

# Tax Bulletin

November 2017



# Highlights

## BIR Ruling

- ▶ The transfer of assets to a liquidator pursuant to a court order is not subject to income tax, VAT and donor's tax.

The transfer of assets to stockholders as a result of liquidation is subject to ordinary income tax and VAT, but not to Documentary Stamp Tax (DST). **(Page 4)**

## BIR Issuances

- ▶ Revenue Regulations (RR) No. 7-2017 amends pertinent provisions of RR Nos. 2-98 and 6-2012, prescribing a lower withholding tax rate of 1% on purchases of minerals, mineral products and quarry resources by the Bangko Sentral ng Pilipinas (BSP). **(Page 5)**
- ▶ Revenue Memorandum Order (RMO) No. 30-2017 amends certain provisions of RMO No. 55-2016 relative to the signatories of Electronic Certificate Authorizing Registration (eCAR). **(Page 5)**
- ▶ Revenue Memorandum Circular (RMC) No. 90-2017 prescribes additional mandatory requirement for all One-Time Transactions (ONETT). **(Page 5)**
- ▶ RMC No. 94-2017 circularizes the BIR Privacy Policy pursuant to the Data Privacy Act of 2012. **(Page 5)**

## BOC Issuances

- ▶ Customs Memorandum Order (CMO) No. 25-2017 provides for the untagging process for containers that are the subject of multiple container importation without suspected content or to hold entire shipment of multiple containers found to contain smuggled or anti-social goods applicable in the Port of Manila (POM) and Manila International Container Port (MICP) Field Offices. **(Page 6)**
- ▶ CMO No. 27-2017 revokes CMO No. 19-2017 dated 22 September 2017, which provides that no single administrative documents (SAD) Cancellations shall be allowed unless approved, and amends CMO 53-2010 entitled Supplemental guidelines in the implementation of CMO No. 27-2009 Re: Post Entry Modification of SAD (PMS) and SAD Cancellation (SC). **(Page 7)**

## BSP Issuances

- ▶ Circular No. 980 provides for the Adoption of the National Retail Payment System (NRPS) Framework. **(Page 7)**
- ▶ Circular No. 981 provides for the Guidelines on Liquidity Risk Management. **(Page 9)**
- ▶ Circular No. 982 provides for the Enhanced Guidelines on Information Security Management. **(Page 10)**

- ▶ Circular No. 983 provides for the Reduction of Reserve Requirement on Repurchase Transactions. **(Page 10)**

### **SEC Opinions and Issuance**

- ▶ A taxable partnership does not have the power to declare dividends out of its net earnings, thus, it is not covered by the provisions of Sec. 43 of the Corporation Code. **(Page 12)**
- ▶ International freight forwarders engaged exclusively in international commerce are not covered by the 40% Foreign Equity Limitation prescribed under the Constitution. **(Page 12)**
- ▶ A member of the board of a non-stock non-profit corporation is not prohibited from receiving compensation for services to the corporation in a capacity other than as a director/trustee. **(Page 13)**
- ▶ SEC Memorandum Circular (MC) No. 12 provides for the rules and regulations governing the public ownership requirement of companies intending to undertake initial public offering as part of the terms and conditions for the registration of securities. **(Page 13)**

### **BLGF Opinion**

- ▶ An administrative office which is neither a branch nor a project office is not subject to local business tax (LBT). **(Page 14)**

### **Court Decisions**

- ▶ The local purchases by renewable energy (RE) developers of goods, properties and services needed for the development, construction and installation of plant facilities are VAT zero-rated. Any VAT erroneously paid by the RE developer to its suppliers on these purchases cannot be recovered through a claim for refund from the BIR. The recourse is to seek reimbursement of the input VAT from its supplier of goods and services. **(Page 15)**
- ▶ For any sale of services to qualify for VAT zero-rating, the recipient of the services must be a foreign corporation engaged in business outside the Philippines. A foreign corporation who regularly provides services to a domestic corporation is deemed engaged in business in the Philippines. **(Page 16)**
- ▶ Under the PH-US Tax Treaty, capital gains derived from the transfer of shares is exempt from CGT if the interest being disposed is in a corporation whose assets do not consist principally of a real property interest. **(Page 17)**
- ▶ Expropriation of private properties by government is embraced within the meaning of sale.

The transfer of property through expropriation proceedings and the payment of just compensation are necessary elements of sale for capital gains tax (CGT) purposes. Both elements must be present in order to be considered a sale and be subjected to CGT. **(Page 17)**

## **BIR Ruling**

### **BIR Ruling No. 522-2017 dated 7 November 2017**

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The transfer of assets to a liquidator pursuant to a court order is not subject to income tax, VAT and donor's tax.

The transfer of assets to stockholders as a result of liquidation is subject to ordinary income tax and VAT, but not to DST.

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#### **Facts:**

ABC Co., a domestic corporation, was being liquidated in order to fully settle and finally close all of its corporate affairs. For this purpose, a liquidator was appointed to liquidate ABC Co.'s remaining properties, settle its obligations and distribute its remaining assets. Pursuant to a court decision, the assets of ABC Co. were ordered to be transferred to the liquidator.

