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Editorial **In Tax** Issue 06



Our Valued Clients,

The month of June has brought new legislation and jurisprudence which will have a significant impact on the way business will be done in the Philippines.

Congress has recently enacted Republic Act No. 9504 which amends certain provisions of the Tax Code of 1997, exempting wage earners from payment of income taxes as well as increasing the tax exemptions of individual taxpayers.

Also:

- The Supreme Court held that while local government units are authorized to burden certain classes of goods with taxes, fees and charges, excepting excise taxes, a specific prohibition is imposed barring the levying of any other type of taxes with respect to petroleum products
- Pursuant to the certification of the Department of Energy, the Bureau of Customs recently issued Memorandum Order 25-2008 decreeing that the tariffs on imported oil products be lowered to 0%

At the administrative level, the Bureau of Internal Revenue has issued several regulations meant to address current economic and business exigencies:

- Interim Adoption of OECD Transfer Pricing Guidelines
- Increase in "de minimis" exemptions from income tax on compensation and fringe benefit tax
- Issuance of Consolidated Regulations on the proper taxation of shares listed in the Philippine Stock Exchange

Finally, the Board of Investments has published the General Policies and Specific Guidelines of the 2008 Investments Priorities Plan.

These new laws, implementing rules and regulations as well as various rulings and opinions will impact the conduct of business for the rest of 2008. We at KPMG Manabat Sanagustin & Co. hope that this information will prepare you to manage your business better. Please do not hesitate to contact us for further clarification and advice.

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Congress



New division at the CTA

The Court of Tax Appeals (CTA) has a new division, its third. The CTA would now have 9 Justices, with the second most senior Associate Justice serving as chairman of such division. The quorum for En Banc sessions, as well as the number of affirmative votes needed to reverse a decision of a Division, has been increased to 5. The Justices are to be appointed by the President as nominated by the Judicial and Bar Council. (*Republic Act (RA) No. 9503 which further amended RA No. 1125, signed on 12 June 2008*)

Exemptions on certain classes of taxpayers

New exemptions and additional relief has been granted to taxpayers. In brief, they are:

- *Minimum Wage Earners* will be exempt from payment of income taxes on their taxable income, including holiday pay, overtime pay, night shift differential pay and/or hazard pay. These cover workers in the Private Sector who are paid the statutory minimum wage fixed by the Regional Tripartite Wage and Productivity Board, or employees of the Public Sector with compensation income of not more than the statutory minimum wage in non-agricultural sector where he is assigned.

- The *Optional Standard Deduction (OSD)* has been increased from 10% to 40% of gross sales/receipts. The OSD is available to individuals engaged in trade or business, as well as to Domestic and Resident Foreign Corporations taxed under 27(A), and 28(A)(1) of the Tax Code, respectively. An election to avail of the OSD by the taxpayer will be irrevocable for the taxable year for which the return was made. Individuals opting for the OSD are not required to submit their financial statements otherwise required under the Tax Code. Both individuals and corporations that opt to avail of the OSD may be required by forthcoming rules and regulations to be issued by the Department of Finance to keep records pertaining to their gross sales/income during the taxable year.
- *Personal Exemption* of individual taxpayers has been increased to P50,000, regardless of status whether single, married, or head of the family.
- *Additional Exemptions* that may be claimed for each dependent, not exceeding 4, has been increased from P8,000 to P25,000 (*RA No. 9504, enacted on 17 June 2008*)

Editor's Note: The law will take effect 15 days following its publication in the Official Gazette or in at least 2 newspapers of general circulation. Furthermore, taxpayers must wait for the revised withholding tax table to be issued by the BIR that will take into consideration the amendments of RA No. 9504.

Supreme Court



Court rules against allowing bad debt deductions; circumstances show advance is not a true loan

The Supreme Court (SC) ruled that advances are not loans which could be allowed as bad debt deductions if a) there was no unconditional obligation to return the advances; b) if such advances were made with neither security or collateral, or a specific deed evidencing the terms and conditions normally accompanying loans; c) the parties also did not provide a specific maturity date for the advances to become due and demandable, and the manner of payment was unclear; and d) if there is evidence of "partnership" between the parties as there would be a 50% sharing of the net profits as "compensation".

