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BUREAU OF INTERNAL

InTAX | JANUARY 2009

Congress

Renewable Energy Act of 2008 Signed into Law

The Renewable Energy Act of 2008 (An Act Promoting the Development, Utilization and Commercialization of Renewable Energy Resources and for Other Purposes) or Republic Act (RA) 9513 was signed into law by President Arroyo on 16 December 2008. This new law aims at accelerating the exploration, development and utilization of renewable energy (RE) by granting developers of RE facilities the following incentives:

1. Income tax holiday for the first 7 years of commercial operations by the Department of Energy in consultation with the Board of Investments (BOI);
2. Duty-free importation of RE machineries, equipments and materials within 10 years upon the issuance of certification;
3. Special realty tax rates on equipment and machinery;
4. Net operating loss carry-over (NOLCO) for the first 3 years from the start of commercial operations;
5. Corporate tax rate of 10% (on the net taxable income) after the 7 years of income tax holiday;
6. Accelerated depreciation;
7. Zero-rated VAT on the sale of fuel or power generated from renewable sources;
8. Cash incentive for missionary electrification;
9. Tax exemption of proceeds of carbon credit sales; and
10. Tax credit on domestic capital equipment and services.

Moreover, manufacturers, fabricators and suppliers of locally produced-equipment duly accredited by the Department of Energy in consultation with the DOST, DOF and DTI, upon registration with the BOI under the Renewable Energy Act of 2008 shall be entitled to the following benefits:

1. Tax and duty-free importation of components, part and materials;
2. Tax credit on domestic capital components, parts and materials;
3. Income tax holiday and exemption; and
4. Zero-rated VAT on transactions with local suppliers of goods properties and services.

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entitled to duty-free importation and VAT exemption on all types of agricultural inputs, equipments and machineries.

Tax rebates are also granted for all or part of the tax paid for the purchase of RE equipment for residential, industrial, or community use.

The Act also makes the RE sector a permanent part of the BOI-formulated Investment Priorities Plan.

Court of Tax Appeals

Time of Withholding

Under the second paragraph of Section 2.57.4 of Revenue Regulations (RR) No. 2-98, the obligation to withhold the creditable withholding tax on income which is not yet paid but has been recorded as an expense arises in the last month of the return period in which it is claimed as an expense or amortized for tax purposes. The last month of the return period is on the last month of the quarter when the expense is claimed in the quarterly income tax returns/final adjustments returns filed by the corporation. As applied to taxpayer's case, the obligation arose on the months of March (for the 1st quarter), June (for the 2nd quarter), August (for the 3rd quarter) and December 2002 (for the 4th quarter). The obligation to remit occurs on or before the 10th day after the quarter which, in taxpayer's case, was April 10, 2002, July 10, 2002, October 10, 2002 and January 15, 2003. (*Isuzu Autoparts Manufacturing Corporation vs. CIR, CTA Case No. 7265, 16 July 2008*)

Requirements for VAT Zero-Rating under Section 108(B)(2)

For services to qualify for VAT zero-rating under Section 108(B)(2) of the Tax Code, the taxpayer must comply with the following requirements:

- a. the recipient of the services is doing business outside the Philippines;
- b. the payment of its service fees is in acceptable foreign currency; and
- c. the accounting of such remittance was in accordance with BSP rules.

It is not sufficient that the taxpayer's clients are "foreign clients" to meet the requirement of law which mandates that the recipient of its services is doing business outside the Philippines. The phrase "foreign clients" is couched in general terms that the court cannot just simply assume that they are engaged in doing business outside the Philippines. A "foreign client" may also be engaged in doing business in the Philippines, which may make the transaction fall squarely under Section 108(A) of the Tax Code governing domestic sale or exchange of services subject to 12% VAT.

