REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

Quezon City

BUREAU OF INTERNAL REVENUE
RECORDS MGT. DIVISION
10:00 A.M.
JUL 30 2014

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Date: July 28, 2014

REVENUE MEMORANDUM CIRCULAR NO. 61-2014

SUBJECT : ***Revocation of BIR Ruling No. DA (OSL-A1)001-2008 dated October 17, 2008***

TO : ***All Internal Revenue Officials, Employees and Others Concerned***

This refers to the revocation of BIR Ruling No. DA (OSL-A1)001-2008 dated October 17, 2008, which declared that creditable withholding taxes fall within the coverage of Republic Act No. 9480 otherwise known as "AN ACT ENHANCING REVENUE ADMINISTRATION AND COLLECTION BY GRANTING AN AMNESTY ON ALL UNPAID INTERNAL REVENUE TAXES IMPOSED BY THE NATIONAL GOVERNMENT FOR TAXABLE YEAR 2005 AND PRIOR YEARS", thereby nullifying the assessments dated by the Large Taxpayers Service against EXTELCOM.

On October 17, 2008, BIR Ruling No. DA (OSL-A1)001-2008 was issued, to wit:

> "Based on the foregoing representations, you now request for clarification of Revenue Memorandum Circular (RMC) No. 69-2007 particularly on the issue that the tax amnesty program (TAP) covers all national internal revenue taxes, except withholding taxes and taxes passed-on and already collected from the customers for remittance to the BIR, as these funds/taxes being considered as funds held in trust for the government.
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> "In reply thereto, please be informed the RMC No. 69-2007, as amended by RMC 19-2008, further clarifying RA 9480, provides that the tax amnesty program (TAP) covers all national internal revenue taxes such as income tax, estate tax, donor's tax and capital gains tax, value-added tax, other percentages, excise taxes and documentary stamp taxes, except withholding taxes and taxes passed on and already collected from the customers from remittance to the BIR,. These taxes/funds being considered as funds held in trust for the government. Moreover, RMC 19-2008 "Circularizing the Full Text of "A Basic Guide on the Tax Amnesty Act of 1007' for Taxpayers Who Wish To Avail of the Tax Amnesty Pursuant to republic Act No. 9480 (Tax Amnesty Act of 2007)" provides that the following taxpayers may avail of the Tax Amnesty Program: individuals, estates and Trusts, Corporation, Cooperatives and tax exempt entities that have

become taxable as of December 31, 2005 and other juridical entities including partnerships. Fiscal year taxpayers may likewise avail of the tax amnesty using their Financial Statement ending in any month of 2005 except withholding agents with respect to their withholding tax liabilities.

"In excluding withholding taxes from the coverage of the TAP, a distinction should be made between final withholding tax system vis-à-vis a creditable withholding tax system. Under the former system, the amount of income tax withheld by the withholding agent is constituted as a full and final payment of the tax rests primarily on the payor as a withholding agent. Thus, in case of his failure to withhold the tax or in case of under withholding, the deficiency tax shall be collected from the payor/withholding agent. Obviously, the taxpayer can not be afforded the immunities under the TAP for either of two violations involving a final withholding tax; 1) failure to withhold the tax because this will free from income tax the income earner which tax is to be collected solely via the withholding tax system, and 2) failure to remit the final withholding tax withheld by the payor because the amount withheld is held in trust for the Government.

"This rule applicable to final withholding taxes, however, will not apply to creditable withholding taxes. Under the creditable withholding tax system, taxes withheld on certain income payments are intended to equal or at least approximate the tax due of the payee on said income. The withholding of the tax will not relieve the income recipient from paying the tax based on the pay-as-you-file system because the withholding tax is merely an advance payment of the income tax due from the income earner payable after the end of the year. If the withholding agent failed to withhold or withholds but does not return. To reiterate, the withholding tax under the creditable withholding tax system, unlike a final withholding tax, is not final settlement of the income tax on the income but the income earner is still required to file an income tax return, as prescribed in Section 51 and 52 of the Tax Code, to report the income and/or pay the difference between the tax withheld and the tax due on the income. Thus, taxes withheld on income payments covered by the expanded withholding tax and compensation income are creditable in nature.

