TAX Insights

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What's Inside...

INSIGHTS is a monthly publication of BDB LAW to inform, update and provide perspectives to our clients and readers on significant tax-related court decisions and regulatory issuances (*includes BIR, SEC, BSP and various government agencies*).

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HIGHLIGHTS for November 2021

HIGHLIGHTS

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- BSP Circular Letter No. 2021-078, October 15, 2021 – This provides a reminder to all BSFIs to consider the Anti-Money Laundering Council's (AMLC) "Analysis of Suspicious Transaction Reports (STR) with Possible Links to Tax Crimes" and "Real Estate Sector: A Money Laundering/Terrorism Financing/Proliferation Financing (ML/TF/PF) Assessment"
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COURT OF TAX APPEALS

DECISION HIGHLIGHTS

The BIR must state in writing the legal and factual basis of his action in refund claims

This is an appeal from the adverse decision of the BIR partially denying the taxpayer's claim for refund of its alleged unutilized input value-added tax (VAT).

In partially granting the taxpayer, the Court ruled that the mandate of giving the taxpayer a notice of the facts and laws on which the assessments are based should not be mechanically applied. Accordingly, substantial compliance with Section 228 of the 1997 National Internal Revenue Code (NIRC), as amended, is allowed, provided that the taxpayer would be later apprised in writing of the factual and legal bases of the assessment to enable him or her to prepare for an effective protest. Further, the Court held that the assessment cases are equally applicable to refund claim cases considering that the provisions of Section 228 of the 1997 NIRC, as amended, is similarly worded as the present Section 112(C) of the same law in that both provisions require the BIR to state in writing the legal and factual basis of his action.

Here, since the taxpayer was able to intelligently file its Petition for Review and the Court was even convinced to partially grant the same, the BIR is deemed to have substantially complied with the aforementioned requirement. (*Atlassian Philippines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 10011, October 6, 2021*)

The mere presentation of registry receipts is not sufficient to establish receipt of the mailed letter.

This is an assessment case for Altimax's alleged deficiency IT, VAT, and EWT for the taxable year 2013. Altimax argued that the assessments for deficiency taxes against it are null and void because it did not receive the PAN and FLD/FAN, as required under the law and regulations.

In ruling for the taxpayer, the Court held that while a mailed letter is deemed received by the addressee in the course of mail, this is merely a disputable presumption subject to controversion, the direct denial of which shifts the burden to the sender to prove that the mailed letter was, in fact, received by the addressee. As such, the mere presentation of registry receipts is not sufficient. It is still required that the said registry receipts be signed by the concerned taxpayer's duly authorized representative, and that the signatures are identified and authenticated.

Here, no signature whatsoever appears on the subject Registry Receipts. Thus, the fact of service to, or receipt of, the taxpayer of the subject PAN and FAN/FLD was never established by the BIR. *(Altimax Broadcasting Co., Inc. v. Commissioner of Internal Revenue, CTA Case No. 10044, October 6, 2021)*

COURT OF TAX APPEALS

DECISION HIGHLIGHTS

Local business tax is payable only where business is conducted, or only where there is a trade or commercial activity regularly engaged in by the taxpayer

This is an appeal on the decision of the RTC – Branch 58 of Makati declaring Eastbay not liable of local business tax. Eastbay argued that being a mere administrative office, despite its classification as Service Establishment - Other Independent Contractor as argued by the City of Makati, it is not subject to local business tax and that it is the actual conduct of business that is the determining factor in subjecting the same to such tax.

The Court held that the pertinent local business tax is payable by every separate or distinct establishment or place only where business is conducted, or only where there is a trade or commercial activity regularly engaged in by the taxpayer, as a means of livelihood or with a view to profit. Furthermore, a branch or sales office may only be treated as such when there is trade or commercial activity regularly engaged in by the taxpayer, as a means of livelihood or with a view to profit, in such establishment or place.

Here, there is no showing that the taxpayer's Makati Office may be treated as a branch or sales office, or as a fixed place, where business transactions were held for the subject period, no valid levy or collection of local business taxes may be made by the City of Makati against the taxpayer. *(The City of Government of Makati and The City Treasurer of Makati City. v. Eastbay Resorts, Inc., CTA AC No. 218, October 12, 2021)*

Right to due process is not violated when the issuance of the FAN and FDDA was not preceded by the issuance of an amended PAN.

This is an assessment case for United International Picture's alleged deficiency IT, VAT, EWT, and FWT for the taxable year 2010. The United International Picture argued that its right to due process was violated when the BIR issued the FAN and the FDDA without the issuances of an amended PAN.

The Court held that there is nothing in Section 228 of the NIRC of 1997, as amended, and in RR No. 12-99, as amended, which requires the issuance of an amended PAN.

Here, the taxpayer received the PAN on September 18, 2013 which laid out the initial findings of the BIR. The taxpayer filed its response to the PAN on October 13, 2013. On August 11, 2014, the taxpayer received the FAN with attached Details of Discrepancies and Assessment Notices. The attached Details of Discrepancies states that upon further verification by the BIR, it concluded that pursuant to RR No. 2-98, the withholding tax rate applicable was five percent (5%) instead of two percent (2%) as previously used in the original investigation. The change in the tax rate was based on the relevant provision of RR No. 2-98. The FAN states in writing the facts and the law on which the EWT assessment was based. Thus, the taxpayer was given the opportunity to contest the application of the five percent (5%) EWT rate. (*United International Pictures Aktiebolag v. Commissioner of Internal Revenue, CTA Case No. 9699, October 14, 2021*)

COURT OF TAX APPEALS

DECISION HIGHLIGHTS

The collection of DST from an FTAA contractor is merely deferred and not exempted.

