REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

Quezon City

RA No. 9369	RR No. 16-05	#139-2016 1-18-2016

Person to Contact: Chief, Law Division
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SMMT-TIM 2016, INC.
16th Floor, Accralaw Tower, 2nd Avenue
Corner 30th St., BGC, Taguig City

Attention: **Brenda O. Batalla**
Treasurer

Gentlemen:

This refers to your letter dated January 11, 2016, requesting urgent clarification on the implications of the Bureau of Internal Revenue (BIR) Ruling No. 390-2015 issued on November 3, 2015 as to the validly existing and partially executed contracts between Commission on Elections (COMELEC) and SMMT-TIM 2016, Inc. (SMARTMATIC).

It is represented that SMARTMATIC is the joint venture corporation that won the COMELEC bidding for the provision of the Integrated Automated Election System through Lease with Option to Purchase 23,000 units and 70,977 units of Optical Mark Reader (OMR) Machines, both in 2015; that immediately after awarding both bids to SMARTMATIC, the COMELEC entered into contracts with the company on August 27, 2015 and September 4, 2015 for 23,000 units and 70,977 units of OMR Machines, respectively; that since the execution of the contracts and to date, SMARTMATIC has been complying with its obligations and deliverables based on the terms of the agreement; and that on October 15, 2015, COMELEC sought for the first time, since the effectivity of Republic Act (RA) No. 9369 in 2007, a BIR Ruling for value added tax (VAT) exemption on its purchases of goods and services relating to the 2016 Automated National Elections.

It is further represented that in COMELEC's Invitation to Bid for the 23,000 OMR Machines and Invitation to Bid for the 70,977 OMR Machines, COMELEC indicated that the approved budget for both contracts (ABCs) are inclusive of all taxes, such as, but not limited to, VAT, income tax, local taxes, and all other allied costs; that SMARTMATIC, on both instances, submitted bid prices that are inclusive of all taxes; that subsequent to the award of bid, COMELEC and SMARTMATIC entered into contracts on August 27, 2015 and September 4, 2015, both with contract prices that are inclusive of all taxes, such as but not limited to, VAT, income tax, local taxes, import duties and other fiscal levies; and that the intention is for COMELEC to have a fixed amount within its approved budget that it should pay, regardless of the taxes and other costs that may arise in the performance of the contracts relating to the 2016 Automated Elections.

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After the biddings were conducted and contracts were executed, BIR Ruling No. 390-2015 was issued on November 3, 2015. The aforementioned BIR Ruling exempts from VAT all the purchases of goods and services of COMELEC related to the 2016 Automated Elections, to wit:

> *"xxx xxx xxx Section 12 of RA No. 8436, as amended by RA No. 9369, clearly intended to exempt COMELEC from the 12% VAT and 3% percentage tax on its local purchases of goods and services as well as importation of goods that will be used relative to the conduct of the May 9, 2016 National, Local and ARMM automated elections. Hence, the suppliers /sellers of goods and services to COMELEC cannot shift or pass on any VAT or percentage tax to COMELEC on the latter's purchases of goods and services that will be used in the May 9, 2016 National, Local and ARMM automated elections. Moreover, importation by COMELEC of goods that will be used in the May 9, 2016 automated elections is also exempt from VAT.*
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> *It must be emphasized, however, that the exemption of the COMELEC from VAT and percentage tax is limited only to its purchases and/or importation of goods and services enumerated above during the period from October 2014 until October 2016. Moreover, the tax exemption shall cover only goods and services that will be used in, or directly related to, the conduct of the May 9, 2016 automated elections, excluding therefrom goods and services that are intended for manual elections. xxx xxx xxx."*

Based on the foregoing, you now seek clarification as to the effect of BIR Ruling No. 390-2015 on the two (2) contracts which the COMELEC entered into with SMARTMATIC on August 27, 2015 and September 4, 2015. In particular, you would like to confirm that since the contracts were entered into prior to the BIR Ruling, the COMELEC shall comply with its obligation to pay the full contract price and shall continue to withhold the 5% final VAT mandated by the National Internal Revenue Code (NIRC) of 1997, to be remitted to the BIR.

