SyCip Salazar Hernandez & Gatmaitan

SyCipLaw Center, 105 Paseo de Roxas
Makati City, 1226 Philippines
T: +632 8982 3500 | +632 8982 3600 | +632 8982 3700
F: +632 8817 3570 | +632 8848 2030
www.syciplaw.com


**1. Are offshore-based Philippine Offshore Gaming Operations (POGO) licensees subject to Philippine taxes?**

Before September 22, 2021, no. In the case of *Saint Wealth Ltd. v. Bureau of Internal Revenue* (G.R. Nos. 252965 & 254102, December 7, 2021), the Supreme Court ruled that before the effectivity of Republic Act No. 11590, which was passed into law on September 22, 2021, offshore-based POGO licensees were not subject to any Philippine tax.

POGO licensees are offshore gaming operators duly authorized through a gaming license issued by a POGO licensing authority (such as the Philippine Amusement and Gaming Corporation [PAGCOR] or any special economic zone authority) to conduct offshore gaming operations including the acceptance of bets from offshore customers. (*Section 2F, Revenue Regulations No. 20-2021 dated November 6, 2021 Implementing Republic Act No. 11590, otherwise known as an "Act Taxing Philippine Offshore Gaming Operations"*).

The Supreme Court declared as null and void for being unconstitutional and contrary to other relevant laws: (1) Sections 11 (f) and (g) of Republic Act No. 11494 (*Bayanihan 2 Law*), as well as Revenue Regulations No. 30-2020 and Revenue Memorandum Circular No. 64-2020, which implement the same; and (2) Revenue Memorandum Circular Nos. 102-2017 and 78-2018, insofar as they impose franchise tax, income tax, and other taxes on offshore-based POGO licensees.

**SyCipLaw TIP 1:**

Offshore-based POGO licensees should take note of the taxes applicable to them before and after the passage of Republic Act No. 11590. If an offshore-based POGO licensee paid Philippine taxes before the passage of Republic Act No. 11590, it must study any available remedy to recover such tax considering, among others, that under the Tax Code, a claim for refund of erroneously or illegally collected taxes must be made within two years from the date of payment of such tax.

The Supreme Court held that Revenue Memorandum Circular Nos. 102-2017 and 78-2018 are invalid insofar as they impose: (1) franchise tax on POGOs without any statutory basis; and (2) income tax and other applicable taxes on offshore-based POGO licensees despite the fact that they do not derive any income from sources within the Philippines. It said that POGOs do not fall under, and could not have been contemplated by, licensees of "casinos and other related amusement places" that are subject to franchise tax under Section 13(2)(b) Presidential Decree No. 1869. Further, it said that offshore-based POGO licensees derive no income from sources within the Philippines (which could be subject to Philippine income tax) because the "activity" which produces the income occurs and is located outside the Philippines. The flow of wealth or the income-generating activity — the placing of bets less the amount of payout — transpires outside the Philippines. Non-resident foreign corporations, such as off-share POGO licensees, are subject to income tax only on income from Philippine sources.

The Supreme Court also ruled that Sections 11 (f) and (g) of the Bayanihan 2 Law, insofar as they impose new taxes on POGO licensees, are unconstitutional for being riders. It held that Sections 11 (f) and (g) are not germane to the purpose of the Bayanihan 2 Law, which is not a tax measure but only a temporary relief measure to address the COVID-19 pandemic, thereby violating the "one subject, one title rule" under Article 6, Section 26(1) of the Constitution.

Presently, pursuant to Republic Act No. 11590, which amended the National Internal Revenue Code of 1997 (*Tax Code*) offshore-based POGO licensees are subject to (1) a 5% gaming tax on income derived from gaming operations; and (2) a 25% income tax on income derived from non-gaming operations from sources within the Philippines.