This is a refund claim on alleged erroneously paid DST by FCF Minerals. FCF Minerals argued that the subject transaction falls within the period of exemption from DST payment, among others.

The Court held that Sections 81 and 97 of RA No. 7942 do not speak of any tax exemption. Neither is it stated that the concerned FTAA contractor is not liable for any tax at all at any given time. In fact, it is even clear that failure to pay taxes, inter alia, for two (2) consecutive years shall cause the cancellation of the pertinent FTAA.

The last paragraph of Section 81 of RA No. 7942 also created an exception to Section 200 of the NIRC of 1997, as to when the DST should be paid. Thus, unlike in the case of taxpayers who are required to pay DST within 10 days after the close of the month when taxable document was made, signed, issued, accepted, or transferred, the collection thereof from an FTAA contractor is merely deferred, or until it has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive. *(FCF Minerals Corporation v. Commissioner of Internal Revenue, CTA Case No. 10003, October 18, 2021)*

The tax exemption privileges of PAGCOR does not extend to corporations whose contractual relationship with PAGCOR is not in connection with operations of casinos(s).

On December 5, 2012, PAGCOR issued in favor of AB Leisure Exponent, Inc. a Renewal of the Term of the Authority to Operate Traditional and Electric Bingo Games. The BIR then assessed AB Leisure for revenues earned from bingo games. AB Leisure argued that its revenues from bingo games are exempt from VAT under PD 1869.

The Court held that the tax exemption privileges of PAGCOR under PD No. 1869 inures to the benefit of and extend: (1) to corporations, associations, agencies, or individuals with whom PAGCOR or operator has any contractual relationship in connection with the operation of casino(s) authorized under PD No. 1869; and (2) to those receiving compensation or other remuneration from PAGCOR or operator as a result of essential facilities furnished and/or technical services rendered to PAGCOR or operator.

Here, there is no indication that the taxpayer's contractual relationship with PAGCOR is in connection with the operations of a casino, or casinos, authorized to be conducted under PD No. 1869. What has been established is merely that the taxpayer has been given by PAGCOR a Renewal of the Term of the Authority To Operate Traditional And Electric Bingo Games dated December 5, 2012 in certain malls in Metro Manila, and not an authority to operate a casino or casinos. *(AB Leisure Exponent, Inc. v. Commissioner of Internal Revenue, CTA Case No. 9620, October 18, 2021)*

COURT OF TAX APPEALS

DECISION HIGHLIGHTS

When the parties are in pari delicto, both parties are estopped from questioning the validity of the waiver.

This is an appeal on the ruling of the CTA in Division declaring that the waiver is void and did not extend the three (3) year period to assess. The BIR argued that the first waiver was not defective, and it was duly notarized by a notary public.

The Court held that the general rule is that when a waiver does not comply with the requisites for its validity specified under RMO No. 20-90 and RDAO No. 01-05, it is invalid and ineffective to extend the prescriptive period to assess taxes. However, the following reasons are considered an exception to the general rule: (1) The parties in this case are in pari delicto or "in equal fault."; (2) The Court has repeatedly pronounced that parties must come to court with clean hands; (3) The taxpayer is estopped from questioning the validity of its Waivers; and (4) The Court cannot tolerate this highly suspicious situation.

Here, both parties are equally remiss in ensuring compliance with legal requirements. The BIR was negligent and failed to exact compliance from respondent of its own rules. On the other hand, the taxpayer is estopped from questioning the validity of the subject Waivers because the BIR delayed the issuance of an assessment by virtue of the Waivers executed by the taxpayer. Therefore, both parties are estopped from questioning the validity of the subject waivers *(Commissioner of Internal Revenue v. Ayala Land International Sales, Inc., CTA EB No. 2017, October 19, 2021)*

Prior approval by the DENR Secretary of taxpayer's pre-operating expense is a requirement to enjoy the incentives under the FTAA and the Mining Act.

This is an appeal on the decision of the CTA in Division requiring prior approval by the DENR Secretary of taxpayer's pre-operating expense as condition to the entitlement of the incentives under the FTAA and the Mining Act.

The Court held that DAO No. 99-56 is applicable to the taxpayer. Under the FTAA and the implementing rules and regulations of the Mining Act, the taxpayer is allowed to recover its pre-operating expenses before the government collects its share but subject to certain conditions, among which include the following: (1) Maximum recovery period of five years, or at a date when the aggregate of the Net Cash Flow from the Mining Operations is equal to the aggregate of its Pre-operating expenses, reckoned from the Date of Commencement of Commercial Production, whichever comes first; (2) Approval of pre-operating expenses by the Secretary of the DENR, upon recommendation of the Director of the Mines and Geosciences Bureau; and (3) Verification of actual expenditure by an independent audit recognized by the Government and chargeable against the Contractor.

