REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

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REVENUE MEMORANDUM CIRCULAR NO. 77-2021

Subject: Clarifies Certain Provisions of Revenue Memorandum Order (RMO) No. 14-2021

To: All Revenue Officers, Employees and Others Concerned

This Circular is issued to address the frequently asked questions regarding the availment of treaty benefits and to clarify certain provisions of RMO No. 14-2021.

Q1: Who may avail of treaty benefits?

Only persons, natural or juridical, who are residents of one or both of the Contracting States may avail of treaty benefits. To establish the fact of residency in a contracting state, the nonresident income recipient should submit a Tax Residency Certificate (TRC) duly issued by the tax authority of the country of residence.

Q2. In a situation where the nonresident claims that it is entitled to the benefits provided under the treaty but fails to submit a TRC, what is the effect of such failure?

The Double Taxation Conventions or tax treaties contain a standard provision that "the Convention shall apply to persons who are residents of one or both of the Contracting States". In other words, the intention of the tax treaties is to limit or restrict the granting of its benefits to those who are entitled thereto, i.e., the residents of the contracting states only. The benefit of a tax treaty does not extend to a taxpayer who fails to prove his/her/its residency in either or both of the contracting states.

The best proof of residency is the TRC duly issued by the competent authority of the treaty partner. Failure to submit the same would result in the denial of the nonresident's claim.

Q3. Would denial based on the issue of residency contravene the pronouncement of the Supreme Court in the case of Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue (G.R. No. 188550, August 19, 2013)?

No. The issue in that case was premised on the nonresident's failure to file a tax treaty relief application (TTRA) within the 15-day period prescribed under RMO No. 1-2000. The Court said that:

> "xxx there is nothing in RMO No. 1-2000 which would indicate a deprivation of entitlement to a tax treaty relief for failure to comply with the 15-day period. We recognize the clear intention of the BIR in implementing RMO No. 1-2000, but the CTA's outright denial of a tax treaty relief for failure to strictly comply with the prescribed period is not in harmony with the

objectives of the contracting state to ensure that the benefits granted under tax treaties are enjoyed by duly entitled persons or corporations."

The rationale of RMO No. 14-2021 is to ensure that the reliefs granted under tax treaties are accorded to the parties clearly entitled thereto. Certainly, relief from double taxation will not be granted to a nonresident who fails to establish his/her/its residency in a contracting state.

Q4. What BIR office has original jurisdiction over matters involving the application and interpretation of tax treaties?

Pursuant to Revenue Administrative Order No. 1-2019, the International Tax Affairs Division (ITAD) of the Bureau of Internal Revenue (BIR) is tasked to formulate policies, work programs, standards, guidelines and procedures, including forms for the proper and effective implementation of tax treaties and to prepare rulings on applications for tax treaty relief and on questions involving the proper interpretation of the provisions of tax treaties and other international tax agreements, among others.

Therefore, rulings involving the application and interpretation of tax treaties should originate from the ITAD.

Q5. In withholding taxes, what treaty rate should be applied by the income payor on the income of the nonresident alien not engaged in trade or business or nonresident foreign corporation (hereinafter referred to as "nonresident")?

If the nonresident submitted to the income payor a TRC and the appropriate BIR Form No. 0901 prior to the payment of income, the income payor may apply the provisions of the applicable treaty; provided that all the conditions for the availment thereof, other than residency, have been satisfied. Otherwise, the regular rates imposed under the Tax Code should be applied.

Illustration 1:

JCo., a resident of Indonesia, agreed to provide consultancy services to ABC Co., a domestic company, for a period of one year. JCo. shall send its employee A to the Philippines to provide the said services. For and in consideration of such services, ABC Co. shall pay JCo. a monthly consultancy fee of 1,000,000. Prior to the first payment, JCo. gave ABC Co. its TRC and BIR Form No. 0901-P.

What withholding tax rate should be applied by ABC Co. on the income of JCo.?

By submitting a TRC, JCo. has proven that it may avail of the benefits of the treaty. For other information pertaining to JCo., ABC Co. may rely, in the meantime, on BIR Form No. 0901-P.

The next thing to be determined then by ABC Co. is whether or not JCo.'s employee will furnish the consultancy services in the Philippines for a period or periods aggregating more than 183 days within any twelve-month period, a material condition for the taxability of the consultancy fees in the Philippines under Article 7 (Business Profits), in relation to Article 5 (Permanent Establishment) of the Philippines-Indonesia tax treaty.

