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Tax News
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BIR Issuances
BIR Freedom of Information Manual

The Bureau of Internal Revenue (BIR) issued the Freedom of Information (FOI) Manual, which provides the following general procedures for filing and processing requests for access to information directed at the BIR pursuant to Executive Order No. 2, Series of 2016.

1. An FOI Receiving Officer (FRO), with a rank lower than Revenue Officer IV or its equivalent, shall be designated at BIR offices to receive all FOI requests and check compliance with the following requirements:

a. The FOI request must be in writing.

b. The FOI request shall state the name and contact information of the requesting party, as well as valid proof of identification or authorization.

c. The FOI request should reasonably describe the information requested.

d. The reason for, or purpose of, the request for information should be specifically or adequately and sufficiently described. The general averments of the purpose such as “for information”, “for research”, “for legal purpose”, or other similarly worded purpose shall not be considered to have met the requirements of specificity.

2. The requesting party should attach to his or her FOI request at least two valid government I.D.s containing the photograph and signature of the requesting party, and if the requesting party is a juridical entity, the original or certified true copy of the board resolution, corporate secretary’s certificate, or other acceptable written document showing the authority of the representative to act on behalf of the juridical entity.

3. The FOI request may be made through registered mail or electronic mail (e-mail) as long as the requesting party provides all the required information and attaches the supporting documents.

4. In case the requesting party chooses to file an FOI request in separate written request by e-mail, such request shall be accompanied by a duly filled up standard FOI Request Form.

5. The BIR must respond to the request promptly -- within 15 working days following the date of receipt of the request. A working day is any day other than a Saturday, Sunday, or a day that has been declared a national public holiday in the Philippines. Should further details be needed to identify or locate the requested information, the 15 working days will commence the day after the BIR receives the required clarification from the requesting party. If no clarification is received from the requesting party after 60 calendar days, the request shall be closed.

6. If the information requested requires extensive search of the BIR’s office records facilities, examination of voluminous records, the occurrence of fortuitous event, or other analogous cases, the FRO shall inform the requesting party of the extension, setting forth the reasons for such extension. The extension shall not exceed 20 working days, which shall be on top of the mandated 15 working days to act on the request, unless exceptional circumstances warrant a longer period.

7. In case of denial of request wholly or partially, the FRO shall, within the prescribed period, notify the requestor of the denial in writing. A party whose request for access to information has been denied may file an appeal to the FOI Appeals Authority within 15 calendar days from receipt of the notice of denial or from the lapse of the period to respond to the request. The appeal shall be decided within 30 working days; failure to decide within the 30-day period shall be deemed a denial of the appeal. The denial of the appeal of the FOI Appeals Authority shall be considered final, and the requesting party may file the appropriate judicial action in accordance with the Rules of Court.

(Revenue Memorandum Circular No. 75-2017, 22 September 2017)

Court Decisions

Offsetting of excess EWT payments against EWT due in succeeding returns

The overpayment or over remittance of expanded withholding tax (EWT) may not be used to offset or claim as credit against the EWT due of the taxpayer in the succeeding EWT return/s.

In the instant case, the taxpayer filed its Monthly Remittance Return of Creditable Income Taxes Withheld (BIR Form No. 1601-E or EWT Return) for the month of July 2012. On 5 September 2012, the taxpayer filed its amended EWT return for the month of July 2012, which reflected an overpayment. In the July amended EWT return, the taxpayer indicated its intention to refund the over remittance by marking the "To be Refunded" box.

On 13 September 2012, the taxpayer filed its EWT return for the month of August 2012where it applied as credit its over remittance per July amended EWT return, and paid the balance. The BIR assessed the taxpayer for deficiency EWT due to underpayment of tax, and in its letter, the BIR explained that offsetting of EWT is not allowed. It advised the taxpayer to request, instead, for a refund of overpayment made in its July EWT return.