Here, there is no compelling reason not to apply DAO No. 99-56 which was already in effect even before the subject taxable year. As such, the absence of the required approval by the DENR Secretary of its pre-operating expenses bars it from recovering the same. (*OceanaGold (Philippines), Inc v. Commissioner of Internal Revenue, CTA EB No. 2216, October 21, 2021)*

COURT OF TAX APPEALS

DECISION HIGHLIGHTS

The Phrase "Other Taxes" in RE Law (R.A. No. 9513) include the Special Education Fund (SEF).

This is an appeal on the Decision and Resolution rendered by the Central Board of Assessment Appeals. The City Treasurer of Davao del Sur argued that the 2% tax rate imposed on the taxpayer is valid and in accordance with the LGC as well as RA No. 9513. The taxpayer, however, argued that it is only liable for realty taxes at the maximum rate of 1.5%.

The Court held that interpreting the RE Law in a manner which allows the imposition of an additional 1% tax for SEF on top of the capped rate of 1.5% special realty tax creates a patent absurdity. This would result in allowing the Provincial Treasurer to apply the maximum special rate for RE machinery and equipment of 1.5% separately for the RPT and the SEF levy, thereby making taxpayer liable for an aggregate property tax rate of 2% prescribed under the LGC.

Thus, to interpret the phrase 'other taxes' in Section 15(c) of the RE Law as exclusive of the SEF runs contrary to the intent of Congress to provide fiscal incentives to RE Developers in the form of special property tax rates (on equipment and machinery that are actually and exclusively used for RE facilities) capped at 1.5% of the original cost, less accumulated normal depreciation or net book value. (*Ellica v. Hedcor Sibulan, Inc., CTA EB No. 2349, October 21, 2021*)

The filing of judicial claim for refund a day after the filing of admin claim for refund does not comply with the requirement of exhaustion of administrative remedies.

This is a refund claim on the excise taxes imposed imported liquor and/or wine. The BIR argued that the taxpayer failed to exhaust administrative remedies which is a condition precedent that renders the Petition for Review dismissible. It pointed out that the judicial claim for refund was filed barely 1 day from the filing of the administrative claim for refund, thus, it was not given an opportunity to ascertain the veracity and validity of the claim.

The Court held that the requirement that administrative remedies be exhausted is based on the doctrine that in providing for a remedy before an administrative agency, every opportunity must be given to the agency to resolve the matter and to exhaust all opportunities for a resolution under the given remedy before bringing an action in, or resorting to, the courts of justice.

Here, while both claims were filed within the 2-year prescriptive period, the administrative claim was filed with the BIR merely days before the lapse of the two (2) year period and that the judicial claim with the Court immediately followed the next day. Certainly, with only 1 day given respondent, he was not "afforded a complete chance to pass upon the matter" nor "given an opportunity to act and correct the errors committed in the administrative forum." *(Philippine Airlines, Inc. v. Commissioner of Internal Revenue, CTA Case No. 9990, October 21, 2021)*

COURT OF TAX APPEALS

DECISION HIGHLIGHTS

When a LOA authorizes an examination for a taxable year and "unverified prior years," it shall be valid only as to the declared taxable year.

This is an assessment case on the alleged deficiency IT, and VAT of Villarica for taxable years 1998, 2000, 2001, 2006, 2007, 2008 and 2009. Villarica argued that the BIR has no authority to investigate him alleging that the LOA herein is invalid. Villarica explains that the coverage of the said instrument, specifically, "Calendar Year 2009 and unverified prior years" runs contrary to the mandate of RMO No. 43-90,91 as interpreted in the Sony case which prohibits the issuance of LOAs covering more than one taxable period.

The Court held that issuance of an LOA covering more than one taxable period is not prohibited. More so when the investigation of prior or subsequent years is necessary in order to determine the transactions or scheme employed by the taxpayer in not paying the correct taxes. However, what the guidelines prohibit is the issuance of LOAs covering "unverified prior years." Such prohibition is founded on the taxpayer's right to due process. Further, in the event an LOA is issued covering a specific taxable year and "unverified prior years", the LOA will not be rendered void in its entirety but will be valid as to the declared taxable year. *(Villarica v. Commissioner of Internal Revenue, CTA Case No. 9343, October 21, 2021)*

Neither RMC No. 76-2007 nor RMC No. 105-2016 requires payment of CGT and DST on prior transfers in case previous CARs cannot be provided.

This is a claim for refund on erroneously paid CGT and DST by the taxpayer in relation to a prior transfer of TCT Nos. T-738930, T-666646, and T-666647.

The Court held that RMC No. 76-2007 and RMC No. 105-2016 show that neither of the two provides for the payment of CGT and DST on prior transfers in case the taxpayer cannot provide a copy of previous CARs. The applicability of either circular to the taxpayer's case becomes a non-issue as neither sanctions the BIR's collection of CGT and DST on the previous transfers of real property from any party to a subsequent transaction over the same.

Here, while there is no question that the taxpayer is obligated by law to settle the CGT and DST in relation to its transactions with the borrowers, it cannot be held liable for the said taxes on the previous transfers of the subject properties to the borrowers. This is simply because the taxpayer was neither a party nor privy to the prior transactions. (*Commissioner of Internal Revenue v. East West Banking Corporation, CTA EB No. 2276, October 28, 2021*)

COURT OF TAX APPEALS

DECISION HIGHLIGHTS

Good faith reliance is sufficient justification to cancel the imposition of interest and compromise penalty.

