INSIGHTS

SEPTEMBER 2018

A monthly digest of significant tax-related court decisions and regulatory issuances (includes BIR, SEC, BSP and various government agencies)

Seventh Issue, Series of 2018

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BDB Law Founding Partner and CEO Atty. Benedicta Du-Baladad was reactor for the segment "Impact of TRAIN and TRABAHO to Employers and Employees" during the 37th ECOP Members' General Meeting. She was joined by fellow reactors: Ms. Alegria Sibal-Limjoco, Vice Chairman of Philippine Retailers Association and President of Philippine Chamber of Commerce Industry and Atty. Victorio Dimagiba, President of Laban Konsyumer Inc. Speaker for this session was Assistant Secretary Ms. Ma. Teresa Habitan of the Department of Finance. (September 20, 2018, Henry Sy Auditorium, St. Luke's Medical Center BGC, Taguig City)

HIGHLIGHTS for SEPTEMBER 2018

Court Decisions

- The issuance of a second letter of authority (LOA) for regular audit does not repeal the first LOA issued under the VAT audit program. *(Southern Luzon Drug Corporation vs. CIR, CTA Case No. 8941, September 7, 2018).*

- Vehicles carrying smuggled goods are exempted from forfeiture if the owner has no knowledge in the transportation of it. *(RS De Vera Trucking vs. COC, CTA Case No. 9521, September 6, 2018).*

- The presence of "deliberate" intent is necessary for the conviction of the offense of willful failure to supply correct and accurate information. *(People vs. Arceo, CTA Crim. Case No. 0-271, September 3, 2018).*

- A Preliminary Assessment Notice (PAN) is meaningless to the concept of due process if the taxpayer's right to respond within the prescribed period would be ignored. *(Max's Sta. Mesa, Inc., vs. CIR CTA Case No. 8786, September 28, 2018).*

- Distribution of property dividend is not within the ambit of "other disposition of shares of stock" which recognizes income from disposal. *(Trans-Asia and Energy Development Corp., vs. CIR, CTA Case No. 9078, September 28, 2018).*

- The waiver is void if not duly notarized. *(Ayala Land Internal Sales, Inc. vs. CIR, CTA Case No. 9262, September 28, 2018).*

- Royalty income earned in the active pursuit of business is subject to 30% regular corporate tax. *(Iconic Beverages, Inc. vs. CIR, CTA EB Nos. 1563 & 1564, September 18, 2018).*

- Local government units are prohibited from imposing taxes on the National Government, its agencies and instrumentalities. *(City of Davao vs. Roxas Shares Inc., CTA EB No. 1654, September 17, 2018).*

- The sales of a generation company prior to the issuance of the certificate of compliance cannot qualify as zero rated sales. *(Hedcor Sibulan, Inc. vs. CIR, CTA EB No. 1641, September 19, 2018)s*

BIR Issuances

- **RR 21-2018, September 14, 2018 –** Effective January 1, 2018, the applicable rate for deficiency and delinquency interest for tax liabilities or deficiency tax/es shall be 12%, and there will be no more double imposition of deficiency and delinquency interest.

- **RMC 75-2018, September 5, 2018 –** This reiterates the importance of an LOA in the issuance of an assessment and provides that any tax assessment issued without an LOA is a violation of the taxpayer's right to due process and therefore inescapably void.

- **RMC 78-2018, September 7, 2018 –** It provides for the registration requirements on business entities and persons who will engage in the business of Offshore Gaming Operations, including their agents and service providers licensed and authorized by PAGCOR.

- **RMC 83-2018, October 1, 2018 –** It circularizes the letter issued by the Microfinance Non-Government Organization (NGOs) Regulatory Council, including the Updated List of Microfinance NGOs accredited by the Council.

- **RMC 85-2018, October 1, 2018 –** It clarifies issues pertaining to the issuance of Electronic Certification Authorizing Registration (eCAR) for Transferring Real Properties involving only one (1) title.

