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PRESCRIBING THE POLICIES, GUIDELINES AND PROCEDURES IN PROCESSING SPECIFIC REQUESTS FOR INFORMATION PURSUANT TO THE EXCHANGE OF INFORMATION PROVISION OF PHILIPPINE TAX TREATIES,...

BIR REVENUE MEMORANDUM ORDER NO. 2-2013, February 18, 2013

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I. BACKGROUND

In the last decade, the world has witnessed a growth in volume and complexity of cross-border commercial and financial transactions. With the liberalization and globalization of economies, however, innovative tax practices by taxpayers that have access to international markets have also emerged alongside an increase in international tax evasion. The harmful effects of some of these practices, e.g. abusive transfer pricing and capital flight, have resulted in significant losses of tax revenues for governments. To confront the challenges presented by globalization, many jurisdictions have emphasized the need for more effective exchange of tax information between national tax authorities.

In response to this changing fiscal environment, the Philippine Government enacted, on March 5, 2010, Republic Act (RA) No. 10021 otherwise known as the “Exchange of Information Act of 2010” which ensures that information held by our banks and financial institutions can be made available to foreign tax authorities, upon request, in accordance with the terms of our Double Taxation Agreements (DTAs) and Tax Information Exchange Agreements (TIEAs)[1] hereafter referred to as Exchange of Information or EOI arrangements. This development solidifies the Philippines’ commitment to comply with internationally-agreed standards on tax transparency and effective exchange of tax information. At the same time, it impacts the manner in which the Bureau handles requests for information exchange pursuant to the relevant treaty provisions.

To ensure that the exchange of information mechanism with our 37 tax treaty partners remains effective in this new environment, the procedures on specific exchange of information (or exchange of information on request),[2] which were last amended in 1997, are being updated - to reflect the foregoing changes in the global economy and the Philippine legal system.

II. POLICY

It is the policy of the Bureau of Internal Revenue to cooperate with foreign tax authorities in combating international tax evasion and other criminal tax offenses and to address tax concerns that affect international trade and investment by fully utilizing the mechanism of exchange of information. To this end, the Bureau shall adopt procedures on specific exchange of information that: 1) Allow for effective information exchange with other jurisdictions with which we have EOI arrangements; 2) Ensure the confidentiality of information received under such arrangements; and 3) Safeguard the rights of taxpayers and third parties.

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III. OBJECTIVES

In order to carry-out this stated policy, this Order:

1. Identifies the scope of exchange of information on request, the subjects covered and the limitations to exchange information;
2. Prescribes the standard procedures to be followed in handling a request for information made to, or received from, a foreign tax authority pursuant to an EOI arrangement; and
3. Prescribes the forms to be used in requesting information from foreign tax authorities, banks and financial institutions and other holders of taxpayer information, and the forms to be used in responding to requests for information from foreign tax authorities pursuant to an EOI arrangement.

IV. COMPETENT AUTHORITY

The competent authority acts as a contact point for the competent authorities of treaty partners for EOI purposes.

Exchange of information can only take place between competent authorities or their authorized representatives. This ensures that the rules applicable to exchange of information (and in particular the confidentiality of information exchanged) are respected and consistently applied. Bypassing the competent authorities constitutes a breach of tax confidentiality which is expressly prohibited by Section 270 of the National Internal Revenue Code (NIRC) and by the terms of our DTAs and TIEAs.

Our DTAs generally provide that “the Secretary of Finance or his authorized representative(s)” are the competent authorities for the Philippines. The DTAs with Bahrain, Bangladesh, Czech Republic, Sweden and United Arab Emirates provide that the competent authority is “the Secretary of Finance or the Commissioner of Internal Revenue”. The DTA with the United States indicates that the competent authority is “the Secretary of Finance or his delegate.”

Section 4 of Revenue Regulations 10-2010 expressly designates the Commissioner of Internal Revenue (Commissioner) as the Philippine competent authority for EOI purposes.

V. SCOPE AND COVERAGE OF EXCHANGE OF INFORMATION

Exchange of information covers any information that is necessary or foreseeably relevant to the administration or enforcement of the domestic laws of the contracting parties concerning income taxes and other taxes covered by the terms of our EOI arrangements. It includes information for cases that involve tax evasion and other criminal tax offenses but is not limited to such cases.

