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Tax brief

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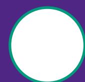

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BIR Issuances

Revised guidelines for tax clearance of government bidders

(Revenue Regulations No. 1- 2016, 10 February 2016)

Revenue Regulations 1- 2016 promulgates that only Tax Returns filed thru Electronic Filing and Payment System (eFPS) will be accepted as attachments to government bids/proposals as required under Executive Order (EO) 398. All Tax clearance applications for bidding taxpayers shall be manually filed with the office of the Accounts Receivable Monitoring Division (ARMD) until such time that an on-line application for this purpose has been made available for use of prospective bidders. Tax Clearance with validity period of six months shall be issued by the ARMD to attest that taxpayer has no delinquent account and has satisfied all other criteria for the issuance of tax clearance, as follows:

a. No unpaid registration fee
b. No open valid stop-filer cases
c. Regular user of EFPS for two consecutive months (for new applicants)
d. No pending criminal case with the DOJ or the courts
e. No delinquent account and/or judicially protested tax assessments with decision favorable to the BIR

The Government Procuring Entity shall validate the authenticity of the tax returns from the list of Tax Clearances published in the BIR website. The attached audited financial statements, on the other hand, must be validated with the RDO/LTS where the bidder is registered. Criminal charges shall be filed against bidders found to have submitted spurious tax clearance. No tax clearance shall be issued to them until the criminal case is resolved.

This shall take effect on 26 February 2016.

Amended RP-Germany DTA lowered preferential rates for dividends, interests, and royalties

(Revenue Memorandum Circular No. 15-2016, 15 February 2016)

The RP-Germany Double Taxation Agreement (DTA) signed in 1983 has been renegotiated to take effect beginning 1 January 2016. The renegotiation lowered certain treaty rates as follows:

Dividends
- 5% if a stockholder owns at least 70 percent of company's shares, from previous 10%.

Interest
- 10% unless otherwise exempt, from 15%
- Interest for sales on credit of a commercial/scientific equipment and an enterprise to enterprise sale on credit, is now taxable only in the residence state of the creditor, and not anymore taxable at 10% in the source state.

Royalties
- Unified at 10% in lieu of the previous 10% or15%.

BIR Rulings

Tax treatment of unincorporated joint venture

(BIR Ruling Nos. 037- 2016 and 038- 2016, 15 January 2016)

Section 2 of Revenue Regulations (RR) No. 10- 2012 provides that a joint venture (JV) is not taxable as corporation and shall be exempt from regular corporate income tax (RCIT) if:

a. formed for the undertaking of a construction project
b. involves joining or pooling of resources by local contractors licensed by the Philippine Contractors Accreditation Board (PCAB) and likewise engaged in construction business; and
d. JV itself must likewise be duly licensed by PCAB

The JV is therefore not required to file quarterly corporate income tax return. Further, the gross income of the JV is not subject to the 2% creditable withholding tax.

The co- venturers are separately subject to RCIT on their taxable income derived from the construction project. Their share in the JV income, however, shall be subject to withholding tax upon distribution by the JV.

Change in accounting method

(BIR Ruling Nos. 048- 2016 and 049- 2016, 29 January 2016)

Company shall adopt the accounting method that bests reflects its income and should be consistently applied from year to year. In case of a need to change, the company must seek approval of the Commissioner. As provided in the Tax Code, taxpayers using a particular method of valuing inventory in any taxable year as approved by the Commissioner shall use such method in all subsequent taxable years unless:

a. a change to different method is authorized and approved by the commissioner; or
b. necessity to modify the valuation method for purposes of ascertaining the income, profits or loss in a more realistic manner arise as determined by the Commissioner.

In two instances, the BIR approved the application for change in accounting method from FIFO Method to Weighted Average Method; and from FIFO Method to Moving Average. The company-applicants reasoned out that the change is necessary to align/ reconcile the inventory valuation method to the global practice of their group. The companies likewise presented proof that such methods still clearly reflect the income of the company and will not entail significant change over the old method.

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BIR Rulings

Treaty rate still applies if interest or dividend is not effectively connected to the permanent establishment in the Philippines

(ITAD BIR Ruling No. 004 and 005-16, 2 February 2016)

Interest on loans and dividends paid by a Philippine company to a foreign corporation resident in Japan may be subject to the 10% preferential tax under the Philippines-Japan tax treaty.

The 10% preferential treaty rate, however, may not apply if the Japanese corporation which is the beneficial owner of the interest or dividend carries on business in the Philippines through a permanent establishment, and that the interest or dividend is effectively connected with such permanent establishment in the Philippines.

In these two cases, the Japanese company has a branch office in the Philippines.

