[BIR REVENUE MEMORANDUM CIRCULAR NO. 7-90, January 16, 1990]

CREDITABLE WITHHOLDING TAX ON SALES, EXCHANGES OR TRANSFERS OF REAL PROPERTY.

Rationale - Under existing issuances, sellers of real properties are required to file their capital gains tax returns within 30 days from date of sale/exchange at the Office of the Revenue District Officer where the property is located. This procedure is followed for all types of taxpayers, corporation or otherwise, whether taxable or exempt from the capital gains (final) tax. However, the gain from sale or exchange of real property by persons exempt from the capital gains (final) tax must be declared for income tax purposes in the seller's regular income tax returns required to be filed after the end of the taxable year (for individual taxpayers) or after the end of the quarter for corporate taxpayers).

It has been observed lately that many sellers of real properties, who are exempt from the capital gains tax, do not include in their income tax returns the gain from their sales of real properties. This non-reporting of gain has been made possible because of the defect in the system - the Certificates Authorizing Registration (CAR) are generally secured from the Revenue District Officer where the property is situated and the regular income tax returns are required to be filed in the place of residence or principal place of business of the taxpayer. Because of this, the Bureau of Internal Revenue is experiencing some difficulties in monitoring and matching these transactions during audit.

In order to prevent further leakage of revenues from these transactions, Revenue Regulations No. 12-89 dated December 21, 1989, subjecting sales of real property other than capital assets to the creditable withholding tax was issued. The rates prescribed in Revenue Regulations (RR) No. 12-89 were, however, deemed high by the various associations engaged in real estate industry, considering that the basis of the withholding tax is the gross selling price. The real estate industry officials expressed their fear that the industry might eventually collapse as a result of the spiralling costs of construction materials, labor, and interest rates, which is exacerbated by the imposition of the high withholding tax rates. It is also feared that there might be numerous claims for tax credits filed in the future; hence, **RR No. 1-90 dated January 16, 1990** (see p._was issued to amend RR No. 12-89.

This Circular seeks to clarify and amplify some pertinent provisions of the aforesaid regulations.

1. *Coverage*. All sales, exchanges, or transfers of real properties (whether classified as ordinary or capital asset) by corporations, consummated on or after January 1, 1990, are subject to the creditable withholding tax. However, in the case of individuals, estates, trusts, trust funds or pension funds, only sales, exchanges or transfers of real properties classified as ordinary assets, consummated on or after January 1, 1990, are subject to the creditable withholding tax. Sales by individuals

of real properties classified as capital assets remain subject to the 5% capital gains (final) tax.

As provided for in **RMC 80-89,** the date of notarization appearing on the Deed of Sale shall be considered prima facie the date of consummation of the contract of sale. In the case of sales evidenced by public instruments notarized on or before November 30, 1989, the same shall be deemed consummated on the date the Deed of Sale/Transfer is filed with or submitted to the proper revenue office, except in exceptional circumstances where the taxpayer can prove by documentary evidence other than the Deed of Sale/Transfer that the public instrument was truly executed and notarized on the date shown therein.

Illustrations. (a) If the Deed of Sale notarized on November 10, 1989 was presented to the proper revenue official within 30 days from date of sale, such transaction is not subject to the withholding tax provision of **RR No. 12-89.**

> (b) If such Deed of Sale was submitted to the proper revenue officer after 30 days from date of sale but before January 1, 1990; i.e., anytime between December 10 to December 31, 1989 in the example, the same is still not subject to the creditable withholding tax but subject to the penalties for late filing of the capital gains tax return and late payment of the tax.
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> (c) The above transaction becomes subject to the creditable withholding tax if presented only on or after January 1, 1990.
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> (d) If a Deed of Sale notarized on December 10, 1989 was presented to the BIR not later than January 9, 1990, such transaction is not subject to the creditable withholding tax. However, if the sales document was submitted to the BIR only on January 15, 1990, the sale is already subject to the creditable withholding tax because more than 30 days have elapsed from the date of sale.

The reason for the cut-off date is to prevent ante-dating of public instruments transferring real properties. However, the Revenue District Officer may issue the CAR without the payment of the creditable withholding taxes where the taxpayer can clearly prove that there was not antedating and the late submission of the Deed of Sale was due to a reasonable and justifiable cause, such as when due to a fire in the Quezon City Hall the title to the property was destroyed and had to be judicially reconstituted, or the Contract To Sell shows the last installment to have been paid on or before November, 1989, or the new Deed of Sale amends only some minor details in the old Deed of Sale notarized in 1989 like adding the Tax Account Numbers of the contracting parties. In such case, the revenue enforcement officer should state in his written report the relevant circumstances and attach to his report the other documents submitted by the taxpayer.

When the seller of real property is an entity exempt from income tax (e.g., GSIS, SSS, qualified pension plan), no withholding of tax is required to be made thereon. In such a case, the seller must execute an affidavit establishing its exemption from income tax and submit the same together with the relevant law, decree or executive order. However, if the seller is an exempt entity under Article 26 of the Tax Code, the gain from sale of real property is still subject to income tax and consequently to the withholding tax, because the last paragraph of said section provides that "notwithstanding the provisions in the preceding paragraphs, the income of