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Tax brief

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BIR Issuances

BIR Form 2305 for claiming PWDs as dependents

(Revenue Memorandum Circular Nos. 42 and 43-2017, June 14, 2017)

BIR has issued a new version of Form 2305 to accommodate the declaration of persons with disability (PWD) as dependents. The new version provides for the columns for claiming of a PWD as dependent to entitle the taxpayer to the additional exemption pursuant to RA No. 10754 (An Act Expanding the Benefits and Privileges of PWD). The name and birthdate of the qualified dependent shall be encoded in Part III of the revised form. It is also important to tick the "Mark if PWD/Mentally/Physically Incapacitated" box and indicate the PWD Identification Number.

To claim the PWD as dependent, the following documents shall be submitted by the employees to their employers, for the first year of claiming the exemption and three years thereafter or upon renewal of the PWD ID whichever comes first:

1. Duly accomplished BIR form No. 2305;
2. Photocopy of PWD Identification Card issued by the PDAO or the C/MSWDO of the place where the PWD resides or the NCDA;
3. Sworn Declaration/ Identification of Qualified Dependent PWD, Support and Relationship;
4. Birth Certificate of PWD;
5. Medical Certificate attesting to disability issued in accordance with the IRR of RA 10754; and
6. Brgy. Certificate attesting to the fact that the PWD is living with the benefactor.

Employers shall ascertain if the claimed PWD qualifies as an additional dependent by satisfying the following conditions, regardless of age:

1. Filipino citizen;
2. Within 4th civil degree of consanguinity or affinity to the taxpayer/benefactor;
3. Not gainfully employed; and
4. Chiefly dependent upon and living with the taxpayer/benefactor.

The maximum number of qualified dependents remains at four (4).

Condonation of RPT of IPP facilities

(Revenue Memorandum Circular No. 45-2017, June 20, 2017)

BIR has circularized the full text of Executive Order No. 19, Reduction and Condonation of Real Property Taxes (RPT) and Interests/Penalties assessed on the Power Generation Facilities of Independent Power Producers (IPP) under Build Operate Transfer (BOT) Contracts with Government-Owned and Controlled Corporations (GOCC). This is pursuant to Sec. 277 of RA No. 7160 which vests power on the President to condone or reduce RPT and interest for any year.

Local governments have taken the position that IPPs are not entitled to the real property tax exemption privilege of GOCCs. These LGUs have assessed the IPPS for deficiency RPT and threatened enforcement actions such as public auction of the properties. It was noted that substantial part of the RPT being charged against affected IPPS have been contractually assumed by NPC, PSALM and other GOCCs. EO No. 19 seeks to address this concern on GOCC's contractual assumption of the IPP's tax liabilities which has a negative impact on their financial stability, government's fiscal consolidation efforts and energy prices.

Under the EO, RPT and any special levies accruing to the Special Education Fund for 2015 and 2016 on the property, machinery and equipment used by IPPs for electricity production are reduced. Instead of the assessment levels provided under the Local Government Code of 1991, computation is based on an assessment level of 15% of the fair market value (FMV) of property, machinery and equipment depreciated at 2% per annum less any amount paid by IPPs. Furthermore, all interests on deficiency RPT liabilities are condoned.

RPT payments in excess of the reduced amount for 2015 and 2016 will be applied to the succeeding years.

IPPs which are not GOCCs are not entitled to the abovementioned privileges.

BIR Issuances

IRR on positions reserved for PWDs

(Revenue Memorandum Circular No. 48-2017, June 30, 2017)

BIR circularized the IRR of RA No. 10524, an Act Expanding the Positions Reserved for Persons with Disability (PWD), amending RA No. 7277, Magna Carta for PWDs.

