REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

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REVENUE MEMORANDUM ORDER NO. 46-2020

SUBJECT : Guidelines and Procedures for the Availment of the Reduced Rate of 15% on Intercompany Dividends Paid by a Domestic Corporation to a Non-resident Foreign Corporation Pursuant to Section 28(B)(5)(b) of the National Internal Revenue Code of 1997, as Amended.

TO : All Internal Revenue Officers and Others Concerned

SECTION 1. Background. —

Under Section 28(B)(5)(b) of the National Internal Revenue Code (NIRC or Tax Code) of 1997, as amended, intercorporate dividends paid by a domestic corporation to a nonresident foreign corporation (NRFC) are subject to income tax of 15% provided that the country of residence of the NRFC shall allow a credit against its tax due taxes deemed to have been paid in the Philippines equivalent to fifteen percent (15%), which represents the difference between the regular tax of 30% on corporations and the reduced tax of 15% on dividends.

This lower tax was introduced in Presidential Decree No. 369 on January 1, 1974 as an amendment to Section 24(b) of the 1939 Tax Code with the aim of encouraging more capital investment for large projects in the Philippines. This provision was codified later in the Tax Code of 1977 and has been retained in the current Tax Code of 1997, as amended.

To borrow the words of the Supreme Court in the case of **Commissioner of Internal Revenue** vs. **Procter & Gamble Philippine Manufacturing Corporation & The Court of Tax Appeals, G.R. No. L-66838, December 2, 1991** (the P&G case), Section 24(b)(1) [now Section 28(B)(5)(b)], NIRC, seeks to promote the in-flow of foreign equity investment in the Philippines by reducing the tax cost of earning profits here and thereby increasing the net dividends remittable to the investor. The foreign investor, however, would not benefit from the reduction of the Philippine dividend tax rate unless its home country gives it some relief from double taxation (i.e., second-tier taxation) (the home country would simply have more "post-R.P. tax" income to subject to its own taxing power) by allowing the investor additional tax credits which would be applicable against the tax payable to such home country. Accordingly, Section 24(b)(1) [now Section 28(B)(5)(b)], NIRC, requires the home or domiciliary country to give the investor corporation a "deemed paid" tax credit at least equal in amount to the twenty (20) percentage points (now 15%) of dividend tax foregone by the Philippines, in the assumption that a positive incentive effect would thereby be felt by the investor.

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SECTION 2. Objectives. —

Essentially, the Court held in the *P&G* case that:

i. Section 24(b)(1) [now Section 28(B)(5)(b)], NIRC, does not in fact require that the "deemed paid" tax credit shall have actually been granted before the applicable dividend tax rate goes down from thirty-five percent (35%) to fifteen percent (15%). It merely requires that the USA "shall allow" a credit against the tax due from [P&G-USA for] taxes deemed to have been paid in the Philippines.

ii. The question of whether or not P&G-USA is in fact given by the US tax authorities a "deemed paid" tax credit in the required amount relates to the administrative implementation, which is not properly imposed as a condition for the applicability, as a matter of law, of a particular tax rate. On the other hand, upon the determination or recognition of the applicability of the reduced tax rate, there is nothing to prevent the BIR from issuing implementing regulations that would require P&G Phil., or any other similarly situated Philippine corporations for that matter, to certify to the BIR the amount of the "deemed paid" tax credit actually and subsequently granted by the US tax authorities to P&G-USA or a US parent corporation for the taxable year involved.

iii. Since the US tax laws can and do change, such implementing regulations could also provide that failure of P&G-Phil. to submit such certification within a certain period of time, would result in the imposition of a deficiency assessment for the twenty (20) percentage points (now 15%) differential.

This Order, therefore, seeks to provide guidance for the NRFCs intending to avail of the reduced tax rate on intercorporate dividends received from a domestic corporation, and to lay down the documentary requirements that must be submitted in support of their application.

It also aims to simplify the manner of confirming entitlement to the reduced rate in view of the implementation of the Ease of Doing Business and Efficient Government Service Delivery Act of 2018.

SECTION 3. Guidelines and Procedures. —

An NRFC applying for the reduced rate must be guided by the following:

1. The reduced rate of 15% may be applied to the cash and/or property dividends declared by all corporations, irrespective of their corporate income tax regimes (i.e. regular rate of 30% or other rates under the Tax Code, or whether granted an income tax holiday or covered by special tax regimes).