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Article 7 (Business Profits) of the said treaty states that the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein, while Article 5 (Permanent Establishment) states that furnishing of consultancy services in the other contracting state for a period or periods exceeding 183 days will constitute a permanent establishment.

If A's stay in the Philippines exceeds 183 days, JCo. shall be deemed to have a permanent establishment in the Philippines. Therefore, the consultancy fees paid by ABC Co. shall be subject to the regular tax rate imposed under the Tax Code.

Thus, if ABC Co. could establish with finality that A would not be staying in the Philippines for more than 183 days, ABC Co. should not impose any withholding tax on the consultancy fees because JCo. would be deemed not to have a permanent establishment in the Philippines. To confirm whether the appropriate rate was applied on such income, ABC Co. shall submit a request for confirmation with the ITAD.

However, if A's actual stay in the Philippines eventually exceeds 183 days, ABC Co. will be held liable for deficiency withholding tax at the regular rate plus penalties.

Q6: Paragraph 2, Section 4 of RMO No. 14-2021 states that the withholding agent shall file a request for confirmation (RFC) on the propriety of the withholding tax rates applied on that item of income. If the nonresident's income was not subjected to tax in the Philippines in accordance with the relevant tax treaty, does the withholding agent have to file an RFC?

Yes, the withholding agent is required to file a request for confirmation.

Paragraph 2, Section 4 of RMO No. 14-2021 is hereby amended to read as follows:

When an item of income was subjected to taxation in accordance with the provisions of the relevant tax treaty, the withholding agent/income payor shall file with ITAD a request for confirmation that the tax treatment of such income was proper.

Illustration 2:

Mr. Xi was invited by a Philippine state university to teach international taxation for a period of two (2) years. He was a resident of Korea before visiting the Philippines. What is the tax treatment of Mr. Xi's income?

The Philippines-Korea tax treaty states that the remuneration received by a professor or teacher, who is or was a resident of Korea and who visits the Philippines for a period not exceeding two years for the purpose of teaching at a university shall be taxable only in Korea.

Therefore, Mr. Xi's remuneration for that two-year period is exempt from Philippine income tax. The state university is required, however, to file a request for confirmation that the tax treatment applied on such income was proper.

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Q7: If the treaty rate was applied on the income of the nonresident, who should file a request for confirmation (RFC) that the withholding tax rates applied on that income was proper? And when should the request for confirmation be filed?

If the treaty rate was applied on the nonresident's income, the income payor, *domestic or foreign*, should be the one to file the request for confirmation with the ITAD. The income payor is not prevented, however, from authorizing the nonresident or any other person to file such request for and on its behalf, provided that the latter is equipped with a Special Power of Attorney (SPA).

Q8: When and how should the request for confirmation be filed?

Paragraph 3, Section 4 of RMO No. 14-2021 is hereby amended and now reads as follows:

> Depending on the type of income, the request for confirmation *with complete documentary requirements* shall be filed by the withholding agent, domestic or foreign, on or before the dates prescribed below:

Type of Income	Date of Filing
Capital Gains	At any time after the transaction but shall not be later than the last day of the fourth month following the close of the taxable year when the income is paid *or* when the transaction is consummated
Other types of income	At any time after the close of the taxable year but not later than the last day of the fourth month following the close of such taxable year when the income is paid or becomes payable, or when the expense/asset is accrued or recorded in the books, whichever comes first.

The general requirements shall be submitted only whenever they are applicable to the case. Thus, if an expense has not yet been paid but has already been accrued in the books of the withholding agent, the proof of remittance is apparently not required to be submitted.

It is imperative for the nonresident income payor-withholding agent to appoint his/her/its authorized representative in the Philippines.

One consolidated request for confirmation per nonresident income recipient, regardless of the number and type of income payments made during the year, shall be filed. The case folder shall, however, be pre-arranged by the filer per type of income following the sequence of documents as stated in the list of requirements. For ease of reference, the documents shall be marked accordingly (e.g. letter-request as Annex "A", contract as Annex "B", etc.) and the checklist of requirements (Annexes A to L) shall serve as the cover page/sheet for each type of income.