Hereunder are the salient provisions:
1. Employment of PWDs

All qualified PWDs should be given equal opportunity in the selection process and suitable employment and with the same terms and conditions of employment, benefits and compensation as the non-PWD employee;

All government agencies should reserve at least 1% of their regular and non-regular positions available to PWDs. Private corporations with more than 100 employees are encouraged to do the same. In the determination of the fitness of the PWD, qualification standards established for the positions should apply to all PWD applicants as well as labor laws governing employment in both government and private entities.

2. Incentives for Private Corporations

Private entities employing PWDs shall be entitled to additional deduction from gross income equivalent to 25% of the total amount paid as salaries and wages to the PWD employees. To qualify for the incentive, the company should secure a DOLE certification on its employment of the PWD and retain proof that PWD is accredited by DOH and DOLE as to his skills, qualification and disability.

Private entities shall also be entitled to an additional deduction from net income equivalent to 50% of direct cost of improvement or modification to physical facilities to provide reasonable accommodation to PWDs. However, this does not apply to improvements of facilities under BP Blg. 344.

A simplified system for providing tax incentives to private entities will be developed by DOLE, DOH, NCDA and the National Anti-Poverty Commission – Persons with Disability Sectoral Council (NAPC-PWDSC).

3. The IRR will be effective 15 days after complete publication in 2 national newspapers.

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BIR Rulings

Importation of cargo vessels for LPG transport/hauling services is VAT exempt

(BIR Ruling Nos. 268 and 269-2017, June 5, 2017)

Section 109 (1) (T) of the 1997 Tax Code, as amended, provides that sale, importation or lease of passenger or cargo vessels and aircraft, including engine, equipment and international transport operations shall be exempt from the value-added tax.

In relation to the above-cited provision, Section 4.109-1 (B) (1) (t) of RR No. 16-2005 as amended by RR No. 15-2015, provides that VAT exemption for these importations shall be subject to the strict compliance of the conditions contained in the letter of approval issued by Maritime Industry Authority (MARINA) for the importation of the vessel.

In the case at bar, the vessel is newly imported and is backed up with an authority to import issued by MARINA. Hence, it is assumed that the vessel complies with the conditions imposed by MARINA.

SEC Opinions

Nationality requirement for an online English tutorial and diving school

(SEC-OGC Opinion No. 17-05, June 8, 2017)

Educational institutions are subject to the 40% foreign ownership requirement under the Constitution. There are, however, exceptions such as in the case of schools established by religious orders and mission boards, and those established for foreign diplomatic personnel and their dependents and for other temporary residents.

The entity subject of the opinion is a domestic corporation catering purely to foreign clients abroad who wish to enhance their English language skills through informal on-line tutorial class instruction.

Based on previous SEC opinions, learning the English language is considered a skill proficiency to which a diploma or certificate can be issued by the school. As such, the school can be considered as engaged in formal technical-vocational education or training activities, hence, under the jurisdiction of TESDA.

Applied to the case of the company offering online courses, if the school shall issue any Certificate of Training or Diploma for Program Completion to their successful on line students, it will be considered as engaged in formal technical vocational education, hence, under the jurisdiction of TESDA. It follows that, being an educational institution, it must comply with the 60%-40% Filipino-foreign ownership requirement, subject to limitation and exceptions prescribed by law.

The rule also applies if the school provides diving lessons, and regardless of whether the students are Filipinos or foreigners, or whether the courses are conducted online or within a regular classroom atmosphere.

CTA Decisions

Validity of waiver cannot be questioned if both parties are in *pari delicto*

(Hon. Commissioner Kim S. Jacinto-Henares, Hon. Ricardo B. Espiritu, Revenue District Officer, RDO 50 v. IP Contact Center Outsourcing, Inc., CTA EB No. 1415 re: CTA Case No. 8537, June 5, 2017)

A waiver of the statute of limitations must be carefully and strictly construed considering that it is a derogation of the taxpayer's right to security against prolonged and scrupulous investigations. Hence, it should strictly follow the format and requisites as prescribed in BIR issuances.