The SC pointed out that in a contract of loan, a person who receives a loan or money or any fungible thing acquires ownership thereof and is bound to pay the creditor an equal amount of the same kind and quality. Furthermore, while a corporation, like petitioner, cannot generally enter into a contract of partnership unless authorized by law or its charter, it has been held that it may enter into a joint venture which is akin to a particular partnership. In this case, the totality of the circumstances and the stipulations in the parties' agreement indubitably lead to the conclusion that a partnership was formed between Co. P and Co. B. (*Philex Mining vs. Commissioner of Internal Revenue (CIR)*, G.R. No. 148187 dated 16 April 2008)

Qualified prohibition to impose fees and charges on petroleum products

The SC ruled that language of Section 133(h) of the Local Government Code (LGC) is clear that the prohibition with respect to petroleum products extends not only to excise taxes thereon, but all “taxes, fees and charges.” The first limitation comprehends a wider range of subjects of taxation: all articles already covered by excise taxation under the NIRC, such as alcohol products, tobacco products, mineral products, automobiles, and such non-essential goods as jewelry, goods made of precious metals, perfumes, and yachts and other vessels intended for pleasure or sports. In contrast, the latter reference to “taxes, fees and charges” pertains only to one class of articles of the many subjects of excise taxes, specifically, “petroleum products.” While local government units are authorized to burden all such other class of goods with “taxes, fees and charges,” excepting excise taxes, a specific prohibition is imposed barring the levying of any other type of taxes with respect to petroleum products. (*Petron Corporation vs. Mayor Tobias M. Tiangco and the Municipal Treasurer of the Municipality of Navotas, G.R. No. 158881, 16 April 2008*)

Prescriptive period for collection

The BIR has three years from the date of actual filing of the tax return to assess deficiency taxes or to commence proceedings for the collection of deficiency taxes. When it validly issues an assessment within the three year period, the BIR has another three years within which to collect the tax due by distraint, levy, or court proceeding. The three year period for collection of the assessed tax begins to run on the date the assessment notice had been released, mailed or sent to the taxpayer. Under Section 320 (now Section 223) of the Tax Code, in order to suspend the running of the prescriptive periods for assessment and collection, the request for reinvestigation must be granted first by the BIR. (*Bank of the Philippine Islands vs. CIR, G.R. No. 74942, 07 March 2008*)

Editor’s Notes: The SC also ruled that the waiver of the statute of limitations signed by BPI did not suspend the prescriptive period since the waiver is void as it shows no date of acceptance in violation of Revenue Memorandum Order No. 20-90.

Court of Tax Appeals



Inventory costing method in coal trading business

Under Section 41 of the Tax Code, if the use of inventories is necessary in order to determine a taxpayer's income, then it shall be taken by the taxpayer based on rules and regulations issued by the Department of Finance (DOF), upon recommendation of the BIR, conforming to the best accounting practice in the trade or business, and most reflecting income. Thus, the method of inventory taking should be that which reflects the taxpayer's income, for this is merely to ensure the assessment of correct taxes. In the absence of evidence to prove that taxpayer has been using the "specific identification method" in previous years, which is an exception under Section 41 of the Tax Code, the "average costing method" commonly used in the coal trading business should be applied. (*Asia Coal Corporation vs. CIR, Court of Tax Appeals Case No. 6803, February 13, 2008*)

Proof of third party information as basis of assessment necessary

While Section 6(B) of the Tax Code empowers the Commissioner to make assessments based on the best evidence obtainable, he must also be able to present such evidence before the Court in the event that litigation ensues. Best evidence obtainable includes those which cannot be admitted in a judicial proceeding where rules of evidence are strictly observed. Considering the

enormous power given to Commissioner and leniency in the kinds of evidence he may accept as basis for assessments, he had no excuse in failing to present to the Court the third party information on which the BIR examiners based the assessments. It must not be forgotten that an assessment must be based on actual facts. (*Wintelecom, Inc. vs. CIR, CTA Case No. 7056, February 20, 2008*)