2. The domestic corporation paying the dividends may remit outright the dividends to the NRFC and apply thereon the reduced rate of 15% without securing first a ruling from the Bureau of Internal Revenue (BIR). It must determine, however, whether the existing law of the country of domicile allows the NRFC a "deemed paid" tax credit in an amount equivalent to the 15% waived by the Philippines or exempts from tax the dividends received.

3. Existence of a foreign law is a question of fact. Philippine courts do not take judicial notice of a foreign law. A foreign law, however, can be established by complying with the mandate of Sections 24 and 25, Rule 132 of the Revised Rules of Court as regards certification and authentication of a copy thereof.[1] In case the country of domicile of the NRFC is a member of the Apostille Convention, a foreign law can also be established by submitting an apostilled copy thereof in lieu of the required certification and authentication.

4. Within ninety (90) days from the remittance of the dividends or from the determination by the foreign tax authority of the deemed paid tax credit/non-imposition of tax because of the exemption, whichever is later, the NRFC or its authorized representative shall file with the BIR, through the International Tax Affairs Division (ITAD), a request for confirmation of the applicability of the reduced dividend rate of 15%.

5. Holders of PDRs may also be entitled to the reduced rate, subject to fulfillment of the conditions set out hereunder.

6. To streamline the process of confirming entitlement to the reduced rate, the BIR shall issue a certification duly signed by the Assistant Commissioner for Legal Service in lieu of the usual BIR ruling. The ITAD shall always ensure that a loose documentary stamp provided by the applicant is affixed on the Certificate before releasing it.

   In case of denial, a BIR ruling signed by the Commissioner or his authorized representative, which shall contain the factual and legal bases that led to the conclusion, shall be issued. Such denial may result in the imposition of a deficiency assessment for the 15% differential, plus penalties.

5. All unfavorable rulings are appealable to the Department of Finance **within thirty (30) days** from receipt thereof pursuant to existing rules and regulations.

SECTION 4. Option to Apply for the Reduced Dividend Rate Under the Tax Code or Under the Treaty. —

The NRFC may opt to avail of the reduced dividend rate under the Tax Code, irrespective of whether a double tax convention or tax treaty exists between the Philippines and its country of residence. If the taxpayer is not entitled to the reduced rate under the Tax Code, the treaty rate shall automatically be applied provided that the NRFC is able to prove its entitlement to the benefits provided under the treaty.

SECTION 5. Philippine Depositary Receipts (PDRs). —

Section 73(A) of the Tax Code defines the term "dividends" as any distribution made by a corporation to its shareholders out of its earnings or profits and payable to its shareholders. On the other hand, Section 22(M) thereof defines the term "shareholder" as holders of a share/s of stock, <u>warrant/s and/or option/s to purchase shares of stock of a corporation</u>, as well as a holder of a unit of participation in a partnership (except general

[1] Geneviove Rosal Arreza v. Tetsushi Toyo, G.R. No. 213198, July 1, 2019

professional partnerships) in a joint stock company, a joint account, a taxable joint venture, a member of an association, recreation or amusement club (such as golf, polo or similar clubs) and a holder of a mutual fund certificate, a member in an association, joint-stock company, or insurance company.

It may be inferred from the foregoing definition that a holder of a PDR may likewise be considered as a shareholder.

A PDR is a document that gives the holder thereof a right, but not an obligation, to *purchase the underlying shares at a specified price, or the right to the delivery of the sales* proceeds of the underlying shares. When the first right is exercised, the PDR holder becomes a shareholder. The PDR holder cannot exercise, however, the first right if the underlying shares cannot be legally owned by a non-Philippine national. In such case, the PDR holder cannot compel the delivery of the underlying shares but is obliged to accept instead the proceeds of the sale of these shares.

A typical PDR also entitles its holder to the dividends accruing to the underlying shares. For taxation purposes, these dividends may or may not be entitled to the reduced rate depending on the nature of the PDRs. In order to be entitled to the reduced rate, the following conditions must be met:

i. the PDR is coupled with a right to purchase the underlying shares; **and**
ii. the said right can be legally exercised.

It is not enough that there is an option to purchase the underlying shares. What is more important is that the option to purchase can be legally exercised without violating the provisions of the Constitution and special laws, which restrict the ownership and operation of certain companies to Philippine nationals. Again, if the ownership of the underlying shares is reserved to Philippine nationals, the foreign PDR holder cannot legally exercise the right to purchase the underlying shares but is only entitled to the monetary value or sales proceeds thereof.