We rule that BIR Ruling No. 390-2015 issued in favor of the COMELEC still applies to those contracts executed prior to the issuance of said ruling relating to the conduct of the May 9, 2016 National, Local and ARMM automated elections. The reasons are as follows:

In BIR Ruling No. 390-2015, we held that COMELEC is exempt from VAT and percentage tax on its local purchases of goods and services as well as on importation of goods that will be used relative to the conduct of the May 9, 2016 National, Local and ARMM automated elections. Said pronouncement is anchored on Section 12 of Republic Act (RA) No. 8436, as amended by RA No. 9369, to wit:

> *"**SEC. 12. Procurement of Equipment and Materials.** - To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by*

> *purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulations. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness."* (Emphasis supplied)

Pursuant to the above-quoted provision, the local purchases and importation of goods and services by COMELEC to be used in the May 9, 2016 National, Local and ARMM automated elections have been ruled as exempt from VAT. We also held that that the exemption of the COMELEC from VAT and percentage tax is limited to purchases and importations made during the period from **October 2014** until **October 2016**.

Section 4.105-2 of Revenue Regulations (RR) No. 16-2005 discusses the nature and characteristics of VAT, to wit:

> *"SECTION 4.105-2. Nature and Characteristics of VAT. — VAT is a tax on consumption levied on the sale, barter, exchange or lease of goods or properties and services in the Philippines and on importation of goods into the Philippines. The seller is the one statutorily liable for the payment of the tax but the amount of the tax may be shifted or passed on to the buyer, transferee or lessee of the goods, properties or services. This rule shall likewise apply to existing contracts of sale or lease of goods, properties or services at the time of the effectivity of RA No. 9337. However, in the case of importation, the importer is the one liable for the VAT."*

Ordinarily, the COMELEC, being a government institution, would have subjected to five percent (5%) final withholding VAT its payments to suppliers of goods and services purchased by it, pursuant to Section 114(C) of the NIRC, as implemented by Section 4.114(2)(a) of RR No. 16-2005, to wit:

> "SEC. 4.114-2. Withholding of VAT on Government Money Payments xxx.-
>
> (a) The government or any of its political subdivisions, instrumentalities or agencies including government-owned or controlled corporations (GOCCs) shall, before making payment on account of each purchase of goods and/or of services taxed at twelve percent (12%) VAT pursuant to Secs. 106 and 108 of the Tax Code, deduct and withhold a FINAL VAT due at

the rate of five percent (5%) of the gross payment thereof. xxx

However, as ruled in BIR Ruling No. 390-2015, COMELEC is exempt from VAT on its local purchases of goods and services that will be used relative to the conduct of the May 9, 2016 National, Local and ARMM automated elections. It must be noted that in a tax exemption granted by law, the government is essentially foregoing revenue that should have been collected by the BIR. In the instant case, the Government is foregoing the collection of the 5% final withholding VAT on contracts entered into by COMELEC for the purchase of goods and services relating to the conduct of the May 9, 2016 automated elections.

While Section 14.3 of the executed contracts with the COMELEC provides that "that there will be no retention of any amount for taxes by COMELEC, except those taxes that should be withheld by COMELEC under Revenue Memorandum Order (RMO) No. 23-2014 issued by the BIR," SMARTMATIC cannot claim that no deduction can be made from the contract price and benefit from the tax exemption. RMO No. 23-2014, in so far as VAT is concerned, will no longer require COMELEC to withhold and remit to the BIR the 5% final VAT. In light of the exemption granted by law, COMELEC may reduce payments to SMARTMATIC only to the extent of the VAT component that government transactions are ordinarily subject to, which is the revenue foregone by the government. The law is clearly intended to benefit COMELEC, hence, SMARTMATIC cannot demand that the entire contract price, without any deduction, be paid to them by COMELEC.

We reiterate, however, as we have emphasized in BIR Ruling No. 390-2015, that the foregoing treatment is only limited to purchases and/or importation of goods and services that will be used in, or directly related to, the conduct of the May 9, 2016 automated elections, during the period from October 2014 until October 2016. Any purchase of goods and services not related to the automated elections and outside the set period will already be subject to the 5% final VAT as provided by law.

This ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be disclosed that the facts are different, then this ruling shall be considered null and void.

Very truly yours,

KIM S. JACINTO-HENARES
Commissioner of Internal Revenue

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