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Tax News
Interpret & Integrate

BIR Issuances
Rules and regulations implementing the tax provisions of RA 10754 (Expanded Persons with Disability Benefits Act)

The Bureau of Internal Revenue (BIR) issued the guidelines implementing the tax incentives granted to persons with disabilities (PWDs) and to establishments that grant the 20% discount pursuant to Republic Act No. (RA) 10754, or the Expanded Persons with Disability (PWD) Benefits Act.

Among the highlights of the guidelines are as follows:

1. *On the tax treatment of the 20% discount granted to PWDs*

The 20% discount granted to PWDs should be treated as deduction from gross income for the same taxable year that the discount is granted by the establishment.

The total amount of claimed tax deduction net of value-added tax (VAT), if applicable, shall be included in the establishment's gross sales/receipts for tax purposes and shall be subject to proper documentation. If no names and identification card numbers of PWDs appear in the record of sales, the sales discount claimed as deduction by the establishment shall be disallowed. The amount of sales discount shall not be allowed as deductible expense for taxpayers availing of the optional standard deduction.

For percentage taxpayers, the amount of discount shall be excluded for purposes of computing the 3% percentage tax but shall be included as part of gross sales/receipts for income tax purposes. The sales discount shall be accounted as deduction from the gross income of the establishment for the same taxable year the discount was granted.

2. *On the VAT exemption of PWDs on their purchase of certain goods and services*

Pursuant to RA 10754, the sales of goods and services that are VAT-exempt must follow the invoicing requirements for VAT-exempt sales prescribed under Revenue Regulations No. (RR) 16-05 (VAT Regulations). If the seller uses a point-of-sale (POS) machine, cash register machine (CRM), e-invoicing, or other receipting software/application in lieu of the manual sales invoice, the machine/system/receipts/invoices must properly distinguish exempt sales from the taxable sales.

The input tax attributable to VAT-exempt sale is considered cost or expense account by the business establishments, i.e., it shall not be allowed as input tax credit. If there is no name indicated in the records of sales, the input tax attributable to the VAT-exempt sale claimed as expense shall be disallowed.

3. *On entitlement of benefactors to claim qualified PWDs as dependent for tax purposes*

Effective taxable year 2016, a benefactor of a qualified PWD may claim the additional exemption of P25,000 for each PWD, if such PWD, regardless of age, satisfies the following conditions:

a. Filipino citizen
b. within the fourth civil degree of consanguinity or affinity to the taxpayer/benefactor
c. not gainfully employed
d. chiefly dependent upon and living with the taxpayer/benefactor

The total number of dependents for which additional exemptions may be claimed by the taxpayer/benefactor shall not exceed four. The additional exemptions for PWDs shall be claimed by only one taxpayer, or by one of the spouses in case of married individuals. In the case of legally separated spouses, the additional exemption may only be claimed by the taxpayer who has legal custody of the child or children, or PWD, subject to the condition that the total qualified dependents do not exceed maximum additional dependents of four.

(Revenue Regulations No. 05-2017, 20 April 2017)

Clarification on the submission of 2016 ITR attachments

TheBIR issued the following clarifications on the deadline of submission of the required attachments and schedules by taxpayers who electronically filed their income tax returns (ITR):

1. Taxpayers who electronically filed their ITRs should submit a copy of the electronically filed ITR with Filing Reference Number through the eFPS (eFiling and Payment System) facility, or an email Tax Return Receipt Confirmation and copy of electronically filed ITR through the eBIRForms facility, together with the required attachments within 15 days from the deadline of filing or date of electronic filing of the return, whichever comes later.

Illustration:

Date of electronic filing	Deadline of filing	Deadline of submission of attachments

14 February 2017	17 April 2017	2 May 2017
17 April 2017	17 April 2017	2 May 2017
18 April 2017 (late filing)	17 April 2017	3 May 2017
28 April 2017 (late filing)	17 April 2017	15 May 2017 (13 May 2017 is the 15th day, which falls on a Saturday)

2. The Summary Alphalist of Withholding Tax (SAWT) using the Data Entry Module of the BIR shall be emailed to esubmission@bir.gov.ph, if applicable.

