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Tax brief

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BIR Issuance

Clarification on tax exemption of NSSLAs

(Revenue Memorandum Circular 9-2016, 28 January 2016)

Non-stock Savings and Loan Associations (NSSLAs), as defined under Section 3 of Republic Act (RA) 8367 are non-stock, non-profit corporations engaged in the business of accumulating the savings of its members and using such accumulations for extending credit to them.

The BIR clarifies that, pursuant to Section 5 of the same law, NSSLAs are only exempted from paying income taxes on income they receive, including interest from bank deposits.

The same section also provides that income derived from any of its properties, real or personal, or any activity conducted for profit, regardless of the disposition thereof, is subject to the corresponding internal revenue taxes. Thus, any disposition made by a NSSLA of its properties (real or personal) is subject to the applicable income tax depending on the classification of such properties either as capital or ordinary asset.

Further, NSSLAs shall also be subjected to gross receipts tax as a nonbank financial institution and to documentary stamp tax on loan agreements and mortgages, among others.

New policies on compromise/abatement applications

(Revenue Memorandum Order 4-2016, 25 January 2016)

Denial of applications for compromise settlement and abatement at the regional/ Large Taxpayers Service (LTS) level shall be considered final, without need to elevate to the National Evaluation Board (NEB).

The regions/ LTS shall prepare the Notice of Denial which will be signed by the Commissioner of Internal Revenue (CIR) without any further review by the NEB. The signed Notice shall be returned to the region/LTS for service to the taxpayer and for enforcement of collection of the outstanding liability.

In case the region/LTS recommended approval of the compromise/abatement, but is found out later to be a case of simply passing on the resolution of a factual/legal issue to the NEB,

the members of the recommending team will be given a demerit without prejudice to administrative liabilities.

The Region/LTS is given a 15-day processing period upon the receipt of application for compromise settlement and abatement.

These new rules shall not cover recommendations that have already been forwarded to the NEB as of 29 January 2016.



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LGU Ordinances

Jan 20 deadline for list of employees by all Makati business establishments

(Revised Makati Revenue Code, City Ordinance No. 2004-A-02)

The Business Permits Office of the City of Makati announced that it is aiming for the strict implementation of the provisions of the Makati Revenue Code (City Ordinance No. 2004-A-02) concerning employees and business establishments located in the City of Makati.

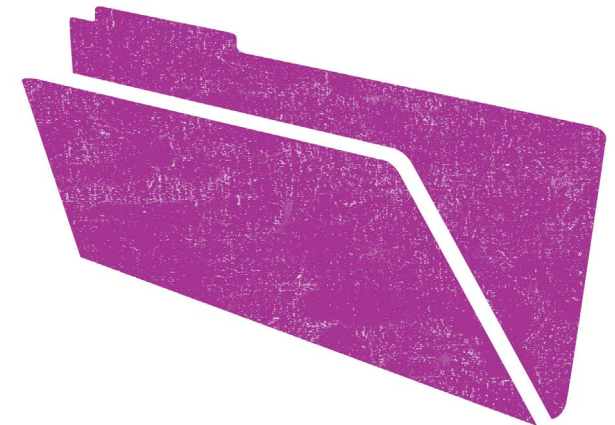
The requirement: all business establishments within the City of Makati are required to submit a certified list of their employees, whether casual, contractual, temporary, probationary or permanent. The list should be signed by a company officer and duly notarized, and should include the following information:

- Names of Employees
- Position

Due date: The list should be submitted twice every year:

- on or before January 20
- on or before July 20

Penalties: Failure to comply shall be subject to a fine not exceeding Php 5,000.



SEC Opinion



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Teleconferencing for stockholder's meeting not allowed

(SEC Opinion No. 16- 01)

Stockholders' meeting cannot be facilitated through teleconferencing, video conferencing or other electronic medium.

Section 51 of the Corporation Code requires that the stockholders' meeting "shall be held in the city or municipality where the principal office of the corporation is located, and if practicable, in the principal office of the corporation." This provision, according to SEC Opinion 16-01, presupposes that the attendees are in the same place during the meeting, which is not the case in teleconferencing.

It would be recalled that SEC Memorandum Circular No. 15 (s 2001), allowed and provided guidelines for the conduct of board meetings through teleconferencing. Section 53 of the Corporation Code on the conduct of the board of directors meeting does not limit the attendees to be in the same place and there is no limitation in the law on the venue.

The SEC though acknowledges that its opinion may differ under a different set of circumstances.



CTA Decision



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FAN shall be properly served to make WDL valid

(CIR v South Entertainment Gallery, Inc. CTA EB 1246, 4 January 2016)

The General Rule in the service of notice is that the person alleging notice was served must prove the fact of service. The burden of proving notice rests upon the party asserting its existence.

As ruled in the Supreme Court (SC) case of *Barcelon Roxas Securities v Commissioner of Internal Revenue* “when a taxpayer denies ever having received an assessment from the BIR, it is incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee. The *onus probandi* was shifted to sender to prove by contrary evidence that the addressee received the assessment in the due course of mail.”

What is essential to prove the fact of mailing is the Registry return card signed by the addressee or its authorized representative. If said document cannot be located, sender at the very least, should submit to the Court a certification issued by the Bureau of Posts and any other pertinent document which is executed with the intervention of the Bureau of Posts. Needless to say that mere notations

made without addressees’ intervention, notice or control, without adequate supporting evidence cannot suffice. Thus, the WDL cannot be held legal and valid.