SEC Issuance

- **SEC-OGC Opinion No. 18-17, September 5, 2018 –** Investment Houses are excluded from the coverage of the SEC's MC No. 08-13, which provides for the two-tiered test in determining the nationality of the corporation.

BSP Circulars

- **BSP Circular No. 1013, September 17, 2018 –** Amends certain provisions on the Rules governing prejudicial acts, practices or omissions of Non-Stock Savings and Loan Associations.

Article Written

- **Taxation of offshore gaming and its implications. Business Mirror: Tax Law for Business, September 14, 2018.** This article discusses on businesses engaged in Philippine Offshore Gaming Operations (POGO) and the nature of taxes attached to it.

COURT ISSUANCES

I
Significant Court of Tax Appeals Decisions

The buyer of services must be a non-resident foreign corporation doing business outside the Philippines to qualify under zero percent VAT.

In this case, the taxpayer claims that the services it rendered to its affiliates abroad are transactions subject to zero percent VAT. In the course of trial, it presented a certificate of non-registration of corporation from the Securities and Exchange Commission (SEC) and a service agreement. The Court held that these documents merely proved that the buyer is a non-resident foreign corporation.

To prove that the buyer is "a non-resident foreign corporation doing business outside the Philippines", the buyer entity must be supported by both (1) certificate of non-registration from SEC and (2) proof of incorporation in a foreign country and (3) that there is no other indication which would disqualify the buyer in being classified as a non-resident foreign corporation. *(Procter & Gamble Asia, PTE. LTD vs. CIR, CTA Case No. 7683, September 6, 2018).*

The three-year limitation period to assess applies also to withholding tax assessments.

The BIR believes that withholding tax assessments are not internal revenue taxes, but assessments issued for failure of the company to withhold the correct taxes. As such, the three-year limitation period to assess shall not apply. The Court ruled differently. It says that the withholding tax falls under the income tax and shall therefore be assessed within the period of three years. *(Thunderbird Pilipinas Hotels and Resorts, Inc. vs. CIR, CTA Case No. 8612, September 6, 2018).*

The issuance of a second LOA for regular audit does not repeal the first LOA issued under the VAT audit program.

Taxpayer contends that the first LOA was cancelled upon the issuance of the second LOA since the second LOA includes the tax type and tax period covered by the first LOA. The Court held that on situation wherein the taxpayer was chosen under the VAT audit program, the second LOA that covers the regular audit should exclude the VAT. However, any deviation from these rules does not renders the LOA invalid. It only opens the revenue examiners to disciplinary or administrative sanctions. *(Southern Luzon Drug Corporation vs. CIR, CTA Case No. 8941, September 7, 2018).*

Vehicles carrying smuggled goods are exempted from forfeiture if the owner has no knowledge in the transportation of it.

The requirements for exemptions of vehicles, vessels, aircrafts or any other crafts from seizure and forfeiture for carrying or holding on board smuggled goods, are as follows: (1) the vehicles are used as common carriers; (2) not chartered or leased; and (3) the owner or its agents had no knowledge of the unlawful act.

Here, aside from the proven fact that petitioner owns and operates a legitimate business as a common carrier, no evidence was presented before the Court to support the conclusion that the owner has knowledge in the transportation of smuggled goods. *(RS De Vera Trucking vs. COC, CTA Case No. 9521, September 6, 2018).*

The presence of "deliberate" intent is necessary for the conviction of the offense of willful failure to supply correct and accurate information.

The accused was charged for violation of the NIRC for failure to supply correct and accurate information in her annual income tax return and audited financial statements. The accused contends that there is no willful and deliberate intention not to declare and pay taxes on her part.

Here, the Court noted that the prosecution failed to prove intent of accused to deliberately omit the transactions in the ITR and audited financial statements. While the accused may have been negligent in signing documents presented by her husband, without having read the same, said negligence does not equate to willful and deliberate intent.