The Court of Tax Appeals (CTA) held that when the taxpayer offset its EWT overpayment, it availed of a remedy that is not sanctioned by law. The CTA noted that BIR Form No. 1601-E or EWT return, under Line 18 thereof, allows taxpayers to choose from any of two options provided therein in case of over remittance by marking the "To be refunded" box, or the "To be issued a [TCC]" box. Clearly, the option to carry over the excess to the subsequent month/s is not a remedy.
The CTA held that to treat the over remittance as an "advance payment" that may be claimed as credit is erroneous. Before any advance payment may be credited against the EWT due for a particular month, proof of payment, that is, Payment Form (BIR Form No. 0605) must be attached.

The CTA took notice that BIR Form No. 0605 is accomplished every time a taxpayer pays taxes and fees that do not require the use of a tax return, such as second installment payment for income tax, deficiency tax, delinquency tax, registration fees, advance payments, deposits, installment payments, etc. In case of over remittance, BIR Form No. 0605 is not accomplished. In fact, the only proof of excess remittance is BIR Form No. 1601-E and the payment confirmation from the BIR. Clearly, the "advance payments made" contemplated under Line 15B of BIR Form No. 1601-E does not refer to an over remittance of EWT made from previous month/s.

(New Coast Hotel, Inc. v. Commissioner of Internal Revenue, CTA Case No. 9146, 19 September 2017)

Coverage of the 15% final tax on income of individuals employed by petroleum contractors and subcontractors

Under Section 25(E) of the Tax Code, an alien individual who is a permanent resident of a foreign country and Filipino employed and assigned in the Philippines by a foreign service contractor or by a foreign service subcontractor engaged in petroleum operations in the Philippines shall be liable to 15% final withholding tax (FWT) on their salaries, wages, annuities, compensation, remuneration and other emoluments, such as honoraria and allowances, received from a petroleum contractor or subcontractor.

Pursuant to Section 3 of Presidential Decree No. 87, the term "petroleum operations" means searching for and obtaining petroleum within the Philippines through drilling and pressure or suction or the like, and all other operations incidental thereto.

The CTA held that pursuant to Section 25(E) of the Tax Code, the following individuals qualify for the preferential 15% FWT rate:

a. Alien individuals and Filipinos employed by a foreign service contractor that is under a service contract with the Philippine government to engage in petroleum operations in the Philippines

b. Alien individuals and Filipinos employed by a foreign service contractor of a petroleum service contractor

In the instant case, a non-resident foreign corporation organized under the laws of Australia entered into a contract with a Singapore-based company for the latter to recruit and provide fully skilled, competent, and experienced personnel for the former's gas field project in Australia. In this regard, the Singapore-based company employed foreign and Filipino nationals to perform its obligations under the contract.

Similarly, a domestic corporation contracted the Singapore-based company to provide specialist staff support solutions for its offshore high-level key positions. Thus, the Singapore-based entity also employed foreign nationals to render services to the domestic company. The domestic company is engaged in the business of providing specialty technical and consultation services to foreign or domestic projects.

The CTA held that neither the Australian company nor the domestic company qualifies as a foreign service contractor engaged in petroleum operations in the Philippines, as defined in Section 3 of PD No. 87, based on the following

considerations: (1) the Australian company is not under any service contract with the Philippine government to engage in petroleum operations within the Philippines; and (2) assuming for the sake of argument that the Australian company entered into a service contract with the government: (a) the project is in Australia; and (b) the construction and assembly of portions of oil rigs in the Philippines do not fall under the definition of "petroleum operations" under PD No. 87. Moreover, the CTA stressed that the law requires a "foreign service contractor". Hence, the determination of whether the domestic company is a qualified petroleum service contractor is irrelevant.

