

**[BIR REVENUE MEMORANDUM ORDER NO. 2-
2013, February 18, 2013]**

**PRESCRIBING THE POLICIES, GUIDELINES AND PROCEDURES IN
PROCESSING SPECIFIC REQUESTS FOR INFORMATION
PURSUANT TO THE EXCHANGE OF INFORMATION PROVISION OF
PHILIPPINE TAX TREATIES, IN RELATION TO REPUBLIC ACT NO.
10021, AS IMPLEMENTED BY REVENUE REGULATIONS NO. 10-
2010**

I. BACKGROUND

In the last decade, the world has witnessed a growth in volume and complexity of cross-border commercial and financial transactions. With the liberalization and globalization of economies, however, innovative tax practices by taxpayers that have access to international markets have also emerged alongside an increase in international tax evasion. The harmful effects of some of these practices, e.g. abusive transfer pricing and capital flight, have resulted in significant losses of tax revenues for governments. To confront the challenges presented by globalization, many jurisdictions have emphasized the need for more effective exchange of tax information between national tax authorities.

In response to this changing fiscal environment, the Philippine Government enacted, on March 5, 2010, Republic Act (RA) No. 10021 otherwise known as the "Exchange of Information Act of 2010" which ensures that information held by our banks and financial institutions can be made available to foreign tax authorities, upon request, in accordance with the terms of our Double Taxation Agreements (DTAs) and Tax Information Exchange Agreements (TIEAs)^[1] hereafter referred to as Exchange of Information or EOI arrangements. This development solidifies the Philippines' commitment to comply with internationally-agreed standards on tax transparency and effective exchange of tax information. At the same time, it impacts the manner in which the Bureau handles requests for information exchange pursuant to the relevant treaty provisions.

To ensure that the exchange of information mechanism with our 37 tax treaty partners remains effective in this new environment, the procedures on specific exchange of information (or exchange of information on request),^[2] which were last amended in 1997, are being updated - to reflect the foregoing changes in the global economy and the Philippine legal system.

II. POLICY

It is the policy of the Bureau of Internal Revenue to cooperate with foreign tax authorities in combating international tax evasion and other criminal tax offenses and to address tax concerns that affect international trade and investment by fully utilizing the mechanism of exchange of information. To this end, the Bureau shall

adopt procedures on specific exchange of information that: 1) Allow for effective information exchange with other jurisdictions with which we have EOI arrangements; 2) Ensure the confidentiality of information received under such arrangements; and 3) Safeguard the rights of taxpayers and third parties.

III. OBJECTIVES

In order to carry-out this stated policy, this Order:

1. Identifies the scope of exchange of information on request, the subjects covered and the limitations to exchange information;
2. Prescribes the standard procedures to be followed in handling a request for information made to, or received from, a foreign tax authority pursuant to an EOI arrangement; and
3. Prescribes the forms to be used in requesting information from foreign tax authorities, banks and financial institutions and other holders of taxpayer information, and the forms to be used in responding to requests for information from foreign tax authorities pursuant to an EOI arrangement.

IV. COMPETENT AUTHORITY

The competent authority acts as a contact point for the competent authorities of treaty partners for EOI purposes.

Exchange of information can only take place between competent authorities or their authorized representatives. This ensures that the rules applicable to exchange of information (and in particular the confidentiality of information exchanged) are respected and consistently applied. Bypassing the competent authorities constitutes a breach of tax confidentiality which is expressly prohibited by Section 270 of the National Internal Revenue Code (NIRC) and by the terms of our DTAs and TIEAs.

Our DTAs generally provide that "the Secretary of Finance or his authorized representative(s)" are the competent authorities for the Philippines. The DTAs with Bahrain, Bangladesh, Czech Republic, Sweden and United Arab Emirates provide that the competent authority is "the Secretary of Finance or the Commissioner of Internal Revenue". The DTA with the United States indicates that the competent authority is "the Secretary of Finance or his delegate."

Section 4 of Revenue Regulations 10-2010 expressly designates the Commissioner of Internal Revenue (Commissioner) as the Philippine competent authority for EOI purposes.

V. SCOPE AND COVERAGE OF EXCHANGE OF INFORMATION

Exchange of information covers any information that is necessary or foreseeably relevant to the administration or enforcement of the domestic laws of the contracting parties concerning income taxes and other taxes covered by the terms of our EOI arrangements. It includes information for cases that involve tax evasion and other criminal tax offenses but is not limited to such cases.

