

[BIR REVENUE MEMORANDUM CIRCULAR NO. 66-2013, September 30, 2013]

CIRCULARIZING REVOCATION OF BIR RULING NO. 011-07

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 subtransmission 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:

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"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.

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"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, resthouses, pension houses, inns, resorts; proprietors or operators of restaurants, refreshment parlors, cafes and other eating places, including clubs and caterers; dealers in securities;