3. The required attachments and accompanying schedules should be submitted to the Large Taxpayers Division (LTD)/Revenue District Office (RDO), or Authorized Agent Banks (AAB) located within the territorial jurisdiction of the LTD/RDO where the taxpayer is registered.

(Revenue Memorandum Circular No. 34-2017, 27 April 2017)

Issuance of tax declaration without sale not subject to capital gains tax

The mere issuance of a tax declaration without any sale, transfer, or exchange is not subject to 6% capital gains tax (CGT). The BIR clarified that the sale must have resulted in a transfer of ownership, a disposition, or a conveyance of real property for the 6% CGT under the Sections 24(D)(1) and 27(D)(5) of the Tax Code to be imposed.

According to the BIR, the payment of the CGT is dependent and is a direct consequence of the sale, transfer, or exchange. It is not the transfer of ownership or possession per se that subjects the sale/transfer or exchange to the 6% CGT, but the profit or gain that was presumed to have been realized by the seller by means of the transfer pursuant to the provisions of Section 24(D)(1) and 25(D)(5) of the Tax Code. Accordingly, the issuance of tax declaration in the absence of any sale, exchange, or other form of conveyance is not subject to CGT.

(Revenue Memorandum Circular No. 35-2017, 27 April 2017)

Prescribed BIR forms for compromise applications

The BIR released the following BIR forms relative to the implementation of Revenue Memorandum Order (RMO) No. 3-2017, which prescribed the format for the certificate of availment/approval and notice of denial for application for compromise settlement and/or abatement of penalties pursuant to Section 204 of the Tax Code.

BIR Accountable Form No.	Form name
2342	Certificate of Availment - Compromise Settlement
2343	Certificate of Availment - Abatement of Penalties
0427	Notice of Denial - Application for Compromise Settlement
0428	Notice of Denial - Application for Abatement of Penalties

The BIR Forms shall be accomplished in three copies and shall be distributed as follows:

Original - taxpayer’s copy
Duplicate – copy for the issuing office
Triplicate – to be attached to the docket of the case

(Revenue Memorandum Circular No. 36-2017, 3 May 2017)

Court Decisions

Refund of excess CWT of dissolved corporation due to merger

Under Section 76 of the Tax Code, a corporation with excess unutilized creditable withholding tax (CWT) credits in a given year may either be refunded (in the form of cash or tax credit certificates, or TCCs) or carried over and applied against the income tax liabilities of the succeeding taxable years. Once the option to carry over has been made, such option becomes irrevocable for that taxable period and no application for cash refund or issuance of tax credit certificate shall be allowed.

As an exception to the irrevocability rule, a corporation contemplating dissolution may opt to claim for refund of its remaining tax credits even if it has previously chosen the irrevocable option to carry over its tax credits.

In the instant case, a claim for refund or issuance of TCC of unutilized CWT was filed after the corporation ceased to exist as a consequence of approval by the Securities and Exchange Commission (SEC) of its merger with another corporation. Both the administrative and judicial claims were filed by the dissolved corporation. However, in its amended petition filed with the Court of Tax Appeals (CTA), the dissolved taxpayer designated the surviving corporation as the petitioner to claim refund of its excess unutilized CWT.

The CTA noted that while the exception to the irrevocability rule applies to dissolution with permanent cessation of business, it does not apply in the case of a dissolution by operation of law of the absorbed corporation on account of its merger with another corporation. As explained by the CTA, the purpose of allowing the refund of excess CWT for dissolved corporations with permanent cessation of operations, as an exception to the irrevocability rule, is due to the impossibility of carrying it over to succeeding years. As compared to dissolution with permanent cessation of business, however, the rights, privileges, immunities and franchises, and all assets of the absorbed corporation in a merger is transferred to the surviving corporation by operation of law.

According to the CTA, upon the effectivity of the merger, the rights, assets, and obligations of the absorbed corporation were transferred to the surviving corporation. The excess CWT of the dissolved corporation, being a prepaid tax asset, was transferred to the surviving corporation by operation of law, as a necessary consequence of the merger. Since the absorbed corporation has chosen to carry over its excess CWT, the surviving corporation, having succeeded to the rights, properties, and liabilities of the absorbed corporation, cannot claim a refund of the absorbed corporation’s excess CWT. It may nonetheless carry over the absorbed corporation’s excess CWT to the succeeding taxable years and use the same as tax credits against its future tax liabilities, until fully utilized, provided that the excess CWT is duly substantiated.