#### **Issues:**

1. Is the transfer of ABC Co.'s assets to the liquidator subject to income tax, VAT and donor's tax?
2. Is the transfer of ABC Co.'s assets to the stockholders subject to income tax and VAT?
3. Is the transfer of ABC Co.'s assets to the stockholders subject to DST?

#### **Ruling:**

1. No. The transfer of ABC Co.'s assets to the liquidator, which was made for the benefit of ABC Co.'s stockholders, creditors, and other parties in interest, is not subject to income tax, particularly to CGT imposed under Section 27 (D) (5) of the Tax Code or to EWT prescribed in RR No 2-98, as amended. There was no transfer of ownership for monetary consideration from ABC Co. to the liquidator.

The transfer of ABC Co.'s assets to the liquidator is also not subject to VAT since such transfer was made pursuant to a court decision in a liquidation proceeding and was clearly not made in the regular course of business.

Lastly, the transfer of ABC Co.'s assets to the liquidator is not subject to donor's tax since ABC Co. was not motivated by any donative intent in transferring the properties to the liquidator and it only acted pursuant to a court order.

2. Yes. Pursuant to Section 73 (A) of the Tax Code, where a corporation distributes all of its assets in complete liquidation or dissolution, the gain realized or loss sustained by the stockholder, whether individual or corporate, is a taxable income or a deductible loss, as the case may be. Accordingly, the gain which is the difference between the adjusted cost of the shares and the fair market value of the properties given as liquidating dividend to the stockholders shall be subject to the ordinary income tax rates and not to CGT on sale of shares.

Also, the conveyance of the assets by ABC Co. to the stockholders as liquidating dividends is within the purview of Section 106 (B) (4) of the Tax Code, which provides that retirement from or cessation of business, with respect to inventories of taxable goods existing as of such retirement and cessation, shall be deemed a sale subject to 12% VAT.

3. No. Section 189 of RR No. 26 provides that a conveyance of real estate by a corporation, without valuable consideration to an owner of all its capital stock as a consequence of dissolution, is not subject to tax. Thus, the transfer by ABC Co. of its real properties to its stockholders shall not be subject to DST imposed under Section 196 of the Tax Code.

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## BIR Issuances

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RR No. 7-2017 amends pertinent provisions of RR Nos. 2-98 and 6-2012, prescribing a lower withholding tax rate of 1% on purchases of minerals, mineral products and quarry resources by the BSP.

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### **RR No. 7-2017 dated 26 October 2017**

- ▶ Section 2.57.2 (T) of RR No. 2-98, as amended, is further amended to prescribe a lower withholding tax (WT) rate of 1% on purchases by the Bangko Sentral ng Pilipinas (BSP) of minerals, mineral products and quarry resources as defined and discussed in Section 151 of the Tax Code.
- ▶ Section 3 (c) of RR No. 6-2012, as amended, is further amended to prescribe a 1% WT on purchases of metallic minerals by the BSP as an exception to the 5% WT, which is generally imposed on buyers of metallic minerals.
- ▶ Section 4 of RR No. 6-2012, as amended, is further amended to provide that the BSP, as a constituted agent, shall only collect the 1% creditable WT on its purchases of metallic minerals and a 2% excise tax due on such purchases.
- ▶ This Regulation shall take effect immediately.

*(Editor's Note: RR No. 5-2017 was published in the Manila Bulletin on 25 November 2017)*

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RMO No. 30-2017 amends certain provision of RMO No. 55-2016 relative to the signatories of eCAR.

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### **RMO No. 30-2017 dated 29 September 2017**

Section II of RMO No. 55-2016 is amended to provide that in the absence of both the RDO and the ARDO, the Chief of the Assessment Section may sign the eCAR on their behalf.

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RMC No. 90-2017 prescribes additional mandatory requirement for all ONETT.

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### **RMC No. 90-2017 dated 20 October 2017**

A Taxpayer Identification Number (TIN) has to be secured for the following taxes or transactions before an application for an Electronic Certificate Authorizing Registration (eCAR) can be filed:

- ▶ Donor's Tax - TIN of donee/s
- ▶ Estate Tax - TIN of heir/s
- ▶ Sale of Shares of Stock - TIN of buyer/s.

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RMC No. 94-2017 circularizes the BIR Privacy Policy pursuant to the Data Privacy Act of 2012.

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### **RMC No. 94-2017 dated 4 October 2017**

- ▶ The BIR Privacy Policy applies to personal information collected and processed on all BIR forms, website and online services.
- ▶ Personal information refers to any information, whether recorded in material form or not, that will ascertain one's identity and includes address and contact information.
- ▶ Sensitive personal information is information that includes age, date of birth, marital status, social security and other government identification numbers, financial information, and tax returns.