This is an appeal on the decision of the CTA Division finding the taxpayer not liable for interest and penalty. The BIR argued that the Court in Division erred in ruling that the taxpayer is not liable to pay interest and compromise penalty on the basis of its good faith reliance on the Previous Perpetual case

The Court held that good faith and honest belief that one is not subject to tax on the basis of previous interpretations of government agencies tasked to implement the tax law are sufficient justification to delete the imposition of surcharges and interest.

Here, the taxpayer, in good faith, honestly believed that it was exempted from paying income tax relying on the Previous Perpetual case which had attained finality through a Minute Resolution issued by the Supreme Court. These facts were not disproved nor denied by the BIR. (*Commissioner of Internal Revenue v. Perpetual Succour Hospital of Cebu, Inc., CTA EB No. 2122, October 28, 2021*)

VAT zero-rated official receipts and sales invoices do not sufficiently establish that the services were indeed performed in the Philippines.

This is a claim for refund on unutilized input VAT of Nokia (Philippines) Inc. for the 3rd and 4th quarters of 2009 attributable to its zero-rated sales. Nokia argued that its VAT invoices and official receipts are sufficient to establish that the services it rendered to Nokia Finland were performed in the Philippines.

The Court held that the VAT zero-rated official receipts and sales invoices do not sufficiently establish that the services were indeed performed in the Philippines. While it is true that VAT official receipts and invoices are proofs of the parties' business transactions - to prove sale or lease of goods or services and payment thereof, the same, however, does not ipso facto equate that the said sale or lease were actually rendered within the Philippines. Nowhere in the said documents is it stated or shown that the services were actually performed in the Philippines. As correctly held by the court a quo, the determination of whether a certain sale or lease of a good or service is performed within or outside of the Philippines is a question of fact which should, therefore, be duly proven and substantiated. *(Nokia (Philippines) Inc. v. Commissioner of Internal Revenue, CTA EB No. 2238, October 28, 2021*)

BIR ISSUANCES

HIGHLIGHTS

RMO No. 28-2021, October 26, 2021

This provides for the amendment of certain provisions of RMO 22-2020 relative to the proper handling of citizens' concerns/complaints.

This amends certain provisions of RMO 22-2020 relative to the proper handling of citizens' concerns/complaints.

1. Citizen's concerns/complaints transmitted through the 8888 Citizen's Complaint Center, Presidential Complaint Center, BIR eComplaint System, Contact Center ng Bayan, Anti-Red Tape Authority and other feedback mechanism channels shall be acknowledged within the same day or the next business day in case it was received by the Bureau on a weekend or holiday. The concerns/complaints shall be categorized and forwarded to the concerned Office (copy furnished the monitoring office, if applicable).

2. If the official being complained is the head of the monitoring office, the immediate superior shall be furnished with a copy of the concerns/complaints and shall serve as the monitoring office.

3. Revenue Official/Personnel who receives concerns/complaints through his/her official BIR email account shall respond directly to the sender/complainant upon receipt of the email.

4. Anonymous complaints/denunciation with no contact information that does not identify the office and/or personnel being complained shall be deemed closed. No succeeding action shall be taken.

   If with verifiable leads, it shall be forwarded to the concerned office.

All anonymous complaints/denunciations shall be recorded and included in the quarterly report to be submitted to the concerned monitoring offices and the Management Committee (MANCOM).

BIR ISSUANCES

HIGHLIGHTS

RMO No. 29-2021, October 29, 2021

This provides for the guidelines on the monitoring and verification of the tax compliance of online merchants, social media influencers and other business operating in digital platforms.

This provides for the guidelines on the monitoring and verification of the tax compliance of online merchants, social media influencers (SMIs) and other business operating in digital platforms.

1. A Special Task Force (STF) in every revenue regional office and in the Large Taxpayer Service (LTS) shall be created to perform the following tasks:

    a. Gather and collate all relevant information pertaining to, and create database of all online sellers of goods and/or services, and SMIs registered or residing within their jurisdiction and properties being leased out by online lessors within their respective jurisdiction.
    b. Determine which among the subject taxpayers are not registered with the BIR and evaluate tax compliance of registered taxpayers.
    c. Submit a Monthly accomplishment Report (MAR) with their respective Revenue Directors (RDs) and Assistant Commissioner (ACIR)-LTS, on or before the 5th dat of the following month.

2. Voluntary declarations made by the subject taxpayers shall be verified through the exchange of information (EOI) mechanism under the valid and effective tax treaties if applicable. In case discrepancies or inconsistencies are found, the STF shall recommend to the concerned RDO, the LTD/LTAD, the RID, or the NlD, as the case may be, the issuance of LOAs against the subject taxpayers.

3. The ACIR-LTS and all the Regional Directors shall transmit the MAR submitted by the STF to the Office of the Commissioner on or before the 10th day of the following month, copy furnished the ACIRs for Assessment Service (AS) and Legal Service (LS).

RMC No. 103-2021, October 1, 2021

This provides information and guidance regarding the letters from the FDA and DOH containing updates to VAT-exempt products.

This provides information and guidance to all internal revenue officers and employees regarding the letters from the FDA and DOH containing updates to VAT-exempt products under Sections 109(1)(AA) and (BB) of the Tax Code, as amended, to wit:

1. Letter dated August 31, 20201, the "Corrigendum to the List of Medicines for Hypertension, Cancer and Kidney Diseases;" and

2. Letter dated August 12, 2021, copy of the "List of VAT Exempt Drugs and Vaccines Prescribed and Directly Used for COVID-I9 Treatment."

