

REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE
Quezon City

September 30, 2013

REVENUE MEMORANDUM CIRCULAR NO. 66-2013

SUBJECT : Circularizing Revocation of BIR Ruling No.011-07
TO : All Internal Revenue Officials, Employees and Others Concerned

For the information and guidance of all internal revenue officials, employees and others concerned, quoted hereunder is the full text of the memorandum to the Large Taxpayers Service, revoking BIR Ruling No. 011-07 dated 31 May 2007, as follows:

“MEMORANDUM

TO : **SARAH B. MOPIA**
Chief, Excise Large Taxpayers Division 1

ALFREDO V. MISAJON
OIC-Assistant Commissioner
Large Taxpayers Service

SUBJECT : **VAT Treatment on the Sale of Sub-Transmission Assets
by the National Transmission Corporation (TransCo)**

DATE : **September 18, 2013**

This refers to your Memorandum dated 30 May 2012 recommending that the VAT exemption granted to National Transmission Corporation (TransCo) under BIR Ruling No. 11-07 dated 31 May 2007 be revoked in the light of the issuance of Revenue Memorandum Circular (RMC) No. 11-2012 [*Tax Consequences of Power Sector Assets and Liabilities Management Corporation (PSALM) Transactions*].

Background

BIR Ruling No. 11-07 was issued to PSALM confirming tax implications of certain transaction arising from or relating to privatization of TransCo through the award by PSALM to the winning bidder/concessionaire of the concession to construct, install, improve, expand, operate, maintain, rehabilitate, repair and refurbish the high voltage and medium voltage transmission system owned by TransCo as well as to operate any related business, and temporarily operate and manage the sub-transmission assets of TRANSCO until the disposal thereof to qualified distribution utilities, all in compliance with Republic Act No. 9136,

otherwise known as the Electric Power Industry Reform Act of 2001 ("EPIRA") and its Implementing Rules and Regulations ("IRRs").

Pursuant to Clause 5.03 in relation to Schedule 6, Draft Concession Agreement (dated 18 August 2006) existing at that time the Ruling was requested:

“TRANSCO shall be entitled to dispose of subtransmission assets in accordance with Section 8 of the EPIRA and retain the proceeds thereof. In such an event, the Concession Fee shall be reduced by an amount equal to the reduction in value of TRANSCO's assets that the ERC requires to be made as a result of the disposal of subtransmission assets after the Commencement Date.”

Based on the foregoing, BIR Ruling No. 11-07 confirmed, among others, that TRANSCO is not subject to VAT on the disposal of the sub-transmission assets, to wit:

“Value Added Tax

Like the privatization of the transmission system through the award of the Concession, the disposal of the subtransmission assets will be undertaken by TRANSCO not in the ordinary course of its trade or business, but in accordance with the mandate of the EPIRA.

Section 8 of the EPIRA provides:

XXX XXX XXX

"The subtransmission functions and assets shall be segregated from the transmission functions, assets and liabilities for transparency and disposal: Provided, That, the subtransmission assets shall be operated and maintained by TRANSCO until their disposal to qualified distribution utilities which are in a position to take over the responsibility for operating, maintaining, upgrading, and expanding said assets. . . ."

TRANSCO shall negotiate with, and thereafter, transfer such functions, assets, and associated liabilities to the qualified distribution utility or utilities connected to such subtransmission facilities not later than two (2) years from the effectivity of this Act or the start of open access, whichever come earlier. . . ."

As such, this Office confirms that TRANSCO shall not be subject to VAT upon its disposal of the subtransmission assets."

RMC No. 11-2012, on the other hand, clarifies that:

“2. The sale by PSALM of the NPC generation assets and other real properties to winning bidders, is subject to Value-Added Tax (VAT);

Pursuant to Section 105 of the Tax Code, any person who, in the course of trade or business, sells, barter, exchanges, leases goods or properties shall be subject to VAT. The Tax Code of 1997 defines the phrase "in the course of trade or business" as 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.