- ▶ The BIR collects personal information directly from taxpayers when they:
  1. Fill out a BIR form either online or in hard copy;
  2. Register and use BIR online services; or,
  3. Contact BIR by phone or other means.
- ▶ The BIR also collects personal information about a taxpayer from third parties to ascertain the correctness of any return, or in making a return when none has been made, or in determining the liability of any person for any internal revenue tax, or in collecting any such liability, or in evaluating tax compliance.
- ▶ The BIR only uses and discloses personal information in connection with its lawful functions and activities administering the Tax Code, as amended, and other existing laws in accordance with Republic Act (RA) No. 10173 (Data Privacy Act of 2012) or RA No. 10021 (Exchange of Information on Tax Matters Act of 2009).
- ▶ The personal information collected by the BIR may be used to:
  1. Administer the Tax Code, as amended, and other existing tax laws.
  2. Update BIR database or records.
  3. Provide to other government agencies, which are entitled to the information under existing laws; or,
  4. Contact the taxpayer, including sending of information electronically.
- ▶ The BIR keeps all information confidential unless it is lawfully required or allowed to disclose it or the taxpayer has given its/his/her written consent to such disclosure.
- ▶ Any BIR personnel cannot divulge information collected from taxpayers concerning the latter's business, income or estate, as well as the secrets, operation, style or work, or apparatus of any manufacturer or producer, or confidential information regarding the business of any taxpayer, except for the following:
  1. Disposition of Income Tax Returns (ITRs) under Section 71 of the NIRC, as amended;
  2. Disclosure of ITRs under Section 26 of RA No. 6388 (Election Code) in case of an individual who files a certificate of Candidacy and executes a waiver for the examinations of his/her returns; or,
  3. Information given by the BIR pursuant to a request by a foreign tax authority under an existing treaty pursuant to RA No. 10021.

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CMO No. 25-2017 provides for the untagging process for containers that are subject of multiple container importation without suspected content or to hold entire shipment of multiple containers found to contain smuggled or anti-social goods applicable in the POM and MICP Field Offices.

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## **BOC Issuances**

### **CMO No. 25-2017 dated 23 October 2017**

- ▶ Multiple container importations tagged to undergo x-ray scanning procedure at the XIP-POM and MICP Field Offices will be subjected to x-ray inspection using the square root rule.

1. Square root rule is applicable to import entries, of the same bill of lading, with several containers regardless of size.
  2. It pertains to random checking of certain number of containers depending on the number rounded off to the nearest higher whole number, i.e.:
    - ▶ 4 containers - 2 containers subject to x-ray
    - ▶ 6 containers - 3 containers subject to x-ray
    - ▶ 9 containers - 3 containers subject to x-ray
  3. If any container within the square root rule is found to contain any suspected items, all the containers subject of the entire shipment shall undergo 100% physical examination or be issued an Alert Order.
  4. If the container subject of the square root rule is found to be in order using the non-intrusive scanning system, the remaining containers shall be immediately manually untagged for release by the respective authorized untagger from each Field Office.
- ▶ This Order shall take effect immediately.

*(Editor's Note: CMO 25-2017 was received by the UP Law Center on 25 October 2017)*

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CMO No. 27-2017 revokes CMO No. 19-2017 dated September 22, 2017, which provides that no SAD Cancellations shall be allowed unless approved, and amends CMO 53-2010 entitled Supplemental guidelines in the implementation of CMO No. 27-2009 Re: PMS and SC.

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#### **CMO No. 27-2017 dated 10 November 2017**

- ▶ In lieu of the mandatory approval of SAD Cancellations (SC) by the Office of the Commissioner, all SC forms from the corresponding Districts shall be forwarded to the Office of the Deputy Commissioner, AOCG for approval.
- ▶ If the grounds for SC is E2M exceptional errors or other Management Information System and Technology Group (MISTG) related errors, the approval of the Deputy Commissioner, AOCG shall no longer be required. The District Collector, however, must ensure that a MISTG Certification to that effect is acquired before the SC is effected.
- ▶ This Order shall take effect immediately.

*Editor's Note: CMO 27-2017 was received by the UP Law Center on 16 November 2017.*

#### **BSP Issuances**

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Circular No. 980 provides for the Adoption of the NRPS Framework.

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#### **BSP Circular No. 980 dated 6 November 2017**

- ▶ The Bangko Sentral adopts the National Retail Payment System (NRPS) Framework consistent with BSP regulations on risk management in light of the complex interplay of different types of risks arising from the rapid evolution of retail payment activities of BSP supervised financial institutions (BSFIs).

