number, and his Tax Identification Number (TIN); and
 2. If the subject of the valuation is other than real property, the appraiser or valuer issuing the report shall show proof upon request by the SEC of the technical expertise on conducting such valuation.

- ▶ All appraisal companies or PSOs accredited by the SEC shall indicate in the appraisal or valuation reports the following information:
 1. The complete name and address of the company including its SEC accreditation number and validity period;
 2. The appraiser or valuation specialist's complete name, office address, the validity periods and numbers of license and registration with PRC and PRBRES or Board of Accountancy, respectively, APO Receipt Number, PTR Number and his TIN;
 3. The purpose of the appraisal or valuation, the description and location of the asset and the type of business of the client company;
 4. The adoption of the current edition of International Valuation Standards (IVS) in the conduct of the subject valuation engagement; and
 5. Such other information that is prescribed under IVS or other applicable framework.

- ▶ An accredited appraisal company or PSO shall maintain the following prescribed qualifications:
 1. It is 100% Filipino-owned pursuant to the 9th Foreign Investment Negative List and it is managed and operated by licensed appraisers or valuation specialists;
 2. It has all the requisite business permits and licenses to operate the business;
 3. It has at least 2 qualified appraisers or valuation specialists and adequate number of technical and administrative personnel for the conduct of valuation;
 4. It has unimpaired outstanding capital stock of not less than P5,000,000;
 5. It has effective internal controls and checks and balances to ensure the quality and integrity of valuation reports; and
 6. It has a professional liability insurance for errors and omissions in the amount of at least P500,000.

- ▶ All accredited appraisal companies or PSOs shall submit within 105 days from the end of its fiscal year an annual report providing the following information:
 1. List of licensed property appraisers or valuation specialists;
 2. List of clients for the immediately preceding year and a brief description of the engagement for each;
 3. Summary of financial information based on Audited Financial Statements that were recently due for filing; and
 4. Other information that may materially affect the operation of the company.

- ▶ Failure to comply with the prescribed qualification and documentary requirements under these guidelines shall be a valid ground for the denial of the application for accreditation as an appraisal company or PSO.

[Editor's Note: SEC MC No. 2 was published in The Manila Times and The Philippine Star on January 31, 2014.]

SEC MC No. 3 requires a sworn certification from the company and its external auditor on the beginning balances of financial statements in support of its Petition to Lift Order of Revocation of Primary Registration.

SEC Memorandum Circular No. 3 dated February 15, 2014

- ▶ A sworn certification from the company and its external auditor on the beginning balances of financial statements is required to support its Petition to Lift Order of Revocation of Primary Registration.
- ▶ The company's sworn certification shall certify the following:
 1. That the latest financial statements that are submitted with the Petition are "accurate, compliant with the applicable financial reporting framework, and are supported by sufficient and valid source documents and schedules"; and
 2. That it extends to all the beginning balances of the accounts from previous years during which the company failed to submit audited financial statements.
- ▶ The external auditor's sworn certification shall certify the following:
 1. That the beginning balances of the company's financial statements are based on valid and sufficient source documents and schedules of the company; and
 2. That the external auditor has conducted audit procedures to attest the correctness and accuracy of the balance.

[Editor's Note: SEC MC No. 3 was published in Business Mirror on February 5, 2014.]

SEC MC No. 4 prescribes the guidelines on requesting for a refund and the re-application of filing fees and excess penalties with the SEC's Company Registration and Monitoring Division (CRMD).

SEC Memorandum Circular No. 4 dated January 23, 2014

- ▶ A request for refund or re-application of fees and penalties must be made in writing, signed by one of the incorporators or directors of the corporation, or one of the partners of the partnership, or their duly authorized representatives, and supported by an original copy of receipt of payment of the filing fees or penalties sought to be refunded or re-applied.
- ▶ Only 50% of the filing fees paid shall be refunded or allowed to be re-applied to future transactions in the following cases:
 1. Where the request for refund or re-application to future transactions is made relative to an application withdrawn prior to its approval; and
 2. In case of applications for dissolution later withdrawn by the corporation or partnership with intention to continue with its term of existence; however, in case of re-application to future transactions, the re-application shall not be allowed to future transactions of affiliates or subsidiaries.
- ▶ The total excess amount of filing fees on applications may be refunded or re-applied to future transactions in the following cases:
 1. Where the amount to be refunded or re-applied to future transactions comes from excess assessment of filing fees on applications resulting from error in computation;
 2. Subject to the approval of the Supervising Commissioner of CRMD, in cases of applications for dissolutions.

