



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

Sections 22(Y) and 27(D) of
the Tax Code of 1997

3IR Ruling No. [DA-007-04]
3IR Ruling No. [DA-491-04]
3IR Ruling No. 008-05
3IR Ruling No. 370-11

DA #370-2011

Oct. 17, 2011

Date

KAWANIHAN NG INGATANG-YAMAN
(BUREAU OF TREASURY)
Intramuros, Manila

Attention : **Hon. Roberto B. Tan**
Treasurer of the Philippines

Gentlemen:

This refers to your letter dated October 12, 2011, seeking confirmation that the imposition and withholding of the 20% final withholding tax on the discount of Php24.3 billion of the PEACe Bonds with maturity face value of Php35.0 billion pursuant to **BIR Ruling No. 370-2011** dated **October 7, 2011** shall be imposed and withheld not only to RCBC/CODE NGO but also to "all subsequent holders of the Bonds."

In reply, please be advised that the term "RCBC/CODE-NGO" referred to under "**On Who Shall Be Liable To Pay the Tax Due**" includes "**all subsequent holders**" thereof. Be it noted that BIR Ruling No. 370-2011 discusses the taxability of the entire discount of P24.3 Billion and it clearly states that the BTr shall withhold and remit the corresponding 20% final tax due on the interest income derived from the PEACe Bonds prior to its payment on the date of maturity. So, it follows that the 20% final withholding tax on the discount of P24.3 Billion shall be imposed and withheld not only to RCBC/Code NGO but also to all subsequent holders of the PEACe Bonds. In any event, and to erase any doubt or ambiguity, the aforementioned BIR Ruling on PEACe Bonds is hereby revised to read:

**"On Who Shall Be Liable
To Pay the Tax Due –**

Again, applying the provisions of Section 7 of DOF Department Order No. 141-95 which requires that the 20% Final Income Tax be withheld on discounts valued at present value on every original sale, RCBC, as the original purchaser of the PEACE Bonds should be held liable to pay the Final Tax due thereon.

However, considering that RCBC merely acted as an agent or conduit of CODE-NGO by virtue of the requirement of BTr that CODE-NGO is not a Government Securities Eligible Dealer (GSED), the beneficial owner of the PEACE Bonds and the corresponding interest income thereon is CODE-NGO which is liable to pay for the Php 4.86 billion final tax due on the discount/interest income realized.

Consequently, **RCBC/CODE-NGO and all subsequent holders of the Bonds** may not invoke the principle of non-retroactivity under Section 246 of the 1997 Tax Code to preclude this Office from collecting the final tax on the original discount/interest income.

It is noteworthy to mention that Section 246 of the 1997 Tax Code is explicit when it provides, to wit:

"SEC. 246. Non-Retroactivity of Rulings. — Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers, except in the following cases:

"(a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;

"(b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or

"(c) Where the taxpayer acted in bad faith." (Underscoring provided)

In **BIR Ruling No. 007-04**, it was categorically stated that the 2001 Rulings were issued based on representations made as follows:

"In previous BIR rulings issued to BTr, this Office had enunciated the rule that to be able to determine whether the financial assets, i.e., debt instruments and securities are deposit substitutes, the "20 or more individual or corporate lenders" rule must apply. Moreover, the determination of the phrase "at any one time" for purposes of determining the "20 or more lenders" is determined at the time of the original issuance. This has been so on the basis of the fact that it is on the original issuance that the act of lending is done." (Emphasis supplied)

However, subsequent findings prove to be contrary to the aforementioned representations, to wit:

"Significantly, we have noted BTR's contention and position on the matter. In short, as we understand from the discussion we had with the representative of the BTR, since the object of the issuance is to obtain the required government funding, the issuance and subsequent distribution (exchange and trading) of Government debt instruments and securities in the secondary market to other market participants, specifically, the investors, is in itself a public borrowing of the government. The financial assets (i.e., debt instruments and securities) in the hands of the investors represent a claim to future cash for which the borrowing entity, at maturity date, must have to pay. It is, however, in the secondary market that the investing public make the indirect investment in the borrowing entity, in this case, the Government." (Underscoring supplied)

Therefore, the facts subsequently gathered by the Bureau of Internal Revenue from which the 2004 Ruling was made are materially different from the facts on which the 2001 Rulings are based. Hence, **BIR Ruling No. 007-04** is applicable retroactively.

Further, there is ample legal authority to conclude that the non-retroactivity principle does not apply when the ruling involved is null and void for being contrary to law, such as the 2001 Rulings. Well-entrenched are the principles that the Government is never estopped from collecting taxes because of mistakes and errors of its agents¹ and there are no vested rights in a wrong interpretation of the law.²

Also, in the case of Emilio Y. Hilado vs. The Collector Of Internal Revenue and The Court of Tax Appeals³ the Supreme Court held:

*"With regard to the contention that General Circular No. V-139 cannot be given retroactive effect because that would affect and obliterate the vested right acquired by petitioner under the previous circular, suffice it to say that **General Circular No. V-123, having been issued on a wrong construction of the law, cannot give rise to a vested right that can be invoked by a taxpayer. The reason is obvious: a vested right cannot spring from a wrong interpretation.** This is too clear to require elaboration.*

*"It seems too clear for serious argument that an administrative officer can not change a law enacted by Congress. **A regulation that is merely an interpretation of the statute when once determined to have been erroneous becomes nullity. An erroneous construction of the law by the Treasury Department or the collector of internal revenue does not preclude or estop the government from collecting a tax which is legally due.**" (Ben Stocker, et al., 12 B. T. A., 1351.)*

¹ Philippine Guaranty Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 775

² Philippine Bank of Communications vs. Commissioner of Internal Revenue, G.R. No. 112024, January 28, 1999

³ G.R. No. L-9408, October 31, 1956.


"Art. 2254. — No vested or acquired right can arise from acts or omissions which are against the law or which infringe upon the rights of others." (Article 2254, New Civil Code.)" (Emphasis provided)

The foregoing principle of non-estoppel was reiterated in the case of Philippine Bank of Communications⁴, viz:

"Fundamental is the rule that the State cannot be put in estoppel by the mistakes or errors of its officials or agents. As pointed out by the respondent courts, the nullification of RMC No. 7-85 Issued by the Acting Commissioner of Internal Revenue is an administrative interpretation which is not in harmony with Sec. 230 of 1977 NIRC, for being contrary to the express provision of a statute. Hence, his interpretation could not be given weight for to do so would, in effect, amend the statute. (Emphasis supplied)

Based on the foregoing, RCBC/CODE-NGO and all subsequent holders of the Bonds has no vested right to invoke the 2001 Rulings and is consequently held liable to pay the Final Tax due on the discount/interest realized from the PEACE Bonds."

Very truly yours,


KIM S. JACINTO-TENARES
Commissioner of Internal Revenue
005944

K-

/Rulings/PEACE Bonds

⁴ *Supra.*