Payment of duties must be made within the validity period of import permit

Importation is a stage which begins with the entry of the goods into Philippine jurisdiction and ends with the withdrawal of the same from customs. When an import permit is issued with a validity period, the importation must be completed within that same period. This means that both the goods must have entered the Philippines and withdrawn from customs within the validity period. If any stage of importation is not completed within the validity period, the importation of an article becomes prohibited. Due to the taxpayer's failure to pay the duties on the imported articles within the validity period of the import permit, the importation of the articles became prohibited. To remedy the situation, however, the taxpayer must have its import permit revalidated so that it may legally withdraw its articles by paying the corresponding duties thereon within the validity period of the revalidated import permit. (*Tri-Mark Ventures Trading Corporation vs. Commissioner of Customs, CTA Case No. 6858, January 30, 2008*)

Office of the President



Charitable contributions as deductible business expenses; accreditation returns to PCNC

Charitable contributions or gifts made to accredited domestic corporation or association organized and operated exclusively for religious, charitable, scientific, youth and sports development, cultural or education purposes or for the rehabilitation of veterans, or to social welfare institution, or non-government organization (NGO) (accredited donee-institutions) are allowed as deductible business expenses for income tax purposes. New rules have been promulgated regarding the implementation of this scheme, particularly with respect to the role of the Philippine Center for NGO Certification (PCNC):

- No corporations, associations, or NGO's shall be processed accreditation by the PCNC unless it has secured a valid registration with the government agency that exercises regulatory function over such corporation, association or NGO.
- In addition to its present membership which includes the DOF or BIR representative, the PCNC Board of Trustees shall include the Department of Social and Welfare Development (DSWD). Other government representative/s may likewise sit in the PCNC Board of Directors, on a case-to-case basis and depending on the subject for deliberation. *(EO No. 720, dated 11 April 2008, amending EO 671 issued last October)*

Department of Finance



Last day for availing of Tax Amnesty

The Department of Finance (DOF) clarified that the last day for availing the benefits of RA No. 9480, otherwise known as “The Tax Amnesty Act of 2007;” was on 5 May 2008.

The Administrative Code of 1987 provides that every agency shall file with the UP Law Center (UPLC) three (3) certified copies of every rule adopted by it, and each rule shall become effective fifteen (15) days from the date of filing with UPLC. Per certification by the UPLC, a copy of implementing rules of the Tax Amnesty was filed with the office only last 23 October 2007. Thus, DOF Department Order (DO) No.29-07 was effective 15 days from 23 October 2007 or on 7 November 2007.

The Tax Amnesty Act of 2007, on the other hand, provides that the amnesty tax shall be paid “within six months from the effectivity of the IRR”. Hence, DOF DO No. 11-08 clarified that the last day for availing benefits of the tax amnesty program shall be six (6) months from the effectivity of DOF DO No.29-07 (7 November 2007), or on 5 May 2008. *(DOF DO No.11-08 dated 18 March 2008)*

Information access on taxpayers between BIR and LGUs

A DO was issued and provides for the mechanics by which the BIR and local government units (LGU) shall exchange information on taxpayers. The LGU will provide the BIR and/or vice versa, with a soft copy of Masterlist of Taxpayers based on certain criteria of the preceding year on specified schedules/timelines

depending on the masterlist specified in the DO. Also, upon written request of either parties' authorized representatives, the requested party shall provide tax returns or list of contractors/suppliers, operators, vendors and such other matters enumerated in the DO, provided that these information shall be exclusively utilized to ascertain, assess, and collect the correct amount of internal revenue taxes or local taxes, as the case maybe, and that it shall not be disclosed to any unauthorized person. *(DO No. 9-08 dated 26 March 2008 was issued to implement Executive Order No. 646 entitled Accessibility of Information on Taxpayers between the Bureau of Internal Revenue and the Local Government Units for Tax Collection Purposes dated 3 August 2007)*