Considering that both the Australian and domestic company do not qualify as foreign service contractors engaged in petroleum operations within the Philippines, the income payments made to employees who were assigned in the Philippines for the projects of the Australian and domestic company do not qualify for the 15% preferential income tax treatment for employees of foreign service contractors and subcontractors engaged in petroleum operations in the Philippines, under Section 25(E) of the Tax Code, as amended.

(NES Global Talent Limited v. Commissioner of Internal Revenue, CTA Case No. 9065, 6 September 2017)

50% surcharge applies only in case of willful failure to file tax return

Under Section 248(B) of the Tax Code, in case of willful neglect to file the return within the period prescribed by the Tax Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be 50% of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud.

In the instant case, the taxpayer is a non-stock, non-profit institution organized as a social welfare institution. The BIR assessed the taxpayer for documentary stamp tax (DST) and value-added tax (VAT) deficiencies for its failure to pay DST on its loan agreements and VAT on interest income it earned from its social lending activity. In addition, the BIR imposed a 50% surcharge for the taxpayer's failure to file VAT and DST returns.

The taxpayer appealed the BIR assessment with the CTA, which denied its petition for review. In response, the taxpayer filed a motion for reconsideration with the CTA in Division, and in its amended decision, the CTA in Division upheld its previous ruling but modified the same insofar as the 50% surcharge imposed therein, reducing it to 25%. The taxpayer filed its petition for review before the CTA En Banc to assail the amended decision promulgated by the Court in Division.

In its response, the BIR argued that the taxpayer did not file its VAT and DST returns for several instances, which shows that the non-filing was willful and

deliberate thus warranting the application of Section 248(B) of the Tax Code. On the other hand, the taxpayer contended that it was not able to file its VAT and DST returns on the belief that it is not subject to VAT and DST.

The Court En Banc found that the CTA in Division correctly reduced the rate of surcharge imposed from 50% to 25% of the amount of deficiency taxes due, in accordance with Section 248(B) of the Tax Code. It held that there is no clear and convincing proof that the taxpayer's failure to file its VAT and DST returns was done willfully and deliberately.

The Court En Banc maintained that it cannot simply subscribe to the Commissioner of Internal Revenue's (CIR) view that the taxpayer's failure to file VAT and DST returns for several instances automatically makes such omission willful and deliberate. According to the CTA En Banc, the facts show that the taxpayer erroneously believed that it is not subject to VAT and DST. At most, the CTA En Banc held that only negligence or mistake may be imputed to the taxpayer for not ascertaining the need to file returns.

As regards to the CIR's contention that the final assessment notice for deficiency VAT and DST containing the imposition of 50% surcharge is prima facie presumed correct and made in good faith, the CTA held that it is enough to state that the presumption of correctness of tax assessment does not negate the burden of the CIR to prove, by clear and convincing evidence, the fraudulent intent required for the imposition of the 50% surcharge on the ground of willful neglect to file return. According to the CTA En Banc, it is well settled that in order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption. In the present case, the presumption of correctness of the FAN cannot be based on the presumption that the failure to file return for several instances automatically makes such omission willful and deliberate.

(Tulay Sa Pag-Unlad, Inc. v. Commissioner of Internal Revenue, CTA En Banc No. 1478 re CTA Case No. 8480, 15 September 2017)

Services rendered outside the economic zone by VAT-registered taxpayers in the customs territory to PEZA enterprises subject to 0% VAT

Under Section 108(B)(3) of the Tax Code, services performed in the Philippines by VAT-registered persons to persons or entities enjoying exempt status under special laws or international agreements to which the Philippines is a signatory are subject to 0% VAT. In relation to this, Section 8 of Republic Act No. 7916 (Philippine Economic Zone Authority, or PEZA, Law) provides that sales made by a supplier in the customs territory to a purchaser in the economic zone shall be treated as an exportation from the customs territory.