SECTION 6. Documentary Requirements. —

The following documents shall accompany the first application for the reduced dividend rate of 15% in a given taxable year:

A. General Requirements

1. Letter-request which shall provide a background of the transaction, the relief sought and the legal basis;
2. Duly accomplished BIR Form No. 0901-TS;
3. Original copy of the apostilled/duly authenticated Tax Residence Certificate issued by the tax authority of the country of domicile;
4. Apostilled/duly authenticated copy of the NRFC's articles of incorporation or proof of establishment in its country of residence;
5. Original copy of apostilled/duly authenticated Special Power of Attorney (SPA) issued by the NRFC to its authorized representative;

6. Certified true copy of the Board of Directors' resolution of the domestic corporation approving the issuance of dividends, which shall include the amount of dividends, and dates of declaration, record and payment, among others;
7. Original copy of the sworn statement executed by the corporate secretary of the domestic corporation/custodian banks/depository account holders/broker dealers stating the legal and beneficial owners, if applicable, of all issued and outstanding shares as of record date, their corresponding subscriptions, date/s of acquisition, percentage of ownership and the allocation of dividend;
8. Certified true copy of the General Information Sheet (GIS) of the domestic corporation for the year or period immediately preceding the date of declaration, whichever is more applicable.
9. Certified true copy of Audited Financial Statements (AFS) of the domestic corporation stamped "received" by the BIR and Securities and Exchange Commission, which was used as the basis of such dividend declaration; and
10. Proof of remittance of the dividend payments.

B. Special Requirements

i. If the dividend is taxable in the country of domicile

1. Duly authenticated or apostilled copy of the law of the country of domicile allowing a tax credit for taxes actually paid in the Philippines and for taxes deemed paid in the Philippines equivalent to at least 15% of the dividends; and
2. Duly authenticated or apostilled copy of any document issued by, or filed with, the foreign tax authority showing the amount of deemed paid tax credit actually granted by the foreign tax authority.

ii. If the dividend is exempt from tax in the country of domicile

1. A duly authenticated or apostilled copy of the law of the country of domicile; and
2. A duly authenticated or apostilled copy of any document issued by the foreign tax authority confirming that the NRFC is exempt from income tax on dividends received from the Philippine corporation.

For subsequent applications during the year involving the same NRFC

1. Letter-request which shall provide a background of the transaction, the relief sought and the legal basis;
2. Duly accomplished BIR Form No. 0901-TS;
3. Original copy of the apostilled/duly authenticated Special Power of Attorney (SPA) issued by the NRFC to its authorized representative, if there is a change in the previous SPA;
4. Certified copy of the Board of Directors' resolution of the domestic corporation approving the issuance of dividends, which shall include the

amount of dividends, and dates of declaration, record and payment, among others;

5. Certification under oath by the corporate secretary of the domestic corporation/custodian banks/depository account holders/broker dealers stating the legal and beneficial owners, if applicable, of all issued and outstanding shares as of record date, their corresponding subscriptions, date/s of acquisition, percentage of ownership and the allocation of dividend;
6. GIS for the year or period immediately preceding the date of declaration, if different from the previously submitted GIS;
7. Original copy of the apostilled/authenticated certification issued by the NRFC, or its authorized representative, confirming that there is no substantial change in the domestic law of the country of domicile of the NRFC;
8. Apostilled or duly authenticated copy of any document issued by, or filed with, the foreign tax authority showing the amount of deemed paid tax credit actually granted by the foreign tax authority; and,
9. Proof of remittance of the dividend payments.

iii. For dividends accruing to PDRs:

1. Duly authenticated and executed PDR Agreement; and,
2. Proof of remittance of dividend payments to the PDR holder.

The BIR reserves the right to require the presentation of the original copies for verification purposes or to request additional information or any related document which may be deemed necessary in the processing of the application.

SECTION 7. Penalties. —

Any violation of the provisions of this Order shall be subject to penalties provided in Section 250 and other pertinent provisions of the Tax Code, and existing revenue issuances.

SECTION 8. Repealing Clause. —

The provisions of any revenue issuance inconsistent with this Order are hereby revoked, repealed, or modified accordingly.

SECTION 9. Effectivity. —

This Order shall take effect immediately.

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Commissioner of Internal Revenue
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