- ▶ In carrying out retail payment-related activities, BSFIs shall adhere to the NRPS Framework as set forth in this Section and *Appendix 121/Q-74/S-13/P-15/N-15*. This framework requires BSFIs to ensure that the retail payment systems they participate in demonstrate sound risk management, and effective and efficient interoperability. BSFIs shall comply with BSP rules and regulations, particularly on information technology, consumer protection, and anti-money laundering/combating the financing of terrorism (AML/CFT).
- ▶ The NRPS Framework shall apply to all BSFIs which meet regulatory requirements and the criteria set on a per Automated Clearing House (ACH) basis under the NRPS framework.
- ▶ The NRPS framework covers all retail payment-related activities, mechanisms, institutions and users. It applies to all domestic payments which are denominated in Philippine Peso (Php), and which may be for payments of goods and services, domestic remittances or fund transfers.
- ▶ Retail payments under the NRPS Framework are payments that meet at least one of the following characteristics:
  1. The payment is not directly related to a financial market transaction;
  2. The settlement is not time-critical;
  3. The payer, the payee, or both are individuals or non-financial organizations; and,
  4. Either the payer, the payee, or both are not direct participants in the payment system that is processing the payment.
- ▶ Under the NRPS framework, sound governance shall be performed by a payment system management body (PSMB), an industry-led self-governing body that is duly recognized and overseen by the BSP.
- ▶ Subsection X1205.5/41205Q.5/4705S.5/4705P.5/4805N.5 provides for the specific rules applicable to transactions performed under the NRPS framework.
- ▶ BSFIs participating in the NRPS governance structure shall comply with regular reporting requirements, which will be covered by a separate issuance.
- ▶ BSFIs shall make available all policies, procedures and other documents/ information related to this Section during the on-site examination, as well as provide copies thereof when a written request is made by the Bangko Sentral.
- ▶ Consistent with Section X009/4009Q, the BSP may deploy enforcement actions to promote adherence to the requirements set forth in Section X1205/41205Q/4705S/4705P/4805N of the MORB/MORNBF1 and bring about timely corrective actions.
- ▶ Section X906/4921Q/4660S/4660N of the MORB/MORNBF1 on the disclosure of remittance charges and other relevant information shall be amended.
- ▶ This Circular shall take effect 15 calendar days following its publication either in the Official Gazette or in any newspaper of general circulation.

*(Editor's Note: BSP Circular No. 980, s. 2017 was published in The Philippine Star on 8 November 2017)*



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Circular No. 981 provides for the Guidelines on Liquidity Risk Management.

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### **BSP Circular No. 981 dated 3 November 2017**

- ▶ This Circular provides for the amendment of the guidelines on liquidity risk management and the related amendments to the Manual of Regulations for Banks (MORB) and the Manual of Regulations for Non-bank Financial Institutions (MORNBFI).
- ▶ Sections X176 /4176Q of MORB/MORNBFI on Liquidity Risk Management are amended to read as follows:

“Statement of Policy. The Bangko Sentral is cognizant that the viability of financial institutions, particularly banks/quasi-banks (QBs), is heavily influenced by their ability to manage liquidity, including intraday liquidity positions. Opportunities to expand lending activities, continuous innovations in investment and funding products, growth in off-balance sheet activities, and intense competition for retail and wholesale funds affect the way banks/QBs operate. Thus, banks /QBs are expected to fully understand, measure, and control the resulting liquidity risk from their operations.

The guidelines in Appendix 74/Q-44a shall be used to determine the adequacy and effectiveness of a bank’s/QBs liquidity risk management process. The sophistication of the liquidity risk management system shall depend on the size, nature and complexity of a bank’s/QB’s activities. However, regardless of its size and complexity, a bank/QB must be able to identify, measure, monitor, and control its exposures to liquidity risk in a timely and comprehensive manner, and maintain a structurally sound funding and liquidity profile. Banks/QBs shall likewise hold liquidity in accordance with the minimum prudential requirements set by the Bangko Sentral.”

- ▶ Subsections X176.20/4176Q.20 on Supervisory enforcement actions are added to the MORB/MORNBFI which provides that the BSP may deploy enforcement actions to promote adherence with the requirements set forth in these guidelines and bring about timely corrective actions.
- ▶ The guidelines on liquidity risk management in Attachment 1 of this circular shall: (1) replace the contents of Appendix 74 of the MORB, and (2) be incorporated in the MORNBFI as Appendix Q-44a. The reference to Sections 4176Q and 4195N of the MORNBFI in the subtitle of Appendix Q-44 shall be deleted. References to “Appendix Q-44” in the N Regulations of the MORNBFI shall be amended to “Appendix Q-44a.”
- ▶ The definition of liquidity risk under Part III of Appendix 72/Q-42 of the MORB/MORNBFI is amended as:
  1. Liquidity risk is generally defined as the current and prospective risk to earnings or capital arising from an FI’s inability to meet its obligations when they become due without incurring unacceptable losses or costs. Liquidity risk includes the inability to manage unplanned decreases or changes in funding sources.
- ▶ Transitory Provision. Banks/QBs shall have until 1 September 2018 to develop or make appropriate changes to their policies and procedures, provided that they complete a gap analysis of the requirements of the Circular vis-a-vis their existing risk management systems by 31 March 2018. The results of the gap analysis shall be documented and made available for review by the BSP.

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

*(Editor's Note: BSP Circular No. 981, s. 2017 was published in Business World on 13 November 2017)*

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Circular No. 982 provides for the Enhanced Guidelines on Information Security Management.