BIR ISSUANCES

HIGHLIGHTS

RMC No. 107-2021, October 18, 2021

This circularizes R.A. No. 11590 or "An Act Taxing Philippine Offshore Gaming Operations."

This circularizes R.A. No. 11590 entitled "An Act Taxing Philippine Offshore Gaming Operations, Amending for the Purpose Sections 22,25,27,28, 106, 108, and Adding New Sections 125-A and 288(G) of the National Internal Revenue Code of 1997, as Amended, and for Other Purposes."

RMC No. 108-2021, October 19, 2021

This provides clarification of certain issues on the utilization of tax payment certificate issued under the Comprehensive Automotive Resurgence Strategy Program.

This provides clarification of certain issues on the utilization of tax payment certificate (TPC) issued under the Comprehensive Automotive Resurgence Strategy (CARs) Program, as follows:

1. TPC shall not be used as advance payment or deposit for excise tax due and for payment of deficiency tax liability.
2. TPC shall not be used for payment of quarterly income tax due and monthly VAT due. It shall be used for payment of annual income tax return and quarterly VAT returns, such being final returns.
3. The receipt of TPC is not taxable.
4. The TPC shall be indicated in the "Details of Payment" located at the lower portion of the tax return, specifically under the item, "Others" or "Others(specify)."
5. The ERP shall attach to the excise tax return a Detailed Schedule of Removals of Automobiles, as a breakdown to Schedule 1A under Part V of the excise tax return.
6. The authorized BIR personnel shall authenticate the TPC only after receipt of its hard copy, together with the tax return and other prescribed documents.
7. The utilization of TPC as payment of the tax dues hall already stop the running of the period of validity.
8. The ERP shall be liable to the amount of tax still due, inclusive of applicable penalties for failure to pay the tax, without prejudice to the filing of an appropriate criminal or civil action against the ERP for using a spurious TPC.
9. Prior to the transmittal of the BIR copy of TPC by LTDPQAD/concerned Revenue District Office to the Revenue Accounting Division (RAD) for recording purposes, the TPC details shall be encoded/uploaded in the Integrated Tax System-Collection and Bank Reconciliation (ITS-CBR) and/or Internal Revenue Integrated System-Collection, Remittance and Reconciliation (IRIS-CRR), as the case may be, pursuant to existing policies and procedures.

BIR ISSUANCES

HIGHLIGHTS

RMC No. 111-2021, October 21, 2021

This provides for the availability of the Offline Electronic BIR Forms (eBIRForms) Package Version 7.9.2.

This provides for the availability of the Offline Electronic BIR Forms (eBIRForms) Package Version 7.9.2, which is downloadable for the following sites:

1. www.bir.gov.ph; and
2. www.knowyourtaxes.ph

The new eBIRForms Package includes the January 2018 version of the following forms:

BIR Form No.	Description
2552	Percentage Tax Return for Transactions Involving Shares of Stock Listed and Traded Through the Local Stock Exchange or Through Initial and/or Secondary Public Offering
1600-VT	Monthly Remittance Return of Value-Added Tax Withheld
1600-PT	Monthly Remittance Return of Other Percentage Taxes Withheld
1707	Capital Gains Tax Return for Onerous Transfer of Shares of Stocks Not Traded Through the Local Stock Exchange
2200-C	Excise l-ax Return for Cosmetic Procedures

BSP ISSUANCES

HIGHLIGHTS

BSP Circular No. 1128, October 26, 2021

This provides amendments to the provisions of Section 153 of the Manual of Regulations for Banks (MORB) on the Sustainable Finance Framework

Section 153 of the MORB as introduced by Circular No. 1085 dated 29 April 2020 is amended to include the following:

Duties and Responsibilities of the Board of Directors

- Set strategic environmental and social (E&S) objectives
- Approve the risk appetite on specific risk areas
- Ensure that material E&S risks are considered in the Internal Capital Adequacy Assessment Process (ICAAP) or internal capital planning process
- Monitor the progress of the bank in meeting its E&S strategic objectives and targets
- Institutionalize a capacity building program for the Board of Directors, all levels of management, and personnel on identifying, measuring, monitoring, and controlling E&S risks
- Adopt an effective communication strategy to inform both internal and external stakeholders of the bank's E&S strategic objectives and targets.

Duties and Responsibilities of the Senior Management

- Ensure that bank activities are aligned with the overall E&S strategic objectives and targets;
- Ensure adoption of methodologies and tools that will effectively identify, and quantify/measure, monitor and control E&S risks;
- Ensure that policies, procedures, and processes are clearly and effectively communicated across the organization

Credit Risk Management System

Banks shall consider environmental and social (E&S) risks in defining credit risk appetite.

Operational Risk Management System

A bank shall integrate E&S risk events in its operational risk management framework, consistent with its size, operational risk profile, and complexity of operations.

