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Tax News
Interpret & Integrate

BIR Issuances
Centralized processing of ATRIG on wheat imported by large taxpayers

The Bureau of Internal Revenue (BIR) has designated the Excise Large Taxpayers Regulatory Division (ELTRD) as the primary office that shall be responsible for receiving the application, and processing and issuing the Authority to Release Imported Goods (ATRIGs) on importation of wheat by millers and traders classified as large taxpayers relative to the advance payments of value-added tax (VAT) on the sale of flour.

Prior to this, the application for ATRIG for importation of wheat by millers and traders were filed with the Large Taxpayers Audit Division (LTAD) II for large taxpayers registered with Revenue District Office (RDO) Nos. 116, 121, and 122, while for large taxpayers registered with RDO 123, their application used to be filed with the Large Taxpayer District Office (LTDO)-Cebu.

(Revenue Memorandum Order No. 16-2017, 21 July 2017)

Seal of honesty program

The BIR has launched the Seal of Honesty (SOH) Certification Program, which is spearheaded by the Center for Strategic Reforms of the Philippines, Inc. (CSR Philippines) in partnership with the BIR and the Department of Trade and Industry (DTI) to promote a culture of honesty and integrity in paying taxes.

The SOH certification program is open to all taxpayers, individuals or non-individuals, particularly self-employed and professionals, estate and trust and co-ownerships, and taxpayers who are regularly monitored by the BIR for taxation and administrative compliance.

The duly certified/awarded SOH taxpayer shall be issued an annual tax clearance, and enjoy the benefit of last priority in audit and other privileges that the DTI and other government agencies may extend to certified honest taxpayers. The SOH is valid for a period of one year and renewable every year subject to revalidation of CSR Philippines for approval of the Evaluation Committee under the Office of the Commissioner of Internal Revenue.

In order to qualify for the certification program, the taxpayers must satisfy the following conditions:

1. Settle all open cases and pending undisputed assessments as per certification of the RDO
2. Observe full and honest compliance with all BIR regulations and requirements at all times
3. Sign Integrity Initiative’s Integrity Pledge to promote and uphold honesty and integrity in paying taxes, and in dealing with all government agencies, customers, and suppliers, without compromises
4. Not bribe any personnel/officials of the BIR
5. Increase voluntary compliance by at least 20% in total tax payments for those who are regularly audited by the BlR, based on the level of their compliance

The SOH certification process includes the signing of the Integrity Pledge, committing to the promotion of a culture of honesty and integrity in paying taxes, and attending roundtable discussions on paying the right taxes organized by any business organization, chamber, or association in partnership with CSR Philippines.

Interested taxpayers shall be required to apply for the SOH Certification Program and undergo preliminary evaluation and tax planning and compliance review to determine their level of compliance.

The result of the tax compliance review shall be submitted to the Evaluation Committee for review and recommendation. Both the Evaluation Committee and CSR Philippines shall jointly endorse the application to the Commissioner of Internal Revenue for final approval and awarding of SOH Certification.

(Revenue Memorandum Circular No. 60-2017, 28 July 2017)

Stricter monitoring of top taxpayers in revenue regions

The top taxpayers of the 12 Revenue Regions that contribute the largest share in the total BIR collections shall be subject to strict monitoring to ensure their compliance with their tax filing, payment, and other compliance obligations.

The top taxpayers in the Revenue Regions shall be composed of the top 500 non-individual taxpayers of the select Revenue Regions who satisfy the criteria for large taxpayers but have not been notified by the Commissioner of Internal Revenue. The list shall not include national government agencies, local government units, government-owned and -controlled corporations, and state universities and colleges.

A regional monitoring team shall be created to monitor the tax compliance of the top taxpayers in the revenue regions, undertake profiling by sector/industry for benchmarking purposes, act on processed third-party data matching, and recommend candidates for tax audit.

(Revenue Memorandum Order No. 17-2017, 7 August 2017)

Court Decisions

Refund of input VAT by renewable energy developers

Under Sections 106(A)(2)(c) and 108(8)(3) of the Tax Code in relation to Section 15(g) of Republic Act (RA) No. 9513, or the Renewable Energy Act of 2008, purchases of goods, properties and services by renewable energy (RE) developers from local suppliers that are needed for the development, construction, and installation of its plant facilities and to the whole process of exploring and developing renewable energy sources up to its conversion into power, including but not limited to the services performed by subcontractors and/or contractors, are subject to 0% VAT.

Likewise, pursuant to Section 108(8)(7) of the Tax Code, as amended, the sale of power generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal, ocean energy, and other emerging energy sources using technologies such as fuel cells and hydrogen fuels is subject to 0% VAT.

In the instant case, the taxpayer-refund claimant is a renewable energy developer that paid the VAT passed onto it by its local suppliers. Considering that the input VAT on its local purchases were attributable to its zero-rated sale of electricity, the renewable energy developer sought a refund of the VAT passed onto it by local suppliers.