**SyCip Salazar Hernandez & Gatmaitan**

**Managing Partner:**
Hector M. de Leon, Jr.

**Tax Department Head:**
Carina C. Laforteza

**Tax Department Partners:**
Carlos Roberto Z. Lopez
Ramon G. Songco
Benedicto P. Panigbatan
Russel L. Rodriguez
Ronald Mark C. Lleno
Hiyasmin H. Lapitan
Leah C. Abutan
John Christian Joy A. Regalado
Ma. Patricia B. Paz-Jacoba
Joanna Marie O. Joson
Maria Viola B. Vista
Maria Christina C. Ortua-Ang

**Of Counsel:**
Rolando V. Medalla, Jr.

**Special Counsel:**
Catherina M. Fernandez

**Tax Department Senior Associates:**
Austin Claude S. Alcantara
Mark Xavier D. Oyales
Camille Angela M. Espeleta-Castillo
Kristina Paola P. Frias
Hailin D.G. Quintos-Ruiz
Renz Jeffrey A. Ruiz

**Tax Department Associates:**
Spencer M. Albos
Diane Elaine B. Bataller
Kevin Joseph C. Berbaño
Roman George P. Castillo

**Editor-in-Chief:**
Ronald Mark C. Lleno (Partner)

**Editor:**
Catherina M. Fernandez

**Contributors:**
Carina C. Laforteza
Benedicto P. Panigbatan
Russel L. Rodriguez
Ronald Mark C. Lleno
Leah C. Abutan
Joanna Marie O. Joson
Maria Viola B. Vista
Maria Christina C. Ortua-Ang
Catherina M. Fernandez
Ana Regina A. Buban
Joseph R. Malcontento
Patrice Jane L. Romero

**Coordinators:**
Marie M. Ingcoco
Joanne V. Lacsina
Angelita O. Dizon

For more information regarding the issuances discussed in this briefing, please contact:
Carina C. Laforteza
cclaforteza@syciplaw.com

**2. Does the Court of Tax Appeals have jurisdiction over issues concerning the national wealth share of local government units under the Local Government Code?**

No because the national wealth share is not considered a tax. In *CE Casecnan Water and Energy Company, Inc. v. Municipality of Alfonso Castañeda, Nueva Vizcaya, et al.* (CTA EB No. 2494 [CTA AC No. 221], September 23, 2022), the Court of Tax Appeals (*CTA*) *En Banc* affirmed the CTA First Division's decision that the CTA has no jurisdiction over issues concerning the national wealth share of local government units (*LGUs*).

In this case, CE Casecnan Water and Energy Company, Inc. (*CE Casecnan*) entered into a Build-Operate-and-Transfer contract with the National Irrigation Administration (*NIA*) for the construction of an irrigation system and dams in the Municipality of Alfonso Castañeda (*Municipality*). Under the Local Government Code (*LGC*), LGUs have "an equitable share in the proceeds derived from the utilization and development of the national wealth within their respective areas, including sharing the same with the inhabitants by way of direct benefits." Pursuant to this provision, the Municipality issued an assessment against CE Casecnan, demanding that CE Casecnan automatically remit the Municipality's supposed national wealth share in the utilization and development of the bodies of water being utilized by CE Casecnan. The Municipality anchored its claim of direct remittance pursuant to Sections 286, 291, and 293 of the LGC and Section 66 of the Electric Power Industry Reform Act (*EPIRA*).

CE Casecnan filed a protest against the assessment, arguing that the Municipality cannot be considered as a host LGU, which is entitled to a share in the proceeds derived by CE Casecnan from its delivery of water to NIA. The Municipality, however, denied CE Casecnan's protest.