Considering that the rights, privileges, assets, and obligations of MESC were transferred to the surviving corporation as a consequence of the merger, the excess CWT of the absorbed corporation, including the right to carry over the same, was already transferred to the surviving corporation. The CTA held that the absorbed corporation no longer has the right to refund the excess CWT and the surviving company, as the taxpayer-refund claimant, could not have acquired such a right through the merger.

(Axia Power Holdings Philippines Corporation v. Commissioner of Internal Revenue, CTA EB Case No. 1203 re CTA Case No. 8092, 6 April 2017)

LOA served beyond 30 days is void

Under RMO 43-90, all audits/investigations, whether field audit or office audit, should be conducted under a Letter of Authority (LOA). In relation to this, Revenue Audit Memorandum Order (RAMO) No. 01-00 requires that the LOA be served or presented to the taxpayer within 30 days from its date of issue. Otherwise, the LOA becomes null and void, unless revalidated.

In the instant case, the LOA was served to the taxpayer three days after the 30-day period prescribed under RAMO 01-00 lapsed. The taxpayer argued that the issuance of the LOA as basis for assessing the taxpayer is void on the grounds that the taxpayer received the LOA beyond 30 days from date of its issuance.

The CTA held that the RMOs clearly mandate that an audit should be conducted under an LOA and that it must be served on the subject taxpayer within 30 days from date of issue lest the authority becomes null and void. According to the CTA, the terms "must", "shall", and "should" are couched in terms that impose a duty that is imperative and mandatory in nature. Thus, a deviation from these obviously renders the result of the audit and examination defective.

Even assuming that the taxpayer may be liable to tax, the CTA held that the deficiency tax assessments will not prosper. The revenue officers acted without authority in arriving at the deficiency tax assessments. The CTA noted that the assessment was invalidated when the procedural standards were done in clear violation of the law. Hence, considering that the assessments are void since they were issued without the necessary authority, the CTA ordered the cancellation of the assessment against the taxpayer.

(Dakay Construction and Development Corporation v. Commissioner of Internal Revenue, CTA EB 1294 re CTA Case No. 8265, 3 April 2017)

Refund of excess unutilized input VAT by a BOI export enterprise

Pursuant to RMO 9-00, sale of goods, properties, or services made by a VAT-registered supplier to a Board of Investment (BOI)-registered entity whose products are 100% exported shall be accorded automatic VAT zero-rating subject to the condition that the BOI-registered enterprise secure a certification that it is a 100% BOI-registered export manufacturer/producer, and a copy of its certification is furnished to its suppliers, which shall serve as authority for the supplier to avail of the benefits of zero-rating for its sales to the BOI-registered buyers.

In the instant case, the taxpayer-refund claimant is a BOI-registered enterprise primarily engaged in the mining of nickel saprolite and limonite ore, which are exported and/or shipped to foreign countries. The taxpayer was issued a certification by the BOI attesting to the fact that it is a BOI-registered entity with 100% exports.

The CTA held that on the basis of the BOI Certification, no output tax should have been shifted by the local suppliers to the taxpayer. Further, it follows, according to the CTA, that the taxpayer should also not be entitled to refund of input VAT from its domestic purchases.

The CTA held that in instances when the taxpayer paid input VAT, notwithstanding that under the law it is subject to VAT at zero-percent rate, the taxpayer’s recourse is not against the government, but against the seller who shifted to it the output VAT. This ruling was affirmed by the Supreme Court in the case of Coral Bay Nickel Corp. vs. Commissioner of Internal Revenue (G.R. No. 190506, 13 June 2016), which held that the proper party to seek the tax refund or credit from the BIR should be the suppliers, not the taxpayer.

(Taganito Mining Corporation v Commissioner of Internal Revenue, CTA Case No. 9057, 5 April 2017)

FAN issued prior to the lapse of period to respond to the PAN

Under Section 228 of the Tax Code, as implemented by (RR) 12-99, as amended, a taxpayer who receives the Preliminary Assessment Notice (PAN) is given 15 days from receipt of the PAN to file its reply to the PAN. If the 15-day period lapses without any response from the taxpayer, the taxpayer shall be considered in default, and a Formal Letter of Demand and Final Assessment Notice (FLD/FAN) shall be issued.