However, if both the BIR and the taxpayer did not challenge the waiver's defect in order to pursue their own interest, they are already estopped from raising the issue of the waiver's defect.

In this case, the first waiver was issued beyond the prescription period. The Court, however, noted that, by virtue of the waiver, the taxpayer was given time to submit additional documents and argue its case. It was also able to defer payment of the assessed taxes. Yet, the taxpayer challenged the validity when the effect is not in its favor. The BIR, on the other hand, despite having knowledge of the rules governing waivers, did not raise the issue on the defect and proceeded to issue an assessment. Considering that a waiver of statute of limitations is, in law and in fact, a bilateral agreement between the CIR and the taxpayer, both of them should thus be held responsible in ensuring that their agreement faithfully complies with the law. Failing which, they should both suffer the consequences.

Documentation of input VAT from prior periods in a claim for VAT refund

(BJ Well Services Company (Philippines), Inc. v. Commissioner of Internal Revenue, CTA Case No. 8859, June 5, 2017)

In order to prove that the taxpayer applying for refund has excess unutilized input VAT in the current year, it must also prove the validity of its excess input VAT from prior periods which were carried forward and utilized as credit against current output VAT. Hence, in a claim for refund, it is important for the taxpayer to prove that it has enough prior year's excess input tax credits which are valid to cover its output tax liability. Pursuant to Section 110 (A) (1) and (B), input tax is creditable against the output tax if it is evidenced by a VAT invoice or official receipt. Failure to support prior year's input VAT with the corresponding invoices and official receipts can result to a denial of the claim for refund of input VAT from current period.

Tax refunds/credits are construed strictly against the taxpayer. Tax refunds are in the nature of tax exemptions, hence the taxpayer has the burden of proof through submission of evidence that he has complied with the requirements in the NIRC and revenue regulations.

Dividends and income from money market placements from government owned shares not subject to LBT

(Toda Holdings Inc. v. City of Davao and Hon. Rodrigo S. Riola, in his official capacity as the City Treasurer of Davao City, CTA AC No. 152, June 14, 2017)

Section 133 (o) of the Local Government Code (LGC) limits the taxing powers of local government units (LGUs). No local business taxes (LBTs) shall be imposed on taxes, fees or charges of any kind on the National Government, its agencies and instrumentalities, and LGUs.

In this case, the LBT was imposed on the dividends and money market placement earnings from the dividends derived from the San Miguel Corporation (SMC) shares.

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Since the SMC shares are owned by the government, any earnings of the SMC shares therefore belong to the government. Any local tax imposed on SMC, is deemed imposed on the national government.

This is clearly in violation of Section 133 (o) of the LGC. Hence, the erroneously paid local business tax must be refunded.

Reckoning the prescription period to collect deficiency taxes

(Island Quarry and Aggregates Corporation v. Commissioner of Internal Revenue, CTA Case No. 8710, June 19, 2017)

A Final Assessment Notice and Formal Letters of Demand were received by the petitioner, finding it liable for deficiency income tax, VAT, withholding tax on compensation for TY 1995, 1996 and 1997. The issue at hand is whether the BIR's right to collect the deficiency taxes are already barred by prescription.

The CTA decided that assessment for the years 1995, 1996 and 1997 shall still be governed by the 1977 Tax Code. Pursuant to Section 203 of the 1977 Tax Code, internal revenue taxes are to be assessed within 3 years after last day prescribed by law for the filing of the return. Further, Section 223 provides that the BIR has 3 years after issuance of the assessment within which to collect tax by distraint or levy or by a proceeding in court.

In the case at bar, the taxpayer was issued an assessment which it protested. The BIR approved the request for reinvestigation but subsequently issued a Collection Letter for the deficiency taxes. The Collection letter can be constituted as the final decision of the BIR on the protest/request for reinvestigation. Hence, the three-year-period to collect the deficiency tax assessments should be counted from this date. Two years after issuing the collection letter, the BIR issued a Warrant of Distraint and Levy (WDL). A Final Notice Before Seizure (FNBS) was later issued but beyond the 3-years from the date of the Collection Letter.