"Prescinding from the foregoing, it is undisputed that only creditable withholding taxes which were collected but not remitted to the BIR are not covered by the TAP, this is so because taxes deducted and withheld by the withholding agent shall be held as a special fund in trust for the government. Accordingly, a mere failure to withhold by the withholding agent shall not disqualify it from availing of the TAP. In other words, what is outside the coverage of the TAP is the failure of a withholding agent to remit what it has withheld as clearly provided in RMC No. 69-2007 when Paragraph A1 thereof said ***"except withholding taxes xxx already collected from***

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the customers for remittance to the BIR, these taxes being considered as funds held in trust for the government". In such a situation, the withholding agent absconds with trust funds in its possession. Such a situation is definitely not subject to the tax amnesty program.

"In the instant case, Extelcom's failure to withhold creditable withholding taxes expressly falls within the coverage of R.A. No. 9480. It is to be noted that for the failure to withhold the tax, Extelcom is made directly liable to pay the tax, not because it is the taxpayer, but because it failed to comply with the law, hence the assessment against it is in the nature of a penalty for failure to withhold. (NDC v. Commissioner) Extelcom's legal duty is to withhold the tax and remit the tax withheld to the BIR. However, the failure on the part of Extelcom to withhold was due to the fact that it was under rehabilitation and because of its honest belief that it has no duty to do so considering it was suffering from financial distress. The assessment of deficiency creditable withholding tax against Extelcom is not an imposition of a direct tax liability but as a penalty for its failure to withhold which is indubitably covered under the immunities and privileges provided in the tax Amnesty Law. 9Section 10, R.A. No. 9480).

"IN VIEW OF THE FOREGOING, this Office holds that the failure of Extelcom to withhold creditable withholding taxes falls within the coverage of R.A. No. 9480 while the failure to withhold final withholding taxes is not covered by the said Amnesty Act. It is to be emphasized that the assessment of deficiency creditable withholding tax is a mere penalty for failure to withhold while the assessment of a deficiency final withholding tax is not a mere penalty but an imposition of a direct tax liability against the income earner. Since the income earner did not avail of the Tax Amnesty (being outside of our jurisdiction) the availment by the withholding agent will not extinguish the tax liability of the income earner which is imposable via the withholding tax system."

DISCUSSION

BIR Ruling No. DA(OSL-A1)0001-2008, is hereby revoked for the following reasons:

1. ***BIR Ruling No. DA(OSL-A1)0001-2008 presents an erroneous interpretation of the provisions of RA No. 9480***

The pertinent provision of RA 9480 is as follows:

"SECTION 8. ***Exceptions.*** — The tax amnesty provided in Section 5 hereof shall not extend to the following persons or cases existing as of the effectivity of this Act:

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(a) Withholding agents with respect to their withholding tax liabilities;

(b) Those with pending cases falling under the jurisdiction of the Presidential Commission on Good Government;

(c) Those with pending cases involving unexplained or unlawfully acquired wealth or under the Anti-Graft and Corrupt Practices Act;

(d) Those with pending cases filed in court involving violation of the Anti-Money Laundering Law;

(e) Those with pending criminal cases for tax evasion and other criminal offenses under Chapter II of Title X of the National Internal Revenue Code of 1997, as amended, and the felonies of frauds, illegal exactions and transactions, and malversation of public funds and property under Chapters III and IV of Title VII of the Revised Penal Code; and

(f) Tax cases subject of final and executory judgment by the courts."

Revenue Memorandum Circular No. (RMC) 69-2007 specifically provides for the taxes covered by the TAP. Its states:

"Q-1 What type of taxes and what taxable period/s are covered by the Tax Amnesty Program under RA 9480 as implemented by DO 29-07?

A-1 The Tax Amnesty Program (TAP) covers all national internal revenue taxes such as income tax, estate tax, donor's tax and capital gains tax, value added tax, other percentage taxes, excise taxes and documentary stamp taxes, **except withholding taxes AND taxes passed-on and already collected from the customers for remittance to the BIR, these taxes/funds being considered as funds held in trust for the government.** Moreover, the time-honored doctrine that "No person shall unjustly enrich himself at the expense of another" should always be observed.

In case of donor's tax and capital gains tax, only cases that have underdeclarations/undervaluations and were already issued with Certificate Authorizing Registration (CAR) by the BIR are covered. xxx"

RMC No. 19-2008 provides, as follows:

"Who may avail of the amnesty?