In the case of Commissioner of Internal Revenue v. Toshiba Information Equipment (Phils.), Inc. (G.R. No. 150154, 9 August 2005), the Supreme Court (SC) held that by virtue of Section 8 of Republic Act (RA) No. 7916, as amended, PEZA-registered enterprises located within an economic zone are considered VAT-exempt entities. According to the SC, the exemption of PEZA entities from the imposition of VAT flows from the legal fiction established in the law that deemed economic zones as foreign territories. Accordingly, the sales made by suppliers from a customs territory to a purchaser located within an economic zone will be considered exportations.

Moreover, in the case of Commissioner of Internal Revenue v. Sekisui Jushi Philippines, Inc., (G.R. No. 149671, 21 July 2006), the SC held that while an economic zone is geographically within the Philippines, it is deemed a separate customs territory and is regarded in law as foreign soil. Thus, sales by suppliers from outside the borders of the economic zone to the customs territory are deemed as exports and treated as export sales subject to 0% VAT.

Applying the cross-border doctrine to the sale of goods, properties, and services to and from the economic zones, the BIR issued Revenue Memorandum Circular (RMC) No. 74-99 (15 October 1999), which provides that sales made by a VAT-registered supplier from the customs territory to a PEZA-registered enterprise shall be treated as subject to 0% VAT under the cross-border doctrine.

In the instant case, the taxpayer is an executive search firm that was engaged by a PEZA-registered enterprise to search for senior and mid-level executives. The taxpayer treated the service it rendered to the PEZA-registered enterprise as a VAT zero-rated sale of service. The BIR assessed the taxpayer for deficiency VAT on its sale of service to the PEZA-registered enterprise.

The BIR contended that the taxpayer’s sale of services does not qualify as VAT zero-rated sale since the services were rendered outside the economic zone and were not connected directly to the activity of the PEZA-registered enterprise. The BIR pointed out that the taxpayer conducted its applicants’ testing and interviews within its office premises and/or some private hotels and restaurants within Metro Manila and not within any economic zone.

Moreover, according to the BIR, the sending of pre-qualified applicants is a service activity that is not directly involved in the manufacture, assembly, or production of final goods or services being provided by its PEZA client, and the services being provided by the taxpayer do not directly vary with the changes in the revenue or some other measure of the registered activity of the PEZA-registered enterprise.

The CTA held that a VAT-registered person’s sale of services within the Philippines to PEZA-registered entities operating within the economic zone is subject to 0% VAT. According to the CTA, the BIR's position that a sale of service by a VAT-registered person should be rendered within the ecozone and should be directly connected to the activities of a PEZA-registered enterprise is not only contrary to

the plain wording of the law but also to established jurisprudence, and even to the BIR's own revenue issuance.

While the CTA acknowledged that in Commissioner of Internal Revenue v. American Express International Inc. (G.R. No. 152609, 29 June 2005), the SC stated that the tax situs of a zero-rated service is the place where the service is rendered, it noted that the SC decision discussed the situs of "zero-rated" service and not the situs of VAT for a sale of service, contrary to the BIR's assertion.

According to the CTA, the import of the decision is that the service must be performed within the Philippines in order for the latter to acquire jurisdiction to subject the sale transaction to VAT. However, it does not mean that the place where the service is rendered will determine whether VAT on the sale of service will be imposed at 0% or at 12%. In other words, VAT-registered persons must perform their services in the Philippines before such transaction may qualify for VAT zero-rating.

As regards the other condition that the sale of service should be directly connected to the registered activity/ies of PEZA-registered enterprises, the CTA held that the VAT exemption of PEZA-registered enterprises flows from the legal fiction establishing ecozones as foreign territories under Section 8 of RA 7916, as amended, and not by virtue of the special tax incentives granted to them under Section 24 of the same law. As such, there is no need to prove that the sale of services to a PEZA-registered enterprise is directly connected to its registered activities. What is important is that the PEZA-registered enterprise availing of the services is located and operating within the ecozone.