BSP ISSUANCES

HIGHLIGHTS

BSP Circular Letter No. 2021-078, October 15, 2021

This provides a reminder to all BSFIs to consider the Anti-Money Laundering Council's (AMLC) "Analysis of Suspicious Transaction Reports (STR) with Possible Links to Tax Crimes" and "Real Estate Sector: A Money Laundering/Terrorism Financing/Proliferation Financing (ML/TF/PF) Assessment"

All BSP-Supervised Financial Institutions (BSFIs) are reminded to:

1. Ensure proper reporting of STRs with possible links to tax crimes under PC35 in accordance with the 2021 AMLC Registration and Reporting Guidelines (ARRG);

2. Include the suggested tax-related keywords/phrases in the narrative of STRs for transactions with possible links to tax crimes with SI3 and other associated financial crimes or PCs (e.g., corruption, fraud, IP violations, among others) as reason/s for filing, considering the conditions laid out in the inclusion of tax evasion under the Anti-Money Laundering Act of 2001 (AMLA), as amended; and

3. Conduct commensurate measures and consider the results of the above reports in their institutional risk assessment as well as risk profiling of the real estate sector, to improve their overall AML/CTPF framework.

BSP Circular Letter No. 2021-080, October 18, 2021

This provides the Coverage of Anti-Money Laundering Council (AMLC) Guidelines on Digitization of Customer Records (DIGICUR)

This is to disseminate to all BSFIs the AMLC advisory on the coverage of ARI A, B, and C, No. 2, Series of 2018, also known as DIGICUR, posted on the AMLC website on 08 October 2021.

The DIGICUR does not apply to MSBs as they generally do not maintain accounts or electronic wallets (e-wallets) for their customers, thereby rendering inexistent the danger sought to be prevented by the DIGICUR, i.e., the immediate movement of funds from accounts subject of an investigation. Nevertheless, the DIGICUR shall still apply when the business model of an MSB is such that the customer is able to open, keep, and maintain an account as an e-wallet or other similar electronic products or services.

DIGICUR shall apply only to covered persons, including BSFIs, whose business involves customers who are able to open, keep, and maintain accounts, e-wallets, or other similar electronic products or services with them.

BSP ISSUANCES

HIGHLIGHTS

BSP Memorandum M-2021-053, October 13, 2021
This provides clarification on the Definition of Digital Banks

Under Circular No. 1105 dated 02 December 2020, a digital bank refers to a bank which offers financial products and services that are processed end-to-end through a digital platform and/or electronic channels with no physical branch/sub-branch or branch-lite unit offering the same.

The Bangko Sentral recognizes that certain banks belonging to other categories use the phrase "digital bank" in their marketing channels even if these banks do not fall under the definition of a digital bank pursuant to Circular No. 1105. Under the said Circular, only a bank that is granted the license to operate as a digital bank may represent itself to the public as such in connection with its business name.

Meanwhile, a bank belonging to other categories (i.e., universal, commercial, Islamic, thrift, rural or cooperative bank) may offer financial products and services, which are within its powers and scope of authorities, through a digital platform and/or electronic channels. This may also include a bank with a digital-centric business model which is operating as such in accordance with relevant rules and regulations. In such cases, the bank may market itself as a bank offering "digital banking products or services" or other equivalent terms: Provided, That the bank has secured the requisite Bangko Sentral license on electronic payment and financial services for these digital banking products or services.

BSP Memorandum M-2021-055, October 19, 2021
This provides guidelines on the adoption of Temporary Regulatory Relief on the Capital Treatment of Provisioning Requirements under the Philippine Financial Reporting Standard (PFRS) 9

Covered BSFIs will be allowed to add-back increase in Stage 1 and Stage 2 provisioning requirements booked under allowance for credit losses from end-December 2019 to Common Equity Tier 1 (CET 1) capital over a period of two (2) years starting 01 January 2022 reporting period, subject to a declining add-back factor (Table 1):

Availment Period	Add-back factor (1%)
01 January 2022 to 31 December 2022	100
01 January 2023 To 31 December 2023	50

To avail of the said regulatory relief, a covered BSFI shall comply with the following conditions provided under the said memorandum.

BSP ISSUANCES

HIGHLIGHTS

BSP Memorandum M-2021-056, October 21, 2021
This provides guidance on Regulatory Treatment of Restructured Loans for Purposes of Measuring Expected Credit Losses

This Memorandum provides guidance on the regulatory treatment of loans with terms and conditions that have been modified due to the impact of the pandemic, especially consumption loans, for purposes of measuring expected credit losses (ECL) and classifying the accounts as non-performing.

Treatment of Restructured Loans

BSFIs that have established that the borrowers' financial difficulty is temporary or whose paying capacity can reasonably be expected to return to levels allowing full payment once COVID-19 restrictions are lifted and that said borrowers are expected to fully pay the loan under the modified terms, shall classify the restructured loan accounts under Stage 2 for purposes of determining ECL: Provided, That the restructured loan accounts are not more than 90 days past due on principal and or interest payments. Stage 2 restructured loans shall be reported as restructured-performing in the prudential reports. The transfer of restructured loans from Stage 2 to Stage 1 shall follow the six (6)-month observation period.

Restructured loans that are classified under Stage 2 shall be considered as credit-impaired (Stage 3) if there is evidence that full repayment of the loan under the modified terms is unlikely without foreclosure of collateral, if any; or if any principal and/or interest are unpaid for more than ninety (90) days from contractual due date under the terms of the restructured loan. All credit-impaired restructured loans shall be reported as non-performing in the prudential reports.