The following taxpayers may avail of the Tax Amnesty Program:

- Individuals
- Estates and Trusts
- Corporations

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- Cooperatives and tax-exempt entities that have become taxable as of December 31, 2005
- Other juridical entities including partnerships
- Fiscal year taxpayers may likewise avail of the tax amnesty using their Financial Statement ending in any month of 2005

EXCEPT:

- Withholding agents with respect to their withholding tax liabilities

xxx xxx xxx"

Pursuant to Section 8 (a) of RA 9480, Q1 of RMC 69-2007 enumerates two kinds of taxes that are not covered by TAP.

1. Withholding taxes; **and**
2. Taxes passed-on and already collected from the customers for remittance to the BIR.

This Office is of the opinion that withholding taxes are not covered by the TAP.

The word "AND" is a conjunctive term which expresses that the idea or term in the latter is to be added or taken along with the first. As used in Q1 of RMC 69-2007, it highlights an enumeration of those taxes that are exceptions to the TAP. The use of the word "TAXES" in the second item (i.e. taxes passed-on and already collected) indicates that the second item is of a different class than the first (i.e. withholding taxes).

This interpretation is more in accord with the provision of RA 9480 in Section 8 that the liabilities of withholding agents (i.e. withholding taxes) are not covered by the TAP.

It should also be noted that the second item, which refers to "taxes passed-on", may seem to have been stricken down by the Supreme Court in *Asia International Auctioneers, Inc. vs. Commissioner of Internal Revenue*[1]. Noting that "taxes that may be passed-on" are indirect taxes, the Supreme Court highlighted its difference from withholding taxes and how they cannot be covered by Section 8(a) of the TAP. It stated:

> "Indirect taxes, like VAT and excise tax, are different from withholding taxes. To distinguish, in indirect taxes, the incidence of taxation falls on one person but the burden thereof can be shifted or passed on to another person, such as when the tax is imposed upon goods before reaching the consumer who ultimately pays for it. On the other hand, in case of withholding taxes, the incidence and burden of taxation fall on the same entity, the statutory taxpayer. The burden of taxation is not shifted to the withholding agent who merely collects, by withholding, the tax due from income payments to entities arising from certain transactions and

[1] G.R. 179115, September 26, 2012

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> remits the same to the government. Due to this difference, the deficiency VAT and excise tax cannot be "deemed" as withholding taxes merely because they constitute indirect taxes. Moreover, records support the conclusion that AIA was assessed not as a withholding agent but, as the one directly liable for the said deficiency taxes."

Following this jurisprudence, the declarations laid down in BIR Ruling No. DA(OSL-A1)0001-2008 must be abandoned.

2. ***The ruling being one of first-impression the same should have been signed by the Commissioner of Internal Revenue***

The National Internal Revenue Code of 1997, as amended, provides:

> **Section 7.** ***Authority of the Commissioner to Delegate Power.*** — The Commissioner may delegate the powers vested in him under the pertinent provisions of this Code to any or such subordinate officials with a rank equivalent to a division chief or higher, subject to such limitations and restrictions as may be imposed under rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner; *Provided however*, That the following powers of the Commissioner **shall not be delegated**:
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> xxx xxx xxx
>
> (b) The power to issue rulings of first impression or to reverse, revoke or modify any existing ruling of the Bureau. xxx

Prior to BIR Ruling No. DA(OSL-A1)0001-2008, the Bureau has not had the opportunity to rule on the issues raised in the said ruling. Thus, the ruling being one of first impression, the Commissioner of Internal Revenue should have reviewed and issued the same. The Assistant Commissioner of the Legal Service not having jurisdiction to issue BIR Ruling No. DA(OSL-A1)0001-2008, the said ruling should be revoked.

PREMISES CONSIDERED, this Office hereby revokes BIR Ruling No. DA (OSL-A1)001-2008 dated October 17, 2008, which declared that creditable withholding taxes fall within the coverage of RA 9480, for lack of legal basis and lack of jurisdiction of the issuing officer.

All concerned are hereby enjoined to be guided accordingly and give this circular as wide as publicity a possible.

KIM S. JACINTO-HENARES
Commissioner of Internal Revenue

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