For failure to establish that the "foreign clients" are doing business outside

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Layout, Design & Circulation

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the Philippines, the sale of service to “foreign clients” does not qualify for 0% VAT. (*Accenture, Inc. vs. CIR, CTA Case Nos. 7158, 7285 and 7313, 07 August 2008*)

10% Final Withholding Tax on Interest under RP-Belgium Tax Treaty

In DA-ITAD Ruling No. 126-03 dated August 18, 2003 issued by the BIR, interest payments to a resident of Belgium are subject to the preferential rate of 10% pursuant to the Protocol Amending the Agreement between the Republic of the Philippines and the Kingdom of Belgium which provisions apply on income derived or accrued beginning January 1, 2000, thereby modifying BIR Ruling No. DA-ITAD 099-03. (*CBK Power Company Limited vs. CIR, CTA Case Nos. 6699, 6884 and 7166, 28 August 2008*)

Requirements for a Valid Waiver of the Statute of Limitations

In this case, the waivers of the statute of limitations were declared invalid due to the following defects:

1. The first waiver was not signed by nor accepted by the Commissioner of Internal Revenue (CIR) or any of his authorized representatives;
2. The second waiver did not bear the date of receipt by the CIR or any of his authorized representatives;
3. The second waiver was signed by the Regional Director, when it should have been signed by the CIR considering that the tax involved an amount of more than Php1M;
4. The subject waivers did not specify the amount of the taxes due; and
5. Both waivers failed to comply with the required format pursuant to Revenue Memorandum Order (RMO) No. 20-90.

(*Solid City Industrial and Commercial Corp. vs. CIR, CTA Case No. 6720, 07 August 2008*)

DST Exemption of a Mutual Life Insurance Company as a Cooperative

The Tax Code does not require a mutual life insurance company to register with the Cooperative Development Authority (CDA) to enjoy exemption from both percentage and documentary stamp taxes (DST). Only cooperatives to be formed or organized under the Cooperative Code need to be registered with the CDA. Under Section 123 of the Tax Code, a “cooperative” is defined as “a company or association conducted by the members thereof with the money collected from among themselves and solely for their own protection and not for profit.” Having established that it is a cooperative that does not have to be registered with the CDA, the taxpayer is entitled to exemption from DST on the insurance policies it issues to its members. (*The Insular Life Assurance Co., Ltd. vs. CIR, CTA Case No. 7291, 12 August 2008*)

Non-compliance with RMO No. 01-2000 Fatal to a Claim for Refund

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KEY CONTACTS:

Emmanuel P. Bonoan
*Chief Operating Officer & Vice
Chairman for Tax & Corporate
Services*
ebonoan@kpmg.com

Ronald L. Carreon
*Principal, Tax & Corporate
Services*
rcarreon@kpmg.com

Herminigildo G. Murakami
*Principal, Tax & Corporate
Services*
hmurakami@kpmg.com

should invoke the provisions of the tax treaty and prove that indeed the provisions of the tax treaty apply to it, before the benefits may be extended to such corporation. Otherwise, a resident or non-resident foreign corporation shall be taxed according to the provisions of the Tax Code, unless it is shown that the treaty provisions apply to the said corporation; and that, in the cases that the same are applicable, the option to avail of the tax benefits under the tax treaty has been successfully invoked.

In this case, the taxpayer only requested for the confirmation of its entitlement to the preferential tax rate of 10% under the RP-Germany Tax Treaty on October 3, 2005, or almost a period of 2 years from the transaction. Clearly, its application for a tax treaty relief with the BIR International Tax Affairs Division (ITAD) was not filed prior to its payment of the branch profits remittance tax (BPRT) and actual remittance of its branch profits to Germany. Neither was it done before its availment of the preferential rate of 10% under the RP-Germany Tax Treaty provision. Instead, the said request for confirmation was filed way beyond the 15 day period mandated under Section III paragraph (2) of Revenue Memorandum Order (RMO) No. 01-2000. Hence, the court found the taxpayer's non-compliance with the procedural requirements under Section III of RMO No. 01-2000 fatal to its claim for refund. (*Deutsche Bank AG Manila Branch vs. CIR, CTA Case No. 7344, 29 August 2008*)