A request for information can include any or all of the following items but not limited to:

1. The fiscal residence of an individual or a company;
2. The tax status of a legal entity;

3. The nature of income in the source country;
4. The income and expenses shown on a tax return;
5. Business records (for instance to determine the amount of commissions paid to a company of another State);
6. Formation documents of an entity and documents about subsequent changes of shareholders/partners;
7. Name and address of the entity at the time of formation and all subsequent name and address changes;
8. Number of entities residing at the same address as the requested entity;
9. Names and addresses of the directors, managers, and other employees of a company for the relevant years, evidence (contracts and bank statements) of their remuneration, social security-payments and information about their occupation with regard to any other entities;
10. Banking records;
11. Accounting records and financial statements;
12. Copies of invoices, commercial contracts, etc.; and
13. The price paid for goods in a transaction between independent companies in both States.^[3]

It must be stressed, however, that the scope of exchange of information is not limited to taxpayer-specific information but also includes information related to tax administration and compliance improvement, such as statistics, information about a particular industry, tax evasion trends, administrative interpretations and practices,^[4] laws, court decisions, official publications and other subjects.

Time periods during which tax situations may be examined vary from country to country, and the beginning of the tax year does not always coincide with the calendar year. Where there is a significant time lag between the time the information is supplied and the year to which the information relates, a statute of limitations issue may arise. The question of whether use of the information is time barred has to be determined by reference to the statute of limitations rules of the country where the information is to be used.^[5]

VI. LIMITATIONS TO EXCHANGE OF INFORMATION

The obligation to exchange information is mandatory and is not limited to information contained in the tax files held by the Bureau. When a request is received from a treaty partner, the Bureau will have to take action to obtain the information requested, if it is not available on its files. It cannot rely solely on the information in its possession. However, the Bureau is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the requesting state.

Thus, the Commissioner can order the obtention of information, and even summon, examine and take the testimony of a person to acquire the information requested since these acts are authorized under Section 5 of the National Internal Revenue Code (NIRC). In addition, the Commissioner can inquire into bank deposit accounts pursuant to Section 6(F) of the NIRC, as amended by RA 10021. Moreover, the income tax return/s of specific taxpayer/s subject of a request of a treaty partner may be open to inspection upon the order of the President.

There are instances, however, where the obligation to exchange information is lifted and a request for information can be declined, viz:

1. Information that the requesting party would not be able to obtain under similar circumstances under its own laws or administrative practice;
2. Information relating to years not covered by DTAs or taxes not covered;
3. Disclosure of information requested would be contrary to public policy. "Public policy" generally refers to the vital interests of a country, for instance where information requested relates to a state secret, the disclosure of which would be contrary to the vital interests of the requested State. A case of "public policy" might also arise, for example, where a tax investigation in another country was motivated by racial or political persecution.
4. Information relating to the administration or enforcement of a provision of the tax laws which discriminates against a national of the requested party (i.e., Philippines) as compared with a national of the applicant party in the same circumstances; and
5. Information subject to legal privilege; that is confidential communications between attorneys or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law.

VII. PROCEDURES

A. Responding to a Request for Information

The international standard for processing requests for information is ninety (90) days from receipt for a request by the tax authority. However, this period may be extended where difficulties in obtaining and providing information are encountered. In order to respond promptly to requests from tax treaty partners, the following procedures are hereby adopted:

Receipt, Evaluation and Acknowledgment of Requests

1. All requests for information from foreign tax authorities received shall be coursed through and processed by the International Tax Affairs Division (ITAD). Should a request for information be received by another office, it should immediately be transmitted to the Chief, ITAD.
2. Upon receipt, ITAD shall assign a reference number to the request for identification of cases and refer it to the Exchange of Information (EOI) Section.
3. The EOI Section shall evaluate and verify the sufficiency of the request. Requests for bank information shall be verified against the checklist of requirements attached to this RMO as Template "1".
4. ITAD shall prepare the acknowledgment letter to the requesting tax authority to be signed by the Commissioner or his/her duly authorized representative within seven (7) days from receipt of the request. The standard format attached to this RMO as Templates "2" and "3" may be used for acknowledging receipt of requests.
 - 4.1 If a request is found to be sufficient, and the information cannot readily be provided by ITAD, the Commissioner or his/her duly authorized representative will send letters to the appropriate information holders (e.g., government or BIR offices, banks, or financial institutions) requesting the relevant information. (Refer to Templates "4", "5" and "6").
 - 4.2 If a request is considered to be insufficient, the requesting tax authority will be asked in the acknowledgment letter to