Hence, failure of the prosecution to present any evidence to prove that the accused willfully failed to file her income tax return, resulting in her failure to pay income taxes due from her for taxable years 2006 to 2009, the Court is duty bound to acquit the accused. (*People vs. Caluag, CTA Crim. Case Nos. O-345, O-346, O-347 and O-348).*

Dissent of Justice Del Rosario: The accused was registered with the BIR as a One-Time Transaction Taxpayer (ONETT), hence, this circumstance at the very least is indicative of knowledge or awareness on the part of the accused that the transaction generating income or gain is subject to payment of tax with corresponding filing of an appropriate tax return. The filing of an Annual ITR is something that is not unknown or unusual to ordinary taxpayers. *(People vs. Caluag CTA Crim. Case Nos. O-345, O-346, O-347 and O-348).*

Note: **In another case, the Court noted that the taxpayer implicitly admits that she was aware of her duty to file a tax return, and yet failed to do so. This is tantamount to conscious and deliberate failure to file the required return.** *(Caluag vs. People, CTA EB Case No. 047, September 17, 2018).*

A PAN is meaningless to the concept of due process if the taxpayer's right to respond within the prescribed period would be ignored.

Here, the CIR unfairly surprised the taxpayer with Final Assessment Notice (FAN) without waiting for the period within which she could submit it protest to the PAN to expire. More glaring is the obvious fact that the CIR did not even consider the points and arguments of the taxpayer raised in its protest to the PAN prior to issuing a decision on it in the form of the FAN.

The Court emphasized that it is clear from the Tax Code that the right to respond to a PAN is given to the taxpayer, and that the period of fifteen (15) days to file said response is also the taxpayer's right -- they are not for the CIR to waive. Taxpayer's right to due process has therefore been violated and the FAN is null and void. *(Max's Sta. Mesa, Inc., vs. CIR, CTA Case No. 8786, September 28, 2018).*

Distribution of property dividend is not within the ambit of "other disposition of shares of stock" which recognizes income from disposal.

The taxpayer argues that the provisions of Revenue Regulations (RR) Nos. 6-2008 and 6-2013 apply only to sales, barter, exchange or other disposition, which give rise to the realization of net capital gains subject to capital gains tax. It maintains that its distribution of shares as property dividends was not a sale, barter, exchange or other disposition that would give rise to any realized net capital gains on its part, because it received no consideration for such distribution of dividends. It further alleges that BIR mistakenly treated the property dividend distribution as a transfer for less than an adequate or full consideration or with insufficient consideration, and concluded that there was an indirect gift for the difference between the adjusted fair market value as against the book value of the shares. The Commissioner of Internal Revenue (CIR), on the other hand, insists that donative intent is not necessary for the Tax Code to apply. The taxpayer purportedly became an intentional donor when it distributed shares of stocks as property dividend at a declared value which is lower than that of the fair market value.

The taxpayer argued that it declared and distributed property dividends to its stockholders out of its earnings or profits. The said property dividends distributed were comprised of taxpayer's shares of stock in its wholly-owned subsidiary and were recorded in taxpayer's books at its carrying value. In recording the property dividends at their carrying value, there was no profit or gain realized or recognized in the transaction. Additionally, distribution of property dividends is a non-reciprocal transfer. In other words, there was no consideration given nor received during the transfer.

Here, the Court finds that the corporation's declaration and distribution of property dividend is not within the ambit of the term "other disposition of shares of stock" that would recognize gain or loss from such disposal. Instead, it is a mere equity transaction since taxpayer did not recognize any gain or loss therefrom. *(Trans-Asia and Energy Development Corp., vs. CIR, CTA Case No. 9078, September 28, 2018).*

The waiver is void if not duly notarized.

Here, the Court looks on the validity of the waivers. The Court finds that the first waiver is void as it was not notarized. The Court noted that neither the name of the person who appeared before the notary public nor the detail of his or her identity is indicated. Consequently, since the first waiver is void, it did not extend the 3- year period to assess. There being no more period to extend, the second to the fifth waivers are also void. In conclusion, the Court explained that the doctrine of "in pari delicto" does not apply to this case because there was no intention on the part of the taxpayer to benefit from the infirmity of such waiver. *(Ayala Land Internal Sales, Inc. vs. CIR, CTA Case No. 9262, September 28, 2018).*

The assessment is null and void if not actually received by the taxpayer.

