NavarroAmper&Co. Deloitte.

Philippines | Tax & Corporate Services | 13 December 2017

Tax News
Interpret & Integrate

BIR Issuances

Reduced CWT on sale of mineral and mineral products to BSP

The Bureau of Internal Revenue (BIR) reduced from 5% to 1% the creditable withholding tax (CWT) that the Bangko Sentral ng Pilipinas (BSP) is required to withhold on its income payments on purchases of minerals, mineral products, and quarry resources such as, but not limited to, silver, gold, marble, granite, sand, boulders and other materials/products.

The reduction in CWT rate is intended to encourage small-scale gold miners to sell their gold produce to the BSP.

(Revenue Regulations No. 07-2017, 23 November 2017)

Implementation of nationwide Z-Reading and post evaluation of CRM, POS machines and other sales receipting software

The BIR mandated all revenue offices to conduct nationwide Z-Reading and post evaluation of cash register machines (CRM), point-of-sale (POS) machines, and other sales receipting system software to validate taxpayer compliance with accreditation, registration, and reportorial requirements such as use of non-thermal paper and posting and attaching of machine identification number (MIN) sticker, e-sales reporting, etc.

The Revenue District Office (RDO) shall have a checklist for use during the conduct of tax compliance verification to evaluate the CRM, POS machines, and other sales receipting system software and to check compliance with eSales reporting requirements.

In particular, the RDO shall identify all unregistered machines/software or unauthorized use of machines/software such as cancelled/retired machines/software that are still being used in business operations. It shall issue an automatic revocation of the provisional Permit-To-Use (PTU), which should have been converted to final PTU as of 31 July 2015.

The RDO shall also check all machines identified with no eSales report submitted to the BIR for the imposition of appropriate penalties, and conduct the reading of all machines/software, whether registered or not, either by year or accumulated that is known as “Z-Reading” or through backend by extracting the summary of sales for the current period and/or immediately preceding year.

After the conduct of Z-Reading and post evaluation, the RDO shall issue the corresponding notice of findings and violations and impose necessary penalties and/or recommend the revocation of permit based on existing revenue issuances. The report shall be submitted to the Client Support Service (CSS) through the Taxpayer Service Programs and Monitoring Divisions (TSPMD).

(Revenue Memorandum Circular No. 91-2017, 3 November 2017)

Tax treatment of Government Securities Repurchase Program

The BIR issued the guidelines on the tax treatment of government securities repurchase program (GS Repo Program), which is governed by the Global Master Repurchase Agreement (GMRA). The GS Repo Program is intended to build a deeper and more liquid bond market that would promote further capital market development in the Philippines.

Under the Government Securities Repurchase Program (GS Repo Program), eligible securities include Philippine peso-denominated treasury bills and treasury bonds issued by the Bureau of Treasury, for and on behalf of the Republic of the Philippines.

The BIR has clarified that repo transactions under the government securities (GS)

Repo Program, as contemplated under Section 199n(h) of the Tax Code, are exempt from documentary stamp tax (DST).

It further clarified that the repo rate, which is the difference between the original price and the repurchase price, and other interest income including interest accruing from the "cash margin", shall be subject to 20% final withholding tax (FWT) pursuant to Sections 27(D)(1) and 28(A)(7) of the Tax Code, as amended, as well as to the applicable gross receipts tax (GRT) imposed under Section 127 or 122 of the Tax Code.

However, any mark-to-market (MTM) gain or loss, and any other realized gain arising from subsequent sale of the Repo Securities within the repo period shall be subject to 30% corporate income tax under Sections 27(A) and 28(A) and GRT under Section 121, or 122 of the Tax Code, as amended.

(Revenue Memorandum Circular No. 95-2017, 16 November 2017)

Additional signatories in the eCAR

The BIR has authorized the Chief of Assessment Section to sign the electronic Certificate Authorizing Registration (eCAR) in the absence of both the Revenue District Officer (RDO) and the Assistant RDO (ARDO).