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**BSP Circular No. 982 dated 9 November 2017**

- ▶ This Circular provides for the guidelines on the information security management of Bangko Sentral Supervised Financial institutions (BSFIs) in line with rapidly evolving technology and cyber-threat landscape, amending relevant provisions of the MORB and MORNBF1.
- ▶ Subsections X177.1 and 4177Q.1, 4196S.1, 4177P.1 and 4196N.1 of the MORB and MORNBF1, respectively, on declaration of policy are amended.
- ▶ Subsections X177.3 and 4177Q.3, 4196S.3, 4177P.3 and 4196N.3 of the MORB and MORNBF1, respectively, are amended, which provides that to ensure that IT risk management systems, governance structures and processes are commensurate with the attendant IT risks, the Bangko Sentral shall determine the IT profile of all BSFIs and classify them as "Complex", "Moderate" or "Simple". The IT profile refers to the inherent risk of a BSFI before application of any mitigating controls, and is assessed taking into consideration the factors enumerated in this Circular.
- ▶ Subsections X177.5 and 4177Q.5, 4196S.5, 4177P.5 and 4196N.5 of the MORB and MORNBF1 are amended to introduce new terminologies in the Definition of Terms.
- ▶ Item 3.a. of Subsection X177.7/4177Q.7/4196S.7/4177P.7/4196N.7. IT Risk Management System (ITRMS) of the MORB and MORNBF1 is also amended.
- ▶ Appendices 75b and Q-59b on the Detailed Information Security Guidelines of the MORB and MORNBF1, respectively, are amended to read as shown in Annex "A" of this Circular.
- ▶ The following transitory provision shall be incorporated as footnote to Sections X177 and 4177Q, 4196S, 4177P and 4196N of the MORB and MORNBF1, respectively:
  1. BSFIs shall comply with the Enhanced Guidelines on Information Security Management within a period of one year from the effectivity date of Circular No. 9.82, Series of 2017. In this regard, a BSFI should be able to show its plan of actions with specific timelines, as well as the status of initiatives being undertaken to fully comply with the provisions of this circular, upon request of the Bangko Sentral starting December 2017.
- ▶ This Circular shall take effect 15 calendar days after its publication either in the Official Gazette or in a newspaper of general circulation in the Philippines.

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Circular No. 983 provides for the Reduction of Reserve Requirements on Repurchase Transactions.

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**BSP Circular No. 983 dated 23 November 2017**

- ▶ This Circular provides for the amendments to the MORB and the MORNBF1 concerning reduction of reserve requirements on repurchase transactions.

- ▶ Subsection X253.1 of the MORB shall be amended to reflect the reduction in the reserve requirement rate on repurchase (repo) transactions, as well as set forth the features of the repo program that shall be eligible for the zero reserve rate requirement, as follows:

**“Subsection X253.1 Required reserves against deposit and deposit substitute liabilities.** The rates of required reserves against deposit and deposit substitute liabilities in local currency of banks starting reserve week 1 December 2017 shall be as follows:

	UBs/KBs	TBs	RBs/Coop Banks
a. Demand Deposits	20%	8%	5%
b. NOW accounts	20%	8%	5%
c. Savings Deposits	20%	8%	3%
d. Time Deposits, Negotiable Certificates of Time Deposits (CTDs), Long-term Non-negotiable Tax Exempt CTDs	20%	8%	3%
e. Long-term negotiable certificates of time deposits			
1. LTNCTDS under Circular No. 304	4%	4%	4%
2. LTNCTDS under Circular No. 842	7%	7%	7%
f. Deposit Substitutes (DS)	20%	8%	NA
g. DS evidenced by repo agreement	0%	0%	NA
h. IBCL (Sec. X343)	0%	0%	0%
i. Bonds	6%	6%	NA
j. Mortgage/CHM cert.	NA	6%	NA
k. Peso deposits lodged under Due to foreign banks	20%	NA	NA
l. Peso deposits lodged under Due to Head Office/Branches/Agencies Abroad (Philippine branch of a foreign bank)	20%	NA	NA

Item “g” refers to deposit substitutes evidenced by repo agreements covering government securities that are transacted in an organized market under the Government Securities Repo Program.”

- ▶ Section 4253Q of the MORNBF1 shall be amended to reflect the reduction in the reserve requirement rate on repo transactions, as well as set forth the features of the repo program that shall be eligible for the zero reserve rate requirement.
- ▶ Subsections X256.5 of the MORB and 4256Q5 of the MORNBF1 shall be deleted.
- ▶ This Circular shall take effect on 27 November 2017.

## SEC Opinions and Issuance

### SEC-OGC Opinion No. 17-13, dated 3 November 2017

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A taxable partnership does not have the power to declare dividends out of its net earnings, thus, it is not covered by the provisions of Sec. 43 of the Corporation Code.

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#### *Facts:*

CA Co. is a registered general partnership engaged in the manufacture, sale, distribution, installation and service of heating, ventilating, air conditioning and refrigeration products. As a partnership, it does not have a Board of Directors that has the exclusive power to control the assets of the corporation, or the absolute power to declare dividends out of the unrestricted retained earnings of the company.

#### *Issue:*

Does CA Co. have the power to declare dividends under Sec. 43 of the Corporation Code?

#### *Held:*

No. Sec. 43 of the Corporation Code applies only to stock corporations. A partnership has neither shares of stocks or capital stock, nor does it have a board of directors that can declare dividends out of its unrestricted retained earnings. The profits of a partnership are due to the partners during the life the partnership in proportion to their interest as set forth in their agreement, and are deemed to have been actually or constructively received in the same taxable year.

### SEC-OGC Opinion No. 17-14, dated 17 November 2017

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International freight forwarders engaged exclusively in international commerce are not covered by the 40% Foreign Equity Limitation prescribed under the Constitution.

