

TAX ALERT

November 2021

SUPREME COURT DECISIONS

A REPRESENTATIVE OFFICE SHOULD BE TREATED AND TAXED IN THE SAME MANNER AS A REGIONAL HEADQUARTERS (“RHQ”) AND NOT A REGIONAL OPERATING HEADQUARTERS (“ROHQ”). SINCE A REPRESENTATIVE OFFICE IS PRIMARILY ENGAGED IN NON-INCOME GENERATING ACTIVITIES LIKE AN RHQ, BY ANALOGY, IT SHOULD BE CONSIDERED EXEMPT FROM INCOME TAX AND VALUE-ADDED TAX (“VAT”). The following are the similarities and differences among a representative office, an RHQ, and an ROHQ:

1. A representative office and an RHQ are not allowed to engage in any income-generating activities in the Philippines. An ROHQ, on the other hand, provides qualifying services that generate income in the Philippines.
2. Both a representative office and an RHQ do not earn or derive income in the Philippines. An ROHQ is allowed to derive income in the Philippines.
3. Unlike an RHQ and an ROHQ, a representative office deals directly with the parent company's clients and not with the affiliates, branches, or subsidiaries.
4. Under the National Internal Revenue Code of 1997 (“1997 NIRC”), RHQs are exempt from both income tax and VAT so long as they do not render any of the qualifying services, whereas ROHQs shall be subject to a tax rate of 10% of their taxable income from its qualifying services and 12% VAT.

A representative office is only allowed under the law to undertake certain activities, such as but not limited to, information dissemination, promotion of the parent company’s products as well as quality control of products. These activities, while directed to the parent company’s clients, are not income generating, similar to the activities of an RHQ and in stark contrast with the qualifying services performed by ROHQs. Considering all of the above, a representative office, while not defined under the 1997 NIRC, is akin to an RHQ and not to an ROHQ. *Commissioner of Internal Revenue v. Shinko Electric Industries Co., Ltd., G.R. No 226287 (Jul. 6, 2021).*

COURT OF TAX APPEALS DECISIONS

THERE IS NOTHING IN SECTION 110(A) OF THE 1997 NIRC WHICH STATES THAT ONLY THOSE INPUT TAXES FROM PURCHASES OF GOODS THAT FORM PART OF THE FINISHED PRODUCT OF THE TAXPAYER OR THOSE DIRECTLY USED IN THE CHAIN OF THE PRODUCTION SHALL BE CONSIDERED AS CREDITABLE. THUS, THE SOURCE OF CREDITABLE INPUT TAX CANNOT BE LIMITED TO PURCHASES OR IMPORTATION OF GOODS THAT ACTUALLY FORM PART OF THE FINISHED PRODUCTS OR DIRECTLY USED IN THE CHAIN OF THE

PRODUCTION ONLY. Section 112(A) of the 1997 NIRC merely states that the creditable input VAT should be "attributable" to the zero-rated or effectively zero-rated sales. It is not required that the input VAT should be "directly attributable" to zero-rated or effectively zero-rated sales. *Commissioner of Internal Revenue v. Lepanto Consolidated Mining Co., CTA EB No. 2389 (Nov. 9, 2021).*

MUTUAL FAILURE OF BOTH THE TAXPAYER AND THE BUREAU OF INTERNAL REVENUE ("BIR") TO FULFILL THEIR OBLIGATIONS TO EXECUTE A VALID WAIVER WITH ALL THE REQUISITES RENDERS THEM *IN PARI DELICTO*. THUS, NEITHER OF THE PARTIES CAN RAISE THE DEFECTS IN THE WAIVERS TO THEIR OWN BENEFIT. *Medicard Phil., Inc. v. Commissioner of Internal Revenue, CTA EB No. 2158 (Nov. 17, 2021).*

ISSUING THE FORMAL LETTER OF DEMAND ("FLD"), WHICH IS AN EXACT REPLICA OF THE PRELIMINARY ASSESSMENT NOTICE ("PAN"), SANS ANY INDICATION IN THE FLD THAT DUE CONSIDERATION WAS ACCORDED ON THE TAXPAYER'S EXPLANATIONS OR ARGUMENTS AS STATED IN ITS REPLY TO THE PAN, IS FATAL TO THE COMMISSIONER OF INTERNAL REVENUE'S ("CIR") CAUSE. THE ISSUANCE OF A PAN IS AN IMPORTANT PART OF DUE PROCESS AND GIVES BOTH THE TAXPAYER AND THE CIR THE OPPORTUNITY TO SETTLE THE CASE AT THE EARLIEST POSSIBLE TIME WITHOUT THE NEED FOR THE ISSUANCE OF A FINAL ASSESSMENT NOTICE. THUS, PROCEDURAL DUE PROCESS IS NOT SATISFIED WITH THE MERE ISSUANCE OF A PAN, SANS ANY INTENTION ON THE PART OF THE BIR TO ACTUALLY CONSIDER THE TAXPAYER'S REPLY THEREON. The FLD issued in this case is a verbatim reproduction of the wordings of the PAN, differing only in the computation of the interest; the FLD neither referred to the taxpayer's Reply nor addressed its arguments therein; and was not even accompanied with a computation sheet. These may be deemed as a failure of the CIR to inform the taxpayer through the FLD the reasons for his apparent rejection of the taxpayer's arguments in the Reply to the PAN. *Bac-man Geothermal, Inc. v. Commissioner of Internal Revenue, CTA Case No. 9728 (Nov. 18, 2021).*