Here, accused Gernale, being the Treasurer of the taxpayer-corporation, was charged of willful failure to pay deficiency income tax and VAT for taxable year 2003. Accused however, avers that she did not receive any notice issued by the BIR. The latter witnesses testified that all notices were served at 1384 Gomez St., Paco, Manila despite the fact that Corporation's principal place of business is in 1331 Burgos St., Paco, Manila.

The Court finds that the evidence of the BIR failed to satisfactorily prove that taxpayer or any of its authorized representatives actually received the PAN. The BIRs witnesses could not positively testify that the PAN was actually received by the Corporation. Hence, the failure of the BIR to prove receipt of the

PAN by the taxpayer leads to the conclusion that no assessment was validly issued. Sending of a PAN to taxpayer to inform him of the assessment made is but part of the due process requirement in the issuance of a deficiency tax assessment, the absence of which renders nugatory any assessment made by the tax authorities. *(People vs. Gernale CTA Case No. O-336, September 26, 2018).*

In fact, in one case, the Court held that having established that the taxpayer never received the PAN, the events that came after became irrelevant such as the issuance of the FAN, the filing of the protest, the submission of supporting documents and the issuance of the Final Decision on Disputed Assessment (FDDA). *(CIR vs. Bloat and Ogle, Inc., CTA EB No. 1578, September 18, 2018).*

Note: **In another case however, the Court held that the presumption of regularity in the service of assessment notices by BIR was undisputed. The Court noted that the BIR was able to prove that the letter was properly addressed with postage prepaid and was sent to the registered address of the accused.** *(People vs. Caguimbal CTA Crim. Case Nos. O-546 & O-547, September 26, 2018).*

Royalty income earned in the active pursuit of business is subject to 30% regular corporate tax.

In this case, the taxpayer argues that the income earned from the act of licensing out certain intellectual property rights is merely incidental to taxpayer's primary purpose of business.

During trial, the taxpayer's manager testified that its main line of business is "the manufacturing, buying, selling, and otherwise dealing in alcoholic and non-alcoholic beverages" and that the acquisition of trademarks and other intellectual property rights is merely incidental to it. However, the Court noted that the taxpayer's financial statements shows no operating expenses for its alleged main trade or business of manufacturing, buying, selling and dealing in alcoholic and non-alcoholic beverages. In fact, the financial statements indicate no source of income for both 2009 and 2010 other than taxpayer's royalty income and a minimal amount of interest income.

The Court concludes that the taxpayer's income from licensing put its intellectual property rights is income generated in the active pursuit and performance of its primary purpose, thus, is not passive income. Hence, the royalty income is considered earned in the active pursuit of its trade or business and proper to be subject to the 30% regular income tax. *(Iconic Beverages, Inc. vs. CIR, CTA EB Nos. 1563 & 1564, September 18, 2018).*

Local government units is prohibited from imposing taxes on the National Government, its agencies and instrumentalities.

Here, the Court cited the pronouncement of the Supreme Court (SC) that the SMC shares held by taxpayer are owned by the government. As such, the Court held that since the subject shares are owned by the government, it follows that the dividends and any income derived from it are owned by the government as well, regardless of who has possession of it. That being the case, the subject shares and the dividends from it do not fall within the taxing power of the City of Davao. *(City of Davao vs. Roxas Shares Inc., CTA EB No. 1654, September 17, 2018).*

The sales of a generation company prior to the issuance of the certificate of compliance cannot qualify as zero rated sales.