The CTA emphasized that the effective zero-rating of goods and services is intended to benefit the purchaser who, not being directly and legally liable for the payment of VAT, will ultimately bear the burden of the tax shifted by the buyers. Accordingly, for as long as the PEZA-registered purchaser is located and operating within the economic zone, sellers from the customs territory cannot pass on any output VAT to it for any sale of goods or services destined for consumption within the economic zone.

(ZMG Ward Howell, Inc. v. Commissioner of Internal Revenue, CTA Case No. 9004, 18 September 2017)

VAT on reimbursement of shared cost

Reimbursements-at-cost for shared expenses such as utilities and other maintenance expenses of the leased areas do not constitute income but are amounts held in trust by the lessor for the service providers. However, the CTA held that in order for reimbursements-at-cost not to form part of the taxable gross receipts of the lessor, the input tax pertaining to the share of the tenants on the shared cost should not be claimed, the VAT should not be passed on to the tenants, and the same should be receipted separately using non-VAT official

acknowledgment receipts.

In the instant case, the BIR assessed the taxpayer for deficiency VAT on the amount it collected from its tenants after advancing the payment of the utility bills for electricity and water. The taxpayer argued that the amounts it billed to its tenants were purely at cost and, therefore, should not form part of gross receipts subject to VAT.

The CTA noted that when the utility expenses advanced by the taxpayer were subsequently billed to its tenants, the taxpayer charged not only the cost but also the 12% VAT billed by the service providers. Likewise, the taxpayer claimed and recognized in its books the entire input VAT on the electric and water utility billings, including the input VAT on the share of the tenants in the utilities expense. The CTA further noted that upon collection of these expenses from its tenants, the taxpayer issued VAT official receipts instead of non-VAT official acknowledgment receipts.

The CTA held that while the amounts subsequently billed by the taxpayer to its tenants were purely at cost, the fact that the taxpayer issued VAT official receipts, claimed the input tax on the share of the tenants in the utilities expense, and passed on the VAT to the tenants makes it rightfully liable to pay output VAT on the amounts collected from its tenants for the electricity and water expenses.

(Wellington Investment and Manufacturing Corporation v. Commissioner of Internal Revenue, CTA Case No. 8726, 14 September 2017)

Immediacy test for IAET purposes

Under Section 29 of the Tax Code, a 10% improperly accumulated earnings tax (IAET) is imposed on every corporation formed or availed for the purpose of avoiding the income tax with respect to its shareholders or the shareholders of any other corporation, by permitting earnings and profits to accumulate instead of being divided or distributed. However, Section 29(D) and (E) also provide that accumulation of earnings for reasonable needs of the business are not subject to the IAET.

Under Section 3 of Revenue Regulations (RR) No. 02-01, the term "reasonable needs of the business" includes, among others, earnings reserved for definite corporate expansion projects or programs requiring considerable capital expenditure as approved by the Board of Directors or equivalent body, and earnings reserved for compliance with any loan covenant or pre-existing obligation established under a legitimate business agreement. To determine the reasonable needs of the business in order to justify an accumulation of earnings, the BIR adheres to the "immediacy test", which means the immediate needs of the business, including reasonably anticipated means.

The Cyanamid Case (Cyanamid Philippines, Inc. v. Court of Appeals, et. al., G.R. No. 108067, 20 January 2000) and Section 7 of RR 2-01 provide that in order for the accumulated profits to be categorized under reasonable needs of the business, the controlling intention of the taxpayer, i.e., definiteness of plan, i.e., not merely speculative or indefinite, coupled with action taken towards its consummation, must be manifest at the time of accumulation, not subsequently, which are mere afterthoughts. Further, the accumulated profits must be used within a reasonable time after the close of the taxable year.

In the instant case, the BIR assessed a company engaged in real estate business for deficiency IAET. The company argued that it should not be subject to IAET since its accumulated earnings will be used for its reasonable needs considering its plan to rehabilitate its building and upgrade its facilities. To support its claim, it presented various secretary's certificate to substantiate the approval of board resolutions on appropriation of its retained earnings as standby funds for the implementation of its contemplated projects.