Bureau of Internal Revenue



BIR adopts OECD Transfer Pricing Guidelines as temporary measure

As a matter of policy, the Bureau of Internal Revenue (BIR) has adopted the Organization for Economic Co-operation and Development (OECD) transfer pricing guidelines as its interim transfer pricing guidelines. This is while the BIR revises its own draft Revenue Regulations on Transfer Pricing. Until the latter is issued, any and all concerns/issues in the interim related to transfer pricing shall be resolved in accordance with the principles laid down by the OECD Transfer Pricing Guidelines. *(Revenue Memorandum Circular (RMC) No. 26-2008 dated 24 March 2008)*

Payment and remittance of DST on taxable certificates of educational institutions

According to the BIR, an educational institution which is one of the parties to a taxable document or transaction, shall be responsible for the remittance of the documentary stamp tax (DST) prescribed therein. Furthermore, in the event that the educational institution is itself exempt from the DST imposed therein, then, it shall remit the tax as a collecting agent. *(RMC No.25-2008 dated 17 March 2008, reiterating certain provisions of Revenue Regulations No. 9-2000, dated 31 August 2000, implementing Section 188 of the Tax Code of 1997)*

Clarification on “direct costs and expenses”

For purposes of the minimum corporate income tax (MCIT), “direct costs and expenses” shall only pertain to those costs exclusively and directly incurred in relation to the revenue realized by the sellers of the service. It refers to costs indispensable to the earning of the revenue that is without such costs, no revenue is generated. Thus, it excludes all expenses and other costs outside that definition and are not included to “cost of services” for purposes of computing the gross income subject to the 2% MCIT. *(RMC No. 24-2008 dated 18 March 2008)*

“De Minimis” exemptions

The “*De Minimis*” benefits, which are exempt from income tax on compensation, as well as withholding tax on compensation income and/or fringe benefit tax, now cover:

- Rice subsidy of P1,500.00 or one (1) sack of 50 kg. rice amounting to not more than P1,500.00 per month, and
- Uniform and clothing allowance not exceeding P4,000.00 per annum *(Revenue Regulations (RR) Nos. 5-2008 dated 17 April 2008)*

Venue for filing of tax returns on CGT, CWT and DST

The pertinent regulations and issuances relative to the venue for the filing of returns for capital gains tax (CGT), creditable withholding tax (CWT), and DST and payment of taxes due on onerous transfers of real properties owned by taxpayers classified as large taxpayers under RR No. 1-98, have been revised as follows:

- If the seller of capital assets is a large taxpayer, the venue for the filing of the CGT and DST returns and payment of the said taxes shall be with the Authorized Agent Bank (AAB) of the concerned Large Taxpayers Services’ (LTS) Office where said large taxpayer-seller is registered and not with the AAB located within the Revenue District Office (RDO) having jurisdiction over the place where the property is located.
- For CWT deducted and withheld by the withholding agent/buyer on the sale, transfer or exchange of real property classified as ordinary asset where the seller is a large taxpayer, the CWT return (BIR Form No. 1606) and the remittance of the CWT shall be filed and remitted by the withholding agent/buyer with the AAB of the concerned LTS Office where the large taxpayer-seller is registered observing the prescribed deadline. The filing and payment of the DST due on this transaction shall observe the same rule on venue and deadline, subject to Electronic Filing and Payment System (EFPS) deadline requirement in case where the withholding agent/buyer is an EFPS taxpayer.

- Following the new rule to be observed in cases involving large taxpayer-seller on the venue of filing and payment of CGT, CWT and DST on the sale, exchange or other mode of onerous disposition of real property, whether capital or ordinary asset; and upon presentation of all requirements on the filing and payment of required returns and taxes, the concerned LTS Office having jurisdiction over the principal office of the large taxpayer-seller shall issue the corresponding Tax Clearance Certificate (TCL) and the Certificate Authorizing Registration (CAR) for the registration of the real property transaction in favor of the transferee, subject to rules on ocular inspection.