CE Casecnan then filed a complaint before the Regional Trial Court (*RTC*), which found that CE Casecnan, as a private entity, is not mandated to directly remit to the Municipality the latter's share in the proceeds of the utilization and development of national wealth within its territorial jurisdiction. The RTC further added that under DBM-DOF-DOE Joint Circular No. 2006-1 the National Government, through its agencies, that has the sole authority to collect and release the claims of LGUs from the proceeds in the utilization and development of national wealth. Accordingly, the RTC cancelled the assessment and set aside the denial of CE Casecnan's protest. The RTC found, however, that the Municipality is still entitled to receive the national wealth share of the proceeds derived by CE Casecnan, not directly from CE Casecnan, but from the National Government, pursuant to Sections 289 and 291 of the LGC. CE Casecnan moved for a partial reconsideration of the RTC's decision finding that the Municipality is entitled to receive its national wealth share but the motion was denied. CE Casecnan filed a petition for review before the CTA.

In affirming the CTA First Division's ruling, the CTA *En Banc* ruled that: (a) Republic Act No. 1125, as amended, vests the CTA with original or appellate jurisdiction to review by appeal, the decisions, resolutions, or orders of the RTC concerning local tax cases; (b) local taxes are those levied by the LGUs on the basis of Titles I and II of Book II of the LGC; (c) the basis of the Municipality's assessment cannot be classified as an assessment of a local tax that is within the coverage of Titles I and II of Book II of the LGC as the share of LGUs in the national wealth is sourced from the taxes levied by the National Government on persons engaged in the utilization and development of national wealth and resources; (d) CE Casecnan's main arguments are based on Title III, Book II of the LGC, which is outside the definition of local taxes under Titles I and II, Book II of the LGC; and (e) CE Casecnan has expressly and categorically stated that the Municipality's sole basis for its entitlement in the national wealth share is Section 66 of the EPIRA, and not the LGC.

**SyCipLaw TIP 2:**

In order to be classified as a local tax case that is within the jurisdiction of the CTA, the taxpayers' cause of action against an LGU must be based on Titles I and II of Book II of the LGC. Cases that involve causes of action that are outside the scope of any of these provisions of the LGC will not be considered as a local tax case and will therefore be outside the jurisdiction of the CTA.

Thus, considering that the subject matter of CE Casecnan's petition is neither a local tax case nor even a tax issue, the CTA is devoid of any jurisdiction to rule on the same.

A motion for reconsideration of the decision is currently pending.

CTA decisions, while persuasive, do not become the law of the land, unlike decisions of the Supreme Court.

**3. Is a general professional partnership, which is engaged in the practice of the architecture profession, liable for contractor's tax, which is a local business tax, under the Revised Makati Revenue Code?**

No. While Section 3A.02(g) of the Revised Makati Revenue Code (*RMRC*) imposes a local business tax on contractors and other independent contractors, and on owners or operators of business establishments rendering or offering interior decorating and landscaping services, the RMRC defines a contractor to include "persons, natural or juridical, *not subject to professional tax*". Considering that the partners of the general professional partnership (*GPP*) involved in this case already paid their professional taxes in their individual capacities, the GPP here is not subject to local business tax under Section 3A.02(g) of the RMRC.

In *Barlis and the City of Makati v. GF & Partners, Architects, Co.* (CTA AC No. 247 [Civil Case No. 15-315], September 16, 2022), GF & Partners, Architects, Co. (GFAPC), a GPP, received an assessment from the City of Makati, finding it liable for local business tax under Section 3A.02(g) of the RMRC. GFAPC filed a protest, but the City of Makati did not act on it. GFAPC then filed a petition for the cancellation of the assessment before the RTC, which ordered the cancellation of the assessment and declared that the GFACP is not liable for the local business tax under Section 3A.02(g) of the RMRC. The City of Makati then filed a petition for review before the CTA. The City of Makati claimed that the GFAPC was assessed as a contractor, or as an owner or operator of a business establishment, which renders or offers interior decoration and landscaping services, based on Section 3A.02(g) of the RMRC, and not as a GPP.