The CTA ruled that prescription has already set in. The period to collect had already prescribed as more than 3 years had passed from the date of the issuance of the final decision (deemed the date of the Collection Letter), barring the BIR from collection of the said taxes.

Refunding erroneously withheld taxes on income derived by foreign government

(GIC Private Limited v. Commissioner of Internal Revenue, CTA Case No. 8965, June 22, 2017)

Under Sec. 32(B)(7)(a) of the NIRC, investment income of the following are excluded from gross income and exempted from tax:

- foreign governments;
- financing institutions controlled, owned or enjoying refinancing from foreign governments or
- international or regional financial institutions established by foreign governments.

Pursuant to the above provision, the Company, as a financial institution wholly-owned and controlled by the Government of Singapore, is exempt from payment of the 20% final withholding tax (FWT) on income derived from investments in Philippine T-Bonds. Consequently, the income tax collected was erroneously collected and the refund was granted.

To prove its entitlement to and the amount of refund due, the Company submitted the following to the CTA:

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1. Confirmations of Sale/Trade Confirmations44 and relevant Bond Exchange Offer issued by various banks as proof of its Philippine T-Bond holdings

2. Entitlement Report and Swift MT566 Confirmation Advices issued by its custodian to show the amount of interest income earned and final tax withheld

3. To prove the withholding and remittance of the taxes, Bureau of Treasury's (BTR) Statements of Taxes Withheld on the Coupon Due on the T-Bond Holdings of Custodian and Journal Entry Vouchers (JEVs) covering the remittance of the FWTs to the BIR; Certificates of Final Tax Withheld (BIR Forms No. 2306) issued by the BTR in favor of Citibank ; BIR Revenue Accounting Division (RAD) Certification No. RAD-15- 06-139-Cert. confirming receipt of the FWTs on the Bureau of Treasury's coupon payments to Custodian Account.

Approval of request for reinvestigation suspends the 5-year prescription period for collection

(Prime Steel Mill, Incorporated v. Commissioner of Internal Revenue, CTA Case No. 8818, June 21, 2017)

Pursuant to Sec. 222 (c) of the NIRC, the BIR is given 5 years following the tax assessment to collect internal revenue tax by distraint or levy or by proceeding in court. The Supreme Court held that the period for collection begins to run on the date the assessment has been released, mailed or sent to the taxpayer. However, Sec. 223 provides that the running of the statute of limitations will be interrupted once the Commissioner grants the taxpayer's request for reinvestigation. The Supreme Court has clarified that request for reinvestigation alone will not suspend the statute of limitations. Clearly, two things must concur: there must be a request for reinvestigation and the CIR must have granted it.

In this case, the taxpayer filed a letter disputing the final assessment and submitting explanations and supporting documents to show that the assessment has no basis in fact. This was considered a request for reinvestigation by the BIR and approval was signified through the issuance of a Tax Verification Notice.

Hence, the 5-year period to collect cannot be reckoned from the date of the FAN.

Determination of prescriptive period for collection

(Acer Philippines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 8372, June 23, 2017)

Section 203 of the NIRC provides that tax should be assessed within 3 years from filing of return or the last day prescribed by law for filing of return, whichever is later. Thereafter, the BIR has 5 years within which to enforce collection of the tax assessed.

In this case, no warrant of distraint and/or levy has been served upon the taxpayer nor any judicial proceedings has been initiated by the BIR. However, when the taxpayer protested the assessment at the CTA, the BIR was able to incorporate in its answer a prayer for the payment of the tax deficiency before the lapse of the prescriptive period.

The CTA ruled that BIR's answer with demand for tax payment before the court should suffice to toll the running of the prescriptive period to collect, even without issuing a Warrant of Distraint and/or Levy or initiating judicial proceedings.