The Court of Tax Appeals (CTA) held that being an RE developer, the taxpayer-refund claimant is entitled to zero-rated VAT on its purchases of local supply of goods, properties, and services needed for the development, construction, and installation of its plant facilities and to the whole process of exploring and developing renewable energy sources up to its conversion into power.

According to the CTA, considering that RE developers are entitled to 0% VAT on their local purchases of goods and services, no output VAT should be shifted or passed on to them, and for this reason, they should not be entitled to refund the VAT on their purchases of goods and services needed for the development, construction, and installation of their plant facilities, as well as for the whole process of exploration and development of RE sources up to its conversion to power.

The CTA held that the taxpayer-refund claimant's recourse is to seek reimbursement of its alleged input VAT paid from its suppliers of goods and services since its purchases of local goods, properties, and services needed for the development, construction, and installation of the plant facilities as well as its purchases of goods, properties, and services for the whole process of exploration and development of RE sources up to its conversion to power, including but not limited to the services performed by subcontractors or contractors, are subject to 0% VAT.

(Hedcor, Inc. v. Commissioner of Internal Revenue, CTA Case No. 8875, 11 July 2017)

Requisites for tax-free de facto merger

Under Revenue Memorandum Ruling (RMR) 1-2002, a de facto merger that is exempt from tax within the purview of Section 40(C)(2) in relation to 40(6)(b) of the Tax Code involves the acquisition by one corporation of all or substantially all the properties of another solely for stock. To constitute a de facto merger, the following elements must concur: (1) there must be a transfer of all or substantially all of the properties of the transferor corporation solely for stock, and (2) it must be undertaken for a bona fide business purpose and not solely for the purpose of escaping the burden of taxation.

As explained under Item II.1 of RMR 1-2002, the phrase "substantially all the properties of another corporation" means "the acquisition by one corporation of at least 80% of the assets, including cash, of another corporation," which ”has the element of permanence and not merely momentary holding”. In the instant case, the taxpayer entered into a plan of de facto merger with a newly formed corporation (transferee corporation) to allow the reorganization of their respective holding structures/businesses. Pursuant to the de facto merger, the taxpayer transferred to the transferee corporation more than 80% of its total assets and some of its liabilities in exchange for the transferee’s shares and additional paid-in-capital (APIC) recorded in its books of accounts.

In order to effect the transfer of the taxpayer's assets and some of its liabilities, a deed of assignment was executed by and between the taxpayer and the transferee corporation. In relation to this, the taxpayer filed a letter-request with the Law Division of the BIR National Office for confirmation from the BIR that the transfer of more than 80% of the taxpayer's total assets and some of its liability to transferee corporation in exchange for the latter's shares of capital stock and APIC constitutes de facto merger pursuant to the provision of Section 40(C)(2) in relation to Section 40(C)(6)(b) of the Tax Code, as amended.

The BIR argued that the transfer of the taxpayer’s assets in exchange for shares does not qualify for tax exemption considering that it failed to comply with the conditions and satisfy all the statutory and administrative requirements to be entitled to tax exemption.

The BIR pointed out that when the exchange was effected, the assets of the subject merger were immediately transferred after four months. As such, the transfer cannot be considered a bona fide business transaction but rather a preliminary action on the part of the taxpayer to escape the burden of taxation. The BIR emphasized that the element of permanence and not mere momentary holding is an essential requirement so as to come within the ambit of the phrase “substantially all the properties of another corporation”.

The BIR further argued that the taxpayer also failed to satisfy the requirement under Revenue Regulations (RR) No. 18-2001, which requires, among others, that the copy of the request for ruling filed with, and the corresponding certification/ruling issued by, the BIR, both duly stamped received by the appropriate office of the BIR, be enclosed in the income tax returns of the transferor and transferee for the taxable year in which the tax-free exchange occurred.

Moreover, according to the BIR, since the taxpayer has not secured a tax-free exchange ruling, it should have initially treated the transaction as taxable and reported it to the BIR. Thus, as a consequence, the BIR assessed the taxpayer for deficiency income tax, VAT, expanded withholding tax (EWT), and documentary stamp tax (DST). On the other hand, the taxpayer argued that the de facto merger is a tax-exempt transaction pursuant to Section 40(C)(2) in relation to Section 40(C)(6)(b) of the Tax Code, which is exempt from income tax, VAT, EWT, and DST.

The CTA held that the transfer of the taxpayer’s assets in exchange for shares of capital stock and APIC satisfies the two requirements under the law and RMR 01-2002 to constitute a tax-free de facto merger.

As regards the first requirement that there must be a transfer of all or substantially all of the properties of the transferor corporation for stock, which means the acquisition by one corporation of at least 80% of the assets with element of permanence and not merely momentary holding, the CTA held that the transferred assets comprised substantially, i.e., more than 80%, the taxpayer's total assets prior to the transfer. The CTA also clarified that the statement "the element of permanence and not merely momentary holding" pertains to the permanent transfer of the assets to the transferee corporation and not merely momentary or temporary holding, which, according to the CTA, means that the transferred assets cannot be returned to the transferor corporation.