(Revenue Memorandum Order No. 30-2017, 27 November 2017)

Court Decisions

Refund of excess unutilized input VAT attributable to zero-rated sales by PEZA-registered enterprises

The excess and unutilized input value-added tax (VAT) on domestic purchase of goods and services by a Philippine Economic Zone Authority (PEZA)-registered enterprise consumed and rendered outside the economic zone and attributable to VAT zero-rated sale may be the subject of a claim for tax refund.

In the instant case, the taxpayer-refund claimant is a PEZA-registered enterprise engaged in the manufacture and exportation of nickel/cobalt mixed sulfide. Its supplier passed onto it the VAT on its domestic purchase of goods and services, which were used to construct housing facilities (row house and dormitory) and a bus terminal that are located outside the PEZA economic zone. Since the VAT passed on to the PEZA enterprise is attributable to its VAT zero-rated sales, the PEZA-registered enterprise claimed a refund of its excess and unutilized input VAT on its local purchases of goods and services consumed and rendered outside the PEZA zone.

The Court of Tax Appeals (CTA) held that while the sale of goods and services by VAT-registered enterprises to PEZA-registered enterprises is subject to 0% VAT following the cross-border doctrine, the VAT zero-rating on the sales of goods, properties, or services by a VAT-registered entity to a PEZA-registered entity applies only when such goods, properties, or services are consumed, used, or rendered within the economic zone and in connection with the registered activities of the PEZA entity. Hence, a PEZA-registered enterprise's purchase of goods and services consumed and rendered outside the PEZA zone is not entitled to VAT zero-rating and, therefore, the taxpayer's suppliers may validly pass on the 12% VAT on its sale transaction.

In as much as the goods and services purchased (which were subjected to 12% VAT) by the company are attributable to its zero-rated sales, the CTA held that the taxpayer is entitled to a refund of the excess and unutilized input VAT relative to its domestic purchase of goods and services that were consumed and rendered outside the PEZA economic zone.

(Coral Bay Nickel Corporation v. Commissioner of Internal Revenue, CTA Case No. 8804, 23 November 2016)

VAT on supply of services to foreign corporation doing business in the Philippines

Under Section 108(B)(2) of the Tax Code, in order for the supply of services to a foreign corporation to qualify for zero-percent VAT, the VAT-registered taxpayer that performed the service/s must prove that: (a) the service is other than processing, manufacturing, or repacking of goods; (b) payment for such services is in acceptable foreign currency accounted for in accordance with BSP rules and regulations; and (c) the recipient of such services is doing business outside the Philippines.

In the instant case, the taxpayer-refund claimant is a domestic corporation engaged in the marketing of an automated computerized reservations system that incorporates a software package, which performs various functions, including real-time airlines seat reservations, schedules bookings for a variety of air, boat, train, package tours, car rental and hotel services, automatic ticketing and fare pricing display in the Philippines.

The company entered into a commercial organization and distribution agreement with its affiliate to market, promote, offer, and distribute the software products in the Philippines. Pursuant to Section 112(A) of the Tax Code, the company filed an application for refund of its unutilized input VAT on its sale of services to its affiliate.

The CTA held that while the taxpayer-refund claimant was able to meet the first requisite -- that is, the services rendered were other than processing, manufacturing, or repacking of goods -- it failed to satisfy the second and third requirements that its affiliate is not doing business in the Philippines and payment for such services must be in acceptable foreign currency accounted for in accordance with the BSP rules and regulations.

The CTA noted that under its distribution agreement, the foreign affiliate appointed the company as sole distributor of its products to customers in the Philippines. The distribution agreement states that the company shall be responsible for the marketing of the products to customers in the Philippines, and that the company is authorized to grant to subscribers non-exclusive, nontransferable licenses, or access rights where applicable to use its products and services.

On the other hand, under the commercial agreement, the company undertakes to market, offer, and promote in the Philippines the affiliate's system to subscribers by means of its products, and to carry out the necessary actions in the Philippines in order to give subscribers appropriate access to the global care, or to other computer database offered or to be offered by the foreign affiliate under license from a third party.