The instant claim for refund covers input tax incurred for the 3rd quarter of 2008 allegedly attributable to zero-rated sales for the 1st quarter of 2010. However, the Court noted that both these periods come before the issuance of either certificate of compliance (COC) for Plant A or

B. Hence, the Court held that although the COCs were eventually issued, the privilege of VAT zero-rating did not retroact to cover the 1st quarter of 2010. *(Hedcor Sibulan, Inc. vs. CIR, CTA EB No. 1641, September 19, 2018).*

Failure to file an application for tax treaty relief does not preclude the taxpayer from enjoying the benefits provided by tax treaty.

Here, CIR argues that any availment of the tax treaty relief should be preceded by an application with International Tax Affairs Division (ITAD) at least 15 days before the transaction accompanies by supporting documents justifying the relief. The Court held that bearing in mind the rationale of tax treaties, the period of application for the availment of tax treaty relief as required by RMO No. 1-2000 should not operate to divest entitlement to the relief as it would constitute a violation of the duty required by good faith in complying with a tax treaty. The denial of the availment of tax relief for the failure of a taxpayer to apply within the prescribed period under the administrative issuance would impair the value of the tax treaty. At most, the application for a tax treaty relief from the BIR should merely operate to confirm the entitlement of the taxpayers to the relief. *(CIR vs. Toyota Motor Philippines, CTA EB No 1688, September 19, 2018).*

BIR Issuances

RR 21-2018, September 14, 2018

This revenue regulation implements Sec. 249 (Interest) of the NIRC of 1997, as amended under Sec. 75 of the TRAIN Law.

It prescribes the interest rate to be imposed when the tax liability/ies or deficiency tax/es became due before the effectivity of the TRAIN Law on January 1, 2018 and where the full payment thereof will only be accomplished after the said effectivity date, to wit:

Period	*Applicable Interest Type and Rate*
For the period up to December 31, 2017	Deficiency and/or delinquency interest rate of 20%
For the period January 1, 2018 until full payment of the tax liability	Deficiency and/or delinquency interest rate of 12%

Note: **The double imposition of both deficiency and delinquency interest under Sec. 249, which is already prohibited under the TRAIN Law, will still apply in so far as the period between the date prescribed for payment until December 31, 2017.**

RMC 75-2018, September 5, 2018

This revenue memorandum circular states for the mandatory statutory requirement and function of an LOA as enunciated by the SC in the case of *"Medicard Philippines, Inc. v. CIR" (G.R. No. 222743, 05 April 2017).*

Based on this judicial ruling, it reiterates the importance of LOA and that no assessments can be issued nor assessment functions or proceedings can be done without the prior approval and authorization of the CIR or his duly authorized representative, through an LOA. It further emphasized that a Letter of Notice (LN) is entirely different and serves a different purpose than an LOA.

RMC 78-2018, September 7, 2018

This revenue memorandum circular provides for the guidelines in the registration of business entities and persons who will engage in the business of offshore gaming operations, including their agents and service providers licensed and authorized by PAGCOR.

Under this memorandum circular, all Foreign-based and Philippine-based Operators, including those have already been issued an Offshore Gaming License by PAGCOR are required to register with the BIR on or before the commencement of business; or before payment of any tax due; or before or upon filing of any applicable tax return, statement or declaration as required by the Tax Code, as amended, whichever comes earlier.

RMO 42-2018, September 12, 2018

This revenue memorandum order amends portion of RMO No. 29-2014 relative to the procedures for the issuance of Certifications on the existence of Outstanding Tax Liabilities of Taxpayers.

In particular, it amends the validity of the certifications issued by all concerned revenue offices pertaining to taxpayer's claim for VAT refund which shall now be valid for six (6) months from date of issue. But, other certifications in relation to the existence of outstanding tax liabilities of taxpayers that do not fall under the same purpose shall be valid only for one (1) month from date of issue.

RMC 83-2018, October 1, 2018

This revenue memorandum circular pertains to the publication of the Letter from the Microfinance NGO Regulatory Council Secretariat and on the updated list of Microfinance NGOs accredited by the Microfinance NGO Regulatory Council. At present, there are 32 accredited microfinance NGOs in the Philippines.