The CTA, in ruling in favor of GFAPC, found that the RMRC provides that persons who are subject to professional tax are not included in the term "contractor." Based on its professional tax receipts, GFAPC was able to prove that its partners have been paying their professional taxes with the City of Makati. In addition, it was shown, through the GFAPC's articles of partnership, that it is engaged in the practice of a profession, considering that the sole purpose of the partnership was for the general practice of architecture, interior decoration, landscaping, land development, and such further activities as may be incident thereto. The CTA further ruled that "[t]he income tax is imposed not on the professional partnership, which is tax exempt, but on the partners themselves in their individual capacity computed on their distributive shares of partnership profits." Hence, as a GPP, GFAPC is not subject to local business tax under Section 3A.02(g) of the RMRC.

A motion for reconsideration of the decision is currently pending.

CTA decisions, while persuasive, do not become the law of the land, unlike decisions of the Supreme Court.

**SyCipLaw TIP 3:**

A GPP is not liable for the contractor's tax under the RMRC, provided that the individual partners are consistently paying their professional taxes as evidenced by its professional tax receipts. However, a GPP must first prove that it is not engaged in any trade or business other than the general practice of its profession.

**4. Are the invoicing requirements under Sections 110 and 113 of the National Internal Revenue Code, as amended, applicable to imported goods?**

No. In *Philex Mining Corporation v. Commissioner of Internal Revenue* (CTA EB No. 2497 [CTA Case No. 10037], September 29, 2022), the CTA *En Banc* clarified that Sections 110 and 113 of the National Internal Revenue Code, as amended (*Tax Code*) requires a value-added tax (*VAT*)-registered person to issue a VAT invoice for every sale, barter, or exchange of goods or properties. As the foreign sellers of the imported goods are not registered with the Bureau of Internal Revenue (*BIR*) and are not VAT-registered, they cannot be expected to issue VAT invoices.

This case involves an input VAT refund application, which the BIR denied in view of the taxpayer's failure to provide VAT invoices to substantiate input VAT credits on the importation of goods.. The taxpayer filed a petition for review before the CTA to question the BIR's decision, which petition was denied by the CTA Second Division.

In its petition for review before the CTA *En Banc*, the taxpayer argued that there is no law or rule which requires the presentation of VAT invoices to substantiate the input VAT on imported goods. The taxpayer also argued that Sections 110 and 113 of the Tax Code cannot apply to input VAT credits for transactions involving the importation of goods considering that the vendors of imported goods are foreign entities not subject to Philippine laws and are not bound to comply with Philippine tax laws.

In ruling for the taxpayer, the CTA *En Banc* held that foreign sellers, not being VAT-registered persons, are not bound to comply with the VAT invoicing requirements under Sections 110 and 113 of the Tax Code.

In addition, the CTA *En Banc* found that the BIR, in Revenue Regulation No. 16-2005 (*RR 16-2005*), made a distinction between the substantiation requirements of input tax credits for importation of goods and domestic purchase of goods and properties.

Based on RR 16-2005, a VAT invoice is required only for domestic purchase of goods and properties, and not for importation of goods. The CTA *En Banc* ruled that a distinction between the substantiation requirements in RR 16-2005 would not have been made had the BIR intended that a VAT invoice should be also required for importation of goods. Further, the Supreme Court, in *Commissioner of Internal Revenue v. Philex Mining Corporation* (G.R. No. 230016, November 23, 2020), ruled that "in substantiating input tax credits, importations must be evidenced by import entry declarations or any equivalent document, while domestic purchases must be evidenced by VAT invoices or receipts."

**SyCipLaw TIP 4:**

A taxpayer-applicant may submit the SSDTs and SADs, in lieu of IEIRD, to prove the payment of input VAT on the importation of goods. Accordingly, a VAT invoice, issued in accordance with Sections 110 and 113 of the Tax Code, is not necessary to prove a taxpayer's entitlement to a VAT refund in respect of input VAT paid on importation of goods.