The BIR maintained that while there was a board resolution to increase the appropriated retained earnings to serve as standby funds for the implementation of its projects, the mere appropriation of retained earnings, without implementation, will fail the immediacy test.

The CTA noted that the taxpayer has continuously appropriated its retained earnings without evidence of implementation of its contemplated projects. The company explained that the increase in total equity and the increase in total non-current assets are clear indications that non-current asset upgrading is being undertaken, which disproves the allegation that no concrete plan as to the disposition of excess profits was done by the company.

As per evaluation of the CTA, while the investment in properties account shows additions in building improvements and office equipment and furniture, there are no additions in the building account of the company. According to the CTA, there is no indication that the management has undertaken any action to prove that the contemplated project, i.e., the construction of a building, has taken place.

With regard to the various secretary's certificate presented to support its contention that the Board of Directors approved the appropriation of its retained earnings to proceed with the implementation of its contemplated projects, the CTA noted that the Secretary's Certificate reveals no clear information regarding the alleged plan for a specific project. Hence, while the CTA found that the taxpayer had a contemplated expansion project, such expansion project was merely speculative or indefinite because the expansion projects will be pursued as soon as the taxpayer’s finances permit. As such, the CTA held that the company failed to pass the "Immediacy Test" and is, therefore, liable to pay the deficiency IAET.

(Opulent Landowners, Inc. v. Commissioner of Internal Revenue, CTA Case No. 8956, 19 September 2017)

Bureau of Customs (BOC) Issuance

Transfer of Account Management Office (AMO) to the Office of Deputy Commissioner, Intelligence Group (IG)

To facilitate trade in a secured manner and ensure that only legitimate importers and brokers are accredited by the Bureau of Customs (BOC), the Account Management Office (AMO) was transferred from the Legal Service, Revenue Collection Monitoring Group (RCMG) to the Intelligence Group (IG), under the direct supervision and control of the Deputy Commissioner, IG.

All organic employees of the AMO shall return to their mother units, while all pending revocation and suspension cases of importers' and brokers' accreditation shall continue to be heard by the Legal Service, RMG.

(Customs Memorandum Order No. 17, 2017, 11 September 2017)

Bureau of Local Government Finance Opinion

Treatment of "Revenue from Equity in Net Earnings of an Associate" for LBT purposes

Under Section 131(n) of the Local Government Code (LGC), gross sales or gross receipts of an establishment subject to local business tax (LBT) shall include the total amount of money or its equivalent representing the contract price, compensation or service fee, including the amount charged or materials supplied with the services and deposits or advance payments actually or constructively received during the taxable quarter for the services performed or to be performed for another person, excluding discounts if determinable at the time of sales, sales return, excise tax, and VAT.

In the instant case, a holding company that owns 51% of a tanker owning company was assessed for deficiency LBT on its "revenue from equity in net earnings of an associate" as appearing in its financial statements. The holding company argued that it should not be subject to LBT on "revenue from equity in net earnings of an associate" since the amount appearing in its financial statements was meant to comply with the accounting standards and does not fall under the category of "gross sales or receipts" subject to LBT as provided under the LGC.

It further contended that as a holding company, it is not engaged in any business that generates gross receipts, but derives income solely from passive investments in the form of interest and dividends.

The Bureau of Local Government Finance (BLGF) opined that the "revenue from equity in net earnings of an associate" as appearing in the holding company's

financial statements cannot be considered gross sales or receipts subject to LBT. As discussed by the BLGF, the alleged revenue appearing as "revenue from equity in net earnings of an associate" in the holding company's financial statements are mere "paper entries", which are mandated by accounting rules considering that it owns 51% of the tank owning company.

(BLGF Opinion dated 14 July 2017, issued to Petrolift Holdings, Inc.)

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

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