Having proven that the Final Assessment Notice (FAN) was not served, the taxpayer was correct in appealing with the court within 30 days from receipt of the letter subsequently sent by the BIR reiterating the collection of the alleged deficiency taxes.

50% penalty for fraudulent returns should be imposed in the FAN to effect the 10-year prescription period for assessment

(Newspaper Paraphernalia, Inc. v CIR, CTA EB 8599, 22 January 2016)

Section 203 of the 1997 National Internal Revenue Code (NIRC) provides the period of limitation upon assessment and collection for three (3) years counted from the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later. This however is with exception as provided by Section 222 (A) of the same Code for the discovery of willful filing of false/fraudulent returns stating that the period to assess can run for ten (10) years after such discovery.

Willful filing of false/fraudulent return is

subject to penalty of 50% of the tax or of the deficiency tax.

In this instant case, CIR failed to impose such 50% penalty in the FAN nor in the Preliminary Assessment Notice (PAN) or in the attached details of discrepancies. Failure to do so equates to no finding of falsity or fraud during the examination of taxpayer’s return. The allegation of fraud was raised by the BIR for the first time when it filed a Motion for Reconsideration at the CTA. Nevertheless, the CIR also failed to present convincing evidence that the taxpayer committed fraud or filed a false return. The CIR based its allegations on mere assumptions. Due process dictates that the taxpayer must be informed of the facts and the law upon which the assessment is made.

The circumstances, taken together, led the Court to conclude that the argument raised by the CIR in the Motion for Reconsideration is a mere afterthought, and thus, deserves scant consideration. Thus, the exception provided by Section 22 (A) which warrants a 10-year prescriptive period shall not apply.

CTA Decision

NOLCO and excess tax credits carried forward can offset current year tax deficiencies

(CIR v AR Realty Holdings, CTA EB No. 1202, CTA Case No. 8239, 28 January 2016)

The taxpayer has been assessed deficiency income tax for year 2006. The CTA agreed that the net operating loss (NOL) and excess tax credits carried forward in the taxpayer's income tax return for the succeeding years can be used to offset the assessed tax in 2006 and the assessment for deficiency income tax can therefore be cancelled.

The CTA ruled that there was no double benefit in allowing the credits because the taxpayer was able to prove that the NOL and excess tax credits that were carried forward have not been utilized in the succeeding years 2006, 2007 and 2008. It was also shown that the Minimum Corporate Income Tax (MCIT) due as a result of the net loss position has already been deducted from the tax credits that were carried forward. The Court took the position that the disallowance of the NOL and excess credits carried forward is beyond the scope of the 2006 audit and should be tackled in the audit of the taxable years to which these were carried over. Likewise, the Court did not agree with the argument of the BIR that the taxpayer should present the corresponding

Certificates of Creditable Tax Withheld (BIR Form 2307) before such credits can be allowed. Such presentation is strictly required only when applying for the refund of excess unutilized creditable withholding tax.



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CTA Decision

Period to collect prescribes in five years

(CIR v Atlas Consolidated Mining Corporation, C.T.A. EB NO. 1101, C.T.A. Case No.8150, 29 January 2016)

The period to collect any deficiency tax prescribes after five years from issuance of the Formal Letter of Demand. The alleged deficiency tax may be collected by distraint or levy or by proceeding in court within five years following the assessment of the tax. Section 223 of the NIRC of 1997, as amended, enumerates the instances when the running of the prescriptive periods for collection is suspended, to wit:

1. for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty (60) days thereafter;
2. when the taxpayer's request for a reinvestigation is granted by the Commissioner;
3. when the taxpayer cannot be located in his given address in the return filed upon which a tax is being assessed or collected: however, if the taxpayer informs the Commissioner of such change in address, the running of the Statute of Limitations is not suspended;

4. when the warrant of distraint or levy is duly served upon the taxpayer, his authorized representative, or a member of his household with sufficient discretion, and no property could be located; and
5. when the taxpayer is out of the Philippines.

None of the above instances is obtaining in this case to suspend the running of the period to collect the assessed deficiency excise taxes. The BIR's contention that the failure to serve the warrant of distraint and/or levy on the President of the company caused the suspension of the prescriptive period under Section 223 of the Tax Code is as well flawed. Section 223 of the Tax Code applies only if the whereabouts of the taxpayer cannot be ascertained which is not obtaining in the present case since the BIR knew the company's address where court processes could be duly served. The warrant, likewise, could have been served on other responsible officers of the company.

In the case at bar, the Warrant of Distraint and/or Levy was served upon the taxpayer way beyond the prescriptive period for collection of the deficiency excise taxes. The Court did not agree that the filing of a criminal case with the Regional Trial Court (RTC) the

then President of the taxpayer-company for non-payment of excise tax already constitutes effort to collect the subject delinquent taxes, which effectively suspended the five-year prescriptive period. It indispensable to implead the corporation as a party in a criminal case for violation of the provision of the Tax Code for the government to enforce collection of tax against such entity by way of a criminal action pursuant to Section 205 (b) of the NIRC of 1997, as amended.



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