In cases when the modification of the terms of the loan would involve capitalization of interest, the resulting amount should not be more than the original principal amount of the loan.

IC ISSUANCES

HIGHLIGHTS

IC Circular Letter CL-2021-55 dated October 6, 2021

This provides the Anti Money Laundering Council (AMLC) 2021 Sanctions Guidelines covering targeted financial sanctions (TFS) related to terrorism, terrorism financing, and proliferation financing.

This Circular provides the AMLC 2021 Sanctions Guidelines which cover TFS related to terrorism, terrorism financing, and proliferation financing, including remedies and relevant links to the appropriate United Nations Security Council (UNSC) Consolidated List and Committee Guidelines on exemptions from asset freeze and de-listing for dissemination of all Insurance Commission Regulated Entities (ICREs) to their respective offices and personnel for reference and guidance.

IC Circular Letter CL-2021-56 dated October 6, 2021

This provides the primer on the Anti Money Laundering Council (AMLC) Resolutions No. TF-33 and TF-34, Series of 2020, relative to the issuance of Sanctions Freeze Order (SFO).

This Circular provides the primer on the AMLC Resolutions No. TF-33 and TF-34, Series of 2020, relative to the SFO issued against terrorist organizations, associations, or groups or persons designated by the Anti-Terrorism Council.

This Primer is a form of Question and Answer on said Resolutions which contains information and guidance on the duties of covered persons and relevant government agencies with respect to the SFO, the freezing of related and materially-linked accounts, submission of suspicious transaction reports for previous transactions of designated persons, remedies of persons aggrieved, and penalties for non-compliance with the SFO.

IC Circular Letter CL-2021-57 dated October 6, 2021

This disseminates the AMLC Regulatory Issuance (ARI) on the amendments to certain provisions of the 2018 IRR of the AMLA, as amended, TFS related to proliferation of Weapons of Mass Destructions (WMD) and Proliferation Financing (PF), and amendments to certain provision of ARI No. 4, Series of 2020.

This Circular disseminates to all ICREs the following:

a. ARI A, B and C No. 1, Series of 2021 contains amendments to the 2018 IRR of the AMLA , as amended, which include the following:

   i. expansion of the list of covered persons to include real estate developers and brokers as well as the offshore gaming operators and their service providers;
   ii. inclusion in the list of unlawful activities the violations of Section 19 (A)(3) of Republic Act No. 10697, otherwise known as the "Strategic Trade Management Act", in relation to the proliferation of WMD and its financing and Section 254 of Chapter II, Title X of the National Internal Revenue Code of 1997, as amended); and
   iii. the additional authority of the AMLC to apply for the issuance of a search and seizure order or a subpoena ad testificandum and/or subpoena duces tecum with any competent court, in the conduct of its investigation, and to implement TFS in relation to the proliferation of WMD and its financing, including *ex parte* freeze.

b. TFS related to Proliferation of WMD and PF

   All covered persons (CPs) are required to implement TFS relating to proliferation of WMD and its financing against all funds and assets that are owned or controlled, directly or indirectly, including those derived or generated therefrom by individuals or entities designed and listed under United Nation Security Council (UNSC) Resolution Nos. 1718 concerning the Democratic People's Republic of Korea and 2231 concerning the Islamic Republic of Iran and their successor resolutions under the UNSC Consolidated List.

c. ARI No. 2 dated January 31, 2021 - Amendments to Certain Provision of ARI No. 4, Series of 2020, also known as "Freeze Order for Potential Target Matches under the UNSC Consolidated Lists

   This amends ARI No. 4, which specifically incorporates provisions relating to the implementation of TFS for PF, such as the legal basis of TFS related to terrorism and terrorist financing, list of AMLC Resolutions/Freeze Orders (FOs) to implement TFS, directive and coverage of the FOs, who needs to comply with the TFS, and filing of detailed return before the AMLC. It also provides new chapters to cover administrative remedies (Chapter 5), authorized dealings and exemptions (Chapter 6), TFS related to PF (Chapter 7), and sanctions (Chapter 8).

IC ISSUANCES

HIGHLIGHTS

Circular Letter CL-2021-58 dated October 11, 2021

This amends Section 3 of CL No. 2017-09 on the documentary requirements for applications for approval of acquisition of a domestic insurance and reinsurance broker.

The amendment to Section 3 of CL No. 2017-09 is as follows:

"Section 3. **DOCUMENTARY REQUIREMENTS**

Accordingly, no person shall acquire ownership of any domestic insurance broker and reinsurance broker without the prior written approval of the Insurance Commissioner: **Provided, That prior approval of the Insurance Commissioner shall only be required in the event of change of ownership in the brokerage itself, i.e. acquisition of shares, and shall not be required in case of a change in ownership of a company indirectly owning the subject domestic insurance and/or reinsurance broker.**

Application for the approval of acquisition of a domestic insurance broker and reinsurance broker shall include the following: x x x."

IC Legal Opinion LO-2021-11 dated October 29, 2021

Dissemination of information is not considered as an act of "offering" insurance products.

This Commission opines that one of the functions of a microinsurance intermediary is to either sell, solicit or offer microinsurance products.