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#### *Facts:*

M Co. is a domestic corporation engaged in the business of international freight forwarding. It seeks to increase its foreign equity from 40% to about 80% to be effected through buyout of shares of stock belonging to its Filipino shareholders. It also intends to elect a foreign citizen as its President.

#### *Issues:*

1. Can M Co. increase its foreign equity beyond 40% without violating the Constitution?
2. Can it elect a foreign citizen to become its President?

#### *Held:*

1. It has been held by the SEC and by the Department of Justice (DOJ) that foreign ownership restriction finds no application in cases where the public utility is engaged exclusively in international commerce. Under Republic Act 776, or the Civil Aeronautics Act of the Philippines, a permit to engage in domestic air commerce and/or air transportation shall be issued only to citizens of the Philippines except as provided in the Constitution and existing treaty or treaties. In SEC Opinion No. 8-21 dated 29 October 2008, adopting DOJ Opinion No. 98 dated 9 November, it was held that "[t]he citizenship requirement does not apply if there is a provision in the Constitution which exempts such person from the said requirement or if there is a treaty in which the Philippines is a signatory which allows a person to participate in a State's domestic air commerce and/

*or air transportation without necessity of complying with any citizenship requirement. For the same reason, it is safe to conclude that the citizenship requirement would come into operation only if such international airfreight forwarder would engage in domestic air commerce and/or air transportation.”*  
Thus, M Co. may be 100% owned by foreigners.

2. Yes. The prohibition under the Anti-Dummy Law, specifically as to electing a foreign citizen as its President, does not apply to corporations engaged in international freight forwarding as they are not considered to be engaged in any nationalized or partly nationalized activity.

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#### **SEC-OGC Opinion No. 17-15, dated 22 November 2017**

A member of the board of a non-stock non-profit corporation is not prohibited from receiving compensation for services to the corporation in a capacity other than as a director/trustee.

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##### **Facts:**

S Co. is a religious corporation whose trustees, composed of preachers and ministers, concurrently perform religious activities for its members. which qualify them as employees.

##### **Issue:**

May the trustees of S Co. receive employees' compensation for performing additional services?

##### **Held:**

Yes. Although, Sec. 30 of the Corporation Code prohibits members of the board from receiving compensation in the absence of any provision in the by-laws or when not voted for by majority of its stockholders, the prohibition applies only if the said member of the board will receive compensation in its capacity as director. Thus, members of the board may still receive compensation, in addition to reasonable per diems, when they render services to the corporation in a capacity other than as directors/trustees. Note as well that the rule under Sec. 30 likewise applies to non-stock corporations.

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SEC MC No. 12 provides for the rules and regulations governing the public ownership requirement of companies intending to undertake initial public offering as part of the terms and conditions for the registration of securities.

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#### **SEC Memorandum Circular No. 12 dated 28 November 2017**

A company applying for the registration of shares of stocks for the purpose of conducting public offering must comply with the following minimum public ownership requirements:

- ▶ The public float, or the portion of the issued and outstanding shares that are freely available and tradeable in the market, must be at least 20%;
- ▶ If the minimum public offering (MPO) falls below 20% at any time after registration, such company shall bring the public float to at least 20% within a maximum period of 12 months from the date of such fall;
- ▶ The company shall immediately report to the SEC within the next business day if its public float level has fallen below 20% and shall submit within 10 days after knowledge thereof a time-bound business plan describing the steps that the company will undertake to bring the public float to at least 20% within the maximum period of 12 months from the date of such decline;

- ▶ The company shall submit to the SEC a Public Ownership Report and progress report on the submitted business plan within 15 days after the end of each month until such time that its public float reaches the required level; and
- ▶ This MC shall apply to any company applying for registration of its shares of stocks for the purpose of conducting an initial public offering.

*(Editor's Note: This MC has not yet been published.)*

## **BLGF Opinion**

### **BLGF Opinion dated 27 October 2017**

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An administrative office which is neither a branch nor a project office is not subject to local business tax (LBT).

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#### **Facts:**

T Co. is a power generation company with principal office located in Cebu City. It operates four barge-mounted power plants in Navotas City. T Co. had difficulties hiring competent administrative officers and personnel willing to work in said location due to incessant flooding. As such, T Co. was constrained to establish an administrative office in Malabon City. Said administrative office is not engaged in generating sales orders or receiving collections, but rather purely on administrative work.

T Co. does not operate any branch or sales outlet in Navotas City, Malabon City, or elsewhere, and that its gross receipts are recorded only in its principal office in Cebu City.

#### **Issues:**

Is T Co. subject to LBT in Malabon City where its administrative office is located?

#### **Ruling:**

No. Since the Malabon Office is neither a branch office nor a project office but merely an administrative office, T Co. is not subject to LBT in said City.

Section 150 (a) of the Local Government Code ("LGC") of 1991 and Article 243 (b) of its Implementing Rules and Regulations provide for the situs of tax for purposes of collection of taxes on businesses maintaining or operating branch or sales outlet. The sale shall be recorded in the branch or sales outlet making the sale or transaction and the tax thereon shall be paid to the city or municipality where such branch or sales outlet is located. In cases where there is no such branch or sales outlet in the city or municipality where the sale or transaction is made, the sale shall be duly recorded in the principal office and the taxes due shall accrue and shall be paid to such city or municipality.