There are no changes in the prescribed period for the filing of the returns and payment. (*Revenue Regulations (RR) No. 4-2008 dated 19 February 2008*)

Consolidated regulations on taxes on share transactions

The regulations on the taxation of sale, exchange or disposition of shares of stock of domestic corporations that are listed and traded through the Local Stock Exchange, or disposition of shares through Initial Public Offering (IPO) or disposition of shares not traded through the Local Stock Exchange have been consolidated as follows:

- The term “Shares Listed and Traded through the Local Stock Exchange” includes block sale or other types of sales, trades or transactions in the Local Stock Exchange (LSE) and executed through the trading system and/or facilities of the LSE in accordance with the rules of the LSE.
- On every sale, exchange or other disposition of shares of stock listed and traded through the LSE other than the sale by a dealer of securities, a tax will be imposed as follows:
 - a) Tax Rate –Stock transaction tax at the rate of one-half of one percent (1/2 of 1%) based on the Tax Base.
 - b) Tax Base – Gross Selling Price or Gross Value in money of the shares of stock sold, bartered, exchanged or otherwise disposed
- On every sale, exchange or other disposition through *IPO* of shares of stock in closely held corporations, the applicable tax is as follows:
 - a) Tax Rates –The rates shall be in accordance with the proportion of the shares of stock sold, exchanged or disposed (DS) to the total outstanding shares of stock (OS) after listing in the Local Stock Exchange, to wit:

Proportion of DS to OS	Tax Rate
Up to 25%	4%
Over 25% but not over 33 1/3%	2%
Over 33 1/3%	1%

b) Tax Base – Gross Selling Price or gross value in money of the shares of stock sold, bartered, exchanged or otherwise disposed of.

- A final tax will be imposed on sale or exchange of *shares of stock NOT traded through the Local Stock Exchange* pursuant to the 1997 Tax Code as follows:

a) Tax Rates:

- 5% if amount of capital gain does not exceed P100,000
- 10% on any amount in excess of P100,000

b) Tax Base: The tax imposed shall be upon the net capital gains realized during the taxable year from the sale or exchange of shares of stock.

- In the case of dissolution and liquidation of the company who issued the shares, the investor shall recognize either capital gain or capital loss upon surrender of shares in exchange for cash and/or property distributed by the issuing corporation upon its dissolution and liquidation, computed by comparing the cash and fair market value of property received against the cost of investment in shares. The difference between the sum of the cash and the fair market value of property received and the cost of investment in shares shall represent the capital gain or loss from the investment, whichever is applicable. The capital gain shall be subject to the regular income tax rates imposed under the 1997 Tax Code, as amended, on individual taxpayers or to the corporate income tax rate, in case of corporations. *(RR No. 6-2008 dated April 22, 2008)*

Editor's Note: In an earlier issuance (RMC No. 73-2007), a block sale was subject to pertinent provisions of income tax [Sec24(C); Sec25(A)(3); Sec25(B); Sec.27(D)(2); Sec28(A)(7)(c) & Sec28(B)(5)(c)] rather than subject it to other percentage tax (Sec127).

Uniform policies on collection, affixture, remittance and reporting of DST

To address the of lack of loose stamps, technical and operational inadequacies of Documentary Stamp Electronic Imprinting Machines, and to boost DST collection by mandating government agencies and its instrumentalities, including the LGUs, to use "Constructive Stamping or Receipt System", the following measures were put in place:

- New guidelines and procedures in the collection, affixture, remittance and reporting of DST through "Constructive Stamping or Receipt System" on certificates issued by government agencies, its instrumentalities, including LGUs.
- Certain government agencies shall be constituted as BIR agents for the collection of tax and shall remit the DST collected to the Bureau.
- The filing of DST Return (BIR Form No. 2000) and payment of the tax shall be made to an AAB within five (5) days after the close of the month when the taxable documents were made, signed, issued, accepted or transferred. *(RMO 13-2008 dated 13 March 2008)*

RATE Policies and Guidelines

The policies and guidelines for the development, investigation and prosecution of cases under the Run After Tax Evaders (RATE) Program of the BIR have been issued and are – briefly – as follows:

- Under the RATE Program, the BIR is mandated to investigate criminal violations of the Tax Code, and assist in the prosecution of criminal cases that will generate the maximum deterrent effect, enhance voluntary compliance, and promote public confidence in the tax system.
- The criminal action and the corresponding civil action for the recovery of civil liability for taxes and penalties shall at all times be simultaneously instituted and jointly determined in proceedings before the CTA. RATE cases filed with the CTA must, as much as possible, be accompanied by an initial assessment.
- For RATE cases, the relevant offices of the BIR may conduct a second examination or inspection of the taxpayer's books of accounts and other accounting records even if the regular audit examination had already been conducted. *(Section 235 of the Tax Code of 1997)*