The General Manager of the Philippine branch office issued a certification that the branch has no participation, directly or indirectly, in the granting of the loan between Philippine company and the Japan Head Office, and that the loan transaction is neither attributable to branch nor paid or coursed through it because any interest income derived from said loan is directly recorded in the books of the Japanese company.

The Philippine branch of the Japanese company receiving the dividends also issued a sworn certification that the branch was not a material factor in the realization of dividends paid by Philippine company to the Japan Head Office and that such dividends were not realized in the ordinary course of trade or business of the Philippine Branch. Furthermore, the shares held by the Japan Head Office on which the dividends were paid were not used in, nor held for use in, the conduct of the trade or business of the Philippine branch.

The BIR ruled that the interest and the dividends shall enjoy the 10% preferential treaty rate notwithstanding that the foreign recipients have each a branch office in the Philippines, considering that the interest or the dividend is not effectively connected with the branch.

The general rule that a foreign corporation is the same juridical entity as its branch office in the Philippines is based on the premise that the business of the foreign corporation is conducted through its branch office, following the principal-agent relationship theory. However, when the foreign corporation transacts business in the Philippines independently of its branch, the principal-agent relationship is set aside. The foreign corporation becomes the taxpayer, not the branch. Corollary to this, if the business transaction is conducted through the branch office, the latter becomes the taxpayer, and not the foreign corporation.

Tax-exempt interest on loan insured by a Japan Government-owned financial institution

(ITAD BIR Ruling No. 002-16, 26 February 2016)

Interest on foreign loan paid by a Philippine company to non-resident foreign corporation is subject to tax at 20%. However, pursuant to the Philippines-Japan tax treaty, such interest is exempt from income tax if it is derived by the Government of Japan, a political subdivision or a local authority of Japan, the Central Bank of Japan, a financial institution wholly owned by the government of Japan, or by a resident of Japan under certain conditions.

Hence, the BIR ruled that interest payable by a Philippine company to a foreign company resident of Japan shall be exempt from Philippine income tax if the loan agreement is insured by the Nippon Export and Investment Insurance, a financial institution wholly owned by the Government of Japan.

The loan agreement, nevertheless, is subject to the documentary stamp tax.

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PCC Issuances

Mandatory notification for merger & acquisition under the Competition Act

(Philippine Competition Commission Memorandum Circular No. 16- 001, 12 February 2016)

Pending the issuance of the implementing regulations of Republic Act 10667, the Philippines Competition Commission shall implement the transitory rules & guidelines described below.

Parties to merger or acquisition transactions where the value of the transaction exceeds P1 billion for execution or implementation after MC 16-001 but before the effectivity of the implementing regulations should notify the PCC through a letter containing the following information:

- the parties to the merger or acquisition;
- the name and contact details of the authorized representatives of each of the parties to the merger or acquisition to whom the Commission may address any correspondence;
- a brief description of the businesses of the parties to the transaction;
- the type of transaction (whether a merger or an acquisition);
- the consideration;
- the key terms of the transaction; and
- the timing for the execution or implementation of the transaction.

A M&A complying with the notification requirement shall be deemed approved and may proceed to execute or implement their agreement except when it is found that the notification contains false material information.

M&A transactions valued at more than P1 billion and executed or implemented from the effectivity of Republic Act 10667 but before enforcement of MC 16-001 is exempted from the notification requirement by the PCC.

This shall take effect on 1 March 2016.

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SEC Opinions

Foreigners cannot be officers in a domestic corporation engaged in a nationalized activity

(SEC Opinion 16- 02, 12 February 2016)

Any domestic corporation engaged in the construction of all types of houses and buildings and whose purpose includes ownership of land will be considered as engaged in partly nationalized activity and as such shall be within the scope of the Anti-Dummy Law. Thus, officer position for the said corporations are limited only to Filipinos and foreign ownership to 40%.

Section 2-A of the Anti-Dummy Law, which applies to corporations engaged in wholly or partly nationalized activity or business undertaking limits the association of an alien national, or corporation in the management operation, administration or control.

Sale transactions must be habitual and direct to the general public to be classified under retail trade

(SEC Opinion 16- 03, 15 February 2016)

Sale of spare parts and materials by a company engaged in repair and maintenance services is not considered retail trade if such materials are reasonably necessary for the performance of the services. The sale is considered incidental and not being pursued as an independent business.

Likewise, sales transaction limited to a particular group of the total market (e.g. company employees) is still an exception to the Retail Trade Law since this is not a sale to the general public.

Habitual selling of merchandise, commodities or goods for the consumption direct to the general public are the ultimate elements for a sale transaction to be deemed retail trade.