THE IMPOSITION OF THE PENALTY UPON A CORPORATE OFFICER UNDER SECTION 254 IN RELATION TO SECTION 253 OF THE 1997 NIRC WITHOUT FIRST CONVICTING THE CORPORATION IS VOID, SINCE WITHOUT A CONVICTED CORPORATION, THERE IS NO ERRING RESPONSIBLE OFFICER. THE CRIME OF WILLFULLY ATTEMPTING TO EVADE OR DEFEAT TAX MAY ONLY BE COMMITTED BY THE PERSON OBLIGATED UNDER THE LAW TO DECLARE AND PAY SUCH TAX, WHICH, IN THIS CASE, IS THE CORPORATION; THERE IS NO CRIMINAL OFFENSE THAT DIRECTLY SANCTIONS THE CORPORATE OFFICERS FOR CORPORATE INCOME TAX EVASION. Here, the corporation was neither charged in the Amended Information nor the subject of an arraignment through its responsible officers. As such, it cannot be considered an accused, much less convicted and ordered to pay the fine under Section 254 in relation to Section 256 of the 1997 NIRC. *Enviroaire, Inc., v. People of the Phil., CTA EB Crim. No. 073 (Nov. 25, 2021).*

BIR ISSUANCES

PUBLICATION OF LETTERS CONTAINING THE ADDENDUM TO THE “LIST OF VAT-EXEMPT DRUGS AND VACCINES PRESCRIBED AND DIRECTLY USED FOR COVID-19 TREATMENT” AND COPY OF THE UPDATED LIST. The attached list supplements and updates the initial list published through RMC 81-2021. *Revenue Memorandum Circular No. 115-2021 (Nov. 3, 2021).*

CLARIFICATION REGARDING THE SUBMISSION OF BIR FORM NOS. 2307 AND 2316 UNDER RR 16-2021 PRESCRIBING THE SUBMISSION OF SUCH FORMS IN SOFT COPIES INSTEAD OF HARD COPIES USING DVD-R. This RMC clarifies that Revenue Regulations No. 16-2021 did not discontinue the submission of Forms 2307 and 2316 via DVD-R, but instead offered other modes of submission. Finally, the issuance authorizes the use of USB memory stick or similar storage devices for the submission of BIR Forms 2304, 2306, and 2307. *Revenue Memorandum Circular No. 117-2021 (Nov. 19, 2021).*

SEC ISSUANCES

THE DEADLINE FOR SUBMISSION OF FORMS/NOTICES PURSUANT TO MEMORANDUM CIRCULAR NO. 28, SERIES OF 2020 HAS BEEN EXTENDED TO NOVEMBER 11, 2021. *SEC Notice dated September 8, 2021. (date posted November 2, 2021)*

CONSIDERING THE EXTENDED DEADLINE FOR FILING OF THE AUDITED FINANCIAL STATEMENTS PROVIDED IN SEC MC NO. 3, SERIES OF 2021, THE DEADLINE FOR POSTING OF ADDITIONAL SECURITIES DEPOSIT AND SUBSTITUTION OF SECURITIES DEPOSIT FOR BRANCH OFFICES WITH FISCAL PERIOD ENDING DECEMBER 31, 2020 IS LIKEWISE EXTENDED ACCORDING TO THE FOLLOWING GUIDELINES:

1. Posting of additional securities deposit for branch offices falling due in 2021 shall be extended until December 23, 2021.
2. The extension for posting of additional securities deposit and substitution of securities deposit shall automatically be applied without the need for a request from the affected branch offices.
3. This Memorandum Circular shall take effect immediately and shall be prospective in nature.

SEC Memorandum Circular No. 11, series of 2021 (Nov. 11, 2021).

Note: The information provided herein is general and may not be applicable in all situations. It should not be acted upon without specific legal advice based on particular situations. If you have any questions, please feel free to send us an email at mail@baniquedlaw.com
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