A request for information can include any or all of the following items but not limited to:

- The fiscal residence of an individual or a company;

- The tax status of a legal entity;

- The nature of income in the source country;

- The income and expenses shown on a tax return;

- Business records (for instance to determine the amount of commissions paid to a company of another State);

- Formation documents of an entity and documents about subsequent changes of shareholders/partners;

- Name and address of the entity at the time of formation and all subsequent name and address changes;

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- Number of entities residing at the same address as the requested entity;

- Names and addresses of the directors, managers, and other employees of a company for the relevant years, evidence (contracts and bank statements) of their remuneration, social security-payments and information about their occupation with regard to any other entities;

- Banking records;

- Accounting records and financial statements;

- Copies of invoices, commercial contracts, etc.; and

- The price paid for goods in a transaction between independent companies in both States.[3]

It must be stressed, however, that the scope of exchange of information is not limited to taxpayer-specific information but also includes information related to tax administration and compliance improvement, such as statistics, information about a particular industry, tax evasion trends, administrative interpretations and practices,[4] laws, court decisions, official publications and other subjects.

Time periods during which tax situations may be examined vary from country to country, and the beginning of the tax year does not always coincide with the calendar year. Where there is a significant time lag between the time the information is supplied and the year to which the information relates, a statute of limitations issue may arise. The question of whether use of the information is time barred has to be determined by reference to the statute of limitations rules of the country where the information is to be used.[5]

VI. LIMITATIONS TO EXCHANGE OF INFORMATION

The obligation to exchange information is mandatory and is not limited to information contained in the tax files held by the Bureau. When a request is received from a treaty partner, the Bureau will have to take action to obtain the information requested, if it is not available on its files. It cannot rely solely on the information in its possession. However, the Bureau is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the requesting state.

Thus, the Commissioner can order the obtention of information, and even summon, examine and take the testimony of a person to acquire the information requested since these acts are authorized under Section 5 of the National Internal Revenue Code (NIRC). In addition, the Commissioner can inquire into bank deposit accounts pursuant to Section 6(F) of the NIRC, as amended by RA 10021. Moreover, the income tax return/s of specific taxpayer/s subject of a request of a treaty partner may be open to inspection upon the order of the President.

There are instances, however, where the obligation to exchange information is lifted and a request for information can be declined, viz:

- Information that the requesting party would not be able to obtain under similar circumstances under its own laws or administrative practice;

- Information relating to years not covered by DTAs or taxes not covered;

- Disclosure of information requested would be contrary to public policy. “Public policy” generally refers to the vital interests of a country, for instance where information requested relates to a state secret, the disclosure of which would be contrary to the vital interests of the requested State. A case of “public policy” might also arise, for example, where a tax investigation in another country was motivated by racial or political persecution.

- Information relating to the administration or enforcement of a provision of the tax laws which discriminates

against a national of the requested party (i.e., Philippines) as compared with a national of the applicant party in the same circumstances; and

- Information subject to legal privilege; that is confidential communications between attorneys or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law.

VII. PROCEDURES

A. Responding to a Request for Information

The international standard for processing requests for information is ninety (90) days from receipt for a request by the tax authority. However, this period may be extended where difficulties in obtaining and providing information are encountered. In order to respond promptly to requests from tax treaty partners, the following procedures are hereby adopted:

Receipt, Evaluation and Acknowledgment of Requests

- All requests for information from foreign tax authorities received shall be coursed through and processed by the International Tax Affairs Division (ITAD). Should a request for information be received by another office, it should immediately be transmitted to the Chief, ITAD.

- Upon receipt, ITAD shall assign a reference number to the request for identification of cases and refer it to the Exchange of Information (EOI) Section.

- The EOI Section shall evaluate and verify the sufficiency of the request. Requests for bank information shall be verified against the checklist of requirements attached to this RMO as Template “1”.