In addition, paragraph (b) of Section 150 of the LGC provides that the following sales allocation shall apply to manufacturers, assemblers, contractors, producers, and exporters with factories, project offices, plants, and plantations in the pursuit of their business:

- ▶ Thirty percent (30%) of all sales recorded in the principal office shall be taxable by the city or municipality where the principal office is located; and,
- ▶ Seventy percent (70%) of all sales recorded in the principal office shall be taxable by the city or municipality where the factory, project office, plant, or plantation is located.

The Malabon Office is not a branch office because it operates purely on administrative matters and it does not generate sales orders, receive collection from customers, or record sales. Moreover, the gross receipts are recorded only in T Co.'s principal office in Cebu City.

The Malabon Office may not also be considered as a project office. A project office is equivalent to the factory of a manufacturer such that the office must be indispensable to the main purpose of the business. Otherwise, it is merely an administrative office.

In view of the above, no gross receipts should be allocated to the Malabon Office and the same should not be subjected to LBT. T Co. should only pay LBT based on the following sales allocation:

LGU	Business/Function	Sales Allocation
Cebu City	Principal Office	30% of all sales recorded in the principal office
Navotas City	Power Plant	70% of all sales recorded in the principal office

## Court Decisions

### Hedcor, Inc. vs CIR

CTA (*En Banc*) Case No. 8931 promulgated 3 October 2017

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The local purchases by RE developers of goods, properties and services needed for the development, construction and installation of plant facilities are VAT zero-rated. Any VAT erroneously paid by the RE developer to its suppliers on these purchases cannot be recovered through a claim for refund from the BIR. The recourse is to seek reimbursement of the input VAT from its supplier of goods and services.

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#### Facts:

Petitioner Hedcor, Inc., a developer of renewable energy sources, filed a claim for refund of unutilized input VAT attributable to its zero-rated sales of electricity. Despite the submission of complete supporting documents, Respondent CIR did not act on the administrative claim within the mandatory 120-day period under Section 112(C) of the NIRC, prompting Hedcor to file a Petition for Review with the CTA.

#### Issue:

Is Hedcor entitled to the VAT refund?

#### Ruling:

No. Under RA 9513 or the Renewable Energy Act and its implementing regulations, no output VAT shall be shifted to or passed on to renewable energy developers, such as Hedcor, in connection with their purchases of goods and services needed for the development, construction, and installation of their plant facilities and to the whole process of exploration and development of RE sources up to its conversion into power. Conversely, no input VAT shall be paid by RE developers on these transactions. There being no input VAT to be paid by RE developers, it necessarily follows that they are not entitled to refund from said purchases.

Hedcor should not have paid input taxes on its purchases of goods and services from VAT-registered suppliers because such purchases were zero-rated. Hedcor's recourse is not a claim for refund from the BIR but to seek reimbursement of its alleged input VAT from its supplier of goods and services.

## **Amadeus Marketing Philippines, Inc. vs. CIR**

CTA (*En Banc*) Case No. 1483 promulgated 9 October 2017

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For any sale of services to qualify for VAT zero-rating, the recipient of the services must be a foreign corporation engaged in business outside the Philippines. A foreign corporation who regularly provides services to a domestic corporation is deemed engaged in business in the Philippines.

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### **Facts:**

Petitioner Amadeus Marketing Philippines, Inc. (AMPI) filed with Respondent Commissioner of Internal Revenue (CIR) a claim for refund for unutilized input VAT attributable to zero-rated sales of services for the year 2011 to Amadeus IT Group S.A. (AIGS), a corporation organized under the laws of Spain. As the CIR failed to act on the claim within the 2-year prescriptive period, AMPI filed a Petition for Review with the Court of Tax Appeals (CTA). The BIR argued, among others, that AMPI's sales are not considered VAT zero-rated as it failed to prove that AIGS is a foreign corporation doing business outside the Philippines.

The CTA Division ruled that AMPI is not entitled to the claim for refund since AIGS is considered engaged in business in the Philippines. Aggrieved, AMPI filed a Petition for Review at the CTA *En Banc* arguing that AIGS is not doing business in the Philippines because it is merely collecting royalties pursuant to a Distribution Agreement. AMPI added that AIGS performed only a singular act, which is to grant AMPI the permission to use its intellectual property.

### **Issue:**

Is AMPI entitled to the claim for refund?

### **Ruling:**

No. AMPI is not entitled to the refund because AIGS is considered doing business in the Philippines.

For services to be considered VAT zero-rated under Section 108 (B)(2) of the Tax Code, the foreign corporation who is the recipient of the services must be engaged in business outside the Philippines. While the Articles of Association of AIGS and the Certificate of Non-Registration issued by the Securities and Exchange Commission (SEC) established that AIGS is a foreign entity incorporated in Spain, the court ruled that AIGS conducts business in the Philippines. AMPI's quarterly VAT returns show that it also reported input VAT on services rendered by AIGS. AIGS is therefore the entity that both provided services to AMPI and to whom AMPI claims to have made its zero-rated sales. Since AIGS is engaged in business in the Philippines, AMPI's sales to AIGS cannot be considered VAT zero-rated hence, the claim for refund has no legal basis.