- ▶ The total excess penalty paid may be refunded or re-applied to future transactions where the excess penalties were as a result of the following:
 1. The corporation's late or non-submission of its prior compliance;
 2. Unreflected reports or approved applications in the SEC electronic records database;
 3. Error in computation.
- ▶ No refund or re-application is allowed and the excess filing fee shall be deemed forfeited in favor of the SEC in the following cases:
 - ▶ Where the amount to be refunded or re-applied to future transactions comes from excess assessment of filing fees on applications, resulting from factors solely attributable to the corporation; and
 - ▶ With respect to abandoned applications of corporations or partnerships due to inability to comply with the deficiencies noted upon review of the approving authority, where a party fails to comply with the directive of a final conference letter and a Notice of Abandonment has been duly sent.
- ▶ All requests for refund or re-application to future transactions, of filing fees or penalties paid shall be subject to the approval of the SEC's Financial Management Department.

[Editor's Note: SEC MC No. 4 was published in the Manila Bulletin and Manila Standard Today on February 7, 2014.]

SEC MC No. 5 prescribes the guidelines on the outsourcing of functions by broker dealers.

SEC Memorandum Circular No. 5 dated February 5, 2014.

- ▶ A broker dealer can only outsource back office functions and not material activities or any activity which involves any interaction or direct contact with the clients of the broker dealer for the purpose of buying or selling securities:
 1. Back office functions refer to administrative or operational functions other than material activities, such as but not limited to clearing and settlement functions, information technology, finance and accounting, marketing and legal services.
 2. Outsourcing refers to the broker dealer's use of a service provider to perform activities that would normally be undertaken by the broker dealer itself.
- ▶ In the engagement of a service provider, broker dealers must conduct suitable due diligence processes to ensure that the appropriate service provider is selected.
 1. In case of a foreign service provider, broker dealers must ensure that the engagement of such foreign service provider is appropriate.
 2. Dealers must also monitor the performance by the service provider of outsourced functions and ensure their compliance with applicable securities laws and regulations.
- ▶ The broker dealer, its management and officers retain full legal liability and accountability to the SEC and the relevant self-regulatory organization for any and all functions that it may outsource to a service provider to the same extent as if the outsourced activity was performed by the broker dealer itself.

- ▶ The broker dealer and the service provider shall execute a legally binding written contract which shall contain, among others, limitations or conditions on the service provider's right to sub-contract the outsourced functions.
- ▶ Broker dealers shall take appropriate measures to ensure:
 1. That service providers have procedures to protect the broker dealers' proprietary and customer-related information and software; and
 2. That service providers protect confidential customer and other proprietary information.
- ▶ The SEC, broker dealer and its auditors shall have access to the records of the service providers relating to the outsourced activities.
- ▶ The broker dealer shall promptly notify the SEC of any outsourcing arrangement, including any change in or termination of the same, within 10 days from the execution of the outsourcing contract or the approval of any amendment or termination.
- ▶ Within 6 months from effectivity of SEC MC No.5, broker dealers shall submit a list of all their existing outsourcing contracts detailing the following information:
 1. Service providers involved;
 2. Services outsourced;
 3. Terms of the contract;
 4. Such other information as may be necessary.
- ▶ For outsourcing contracts not in accordance with the provisions of SEC MC 5, broker dealers have the option to either:
 1. Pre-terminate the subject contracts; or
 2. Renegotiate and/ or amend the outsourcing contract to comply with the requirements of SEC MC 5.

[Editor's Note: SEC MC No. 5 was published in The Manila Times and The Philippine Star on February 13, 2014.]

SEC MC No. 6 requires existing corporations and partnerships whose AOI or AOP indicate only a general address as their principal office, to file an amended AOI or AOP in order to specify their complete addresses.

SEC Memorandum Circular No. 6 dated February 20, 2014.

- ▶ The addresses of existing corporations or partnerships must not only refer to a city, town or municipality (e.g. "Metro Manila) in their Articles of Incorporation (AOI) or Articles of Partnership (AOP);
- ▶ The addresses should have a street number, street name, barangay, city or municipality, and if applicable, the name and number of the building, as well as the name and number of the room or unit.
- ▶ In case an affected corporation or partnership has an application for amendment of AOI or AOP pertaining to other provisions thereof, an affidavit of undertaking is required from the corporation or partnership to effect a change in its specific address.
- ▶ Affected corporations and partnerships are given until December 31, 2014 to effect a change in their principal office addresses.

- ▶ While affected corporations and partnerships are not penalized for non-compliance of the above requirement, SEC can impose sanctions of deferment of applications (e.g., amendments, certifications, and clearances).

[Editor's Note: SEC MC No. 6 was published in Business Mirror on February 24, 2014.]