Bureau of Internal Revenue

Expanded Coverage of Withholding Tax Agents

The coverage of withholding tax agents who are required to withhold 1% from the regular suppliers of goods (i.e., tangible personal property, not including real property) and 2% from the regular suppliers of services has been widened from the top ten thousand (10,000) private corporations to the top twenty thousand (20,000) corporations. Top 20,000 private corporations include a corporate taxpayer who has been determined and notified by the Bureau of Internal Revenue (BIR) as having satisfied any of the following criteria:

- a. Classified and duly notified by the Commissioner as a large taxpayer under Revenue Regulations No. 1-98; as amended, or belonging to the top five thousand (5,000) private corporations under RR 12-94, or to the top ten thousand (10,000) private corporations under RR 17-2003, unless previously de-classified as such or has already ceased business operations;
- b. Any taxpayer with net VAT paid or payable for the preceding year of at least Php100,000;
- c. Any taxpayer with annual income tax paid or payable for the preceding year of at least Php200,000;
- d. Any taxpayer with percentage taxes for the preceding year of at least Php100,000;
- e. Any taxpayer whose gross sales for the preceding year is

Maria Georgina J. Soberano
Principal, Tax & Corporate Services
gsoberano@kpmg.com

Roberto L. Tan
Principal, Tax & Corporate Services
rtan@kpmg.com



KPMG CORNER **TAX ARTICLES**

Digging into the mining business

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By Alma Barcelo

PERA in your pocket

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By Emmanuel P. Bonoan

Tax relief in times of crisis

8/26/2008

By Maria Myla S. Maralit

Knowing the Foreign Corrupt Practices Act

- over Php10,000,000;
- f. Any taxpayer whose gross purchases for the preceding year is over Php5,000,000.

Suppliers from whom any of the top 20,000 private corporations regularly makes purchases will be considered local/resident suppliers of goods. This however does not include casual purchases of goods (i.e., purchases made from a non-regular supplier and oftentimes involving a single purchase). Nevertheless, a single purchase which involves ten thousand pesos (Php10,000) or more shall be subject to a withholding tax. Regular suppliers, on the other hand refers to suppliers who are engaged in business with whom the taxpayer-buyer has transacted at least six (6) transactions, regardless of the amount per transaction, either in the previous year or current year. These same rules apply to local/resident supplier of services other than those covered by separate rates of withholding tax.

A corporation shall not be considered a withholding agent under the new regulation unless such corporation has been determined and duly notified in writing by the Commissioner that it has been selected as one of the top 20,000 private corporations. Any corporation shall remain a withholding agent unless the Commissioner notifies it in writing that it shall cease to be one. Should any of the following occur, however, no written notice shall be needed:

- a. closure/cessation of business or dissolution (for taxpayer with notice of dissolution given to the BIR)
- b. merger/consolidation (for dissolved or absorbed corporation);
- c. any other form of business combination wherein by operation of law a corporate taxpayer loses its juridical personality.

Withholding agents shall submit on a semestral basis, a list of its regular supplier of goods and/or services to the Large Taxpayers Assistance Division/Large Taxpayers District Office in case of large taxpayers or the Revenue District Office (RDO) having jurisdiction over the withholding agent's principal place of business on or before July 31 and January 31 of each year. (*Revenue Regulations No. 14-2008 dated 26 November 2008*)

Consolidation of issuances on advance value-added tax (VAT) on the sale of refined sugar

The BIR now requires all sugar refineries/ mills to submit to the Regional District Officer (RDO) where the mill site is located a Weekly Production Report which corresponds to the Weekly Report on Raw and Refined Sugar required by the Sugar Regulatory Administration.