In sustaining the denial of the refund claim, the CTA *En Banc* found unmeritorious AMPI's claim that only a single transaction is involved in the contract between the company and AIGS. The contracts have been in existence for several years prior to 2011. AMPI's act of withholding payments to AIGS is a sign that there is continuity of commercial dealings. Hence, AIGS is doing business in the Philippines.

*[Editor's Note: Justice Manahan dissents from the majority opinion arguing that the mere acceptance of royalties for the use of a property right in the instant case is not constitutive of doing business in the Philippines as the foreign counterpart does not play an active role in the pursuit of business. Justice Bautista, in his concurring and dissenting opinion, also argues that law and jurisprudence merely require that the service, to qualify for zero-rating, be rendered in favor of an entity conducting business outside the Philippines.]*



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**GE Consumer Finance, Inc. vs. CIR**

CTA (Second Division) Case No. 1446 promulgated 19 October 2017

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Under the PH-US Tax Treaty, capital gains derived from the transfer of shares is exempt from CGT if the interest being disposed is in a corporation whose assets do not consist principally of a real property interest.

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**Facts:**

Petitioner GE Consumer Finance, Inc. (GCFI), a US company, transferred its shares in GEC RF Global Services Philippines, Inc. (GECRH PH) to GE Capital Retail Finance Corporation in 2003. Believing that a gain from the transfer of the shares is exempt from capital gains tax (CGT) pursuant to Article 14 of the Philippines-US Tax Treaty, GCFI filed a tax treaty relief application on the capital gains from the transfer of the shares. It subsequently paid the CGT in order to obtain the Certificate Authorizing Registration and tax clearance on the transaction. Within the 2-year prescriptive period, GCFI filed an administrative claim for refund of its erroneously paid CGT. Due to inaction of the BIR, GCFI filed a Petition for Review with the CTA.

**Issue:**

Is GCFI entitled to a refund of the CGT paid?

**Ruling:**

Yes. Section 28(B)(5)(c) of the NIRC, in relation to Sections 32(A)(3) and 32(B)(5), provides that non-resident foreign corporations are subject to CGT on their net capital gains realized during the taxable year from the sale or other disposition of shares of stocks in a domestic corporation made outside the stock exchange and any gain derived from such dealings in property shall form part of gross income except that income exempt under any treaty obligation binding on the Government of the Philippines shall be excluded from gross income and exempt from tax.

Under the PH-US Tax Treaty, capital gains of a US company from the sale of shares of stock in the Philippines shall be taxable only in the US but the sale may be taxed by both the Philippines and US if the interest being disposed is in a corporation whose assets consist principally of a real property interest. Based on the Audited Financial Statements, the assets of GECRF PH do not principally consist of real property interest and as such, GCFI's capital gain derived from the transfer of shares is exempt from CGT.

**Capitol Steel Corporation vs. CIR**

CTA (Second Division) Case No. 9240 promulgated 26 October 2017

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Expropriation of private properties by government is embraced within the meaning of sale.

The transfer of property through expropriation proceedings and the payment of just compensation are necessary elements of sale for CGT purposes. Both elements must be present in order to be considered a sale and be subjected to CGT.

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**Facts:**

Respondent CIR assessed Capitol Steel Corporation (CSC) for deficiency Capital Gains Tax (CGT) and Documentary Stamp Tax (DST) on the payment by the Phividec Industrial Authority for the expropriation of CSC's land in Misamis Oriental. The payment, which represents 100% of the value of the properties based on zonal valuation, was initially deposited in bank escrow accounts and withdrawn in 2008. The CIR argued there was already a gain subject to CGT when CSC received payment from Phividec. CSC posited that there can be no transfer of title until the payment of just compensation to CSC. It is only upon payment of just compensation that the title over the property passes to the government and CGT may be imposed.

### **Issues:**

1. Is the expropriation by the government of a private property considered a sale for CGT purposes?
2. Is CSC liable to pay the assessed CGT?

### **Rulings:**

1. Yes. The acquisition by the government through the exercise of the power of eminent domain with just compensation is considered a sale and the proceeds from the transaction falls within the definition of gross income pursuant to Section 29 of the NIRC.
2. No. The transfer of property through expropriation proceedings and the payment of just compensation are necessary elements of sale for CGT purposes. Both elements must be present in order to be considered a sale and be subjected to CGT.

Quoting the Supreme Court's decision in *Capitol Steel Corporation vs. Phividec Industrial Authority*, GR No. 169453 promulgated on December 6, 2006, just compensation is based on the prevailing fair market value of the property. While zonal valuation is one of the indices of the fair market value of the real property, it cannot be the sole basis of just compensation in expropriation cases.

Since the final valuation has not yet been decided by the Regional Trial Court of Misamis Oriental, the payment of just compensation has not been made. Without payment of just compensation, title remains with CSC. The expropriation process is not yet complete and terminated. Thus, there is no sale and capital gain upon which the CGT may be imposed.

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