Corporations with foreign equity not allowed to practice interior design in the Philippines

(SEC Opinion 16- 04, 16 February 2016)

Section 114, Article XII of the 1987 Constitution provides that practice of profession in the Philippines shall be limited to Filipino citizens unless specific law provides otherwise. This basic constitutional rule is aimed at protecting the welfare of Filipino professionals and has been the long-standing rule upon which the enactment of laws and regulations relating to the practice of profession is based.

While the Philippine Interior Design Act of 2012 allowed the corporate practice of interior design, said law is silent on whether corporations with foreign equity can engage in the practice of interior design. Hence, the constitutional provision and the general law should be applied.

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CTA Decisions

Criminal liability for willful failure to file income tax return;

Civil liabilities cannot be enforced if no assessment was formally issued

(People of the Philippines v Joel C. Mendez, CTA Crim CD 0-014, February 10, 2016)

To sustain conviction for criminal liability for failure to file an income tax return (ITR), the following elements of the offense charged must be established by sufficient and credible proof:

(1) That accused was a person required to make or file a return;
(2) That he failed to make or file such return at the time required by law;
(3) That the failure to make or file the return was willful.

The accused alleged that he was not yet earning income in 2001, the year being assessed, hence is not yet liable to file an ITR. The BIR, however, presented proof, which the CTA accepted, that the taxpayer was already practicing his profession during the year under audit, as follows:

a. the accused is operating clinics in several locations prior to and in the years after the year under assessment;

b. the accused embarked on massive advertising campaign as certified by newspapers where he placed his advertisements; and
c. the accused admitted having rendered professional services to celebrity clients though for free or in exchange for free plugging of his business in their shows.

Even granting that he is not yet deriving income in 2001, the Tax Code requires that a person register with the BIR on or before the commencement of the business, and thereafter, file income tax returns, regardless of whether or not there was income or loss.

The CTA also agreed that there was willful failure. The accused is highly literate and his own declarations pertaining to his various businesses manifest an unobscured awareness that he was in business with the obligation to register his businesses and pay the corresponding taxes for income earned therefrom. Likewise, despite notice and opportunity granted, he failed to take any action which is an indication of his intent to defraud government.

The CTA decided that the prosecution was able to establish the guilt of accused beyond reasonable doubt for violation of Section 255 of the NIRC, as amended. He was sentenced to imprisonment of one to three years and ordered to pay a fine of P10,000.

As regards, the unpaid taxes and penalties, the BIR did not present any assessment by the Commissioner. What was presented was only a computation of the alleged unpaid tax which was based on the expenditure method. The amounts spent by the accused on advertising, rentals, purchase of motor vehicle and foreign travels during the year were totaled and subjected to the appropriate income tax rates after deducting personal exemption and optional standard deduction.

Such may not be used as basis to impose the civil liabilities. The CTA ruled that a civil action for collection of the tax requires that the assessment procedures be complied with.

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CTA Decisions

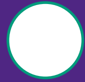
Assessments must be based on actual facts though correctness are presumed

(Altimax Broadcasting Co., Inc., v CIR, CTA CD 8828, 29 February 2016)

All presumptions are in favor of the correctness of a tax assessment. However, the presumed correctness of a tax assessment does not apply upon proof that an assessment is arbitrary or unreliable. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption no matter how reasonable or logical said presumptions may be. In order to stand the test of judicial scrutiny, the assessment must be based on actual facts.

In the present case, the BIR assessed the taxpayer of deficiency income tax by disallowing the unsupported direct write-off of other assets. The assessment is based solely on its reliance with Section 34(D)(2) of the NIRC of 1997, which applies to foreign corporations. The taxpayer, being a domestic corporation cannot be assessed on the basis of the cited Section.

In addition the court observed that the amount disallowed as deduction by the BIR was not even claimed as deduction in the taxpayer's income tax return. The CTA concluded that the assessment has no factual and legal basis and, therefore, should be cancelled.



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Expatriate tax services

We ensure the proper and efficient compliance of expatriates with their Philippine income tax obligations. Our services include registration and application for Taxpayer Identification Number (TIN), preparation and filing of annual Philippine income tax return, and payment of tax due in the proper venue and within the allowed period. As a value-added service, we respond to Correspondence Audits/Inquiries by the BIR regarding information declared in the tax return. If desired by clients, we also conduct arrival or departure briefings and interviews to apprise the expatriate of his Philippine tax liabilities. Upon a company's request, we can compute, on an annualized basis, the total withholding tax due from its expatriate during the taxable year and prepare tax equalization and reimbursement calculations in accordance with company policies.

If you would like to know more about our Expatriate Tax Services

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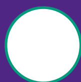

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