- To qualify under the RATE Program, a case must conform, among others, to the following conditions:
 - a. High-profile Taxpayers or taxpayers well-known within the community, industry or sector to which the taxpayers belong; and
 - b. Estimated basic tax deficiency is at least P1,000,000 per year and tax type, but priority should be given to tax cases where the aggregate basic tax deficiencies for all tax types per year is P50,000,000, or more. *(RMO No. 24-2008, issued on 9 May 2008)*

Bureau of Local Government Finance



RA 7160 grants LGUs the authority to adjust tax rates not exceeding 10%

Sec. 191 of RA 7160 grants local government units (LGUs) the authority to increase its tax rates by not more than 10% every 5 years. However, specific provisions of RA No. 7160 on professional tax, amusement tax, among others, impose absolute amounts to limit adjustments, which amounts may be lower than the 10% maximum rate of adjustment provided in Sec. 191. The Bureau of Local Government Finance (BLGF) opined that Sec. 191 of RA No. 7160 grants LGUs a clear and unambiguous authority to adjust rates not exceeding 10%. Thus, it must be applied without further interpretation. However, it hedges its opinion by stating that the declaration of legality of a local tax ordinance is within the exclusive jurisdiction of the Department of Justice. *(BLGF Opinion dated 01 April 2008)*

An entity with a plant situated in two municipalities is liable to pay Local Business Tax in the two municipalities where the plant is located

If the plant of an entity is located in two municipalities and the operation of such plant involves a continuous and integrated process, the said municipalities should share equally in 70% of the Local Business Taxes payable by the entity. *(BLGF Opinion dated 19 May 2008)*

Bureau of Customs



Functions of the CAS and appeals on its decisions

Amendments have been introduced to the functions and responsibilities of the Customs Accreditation Secretariat (CAS), as well as the appeal procedure on decisions by the Executive Director of the CAS. The CAS is responsible for processing the applications for the accreditation of customs brokers or their representatives. Applications disapproved by the CAS Executive Director may be appealed to the Deputy Commissioner designated as CAS Supervisor by filing a notice of appeal within 15 days upon receipt of the said disapproval. An affirmation of the disapproval by the Deputy Commissioner can then be appealed to the Commissioner within the same time period prescribed. Both Deputy Commissioner and Commissioner will decide on the appeal elevated to them within 30 days. *(Customs Administrative Order (CAO) 3-2008 dated 16 May 2008 amending CAO 3-2006)*

Resins no longer allowed as warehousing entries

To curb incidences of warehouses being used to smuggle resins into the country, the importation of resin as warehousing entries is no longer allowed. However, refund or drawback under Section 106 of the Tariff and Customs Code of the Philippines (TCCP) may still be availed of on importations of resins upon presentation of valid proof that the said resin was used for the manufacture or processing of articles that have been exported. *(CAO 4-2008 dated 23 May 2008)*

Treatment of articles declared as off-quality, overruns, waste, etc.

To prevent the proliferation of articles being misdeclared as off-quality to avoid the payment of proper duties and taxes, all shipments that are declared as stocklots, side-runs, cull rolls, seconds, mill lots, off-grade, B-grade, C-grade, used, second-hand, off-specs, sub-standard, off-quality, overruns, sweepings, overflow, recycled, waste-waste, reconditioned, refurbished, re-fashioned, surplus, scrap, scrap metals, metal waste, cut-up, bath-roll, odd lengths, unbranded and other similar descriptive terms shall be subject to 100% examination. These shipments will also be subject to the clearance of the District Collector and will be required to be validated by various certifications and laboratory exam results. *(Customs Memorandum Order (CMO) 21-2008 dated 16 April 2008)*

Warehouse entries

All Customs Bonded Warehouses, except those in international airports, will be required to specify in their list of importable goods and statement of raw material importation requirements the specific and proper description of each item in accordance with Customs Administrative Order 8-2007. Otherwise, their applications will not be accepted and deemed in violation of the said Order thereby subjecting the cargo to 100% physical inspection. *(CMO 24-2008 dated 16 May 2008)*