Illustration 3:

ACo., a domestic corporation, paid regular dividends to SCo., a resident of Singapore, on February 20, 2021 and remitted the withholding tax on such dividends on March 10, 2021. Again, ACo. paid special dividends to SCo. on April 30, 2021 and remitted the tax on May

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10, 2021. When should ACo file the request for confirmation if its taxable year ends on December 31, 2021?

If ACo. adopts the calendar-year accounting period, the request for confirmation shall be filed at any time from January 1, 2022 to April 30, 2022.

Illustration 4:

ACo.'s taxable year ends every 31st of March. When should it file the request for confirmation?

If its taxable year ends every 31st of March, the request for confirmation for the first dividend payment should be filed at any time from April 1, 2021 to July 31, 2021; and for the second dividend payment, from April 1, 2022 to July 31, 2022.

Illustration 5:

Same fact pattern as in Illustration 3 except that ACo. paid the following income payments to SCo. in 2021:

Type of Income	**Date of Income Payment**	**Date of Remittance of Withholding Tax**
i. interest	Every 10th day of the month	Every 10th day of the succeeding month
ii. dividends	April 1, 2021 and November 15, 2021	May 10, 2021 and December 10, 2021
iii. royalties	Every 15th day of March, June, September, and December	Every 10th day of the month following the close of each quarter
iv. capital gains from sale of shares in RMB Co., a domestic corporation	July 11, 2021	The transaction is exempt from tax.

When should ACo. file the request for confirmation?

A Co. may file the request for confirmation for all types of income at any time from January 1, 2022 until April 30, 2022.

It may, however, opt to file the request for confirmation for the capital gains transaction ahead of all other types of income at any time after the transaction but shall not be later than April 30, 2022.

Illustration 6:

SCo, a resident of Singapore and a holder of 1,000,000 shares in RMB Co., a domestic corp., sold its shares to FCo, a resident of France, on May 1, 2021. FCo, paid the consideration on May 1, 2021. Who should file the request for confirmation? When is the deadline for filing?

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SCo or its authorized representative should file the request for confirmation at any time after the transaction but shall not be later than April 30, 2022.

An electronic Certificate Authorizing Registration (eCAR) may be secured from Revenue District Office No. 39 at any time after obtaining a certificate confirming the nonresident income recipient's entitlement to treaty benefit.

Q9: Does the nonresident have to re-submit a TRC each time an income is earned within the same taxable year?

One original and authenticated TRC shall be submitted to each income payor per year. In the alternative, a certified true copy of the original may be submitted to other payors of income if the original copy is no longer available, with a notation as to whom the original copy was previously submitted.

The same rule applies to the proof of establishment or incorporation, Certificate of Non-registration or License to Do Business in the Philippines duly issued by the Securities and Exchange Commission, and Certificate of Business Registration/Presence duly issued by the Department of Trade and Industry.

Q10: If the treaty rate was not applied on an item of income, what is the remedy of the nonresident?

The nonresident, or its authorized representative, should file a TTRA with complete documentary requirements and a claim for refund at any time after the payment of the withholding tax if the regular rate under the Tax Code was applied on the income instead of the treaty rates.

Q11. Is the annual updating for long-term contracts mandatory?

For long-term contracts involving the payment of interests and royalties and other types of income where the condition for entitlement to treaty benefits is not dependent on time threshold, the annual updating is not mandatory. In this case, the BIR will issue a one-time certification that is presumably valid for the whole duration of the contract so long as there is no relevant and significant change in the facts or circumstances upon which the ruling was based (e.g. change in the country of residence, the recipient of the income or the beneficial owner of the income, or the legal basis).

It shall be the duty of the withholding agent to ensure that the nonresident continues to be a resident of the same country for the whole duration of the contract, and for this purpose, it may require the submission of TRC at the beginning of each year. If there would be material changes in the facts or circumstances upon which the previous ruling was based in the succeeding year, a request for confirmation shall again be filed by the withholding agent.

During audit, the withholding agent shall be required by the tax auditor to prove that the facts and circumstances did not change at any time after the issuance of the Certificate of Entitlement to Treaty Benefit (COE).



On the other hand, in the case of long-term contract of services where the existence of a PE in the Philippines is dependent on time threshold (e.g. days of physical presence of the nonresident company's employees in the Philippines within a twelve-month period or calendar year or taxable year), the annual updating is mandatory. For contract of services, the COE shall be limited to a particular period of engagement.

