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## **TAX LAW FOR BUSINESS**

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### **The booby trap named 'withholding-tax system'**

The withholding-tax system is said to be a land mine for the tax authorities. It is a booby trap—an explosive mine hidden underground that can explode when stepped into or driven over. Never in my six years of tax practice have I ever handled a Bureau of Internal Revenue (BIR) assessment without any findings on withholding tax.

As an agent of the payee and of the government, a withholding agent is required to withhold portion of the amount paid to suppliers, and remit the amount withheld to the BIR on or before the required due dates, which is usually after the 10th to 15th day of every month. Failure to withhold the proper amount of tax or apply the correct withholding-tax rate on certain income payments would effectively deprive the taxpayer of its right to claim said income payments as deduction against its income.

Way back in 2013, a regulation was issued which provides that no deduction will be allowed, notwithstanding the payments of withholding tax at the time of the audit investigation or reinvestigation/reconsideration where no withholding of tax was made. In effect, a single transaction, due to mere failure to withhold, would be taxed thrice: first, the 1-percent to 15-percent expanded withholding tax; second, 30-percent income tax on the part of the payor due to disallowance of the expense; and another 30 percent on the payee, as earner or recipient of the income.

Although not all income payments should be subjected to withholding taxes, the regulations include an “all-encompassing provision,” that is the imposition of 1- percent and 2-percent withholding tax on income payments to regular suppliers of goods and services by top 20,000 private corporations.

Under the prevailing rules, top 20,000 private corporations shall include a corporate taxpayer who has been determined and notified by the BIR as having satisfied any of the criteria enumerated in the regulations. A corporation shall not be considered as one of the top 20,000 private corporations, unless such entity has been determined and duly notified in writing by the commissioner that it has been selected as such. Said corporation's authority as withholding agent shall be effective only upon receipt of written notice of the commissioner. There is no automatic or deemed classification as one of the top 20,000 private corporations, in the absence of the written notification, notwithstanding the fact that the taxpayer/withholding agent can be classified as such based on existing criteria.

The Court of Tax Appeals (CTA), in a recent case (CTA Case 8551), however, provided an exemption on the written notice requirement. In the said case, an assessment was made by the BIR for deficiency 1-percent expanded withholding tax. The taxpayer argued that the BIR failed to inform the former that it is one of the top 10,000 (now 20,000) taxpayers. According to the taxpayer, being a top 10,000 corporation was neither alleged nor proven during the trial. This being so, the income payments made were not subject to 1-percent withholding tax on income payments to regular suppliers of goods.

The CTA found petitioner's arguments without merit. According to the CTA, when taxpayer remitted the EWT under the Alphanumeric Tax Codes (ATC) of WC158 and WC160, taxpayer deemed itself as one of the top 10,000 corporations. Accordingly, the income payments on its purchases of goods and services are subject to withholding tax as one of the top 20,000 corporations.

It can be gleaned that, by voluntarily (or in some cases, erroneously) withholding 1-percent or 2-percent expanded withholding tax on suppliers of goods and services, despite the absence of written notification from the BIR, a taxpayer is deemed a top 20,000 private corporation. Hence, it is no longer allowed to argue or raise as defense, during BIR assessment, the absence of such written BIR notification.

A taxpayer that voluntarily withholds on its income payments, notwithstanding the fact that it is not required to do so, is effectively implanting a land mine on its backyard. Thus, a withholding agent should be vigilant in determining not only its obligation to withhold, but also its obligation not to withhold.

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