Oil tariffs now at 0%

Pursuant to the Certification issued by the Department of Energy dated 16 May 2008 that the CIF price of Dubai crude and diesel in the international market have breached the levels of US\$103.50 per barrel and US\$117, respectively tariffs on imported oil products have been lowered to 0%. It may be recalled that oil tariffs were brought down to 1% just last May. *(CMO 25-2008 dated 21 May 2008)*

Warehouse withdrawals

For warehousing entries which were eventually withdrawn and subjected to customs duties and taxes, bonded warehouse operators will be required to apply in writing for the payment of the said duties and taxes and withdrawal, while likewise stating the valid reasons for doing so. The application will be subject to the approval of the Customs Bonded Warehouse (CBW) Committee and may elicit a review of the CBW license and its authorized volumes. All withdrawals of imported articles for domestic consumption, except for Public and Private Customs Bonded Warehouses should not exceed 30% of a shipment. *(CMO 26-2008 superseding CMO1-2005)*

Securities and Exchange Commission



Permissible decrease in the capital stock of a corporation

A decrease in the capital stock of a corporation for the purpose of a partial return of capital to its stockholders in the form of shares of stock in another entity is permissible so long as the following procedure and requirements are satisfied:

- (1) Amendment of the Articles of Incorporation;
- (2) Consent of creditors;
- (3) The corporation remains solvent after the decrease; and
- (4) Publication in a newspaper of general circulation of the purported decrease. *(Securities and Exchange Commission - Office of the General Counsel (SEC-OGC) Opinion 08-04 dated 04 February 2008)*

Non-Philippine nationals may own 100% of the non-voting shares in a financing company

Non-Philippine nationals may own 100% of the non-voting shares in a financing company because RA No. 5980 only requires that 40% of the voting stock be owned by Philippine nationals. However, the company should also comply with the minimum paid-up capital requirement under Sec. 6 of RA 5980 and there is reciprocity between the country of the foreign individual or entity and the Philippines. *(SEC-OGC Opinion 08-14 dated 02 June 2008)*

A PEZA-registered retail enterprise is not exempt from the Retail Trade Liberalization Act vis-à-vis the Foreign Investments Act.

A PEZA-registered entity engaged in retail trade, which falls under the Foreign Investments Negative list, should comply with its nationality and capitalization requirements, i.e., no foreign equity if the paid-up capital is less than US\$2,500,000. The law allows full foreign equity ownership in a retail enterprise if: (1) its paid-up capital is greater than or equal to US\$2,500,000 and investments for establishing a store is not less than US\$830,000; or (2) it is specializing in high-end luxury products and the paid-up capital per store is not less than US\$250,000. *(SEC Opinion 08-06 dated 23 January 2008)*

Filing notices of exemption from registration of securities

No notice of exemption shall be required for any transaction covered by Section 10.1 of the SRC, except those covered by subparagraphs (k) and (l), namely:

- (k) The sale of securities by an issuer to fewer than twenty (20) persons in the Philippines during any twelve-month period.
- (l) The sale of securities to any number of the following qualified buyers:
 - (i) Bank;
 - (ii) Registered investment house;
 - (iii) Insurance company;
 - (iv) Pension fund or retirement plan maintained by the Government of the Philippines or any political subdivision thereof or managed by a bank or other persons authorized by the Bangko Sentral to engage in trust functions;
 - (v) Investment company; or
 - (vi) Such other person as the Commission may by rule determine as qualified buyers, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial and business matters, or amount of assets under management.

Citizenship of Assistant Corporate Secretary

A foreigner cannot be the Assistant Corporate Secretary pursuant to Section 25 of the Corporation Code which provides that a Corporate Secretary must be a citizen of the Philippines. *(SEC Opinion No. 08-06 dated 23 January 2008)*

Board of Investments



The Investments Priorities Plan (IPP) of 2008

The Board of Investment (BOI) published the General Policies and Specific Guidelines of the 2008 IPP on 2 June 2008. The new General Policies includes a list of specific activities not entitled to income tax holiday (ITH) as follows:

1. New projects involving the same activity to be undertaken by the same company or another company with the same stockholders or interlocking shareholders to the extent of 50% ownership.