Illustration 7:

On January 1, 2021, ACo., a domestic corporation, entered into a facility agreement with SCo., a resident of Singapore, for the provision of a loan amounting to ₱10 million. The said loan bears an interest of 5% per annum, which shall be paid by ACo. monthly in equal payments. The principal shall be repaid after five (5) years from the execution date.

a) When shall the request for confirmation be filed by ACo.?

   A single request for confirmation shall be filed at any time from January 1, 2022 until April 30, 2022.

b) Suppose SCo. does not change its residency in 2022, is ACo. required to file another request for confirmation?

   No, ACo. is not required to file another request for confirmation if there is no relevant and significant change in the facts or circumstances upon which the previous ruling was based.

c) Suppose SCo. changes its residency in 2023, i.e., from Singapore to Japan, is ACo. required to file another request for confirmation for its income payments to SCo. in 2023?

   Yes, ACo. should again file another request for confirmation at any time from January 1, 2024 to April 30, 2024.

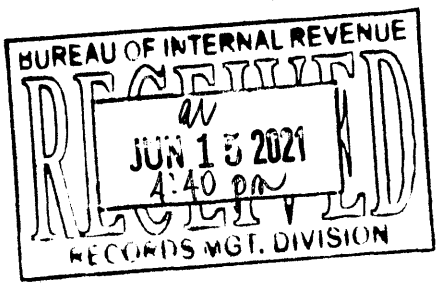
Q12. Will ITAD accept applications with incomplete documents?

Given the limited storage of ITAD, applications with incomplete documents will no longer be accepted. The space will instead be allotted to more important applications that are ready for evaluation.

In case an application with incomplete documents was inadvertently accepted, the filer shall be duly notified of the result of evaluation and the docket shall be returned immediately to said filer.

Q13. Is the domestic withholding agent not required to submit a notarized SPA when filing a request for confirmation since Section 5(A)(7) of RMO No. 14-2021 only mentioned nonresident taxpayer?

The intention of the RMO is to require all filers, other than the nonresident income recipient or withholding agent, to present a notarized SPA when filing an application with ITAD.



Section 5(A)(7) of the RMO is hereby amended and now reads as follows:

7. Notarized Special Power of Attorney (SPA) issued by the nonresident income recipient or withholding agent to his/her/its authorized representative(s), which shall expressly state the authority to sign the Application Form and/or to file the TTRA or request for confirmation.

Q14. How could a nonresident enterprise prove that an item of income is not effectively connected with its permanent establishment (PE) in the Philippines?

The foreign enterprise may submit the audited AFS of the PE to prove that the income is not effectively connected with its PE in the Philippines. If the same is not yet available at the time of filing, it may submit a Sworn Certification signed by a principal officer of the PE, which shall contain material facts that may lead the BIR to believe that the income is not effectively connected with the PE and that the PE is not material to the realization of such income.

In evaluating the case, ITAD may, even after the filing of the application, still require the presentation of the AFS of the PE if the same is already available.

Q15. What document should be submitted to prove that the interest rate imposed on a loan or debt-claims is arm's length if the debtor and creditor are related parties?

The best proof of arm's length transfer prices for controlled transactions is the transfer pricing documentation (TPD) of the nonresident creditor.

In the event that a full TPD is not available, the nonresident may prove, through its Transfer Pricing Policy for Intercompany Loans or any equivalent transfer pricing study, that the interest rate imposed on the loan or debt-claim is arm's length.

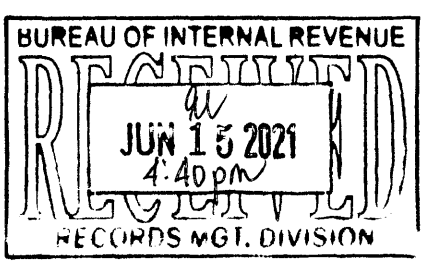
Q16. Is the submission of audited interim FS for capital gains transactions mandatory?

The BIR prefers the audited interim FS when computing the real property interest of the issuing domestic corporation at the time of the transaction.

In the alternative, the following may be submitted:
1. unaudited interim FS; and
2. lapsing schedule as of the date of transfer or alienation of property.

Q17. Will there be an automatic denial for failure to file the RFC within the prescribed period?