CTA Decisions

Proof of receipt of tax assessment required to prove willful non-payment

(People of the Philippines v. Neil S. Bautista and Cecilia V. Aquino, CTA Crim. Case No. 0-394, June 28, 2017)

Criminal charges were filed against the partners/co-owners of a company for failure to pay the deficiency taxes from an assessment which has become final and executory.

According to the BIR, the Company did not submit the required accounting records requested under the LOA. Hence, deficiency taxes were assessed based on the best evidence obtainable. A Post Reporting Notice (PRN), Preliminary Assessment Notice (PAN) and Final Assessment Notice (FAN) were issued and sent by registered mail, which were never refuted by the taxpayer.

Since the assessment became final and executory, collection proceedings were initiated. Preliminary Collection Letter and Final Notice Before Seizure were served but the two owners cannot be found. A Warrant of Distraint and Levy was subsequently prepared and served and was received by one of the two owners. However, there were no properties found of the Company.

Hence, judicial proceedings were initiated, a criminal case was filed.

However, the accused denied receipt of the assessment notices.

The CTA cited provisions of the Tax Code which requires among others that, to be liable for the alleged crime, the accused should have willfully failed to pay the corporate taxes. Willfulness is a state of mind and it is imperative for the court to carefully determine whether the failure to pay the tax was willful or just due to non-receipt of notice of assessment. Should the taxpayer deny having received an assessment, the burden of proof lies upon the BIR to prove by contrary evidence that the taxpayer received the assessment in the due course of mail.

To prove the fact of mailing, it is essential to present the Registry Return Notices. However, the latter showed that the one who received the PAN, FAN and FLD is neither the accused nor the duly authorized representative of the partnership. Hence, without any proof of receipt, the element of willfulness cannot be proven. The guilt of the accused has not been proven beyond reasonable doubt.

Corporate personality is distinct from its owners

(The City of Makati and the City Treasurer of Makati City v. Cityland, Inc., CTA EB No. 1428, Cityland, Inc. v. The City of Makati and the City Treasurer of Makati City, CTA EB No. 1439, June 28, 2017)

Sec. 129 of the Local Government Code (LGC) of 1991 vests LGUs with the power to create their own sources of revenue and levy taxes, fees and charges.

The City of Makati reclassified the Company as a real estate developer from its registration as real estate dealer, and subjected it to a higher local business tax. Pursuant to Sec. 3A.02(m) of the revised Makati Revenue Code, local business tax shall be imposed on owners or operators of real estate developer.

The provision of the Makati Revenue Code is clear that the tax is imposed on the "owners or operators". While the Company can be considered a real estate developer, it is not, however, the owner or operator of the real estate developer. Sec. 131(s) of the LGC includes in the definition of operator, the owner, manager, administrator or any other person who operates or is responsible for the operation of a business establishment.

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However, City of Makati failed to establish that the Company is an operator of real estate developer. Hence, the subject provision in the Makati Revenue Code is inapplicable.

On the contrary, Sec. 3A.02(m) of the Revised Makati Revenue Code is in violation of Sec. 146 of the LGC which provides that "the tax on a business must be paid by the person conducting the same". A corporation has a separate and distinct personality apart from its directors, officers or owners; mere ownership by a single stockholder or by another corporation of all or nearly all of capital stock is not sufficient ground for disregarding the separate corporate personality. The Court, however, noted that it does not have the power to delete the "owners and operators" clause because such authority belongs to the Sangguniang Panglungsod ng Makati.

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CTA litigation support

To avoid prolonged trials, we offer independent verification of financial and other pertinent documents that are presented as evidence in tax cases/disputes or claims for refund before the Court of Tax Appeals (CTA). This involves an evaluation of the completeness and validity of the documents and the correctness of the claims involved or other representations made by the taxpayer based on the requirements provided under applicable laws and regulations.

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