Furthermore, if the quedan reflects that the owner of the refined sugar is the producer of the sugar cane, the sale of the resulting refined sugar to another agricultural cooperative is not subject to VAT pursuant to the Tax Code. However, if the seller-cooperative is not an agricultural producer

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Some issues regarding the transfer pricing regulations

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Here comes the SALN

but merely purchases the sugar cane or the raw sugar from planter-members or transfer the raw sugar to a cooperative through assignment, its sale of the resulting refined sugar to another agricultural cooperative shall be subject to VAT and its withdrawal from the Sugar Refinery/Mill will only be allowed upon payment of the advance VAT in the RDO having jurisdiction over the business place of the cooperative. (*Revenue Regulations RR No. 13-2008 dated 19 September 2008*)

Recognition of the Makati Development Corporation as U.S. Embassy Construction Agent

The Makati Development Corporation (MDC) is recognized as the U.S. Embassy (the Embassy) Construction agent. To the extent that the MDC is authorized to act for and on behalf of the Embassy, MDC shall be allowed to make local purchases of supplies, goods and services, for and on behalf of the Embassy, and avail of the VAT Exemption on the purchases at the point of sale.

The sale to MDC, acting on behalf of the Embassy, of the goods and services for specific construction/renovation projects covered by this RMC shall be considered as zero-rated transactions. Also, this RMC is sufficient basis to entitle such supplier of goods, property or services to the benefit of the zero percent (0%) VAT for sales made to the Embassy in relation to such renovation/construction projects. [*Revenue Memorandum Circular (RMC) No. 76-2008*]

Director's fees are not subject to VAT or percentage tax

Fees, per diems, honoraria and allowances given to a director of a corporation are not subject to the 12% VAT or 3% percentage tax. This resolves queries brought before the BIR by the business community on the taxability of fees paid to members of the board of directors promulgated by RMC No. 34-2008. Hearing the concerns of business, the BIR concluded that acting as a director for corporations is not within the purview of activities pursued "in the course of trade or business" under Section 105 of the Tax Code, as amended. The Bureau considered the following: (1) the applicability of the said VAT provision generally pertains to persons whose undertakings are generally intended to be an on-going concern where the end view is to realize potential unrestricted amounts of pecuniary gains/profits; (2) an individual does not disparately offer his services as director in the sense that no less than the Corporation Code requires ownership of at least one share in the corporation; (3) the Corporation Code limits the term of the elected director for only one year until his successor is elected, therefore not an "on-going concern" in actuality. Rather than being viewed as a pursuit of commercial activity, the BIR concluded that director's fee are remuneration paid in the exercise of a right of an owner in the management of a corporation.

The resolution of this issue was the result of consultations between the Institute of Corporate Directors, with the technical assistance of KPMG Manabat Sanagustin & Co. (*RMC No. 77-2008 dated November 24, 2008, amending RMC No. 34-2008*)

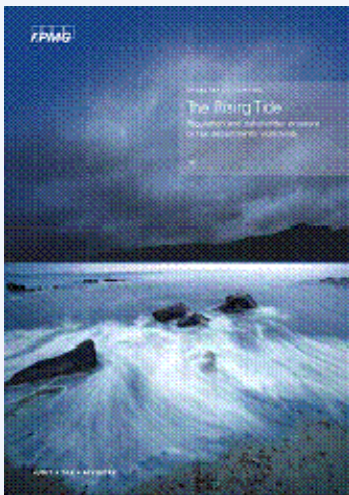
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Forgiveness and Redemption

4/24/2007

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Basis for beneficiary provinces' share in excise tax collections

The 15% share of the beneficiary provinces in the excise tax collection from locally manufactured Virginia-type cigarettes (under R.A. 7171) shall be based on the actual excise taxes collected annually. The term "Virginia-type cigarettes" refers to cigarettes containing Virginia-type leaf tobacco, whether imported or locally produced, as one of the raw materials thereof. *(RR No. 12-2008 dated 23 September 2008)*

Calculating incremental revenue base for beneficiary provinces' share of excise collections

The incremental revenue to be used as basis of the 15% share of the beneficiary provinces producing burley and native tobacco in the excise tax collection (under Republic Act No. 8240) shall be equivalent to the excess of the actual collection of excise taxes from tobacco products for the year under consideration over the base calendar year 1996, net of the incremental revenue from the increase in the excise tax rate under Republic Act No. 9334. *(RR No. 15-2008 dated 21 November 2008)*