No, there will be no automatic denial for failure of the filer to file within the prescribed period. Denials will purely be based on the merits of the case, i.e., whether or not the nonresident has established and proved his/her/its entitlement to treaty benefit. However, the penalty for late filing shall be imposed (Section 13 of RMO No. 14-2021).



Q18. Will the taxpayer be granted an extension of time within which to submit additional documents?

In meritorious cases, the nonresident or withholding agent may be granted an extension within which to submit the required documents but in no case shall it exceed thirty (30) days.

Q19: The taxpayer received a Notice to Submit Additional Documents prior to the effectivity of RMO No. 14-2021. Will the BIR still issue a Final Notice before it denies the application?

All taxpayers with pending TTRAs will still receive a "*Final Notice to Submit Additional Documents*" despite receiving a notice prior to the effectivity of the new RMO and will be given three (3) months from receipt thereof to submit the required documents.

Those who have been notified that their applications have been archived will no longer receive a Final Notice but are obliged to submit the required documents indicated in the previous notice/s within four (4) months from the effectivity of the new RMO.

Q20. When the application is approved, what will the BIR issue to confirm the nonresident's entitlement to treaty benefit?

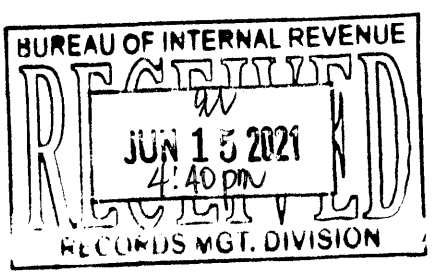
If the RFC or TTRA is approved, the BIR will issue a COE instead of the usual BIR Ruling. The COE will still contain the material facts of the case and a ruling confirming the nonresident's entitlement to treaty benefit.

For TTRAs relating to interests, dividends, and royalties, which were filed prior to the effectivity of RMO No. 8-2017, the BIR may still issue a Compliance Check Report to be consistent with the manner of approving similar applications prior to the effectivity of the new RMO.

Q21. The nonresident has income payments in 2020 and prior years but no TTRA or Certificate of Residence for Tax Treaty Relief (CORTT) Form was filed therefor. How will the nonresident obtain a confirmation of its entitlement to treaty benefit?

If such income payments were subjected to treaty rates, the withholding agent has until the last working day of this year to file an RFC with complete documentary requirements. Failure to file the same within the prescribed deadline would be subject to the provisions of Sections 250 and 255 of the Tax Code.

A penalty of ₱1,000 per failure to file a CORTT Form for dividends, interests and royalties paid after the effectivity of RMO No. 8-2017 until December 31, 2020 shall, however, be imposed to be fair with the taxpayers who previously complied with the provisions of such RMO.



Q22. For dividends, one of the specific requirements is the audited financial statements (AFS) as of the last fiscal year stamped "received" by the BIR and SEC". What if the taxpayer adopts the calendar year as its taxable year? What AFS is he/she/it going to attach to the RFC or TTRA on dividends?

The specific requirements that must accompany each RFC or TTRA pertaining to dividends is hereby amended as follows:

xxx

3. Certified true copy of the audited financial statements (AFS) as of the taxable year immediately preceding the date of declaration, which was duly filed with the BIR and SEC"

xxx

Q23. When the tax authority of the United States of America (US) confirms that a trust arrangement is fiscally transparent and that the income of such trust is attributed to the beneficiaries who are all residents of that State, are these beneficiaries still required to submit their individual TRCs?

No, the TRC issued by the tax authority of the US confirming that all of the beneficiaries of the trust are residents of that state would suffice.

If, on the other hand, the TRC states that not all of the beneficiaries of such trust are residents of the US, those who are residents of a third state shall be required to present their separate TRCs. The income attributable to them will be taxed based on the provisions of the tax treaty between the Philippines and that third state, if any, or of the Tax Code.

Q24. Are the following documents also required for redemption of common shares: 1. notarized Board of Directors' resolution authorizing the redemption or buy-back of shares; and 2. Articles of Incorporation and By-Laws of the issuing corporation?

Yes, these documentary requirements equally apply to redemption or buy-back of common shares.

All internal revenue officers, employees and others concerned are enjoined to give this Circular the widest dissemination and publicity possible.

CAESAR R. DULAY
Commissioner of Internal Revenue

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