The enactment of RA 9337 on July 1, 2005 placed the electric power industry in the VAT System. Particularly, the amendment included the sale of electricity by generation companies, transmission and distributions companies, to sales subject to VAT, to wit:

“SEC. 6. Section 108 of the same Code, as amended, is hereby further amended to read as follows:

SEC. 108. Value-added Tax on Sale of Services and Use or Lease of Properties. –

xxx xxx xxx

"The phrase 'sale or exchange of services' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration, including those performed or rendered by construction and service contractors; stock, real estate, commercial, customs and immigration brokers; lessors of property, whether personal or real; warehousing services; lessors or distributors of cinematographic films; persons engaged in milling, processing, manufacturing or repacking goods for others; proprietors, operators or keepers of hotels, motels, rest-houses, pension houses, inns, resorts; proprietors or operators of restaurants, refreshment parlors, cafes and other eating places, including clubs and caterers; dealers in securities; lending investors;

transportation contractors on their transport of goods or cargoes, including persons who transport goods or cargoes for hire and other domestic common carriers by land relative to their transport of goods or cargoes; common carriers by air and sea relative to their transport of passengers, goods or cargoes from one place in the Philippines to another place in the Philippines; sales of electricity by generation companies, transmission, and distribution companies; xxx" (emphasis supplied)

Moreover, Revenue Regulations (RR) No. 16-2005 was accordingly amended by RR 04-2007 and subjected the sale of real properties not primarily held for sale or for lease, but used in business, to VAT, to wit:

"SEC. 4.109-1. VAT-Exempt Transactions.-

xxx xxx xxx

(B) Exempt transactions . – Subject to the provisions of Sec. 4.109-2 hereof, the following transactions shall be exempt from VAT:

xxx xxx xxx

(p) The following sales of real properties are exempt from VAT, namely:

(1) Sale of real properties not primarily held for sale to customers or held for lease in the ordinary course of trade or business.

However, even if the real property is not primarily held for sale to customers or held for lease in the ordinary course of trade or business but the same is used in the trade or business of the seller, the sale thereof shall be subject to VAT being a transaction incidental to the taxpayer's main business.

xxx xxx xxx" (emphasis supplied)

Considering that the sale of electricity is now subject to VAT, the real properties sold by PSALM are regarded as real properties used in the trade or business. While it is clear under the Tax Code of 1997 that such sale is not subject to income tax, there is no provision under the same Code that exempts it from VAT nor subject it to

VAT at zero rate. Sec. 106 of the Tax Code of 1997 imposes VAT on “all kinds of goods and properties” sold in the Philippines, with the term “goods and properties” given an all-encompassing meaning by Congress. Thus, any goods and properties sold should be deemed included unless some provisions of law especially exclude it. The sale of the generation assets, real properties and other disposable assets by PSALM are no different from the goods and properties provided under Section 106 of the Tax Code of 1997.

It is to be noted, however, that the VAT imposed on the sale of the transferred assets may be utilized by the buyer as creditable input VAT.” (*Underscoring supplied*)

It is submitted that the sub-transmission assets form part of the “other real properties” or disposable assets of PSALM that are subject to VAT.

In the light of the clarifications made by RMC No. 11-2012 on the sale or disposition by PSALM of the NPC generation assets and other real properties and its repealing clause, BIR Ruling No. 11-07 is hereby REVOKED in so far as it is inconsistent with the provisions of the RMC.

Additionally, the foregoing BIR Ruling is likewise revoked in so far as it opined that—

“(2) TRANSCO is not subject to ..x x x VAT on its transfer of title to the Transferable Assets and assignment of Intellectual Property Rights to the Concessionaire pursuant to the award of the Concession”, and

Furthermore, the Large Taxpayers Service (LTS) is hereby ordered to conduct an audit and investigation in order to ascertain the taxes due on the instant transaction.

For your immediate and appropriate action.

(SGD) KIM S. JACINTO-HENARES
Commissioner of Internal Revenue”

The revocation and nullification of **BIR Ruling No. 011-07**, is anchored on the enactment of RA 9337 on July 1, 2005, particularly Section 6 which provided for the amendment of Section 108 (Value-Added Tax on Sale of Services and Use or Lease of Properties) which placed the electric power industry in the VAT System. The amendment included the sale of electricity by generation companies, transmission and distribution companies, to sales subject to VAT. Moreover, Revenue Regulations (RR) No. 16-2005 was accordingly amended by RR 04-2007 and subjected the sale of real properties not primarily held for sale or for lease, but used in business, to VAT.

Thus, the sale or disposition of sub-transmission assets by PSALM is subject to VAT.

The revocation of **BIR Ruling No. 011-07 dated May 31, 2007** is hereby circularized for the guidance and information of all Revenue District Offices. All concerned are hereby enjoined to be guided accordingly and to give this Circular as wide publicity as possible.

(Original Signed)
KIM S. JACINTO-HENARES
Commissioner of Internal Revenue

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