SEC OGC Opinion No. 14-01 dated February 21, 2014

Although holding a minority and non-controlling interest in a petroleum consortium, a foreign corporation may be considered to be doing business in the Philippines even if it is not the operator of the consortium.

Facts:

A Co., a foreign corporation, is a member of a petroleum consortium in the Philippines. In lieu of shares of stock, A Co. will hold a participating percentage interest in the exploration, drilling and production costs and a corresponding percentage share in the profits obtained from petroleum production. A Co. holds a minority and non-controlling interest in said petroleum consortium. The Consortium Agreement stipulates that each consortium member is granted a voting interest equal to its percentage interest. Under the Agreement, A Co. is not the operator of the consortium; however, it is part of the Operating Committee which exercises overall supervision and control on all matters pertaining to operation.

A Co. also entered into a Service Agreement with the Government Petroleum Board (the "Board") and other members of the consortium. Under the Service Agreement, the Board shall have the right to require the consortium members, including A Co., to perform any and all of the obligations of the joint venture or partnership under said contract.

Issue:

Is A Co. doing business in the Philippines?

Ruling:

Yes. A Co. is considered to be doing business in the Philippines, notwithstanding the fact that it holds a minority and non-controlling interest in the consortium. In this case, while not the operator of the consortium, A Co. is a member of the Operating Committee which takes active part in the management and control of the business operation of the consortium. Further, under the Service Agreement, A Co. appears to be a general partner of the Consortium Agreement because it can be required to perform any or all obligations of the partnership under the Contract.

Based on the Consortium Agreement and the Service Agreement, A Co. will actively participate in the management, supervision and control of the business operation of the partnership. Hence, it is considered as doing business in the Philippines and is required to obtain a license to transact business in the Philippines.

Generally, the Foreign Investments Act of 1991 provides that a mere investment by a foreign corporation as a shareholder in a domestic corporation is not considered as doing business in the Philippines. However, this exemption pertains only to investment in a corporation and will not automatically apply to investment in a general partnership.

The difference in treatment is based on the substantial distinction between a corporation and a partnership. In a corporate setting, generally the stockholders do not directly manage the affairs of the corporation. However, in a partnership, all the partners participate in the management of the business except when it is a limited

partnership. In other words, investment in a partnership will only be akin to an investment in a corporation only when the foreign corporation is exclusively a limited partner (rather than a general partner) and takes no part in the management and control of the business operation of the limited partnership.

Under the Service Agreement, A Co. cannot be considered as a limited partner because the agreement stipulates that the Board shall have the right to require performance of any and all of the obligations under the contract from the consortium members. From said agreement, it would appear that A Co. is liable personally for contractual obligations of the partnership even beyond its capital contributions. Accordingly, A Co. may be considered as a general partner rather than a limited partner.

SEC-OGC Opinion No. 14-02 dated February 21, 2014

A corporation's former director and corporate secretary or counsel can act as trustee of the corporation even after the expiration of the 3-year winding up period for the final liquidation of the dissolved corporation.

Facts:

B Co. was dissolved on February 12, 2008 and was issued its Certificate of Dissolution by the SEC on September 8, 2009. At the time of its dissolution, it had time deposit accounts with P bank covered by two Certificates of Deposit, which were then assigned in favor of E Co. to serve as security bonds to guarantee monetary claims arising from a labor case filed against B Co. with the National Labor Relations Commission (NLRC). Subsequently, on February 25, 2013, more than 3 years after the dissolution, the NLRC ordered the release and cancellation of the surety bonds in favor of B Co. In effect, B Co. still has remaining assets which must be disposed of to complete its liquidation.

Issue:

Can a former Director and Corporate Secretary of a corporation, or the counsel that represented the corporation in court, act as trustee even after the expiration of the 3-year winding-up period for the final liquidation of the dissolved corporation?

Ruling:

Yes, a corporation's director and corporate secretary at the time the Certificate of Dissolution was issued, or the counsel who represented it in the NLRC case, can act as trustee-in-liquidation of the corporation.

As to the former director and corporate secretary of the corporation, there is jurisprudence to the effect that if the 3-year extended life has expired without a trustee or receiver having been expressly designated by the corporation within that period, the board of directors may be permitted to continue as trustees by legal implication to complete the corporate liquidation.

On the other hand, as to the counsel that represented the corporation in court, there is jurisprudence to the effect that when a corporation did not appoint a trustee, the counsel who prosecuted and defended the interest of the corporation and who appeared on behalf of the corporation may be considered a trustee of the corporation.