The commercial agreement further provides that the foreign affiliate shall pay the company a distribution fee, which shall be considered a commission fee for marketing, offering, and promoting its products in the Philippines.

Sans the commercial organization agreement, the CTA pointed out that the company may be justified in insisting that the foreign affiliate is not engaged in the active conduct or pursuit of its business in the Philippines, as the distribution agreement only grants to the company the authority to grant to subscribers nonexclusive, non-transferable licenses, or access rights where applicable, to use its affiliate's products and services, for which it collects license fees or royalties. When the commercial organization agreement and the distribution agreement are, however, taken together, it shows that the transactions of the affiliates in the Philippines are not merely passive, isolated, occasional, or casual in nature.

The CTA stressed that while the distribution agreement says that the company is responsible for marketing the products in the Philippines, which according to the company is indicative that the foreign affiliate has no participation in the operations of the company's business in the Philippines, the terms of the commercial agreement clearly establish that the company's foreign affiliate actively participates in the operations of the petitioner's business in the Philippines. This means that the foreign affiliate actually pursues its business in the Philippines and that the company merely acts as its agent.

Considering that the company's foreign affiliate, the recipient of services, is doing business in the Philippines, the CTA held that the company failed to satisfy the third requisite for VAT zero-rating of sale of services. With the company failing to prove that it had zero-rated sales from which the claimed input VAT is attributable to, the second requisite for the refund or tax credit of input VAT under Section 112(A) of the Tax Code was also not met. Hence, for failure to comply with other requisites for the company's transaction to qualify for VAT zero rating, the CTA denied the company's claim for refund.

(Amadeus Marketing Philippines v. Commissioner of Internal Revenue, CTA No.

8869, 27 November 2017)

BOI Certification as proof of actual exports

Under Section 112(A) of the Tax Code, a VAT-registered taxpayer with input taxes attributable to zero-rated or effectively zero-rated sales is entitled to claim for refund within the two-year period from the close of the taxable quarter when such sales were made.

As one of the transactions subject to zero-percent rate, direct export sales qualify as VAT zero-rated sale pursuant to Section 106(A)(2)(a)(1) of the Tax Code if the following conditions are present: (1) there was a sale and actual shipment of goods from the Philippines to a foreign country; (2) the sale was made by a VAT-registered person; and (3) the sale was paid for in acceptable foreign currency.

To establish that there is a VAT zero-rated direct export sale, the VAT-registered taxpayer claiming VAT refund must present at least three types of documents: (1) the sales invoice as proof of sale of goods; (2) the export declaration and bill of lading or airway bill as proof of actual shipment of goods from the Philippines to a foreign country; and (3) the bank credit advice, certificate of bank remittance, or any other document proving payment of goods in acceptable foreign currency or its equivalent in goods and services.

In the instant case, the taxpayer-refund claimant is an enterprise registered with the Board of Investments (BOI) and engaged in the business of mining ores and other mineral resources. It filed a claim for refund of its unutilized input VAT attributable to its alleged zero-rated sales of copper concentrates. To establish that its export sales qualify as VATzero-rated sale, it submitted, among others, a BOI certification to prove actual shipment of goods from the Philippines to a foreign country.

The taxpayer-refund claimant insisted that the BOI Certification is sufficient to prove actual export of its copper concentrates. Allegedly, the BOI Certification was issued pursuant to the regulatory issuances of two government agencies: (i) Revenue Memorandum Order (RMO) No. 9-2000 issued by the BIR; and (ii) the Guidelines on the Issuance of Certification to BOI-Registered Companies Pursuant to BIR Revenue Memorandum Order No. 9-2000 issued by the BOI.

Under the BOI guidelines, before a BOI Certification shall be issued, the applicant is required to submit a duly notarized Detailed Export Sales Report for the year immediately preceding, showing the export invoice number, export declaration number, airway bill/bill of lading no. and date, product exported, sales volume, and value.