Exceptions are:

- a. Direct and constructive exports
- b. Projects undertaken by Micro, Small and Medium Enterprises (MSMEs)
- c. Socialized and low-cost mass housing
- d. Tourism projects in accordance with the Tourism Master Plan
- e. Shipbuilding
- f. Shipping serving the nautical highways and missionary routes
- g. Air transport serving the missionary routes.

The following activities shall have diminishing rate of ITH to be determined in the Specific Guidelines:

- a. Vertical mass housing projects located in Metro Manila
- b. Power generation projects

- c. Shipping
 - d. Air transport
2. Expansion and Modernization projects, except the following:
 - a. Direct and constructive exports
 - b. MSMEs projects
 - c. Socialized and low-cost mass housing
 - d. Tourism projects in accordance with the Tourism Master Plan
 - e. Printing, Publication or Content Development of Books or Textbooks
 - f. Manufacture of long steel products (billets and reinforcing steel bars)
 - g. Strategic activities
 3. Indirect exports of goods except constructive exports;
 4. Industrial tree plantation;
 5. Exploration, mining, quarrying, and processing of minerals except those projects that comply with the minimum investment requirement or degree of value adding as provided in the Specific Guidelines;
 6. Storage, marketing and distribution of petroleum products (entitled to ITH if registered under RA No. 8479 or the Downstream Oil Industry Deregulation Act) except when located in government identified logistics hubs;
 7. Logistics services rendered to exporters;
 8. Adoption of water pollution control technology, cleaner production and waste minimization;
 9. Activities listed in the IPP but intended for the firm's own use;
 10. Projects with sovereign guarantee or guaranteed rate of return; and
 11. Privatized projects paying income taxes prior to or at the time of privatization except those pre-qualified before the effectivity of the 2008 IPP with ITH factored-in in the bids.

Projects covered under 1 to 6 may be entitled to ITH if located in Less Developed Areas or in the 30 poorest provinces.

The General Policies also contain a new item entitled "Re- registration of Cancelled Projects," which provides that in general, the following activities are not qualified for re-registration:

1. Registered projects that stopped operations and were subsequently cancelled; and
2. Registered projects that were not implemented and were subsequently cancelled.

Exceptions to this re-registration policy are:

1. Projects that were previously registered with the Board and were cancelled prior to the effectivity of the 2008 IPP, provided that the activity is listed in the 2008 IPP and the enterprise has no outstanding obligations with the DTI/BOI.
2. Projects acquired through Special Purpose Vehicle (SPV).

However, the ITH shall be limited to the remaining period of entitlement.

The 2008 IPP expressly provides that pioneer status shall not be automatically granted on the basis of new product or new technology.

Another notable change is that projects with sovereign guarantee for risks other than commercial risk may be granted ITH subject to certification as such by the agency/institution providing the guarantee.

Under the 2008 Specific Guidelines, the following are the 3 classifications of priority investment areas:

1. Preferred Activities. The classification of preferred activities has been reduced from 11 to the following 6:
 - Agriculture/ Agribusiness and Fishery (includes production and processing of biofuels which was previously classified under Energy)
 - Infrastructure (combines the activities under Energy, Infrastructure and Shipping of the 2007 IPP; now includes government identified logistics hubs, and IT-enabled logistics services, and IT services rendered to government agencies and Local Government Units)
 - Tourism
 - Research and Development
 - Engineered Products
 - Strategic Activities
This is a new classification which covers activities with a minimum project investment cost of the peso equivalent of US\$300 million and complies with either (a) employment generation of at least 1,000; or (b) use of internationally

accepted high level of technology. This also covers major projects of global companies intended to be located only in one country as a regional hub where the Philippines is one of the short-listed countries for investment location.

2. Mandatory Inclusions

3. Export Activities

While the categories of (a) Information and Communications Technology and (b) Electronics no longer appear in the Preferred Activities, many activities falling under these categories are dealt with in the Export Activities classification.

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