In the instant case, the taxpayer received a copy of the PAN from the BIR dated 17 December 2010 on 3 January 2011. The taxpayer has 15 days, or until 18 January 2011, within which to file a reply or protest against the PAN. Prior to the lapse of the 15-day period within which the taxpayer can respond to the PAN, it received the FLD dated 7 January 2011 and Assessment Notices on 17 January 2011. Notably, the BIR did not even wait for the taxpayer to reply to the PAN before issuing the FLD and the Assessment Notices on 7 January 2011.

The CTA held that in wantonly disregarding the taxpayer's right to be heard with regard to its positions or arguments against the PAN, the BIR clearly violated the taxpayer's right to due process as enshrined in Section 228 of the Tax Code, as amended, and RR 12-99. According to the CTA, procedural due process is not satisfied with the mere issuance of a PAN, without giving the taxpayer an opportunity to respond to the PAN.

The CTA maintained that although the taxpayer was given ample opportunity to contest the FLD and assessment notices, the fatal infirmity that attended its issuance prior to the lapse of the period to respond to the PAN is not cured by the opportunity accorded to the taxpayer to protest the FAN/FLD. The CTA cited the case of Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue (G.R. No. 172598, 21

December 2007), where the Supreme Court ruled that non-compliance with statutory and procedural due process renders the FAN null and void.

Considering the palpable violation of taxpayer's right to procedural due process pursuant to Section 228 of the Tax Code, the CTA held that the FLD and the assessment notices, being fatally infirm, are void.

(Freelife Philippines Distribution, Inc. Philippine branch v Hon. Kim S. Jacinto-Henares in her capacity as Commissioner of Internal Revenue, CTA Case No. 8838, 27 April 2017)

FAN sent through email is void

Under Section 3.1.4 of RR 12-99, as amended, the FLD or FAN issued by the Commissioner or his duly authorized representative should be sent to the taxpayer only by registered mail or by personal delivery. Thus, in case the FAN/FLD issued by the BIR was sent through electronic mail to the taxpayer, the FAN/FLD issued to the taxpayer shall not be deemed valid.

(Freelife Philippines Distribution, Inc. Philippine branch v Hon. Kim S. Jacinto-Henares in her capacity as Commissioner of Internal Revenue, CTA Case No. 8838, 27 April 2017)

Transfer of property as liquidating dividend not subject to 6% CGT

The transfer of real properties by way of liquidating dividends to its stockholders is not considered a sale of assets that would give rise to liability to pay the 6% CGT on sale, exchange, or other disposition of real property.

In the instant case, the refund claimant is a corporation that is a shareholder of another corporation dissolved by virtue of the shortening of its corporate term. The shareholder received from the dissolved corporation several properties as liquidating dividends. In its annual income tax return, the shareholder reported the net liquidating gains as part of its other income subject to the 30% regular income tax.

However, to ensure a Certificate Authorizing Registration (CAR) is issued on the transfer of properties, the shareholder paid the 6% CGT – subject of the refund – on the presumed gain from the liquidating dividends.

Citing the case of Victoria Fernando v. Sps. Reginaldo Lim and Asuncion Lim, which was decided by the Supreme Court (SC), the CTA held that a mere distribution of liquidating dividends on account of the dissolution of a corporation is not considered a sale of asset by the liquidating corporation for the purpose of the imposition of CGT.

In its decision, the SC held that the distribution of liquidating dividends is not a sale of assets but a sale of shares of the stockholder to the corporation or the surrender of the stockholder's interest in the computation, in place of which said stockholder receives property or money from the corporation about to be dissolved. Thus, according to the SC, on the part of the stockholder, any gain or loss is subject to tax, while on the part of the liquidating corporation, no tax is imposed on its receipt of the shares surrendered by the stockholder or transfer of assets to said stockholder because said transaction is not treated as a sale.

(Belle Corporation v. Commissioner of Internal Revenue, CTA Case No. 8939, 20 April 2017)

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