The CTA En Banc held that the presentation of the BOI Certification attesting that 100% of the taxpayer-refund claimant's sales volume/value were by way of exports does not sufficiently meet the requirement of the law that there be actual shipment of the goods from the Philippines to a foreign country. As required by Section 106(A)(2)(a)(1) of the Tax Code, there must be an actual shipment of the goods from the Philippines to a foreign country, where the fact of actual shipment can be evidenced by the export declaration and bill of lading or airway bill

According to the CTA En Banc, the BOI certification was issued "pursuant to the guidelines on the issuance of BOI Certification per Revenue Memorandum Order (RMO) No. 9-2000 entitled, “Tax Treatment of Sales of Goods, Properties and Services made by VAT-registered Suppliers to BOI-registered Manufacturers Exporters with 100% Export Sales.” Section 3(4) of RMO No. 9-2000 shows that the BOI certification is furnished to the suppliers of a BOI-registered buyer, which shall serve as authority for the supplier to avail of the benefits of zero-rating for its sales to said BOI-registered buyers.

Clearly, a BOI Certification is not issued to attest to a taxpayer’s export sales in connection with its claim for input VAT refund; rather, the certification serves as authority for the suppliers of the taxpayer to avail of the benefits of zero-rating on their sales to the taxpayer. Hence, for failure to prove that its export sales qualify for VAT zero-rating, the CTA denied the claim of the taxpayer for refund of its unutilized excess input VAT.

(Carmen Copper Corporation v. Commissioner of Internal Revenue, CTA Case No. EB 1461 re CTA Case No. 8418, 16 November 2017)

LN not a substitute for LOA

Under Section 6(A) of the Tax Code, after a return has been filed, the Commissioner or his duly authorized representative may authorize the examination of any taxpayer and the assessment of the correct amount of tax. Accordingly, Section 13 of the Tax Code provides that a revenue officer assigned to perform assessment functions may examine the books of accounts and accounting records of a taxpayer pursuant to a Letter of Authority (LOA) issued by the Revenue Regional Director.

In the instant case, the taxpayer received a Letter of Notice (LN) informing it that a computerized matching conducted by the BIR disclosed discrepancies in the information/data provided by third party sources against the taxpayer’s declarations per VAT returns. On the basis of the LN, the BIR issued a Preliminary Assessment Notice (PAN) and, subsequently, a Formal Assessment Notice (FAN) assessing the taxpayer for deficiency taxes.

The taxpayer argued that the BIR violated its right to due process when it based its assessment only on computerized matching of information/data provided by third party sources in computing the petitioner's tax deficiencies. The taxpayer further averred that the BIR did not issue an LOA and that the LN, by itself, is not a valid basis of tax assessment. On the other hand, the BIR argued that an assessment arising from an LN is valid even if it is not covered by an LOA.

The CTA held that while there was an LN issued by the BIR, it cannot be considered the LOA required by law. In relation to this, the CTA cited the case of

Medicard Philippines Inc. vs. Commissioner of Internal Revenue (G.R. No. 222743, 05 April 2017), where the Supreme Court (SC) held that the LN cannot be converted into an LOA. According to the SC, the LOA addressed to a revenue officer is specifically required under the Tax Code before an examination of a taxpayer may proceed, while an LN is not found in the Tax Code and is only for the purpose of notifying the taxpayer that a discrepancy is found based on the BIR's RELIEF System.

Moreover, an LOA is valid for only 30 days from date of issue, while an LN has no such limitation. It also pointed out that an LOA gives the revenue officer only a period of 10 days from receipt of LOA to conduct his examination of the taxpayer, whereas an LN does not contain such limitation. According to the SC, an LN is entirely different from an LOA and serves a different purpose.

Hence, considering that no LOA was issued, the deficiency taxes resulting from the unauthorized examination and assessment of the taxpayer's tax liability was nullified by the CTA.