Bureau of Customs

Proposed publication of Inward Foreign Manifests on Customs website

During the Senate Hearing for the Department of Finance budget, the Bureau of Customs (BoC) was instructed to publish inward foreign manifests (IFM) on its website as way to mitigate smuggling. As the BoC informed the business community of its plan to begin posting IFMs on its website starting 28 November 2008 however, business groups such as the Joint Foreign Chambers of the Philippines (JFCP) voiced opposition to the proposal on grounds that doing so would threaten commercial privacy and open sensitive information to competitors. The plan to publish IFMs online did not push through on the expected date and was suspended pending final advice from the Senate.

Creation of Permanent Intellectual Property Rights Division at Customs

A Permanent Intellectual Property Rights Division (IPRD) has been created at the Bureau of Customs. The new division will be part of the Customs Intelligence and Investigation Service (CIIS) and will be comprised of three Sections – Administration, Operation, and Legal. Among the powers and functions of the IPRD is the handling of applications/recording of Intellectual Property Rights (IPR), the issuance of hold/alert orders against shipments suspected of containing goods infringing on IPR, and the investigation/prosecution of violations of the Tariff and Customs Code in relation to the Intellectual Property (IP) Code. Rules have been provided on the recording/monitoring of IPR as well as the seizure of infringing goods. *(Customs Administrative Order 9-2008 dated 21 November 2008)*

Improving transfer pricing in the high technology industry

Tariffs on Oil up to 3%

Following the fall of global oil prices below the threshold prescribed by Executive Order 691 (as certified by the Department of Energy), the tariff rate for imported petroleum products has been adjusted accordingly to 3% for the months of November and December 2008. (*Customs Memorandum Orders 37-2008 dated 30 October 2008 and 38-2008 dated 26 November 2008*)

Requirement for electronic lodgment of shipments

3. Companies required to submit quarterly reports shall reflect in their quarter report as of September 30, 2008 any reclassification made in accordance with the Circular;
4. For pre-need companies, reclassification of *Held for Trading* or *Available for Sale* investments to *Held to Maturity* shall be allowed only upon showing that their liquid assets will be sufficient to service maturing plans within the term of the instruments proposed to be reclassified;
5. On account of the nature of their business, mutual funds or investment companies cannot avail of the reclassification option provided for in the Circular.

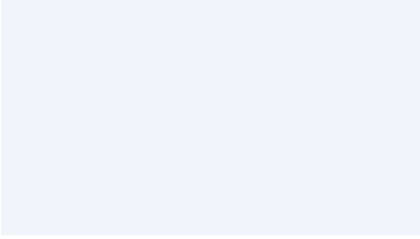
(Securities and Exchange Commission Memorandum Circular No. 10, Series of 2008 dated 14 November 2008)

SEC circulates draft letter on directing risk evaluation on the preparation of interim financial statements

In response to the global economic conditions, the SEC may be issuing directives for the regular evaluation of risk exposures and financial instruments profile. The SEC directive, which may be issued to specific companies, mandates the observance of several requirements in relation to the preparation of Interim Financial Report for the period ended September 30, 2008, and thereafter. A summary of the requirements is as follows:

- a) Assess financial risk exposures on currency, interest, credit, market and liquidity risks;
- b) Evaluate the company's capacity to provide clearer and more transparent disclosures regarding financial instruments including:
 1. Description of financial instruments;
 2. Amount and description of investment in foreign securities;
 3. Significant judgment made in classifying instruments in the fair value hierarchy;
 4. Explanation of how risk is incorporated and considered in the assets or liabilities valuation;
 5. Comparison of fair values of the recent and preceding interim periods;
 6. Criteria used to determine whether market for a financial instrument is active or not.
- c) Provide brief explanation should the preceding disclosures be inapplicable.

(Undated draft letter of the Securities & Exchange Commission)



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