After finding that Sections 110 and 113 of the Tax Code do not apply to importation of goods, the CTA *En Banc* also ruled that the Statement of Settlement of Duties and and Taxes (*SSDTs*) and Single Administrative Documents (*SADs*) are already sufficient to prove payment of input VAT on the importation of goods, considering that the use of the Import Entry and Internal Revenue Declaration (*IEIRD*) is discontinued under Customs Memorandum Order No. 29-15.

A motion for reconsideration of the decision is currently pending.

CTA decisions, while persuasive, do not become the law of the land, unlike decisions of the Supreme Court.

**SyCipLaw TIP 5:**

To be able to be entitled to the tax incentives under the Free Legal Assistance Act of 2010, the lawyer must ensure that he is in good standing as of the date of rendering the free legal service - this requires the annual payment of membership dues with the Integrated Bar of the Philippines, annual payment of professional tax with the local government unit as evidenced by the PTR receipt number, and compliance with Mandatory Continuing Legal Education. Only lawyers who are required to file a BIR Form No. 1701, or those lawyers deriving income purely from the practice of profession or earning mixed income, may claim the allowable deduction. Lawyers earning purely compensation income are not entitled to the tax deduction.

**5. Are lawyers or legal professional partnerships entitled to tax incentives for rendering free legal services?**

Yes. Lawyers or professional partnerships who render actual free legal services are entitled to a "Special Allowable Itemized Deduction" from gross income under Republic Act No. 9999, otherwise known as the Free Legal Assistance Act of 2010. BIR Revenue Regulations No. 12-2022 (*RR 12-2022*), which is effective as of October 5, 2022, prescribes more definitive guidelines, procedures, and requirements for the availment of this tax incentive.

Under RR 12-2022, lawyers or professional partnerships shall be entitled to an allowable deduction from gross income equivalent to the lower of:

a) the amount that could have been collected for the actual free legal services rendered; or

b) ten (10) percent of the gross income derived from the actual performance of the legal profession.

The free legal service shall refer to the appearance in court or quasi-judicial body for and on behalf of an indigent or pauper litigant and the preparation of pleadings or motions. It shall also cover assistance by a practicing lawyer to indigent or poor litigants in court-annexed mediation and other modes of alternative dispute resolution, including being appointed as *counsel de officio* (collectively, *Legal Service*). However, the lawyer or professional partnership will not be entitled to the deduction if the free Legal Service rendered is part of the minimum 60-hour mandatory legal aid services rendered to indigent litigants as required under the Rule on Mandatory Legal Aid Services for Practicing Lawyers under Supreme Court (*SC*) Bar Matter No. 2012.

**6. What documents, if any, are required for lawyers or professional partnerships to avail themselves of the "Special Allowable Itemized Deduction"?**

Under RR 12-2022, the lawyer or professional partnership must attach the following documents to their annual income tax return (*ITR*) for the period when the deduction is claimed:

a) A certification from the Public Attorney's Office, Department of Justice, or accredited association of the Supreme Court stating (i) that the free Legal Services provided are within those services defined under SC Bar Matter No. 2012; (ii) that said agencies cannot provide the Legal Services provided by private counsel; (iii) that the Legal Services were actually rendered; and (iv) the number of hours actually provided by the lawyer or professional partnership in the provision of the free Legal Services;

b) An accomplished BIR Form 1701 (ITR for individuals) or BIR Form 1702-EX (ITR for general professional partnerships), particularly Schedules 5 and 2, respectively on "Special Allowable Itemized Deductions"; and

c) A sworn statement of the lawyer or managing partner (in case of professional partnerships) as to the amount that could have been collected for the actual free Legal Service.

**SyCipLaw TIP 6:**

Lawyers or professional partnerships seeking to avail themselves of the Special Allowable Itemized Deduction for services actually rendered for or on behalf of an indigent or pauper litigant must ensure that the documentary requirements are attached to his/her/its annual income tax return for the year the deduction is claimed.