Court Decisions

Commissioner of Internal Revenue vs. Waterfront Cebu City Hotel & Casino, Inc. CTA (*En Banc*) EB No. 991 promulgated January 29, 2014

A taxpayer is not liable for deficiency income tax arising from erroneous carry-over of excess CWTs from the prior year and disallowance of unsupported CWTs if, after proper adjustments, the taxpayer will still have a tax overpayment for the year. At most, the taxpayer may only be assessed in the succeeding taxable year when it enjoyed the tax benefit.

Facts:

Petitioner CIR assessed respondent Waterfront Cebu City Hotels and Casino, Inc. (Waterfront) for, among others, deficiency income tax for the calendar year (CY) 2006. The income tax assessment arose from 2 items, namely: (i) erroneous carry-over of excess tax credits from CY 2005 to CY 2006, and (ii) disallowance of unsupported creditable withholding taxes (CWTs).

Waterfront protested the assessment and argued that it adjusted the amount of its CWTs in its CY 2008 annual ITR to correct the erroneous carry-over in CY 2006. Waterfront also asserts that even with the adjustments of over-claimed excess tax credits and disallowed CWTs, it will still have a tax overpayment for CY 2006.

Upon denial of its protest, Waterfront filed a Petition for Review with the Court of Tax Appeals (CTA). The CTA Second Division granted the Petition and cancelled the deficiency income tax assessment. The CIR appealed the decision to the CTA *En Banc*.

Issue:

Is Waterfront liable for deficiency income tax?

Ruling:

No, Waterfront is not liable for deficiency income tax for CY 2006.

The CIR erroneously assessed Waterfront for deficiency income tax for 2006 because the items of assessments involved do not pertain to either the income or cost/expense accounts that could affect Waterfront's income tax due for the year.

Waterfront did not derive any tax benefit in CY 2006 from the erroneous carry-over of the 2005 CWTs. In fact, it will still have a tax overpayment after adjustments for the over-claimed excess CWTs and the disallowed CWTs.

Any tax benefit from the error in CY 2006 redounded to the succeeding year 2007 which is beyond the scope of the assessment. At most, Waterfront may only be assessed for CY 2007 as any tax benefit will be enjoyed in the said year.

Lindberg Subic, Inc. vs. Commissioner of Internal Revenue

CTA (First Division) Case No. 8524 promulgated on February 11, 2014

The prior filing of a TTRA is not mandatory before a taxpayer can avail of the benefits under the treaty, provided the conditions for availment as prescribed in the treaty are complied with.

Facts:

The BIR assessed Petitioner Lindberg Subic, Inc. (Lindberg) for, among others, deficiency 20% final withholding tax (FWT) on interest payments on the loan contracted with SHOLT HOVEDGÅRD A/S (SH), a resident of Denmark.

Lindberg protested the assessment and argued that it is entitled to the 10% preferential tax rate under Article 11(2) of the RP-Denmark Tax Treaty. Respondent CIR denied the protest on the ground that Lindberg did not file a TTRA, in violation of RMO No. 1-2000 which requires the filing of a TTRA at least 15 days before the transaction to avail of the benefits under the treaty.

Issues:

1. Is a prior TTRA mandatory in order to avail of the preferential FWT on interest provided under the RP-Denmark Tax Treaty?
2. Is the petitioner liable to pay deficiency FWT on the interest on foreign loan?

Ruling:

1. No, a prior TTRA is not mandatory in order to avail of the benefits under the treaty.

The Supreme Court (SC) had already ruled in *Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue* (G.R. No. 188550 dated August 19, 2013) that failure to comply with RMO No. 1-2000 should not automatically deprive a taxpayer of the benefits or reliefs provided under Philippine tax treaties. At the most, the application for tax treaty relief should merely operate to confirm the taxpayer's entitlement to the tax treaty relief.

The Philippines is bound by the principle of *pacta sunt servanda*. Obligations under the treaty must be performed by contracting states in good faith. An administrative agency, such as the BIR, cannot impose additional requirements that would negate the availment of the reliefs provided for under international agreements.

Even without a TTRA, which merely serves to confirm entitlement to such relief, Lindberg may apply the 10% preferential tax on interest, provided the requirements set forth under the RP-Denmark Tax Treaty have been complied with.

2. No, Lindberg is not liable for deficiency FWT. The condition prescribed under the RP-Denmark Tax Treaty to avail of the 10% preferential tax on interest was satisfied.

The RP-Denmark Tax Treaty states that interest arising in the Philippines paid to a resident of Denmark may be taxed in the Philippines but the tax shall not exceed 10% of the gross amount if the beneficial owner of the interest is a resident of Denmark.

In this case, the interest income arose from the loan contracted between Lindberg, a resident of the Philippines and SH, a resident of Denmark. SH, as the lone creditor, is the beneficial owner of the interest income paid.