(Catering Professionals Inc. v. Commissioner of Internal Revenue, CTA Case No. 8852, 28 November 2017)

New LOA required on reassignment of tax investigation

Under Section (IV)(F)(2)(e) of Revenue Memorandum Order (RMO) 08-06, where both the revenue officer (RO) and the group supervisor (GS) have resigned/retired or transferred to another Revenue Region (RR), the case shall be reassigned to another RO under the supervision of another GS within the same Revenue District Office (RDO). In case of reassignment, a memorandum to that effect shall be issued by the head of the investigating office to the concerned taxpayer and the concerned RO and/or GS.

Moreover, under Section II (7.1) of RMO 62-10, a Memorandum of Assignment (MOA) with a system-generated number shall be issued in case of assignment to the original RO of returned cases by the reviewing office and reassignment to another RO of returned cases in case of resignation/retirement/transfer of the original RO.

In the instant case, the examination of the taxpayer's books of accounts and other accounting records was authorized under an LOA that specifically named the ROs who will conduct the examination. However, the ROs who actually conducted the investigation and examination of the taxpayer’s books of accounts and other accounting records were different from those named in the LOA. According to the CTA, there is nothing in the records showing that the new ROs were authorized, by way of an LOA, to audit the taxpayer.

The BIR argued that there is no need for the issuance of a new LOA if the audit examination was merely reassigned to another revenue officer or group supervisor. The BIR cited Section (IV)(F)(2)(e) of RMO 8-06 and Section II (7.1) of RMO 62-10.

In its decision, the CTA held that RMO 8-06, which was cited by the BIR, contemplates a situation where reassignment is a consequence of transfer, resignation, or retirement of both the original RO and the GS. In the instant case, there is no showing that there was a transfer, resignation, or retirement of both the original RO and the GS assigned under the LOA.

Moreover, the CTA held that the pertinent provision of RMO 62-10 provides the propriety of a reassignment for the continuation of an audit investigation to another RO due to resignation, retirement, or transfer of the original RO. Considering that the reassignment of the audit investigation does not conform to the BIR's own RMOs, i.e., there is no transfer, resignation, or retirement of both the original RO and the GS, or the RO alone, the CTA cancelled the deficiency tax assessment, which resulted from an audit examination conducted without authority.

(Ithiel Corporation v. Commissioner of Internal Revenue, CTA Case No. 8689, 17 November 2017)

SEC Issuance

Minimum public float requirement for IPOs increased to 20%

The Securities and Exchange Commission (SEC) increased the minimum public ownership (MPO) requirement to 20% for all covered companies, that is, companies applying for the registration of its shares of stocks for purpose of conducting an initial public offering (IPO).

All covered companies filing a registration statement and with intention to list their shares for trading in an exchange shall apply for registration with a public float that meets the 20% MPO requirement. The public float of the company refers to the portion of the issued and outstanding shares that are freely available and tradeable in the market and are non-strategic in nature or those not meant for the purpose of gaining substantial influence on how the company is being managed. For this purpose, significant holdings of 10% or more of the total issued and outstanding shares of the company are considered strategic and, thus, excluded from the public float of the company.

A covered company should establish and implement an internal policy and procedure to monitor its MPO and shall immediately report to the SEC within the next business day if its public float has fallen below 20%. In case the MPO of a covered company falls below 20% at any time after registration, the company shall bring the public float to at least 20% within a maximum period of 12 months from the date of such fall. In this regard, the covered company shall submit to the SEC within 10 days after knowledge of the deficiency in its MPO a time-bound business plan describing the steps that the company will take to bring the public float to at least 20% within the maximum period of 12 months from the date of decline.

Non-compliance shall subject the company to administrative sanctions, including the initiation of suspension and/or revocation proceedings against the listed company's registration statement.

(SEC Memorandum Circular No. 13, series of 2017, 28 November 2017)

For inquiries, please contact:

Walter L. Abela Jr.
Tax Partner
wabela@deloitte.com
+63 2 581 9034

Richard R. Lapres
Tax Partner
rlapres@deloitte.com
+63 2 581 9044

Alvin Noel R. Saldana
Tax Principal
asaldana@deloitte.com
+63 2 581 9046

Get in touch