- ITAD shall prepare the acknowledgment letter to the requesting tax authority to be signed by the Commissioner or his/her duly authorized representative within seven (7) days from receipt of the request. The standard format attached to this RMO as Templates “2” and “3” may be used for acknowledging receipt of requests.

4.1

If a request is found to be sufficient, and the information cannot readily be provided by ITAD, the Commissioner or his/her duly authorized representative will send letters to the appropriate information holders (e.g., government or BIR offices, banks, or financial institutions) requesting the relevant information. (Refer to Templates “4”, “5” and “6”).

4.2

If a request is considered to be insufficient, the requesting tax authority will be asked in the acknowledgment letter to clarify the request or to furnish additional documents or information as required to allow a response to be made.

4.3

Where there is ground to refuse or decline a request, the requesting tax authority will be informed in the acknowledgment letter of the grounds for such refusal.

Gathering of Information by BIR Offices

- If a request for taxpayer information is forwarded to another office within the Bureau that office should act on the request within sixty (60) days from the date of the request. The information request may already be at the

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disposal of the requested BIR office or it may require information gathering measures.

- If access to a taxpayer's records is required to obtain the information requested by the foreign tax authority, the concerned Revenue District Officer/Chief of the Division shall issue an Access to Records/Request for Information (for Exchange of Information Purposes- Template "7") to the taxpayer or entity concerned and serve the same within seven (7) days from date of issuance. Revenue officers should, as much as possible, secure records requested within thirty (30) days from date of service to the taxpayers.

- Once obtained, the information requested should immediately be forwarded to the Chief, ITAD (Attention: EOI Section) using the Feedback Sheet attached as Template "8" to this RMO.

- The Feedback Sheet shall also be used if the action/information requested cannot be provided by the Revenue District Officer/Chief of the Division at the end of the 60-day period.

> A revenue official or employee shall under no circumstances communicate directly to the requesting foreign tax authority (or a representative thereof) on matters pertaining to the latter's request for information without prior approval of the Commissioner.

> Issuance of Subpoena Duces Tecum to Officers of Banks and Financial Institutions

- If a bank or financial institution is requested to provide information but does not reply to a request for that information within the period specified in the request, or provides incomplete information, the Commissioner or his/her duly authorized representative, upon request of ITAD, shall issue a subpoena duces tecum (SDT) against the said bank or financial institution pursuant to existing revenue issuances, copy furnished the Bangko Sentral ng Pilipinas.

> Should the officer, owner, agent, manager, director or officer-in-charge of such bank or financial institution fail to comply with the subpoena duces tecum (SDT), ITAD shall refer the case to the Prosecution Division for the filing of appropriate criminal actions against such person (i.e., for violation of Sections 6 and Section 266 of the NIRC and RA 10021).

> Sending of Information to the Requesting Tax Treaty Partner

- Upon receipt of information from the appropriate offices, banks, or financial institutions, ITAD shall prepare a transmittal of the information to the requesting foreign tax authority to be signed by the Commissioner or his/her duly authorized representative. (Template "9") Documents transmitted shall be stamped with a note that the information contained therein is solely for the use of the requesting foreign tax authority pursuant to an existing income tax treaty or agreement on tax matters.

- If the information requested cannot be obtained or exchanged within 90 days, the Commissioner or his/her duly authorized representative shall inform the requesting foreign tax authority of the obstacles encountered in obtaining the information and the reasons for the failure to provide the information. (Refer to Template "10")

> Notice to Taxpayer

- With respect to request for information held by a bank or a financial institution and requested by a foreign tax authority, the Commissioner or his/her duly authorized representative shall, within sixty (60) days from receipt of all requested information, send a notice to the taxpayer concerned (Template "11") that he/it is or was subject of a request for information by the foreign tax authority.

> This Bureau shall not be at default of this provision should it fail to inform the taxpayer by reason that his or its address is not known to or is not supplied to the Bureau, when he or it cannot be located in the address registered/given by him to the Bureau, or that the notice was not sent to the current address of the taxpayer but

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to that only known or supplied to the Bureau.

