

REPUBLIC OF THE PHILIPPINES  
DEPARTMENT OF FINANCE  
BUREAU OF INTERNAL REVENUE

Quezon City

November 24, 2008

**REVENUE MEMORANDUM CIRCULAR NO. 77 - 2008**

**SUBJECT : TAXABILITY OF DIRECTOR'S FEES RECEIVED BY DIRECTORS WHO ARE NOT EMPLOYEES OF THE CORPORATION FOR VAT OR PERCENTAGE TAX PURPOSES AS ESPOUSED UNDER REVENUE MEMORANDUM CIRCULAR NO. 34-2008.**

**TO ALL INTERNAL REVENUE OFFICERS AND OTHERS CONCERNED.**

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Sometime in April 2008, the Bureau of Internal Revenue promulgated Revenue Memorandum Circular No. 34-2008. In the said revenue issuance, the Bureau, aside from touching on the well-settled rule that director's fees are subject to income tax, has likewise espoused the view that the fees, including the per diems or allowances paid to a director who is not an employee of the corporation paying such fees, per diems, or allowances are not only subject to the income tax but are likewise subject to the imposition of the 12% VAT or to the 3% percentage tax.

As stated in the said Revenue Memorandum Circular No. 34-2008, *"[A]side from being liable to the payment of income tax imposed under Title II of the Code, these directors who are not employees, having received such fees which had been subsequently reported in their annual income tax returns as part of their gross income should likewise be liable to pay business tax on account of such receipt of income. They fall under the category of sellers of services under Title IV of the Code who are liable to pay the 12% VAT on their gross receipts pursuant to Section 108 thereof, or the 3% percentage tax imposed under Section 116, should they fail to meet the VAT threshold."*

In asserting further this view that such directors receiving such fees, per diems or allowances fall under the category of sellers of services pursuant to Section 108 of the Tax Code, the Bureau averred that since such fees, per diems or allowances received by these directors are not enumerated among those remunerations for services that are exempt from the imposition of the VAT under Section 109 of the Code, the same are, thus, effectively covered by said VAT imposition.

This recent position taken by the Bureau has apparently caused clamor from the various sectors of the business community to review and revisit the expositions taken by the Bureau in Revenue Memorandum Circular No. 34-2008.

In resolving the issue of whether or not directors sitting as members of Board of Directors for corporations of which they are not employees are considered as persons considered liable to VAT, it is essential to determine first whether the functions discharged by these individuals as directors of corporations fall within the purview of those transactions pursued “*in the course of trade or business*” which as defined in Sec. 105 of the Code, pertains to the “*regular conduct or pursuit of a commercial or economic activity*”.

Section 105 of the Tax Code provides the persons who are liable to VAT under Title IV thereof, viz:

**“SEC. 105. Persons Liable.** - Any person who, *in the course of trade or business, sells, barter, exchanges, leases goods or properties, renders services*, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 and 108 of this Code.

“ xxx xxx xxx

*“The phrase ‘in the course of trade or business’ means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a nonstock, nonprofit private organization (irrespective of the disposition of its net income and whether or not it sells exclusively to members or their guests) or government entity.” (Emphasis supplied.)*

“ xxx xxx xxx.”

As can be gleaned from the abovementioned provision, it is clear that the applicability of the VAT provisions generally pertain to those persons whose undertakings are intended to be pursued on a going-concern basis where the end view is to realize unrestricted amounts of pecuniary gains/profits from those who may avail of the goods they sell or the services they render.

A member of the board of directors therefore who is not an employee of the corporation does not fall under the foregoing category.

For one, such individual does not freely offer his services as director disparately to just any corporation. In order to be elected as a director of a corporation, Section 23 of the Corporation Code requires such individual to at least own one (1) share of the capital stock of said corporation.

Secondly, said section of the Corporation Code limits the term of the elected director for only one (1) year until his successor is elected. This means that his functions as a director of the company can only be exercised within this limited term period. Being so, such limited services can not be considered as one of those undertaken on a going-concern basis as would normally be expected from those who are in the regular conduct of selling goods and/or services upon whom the VAT is consequently imposed pursuant to Sec. 105 of the Code.

Moreover, the remuneration that a director may get from the corporation is fixed and subject to the ceiling prescribed by the Corporation Code, whereas the remunerations/gains or profits that a seller of goods/services may realize from his commercial transactions vary. As provided in Section 30 of the same

Corporation Code, *“in the absence of any provision in the by-laws fixing their compensation, the directors shall not receive any compensation, as such directors, except for reasonable per diems: Provided, however, That any such compensation other than per diems may be granted to directors by the vote of the stockholders representing at least a majority of the outstanding capital stock at a regular or special stockholders’ meeting. In no case shall the total yearly compensation of directors, as such directors, exceed ten (10%) percent of the net income of the corporation during the preceding year.”*

Furthermore, as a director of a corporation, an individual is generally precluded from entering into a contract with the corporation of which he is a director subject to the conditions provided for under Section 32 of the Corporation Code. By this, such director is generally restricted from having business dealings directly with the corporation of which he is a director.

Based on the foregoing, it is therefore apparent that the fees, per diems, honoraria or allowances being given to a director of a corporation as such cannot be considered as derived from an economic or commercial activity that have been pursued *“in the course of trade or business”*. Rather, said director’s fees are remunerations paid in the exercise of a right of an owner in the management of a corporation. Thus, not *“in the course of trade or business”* as contemplated under Section 105 of the Code. Such fees, per diems, allowances and other income received by the director as such, are therefore, exempt from the imposition of the 12% VAT or 3% percentage tax, notwithstanding that the said payments are not among those enumerated under Section 109 of the said Code.

**In view thereof, the penultimate paragraph of Revenue Memorandum Circular No. 34-2008 stating that directors receiving fees, per diems, allowances, and the like, from corporations of which they are directors but are not employees thereof “fall under the category of sellers of services under Title IV of the Code who are liable to pay the 12% VAT on their gross receipts pursuant to Section 108 thereof,, or to the 3% percentage tax imposed under Section 116, should they fail to meet the VAT threshold”, is hereby REPEALED.**

This Order takes effect immediately .

(Original Signed)  
**SIXTO S. ESQUIVIAS, IV**  
Commissioner of Internal Revenue