**7. Is equity-based compensation received by supervisory or managerial employees still taxed as fringe benefits?**

No, not anymore. Beginning October 29, 2022, which is the effective date of BIR Revenue Regulations No. 13-2022 (*RR 13-2022*), equity-based compensation received by both managerial and supervisory employees as well as rank-and-file employees, once exercised or availed of by the employee, are considered compensation taxable under Section 32 of the Tax Code, as amended.

Prior to RR 13-2022, Revenue Memorandum Circular No. 79-2014 (*RMC 79-2014*) provided preferential treatment to equity-based compensation received by supervisory or managerial employees, which were excluded from compensation and subjected to the fringe benefits tax paid by the employer. RR 13-2022 has removed this distinction, hence, equity-based compensation, whether in the form of stock options, restricted share awards, stock appreciation rights, or restricted stock units, will be subject to income tax and consequently, to withholding tax, on compensation, upon the exercise by the employee, regardless of rank. Once exercised or availed of by the employee, the stock option or award is considered additional compensation equivalent to the difference of the book value or fair market value of the shares, whichever is higher, at the time of the exercise of the stock option, and the price fixed on the date that it was granted.

Note that the reporting requirements under RMC 79-2014 are retained, including the submission by the issuing corporation of a statement under oath containing mandatory information regarding the stock option within 30 days from the grant of the option and the additional report within 10 days from the exercise of the option.

**SyCipLaw TIP 7:**

With the issuance of RR 13-2022, the burden of taxes is shifted from the employer to the employee holding a supervisory or managerial role, since the additional compensation received after the option is exercised is no longer subject to fringe benefits tax but to withholding tax on compensation. Although the shift in the treatment of equity compensation may be less costly to the employer, companies should explore how to better design stock option plans for their employees considering that, taxwise, receiving stock options may be less appealing to employees.

**8. Are Health Maintenance Organization (HMO) plans acquired by Registered Export Enterprises (REEs) for its employees subject to VAT at zero-rate?**

Yes, subject to certain conditions. Under BIR Revenue Memorandum Circular No. 137-2022 dated October 14, 2022 (*RMC 137-2022*), HMO plans acquired by REEs for its employees who are **directly** involved in the operations of their registered projects or activities and forming part of their compensation package, are subject to VAT at zero-rate.

RMC 137-2022 clarifies that HMO plans are considered expenses that are necessary or required to be incurred based on the nature of the registered project or activity of the REE, and that providing health benefits to employees is an indispensable tool for building a competitive workforce and ensuring the smooth operation of the registered project or activity.

**SyCipLaw TIP 8:**

Only the costs for HMO plans procured for employees directly involved in the operations of the REEs registered projects or activities shall be allowed as expenditures for VAT zero-rating. Thus, HMO plans procured for the employee's dependents and those employees not directly involved in the operations of the REE's registered projects shall not be eligible for zero-rated VAT.

The BIR clarified in RMC 137-2022 that the list of expenditures that may be direct expenses of REEs provided in Q14 of RMC 24-2022 is not an exclusive list, hence expenditures not included in the list may be allowed for VAT zero-rating provided the same can be attributed directly to the registered activity of the REE.

**9. What are the requirements for REEs to avail of zero-rated VAT on their expenses incurred in procuring HMO plans?**

All REEs who wish to avail themselves of the VAT zero-rate on their purchase of HMO plans must provide their VAT-registered suppliers detailed information (including the policy number, name of the employee, the department where the employee is assigned, employee's job description or position, period of coverage, and amount of contributions allocated to the employee and his/her dependents) using the format in Annex A of RMC 137-2022. The information provided in Annex A will form part of the documents to be submitted by the VAT-registered HMO suppliers in filing the application for VAT zero-rating with the BIR.

**SyCipLaw TIP 9:**

REEs should ensure that the detailed information required by Annex A of RMC 137-2022 is provided to their HMO in order to secure BIR approval of its VAT zero-rating application, otherwise, the HMO provider will pass on to them the 12% VAT on their purchase of HMO plans.