RMC 85-2018, October 1, 2018

This revenue memorandum circular addressed issues pertaining to the issuance of Electronic Certification Authorizing Registration (eCAR) for Transferring Real Properties.

This revenue memorandum circular clarifies the problems being encountered by taxpayers who have multiple transactions involving only one title in transferring their real properties with the Land Registration Authority.

*Extra-Judicial Settlement **with** Sale/Waiver of Rights*	*Extra-Judicial Settlement **and** Deed of Absolute Sale/Deed of Donation (two separate documents)*
• Two (2) eCARs will be issued that shall be simultaneously be presented to the Registry of Deeds.	• An eCAR for the estate settlement shall first be issued.

	• The eCAR for sale/donation shall be issued upon release of the new title number on the settlement of estate. • Applicable taxes for both transactions may be paid at one-time to avoid penalties and interest.

SEC Issuances

SEC-OGC Opinion No. 18-17, September 5, 2018

This opinion pertains to the Applicability of SEC Memorandum Circular (MC) No. 08-13 to Investment Houses.

The opinion is premised on the question of whether Investment Houses are covered by the MC No. 08-13, which provides for the two-tiered test (total number of outstanding shares of stock entitled to vote in the election of directors and the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors) in determining the nationality of the corporation.

SE,C, in its opinion, states that the corporations which are covered by special laws are excluded from the coverage of MC No. 08-13. The Circular cited laws like the Lending Company Regulation Act of 2000, the Financing Company Act of 1998 and the Investment House Law as examples of such special laws.

Further, P.D. 129, as amended, which governs the investment houses, specifically provides for a different citizenship requirement, thus the same shall be followed and complied with in case of Investment Houses.

BSP Issuances

BSP Circular No. 1013, September 17, 2018

This circular amends Sec. 4184S and its Subsections of the Manual of Regulations for Non-Bank Financial Institutions on the rules governing prejudicial acts, practices or omissions of Non-Stock Savings and Loan Associations (NSSLA).

Under this circular, it modifies certain provisions pertaining to the act, practices or omissions prejudicial to the interest of member and on the enforcement of the same. The act, practice or omission is deemed willful if, despite BSP directive to stop the said act, practice, or omission, the NSSLA and/or its trustees and/or officers, continue to commit the same or related acts. "Related acts" shall refer to specific acts which result in the same prejudicial act, practice or omission.

Articles Written

Business Mirror: Tax Law for Business

Taxation of offshore gaming and its implications

By: Pierre Martin Reyes

In September 2016 the Philippine Amusement and Gaming Corp. (Pagcor) started issuing Philippine Offshore Gaming Operations licenses that allow entities to engage in the business of offshore gaming operations. The government's Pogo revenue in 2017 reached around P3 billion ($56 million) and is expected to rise to a whooping P6 billion ($115.2 million) this year. With its fast growth and profits, Philippine offshore gaming has caught the attention of the taxman. Revenue Memorandum Circular 102-2017 and the recently issued RMC 78-2018 provide the rules on the taxability of offshore gaming operations in the Philippines.

In RMC 102-2017, the Bureau of Internal Revenue (BIR) classified Pogo taxpayers as either: (1) the licensee, which pertains to the Pogo duly licensed and authorized by the Pagcor to provide offshore gaming corporations and which may either be a Philippine-based operator or an offshore-based operator; or (2) other entities, which refer to a licensee or any other business entity which provides a particular component of the offshore gaming activities, i.e. Pogo-gaming agent, service provider, and gaming support provider.

For tax purposes, the income of a Pogo taxpayer should be broken down between its income from gaming operations and its income from other services, shows and entertainment necessary and related to its gaming operations.

The entire gross gaming receipts/earnings or the agreed minimum monthly revenues from gaming operations, whichever is higher, shall be subject to the 5-percent franchise tax in lieu of all kinds of taxes, fees or assessments. This means that income from gaming operations is exempt from any other national and local tax. On the other hand, income from services necessary and related to gaming operations shall be subject to the normal income tax, value- added tax and other applicable taxes.