The term "offer" can be used interchangeably with the term "solicitation" as this word is the term more appropriate from insurance brokers. Further, the term "selling or solicitation" is the systematic attempt to persuade the purchase of a micro risk protection product/service which concurrently includes:

- Making or proposing to make, as micro risk protection provider, any micro risk protection contract;
- Explaining the features, terms and conditions of micro risk protection products and concepts related to life-cycle risks, business risks, etc.;
- Handling of customer questions and objections; and
- Performing other similar activities necessary to complete the sale.

On the other hand, "information dissemination" is defined as "the act of bringing micro risk protection product concepts, products, or services to the public's attention by any form of media such as print, broadcast, digital/mobile or others."

DIVIDENDS TO NON-RESIDENTS: TAX SPARING PROVISION OR TAX TREATY

By

Mabel L. Buted

The reduction starting this year of the corporate income tax rate applicable on income derived from sources within the Philippines by non-resident foreign corporations (NRFCs) to 25% necessarily reduced the final withholding tax rate to the same rate. The income subject to the new rate includes dividends. It follows that the final withholding tax rate that should generally be used by the Philippine investee corporations when paying dividends to their corporate foreign shareholder shall be 25%.

There is, however, a provision in the Tax Code (usually referred to as the tax sparing credit provision) allowing a reduction of the 25% tax rate to 15%, on the condition that the country in which the non-resident foreign corporation is domiciled allows a credit against the tax due from the non-resident foreign corporation taxes deemed to have been paid in the Philippines equivalent to 10%. This deemed paid tax credit is the difference between the regular tax rate (now at 25%) and the 15% reduced tax rate. An old decision of the Supreme Court interpreted this rule to include an instance where the country of residence of the corporate stockholder exempts from tax the dividends derived from the Philippines.

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By

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Another alternative for the reduction of the final tax on dividends due to non-residents is through the availment of tax treaty benefits. For dividends, the maximum rates provided in these treaties range from 10% to 25%. There are exceptional instances where 5% could apply. Of course, the application of these preferential rates are subject to conditions defined in the respective treaties.

So there are two instances where the 25% tax rate on dividends may be reduced. One is through the availment of the preferential tax rates provided in the tax treaties. The other instance is through the availment of the tax sparing provision in our Tax Code.

Are taxpayers mandated to follow either of these or to choose which one to apply? No. Taxpayers may not in fact avail of the reduced rates and instead apply the 25% rate under the Tax Code. But if a taxpayer is considering the use of lower rates, it has to determine first whether these are applicable. For the tax treaty to apply, there has to be an existing tax treaty between the Philippines and the country of the recipient shareholder. There are more than forty tax treaties which the Philippines had concluded with other countries. If the shareholder is not a resident of any of these countries, no treaty and accordingly, no preferential tax treaty rate will apply. On the other hand, for the tax sparing provision to apply, the country of residence of the shareholder should either exempt the dividends received by the shareholder from income tax or allows a tax credit for the tax deemed paid in the Philippines equivalent to 10%. If not, the tax sparing provision will not apply.

By the way, the tax sparing provision does not apply to individual shareholders. It applies only if the shareholder is a non-resident foreign corporation. So if the shareholder is a non-resident individual, the reduction in rate can only be availed through the tax treaty, if one is applicable.

Should the NRFC be entitled to avail of a reduced rate either under the tax treaty or through the tax sparing provision, one important factor is the rate. The reduced rate under the tax sparing rule is fixed at 15%. But tax treaties provide for varied rates, subject to conditions. The imposable rate could also be 15% but it could be higher or lower. The difference between the rate provided in the treaty and the 15% tax sparing rate may determine which one to avail.

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While the rates are important, the procedures for the availment of the reduced rates on dividends are also essential in determining which one to avail. Separate issuances define the guidelines for the availment of the reduced rates under both instances. Revenue Memorandum Order No. 046-20 provides for the procedures in availing the 15% rate under the tax sparing rule. Under this RMO, the reduced rate of 15% may be applied outright by the withholding agent. However, within 90 days from the remittance of the dividends, or from the determination by the foreign tax authority of the deemed paid tax credit/non-imposition of tax because of the exemption, whichever is later, the foreign corporation shall file with the International Tax Affairs Division of the BIR a request for confirmation for the applicability of the reduced dividend rate of 15%.

For the availment of tax treaty benefits, Revenue Memorandum Order No. 14-2021 returned the requirement for the application for tax treaty relief. This covers all types of income payments entitled to treaty benefits, including dividends. The reduced rate under the treaty may also be applied outright subject to a subsequent request for confirmation on the propriety of the withholding tax rate applied. The request for confirmation shall be made any time after the close of the taxable year but not later than the last day of the fourth month following the close of such taxable year. If the withholding agent does not apply the treaty rate and instead applies the 25% tax rate under the Tax Code, the income recipient or its authorized representative may file a tax treaty relief application, as well as an application for refund, any time after the payment of the withholding tax.

So in either case, there has to be an application/request for confirmation of the application of the reduced rate. The difference lies in the period for filing the application/request, the documentary requirements for the filing, as well as the regularity in filing. There is no preferred option. That depends on the circumstances of the transaction and the parties involved. One has to note, however, that in the availment of the tax sparing provision, the law granting tax exemption or the allowance of tax credit in the country of residence of the income recipient has to be substantiated. That is not required in the availment of tax benefit as the treaty itself serves as the law that governs the entitlement to the preferential rate.

DIVIDENDS TO NON-RESIDENTS: TAX SPARING PROVISION OR TAX TREATY

By

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