B. Making a Request for Information to a Tax Treaty Partner

The following shall be observed when making a request for information to our tax treaty partners:[6]

- All requests for information by different offices of this Bureau (e.g., Regional Offices, Revenue District Offices [RDOs], Large Taxpayers Service, Large Taxpayers District Offices [LTDOs], National Investigation Division) shall be coordinated with ITAD. A revenue official or employee shall, under no circumstances, communicate directly to the requested foreign tax authority (or a representative thereof) on matters pertaining to this Bureau's request for information without prior approval of the Commissioner.

Form of Request

- A request shall be contained in a Memorandum (Template "12") together with all necessary documents. The request should be drafted in a simple and clear manner.

Any additional information that may facilitate the request (e.g., taxpayer's date of birth, middle or maiden name, foreign address), the type and required form of document (e.g., if authentication is required) and timeline for the request should be indicated.

- The requesting office shall secure the approval of the supervising Regional Director or Assistant Commissioner on the Memorandum.

- The request, together with necessary documents, shall be forwarded to the Assistant Commissioner (Legal Service), who will forward the same to Chief, ITAD for evaluation.

ITAD shall prepare the acknowledgement letters to the concerned office of the Bureau confirming receipt of request for information.

Sending of Request to Tax Treaty Partners

- If the request meets all the requirements, ITAD shall prepare the request letter to be signed by the Commissioner or his/her duly authorized representative addressed to the competent authority of the requested foreign tax authority. (Template "13" with attachments).

Receipt and Transmittal of Information

- Upon receipt of information from the requested foreign tax authority, ITAD shall prepare and send a letter to the said tax authority to be signed by the Commissioner or his/her duly authorized representative to acknowledge the information given. (Template "14")

- The Chief, ITAD shall also cause the transmittal of the information to the requesting BIR office signed by the Commissioner or his/her duly authorized representative. (Template "15")

VIII. CONFIDENTIALITY

All taxpayer information obtained pursuant to this Order are confidential and may only be disclosed in accordance with Philippine law (e.g., Section 270 of the NIRC). Confidentiality obligations are also imposed under our EOI arrangements which generally follow the rules of the OECD Model Tax Convention or Model TIEA. Moreover, the provisions cover not only information received in response to a request, but also information contained in competent authority letters, including the letter requesting information.

Generally, the Exchange of Information article in our DTAs provides that any information received shall be

treated by the Bureau as secret in the same manner as information obtained under the domestic laws of the Philippines and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes on income. Such persons or authorities shall use the information only for such purposes, but they may disclose the information in public court proceedings or in judicial decisions. However, some of the Philippines' DTAs, e.g., those with Canada and Singapore, have even more restrictive confidentiality provisions. Accordingly, any disclosure of taxpayer information received under an EOI arrangement, outside of the Bureau, must be in accordance with the terms of the relevant EOI arrangement and shall only be allowed after sign-off by the Commissioner or his/her duly authorized representative for this purpose.

IX. FINAL PROVISIONS

The gathering of information by this Bureau for a foreign tax authority pursuant to the latter's request does not constitute an actual investigation of this Bureau on the subject taxpayer or taxpayers nor authorizes the Bureau to issue corresponding Letters of Authority on the request, unless warranted.

However, information supplied by a bank or a financial institution to the Bureau may be used by it in its own assessment, verification, audit, and enforcement of the taxpayer whose account and his or its transactions are now made known to the Bureau. Likewise, the Bureau shall not be precluded from carrying out subsequent investigations on taxpayers whose transactions with foreign taxpayers were subject of examination by foreign tax authorities.

X. REPEALING CLAUSE

All issuances or portions thereof not consistent with the provisions of this Order are hereby repealed or amended accordingly.

XI. EFFECTIVITY

This Order takes effect immediately.

(SGD) KIM S. JACINTO-HENARES
Commissioner of Internal Revenue

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[1] The Philippines is planning to enter into negotiations for TIEAs but has not yet signed any such agreements.

[2] Refers to a situation where the competent authority of one country asks for particular information from the competent authority of another contracting party.

[3] Par. 26, Module 1, OECD Manual of Exchange of Information

[4] Par. 27, Module 1, OECD Manual of Exchange of Information

[5] Par. 30, supra

[6] See List of Tax Treaty Partners

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