Further, income payments made by Pogo taxpayers for all their purchases of goods and services shall be subject to expanded withholding taxes while compensation, fees, commissions, or any other form of remuneration for services rendered to Pogo taxpayers are subject to withholding taxes on compensation.

While the above tax rules are very much straightforward, the quandary here is its application and enforcement to offshore-based operators. Under the rules, an offshore-based operator is an enterprise organized in a foreign country who will engage the services of a Pagcor- accredited local gaming agent and service providers for its offshore gaming corporations. Considering the digital nature of the business, these offshore-based operators have no physical presence upon which current rules of taxation are premised.

To address this, RMC 78-2018 now requires that all Pogo licensees, whether foreign-based or Philippine-based, including those that have already been issued a license to register with the BIR. From the BIR's standpoint, "online activity is sufficient to constitute doing business in the Philippines." Thus, offshore-based operators are considered as resident foreign corporations (foreign corporations engaged in trade or business within the Philippines) and not nonresident foreign corporations (foreign corporations not engaged in trade or business within the Philippines).

The Pogo licensees shall register with the BIR Revenue District Office having jurisdiction over the place where the Head Office and/or branch or "Pogo Hub" is located. As offshore-based operators do not have

a physical presence in the Philippines, the RMC introduces the concept of a Pogo Hub. A Pogo Hub pertains to a complex, which houses the operations, as well as other logistical, administrative, and support services for offshore gaming operations of Pogo licensees and service providers. Therefore, even if the offshore-based operator does not have a head office or branch in the country, the Pogo Hub operated by its contracted service provider will suffice for jurisdiction tax purposes.

The implications of these rules on the Philippine offshore gaming industry are far-reaching. Currently, there is an ongoing international debate on how to adapt existing tax rules to digital business activities. In March 2018, for example, the European Commission adopted a proposal that will enable the member-states of the European Union to tax profits generated in their territory by digital companies even if that company does not have a physical presence there. Such digital company shall be deemed to have a taxable "digital presence" or "virtual permanent establishment" provided certain requirements be met. A law has yet to be passed carrying on this proposal.

In the Philippines the BIR, through RMC 78-2018, is of the position that mere online activity is sufficient to constitute "doing business" in the Philippines. Notably, however, this has only been enunciated in an opinion by the Securities and Exchange Commission and not by the Courts. Nowhere can this also be expressly found in the Tax Code or other laws. With this comes the billion-dollar question that the Courts may eventually have to resolve: Is there legal basis to consider offshore-based companies with digital business transactions here, including foreign-based Pogos, as deemed "doing business" in the Philippines?

BDB Law's "Tax Law for Business" appears in the opinion section of Business Mirror every Thursday.

Our Experts

If you have any comments or questions concerning the contents of this issue of Insights, you may contact any of our experts

BENEDICTA DU-BALADAD
Managing Partner & CEO
T: +63 2 403 2001 loc. 300
dick.du-baladad@bdblaw.com.ph

FULVIO D. DAWILAN
Senior Partner
T: +63 2 403 2001 loc. 310
fulvio.dawilan@bdblaw.com.ph

IRWIN C. NIDEA, JR.
Partner
T: +63 2 403 2001 loc. 330
irwin.c.nideajr@bdblaw.com.ph

RODEL C. UNCIANO
Senior Associate
T: +63 2 403 2001 loc. 140
rodel.unciano@bdblaw.com.ph

PIERRE MARTIN D. REYES
Senior Associate
T: +63 2 403 2001 loc. 311
pierremartin.reyes@bdblaw.com.ph

RONALD S. CUBERO
Senior Associate
T: +63 2 403 2001 loc. 360
ronald.cubero@bdblaw.com.ph

MABEL L. BUTED
Senior Associate
T: +63 2 403 2001 loc. 380
mabel.buted@bdblaw.com.ph