The CTA maintained that the second requisite of a de facto merger was likewise satisfied. The planned de facto merger executed between the taxpayer and transferee corporation "will allow the reorganization of their group holding structures which will bring about reduced operating and administrative expenses owing to the elimination of extraneous facilities, simplified management, and optimal use of resources." Hence, the purpose of the de facto merger was mainly to streamline processes and maximize resources, which is a bona fide business purpose.

As to the claim that a tax-free exchange ruling must be secured as required under RR 18-01 before the taxpayer can avail of the tax exemption under Section 40(C)(2) of the Tax Code, the CTA held that there is no basis for such requirement. In its decision, the CTA held that RR No. 18-01 relied upon by the BIR merely provides the guidelines and there is nothing in the regulations that explicitly requires a party, in exchanging property for shares of stock, to first secure a BIR confirmatory certification or tax ruling before it can avail itself of tax exemption.

(Premium Tobacco Redrying and Fluecuring Corporation v. Commissioner of Internal Revenue, CTA Case No. 8897, 18 July 2017)

Substantiation of input VAT on sales to government

Under Section 114 (C) of the Tax Code, sales to the government or any of its political subdivisions, instrumentalities, or agencies, including government-owned and –controlled corporations (GOCCs), of goods and services are subject to 12% VAT. Before making payment on its purchase of goods and services, the government is mandated to withhold a final VAT (FVAT) at the rate of 5% on its gross payment. The amount withheld by the government represents the net VAT payable by the seller.

As to what would happen to the seller's actual input VAT, Section 4.114-2 of RR 16-2005, as amended, provides that should the actual input VAT exceed the standard input VAT (7% of gross payments), the excess may form part of the seller's expense or cost. If the actual input VAT is less than the standard input VAT, the difference shall be closed to expense or cost.

In the instant case, the BIR disallowed the input VAT for failing to meet the substantiation requirements. The BIR maintained that although the 5% final VAT on the taxpayer’s services to the government constitutes a final VAT payment (as opposed to creditable), the taxpayer is still required to meet the substantiation requirements for input VAT, notwithstanding that the taxpayer’s actual input VAT was less than the standard input VAT.

The CTA maintained that since the 5% final VAT has already been withheld by the government agency, the taxpayer's VAT liability is deemed to have been fully paid. The CTA noted that since the taxpayer’s actual input VAT was less than the standard input, its actual input VAT was not utilized in paying the VAT due on its sales to the government. Hence, the disallowance of the taxpayer's actual input for allegedly failing to comply with the substantiation requirements does not result in any VAT liability against the taxpayer.

The CTA explained that the substantiation requirements for input VAT would affect not the VAT liability of the taxpayer but the amount to be treated as "other income" for income tax purposes. As discussed by the CTA, the taxpayer’s actual input VAT was less than the standard input VAT, and pursuant to Section 4.114-2 of RR 16-2005, it closed the difference to expense or cost. If the disallowed input VAT is deducted from the taxpayer’s actual input VAT, the difference between the taxpayer's substantiated actual input and the standard input VAT would be higher, which means that the taxpayer should have declared a higher amount of "other income" for income tax purposes.

According to the CTA, the effect of the disallowance of the taxpayer’s actual input VAT is on the income tax paid by the taxpayer rather than the VAT. However, the CTA noted that while it is allowed to make its own determination of the taxpayer's liability in the process of reviewing the BIR's assessment, any determination in excess of what the BIR has assessed cannot simply be included in the computation of tax liability since this means arrogating unto the CTA a duty that rightfully belongs to the BIR. Accordingly, the CTA cancelled the assessment issued against the taxpayer.

(Kepco Ilijan Corporation v. Commissioner of Internal Revenue, CTA Case No. 9261, 24 July 2017)

Presentation of proof of actual remittance in CWT refunds

The proof of actual remittance of creditable withholding tax (CWT) to the BIR is not a requirement for proving entitlement to a claim for refund of excess and unutilized CWTs. And there is no need to present evidence of the testimony of the person who made the entries in the CWT certificate; the certificate already proves the fact of withholding of the tax.

Citing the case of Commissioner of Internal Revenue vs. Philippine National Bank (G.R. No. 180290, 29 September 2014), the CTA held that proof of actual remittance is not a condition to claim for a refund of unutilized tax credits. The CTA also cited the case of Commissioner of Internal Revenue vs. Asian Transmission Corporation (G.R. No. 179617, 19 January 2011), where the Supreme Court held that the Certificates of Creditable Tax Withheld at Source (BIR Form 2307) issued by the withholding agents of the government are prima facie proof of actual payment of the tax to the government.

Moreover, the CTA maintained that it is not necessary for the person who executed and prepared the certificate of creditable tax withheld at source to be presented and to testify personally to prove the authenticity of the certificates. The certificate of creditable tax withheld at source is the competent proof to establish the fact of withholding of tax.

(Sonoma Services, Inc. v. Commissioner of Internal Revenue, CTA Case No. 9026, 6 July 2017)

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